COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
NO. SJC-12730

Gregory M. Olchowski; Office of Bar Counsel; and Massachusetts IOLTA Committee
Appellants

v.

Office of the State Treasurer and Receiver General
Appellee

Brief of Amici Curiae Boston Bar Association, Massachusetts Bar Association and Real Estate Bar Association for Massachusetts, Inc. In Support of Appellants

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IDENTITY AND INTERESTS OF AMICI CURIAE

The Boston Bar Association ("BBA") traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. The BBA's diverse, member-driven leadership draws attorneys from all areas of the legal profession.

The Massachusetts Bar Association ("MBA"), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence, diversity and unity in the legal profession, and respect for the law. The mission of the MBA is to provide professional support and education to members, and advocacy on behalf of lawyers, legal institutions, and the public.

Upon the recommendation of its Amicus Curiae Committee, and with the approval of the Association's President and Chief Legal Counsel, the MBA House of Delegates authorized submission of this amicus curiae brief supporting the disposition of unidentified IOLTA funds to the IOLTA Committee in this and similar cases.

The MBA and the BBA have longstanding interests in the regulation of the practice of law, and in the professional use of Interest on Lawyers Trust Accounts ("IOLTA") to protect clients and to provide critical financial support for improving access to legal services in the Commonwealth for the poor. Indeed, the MBA and BBA jointly petitioned the Supreme Judicial Court to establish the first rule authorizing IOLTA accounts in Massachusetts. See Petition by Massachusetts Bar Ass'n and the Boston Bar Ass'n, 395 Mass. 1 (1985).

The BBA and the MBA also have a strong interest in protecting the attorney-client relationships necessary to provide the highest quality legal services. Few aspects of the attorney-client relationship are as important as the preservation of

client confidences. The BBA and the MBA are concerned that interpreting the Abandoned Property Act, G.L. c. 200A, to allow the Treasurer to control the disposition of unidentified funds in IOLTA accounts, as apparently has become the practice unknown to the Court or the bar, would threaten those confidences by exposing confidential client information to the Treasurer or her agents.

The Real Estate Bar Association for Massachusetts, Inc. ("REBA"), formerly known as the Massachusetts Conveyancers Association, is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for nearly 150 years. It has almost 2,000 members practicing throughout the Commonwealth. REBA promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative guidance to its members and the real estate bar generally in the field of real estate law and practice and taking the lead in the effort to improve practice in that field. The real estate conveyancing practices of REBA's members collectively account for a significant portion of the funds held in IOLTA accounts in the

Commonwealth, and REBA's members therefore have a considerable interest in protecting the integrity of the IOLTA account process and the confidential information of their clients associated with such accounts. The REBA Amicus Committee is comprised of real estate lawyers with many years of experience. The Amicus Committee, from time to time, files amicus briefs on important questions of law. On several occasions it has been requested to do so by this Court or the Appeals Court. All Committee members serve without compensation.

RULE 17 (C) (5) DECLARATION

Amici and their counsel declare that they are independent from the parties and have no economic interest in the outcome of this case. The MBA and BBA note that they have affiliated but separate charitable foundations (the Boston Bar Foundation and the Massachusetts Bar Foundation) that receive IOLTA funding in the Commonwealth, and then make grants from these funds to qualified recipients for use in delivering legal services to the poor or improving the administration of justice.

None of the conduct described in Appellate Rule 17 (c) (5) has occurred:

a. No party or party's counsel authored this brief in whole or in part;

b. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

c. No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

d. No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUES ADDRESSED BY AMICI

The Court's request for Amicus Briefs identified three questions.

1. Do unidentified client funds on deposit in an IOLTA account fall within the statutory definition of "abandoned property" under G. L. c. 200A?

Amici submit the answer should be "No."

2. Does Mass. R. Prof. C. 1.15, or any other rule of this court, govern the disposition of such funds?

Amici submit that as construed and applied in practice by the Court, the answer should be yes, though the Court may wish to clarify the rule.

3. Are any constitutional issues raised by the parties' proposed disposition(s) of the funds?

In light of the answers to the first two questions, Amici do not address any constitutional issue regarding separation of powers.

SUMMARY OF THE ARGUMENT

Rule 1.15 of the Rules of Professional Conduct provides the requirements for IOLTA accounts, including record-keeping and accounting requirements. If those record-keeping and accounting rules are not complied with, extensive investigation, currently conducted under the supervision of the Board of Bar Overseers, may be needed to determine the owners of the unidentified funds in IOLTA accounts. Brief at 18-22.

This Court has the ultimate authority to regulate the practice of law. This power extends to regulating IOLTA accounts, including the disposition of unidentified funds. Brief at 22-26.

The legislative history of the Abandoned Property Act, G.L. c. 200A, indicates it does not cover unidentified funds in IOLTA accounts. The Act has been extensively amended to address when specific kinds of property are deemed abandoned and subject to the Act. However, the Legislature has never amended the Act to expressly cover unidentified funds in IOLTA accounts. Brief at 27-30.

Maintaining client confidences is an essential and core aspect of the practice of law, and subject to regulation by this Court. If the Abandoned Property Act is interpreted to apply to unidentified funds in an IOLTA account, the Treasurer would be empowered to conduct audits and take other actions that would intrude upon client confidences. Brief at 30-38.

Following a Board of Bar Overseers/Office of Bar Counsel investigation, unidentified funds in IOLTA accounts should be remitted to the IOLTA Committee for use in funding its access to justice efforts. This approach leverages the Board of Bar Overseers and Office of Bar Counsel's expertise in forensic analysis of IOLTA accounts to improve the likelihood of locating owners of unidentified funds, while also preserving client confidentiality. Brief at 38-42.

Remitting unidentified IOLTA funds to the IOLTA Committee does not increase constitutional concerns, provided that the IOLTA Committee can repay funds when a true owner comes forward. There is no reason to believe the IOLTA Committee cannot establish procedures and adequate reserves that would allow it to repay owners. Brief at 42-44.

ARGUMENT

INTRODUCTION

This Court has constitutional authority over admission to the bar and the conduct of lawyers in the practice of law. In the exercise of that authority, the Court has regulated "Interest on Lawyers Trust Accounts" ("IOLTA") from their inception in 1985 at the request of the Massachusetts and Boston Bar Associations. See Petition by Massachusetts Bar Ass'n and the Boston Bar Ass'n, 395 Mass. 1 (1985). The regulatory provisions are contained within the Court's ethical rules for lawyers, supplemented by established practices of the Board of Bar Overseers and this Court. Oversight of IOLTA funds by this Court is critical to the protection of clients and the maintenance of public trust and confidence in the legal profession.

IOLTA programs now exist in all 50 states and have become one of the major funding sources for civil legal aid to the poor, helping fulfill the American promise of "justice for all." By providing funding to state and local legal aid organizations and other charities, the IOLTA program helps provide legal

services and representation to those in our community most vulnerable to being denied access to justice. More than thirty years after IOLTA was created, the need for such funds is as great today as it was then.

The Legislature has never sought to interfere with this Court's exercise of its constitutional authority by extending the Abandoned Property Act ("APA") by its terms to lawyers' trust accounts. The Treasurer's novel effort in this case to assert regulatory authority over lawyers under the APA and the extensive detailed regulations that have been adopted under the APA raises the spectre of intrusion into the attorney-client relationship and conflicting obligations between the Treasurer's regulations and the obligations of attorneys under the Rules of Professional Conduct.[1]

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[1] Amici do not address the arguments made in Section III of the Appellants' brief and in Section III of the Appellee's Brief. The Court's solicitation of amicus briefs asked amici to address, among other things, whether any constitutional issues are raised by the parties' proposed disposition of the funds. Under Amici's analysis, constitutional issues do not arise and can be avoided.

Thus, the disposition of funds under current practice is entirely consistent with the goals of IOLTA and the protection of clients, and there is no justification for executive branch intrusion into this aspect of the regulation of law practice. Amici urge the Court to follow its customary practice and order that the unidentified funds in former attorney Olchowski's client funds account be remitted to the Massachusetts IOLTA Committee.

I. BACKGROUND ON IOLTA ACCOUNTS AND UNIDENTIFIED FUNDS

In the course of representing clients, lawyers are often required to hold other people's money, including the funds of both clients and third parties. Examples include the proceeds of a settlement, a retainer to secure the payment of fees, and funds entrusted with the lawyer for purpose of paying another party. Simply put, holding trust funds is an essential, defining component of the practice of law and public confidence in the bar depends on the safety of funds entrusted with lawyers.

In Massachusetts, a lawyer's handling of other people's money is governed by Rule 1.15 of the Rules of Professional Conduct and the bar discipline system

that enforces that rule. Board of Bar Overseers, Massachusetts Bar Discipline: History, Practice and Procedure 240 (2018), https://bbopublic.blob.core.windows.net/web/f/Massachusetts_Bar_Discipline.pdf ("Massachusetts Bar Discipline"). Under that Court-made rule, lawyers holding funds that belong to others must maintain the money in a separate interest-bearing account, or in an IOLTA account for amounts too small or held for too short a time to warrant the administrative costs of a separate account. Mass. R. Prof. C. 1.15(e)(6)(i)-(ii); Massachusetts Bar Discipline 242-243. The interest that is earned on IOLTA accounts is paid to the IOLTA Committee, Mass. R. Prof. C. 1.15(e)(3), whose members are appointed by the Court. Mass. R. Prof. C. 1.15(g)(4).

Every lawyer in Massachusetts must have an IOLTA account - individually or through a law firm - unless the lawyer is not engaged in private practice and does not hold client funds or has other good cause. Massachusetts Bar Discipline 511. IOLTA accounts, in turn, are "pooled accounts" holding deposits from more than one source and subject to strict accounting and

record keeping requirements. Mass. R. Prof. C. 1.15(f); see also Mass. R. Prof. C. 1.15 cmt. 10. Among other things, separate from the check register for the account, a lawyer must maintain a ledger for each client (or third party) matter for which funds are held. Mass. R. Prof. C. 1.15(f)(1)(C). This client ledger must give the name of the client, detail all money received or paid out on behalf of the client (or third party), and show the client's balance following every receipt or payment. Id. In addition, an IOLTA account must be reconciled at least every sixty days, such that the bank statement for the account, the check register for the account and the sum of the individual client (and third party) ledgers balance exactly. Mass. R. Prof. C. 1.15(f)(1)(E). This is known as the three-way reconciliation requirement. Mass. R. Prof. C. 1.15 cmt. 11.

Rule 1.15's extensive record-keeping and accounting requirements are policed by the bar discipline system, created and supervised by this Court and are indispensable to safe-guarding client property. The existence of unidentified IOLTA funds typically comes to light when a lawyer dies, becomes

disabled or is subject to discipline. See S.J.C Rule 4:01, § 17(1)(g); id. § 17(5) (every lawyer who is disbarred, suspended or placed on disability inactive status is required to close all IOLTA accounts and disburse the funds, and file an affidavit of compliance of having done so); id. § 14 (authorizing the appointment of a commissioner to protect the interests of clients "whenever a lawyer is placed on disability inactive status, or disappears or dies or no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist . . . .").[2] The job of administering those orphan funds and identifying who owns them resides with the Board of Bar Overseers ("BBO"), and the Office of Bar Counsel ("OBC") and ultimately this Court. Id. §§ 14, 17(5)(a)-(f).

When a lawyer fails to follow the record keeping and accounting requirements imposed by Rule 1.15, a forensic investigation is required to determine the owners of the trust funds. It is impossible from just a bank statement to determine who owns the funds in a

[2] Other examples include retirement or merger of law firms.

pooled account. So this investigation typically entails review of confidential client files, billings statements and the lawyer's banking and other financial records as well as interviewing parties with relevant information, including the lawyer's former clients and other members of the public who entrusted funds with the lawyer.

II. THE SUPREME JUDICIAL COURT'S INHERENT AUTHORITY GIVES IT THE POWER TO REGULATE UNIDENTIFIED IOLTA FUNDS AND THE COURT HAS EXERCISED ITS AUTHORITY.

This Court has the power to regulate IOLTA accounts, including the disposition of unidentified funds held in IOLTA accounts. This flows from its broad inherent authority to regulate the practice of law, an arena in which it is the ultimate authority.

"It must now be regarded as settled that in the distribution of powers under art. 30 the ultimate power of general control over the practice of law by its own officers fell to the judicial department." Collins v. Godfrey, 324 Mass. 574, 576 (1949) (emphasis added). Not only does this Court have inherent authority over the practice of law, it also determines the bounds of this inherent authority. See First Justice of Bristol Div. of Juvenile Court Dept.

v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dept., 438 Mass. 387, 397 (2003).

This Court has determined its inherent authority extends to diverse aspects of the practice of law. See, e.g., In re Opinion of the Justices, 289 Mass. 607, 612 (1935)("It is inherent in the judicial department of government under the Constitution to control the practice of the law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful to their trust.") (abrogated on other grounds); Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 213 (2011) (public records law did not override the judiciary's authority to enter protective orders preventing public disclosure).

Most relevant to the issues at hand, this Court has already exercised its inherent authority to regulate attorney trust accounts. See, e.g., Petition by Massachusetts Bar Ass'n and Boston Bar Ass'n, 395 Mass. 1 (1985) (amending rules to permit IOLTA accounts under certain terms); see also Go-Best Assets Limited v. Citizens Bank of Massachusetts, 463 Mass. 50, 59 n. 8 (2012)(instructing rules committee to

determine "whether an attorney opening an individual non-IOLTA 'trust account' should be required to deliver to a bank a form notifying the bank that the account is a 'trust account' to avoid any ambiguity as to the nature of the account.")

Moreover, this Court has already determined that it can order unidentified IOLTA funds to be transferred to the IOLTA committee. See Appellants' Brief at 19-23 (collecting cases where the Court ordered remittance of unidentified IOLTA funds to the IOLTA Committee). It stands to reason that the Court's inherent authority extends to regulating the disposition of unidentified funds that may arise in accounts required to practice law in Massachusetts. Public confidence in lawyers directly depends on the obligation of lawyers to meticulously account for funds held in trust. In administering their IOLTA accounts, Massachusetts lawyers must follow the strict protocols imposed by Rule 1.15(f). As a result, a lawyer's inability to identify the owner of IOLTA funds generally raises disciplinary issues and implicates this Court's authority to regulate lawyers

and the practice of law.[3] Amici urge the Court to follow its established practice and order the disposition of the funds at issue in this case to the IOLTA Committee.

The Court's handling of IOLTA accounts has been in line with the majority of the states that have expressly addressed this issue. Amici have identified nineteen states that have expressly addressed the disposition of unidentified funds in IOLTA accounts by either statute or court rule. Of those nineteen states, fourteen states have addressed the disposition of unidentified IOLTA funds by court rule[4] and five states by statute.[5] Further, nine of the fourteen

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[3] The Amici take no position on whether disciplinary sanctions are appropriate or necessary in all cases of non-compliance with IOLTA record-keeping rules.

[4] Arkansas (Ark. R. Prof'l Conduct 1.15(c)); Colorado (Colo. R. Prof'l Conduct 1.15B(k)); Delaware (Del. Sup. Ct. R. 73); Florida (Fla. R. Regulating Fla. Bar 5-1.1(i)); Illinois (Ill. R. of Prof'l Conduct 1.15(i) cmt. 8); Louisiana (La. R. of Prof'l Conduct 1.15(h)); Montana (Mont. R. Prof'l Conduct 1.15(f)); New Jersey (N.J. Ct. R. 1:21-6(j)); North Carolina (N.C. R. Prof'l Conduct 1.15-2(r)); Pennsylvania (Pa. R. of Prof'l Conduct 1.15(v)); Tennessee (Tenn. R. Prof'l Conduct 1.15, cmt. 14); Washington (Wash. R. Prof'l Conduct 1.15A, cmt. 6); West Virginia (W. Va. St. B. Admin. R. 10.09); and Wyoming (Wyo. R. Prof'l Conduct 1.15(j)).

[5] California (Cal. Civ. Proc. Code § 1564.5); Kentucky (Ky. Rev. Stat. Ann. § 393A.020); Maine (33 Me. Stat. tit. 33, § 1959(5)); Maryland (Md. Code Ann. Commercial Law § 17-316(a)(2)); and Oregon (OR. REV. STAT. §§ 98.304; 98.332(1); 98.352(1)(c); 98.386(2)).

states addressing this issue by court rule and four of the five states addressing this issue by statute require that unidentified IOLTA funds be sent to the IOLTA Committee or a similar entity instead of escheating to the state under the applicable abandoned property law.[6]

The Treasurer has cited to seven states for the proposition that they direct attorneys to pay unclaimed accounts to that state's abandoned property fund, see Appellee's Brief at 36-37, but acknowledges that these various ethics opinions – not court rules – deal with true trust accounts as well as IOLTA accounts and with both unidentified and unclaimed accounts, blurring important distinctions. These authorities provide no reason to change the Court's current practice.

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[6] Arkansas (Ark. R. Prof'l Conduct 1.15(c)); California (Cal. Civ. Proc. Code § 1564.5); Colorado (Colo. R. Prof'l Conduct 1.15B(k)); Illinois (Ill. R. of Prof'l Conduct 1.15(i) cmt. 8); Kentucky (Ky. Rev. Stat. Ann. § 393A.020); Louisiana (La. R. of Prof'l Conduct 1.15(h)); Maine (33 Me. Stat. tit. 33, § 1959(5)); Montana (Mont. R. Prof'l Conduct 1.15(f)); New Jersey (N.J. Ct. R. 1:21-6(j)); Oregon (OR. REV. STAT. §§ 98.304; 98.332(1); 98.352(1)(c); 98.386(2)); Pennsylvania (Pa. R. of Prof'l Conduct 1.15(v)); West Virginia (W. Va. St. B. Admin. R. 10.09); and Wyoming (Wyo. R. Prof'l Conduct 1.15(j)).

III. THE ABANDONED PROPERTY ACT DOES NOT CONTROL THE DISPOSITION OF FUNDS IN IOLTA ACCOUNTS.

The enactment and subsequent legislative history of the Abandoned Property Act ("APA"), G.L. c. 200A, demonstrates that it does not apply to unidentified funds in IOLTA accounts. The APA was enacted long before IOLTA accounts existed in this country, such that the original enacting legislature could not have envisioned the APA covering IOLTA accounts. And in the 70 years since the APA's enactment and 35 years since judicial authorization of IOLTA accounts, despite numerous amendments to bring specific types of property within the APA's purview, no amendment has specifically addressed funds in IOLTA accounts.[7] Had the legislature intended to bring unidentified IOLTA funds under the APA, it could have done so by express amendment, as it did for other kinds of property. This history shows that the Legislature never intended the APA to apply to unidentified funds in an IOLTA account.

[7] This is true not only in Massachusetts but also as to the uniform law on this topic, which has never been amended to either include or exclude IOLTA accounts. See Unif. Unclaimed Prop. Act (Nat'l Conference of Comm'rs on Unif. State Laws 2016).

The APA pre-dates IOLTA accounts in the U.S. The Massachusetts legislature first enacted the APA in 1950. St. 1950, c. 801 (Mass. 1950). The first state to implement IOLTA accounts was Florida in 1978. See In re Interest on Trust Accounts, Etc., 356 So. 2d 799 (Florida 1978). And Massachusetts did not implement IOLTA accounts until 1985. See Petition by Massachusetts Bar Ass'n and the Boston Bar Ass'n, 395 Mass. 1 (1985). As IOLTA accounts did not come into existence until nearly three decades later, the original APA could not have been specifically intended to cover IOLTA accounts.

Since its enactment, the APA has been amended at least five times to include provisions defining when specific types of property are deemed abandoned, and therefore subject to the mechanics of the law. Specifically, the legislature has amended the APA to address the following specific kinds of property:

- **Intangible personal property; presumption of abandonment.** See G.L. c. 200A, § 1A (defining when presumed abandoned and added by St. 1980, c. 130, § 4).

- **Property distributable in a dissolution or liquidation.** See G.L. c. 200A, § 6A (defining when presumed abandoned and added by St. 1962, c. 248, § 2).
- **Sums payable in connection with traveler's checks and other written instruments.** See G.L. c. 200A, § 6B (defining when presumed abandoned and added by St. 1975, c. 889, § 1);[8] G.L. c. 200A, § 6C (setting record keeping requirements for traveler's checks and other written instruments and added by St. 1980, c. 130, § 8).
- **Property distributable in a demutualization or related reorganization of an insurance company.** See G.L. c. 200A, § 6D (defining when presumed abandoned and added by St. 2003, c. 4, § 47).
- **Proceeds from mineral rights.** See G.L. c. 200A, § 6E (defining when presumed abandoned and added by St. 2004, c. 352, § 45).

These provisions all affect what constitutes unclaimed or abandoned property, and therefore what is

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[8] Section 6B was further amended to address sums payable in connection with cashier's checks, certified checks, and other written instruments in 1980. See St. 1980, c. 130, § 8.

covered by the APA. And they make clear that the legislature knows how to amend the APA when it wants to expressly reach specific kinds of property. Yet none of these amendments, including G.L. c. 200A, § 1A, squarely apply to unidentified funds in IOLTA accounts. See Appellants' Brief at 35-40. Had the legislature intended the APA to reach unidentified funds held in a type of account created, regulated, and required by the judiciary for the practice of law, it would surely have done so explicitly.[9]

IV. INTERPRETING THE APA TO COVER UNIDENTIFIED FUNDS IN IOLTA ACCOUNTS WOULD INTERFERE WITH THE PRACTICE OF LAW BY INTRUDING ON ATTORNEY-CLIENT CONFIDENCES.

A. Maintaining Attorney-Client Confidences is Essential to the Practice of Law.

Protecting attorney-client confidences is a critical aspect of the practice of law. Courts have frequently emphasized the importance of confidentiality in the attorney-client relationship. The Supreme Court has observed that maintaining

[9] The APA also was amended in 2011 in some places to refer to "unclaimed" property in lieu of or in addition to "abandoned" property. St. 2011, C. 90, §§ 5-12. This ostensibly broadening amendment to the general language also did not expressly bring unidentified IOLTA funds within the APA's coverage.

attorney-client confidences is necessary to the administration of justice:

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888); see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.") (emphasis added).

Similarly, this Court has observed that "[t]he relation of an attorney to his client is pre-eminently confidential." See In re Opinion of the Justices, 289 Mass. 607, 613 (1935) (abrogated on other grounds).

According to this Court, the maintenance of the confidence between an attorney and client is critical to enable an attorney to perform "the duties of his office":

> that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.

Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc., 449 Mass. 609, 615 (2007) (quoting Hatton v. Robinson, 31 Mass. 416, 422 (1833)).

While some of these cases concern the attorney-client privilege and others concern attorney discipline, they speak to a broader principle — protecting attorney-client confidences is essential to

the practice of law. See, e.g., Commonwealth v. Perkins, 450 Mass. 834, 851 (2008) ("It is axiomatic that among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information.") (citations omitted); Mass. R. Prof. C. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent or as otherwise permitted by these Rules, the lawyer must not reveal confidential information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.") (emphasis added). And, in recognition of this principle, this Court has used its inherent authority to create rules obligating attorneys to protect client confidences. See, e.g., Mass. R. Prof. C. 1.6 (providing for the protection of confidential client information). It should not be presumed that the legislature intended general terms in a general statute to displace this Court's regulation of the practice of law or to destroy this attorney-client confidentiality.

B. Interpreting the APA to Cover Unidentified Funds Exposes Attorney-Client Confidences to Intrusion by the Treasurer and by Non-Governmental Vendors Thereby Jeopardizing the Security of Client Information.

Attorney records concerning IOLTA accounts are necessarily intertwined with attorney-client confidences. As discussed above, determining the amount of money due each client can require consideration of engagement terms and fee arrangements, settlement agreements, and money owed to third parties for provision of confidential services. It can also require consideration of private client information, such as medical bills and other financial obligations of clients. This is especially true where funds are unidentified. Review of these and similar materials becomes all the more necessary when one needs to determine not only how much, but to whom IOLTA funds are owed. These records unavoidably incorporate client confidences that must be protected.

If the APA applied to funds in an IOLTA account, the Treasurer would have broad discretion to review attorney records related to IOLTA accounts holding such funds. The APA and the regulations promulgated thereunder give the Treasurer broad discretion to

select whose records to review, when and how the review will occur, and, which records will be reviewed. And, critically, the APA and related regulations do not provide any protections for attorney-client confidences, unlike the provisions applicable to the BBO which provides that the BBO must maintain the utmost confidentiality of its investigations. Mass. R. Bd. of Bar Overseers § 4.7(a). The IOLTA Committee has also adopted guidelines to protect against the disclosure of confidential information. See IOLTA Guidelines, Disclosure of Confidential Information Prohibited § F, https://www.maiolta.org/all-documents/5-iolta-guidelines.

The APA requires that "[e]very person holding property declared by this chapter to be presumed abandoned" shall comply with its reporting requirements. G.L. c. 200A, § 7(a). To ensure that potential "holders" of property presumed abandoned under the APA are complying with the reporting requirement, the statute vests in the Treasurer broad rights to examine records. Indeed, the Treasurer can examine the records of <u>any</u> person for compliance with

the APA. See G.L. c. 200A, § 12(a) ("The treasurer may at any reasonable time and upon reasonable notice examine the records of any person to determine if said person has complied with the provisions of the chapter."); see also 960 C.M.R. 4.07 ("Pursuant to M.G.L. c. 200A, § 12, the Treasurer, his/her designee or agent may at any reasonable time and upon reasonable notice examine or audit a holder's books, papers or other records to verify proper compliance with the reporting requirements of M.G.L. c. 200A.").

The Treasurer also controls the form of the review. Under the regulations, the Treasurer can elect to do a field audit or desk audit. 960 C.M.R. 4.07(4)(a). Both are highly intrusive and lack protection for attorney-client confidences. A "desk audit" involves "the Treasurer, his/her designee or agent examining the books, papers or other records of a holder at the office of the Division to determine compliance with the abandoned property reporting requirements of M.G.L. c. 200A, § 7." 960 C.M.R. 4.07(4)(b). With this kind of audit, the Treasurer can "request any information necessary to complete the audit and may require the holder or his/her

representative to appear in person." 960 C.M.R. 4.07(4)(b) (emphasis added).

On the other hand, a "field audit" involves "the Treasurer, his/her designee or agent conducting an examination of the books, papers or other records of a holder at the holder's place of business." 960 C.M.R. 4.07(4)(c) (emphasis added). As with the desk audit, there is no meaningful limitation on the records that the Treasurer can review. Indeed, the only requirement is that "[t]he holder shall be notified in advance that he or she has been selected for audit and shall be instructed as to the books, papers and other records which should be made available to complete the audit." 960 C.M.R. 4.07(4)(c).

Regardless of the type, an audit pursuant to the APA threatens attorney-client confidences because the Treasurer or her vendors[10] would have essentially

[10] The Treasurer has disclosed that a vendor, Kelmar Company, now administers the unclaimed property process management system. See Proposed Supplemental Record Appendix 10, ¶ 4. It is not known whether the Treasurer employs any vendors who are under a contingent fee contract to recover funds, which is now a very common practice when dealing with abandoned property. See Unif. Unclaimed Prop. Act, prefatory note, p. 6–8 (Nat'l Conference of Comm'rs on Unif. State Laws 2016). If so, concerns about violating client confidentiality would be even greater.

unconstrained access to confidential documents related to the attorney's IOLTA account.

V. REMITTING UNIDENTIFIED FUNDS TO THE IOLTA COMMITTEE AFTER THE USUAL BAR INVESTIGATION BEST ACCOMPLISHES THE GOALS OF RETURNING CLIENT FUNDS WHILE PRESERVING CLIENT CONFIDENCES.

The existing bar system, rather than the Treasurer's Unclaimed Property Division ("Division"), is in the best position to analyze claims to unidentified funds and ensure that client confidences and the public interest are protected when such funds are administered. Administration of unidentified IOLTA funds requires detailed knowledge of Rule 1.15's record keeping and accounting requirements, expertise in forensic accounting and the ability to identify and manage confidential attorney-client information.

Protecting the public interest in this context also requires broad knowledge of the rules of professional conduct and the bar discipline system as well as the ability to compel the production of relevant information from third parties. By way of example, in a particular case, a former client may not be able to trace funds to an IOLTA account but nonetheless may have suffered a loss from a lawyer's dishonest conduct and should be referred to the Client

Security Board for help. Similarly, obtaining the information necessary to determine the ownership of IOLTA funds may require the cooperation of other lawyers and law firms or the ability to subpoena third parties, such as banks and insurance companies. See Mass. R. Bd. of Bar Overseers §§ 4.4-4.8. The professionals at the BBO and OBC who are entrusted with the responsibility to enforce trust funds rules are uniquely qualified to analyze the ownership of orphan funds and ensure that they are returned to appropriate parties and that clients are made whole.[11]

The Division lacks an equivalent competence, nor is it under the control or supervision of this Court. In stark contrast with the BBO and OBC, the Division has no special expertise in forensic accounting, bar discipline procedures, Rule 1.15's record keeping and accounting requirements, or the management and administration of IOLTA accounts.

As currently handled by the Treasurer, little is done to specifically investigate the ownership of

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[11] With regard to the Client Security Board's suggestion that another entity could be created or designated to perform this task, Amici note that there must be protections for client confidences and privileges in any investigation.

IOLTA accounts. Despite the broad authority the Treasurer has in this field, as described above, the only practices described by the Treasurer when a claimant comes forward are minimal, consisting of a request that the claimant provide documentation establishing a relationship with the attorney. Proposed Supplemental Record Appendix ("Pr. Supp. R.A.") 6, ¶ 11. Not only does this practice potentially require a client to waive attorney client privilege, work product immunity and client confidentiality as the price of getting her money back, but this level of inquiry also is strikingly deficient compared to the efforts normally undertaken by the BBO or a court-appointed commissioner, who has access, on a privileged and confidential basis, to client files and attorney records.

It comes as little surprise, then, that the Treasurer's efforts to return IOLTA accounts to clients have been remarkably unsuccessful to date. According to the Treasurer's brief and supporting

affidavits, 572 IOLTA accounts,[12] some dating back to the mid-1990s, have been unilaterally "transmitted to Treasury as unclaimed property by banks or other holders." Appellee's Brief at 17; Pr. Supp. R.A. 10, ¶ 5. Of those, all but 14 were turned over to the Treasurer by banks. Id. But only 58 (10%) of these IOLTA accounts have been claimed, allegedly by the true owner, although at least in five cases, the claimant was a law firm, not the client. Id. ¶ 6.[13]

Thus, the Treasurer's involvement would not lead to a greater likelihood of returning funds to the client, as demonstrated by experience to date, than if the resources of the bar – acting through the Board of Bar Overseers and the IOLTA Committee – are charged with that effort. These practical considerations dictate that the most effective way to balance the twin policies of preserving client confidences and finding the actual owner of the account is by

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[12] That represents roughly 4% of the average number of current IOLTA accounts. See IOLTA Commission website, https://www.maiolta.org/making-a-difference#Making_a_Difference.

[13] At no point does the Treasurer address the diversion of interest on these accounts from the IOLTA Committee after they were turned over to the Division.

continuing the types of bar investigations now in place, after which the unidentified funds can be turned over to the IOLTA Committee. This will also have the benefit of maintaining public trust and confidence that the Court and entities it has created and oversees are ultimately responsible for the regulation of lawyers and the security of client trust funds.

VI. REMITTING UNIDENTIFIED FUNDS TO THE IOLTA COMMITTEE DOES NOT RAISE FREEDOM OF SPEECH OR TAKINGS CONCERNS

The Treasurer argues that two constitutional issues could arise if unidentified IOLTA funds are remitted to the IOLTA Committee instead of the Treasurer: compelled speech and takings without just compensation. See Appellee's Brief at 46-51. But neither of these issues are of greater concern (as compared to if the Treasurer receives the funds) if the IOLTA Committee is able to return funds to the true owner.

The Treasurer contends that a compelled speech concern might arise because remitting the unidentified funds to the IOLTA Committee could be compelling the owner of the funds to subsidize the charitable

organizations receiving IOLTA funds, with which she might disagree. See Appellee's Brief at 46-47. It is unclear how and if the Treasurer would have standing to assert the constitutional rights of individuals or why diverting the funds to some other purpose by the Treasurer would not also be a disagreeable use.

The Treasurer also argues that if the IOLTA Committee does not have a way to return the unidentified funds to its true owner, should she come forward, it would amount to an unconstitutional taking without just compensation. See id. at 47-51. But according to the Treasurer, both of these concerns can be ameliorated by having, as the Treasurer does, procedures and financial reserves in place to ensure the return of the funds to the true owner, if she ever comes forward.

There is no reason the IOLTA Committee cannot do the same. IOLTA currently has a $270,000 reserve. See 2018/2017 Financial Statement (net unrestricted assets of $269,000; see also Note 5 (describing reserve), https://www.maiolta.org/about-us/financial-statements/file. IOLTA also has a refund policy for interest attributable to funds inadvertently placed in

an IOLTA account, see Client Funds Manual 144, https://maiolta.org/all-documents/3-client-funds-manual-2018. And it should not be overlooked that by Court rule the legal profession funds the Client Security Board to compensate any client damaged by her attorney's misconduct. Among other possible actions, if needed, Massachusetts Rule of Professional Conduct 1.15 could be amended to formalize the requirement for an IOLTA reserve, as has been done in other states by court rule.[14]

CONCLUSION

For these reasons, specifically, the unique nature of the property at issue (IOLTA accounts) which is integrally related to the practice of law over which this Court has broad and distinct authority, the plain language and history of the APA, practical considerations of how best to preserve client confidences while trying to find the rightful owner of

[14] See, e.g., Arkansas (Ark. R. Prof'l Conduct 1.15(c)); Colorado (Colo. R. Prof'l Conduct 1.15B(k)); Illinois (Ill. R. of Prof'l Conduct 1.15(i) cmt. 8); Kentucky (Prop. KY S. Ct. R. 3.820(21)(A)-(D)); Louisiana (La. R. of Prof'l Conduct 1.15(h)); Montana (Mont. R. Prof'l Conduct 1.15(f)); New Jersey (N.J. Ct. R. 1:21-6(j)); Pennsylvania (Pa. R. of Prof'l Conduct 1.15(v)); West Virginia (W. Va. St. B. Admin. R. 10.09); and Wyoming (Wyo. R. Prof'l Conduct 1.15(j)).

these accounts, and the beneficial effects that turning even modest sums of money over to the IOLTA Committee will have on access to justice for all, this Court should order that the unidentified funds from the Olchowski IOLTA account be remitted to the Massachusetts IOLTA Committee.

Further, in light of suggestions in the record and briefing that additional protection of clients' rights may be needed, the Court may wish to undertake additional rulemaking addressing unidentified and unclaimed IOLTA funds consistent with the ruling in this case and confirming that unidentified IOLTA funds be turned over to the Massachusetts IOLTA Committee after an appropriate investigation has failed to identify the owner.

Respectfully submitted,

Boston Bar Association

Massachusetts Bar Association

Real Estate Bar Association for Massachusetts, Inc.

As *AMICI CURIAE*,

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CERTIFICATE OF SERVICE

I certify under the penalties of perjury that on January 21, 2020, a copy of the foregoing document was filed electronically through the Court's e-filing system for electronic service to the following registered users:

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CERTIFICATE OF COMPLIANCE

I, Micah W. Miller, hereby certify pursuant to Mass. R. App. P. 17 that this brief complies with the rules of court that pertain to the filing of amicus briefs. In compliance with Rules 20(a)(3)(E) and 20(a)(4), the brief uses a 12 point monospaced font, one inch top and bottom margins, and 1.5 inch left and right margins. The brief does not exceed 35 pages of countable material.

Micah W. Miller

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Statutes and Acts

Court Rules

Regulations

West's Annotated California Codes Code of Civil Procedure (Refs & Annos) Part 3. Of Special Proceedings of a Civil Nature (Refs & Annos) Title 10. Unclaimed Property (Refs & Annos) Chapter 7. Unclaimed Property Law (Refs & Annos) Article 5. Administration of Unclaimed Property (Refs & Annos)

West's Ann.Cal.C.C.P. § 1564.5

§ 1564.5. Abandoned IOLTA (Interest on Lawyers' Trust Account) Property Account; establishment, deposits, and transfers

Effective: January 1, 2019
Currentness

(a) Notwithstanding any law, including, but not limited to, Section 1564, all money received under this chapter from funds held in an Interest on Lawyers' Trust Account (IOLTA) that escheat to the state shall be administered as set forth in this section. The money shall be deposited into the Abandoned IOLTA Property Account, which is hereby established within the Unclaimed Property Fund.

(b) Twenty-five percent of the money in the Abandoned IOLTA Property Account shall be deposited into the IOLTA Claims Reserve Subaccount, which is hereby established within the Abandoned IOLTA Property Account. Notwithstanding Section 13340 of the Government Code, funds in the subaccount are continuously appropriated to the Controller for the payment of all refunds and claims pursuant to this chapter related to escheated IOLTA funds.

(c) The balance of the funds in the Abandoned IOLTA Property Account, excluding funds in the subaccount, shall be transferred on an annual basis to the Public Interest Attorney Loan Repayment Account established pursuant to Section 6032.5 of the Business and Professions Code. Before making this transfer, the Controller shall record the name and last known address of each person appearing from the holders' report to be entitled to the escheated property. The record shall be available for public inspection at all reasonable business hours.

Credits
(Added by Stats.2015, c. 488 (S.B.134), § 2, eff. Jan. 1, 2016. Amended by Stats.2018, c. 390 (A.B.2350), § 1, eff. Jan. 1, 2019.)

West's Ann. Cal. C.C.P. § 1564.5, CA CIV PRO § 1564.5
Current with all laws through Ch. 870 of 2019 Reg.Sess.

End of Document

Baldwin's Kentucky Revised Statutes Annotated Title XXXIV. Descent, Wills, and Administration of Decedents' Estates Chapter 393A. Revised Uniform Unclaimed Property Act (Refs & Annos) General Provisions

KRS § 393A.020

393A.020 Inapplicability to foreign transaction

Effective: June 27, 2019
Currentness

This chapter shall not apply to:

(1) Property held, due, and owing in a foreign country if the transaction out of which the property arose was a foreign transaction;

(2) Money, funds, or any other intangible property held by or owing:

(a) To a nonprofit exempt under Section 501(c)(3) of the Internal Revenue Code [1] ;

(b) For any minerals or other raw materials capable of being used for fuel in the course of manufacturing, processing, production, or mining; or

(c) For any mineral proceeds;

(3) Wages or salaries of fifty dollars ($50) or less that are not claimed by an employee within one (1) year of the date the wages or salaries are earned, unless the amounts are held on a payroll card;

(4) Moneys in inmate accounts and prisoner canteen accounts held by jailer under KRS 441.137; or

(5) Funds held in a lawyer IOLTA trust account under Supreme Court Rule 3.830.

Credits
HISTORY: 2019 c 125, § 3, eff. 6-27-19; 2018 c 163, § 2, eff. 7-14-18

Footnotes
1 26 U.S.C.A. 501(c)(3)
KRS § 393A.020, KY ST § 393A.020
Current through the end of the 2019 Regular and First Extraordinary Sessions

End of Document

West's Annotated Code of Maryland Commercial Law Title 17. Disposition of Abandoned Property (Refs & Annos) Subtitle 3. Abandoned Property in this State (Refs & Annos)

MD Code, Commercial Law, § 17-316

§ 17-316. Sale of property

Currentness

(a) Except as provided in this subsection, all abandoned property under this title, other than money delivered to the Administrator under this title, shall be offered for sale by the Administrator within 1 year of delivery. The sale shall be to the highest bidder at public sale in whatever place in the State affords the most favorable market for the property involved. The Administrator may decline the highest bid and reoffer the property for sale if the price bid is insufficient. The Administrator need not offer any property for sale if, the probable cost of sale exceeds the Administrator's estimation of the value of the property.

(b) Any sale held under this section shall be preceded by a single publication of notice at least three weeks in advance of the sale in a newspaper of general circulation in the county where the property is to be sold.

(c) The purchaser at any sale conducted by the Administrator under this section shall receive title to the property purchased, free from every claim of the owner or prior holder of it and of every person who claims through or under them. The Administrator shall execute all documents necessary to complete the transfer of title.

(d) No action by any person may be brought or maintained against the State or any officer of the State for or on account of any transaction entered into pursuant to and in accordance with the provisions of this section.

Credits

Added by Acts 1975, c. 49, § 3, eff. July 1, 1975. Amended by Acts 1981, c. 752; Acts 1981, c. 773, § 2; Acts 1981, c. 774, § 2.

Formerly Art. 95C, § 15.

MD Code, Commercial Law, § 17-316, MD COML § 17-316
Current through all legislation from the 2019 Regular Session of the General Assembly.

End of Document

The commissioner, with the approval of the public health council, shall appoint a director of the clinics.

Director.

The director shall consult and work in conjunction with nationally recognized scientific and service organizations and such other agencies as are able to assist in the study, treatment and rehabilitation of alcoholics and in a scientific and educational program relative to the problems of alcoholism.

Same subject.

Section 4B. The department shall establish and maintain such hospital and clinic facilities as are necessary to properly care for persons addicted to the excessive use of alcoholic beverages.

Voluntary admissions to clinic facilities.

Section 4C. Any person who through the excessive use of alcoholic beverages has become unable to care for himself, his family, or his property, or has become a burden on the public, may voluntarily request admission to the hospital and clinic facilities established under section four B. Admissions to such hospital and clinic facilities may also be made on recommendation by a physician, by the courts, social agencies, families or friends of such person. All admissions under this section shall be voluntary on the part of the patient and subject to the approval of the department or its authorized agents. *Approved August 17, 1950.*

AN ACT TO PROVIDE FOR THE DISPOSITION OF ABANDONED PROPERTY. *Chap.* 801

Emergency preamble.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is, in part, to recover abandoned property by the commonwealth, therefore it is hereby declared to be an emergency law necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

G. L. (Ter. Ed.), new chapter 200A, added.

The General Laws are hereby amended by inserting after chapter 200 the following new chapter: —

CHAPTER 200A.

ABANDONED PROPERTY.

Definitions.

Section 1. The following words when used in this chapter, unless the context otherwise requires, shall have the following meanings: —

(*a*) "Property", all tangible or intangible personal property.

(*b*) "Abandoned property", property shall be presumed abandoned to which there has been no valid claim or evidence of ownership within a period of fourteen years.

(*c*) "Claim", demand for payment or surrender of property from the holder of same, whose duty it is to pay or surrender the property to the legitimate claimant.

(*d*) "Commissioner", the commissioner of corporations and taxation.

(*e*) "Department", department of corporations and taxation.

(*f*) "Treasurer", the treasurer and receiver general.

(*g*) "Person", any person as defined in section seven, twenty-third, of chapter four of the General Laws as appearing in the Tercentenary Edition, acting in any capacity whatsoever, and all political subdivisions of the commonwealth.

Property presumed abandoned.

Section 2. (*a*) Property which has been bequeathed to any person, shall be presumed abandoned, if not claimed by that person or his heirs, legatees or distributees within fourteen years after the death of the testator unless the will makes provision in case of a lapse, failure or rejection of the bequest for the disposition of the property.

Person's property deemed to have been abandoned, when.

(*b*) When a person, owning property, is not known for fourteen successive years to be living and neither he nor his heirs or distributees can be located or proved for fourteen successive years to have been living, he shall be presumed to have died without heirs or distributees, and his property shall be presumed abandoned.

Property on deposit, when abandoned.

Section 3. Any deposit of property with a person having a residence or place of business in the commonwealth, or authorized to do business therein, together with the increments thereon, shall be presumed abandoned unless the owner has, within fourteen years next preceding the date as of which reports are required by section seven: —

(1) Communicated in writing with the person concerning the deposit; or

(2) Been credited with interest on a passbook or certificate of deposit at his request; or

(3) Had a transfer, disposition of interest or other transaction noted of record in the books or records of the person; or

(4) Increased or decreased the amount of the deposit.

Property deposited as security for services, etc., when abandoned.

Section 4. Any deposit of property made to secure payment for services rendered or to be rendered, or to guarantee the performance of service or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned, unless claimed by the person entitled thereto within fourteen years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

Dividends, stocks, bonds, etc.

Section 5. All dividends, stocks, bonds, money, credits and claims for money and credits, and all intangible personal property, and the increments of any of them, held by, or in the control of, any person for the benefit of a person residing or having a place of business in this commonwealth shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within fourteen years from the time the holder, trustee or other responsible person became obligated to return them or their equivalent to the proper owner or claimant.

Money paid into court, etc.

Section 6. Monies paid into any court within this com-

monwealth for distribution, and the increments thereof, shall be presumed abandoned if not claimed within fourteen years after the date of payment into court, or as soon after the fourteen year period as all claims filed in connection with it have been disallowed or settled by the court.

Annual report.

Section 7. (*a*) It shall be the duty of all persons, or the agents thereof, holding property within the purview of this chapter, to report annually under penalties of perjury to the department as of July first, property held by them declared by this chapter to be presumed abandoned.

Form and contents.

(*b*) The report shall be made in triplicate and filed in the office of the department on or before September first of each year for the preceding July first, and shall give the name of the owner, his last known address and the amount and kind of property. It shall also give such other information as the department may require for the administration of this chapter. All property contained in said report unless earlier claimed by the owner or his legal representative shall be turned over to the commissioner on or before November first each year.

(*c*) No person shall be required to report any property on a presumption of abandonment to the commissioner if the period of time provided by any statute of limitations applicable to the owner's right as against a holder has expired unless the court orders him to do so.

Notice of certain unclaimed property, publication, etc.

Section 8. (*a*) Within thirty days after making the report of abandoned property pursuant to the provisions of section seven, the holder shall cause to be published a notice entitled: "NOTICE OF CERTAIN UNCLAIMED PROPERTY HELD BY [name of holder]".

(*b*) Such notice shall be published once in a newspaper in the county of the situs of the property and in the city or town or if there is no newspaper in such city or town in the county where the owner according to the records of the holder last had a business or residential address. If there are no newspapers published in such county then such publication shall be in a newspaper published in an adjacent county. All newspapers in which such notice shall be published shall be newspapers printed in the English language.

(*c*) Such notice shall be approved as to form by the commissioner and shall contain the name and the city or town of last known residence of the presumed owner; a description of the property; information concerning the intention of the holder to turn over such property to the commissioner on or before November first and that the holder shall thereupon cease to be liable therefor; and such other information as the commissioner may require.

(*c*) (1) Such holder shall notify by registered mail at the last known address of such owner on a form approved by the commissioner of certain unclaimed or abandoned property pursuant to law is to be considered abandoned.

(*d*) Such holder shall file with the commissioner on or before November first each year a copy of such publication

required in paragraph (*b*) and also a copy of the notice required by subsection (*c*) (1).

Property to vest in the state.

Section 9. (*a*) Property which has been surrendered to the commissioner under provisions of this chapter shall vest in the commonwealth, subject, nevertheless, to provisions of section ten.

(*b*) The commissioner shall proceed with the liquidation of property within one year after it has been surrendered to him under the provisions of this chapter.

(*c*) If the liquidation requires that the property be sold the commissioner shall sell it to the highest bidder at public sale in whatever city in the commonwealth affords, in the commissioner's judgment, the most favorable market for the particular property involved. The commissioner may decline the highest bid and reoffer the property for sale if he considers the price offered insufficient. The sale shall be advertised in a newspaper once a week for three successive weeks in the county wherein the property was located at the time that it was presumed abandoned, but where the sale will be made in a different county it shall likewise be advertised in such county once a week for three successive weeks immediately preceding the sale. The commissioner may refuse to offer such property at public sale if, in his opinion, it is valueless or of such little value that the cost of sale would exceed the public proceeds therefrom. The commissioner shall send by registered mail to the holder and to the last known address of the owner a copy of the published notice ten days prior to said sale.

(*d*) All monies received by the commissioner from the holder thereof, or from the liquidation of property under the preceding paragraphs hereof, shall be forthwith turned over to the treasurer, but the holder shall be entitled to such reasonable expenses for insurance, advertising, storage and compliance with this chapter as the commissioner may determine, not in excess of the money, or proceeds of property, received from the holder. The amount of such expenses shall be certified by the commissioner to the treasurer who shall, within three months from such certification, unless an appeal from the commissioner's determination is taken within that time, pay over to the holder the amount so certified.

(*e*) Monies received by the treasurer under proceedings of this chapter shall be placed in a special fund to be known as the abandoned property fund. Whenever such fund exceeds one hundred thousand dollars the excess shall be placed in the Old Age Assistance Fund. Payments made by the treasurer under the provisions of paragraph (*e*) of section ten shall be made from said abandoned property fund.

(*f*) All sales of property made by the commissioner under provisions of this chapter shall pass absolute title to the purchaser thereof.

Person claiming an interest in abandoned property may establish claim.

Section 10. (*a*) Any person claiming an interest in property surrendered to the commissioner under the provisions of this chapter may establish his claim at any time thereafter.

In the event that said property has not been liquidated at the time said claim is filed the commissioner shall, forthwith, delay liquidation proceedings that may be in process until such time as the rights of the claimant have been finally determined.

(*b*) The commissioner shall possess full and complete authority to determine all such claims and shall, forthwith, send a written notice of such determination to the claimant. At any time within twenty days thereafter such claimant may apply for a hearing and a redetermination of his claim. After an appropriate hearing before the commissioner, or person duly designated by him, the commissioner shall make a final determination.

(*c*) The commissioner, or any person duly designated by him, is empowered to take testimony under oath and shall have the power to subpoena and require the attendance of witnesses and the production of books, papers and documents which may be pertinent to such hearing.

(*d*) The commissioner shall render a decision within thirty days after such hearing. A claimant adversely affected by such decision may appeal to the district, municipal or superior court of the county wherein he resides and shall be entitled to a trial de novo. Such appeal shall be perfected by the claimant within twenty days after receiving notice from the commissioner. Any party adversely affected by a decree or order of the district, municipal or superior court may appeal to the supreme judicial court within twenty days from the date of the decree.

(*e*) If the validity of a claim shall be determined in favor of the claimant the commissioner shall so certify to the treasurer who shall forthwith pay over to the claimant only that amount which the treasurer actually received from the commissioner less all expense incurred by the commonwealth, with interest at the rate of three per cent per annum from the time when it was paid to the treasurer to the time when it is paid by him to the claimant. If the property has not been liquidated and still remains in the hands of the commissioner he shall forthwith turn it over to the claimant.

Freedom from liability.

Section 11. (*a*) A person who surrenders property to the department under the provisions of this chapter shall be relieved of liability to the owner of said property, or any person claiming under him, arising from such surrender.

(*b*) A payment by the treasurer as provided in paragraph (*e*) of section ten shall forever bar any claims or demands of any person or persons against said property.

Commissioner may petition court to inspect books of person suspected of failing to report.

Section 12. (*a*) If the commissioner believes that a person has failed to report property that should have been reported under provisions of this chapter, the commissioner shall petition the superior court for an order to allow the commissioner or his agents to examine all appropriate business records of such person. The commissioner shall give notice by registered mail of his intention to such person to-

gether with a copy of his petition at least ten days prior to a hearing thereon.

(*b*) If upon an examination of the records the commissioner believes that such person has violated the provisions of section seven, he shall petition the superior court for an order to require the holder thereof to turn over said property to him.

(*c*) If the court shall determine that the holder of such property has violated the provisions of section seven he shall be liable to a penalty of not more than five hundred dollars. However, no person shall be penalized for failure to report property as provided herein if the court shall find that such person has acted in good faith.

Commissioner may make rules and regulations.

Section 13. The commissioner is hereby empowered to promulgate such rules and regulations as are consistent herewith which he may deem advisable to the proper enforcement of this chapter. The commissioner is hereby empowered to extend the date for the filing of the report required in paragraph (*b*) of section seven for such periods up to six months if, in his opinion, such extension is advisable. Where the commissioner grants such an extension the requirements with respect to the turning over of the property in paragraph (*b*) of section seven and the filing of the published notice with the commissioner as required by paragraph (*d*) of section eight shall be extended for an additional two months.

Certain chapters not affected by provisions of act.

Section 14. Nothing in this chapter shall be construed to affect the provisions of section eight B of chapter one hundred and twenty-one; sections two C, two D and two E of chapter one hundred and twenty-two; sections thirty-nine A, thirty-nine B and thirty-nine C of chapter one hundred and twenty-three; sections ninety-six A and ninety-six B of chapter one hundred and twenty-seven; section five A of chapter one hundred and twenty-eight A; chapter one hundred and thirty-four; chapter one hundred and thirty-five; sections six A, six B, six C and six D of chapter one hundred and forty-seven; and sections one hundred and forty-nine A, one hundred and forty-nine B, one hundred and forty-nine C and one hundred and forty-nine D of chapter one hundred and seventy-five; all of the General Laws.

Appropriations to make up for insufficient funds.

Section 15. If during any session of the legislature there are insufficient funds in the Abandoned Property Fund to pay all claims which have been allowed by the commissioner or ordered to be paid by the court, the treasurer shall so certify to the legislature and shall request the legislature to appropriate from the General Fund to the Abandoned Property Fund an amount sufficient to pay such claims.

Section 16. All provisions of the General Laws inconsistent herewith are hereby repealed.

Section 17. If any section or clause of this chapter is held invalid or unconstitutional by a court of competent jurisdiction the remainder shall not be affected thereby.

Approved August 18, 1950.

occupant may vote or participate in any way in making a determination to approve the sale of a municipal bond issue the proceeds of which will be used by said prospective industrial occupant. Whoever violates any provision of this paragraph shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year, or both.

Approved January 17, 1976.

Chap. 888. AN ACT INCREASING THE POWERS OF THE BOARDS OF PARK COMMISSIONERS.

Be it enacted, etc., as follows:

Section 5 of chapter 45 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding the following sentence: — Subject to appropriation, such boards shall also have the power to conduct park programs and recreation activities at places other than such public parks.

Approved January 17, 1976.

Chap. 889. AN ACT REGULATING THE ABANDONMENT OF TRAVELERS CHECKS ISSUED OR SOLD IN THE COMMONWEALTH.

Be it enacted, etc., as follows:

SECTION 1. Chapter 200A of the General Laws is hereby amended by inserting after section 6A the following section: —

Section 6B. Any sum payable with respect to a travelers check issued or sold in the commonwealth by a corporation, partnership, limited partnership or other business association subject to the laws of the commonwealth, which has been outstanding for more than fifteen years from the date of its issuance, shall be presumed abandoned, unless the owner has within fifteen years corresponded in writing with such corporation, partnership, limited partnership, or other business association concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with such corporation, partnership, limited partnership or other business association.

SECTION 2. Section 11 of said chapter 200A is hereby amended by adding the following paragraph: —

(c) Any seller or issuer of travelers checks who has surrendered funds to the treasurer under the provisions of this chapter may make payment to any person appearing to such seller or issuer to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the treasurer shall forthwith reimburse the seller or issuer for such payment.

Approved January 17, 1976.

Three or more members of the board of health for the term of one or more years if the town provides for such board, otherwise the selectmen shall act as a board of health.

All other town officers shall be appointed by the selectmen unless other provision is made by law or by vote of the town.

In any town or district in which the election date of the officers, authorized under this section, is changed, the officers currently serving shall continue to hold their offices until the appointment or election and qualification of their successors.

In any case where three or more members of a board are to be elected for terms of more than one year, as nearly one-third as may be shall be elected annually.

The provisions of this section or any of the following sections of this chapter which authorize or require the fixing of the terms of office of members of any board, commission or body in such a manner that all such terms would not expire at the same time shall not apply with respect to such board, commission or body after the town has voted under section two of chapter fifty-four A to elect the members thereof by the proportional representational method of election. In no case shall the term of any officer exceed five years.

Approved May 2, 1980.

Chap. 130. AN ACT RELATIVE TO CERTAIN ABANDONED PROPERTY.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is relative to the state treasurer obtaining custody of certain abandoned property, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

SECTION 1. Section 149B of chapter 175 of the General Laws, as most recently amended by section 1 of chapter 474 of the acts of 1962, is hereby further amended by striking out the first and second sentences and inserting in place thereof the following two sentences:- In addition to all other reports required by law, every life company shall, on or before the first day of April of each year, make a report in writing to the state treasurer of all unclaimed funds as defined in section one hundred and forty-nine A held or owing by it on the thirty-first day of December next preceding. The state treasurer may, for cause shown, extend the filing date of said report, for not more than sixty days beyond April first in said year.

SECTION 2. Said chapter 175 is hereby further amended by inserting after section 149D the following section:-

Section 149E. The state treasurer may at any reasonable time following reasonable notice examine the records of any life company to determine if said company has complied with the provisions of this chapter. In the event any life company refuses to permit the state treasurer to examine such records, the state treasurer shall petition the superior court for an order to allow the state treasurer or his agents to examine all appropriate business records of such person.

If the state treasurer believes that any life company has violated the provisions of section one hundred and forty-nine B by withholding or failing to report funds specified therein, the state treasurer shall petition the superior court for an order to require the holder thereof to surrender such unclaimed funds to him.

SECTION 3. Section 1 of chapter 200A of the General Laws is hereby amended by striking out the definition of "Abandoned property", as amended by section 1 of chapter 277 of the acts of 1975, and inserting in place thereof the following definition:-

(b) "Abandoned property", property presumed abandoned pursuant to this chapter.

SECTION 4. Said chapter 200A is hereby further amended by inserting after section 1 the following section:-

Section 1A. Unless otherwise provided, intangible personal property is presumed abandoned under this chapter if the conditions for presumption of abandonment stated in section three, four, five, five A, five B, six A or six B exist, and if any one of the following four conditions are met:-

(a) the last known address of the apparent owner is in the commonwealth as shown on the records of the person in possession of property;

(b) no address of the apparent owner appears on the records of the person in possession of the property and

(1) the last known address of the apparent owner is in the commonwealth, or

(2) the person in possession of property subject to this chapter is domiciled in the commonwealth and has not previously paid the property to the state of the last known address of the apparent owner, or

(3) the holder is a government or governmental subdivision or agency of the commonwealth and has not previously paid the property to the state of the last known address of the apparent owner;

(c) the last known address, as shown on the records of the person in possession of property, is in a state that does not provide by law for the escheat or custodial taking of such property and the person in possession of property is domiciled in the commonwealth or is a government or governmental subdivision or agency of the commonwealth; or

(d) the last known address, as shown on the records of the person in possession of property, of the apparent owner is in a foreign nation and the person in possession of property is domiciled in the commonwealth or is a subdivision or agency of the commonwealth.

SECTION 5. Paragraph (a) of section 2 of said chapter 200A, as appearing in section 1 of chapter 608 of the acts of 1975, is hereby amended by striking out, in line 3, the word "ten" and inserting in place thereof the word:- seven.

SECTION 6. Paragraph (b) of said section 2 of said chapter 200A, as so appearing, is hereby amended by striking out, in lines 1 and 3, the word "ten" and inserting in place thereof, in each instance, the word:- seven.

SECTION 7. Section 3 of said chapter 200A is hereby amended by striking out the word "ten", inserted by section 2 of said chapter 608, and inserting in place thereof the word:- seven.

SECTION 8. Said chapter 200A is hereby further amended by striking out sections 4 to 8, inclusive, and inserting in place thereof the following fifteen sections:-

Section 4. Subject to the provisions of section one A, any deposit of property made to secure payment for services rendered or to be rendered, or to guarantee the performance of service or duties, or to protect against damage or harm, and the increments thereof, shall be presumed abandoned, unless claimed by the person entitled thereto within seven years after the occurrence of the event that would obligate the holder or depository to return it or its equivalent.

Section 5. Subject to the provision of section one A, all intangible personal property including but not limited to all certificates of ownership, dividends, stocks, bonds, money, drafts and claims for money and credits, including gift certificates and the increments of any of them, except deposits and the increments thereon referred to in section three that are held or owing in the commonwealth in the ordinary course of the person's business, including all such property held by any fiduciary, shall be presumed abandoned unless claimed by the beneficiary or person entitled thereto within seven years after the date prescribed for payment or delivery. Any dividend, distribution, interest, accrual, or payment on principal declared, set aside, accumulated, provided for or owed with respect to property presumed abandoned under the foregoing provisions of this section shall itself be presumed abandoned. This section shall not apply to property subject to section six A.

Section 5A. (a) Subject to the provisions of section one A, funds held or owing by a life insurance company under any life or endowment insurance policy or annuity contract which has matured or terminated shall be presumed abandoned if unclaimed and unpaid for more than seven years after the funds became due and payable as established from the records of the company.

(b) If a person other than the insured or annuitant is entitled to the funds and no address of such person is known to the company or if it is not definite and certain from the records of the company what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the company. This presumption is a presumption affecting the burden of proof.

(c) A life insurance policy not matured by actual proof of the death of the insured according to the records of the company is deemed to be matured and the proceeds due and payable if:-

(1) the insured has attained, or would have attained if he were living, the limiting age under the mortality table on which the reserve is based;

(2) the policy was in force at the time the insured attained, or would have attained, the limiting age specified in paragraph (1); and,

(3) neither the insured nor any other person appearing to have an interest in the policy has within the preceding seven years, according to the records of the company (i) assigned, readjusted, or paid premiums on the policy, (ii) subjected the policy to loan, or (iii) corresponded in writing with the life insurance company concerning the policy.

(d) Any funds otherwise payable according to the records of the company are deemed due and payable although the policy or contract has not been surrendered as required.

Section 5B. (a) Subject to section one A, any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to its shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association within seven years after the date prescribed for payment or delivery is presumed abandoned.

(b) Subject to section one A, any intangible interest in a business association, as evidenced by the stock records or membership records of the association is presumed abandoned if (1) the interest in the association is owned by a person who for more than seven years has neither claimed a dividend or other sum referred to in subsection (a) nor corresponded in writing with the association or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association and (2) the association does not know the location of the owner at the end of such seven year period. With respect to such interest the business association shall be deemed the holder.

(c) Subject to section one A, any dividends or other distributions held for or owing to a person at the time the stock or other security to which they attach are presumed abandoned also shall be presumed abandoned as of the same time.

(d) For the purposes of subsection (a) and (b) of this section a record of the sending of an Internal Revenue Service Form 1099, or its equivalent, to the persons enumerated in those subsections and a record of its not being returned by the United States Postal Service or its successor, shall be an indication of interest.

Section 5C. All employee benefit trust distributions and any income or other increment thereon shall be presumed abandoned if the owner within seven years after it becomes payable or distributable has not accepted the distribution, corresponded in writing concerning the distribution, or otherwise indicated an interest as evidenced by a memorandum or other record on file with the fiduciary of the trust or custodial fund or administrator of the plan under which the trust or fund is established.

Section 6. Monies paid into any court within the commonwealth for distribution, and the increments thereof, shall be presumed abandoned if not claimed within seven years after the date of payment into court, or as soon after the seven year period as all claims filed in connection with it have been disallowed or settled by the court.

Section 6A. All property distributable in the course of a voluntary or involuntary dissolution or liquidation of a person that remains unclaimed by the person entitled thereto, within one year after the date of final distribution or liquidation, shall be presumed abandoned. This section shall apply to all tangible personal property located in the commonwealth and subject to the provisions of section one A to all intangible personal property.

Section 6B. (a) Subject to the provisions of section one A and subsection (b) of this section, any sum payable on a certified check, draft, cashier's check, treasurer's check, registered check, money order, traveler's check, or other similar written instrument, other than a third-party bank check, on which a person is directly liable shall be presumed abandoned under this section if it has been outstanding for more than seven years from the date it was payable, or from the date of its issuance, if payable on demand, or in the case of traveler checks has been outstanding for more than fifteen years from the date of its issuance, unless the owner has within seven years, or within fifteen years in the case of travelers checks, corresponded in writing with the person concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the person. A new person is directly liable if it is the actual holder of the fund representing the face amount of any such instrument at the time of presumed abandonment hereunder.

(b) Any sum payable on a money order, travelers check, certified check, draft, cashiers check, treasurer's check, or other similar written instrument, other than a third-party bank check, on which a person is directly liable is presumed abandoned if:-

(1) the books and records of such person show that such money order, certified check, registered check, draft, cashiers check, treasurer's check, travelers check, or similar written instrument was purchased in the commonwealth;

(2) the person has its principal place of business in this commonwealth and its books and records do not show the state in which such money order, certified check, draft, cashiers check, treasurer's check, travelers check, or similar written instrument was purchased; or

(3) the person has its principal place of business in the commonwealth and its books and records show the state in which such certified check, registered check, draft, cashiers check, treasurer's check, money order, travelers check, or similar written instrument was purchased, and the laws of the state of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument.

(c) Notwithstanding the provisions of subsection (b) this section shall apply to sums payable on certified checks, drafts, cashiers checks, treasurer's checks, money orders, travelers checks, registered checks and similar written instruments deemed abandoned on or after February first, nineteen hundred and sixty-five, except to the extent that such sums have been paid over to a state prior to January first, nineteen hundred and seventy-four. For the purposes of this subsection, the words "deemed abandoned" shall have the same meaning as those words have as used in an Act of Congress identified in Section 604 of Public Law 93-495 and approved on October twenty-eighth, nineteen hundred and seventy-four, (88th Statutes at Large 1500).

(d) Sums payable on certified checks, drafts, cashiers checks, treasurer's checks, money orders, travelers checks, and similar written instruments deemed abandoned prior to February first, nineteen hundred and sixty-five, shall be reportable pursuant to subsection (a).

Section 6C. (a) Any person that sells in the commonwealth certified checks, drafts, cashiers checks, treasurer's checks, registered checks, travelers checks, money orders, or other similar written instruments on which such person is directly liable, or that provides such certified checks, drafts, cashiers checks, treasurer's checks, registered checks, travelers checks, money orders, or similar written instruments to others, for sale in the commonwealth shall maintain a record indicating those travelers checks, money orders, or similar written instruments that are purchased from it in the commonwealth.

(b) The records required by this section must be retained for period of seven years from the date the report is filed.

(c) Any person that willfully fails to comply with this section shall be liable to the commonwealth for a civil penalty of five hundred dollars for each day of failure to comply, which penalty may be recovered in an action brought by the treasurer.

Section 7. (a) Every person holding property declared by this chapter to be presumed abandoned shall report to the treasurer as provided in this section.

(b) The report shall be on a form prescribed by the treasurer and shall include:-

(1) Except with respect to traveler's checks, registered checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of twenty-five dollars or more presumed abandoned under this chapter.

(2) In the case of presumed abandoned funds of life insurance companies, the full name of the insured or annuitant, and his last known address, according to the records of the life insurance company.

(3) The nature and identifying number, if any, or description of any intangible property and the amount appearing from the records to be due, except that items of value under twenty-five dollars each may be reported in aggregate.

(4) Except for any property reported in the aggregate, the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property.

(5) Other information which the treasurer prescribes by rule as necessary for the administration of this section.

(c) If the holder is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed no later than November first of each year as of June thirtieth or the end of the fiscal year next preceding but the report of life insurance companies shall be filed before May first of each year as of December thirty-first next preceding.

(e) The report shall be made under penalty of perjury, and if made by an individual, by the individual; if made by a partnership, by a partner; if made by an unincorporated association or private corporation, by an officer; and, if made by a public corporation, by its chief fiscal officer.

Section 7A. If the person in possession of property in an amount of five dollars or more presumed abandoned under this

chapter has the last known address of the apparent owner, the holder shall at least ninety days before filing the annual report send a notice by first class mail to inform the owner of the process necessary to rebut the presumption of abandonment.

Section 7B. Every person required to file a report under section seven, except holders in possession of property subject to section six C, shall, as to any property for which it has obtained the address of the owner, maintain a record of the name of the owner and last known address for seven years or such other period as the treasurer shall prescribe by regulation.

Section 8. (a) The treasurer shall cause a notice to be published, not later than March first, or in the case of life insurance companies September first of the same year following the report, at least once a week for two consecutive weeks in a newspaper of general circulation which is printed in English in each county in which an apparent owner had a last known address. Said notice shall contain:-

(1) the last known address, as listed in the reports, of any person named in the reports as the apparent owner of property presumed abandoned under this chapter; or

(2) if no address of any apparent owner named in the reports is listed or if the address listed in the reports is outside the commonwealth, the principal place of business, if any, within the commonwealth of the holder of the property presumed abandoned.

(b) Each published notice shall be entitled "notice of names of persons appearing to be owners of abandoned property", and shall contain the names in alphabetical order and last known addresses, if any, of:-

(1) those apparent owners listed in the reports as having a last known address within the county;

(2) those apparent owners listed as having a last known address outside this commonwealth or as having no last known address in a report filed by a holder with his principal place of business within the county; and

(3) the insured or annuitant in the case of funds described in section five A if: (i) the report does not list the name of the apparent owner and his last known address; and (ii) the last known address of the insured or annuitant is within the county.

(c) Each published notice shall also contain:

(1) a statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the treasurer.

(2) a statement that, if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holders satisfaction before April first, or October first in the case of life insurance companies, the property will be placed not later than May first, or

November first in the case of life insurance companies, in the custody of the treasurer and all further claims must thereafter be directed to the treasurer.

(d) The treasurer is not required to publish in such notice any items of less than twenty-five dollars value unless he deems such publication to be in the public interest.

(e) By March first or September first in the case of life insurance companies, the treasurer shall mail a notice to each person having an address listed therein who appears to be entitled to property of the value of twenty-five dollars or more presumed abandoned under this chapter.

(f) The mailed notice shall contain:-

(1) a statement that, according to a report filed with the treasurer, property is being held to which the addressee appears entitled;

(2) the name and address of the person holding the property and any necessary information regarding changes of name and address of the holder; and

(3) a statement that, if satisfactory proof or claim is not presented by the owner to the holder by the date specified in the published notice the property will be placed in the custody of the treasurer and all further claims must be directed to the treasurer.

(g) This section shall not apply to sums payable on travelers checks, money orders, and similar written instruments that are presumed abandoned under section six B.

Section 8A. (a) Except as otherwise provided in paragraphs (b) and (c) every person who has filed a report as provided by section seven shall by May first, or in the case of life insurance companies November first, pay or deliver to the treasurer all property presumed abandoned specified in the report.

(b) If any person establishes his right to receive any property specified in the report to the satisfaction of the holder before such property has been delivered to the treasurer, or if it appears that for some other reason the property is not to be presumed abandoned under this section, the holder need not pay or deliver the property to the treasurer, but in lieu thereof shall file with the treasurer a written explanation of the proof of claim or the reason the property is not to be presumed abandoned.

(c) In the case of sums payable on travelers checks, registered checks and money orders presumed abandoned under section six B, or any other sums reported pursuant to section seven for which the holder has not reported the name of the apparent owner, such sums shall be paid to the treasurer not later than twenty days after the final date for filing the report.

(d) Payment of any intangible property to the treasurer shall be made at the office of the treasurer in Boston or at such other location as the treasurer by regulation may designate.

Section 8B. (a) At any time after property has been paid or delivered to the treasurer under this chapter, another state is entitled to recover the property if:-

(1) for property presumed abandoned under clause (b) of section one A because no address of the apparent owner of the property appeared on the records of the holder when the property was presumed abandoned under this chapter, the last known address of the apparent owner was in fact in such other state, and, under the laws of the state, the property escheated to or was subject to the custodial taking of that state;

(2) the last known address of the apparent owner of the property appearing on the records of the holder is in such other state and, under the laws of that state, the property escheated to or was subject to the custodial taking of that state;

(3) the property is the sum payable on a travelers check, registered check, money order, or other similar instrument that was presumed abandoned under section six B, the travelers check, registered check, money order, or other similar instrument was in fact purchased in such other state, and under the laws of that state, the property escheated to or was subject to the custodial taking of that state.

(b) The claim of another state to recover abandoned property under this section shall be presented in writing to the treasurer, who shall consider the claim within ninety days after it is presented. He may hold a hearing and receive evidence. He shall allow the claim if he determines that the other state is entitled to the abandoned property.

(c) Subparagraphs (1) and (2) of paragraph (a) shall not apply to property described in subparagraph (3) of said paragraph (a).

SECTION 9. Section 9 of said chapter 200A, as most recently amended by section 11 of chapter 377 of the acts of 1969, is hereby further amended by striking out paragraphs (d) and (e) and inserting in place thereof the following two paragraphs:-

(d) All monies received by the treasurer from the holder thereof, or from the liquidation of the property under paragraphs (a) to (c), inclusive, shall be placed in a special fund as provided in paragraph (e) after deducting therefrom the costs incurred in connection with any liquidation of abandoned property, any costs of mailing and publication in connection with any abandoned property, and cost incurred in examining records of holders of abandoned property and collecting such property from such holders and reasonable service charges.

(e) Monies received by the treasurer under the proceedings of this chapter shall be placed in a special fund to be known as the Abandoned Property Fund. Whenever such fund exceeds five hundred thousand dollars, the excess shall be credited to the General Fund. Payments made by the treasurer under the

provisions of paragraph (e) of section ten shall be made from said Abandoned Property Fund.

SECTION 10. Section 10 of said chapter 200A, as most recently amended by section 12 of chapter 377 of the acts of 1969, is hereby further amended by striking out paragraph (e) and inserting in place thereof the following paragraph:-

(e) If the validity of a claim shall be determined in favor of the claimant, the treasurer shall pay over to the claimant only that amount which the treasurer actually received together with interest at the rate of one-twelfth of one per cent per month from the time when it was received by the treasurer to the time when it was paid by him to the claimant; provided, however, that if the property claimed was interest bearing to the owner on the date of surrender by the holder then the treasurer shall instead add interest at a rate not to exceed five-twelfths of one per cent per month or such lesser rate as the property earned while in the possession of the holder. Such interest on interest bearing property shall begin to accumulate on the date property is delivered to the state treasurer and shall cease on the earlier of the expiration of fourteen years following delivery or the date on which payment is made to the owner. No interest on such interest bearing property shall be payable for any period prior to the effective date of this paragraph. Any holder who pays to the owner property which has been delivered to the commonwealth and which if claimed from the treasurer, would be subject to this section as interest-bearing property shall add interest as provided in this section. Such added interest shall be repaid to the holder by the treasurer in the same manner as the principal.

SECTION 11. Said section 10 of said chapter 200A is hereby further amended by adding the following paragraph:-

(e) All claims previously administered under the provisions of sections one hundred and forty-nine A to one hundred and forty-nine D, inclusive, of chapter one hundred and seventy-five shall be administered under the provisions of this section.

SECTION 12. Said chapter 200A is hereby further amended by striking out sections 11 to 14, inclusive, and inserting in place thereof the following six sections:-

Section 11. (a) At the request of another state, the attorney general may bring an action in the name of such other state in any court of competent jurisdiction in the commonwealth, or federal court within the commonwealth, to enforce the unclaimed property laws of such other state against a holder in the commonwealth of property subject to escheat or a claim of abandonment by such other state, if the other state has agreed to pay reasonable costs incurred by the attorney general in bringing the action.

(b) If the treasurer believes that a person in another state holds property subject to a claim of abandonment by the common-

wealth under this chapter, the treasurer may request that the attorney general of the other state, or any other person, bring an action in the name of the commonwealth to enforce the provisions of this chapter against such person.

(c) The commonwealth shall pay all reasonable costs incurred in any action brought under the authority of this section. The treasurer may agree to pay to any person bringing such an action a fee not to exceed ten per cent of the value, after deducting reasonable costs, of any property recovered for the commonwealth as a direct or indirect result of the action; provided, however, that any cost or fee paid pursuant to this section shall not be deducted from the amount that is subject to the claim by the owner in accordance with this chapter.

(d) The treasurer may enter into an agreement to provide information needed to enable another state to audit or otherwise determine unclaimed property it may be entitled to escheat or subject to a claim of custody as abandoned property. The treasurer may, by regulation, require the reporting of information needed to enable him to comply with agreements made pursuant to this section and may prescribe the form including verification of the information to be reported and the time for filing of the reports.

Section 12. (a) The treasurer may at any reasonable time and upon reasonable notice examine the records of any person to determine if said person has complied with the provisions of the chapter. In the event such person refuses to permit the treasurer to examine such records, the treasurer shall petition the superior court for an order to allow the treasurer or his agents to examine all appropriate business records of such person.

(b) If the treasurer believes that the holder of property has violated the provisions of section seven, he shall petition the superior court for an order to require the holder thereof to turn over said property to him.

(c) If the court shall determine that the holder of such property has violated the provisions of section seven, he shall be liable to a penalty of not more than five hundred dollars; provided, however, that no person shall be penalized for failure to report property as provided herein if the court shall find that such person has acted in good faith.

(d) In the event that the superior court shall order the holder of property to turn over said property to the treasurer pursuant to paragraph (b), the court may include in said order a per diem rate of one hundred and fifty dollars per examiner as the cost of conducting the examination provided for in paragraph (a).

(e) In addition to any damages, penalties, or fines for which a person may be liable under other provisions of law, any person who fails to report or deliver unclaimed property within the

time prescribed by this chapter, shall pay to the treasurer interest at the rate of twelve per cent per annum, or such adjusted rate as is hereinafter established under Title 26, section 6621 of the United States Code, on such property or value thereof from the date such property should have been paid or delivered.

Section 13. No agreement entered into within two years after the date a report is filed under paragraph (d) of section seven shall be valid if any person thereby undertakes to locate property included in that report for a fee or other compensation exceeding twenty per cent of the value of the recoverable property. Such an agreement shall be valid only if it is in writing, signed by the owner, discloses the nature and value of the property, and the owners share after the fee or compensation has been subtracted is clearly stipulated. The fee or compensation shall not exceed thirty-five per cent at any time. Nothing in this section shall be construed to prevent an owner from asserting, at any time, that any agreement to locate property is based upon excessive or unjust consideration.

Section 13A. The treasurer is hereby authorized to make necessary rules and regulations to carry out the provisions of this section.

Section 13B. The treasurer is hereby empowered to extend the date for filing of a report and turning over property for a period up to two months upon written request of a holder if he deems such extension is warranted. Where such extension is granted the requirement for notice and publication by the treasurer shall be extended by a like period not to exceed two months.

Section 14. Nothing in this chapter shall be construed to affect the provisions of section thirteen of chapter eighteen; section six of chapter one hundred and fifteen A; section seven, eight and nine of chapter one hundred and twenty-two; section twenty-seven of chapter one hundred and twenty-three; sections ninety-six A and ninety-six B of chapter one hundred and twenty-seven; section five A of chapter one hundred and twenty-eight A; chapter one hundred and thirty-four; chapter one hundred and thirty-five; and, sections six A, six B, six C and six D of chapter one hundred and forty-seven.

SECTION 13. Said chapter 200A is hereby further amended by inserting after section 15 the following three sections:-

Section 15A. The payment or delivery of any property except property other than cash, whether or not payable or deliverable under this chapter, to the treasurer by any holder shall terminate any legal relationship between the holder and the owner and shall release and discharge such holder from any and all liability to the owner, his heirs, personal representatives, successors and assigns and any state or governmental agency,

whether federal or foreign, by reason of such delivery or payment, regardless of whether such property, and such delivery and payment may be pleaded as a bar to recovery, and shall be a conclusive defense in any suit or action brought by such owner, his heirs, personal representatives, successors and assigns, or any state or governmental agency whether federal or foreign, or any other claimant against the holder by reason of such delivery or payment.

Section 15B. The holder of any interest under section five B shall deliver a duplicate certificate to the treasurer within the time specified in section eight A. Upon delivery to the treasurer, the holder and any transfer agent, registrar, or other person acting for or on behalf of the holder in executing or delivering such duplicate certificate shall be relieved from any liability to any person, including, but not limited to, any person acquiring the certificate presumed abandoned or the certificate issued to the treasurer, for any losses or damages resulting to such person by the issuance and delivery to the treasurer of such duplicate certificates. The issuance and delivery of a duplicate certificate pursuant to this section shall constitute the surrender of the said interest evidenced thereby within the meaning of paragraph (a) of section nine and paragraph (a) of section eleven.

Section 15C. In connection with property heretofore or hereinafter reportable or reportable under this chapter, no holder may impose any charges in respect of dormancy or inactivity on a savings or checking account or cease payment of interest unless:-

(1) such charges and such cessation of interest are provided for in a valid, enforceable and written contract between the holder and the customer which specifies the amount of such charges and that interest will cease;

(2) the customer is notified prior to the imposition of such charges and cessation of interest; and

(3) it is not the policy of the holder to waive such charges or to restore interest. No holder shall deduct from the amount of any draft, registered check, money order, certified check, cashier's check or treasurer's check or any similar written instrument any charges imposed by reason of the failure to present such items for encashment unless such charges are provided for in a valid enforceable and written contract and it is not the policy of the holder to waive such charges.

SECTION 14. If a court of competent jurisdiction, after all rights of appeal from a decision of such a court have been exhausted or have expired, should hold that property presumed abandoned under said chapter two hundred A and sections one hundred and forty-nine A to one hundred and forty-nine C, inclusive, of chapter one hundred and seventy-five of the Gen-

eral Laws would not have been presumed abandoned prior to the effective date of this act, then such property received by any person seven or more years prior to the effective date of this act shall not be presumed abandoned.

SECTION 15. The commissioner of insurance shall deliver to the treasurer all records filed prior to the effective date of this act under the provisions of section one hundred and forty-nine B of chapter one hundred and seventy-five of the General Laws.

SECTION 16. On the effective date of this act the provisions of section one hundred and forty-nine A of chapter one hundred and seventy-five of the General Laws shall apply to property reportable prior to the effective date of this act.

Approved May 5, 1980.

Chap. 131. AN ACT FURTHER REGULATING CONDITIONS OF EMPLOYMENT FOR CERTAIN WORKERS.

Be it enacted, etc., as follows:

SECTION 1. Chapter 149 of the General Laws is hereby amended by striking out section 17, as most recently amended by section 6 of chapter 760 of the acts of 1970, and inserting in place thereof the following section:-

Section 17. For the enforcement of the provisions of this chapter, the commissioner, the assistant commissioner and the associate commissioners, and the director, inspectors, and other representatives of the division of industrial safety may enter places of employment, other than places of employment of persons engaged in domestic service in the home of the employer, and examine the methods of protection from accident, the means of escape from fire, the sanitary provisions, the lighting and means of ventilation, and make investigations as to the employment of minors and as to compliance with all provisions of this chapter, and shall have access to all records pertaining to wages, hours, and other conditions of employment which are found essential to such investigations.

SECTION 2. Sections fifty-three and fifty-three A of said chapter one hundred and forty-nine are hereby repealed.

SECTION 3. Section 56 of said chapter 149 is hereby amended by striking out the first paragraph, as most recently amended by section 2 of chapter 374 of the acts of 1974, and inserting in place thereof the following paragraph:-

No minor shall be employed or permitted to work in, or in connection with, any factory or workshop, or any manufacturing, mercantile or mechanical establishment, telegraph office or telephone exchange, or any express or transportation company, or any private club, or any office, letter shop or financial

2003 Mass. Legis. Serv. Ch. 4 (S.B. 1949) (WEST)

SEE GOVERNOR'S VETO MESSAGE AT END OF DOCUMENT

MASSACHUSETTS 2003 LEGISLATIVE SERVICE
General Court, 2003 First Annual Session

Additions and deletions are not identified in this document.

CHAPTER 4
S.B. No. 1949
APPROPRIATIONS—FISCAL YEAR 2003—SUPPLEMENTAL

< [Vetoes are contained in the Governor's message following this chapter.] >

AN ACT making appropriations for fiscal year 2003 to provide for supplementing certain existing appropriations and for certain other activities and projects.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to make forthwith supplemental appropriations and related changes in certain general and special laws, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. To provide for certain unanticipated obligations of the commonwealth, to provide for alterations of purpose for current appropriations and to meet certain requirements of law, the sum set forth in this section is hereby appropriated from the general fund unless specifically designated otherwise in this section, for the several purposes and subject to the conditions specified in this section and subject to laws regulating the disbursement of public funds for the fiscal year ending June 30, 2003. Said sum shall be in addition to any amounts previously appropriated and made available for the purposes of said item.

OFFICE OF THE COMPTROLLER.

1599–4148	For a reserve for the payment of certain court judgments, settlements and legal fees, in accordance with regulations promulgated by the comptroller, which were ordered to be paid in fiscal year 2003 or a prior fiscal year; provided, that the comptroller shall report quarterly to the house and senate committees on ways and means on the amounts expended from this item; provided further, that not more than $3,662,500 shall be expended to the Tufts School of Veterinary Medicine for services rendered during fiscal years 2003 and before; provided further, that the comptroller may transfer funds from this item to the Liability Management and Reduction Fund established in section 2TT of chapter 29 of the General Laws; and provided further, that no funds appropriated in this item shall be expended on any settlements pursuant to chapter 55A of the General Laws.....	$8,462,500.

1599–4148 For a reserve for the payment of certain court judgments, settlements and legal fees, in accordance with regulations promulgated by the comptroller, which were ordered to be paid in fiscal year 2003 or a prior fiscal year; provided, that the comptroller shall report quarterly to the house and senate committees on ways and means on the amounts expended

due to such other entity, as well as all other things and causes of action belonging to such other entity, shall be vested in the domestic limited liability company and shall thereafter be the property of the domestic limited liability company as they were of such other entity. The title to any real property vested by deed or otherwise under the laws of the commonwealth in such other entity shall not revert or be in any way impaired by reason of this chapter, but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired and all debts, liabilities and duties of such other entity shall then attach to the domestic limited liability company and may be enforced against it to the same extent as if the debts, liabilities and duties had been incurred or contracted by it.

(g) Unless otherwise agreed or required under the laws of another jurisdiction applicable to the other business entity, such other entity shall not be required to wind up its affairs or pay its liabilities and distribute its assets and the conversion shall not be deemed to constitute a dissolution of such other entity.

(h) Prior to filing a certificate of conversion to a limited liability company with the state secretary, the conversion and the operating agreement of the limited liability company shall be approved by the other business entity in the manner provided in its governing documents or the laws applicable to it for authorization of a merger of the other business entity into a limited liability company or, in the absence of such provisions, in the manner of a sale of all or substantially all of its assets.

(i) This section shall not be construed to limit the ability of another business entity to change its governing law, its legal status or its domicile by any other means provided for in its governing documents, instruments or agreements or by applicable laws, including by amendment of the governing documents or operating agreement.

<< MA ST 200A § 1A >>

SECTION 46. Section 1A of chapter 200A of the General Laws, as so appearing, is hereby amended by striking out, in line 4, the words “A or six B” and inserting in place thereof the following words:— A, six B or six D.

SECTION 47. Said chapter 200A is hereby further amended by inserting after section 6C the following section:—

<< MA ST 200A § 6D >>

Section 6D. Notwithstanding any provision of this chapter to the contrary, unclaimed property payable or distributable in the course of a demutualization or related reorganization of an insurance company shall be presumed abandoned 3 years after the earlier of: (a) the date of last contact with the policyholder; (b) the date of last activity on the account of the policyholder, as defined in 960 CMR 4.02; or (c) the date the property becomes payable or distributable.

Before presuming property abandoned pursuant to this section, the treasurer shall determine that the insurance company holding the unclaimed proceeds from its demutualization or related reorganization has made all reasonable, good faith efforts to locate, contact and inform the policyholder or other apparent owner of the existence of the property.

<< MA ST 200A § 7 >>

SECTION 48. Section 7 of said chapter 200A, as appearing in the 2000 Official Edition, is hereby amended by inserting after the word “companies”, in line 29, the following words:— , and persons holding unclaimed proceeds from the demutualization or related reorganization of a life insurance company.

SECTION 49. Section 8A of said chapter 200A, as so appearing, is hereby amended by striking out subsection (a) and inserting in place thereof the following subsection:—

<< MA ST 200A § 8A >>

(a) A person who has filed a report as provided in section 7 shall, by November 1 or, in the case of life insurance companies and persons holding unclaimed proceeds from demutualization or related reorganization of a life insurance company, May 1, pay or deliver to the treasurer at the time of filing the report all property presumed abandoned specified in the report.

<< MA ST 200A § 12 >>

SECTION 50. Section 12 of said chapter 200A, as so appearing, is hereby amended by striking out, in lines 32 and 33, the words “or 6B” and inserting in place thereof the following words:— ,6B or 6D.

GOVERNOR'S VETO MESSAGE

I hereby disapprove the following items:

Sections 83A, 89, 91.

The remainder of this bill I hereby approve.

Approved March 5, 2003.

MA LEGIS 4 (2003)

End of Document

2004 Mass. Legis. Serv. Ch. 352 (H.B. 5076) (WEST)

SEE GOVERNOR'S VETO MESSAGE AT END OF DOCUMENT

MASSACHUSETTS 2004 LEGISLATIVE SERVICE
General Court, 2004 Second Annual Session

Additions and deletions are not identified in this document.

CHAPTER 352
H.B. No. 5076
APPROPRIATIONS—SUPPLEMENTAL—FISCAL YEAR 2004 BUDGET

< [Vetoes and reductions are contained in the Governor's message following this chapter.] >

AN ACT making appropriations for the fiscal year 2004 to provide for supplementing certain existing appropriations and for certain other activities and projects.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is immediately to make supplemental appropriations for the fiscal year beginning July 1, 2004, and to make certain changes in the law, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. To provide for supplementing certain items in the general appropriation act and other appropriation acts for fiscal year 2004, the sums set forth in section 2 are hereby appropriated from the Stabilization Fund unless specifically designated otherwise herein or in said appropriation acts, for the several purposes and subject to the conditions specified herein or in said appropriation acts, and subject to the provisions of law regulating the disbursement of public funds for the fiscal year ending June 30, 2004, provided that said sums shall be in addition to any amounts previously appropriated and made available for the purposes of said items; and provided further, that all funds appropriated in this section shall not revert and shall be available for expenditure until June 30, 2005.

< [Certain items in Section 2 are subject to a veto, in whole or in part, or reduced. See Governor's veto message following this chapter.] >

SECTION 2.

JUDICIARY.

Committee for Public Counsel Services.

0321–2000	$52,204

Trial Court.

0330–0300	$1,600,000
0331–3400	$10,000

this chapter as of June 30, 1997; (iii) had an application for long-term care services pending on July 1, 1997; or (iv) is eligible for federally reimbursed services or benefits; provided, however, that services or benefits other than emergency services shall not be provided to undocumented aliens unless required by federal law.

(3) Benefits for aliens under this section shall not be provided to persons age 19 through age 64 unless such aliens are disabled; but benefits shall not be terminated for persons described in clauses (i), (ii), (iii) and (iv) of subsection (2).

<< MA ST 128C § 2 >>

SECTION 41. Section 2 of chapter 128C of the General Laws, as amended by section 174 of chapter 149 of the acts of 2004, is hereby further amended by striking out, in line 156, the first time it appears the word “harness” and inserting in place thereof the word:— running.

< [Section 42 is subject to a veto. See Governor's veto message following this chapter.] >

SECTION 42. Subsection (1) of section 1 of chapter 152 of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by adding the following paragraph:—

For purposes of sections 31, 32 and 35C, the earnings of the employee shall be determined as of the date of his last full time employment, irrespective of whether that employee is subject to this chapter. Notwithstanding the prior voluntary retirement of the employee, such earnings shall be considered wages upon which the spouse is dependent at the time of the employee's death. This paragraph shall be deemed to be procedural in character.

NO SECTION 43.

< [Section 44 is subject to a veto. See Governor's veto message following this chapter.] >

SECTION 44. Section 5 of chapter 200A of the General Laws, as so appearing, is hereby amended by adding the following paragraph:—

Any intangible property held by the executive, legislative, or judicial branch of the United States Government, or a state, or a county or municipal subdivision of the state, or any of their authorities, agencies, instrumentalities, administrations, services, paying agents or other organizations, and remaining unclaimed for more than one year after it became payable or distributable is presumed abandoned.

SECTION 45. Said chapter 200A is hereby further amended by inserting after section 6D, inserted by section 47 of chapter 4 of the acts of 2003, the following section:—

<< MA ST 200A § 6E >>

Section 6E. (a) Mineral proceeds includes all obligations to pay resulting from the production and sale of minerals, including net revenue interests, royalties, overriding royalties, production payments, and joint operating agreements.

(b) All mineral proceeds that are held or owing by the holder and that have remained unclaimed by the owner for longer than three years after they become payable or distributable and the owners underlying right to receive those mineral proceeds are presumed abandoned.

At the time any owners underlying right to receive mineral proceeds is presumed abandoned under this section, any mineral proceeds then held for or owing to the owner as a result of the underlying right and any mineral proceeds accruing after that time as a result of the underlying right and not previously presumed abandoned are presumed abandoned.

<< MA ST 218 § 10 >>

SECTION 46. The second paragraph of section 10 of chapter 218 of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by striking out the line reading “district court of central Middlesex”.

<< MA ST 218 § 10 >>

SECTION 47. The third paragraph of said section 10 of said chapter 218, as so appearing, is hereby further amended by adding the line “district court of central Middlesex”.

Approved September 17, 2004.

MA LEGIS 352 (2004)

End of Document

Acts (2011)

Chapter 90

AN ACT RELATIVE TO UNCLAIMED PROPERTY IN THE COMMONWEALTH.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. Section 32 of chapter 29 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by striking out, in lines 6 and 7, the words “abandoned property fund” and inserting in place thereof the following words:- Unclaimed Property Fund.

SECTION 2. Section 7D of chapter 79 of the General Laws, as so appearing, is hereby amended by inserting after the word “to”, the second time it appears in line 27, the following words:- unclaimed and.

SECTION 3. Section 17 of chapter 158 of the General Laws, as so appearing, is hereby amended by inserting after the word “as”, in line 47, the following words:- unclaimed and.

SECTION 4. Section 75 of chapter 171 of the General Laws, as so appearing, is hereby amended by inserting after the word “as”, in line 122, the following words:- unclaimed and.

SECTION 5. Chapter 200A of the General Laws is hereby amended by striking out the title “ABANDONED PROPERTY”, as so appearing, and inserting in place thereof the following title:- DISPOSITION OF UNCLAIMED PROPERTY.

SECTION 6. Section 1 of said chapter 200A, as so appearing, is hereby amended by inserting after the word “presumed”, in line 3, the following words:- unclaimed and.

SECTION 7. Section 8 of said chapter 200A, as so appearing, is hereby amended by striking out, in line 8, the word “abandoned” and inserting in place thereof the following word:- unclaimed.

SECTION 8. Section 9 of said chapter 200A, as so appearing, is hereby amended by striking out, in lines 39, 40 and 41, the word “abandoned” and inserting in place thereof, in each instance, the following word:- unclaimed.

SECTION 9. Said section 9 of said chapter 200A, as so appearing, is hereby further amended by striking out, in lines 44 and 48, the word “Abandoned” and inserting in place thereof, in each instance, the following word:- Unclaimed.

SECTION 10. Section 10 of said chapter 200A, as so appearing, is hereby amended by striking out, in lines 86 and 91, the words “abandoned property trust fund” and inserting in place thereof, in each instance, the following words:- Unclaimed Property Fund.

SECTION 11. Section 12 of said chapter 200A, as so appearing, is hereby amended by striking out, in line 35, lines 42 and 43, lines 44, 49, 59, 63, 67, the word “abandoned” and inserting in place thereof, in each instance, the following word:- unclaimed.

SECTION 12. Section 15 of said chapter 200A, as so appearing, is hereby amended by striking out, in line 2, the word “Abandoned” and inserting in place thereof, in each instance, the following word:- Unclaimed.

Approved, August 3, 2011.

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 1A

§ 1A. Intangible personal property; presumption of abandonment

Effective: March 5, 2003
Currentness

Unless otherwise provided, intangible personal property is presumed abandoned under this chapter if the conditions for presumption of abandonment stated in section three, four, five, five A, five B, six A, six B or six D exist, and if any one of the following four conditions are met:--

(a) the last known address of the apparent owner is in the commonwealth as shown on the records of the person in possession of property;

(b) no address of the apparent owner appears on the records of the person in possession of the property and

(1) the last known address of the apparent owner is in the commonwealth, or

(2) the person in possession of property subject to this chapter is domiciled in the commonwealth and has not previously paid the property to the state of the last known address of the apparent owner, or

(3) the holder is a government or governmental subdivision or agency of the commonwealth and has not previously paid the property to the state of the last known address of the apparent owner;

(c) the last known address, as shown on the records of the person in possession of property, is in a state that does not provide by law for the escheat or custodial taking of such property and the person in possession of property is domiciled in the commonwealth or is a government or governmental subdivision or agency of the commonwealth; or

(d) the last known address, as shown on the records of the person in possession of property, of the apparent owner is in a foreign nation and the person in possession of property is domiciled in the commonwealth or is a subdivision or agency of the commonwealth.

Credits
Added by St.1980, c. 130, § 4. Amended by St.2003, c. 4, § 46, eff. Mar. 5, 2003.

M.G.L.A. 200A § 1A, MA ST 200A § 1A
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 6A

§ 6A. Property distributable upon dissolution or liquidation; presumption of abandonment

Currentness

All property distributable in the course of a voluntary or involuntary dissolution or liquidation of a person that remains unclaimed by the person entitled thereto, within one year after the date of final distribution or liquidation, shall be presumed abandoned. This section shall apply to all tangible personal property located in the commonwealth and subject to the provisions of section one A to all intangible personal property.

Credits

Added by St.1962, c. 248, § 2. Amended by St.1980, c. 130, § 8.

M.G.L.A. 200A § 6A, MA ST 200A § 6A
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 6B

§ 6B. Traveler's checks and other written instruments; presumption of abandonment

Currentness

(a) Subject to the provisions of section one A and subsection (b) of this section, any sum payable on a certified check, draft, cashier's check, treasurer's check, registered check, money order, traveler's check, or other similar written instrument, other than a third-party bank check, on which a person is directly liable shall be presumed abandoned under this section if it has been outstanding for more than three years from the date it was payable, or from the date of its issuance, if payable on demand, or in the case of traveler's checks has been outstanding for more than fifteen years from the date of its issuance, unless the owner has within three years, or within fifteen years in the case of traveler's checks, corresponded in writing with the person concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the person. A new person is directly liable if it is the actual holder of the fund representing the face amount of any such instrument at the time of presumed abandonment hereunder. Under no circumstance shall the holder of such abandoned instrument assess a fee for the processing of said instrument with the state treasurer in an amount which is in excess of one dollar per instrument.

(b) Any sum payable on a money order, traveler's check, certified check, draft, cashier's check, treasurer's check, or other similar written instrument, other than a third-party bank check, on which a person is directly liable is presumed abandoned if:--

(1) the books and records of such person show that such money order, certified check, registered check, draft, cashier's check, treasurer's check, traveler's check, or similar written instrument was purchased in the commonwealth;

(2) the person has its principal place of business in this commonwealth and its books and records do not show the state in which such money order, certified check, draft, cashier's check, treasurer's check, traveler's check, or similar written instrument was purchased; or

(3) the person has its principal place of business in the commonwealth and its books and records show the state in which such certified check, registered check, draft, cashier's check, treasurer's check, money order, traveler's check, or similar written instrument was purchased, and the laws of the state of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument.

(c) Notwithstanding the provisions of subsection (b) this section shall apply to sums payable on certified checks, drafts, cashier's checks, treasurer's checks, money orders, traveler's checks, registered checks and similar written instruments deemed abandoned on or after February first, nineteen hundred and sixty-five, except to the extent that such sums have been paid over to a state prior to January first, nineteen hundred and seventy-four. For the purposes of this subsection, the words “deemed abandoned” shall have the same meaning as those words have as used in an Act of Congress identified in Section 604 of Public Law 93-495 and approved on October twenty-eighth, nineteen hundred and seventy-four, (88th Statutes at Large 1500).

(d) Sums payable on certified checks, drafts, cashier's checks, treasurer's checks, money orders, traveler's checks, and similar written instruments deemed abandoned prior to February first, nineteen hundred and sixty-five, shall be reportable pursuant to subsection (a).

Credits

Added by St.1975, c. 889, § 1. Amended by St.1980, c. 130, § 8; St. 1981, c. 351, § 109; St.1992, c. 286, §§ 242 to 244; St.1994, c. 60, § 151.

M.G.L.A. 200A § 6B, MA ST 200A § 6B
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 6C

§ 6C. Traveler's checks and other written instruments; records; penalty

Currentness

(a) Any person that sells in the commonwealth certified checks, drafts, cashier's checks, treasurer's checks, registered checks, traveler's checks, money orders, or other similar written instruments on which such person is directly liable, or that provides such certified checks, drafts, cashier's checks, treasurer's checks, registered checks, traveler's checks, money orders, or similar written instruments to others, for sale in the commonwealth shall maintain a record indicating those traveler's checks, money orders, or similar written instruments that are purchased from it in the commonwealth.

(b) The records required by this section must be retained for a period of five years from the date the report is filed.

(c) Any person that willfully fails to comply with this section shall be liable to the commonwealth for a civil penalty of five hundred dollars for each day of failure to comply, which penalty may be recovered in an action brought by the treasurer.

Credits

Added by St.1980, c. 130, § 8. Amended by St.1981, c. 351, § 110; St.1992, c. 286, §§ 245 to 247.

M.G.L.A. 200A § 6C, MA ST 200A § 6C
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 6D

§ 6D. Property payable in course of demutualization; presumption of abandonment

Effective: March 5, 2003
Currentness

Notwithstanding any provision of this chapter to the contrary, unclaimed property payable or distributable in the course of a demutualization or related reorganization of an insurance company shall be presumed abandoned 3 years after the earlier of: (a) the date of last contact with the policyholder; (b) the date of last activity on the account of the policyholder, as defined in 960 CMR 4.02; or (c) the date the property becomes payable or distributable.

Before presuming property abandoned pursuant to this section, the treasurer shall determine that the insurance company holding the unclaimed proceeds from its demutualization or related reorganization has made all reasonable, good faith efforts to locate, contact and inform the policyholder or other apparent owner of the existence of the property.

Credits
Added by St.2003, c. 4, § 47, eff. Mar. 5, 2003.

M.G.L.A. 200A § 6D, MA ST 200A § 6D
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 6E

§ 6E. Mineral proceeds; abandonment

Effective: September 17, 2004
Currentness

(a) Mineral proceeds includes all obligations to pay resulting from the production and sale of minerals, including net revenue interests, royalties, overriding royalties, production payments, and joint operating agreements.

(b) All mineral proceeds that are held or owing by the holder and that have remained unclaimed by the owner for longer than three years after they become payable or distributable and the owners underlying right to receive those mineral proceeds are presumed abandoned.

At the time any owners underlying right to receive mineral proceeds is presumed abandoned under this section, any mineral proceeds then held for or owing to the owner as a result of the underlying right and any mineral proceeds accruing after that time as a result of the underlying right and not previously presumed abandoned are presumed abandoned.

Credits
Added by St.2004, c. 352, § 45, eff. Sept. 17, 2004.

M.G.L.A. 200A § 6E, MA ST 200A § 6E
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 7A

§ 7A. Notice to property owner at last known address

Currentness

If the person in possession of property in an amount of one hundred dollars or more presumed abandoned under this chapter has the last known address of the apparent owner which the person's records do not disclose to be inaccurate, the holder shall at least sixty days before filing the annual report send a notice by first class mail to inform the owner of the process necessary to rebut the presumption of abandonment.

Credits

Added by St.1980, c. 130, § 8. Amended by St.1984, c. 458, § 5; St.1992, c. 133, § 542.

M.G.L.A. 200A § 7A, MA ST 200A § 7A
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated Part II. Real and Personal Property and Domestic Relations (Ch. 183-210) Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206) Chapter 200A. Disposition of Unclaimed Property (Refs & Annos)

M.G.L.A. 200A § 12

§ 12. Treasurer; examination of books and records; reporting violations; penalty; costs; interest; limitation period for examinations; appeal of audit findings; written petition for review

Effective: November 1, 2011
Currentness

(a) The treasurer may at any reasonable time and upon reasonable notice examine the records of any person to determine if said person has complied with the provisions of the chapter. In the event such person refuses to permit the treasurer to examine such records, the treasurer shall petition the superior court for an order to allow the treasurer or his agents to examine all appropriate business records of such person.

(b) If the treasurer believes that the holder of property has violated the provisions of section seven, he shall petition the superior court for an order to require the holder thereof to turn over said property to him.

(c) If the court shall determine that the holder of such property has violated the provisions of section seven, he shall be liable to a penalty of not more than five hundred dollars; provided, however, that no person shall be penalized for failure to report property as provided herein if the court shall find that such person has acted in good faith.

(d) In the event that the superior court shall order the holder of property to turn over said property to the treasurer pursuant to paragraph (b), the court may include in said order a per diem rate of one hundred and fifty dollars per examiner as the cost of conducting the examination provided for in paragraph (a).

(e) In addition to any damages, penalties, or fines for which a person may be liable under other provisions of law, any person who fails to report or deliver unclaimed property within the time prescribed by this chapter, shall pay to the treasurer interest at the rate of twelve per cent per annum, or such adjusted rate as is hereinafter established under Title 26, section 6621 of the United States Code, on such property or value thereof from the date such property should have been paid or delivered.

(f) Any examination undertaken by the treasurer, pursuant to this section, shall be conducted within a period of limitation; provided, however, that said period of limitation shall be defined as an abandonment period of three years pursuant to section 2, 3, 4, 5, 5A, 5B, 5C, 6, 6A, 6B or 6D, plus a six year statute of limitation period immediately following said abandonment period; provided, further, that unless otherwise provided, holders of unclaimed property shall maintain records of the property for the period of limitation; and provided, further, that in the event a holder fails to comply with the provisions of subsection (d) of section 7, any examination undertaken by the treasurer shall not be temporally limited.

(g) If the treasurer finds that the holder of property has violated the provisions of section 7 pursuant to an audit finding, the holder may appeal said finding. The appeal shall be in writing on a form prescribed by the treasurer and received by the assistant state treasurer of the unclaimed property division within 30 days of said finding. The assistant state treasurer of the unclaimed property division may hold a hearing on such appeal at a time and place to be fixed by him, but not later than 30 days from the date the appeal was due, unless such time shall be extended by mutual agreement of both parties. The holder may appear in person or by agent or attorney at such hearing. To the extent the assistant state treasurer of the unclaimed property division may consider practicable, the hearing shall be conducted as informally as possible and shall eliminate formal rules of evidence, practice and pleading. The assistant treasurer or his designee shall hear all pertinent evidence and determine the facts, and shall issue an appropriate decision or order reversing, affirming or modifying in whole or in part said finding. The decision or order shall be made in writing within 45 days after the hearing and a copy of the decision or order shall be sent by registered mail to the holder or his designee, and to all interested parties. Nothing herein shall be construed as preventing the assistant state treasurer of the unclaimed property division from granting temporary relief if, in his discretion, such relief is justified, nor from informally adjusting or settling controversies with the consent of all parties.

(h) A holder aggrieved by the decision of the assistant treasurer of the unclaimed property division may, within 30 days of the receipt of such decision, file a written petition for review, on a form prescribed by the treasurer, with the treasurer or his appointee. Said petition shall include a summary of the facts presented to the assistant state treasurer of the unclaimed property division, a copy of the assistant treasurer's decision, the issue in dispute, and any other relevant information. Within 45 days of receipt of the petition, the state treasurer or his appointee, shall either affirm or amend the decision of the assistant state treasurer. The treasurer's decision shall be in writing and sent by first class mail to the holder and any interested parties stating the decision and outlining the reasons therefor.

(i) A holder aggrieved by the decision of the treasurer or his appointee may, after exhausting the processes described in paragraphs (g) and (h), file a claim in superior court pursuant to the requirements set forth in chapter 212.

Credits

Added by St.1950, c. 801. Amended by St.1969, c. 377, §§ 14, 15; St.1980, c. 130, § 12; St.2000, c. 198, § 3; St.2003, c. 4, § 50, eff. Mar. 5, 2003; St.2011, c. 90, § 11, eff. Nov. 1, 2011.

Notes of Decisions (1)

M.G.L.A. 200A § 12, MA ST 200A § 12
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Maine Revised Statutes Annotated Title 33. Property Chapter 41. Uniform Unclaimed Property Act (Refs & Annos)

33 M.R.S.A. § 1959

§ 1959. Payment or delivery of property presumed abandoned

Effective: September 19, 2019
Currentness

1. Payment or delivery. Except for property held in a safe deposit box or other safekeeping depository, upon filing the report required by section 1958, the holder of property presumed abandoned shall pay, deliver or cause to be paid or delivered to the administrator the property described in the report as unclaimed, but if the property is an automatically renewable deposit and a penalty or forfeiture in the payment of interest would result, the time for compliance is extended until a penalty or forfeiture would no longer result. Tangible property held in a safe deposit box or other safekeeping depository may not be delivered to the administrator until 120 days after filing the report required by section 1958.

2. Security or security entitlement. If the property reported to the administrator is a security or security entitlement under Title 11, Article 8, the administrator is an appropriate person to make an indorsement, instruction or entitlement order on behalf of the apparent owner to invoke the duty of the issuer or its transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement in accordance with Title 11, Article 8.

3. Certificated security. If the holder of property reported to the administrator is the issuer of a certificated security, the administrator has the right to obtain a replacement certificate pursuant to Title 11, section 8-405, but an indemnity bond is not required.

4. Liability and indemnification. An issuer, the holder and any transfer agent or other person acting pursuant to the instructions of and on behalf of the issuer or holder in accordance with this section is not liable to the apparent owner and must be indemnified against claims of any person in accordance with section 1961.

5. Payment of certain funds presumed abandoned in lawyer's trust accounts. Notwithstanding any other provision in this chapter to the contrary, a lawyer, law firm or financial institution holding funds presumed abandoned in a lawyer's trust account for which no identifying client information can be found shall file a report with the administrator pursuant to section 1958, subsection 1 and then transfer such funds, along with a copy of the report, to the lawyer's trust account program manager to provide funding to organizations whose primary purpose is to provide civil legal aid to low-income residents of the State.

Credits
1997, c. 508, § A-2, eff. July 1, 1998; 2003, c. 20, § T-25, eff. July 1, 2003; 2019, c. 496, § 5, eff. Sept. 19, 2019.

Editors' Notes

UNIFORM COMMERCIAL CODE COMMENT

1997

Subsections (b) and (c) [Me. cite subsections 2 and 3] particularize the general duty stated in subsection (a) [Me. cite subsection 1] with respect to investment securities, including securities positions held directly and securities positions held through accounts with brokers or other intermediaries (referred to as security entitlements" under revised Article 8 of the Uniform Commercial Code). UCC Article 8 provides that the issuer of a security, or intermediary with respect to a security entitlement, has a duty to act at the direction of the "appropriate person." Subsection (b) [Me. cite subsection 2] provides that with respect to securities and security entitlements that have been reported as abandoned property pursuant to Section 7 [Me. cite section 1958], the administrator is an "appropriate person." Accordingly, the administrator has the same rights under UCC Article 8 as other persons who succeed by operation of law to securities or security entitlements, such as the executor or administrator of a decedent. Subsection (c) [Me. cite subsection 3] deals with situations where the holder reporting abandoned property is itself the issuer of a certificated security, and hence does not have the original certificate to turn over to the administrator. Accordingly, subsection (b) [Me. cite subsection 2] provides that the administrator can invoke the provisions of UCC Article 8 governing replacement certificates, without an indemnity bond.

Subsection (d) [Me. cite subsection 4] indemnifies a person causing a replacement certificate to be issued to the administrator from any claims that the person acted wrongfully in so doing. This indemnification is desirable in that it eliminates any duty of the transferring authority to make an independent investigation into whether the listed owner of the security is in fact missing, or into other factors which might affect the administrator's right to obtain custody of the property.

33 M. R. S. A. § 1959, ME ST T. 33 § 1959
Current with legislation through the 2019 First Regular Session and Chapter 531 of the First Special Session of the 129th Legislature. The First Regular Session convened December 5, 2018 and adjourned sine die June 20, 2019. The general effective date is September 19, 2019. The First Special Session convened September 19, 2019. The 2019 Referendum Election was held November 5, 2019.

End of Document

West's Oregon Revised Statutes Annotated Title 10. Property Rights and Transactions Chapter 98. Lost, Unclaimed or Abandoned Property; Vehicle Towing Uniform Disposition of Unclaimed Property Act (Refs & Annos)

O.R.S. § 98.304

98.304. State as custodian of intangible property; presumption of abandonment

Currentness

Unless otherwise provided in ORS 98.302 to 98.436 and 98.992 or by other statute of this state, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under ORS 98.342 are satisfied, and one or more of the following is true:

(1) The last-known address, as shown on the records of the holder, of the apparent owner is in this state.

(2) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last-known address of the person entitled to the property is in this state.

(3) The records of the holder do not reflect the address of the apparent owner, and one or more of the following is established:

(a) The last-known address of the person entitled to the property is in this state.

(b) The holder is a domiciliary or a government or political subdivision or agency of this state and has not previously paid or delivered the property to the state of the last-known address of the apparent owner or other person entitled to the property.

(c) The last-known address, as shown on the records of the holder, or the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary or a government or political subdivision or agency of this state.

(4) The last-known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or political subdivision or agency of this state.

(5) The transaction out of which the property arose occurred in this state, and:

(a) There is no known address of the apparent owner or other person entitled to the property;

(b) The last-known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheats or custodial taking of the property or its escheats or unclaimed property law is not applicable to the property; or

(c) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

Credits

Laws 1983, c. 716, § 28; Laws 1993, c. 694, § 1.

O. R. S. § 98.304, OR ST § 98.304

Current through laws enacted in the 2018 Regular Session and 2018 Special Session of the 79th Legislative Assembly; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, 91-day legislation, and general effective legislation effective Jan. 1, 2020, enacted during the 2019 Regular Session of the of the 80th Legislative Assembly, which adjourned sine die June 30, 2019, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Non-legislative changes made by the Legislative Counsel Committee, consisting of codifications, renumbers, and other non-legislative revisions, have been incorporated.

End of Document

West's Oregon Revised Statutes Annotated Title 10. Property Rights and Transactions Chapter 98. Lost, Unclaimed or Abandoned Property; Vehicle Towing Uniform Disposition of Unclaimed Property Act (Refs & Annos)

O.R.S. § 98.332

98.332. Fiduciaries holding property

Currentness

(1) All intangible personal property and any income or increment thereon, held in a fiduciary capacity is presumed abandoned unless the owner has, within two years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary.

(2) Funds in an individual retirement account or a retirement plan or a similar account or plan established under the Internal Revenue laws of the United States are not payable or distributable within the meaning of subsection (1) of this section unless, under the terms of the account or plan, distribution of all or part of the funds would then be mandatory.

Credits

Laws 1957, c. 670, § 9; Laws 1983, c. 716, § 5; Laws 2003, c. 580, § 1.

O. R. S. § 98.332, OR ST § 98.332

Current through laws enacted in the 2018 Regular Session and 2018 Special Session of the 79th Legislative Assembly; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, 91-day legislation, and general effective legislation effective Jan. 1, 2020, enacted during the 2019 Regular Session of the of the 80th Legislative Assembly, which adjourned sine die June 30, 2019, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Non-legislative changes made by the Legislative Counsel Committee, consisting of codifications, renumbers, and other non-legislative revisions, have been incorporated.

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West's Oregon Revised Statutes Annotated Title 10. Property Rights and Transactions Chapter 98. Lost, Unclaimed or Abandoned Property; Vehicle Towing Uniform Disposition of Unclaimed Property Act (Refs & Annos)

O.R.S. § 98.352

98.352. Abandoned property reports

Effective: [See Text Amendments] to June 30, 2021
Currentness

<Text of section operative until July 1, 2021. See, also, section operative July 1, 2021.>

(1) Every person holding funds or other property, tangible or intangible, presumed abandoned under ORS 98.302 to 98.436 and 98.992 shall report and pay or deliver to the Department of State Lands all property presumed abandoned as provided in this section, except that:

(a) Funds transferred to the General Fund under ORS 293.455 (1)(a) shall only be reported to the department.

(b) Funds in the possession of the Child Support Program described in ORS 180.345 shall only be reported to the department.

(c) Funds in lawyer trust accounts shall only be reported to the department.

(2) The report shall be verified as to the accuracy of the information contained and shall include:

(a) Except with respect to traveler's checks and money orders, the name, if known, and address, if known, of each person appearing from the records of the holder to be the owner of any property of value of $50 or more presumed abandoned under ORS 98.302 to 98.436 and 98.992;

(b) In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and last-known address according to the life insurance corporation's records;

(c) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $50 each may be reported in aggregate;

(d) The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(e) Other information that the department prescribes by rule as necessary for the administration of ORS 98.302 to 98.436 and 98.992.

(3) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has had a name change while holding the property, the holder shall file with the report all prior known names and addresses and effective dates of changes if known of each holder of the property.

(4) The report shall be filed after October 1, but no later than November 1 of each year for accounts dormant as of June 30. The department may postpone the reporting date upon written request by any person required to file a report. All records are exempt from public review for 12 months from the time the property is reportable and for 24 months after the property has been remitted to the department. All lists of records or property held by a government or public authority under ORS 98.336 shall be exempt from public review until 24 months after the property is remitted to the department.

(5) If the holder of property presumed abandoned under ORS 98.302 to 98.436 and 98.992 knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(6) If the property presumed abandoned is a lawyer trust account established by an attorney or law firm, the report required by this section must indicate that the account is a lawyer trust account in addition to providing the information required by subsection (2) of this section.

(7) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

Credits

Laws 1957, c. 670, § 13; Laws 1967, c. 357, § 2; Laws 1981, c. 475, § 4; Laws 1983, c. 716, § 9; Laws 1993, c. 694, § 6; Laws 1997, c. 86, § 1; Laws 1999, c. 798, § 2; Laws 2003, c. 73, § 48, eff. July 1, 2003; Laws 2009, c. 462, § 1, eff. Jan. 1, 2010.

O. R. S. § 98.352, OR ST § 98.352

Current through laws enacted in the 2018 Regular Session and 2018 Special Session of the 79th Legislative Assembly; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, 91-day legislation, and general effective legislation effective Jan. 1, 2020, enacted during the 2019 Regular Session of the of the 80th Legislative Assembly, which adjourned sine die June 30, 2019, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Non-legislative changes made by the Legislative Counsel Committee, consisting of codifications, renumbers, and other non-legislative revisions, have been incorporated.

End of Document

West's Oregon Revised Statutes Annotated Title 10. Property Rights and Transactions Chapter 98. Lost, Unclaimed or Abandoned Property; Vehicle Towing Uniform Disposition of Unclaimed Property Act (Refs & Annos)

O.R.S. § 98.386

98.386. Fund deposits

Effective: [See Text Amendments] to June 30, 2021
Currentness

<Text of section operative until July 1, 2021. See, also, section operative July 1, 2021.>

(1) Except as provided in subsection (2) of this section, all funds received under ORS 98.302 to 98.436 and 98.992, including the proceeds from the sale of unclaimed property under ORS 98.382, shall be deposited by the Department of State Lands in the Common School Fund Account with the State Treasurer. Before making the deposit the department shall record the name and last-known address of each person appearing from the holders' reports to be entitled to the unclaimed property and the name and last-known address of each insured person or annuitant, and with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation, and the amount due.

(2) Any amounts identified as lawyer trust account funds in the report required by ORS 98.352 shall be paid or delivered by the person holding the amounts to the Oregon State Bar along with a copy of the report. All amounts paid or delivered to the Oregon State Bar under this section are continuously appropriated to the Oregon State Bar, and may be used only for the funding of legal services provided through the Legal Services Program established under ORS 9.572, the payment of claims allowed under ORS 98.392 (2) and the payment of expenses incurred by the Oregon State Bar in the administration of the Legal Services Program.

(3) Before making a deposit to the credit of the Common School Fund Account, the department may deduct:

(a) Any costs in connection with sale of unclaimed property;

(b) Any costs of mailing and publication in connection with efforts to locate owners of unclaimed property as prescribed by rule; and

(c) Reasonable service charges.

Credits
Laws 1957, c. 670, § 20; Laws 1983, c. 716, § 16; Laws 1989, c. 183, § 2; Laws 1993, c. 694, § 15; Laws 2009, c. 462, § 2, eff. Jan. 1, 2010.

O. R. S. § 98.386, OR ST § 98.386

Current through laws enacted in the 2018 Regular Session and 2018 Special Session of the 79th Legislative Assembly; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, 91-day legislation, and general effective legislation effective Jan. 1, 2020, enacted during the 2019 Regular Session of the of the 80th Legislative Assembly, which adjourned sine die June 30, 2019, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Non-legislative changes made by the Legislative Counsel Committee, consisting of codifications, renumbers, and other non-legislative revisions, have been incorporated.

End of Document

REVISED UNIFORM UNCLAIMED PROPERTY ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIFTH YEAR
STOWE, VERMONT
JULY 8 - JULY 14, 2016

WITH PREFATORY NOTE AND COMMENTS

December 5, 2016

REVISED UNIFORM UNCLAIMED PROPERTY ACT

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REVISED UNIFORM UNCLAIMED PROPERTY ACT

PREFATORY NOTE

This revised Act is a complete revision of its immediate predecessor, the Uniform Unclaimed Property Act (1995) (the 1995 Act), which itself was a rewrite of its predecessor, the Uniform Unclaimed Property Act (1981) (the 1981 Act), which was a revision of the Uniform Disposition of Unclaimed Property Act (1966) (the 1966 Act), and of the Uniform Law Commission's first effort in this field which was the Uniform Disposition of Unclaimed Property Act (1954) (the 1954 Act).

All 53 jurisdictions that make up the Uniform Law Commission have some form of unclaimed property law on their books, some which predate the 1954 Act. The various Uniform Acts have received substantial but not complete acceptance. In one form or another (with modifications) either the 1981 Act or the 1995 Act has been adopted in 39 of the 53 jurisdictions. Of these, the most accepted version is the 1981 Act which has been adopted (with revisions) in 23[1] jurisdictions. Nine[2] states have adopted the 1995 Act without revisions and six[3] more have a hybrid version. There are fourteen jurisdictions−most notably California, New York, Texas, and Delaware, that have non-uniform unclaimed property acts.

The concept of "unclaimed property" is a modern outgrowth of the English law of escheat, and while the two concepts have substantial differences they are somewhat improperly used interchangeably.[4] Although rooted in the doctrine of escheat, since inception all of the Uniform Unclaimed Property Acts have been "custodial" acts which deal with the right of states to take custody of abandoned property to hold indefinitely for the benefit of the owner, which is different from a state taking title to and ownership of abandoned property under its escheat law.

Since the Norman Conquest all real property in England has belonged to the Crown who could give the use of it to a tenant, but if the tenant was convicted of a felony or died without an heir who could take the tenancy, it escheated to the sovereign to keep or give to another as he or she saw fit. The official in charge of collecting escheated property was called the Escheator, a term still in use today. Over time the concept has been extended to tangible and intangible personal property, and in modern times the concept of custodial taking of unclaimed property by the sovereign to hold for the benefit of owners has developed.

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[1] AK, CO, DC, FL, GA, ID, IL, IA, MD, MN, NH, NJ, ND, OK, OR, RI, SC, SD, TN, UT, VA, WA, WI, and WY.
[2] AL, AZ, AR, IN, KS, LA, MT, MI, NM, and VI.
[3] HI, MI, NV, VI, VT, and WV.
[4] *See e.g.*, Section 23(c) of the 1995 Act which allows a state to maintain an action to enforce the unclaimed property laws of another state against the holder of property "subject to escheat" or a claim of abandonment by the other state, and Section 14 which refers to the laws of another state that do "not provide for the escheat or custodial taking of property."

Although the distinction has become blurred, and the terms "escheated" and "unclaimed" have sometimes come to be used interchangeably, the two terms are not the same.[5] In an escheat the state succeeds to legal ownership of the property. When property has "escheated," the state has become the legal owner of the property with no obligation to return it to the previous owner or to anyone claiming to have derived title from or through the previous owner. But in the case of unclaimed property, after it is out of the hands of the holder and in the hands of the state, legal title to the unclaimed property remains in the owner, or in those deriving title from or through the previous owner. The state merely holds possession of the property, indefinitely, as custodian for the benefit of the owner or the previous owner's successors-in-interest or legal heirs.

The significance of the distinction between property that has escheated to the state, and unclaimed property held in custody by the state, is illustrated in the case of *Treasurer of New Jersey vs. United States Treasury*, 684 F.3d 382 (3d Cir. 2012), where the Court held that United States Savings Bonds are not subject to a state's unclaimed property laws. By federal statute the United States holds unclaimed United States Savings Bonds as custodian for the owners; thus federal custodial holding preempts state custodial taking of United States Savings Bonds as unclaimed property. However, the Court, citing United States Treasury Regulations, observed that the United States Treasury recognizes escheat statutes when a state has become the legal owner of bonds by escheat, and payment of the bonds to the state as the owner results in a full discharge of the Treasury's obligation with respect to the bonds. But payment of bonds to a state as a custodian for the owner would only substitute one obligor, the Department of the Treasury, for another, the state.

Under the common law of escheat as codified into state law, if an owner of property dies intestate without "legal heirs" entitled to inherit the property, the property escheats to the state and the state takes title to the property as its owner. [6] Whether there are any "legal heirs" of the decedent is determined under the laws of each state. Some state statutes refer to heirs as next-of-kin, or closest relatives by blood or marriage, which theoretically could mean every decedent has one or more heirs, no matter how many generations one has to go back to find them. However, the laws of intestacy of many states, Tennessee for example, define "heirs" entitled to take the property of an intestate decedent as the grandparents or a grandparent of the decedent or the descendants of the grandparents or a grandparent of the decedent. (Tenn. Code Ann. Section 31-

[5] Confusion exists over when an unclaimed property statute is an escheat statute and when it is a custodial statute. The Courts have done little to clarify the issue and in fact have added to the confusion. For example, the majority opinion in *Delaware v. New York*, 507 U.S. 490 (1992) starts out reciting that it is another dispute among states over unclaimed securities held for owners who cannot be located and holds that the state in which the intermediary is incorporated has the right to "escheat" funds belonging to individual owners who cannot be located. However, further on in the opinion the Court says that "States as sovereigns may take custody of or *assume title* to abandoned personal property as *bona vacantia* [vacant goods]" a process commonly (though somewhat erroneously) called escheat. In the majority opinion of the Court in *Pennsylvania v. New York*, 407 U.S. 206 (1972), the first paragraph says this case is an action brought to determine the authority of states to *escheat, or take custody* of, unclaimed funds for the purchase of money orders. And in an effort to clear up the confusion, the opinion of the 3d Circuit Court of Appeals in *Treasurer of New Jersey v. United States Dept. of the Treasury*, 689 F.3d. 382 (3d Cir. 2012) creates further confusion when it refers to the unclaimed property act at issue as a "custody escheat" statute rather than a "title escheat" statute.

[6] "Escheat - Reversion of property (esp. real estate) to the state upon the death of an owner who has neither a will nor any legal heirs." *Black's Law Dictionary*, 10th ed. (2012) at p. 661.

2-104). If there are no known living heirs of the intestate decedent within the requisite degree of kinship, the decedent's property escheats to the state, even if there are known kin of a more remote degree.[7]

The rules by which a state may escheat abandoned property are outside the scope of this revised Act. However, in analyzing the source of unclaimed property, it becomes apparent that when turned over to the administrator, the funds fall into one of two "buckets" or categories--property with respect to which there is an identifiable or determinable owner and property which is not identified in the holder's records as being the property of an owner whose identity is known or ascertainable. Unclaimed property which falls in the first category is held for the owner, who may or may not be the original owner, but is the person now legally entitled to recover the property as its owner. On the other hand, unclaimed property for which there is no known or ascertainable owner, in effect becomes the same as escheated property where the state has become the owner by operation of law when the owner has died intestate with no heirs to inherit the property--the legal right to hold and use the property falls to the state by default. While this revised Act cannot be expected to clear up the confusion, it is well to keep in mind the distinction between a state taking title to property as the owner of the property through escheat, and the custodial taking of unclaimed property by the state to hold for the benefit of its owner. To that end this revised Act avoids the use of the term "escheat" to refer to the process by which a state takes custody of, but not title to, unclaimed property for the benefit of its owner. However, it implicitly recognizes that the revised Act serves a dual purpose. Its primary function is to provide protection for owners and reunite them with their lost or abandoned property. But a secondary function is to take, hold, and use for the common good, property which has been lost or abandoned and for which there is no way to identify the owner nor ability to restore the property to its owner. In those situations the policy is that it is better that the state and its citizens enjoy the benefit of the windfall rather than the holder.

The process by which "unclaimed" property[8] comes into the custody of a state administrator of unclaimed property is as follows: (1) businesses which have possession or control of property that does not belong to them, hold it for the benefit of the owners of the property, thus they are called "holders." If the status of the property is in question as to whether or not it is "unclaimed" property being held for owners, they are referred to as "putative holders" until there has been a determination of the status of the property, i.e., they are persons who are said to be but have not yet been determined to be holders as a result of an examination.

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[7] An example is a recent case in Florida where an elderly widow died intestate without issue. She had been born in Sweden and when her estate was administered in Florida, no one knew or thought to look for her relatives in Sweden and the state administrator took the net proceeds from sale of her house as unclaimed property. An unclaimed property locator later found her heirs in Sweden and asserted a claim on their behalf. The Florida Administrator denied the locator's claim made on behalf of the Swedish heirs despite the fact that the Florida probate court had modified the final probate order to establish them as her heirs. The matter was still being litigated when last reported.

[8] Some confusion arises out of the undifferentiated use of the terms "unclaimed" and "abandoned" property. When property is in the hands of a holder who is not its owner, and the owner is either not known or is not presently asserting his rights of ownership, the property is said to be "unclaimed." Under the revised Act, after the passage of a set amount of time that can vary from one to 15 years, the property is deemed to have been abandoned and becomes subject to being turned over to the custody of the state administrator of unclaimed property. All abandoned property is also unclaimed, but not all unclaimed property is abandoned.

"Owners" are the people who own property which is in the possession of another. During a specified holding period (the "Holding Period"), which under the various acts varies from one to 15 years for different categories of property, the holder is required to attempt to notify the owner to claim his or her property. After unsuccessful attempts at notification, at the end of the holding period, the unclaimed property is deemed to have been abandoned and the holder is required to file a report with the unclaimed property administrator in the appropriate state and remit or deliver the property into the custody of the administrator.

The rules for determining which state has the prior right to take custody of unclaimed property were set out by the *U. S. Supreme Court in Texas v. New Jersey*, 379 U.S. 674 (1965)[9], and were incorporated into the 1981 Act. The first priority state is the state of the last known address of the owner if it can be determined from the records of the holder. How much information is required to establish the state of the owner's last known address is in dispute, with some states asserting that only an address sufficient for mailing notice to the owner is sufficient to establish that there is a state with first priority. Absent being able to determine the state of the owner's last known address, the second priority state is the state of incorporation of an incorporated holder. For holders that are not corporations or limited liability companies, such as sole proprietorships and partnerships, and the second priority state is the state in which the unincorporated holder's principal place of business is located. Some states have gone further and created a "third priority" by asserting that if neither the first nor the second priority state provides for taking custody of the property, the state in which the transaction which gave rise to the property took place is entitled to take custody of the property.

The records of a holder who does not timely file and deliver unclaimed property may be examined to determine if the holder has a liability for unremitted unclaimed property. If a liability is determined to exist, the holder can be required to turn the unremitted property over to the administrator together with applicable penalties and interest. A holder who has filed and remitted as required may nevertheless be examined to verify or confirm the accuracy and completeness of its filings. However, holders who have timely filed as required are not usually selected for examination.

As the body of unclaimed property law has matured since 1954, six significant groups, each with various economic or policy interests, have evolved, each with its own, sometimes conflicting, concerns. In the process of preparing this revised Act significant effort was made to include and involve in the drafting process parties with a significant stake in the outcome of the policy decisions required for the revision. There are many, and they have become very involved.[10]

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[9] This holding was reexamined and affirmed by the Court in *Delaware v. New York*, 509 U.S. 470 (1993).

[10] The organizations that have participated in the drafting meetings through representatives and by written submissions to the Uniform Law Commission are: the National Association of Unclaimed Property Administrators (NAUPA); the American Council of Life Insurers (ACLI); the Council on State Taxation (COST); the Investment Company Institute (ICI); the Securities Transfer Association (STA); the Securities Industry and Financial Markets Association (SIFMA); Shareholder Services Association (SSA); the American Bar Association (ABA); the Unclaimed Property Professionals Association (UPPO); and the U. S. Chamber Institute for Legal Reform (US Chamber). Uniform Law Commission meetings have been attended by upwards of 100 observers and more than 2,000 pages of written materials have been submitted by interested parties.

State administrators, members of the first group, obviously have a significant interest. In 1954 when the Uniform Law Commission undertook to create the first Uniform Disposition of Unclaimed Property Act, unclaimed property taken into custody was not initially expected to be a significant source of state revenue, but rather was intended to create uniformity in the means by which states provided protection of the unclaimed property of consumers and residents. Nevertheless, when the state becomes the custodian of unclaimed property, regardless of how diligently and effectively the administrator acts to return the property to the owner, it will always be the case that a significant portion, if not the majority of the funds held in the custodial account, will never be returned to an owner for three reasons. One is that a significant portion of the funds are turned over with no identification of the owner, thus there is no possibility of its return to the owner. These funds have essentially escheated to the state for its use. Second, states vary in the effectiveness of an administrator's efforts to locate the owner, even though the identity of the owner is known. And third, there may be administrative obstacles which arise and which impede the ability of owners to recover their property.

It has been estimated that in 2011 states collectively held more than $40 billion in unclaimed property, a figure nearly double the figure of $22.8 billion reported by NAUPA[11] in 2003. This property seldom lies fallow in the hands of the administrators. Some states use that portion of the funds that are estimated and will likely never be returned to the owners for purposes ranging from supplementing educational funds to helping fund Medicaid obligations. It can involve a lot of money. Delaware, by far the largest custodian of unclaimed property, brought in over $600 million in 2014.[12] A large portion of unclaimed property turned over to Delaware is second priority funds for which there is no ability to identify the owner because there is no name or no viable address, and thus it will never be returned to an owner and is effectively escheated to the state.

Administrators have been represented in the drafting process by representatives of NAUPA. Administrators are sincere when they say the principal focus of their office is to reconnect unclaimed property with owners. In the current economic climate, some states are looking for more money, and some legislators and governors are squeezed between the demands of constituents for services and the resistance of voters to tax increases. For some states unclaimed property has become money available to make up revenue shortfalls.[13] States may oppose enactment of this revised Act if it is seen as having a significant potential of decreasing the amount of money that will come into state coffers as unclaimed property that will never be returned to owners. If that is the case, it can be anticipated that significant negative fiscal notes will be attached to introductions of the revised Act.

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[11] National Association of Unclaimed Property Administrators. https://www.unclaimed.org.

[12] Reportedly it is Delaware's third largest source of state revenue. *See* Del. S. Com. Res. 59, 147th Gen. Assem. (2014).

[13] The states' use of the funds is outside of the control of the administrators. An article in the Charleston (WV) Gazette (2/19/15) reported on that state's unclaimed property administrator's complaint that the Governor had taken $15 million out of the state's unclaimed property fund to help balance the state's 2015-16 budget, saying it would cripple the division's ability to pay the rightful owners of lost assets. "This is the people's money. This is not taxpayer's money" the administrator told the Senate Finance Committee.

While unclaimed property funds are not tax revenues, some state courts have agreed with states that they have the right to enforce unclaimed property claims as a means of augmenting state revenues.[14] However, it is well to keep in mind the fundamental constitutional relationship between states and their citizens. A state, acting through the people's elected representatives, may impose taxes for the purpose of raising revenues, and may exact fees for certain services. Otherwise a state is without legal authority to seize and take title to property belonging to a citizen other than by condemnation or seizure for public use for which it must pay fair compensation, forfeiture for wrongdoing, or by escheat. That funds from unclaimed property held in custody for owners may be available for public use should be a byproduct and not the object or purpose of a state's unclaimed property laws. Administrators recognize that they are under a duty to seek to locate owners and that unnecessary requirements that frustrate or delay the return of unclaimed property to owners has no place in the context of a custodial unclaimed property act.[15]

The second group with a significant stake in the outcome of this revision is a business that has grown up alongside the growth of receipts from unclaimed property laws. This group is composed of private firms organized to examine the records of holders looking for unreported unclaimed property. Decisions made by the Uniform Law Commission with respect to this revised Act can impact these firms by affecting the significant fees paid to them by administrators for services in connection with examinations of records of holders looking for unremitted unclaimed and abandoned property on their books. These examinations are usually[16] performed on a contingency fee basis where the firms performing the examinations receive an agreed percentage of between 10% and 15% of the monies recovered in the process of examining the books and records of the companies under examination. [17]

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[14] The Court in *Treasurer of New Jersey v. United States Dept. of the Treasury*, 684 F.3d 382 (3d Cir. 2012) observed that the case was not about returning the bond proceeds to the owner, but was about whether the United States or the State of New Jersey would be able to hold and keep unclaimed bonds for its own uses. The Court pointed out that although the practical effect of the Unclaimed Property Act is to prevent unclaimed property from being eventually appropriated by the holders, it is sometimes admitted that unclaimed property statutes "are also a means of raising revenue, citing *Louisiana Health Serv. & Indem. v. McNarmara*, 561 So.2d 712, 716 (Ca. 1990) and *Clymer v. Summit Bancorp*, 771 N.J. 57, 292 A.2d 396, 400 (2002); noting that 75% of the funds New Jersey collects under its Uniform Unclaimed Property Act is transferred to the General State Fund. *See also American Express Travel Related Services v. Kentucky*, 641 F.3d 685 (6th Cir. 2011) where the Court specifically held that revenue raising is a legitimate purpose and a state may use its legislative power to take custody of property within its reach belonging to unknown persons, because doing so prevents the property from being used by "would-be possessors" and can be "used for the general good" rather than the chance enrichment of particular individuals or organizations.

[15] *See* the holding of a federal court in California which specifically recognized that "If the purpose of the [unclaimed property] law is . . . to reunite owners with their lost or forgotten property, its ultimate goal should be to generate little or no revenue at all for the state." Order re Preliminary Injunction. Case 2:01-CV-02407-WBS-GGH, June 1, 2007.

[16] According to the NAUPA advisors all states except one regularly employ independent auditors to perform unclaimed property examinations on a contingent fee basis.

[17] Another less significant source of revenue is a service offered to holders who have not been examined where for a fee the firm helps them prepare returns and voluntarily remit the unclaimed property on their books.

Auditing holders for unremitted unclaimed property can be a significant source of revenue for certain firms. Recently, in the course of a review of its practices by officials in Delaware, it was revealed that one private company had been awarded substantially all of the private examinations performed on behalf of the Delaware Escheator, and had been paid over $200 million in contingent fees over a period of 10 years.

Contingent fee examinations have recently come under consideration in North Carolina with the result that legislation was enacted which bans, as a general practice, the use of contingent fee examiners, other than in examinations of life insurance companies, on the basis that the "fee may impair an auditor's independence, or the perception of the auditor's independence by the public." N.C. Gen. Stat. Section 116B-8.

NAUPA points out that administrators do not have sufficient resources to hire examiners, and the continued use of contingent fee examiners is essential to the ability of most states to examine holders and enforce compliance with their unclaimed property laws.

The third group with significant interests at stake is the cadre of professionals who have developed the expertise needed to service the needs of businesses who as putative holders of unclaimed property are subject to unclaimed property examinations. This organization whose members have been most affected and who have been most involved in the drafting process are the Unclaimed Property Professionals Organization (UPPO) which has participated in drafting sessions and advanced substantial arguments and documentation in support of their constituents' interests.

The fourth group with various policy interests and concerns are representatives of the American Bar Association (ABA) which reflect a number of constituencies and views. These include holders, in certain context owners, as well as practitioners with various academic and policy positions depending on the issue. The ABA views its role as primarily intended to offer guidance and expertise.

The fifth group is composed of various industries and industry groups[18] whose members as holders and putative holders will be substantially impacted, for good or ill, by the revised Act. This group, as a Holders' Coalition, has participated in the drafting process through their representatives. Their insight into the problems the current acts cause or contribute to, and their suggestions of how the act can be improved, have been very helpful to the Uniform Law Commission.

The sixth group with an economic stake in this effort is made up of those individuals and companies whose business is to assist owners in finding and recovering unclaimed property. They report anecdotal instances in which rules and rulings by administrators have in their view created procedural roadblocks that make it difficult for them to learn about property held by administrators for owners, or to pursue claims effectively on behalf of owners for which they expect to receive under contract with the owners a percentage of any recovery as a contingent fee.

[18] *See* list in footnote 10.

There are three broad categories of disputes that most often arise between the holders and the examiners. The first category has to do with how far back in time the examiner may go in looking for unclaimed property, what records the holders are required to maintain, and for how long.[19] The 1981 Act provides an absolute 10 year statute of repose. The 1995 Act does not, and takes the position that no statute of limitations on examinations begins to run until a report is filed. The revised Act reverts to the 1981 Act and provides a 10 year time bar on how far back of the end of the holding period an examiner can go, as well as specifies a 10 year record retention rule.

The second category has to do with whether or not the examiner may use estimation methods when records are not available or are incomplete, and the permissible use and scope of statistical sampling as a technique for estimation of liabilities of holders.

The third category concerns the doctrine of "derivative rights" and how it applies in the context of unclaimed property. In essence the "derivative rights" doctrine is the position taken by holders that vis-à-vis the holder of property, the state steps into the shoes of the owner as custodian, and the state's right to unclaimed property, being derived from the owner, can be no greater than the rights the owner had with respect to the property. States do not agree that the "derivative rights" doctrine should apply to limit their right to take custody of unclaimed property. They assert instead that their right to unclaimed property cannot be limited to the rights of the owner because some limitations placed on owners are beyond the state's ability to perform, and as the sovereign with the ultimate right to the benefit of property which has been permanently lost or abandoned by its lawful owner, its rights are superior to the rights of the holder.[20]

Two situations illustrate the problem. If a person whose life has been insured by an insurance company dies, the insurer's contractual obligation to pay the death benefit does not mature until a claim has been filed by the beneficiary with proof of the decedent's death under circumstances that do not preclude payment of the claim, such as a death by suicide. When death benefits otherwise payable by reason of the death of an insured are not claimed during the requisite holding period, states have successfully maintained their right to take custody of the funds without having to submit a claim on behalf of the owner, even though the owner would

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[19] Some states, Delaware for example, assert the right to go back as far as 1986 in an examination in its search for unreported and unremitted unclaimed property. This practice has been under review in that state and a Delaware Federal District Court found that, as applied in the context of that audit, the extensive look back period was one of several factors that violated the holder's due process. *Temple-Inland, Inc. v. Cook,* 2016 WL 3536710, at *1 (D. Del. June 28, 2016).

[20] *See American Travel Related Services, supra*, at note 14. *Compare Sennett v. Ins. Co. of N. Am.,* 247 A.2d 774, 778 (Pa. 1968) (although the Commonwealth's right to the property at issue was "derivative," statute of limitations effective against owners' claim "nevertheless do[es] not prevent the Commonwealth from enforcing its separate and distinct right to bring escheat proceedings") *with State by Furman v. Elizabethtown Water Co.,* 191 A.2d 457, 458 (N.J. 1963) (holding that a contract allowing developer to claim a refund for a deposit within a specified period precluded escheat liability for unreturned deposits, stating "[t]his course would undoubtedly be followed if the [owners] themselves were claiming the unrefunded balances and … the State's claims are nonetheless derivative and certainly no broader than the [owner's] claims").

have been required to file a claim.[21] Another example arises when the owner of a claim does not file suit to recover on the claim before the applicable statute of limitations has run and the owner's claim has become time-barred. States have asserted that their right to take custody of the funds survives the running of the statute of limitations, because it is the state, not the holder, that should have the benefit of the windfall, if there is one. The problem is that the claim may be disputed or the holder may have offsetting claims, so the question becomes should the holder be entitled to litigate those issues in defense of a state's custody claim? Conversely, should the owner be allowed to circumvent the bar of the statute of limitations by waiting until the funds have been turned over to the state and then asserting his claim against the administrator? Representatives of the ABA and the Holders' Coalition have argued vigorously that the derivative rights doctrine has been recognized by the Supreme Court[22] as the basis for custodial taking of property, and therefore, it should apply as well as a limitation on the obligations of holders to turn over property to the administrator.

Probably the most contentious issues that come up in any discussion of the extent and reach of the derivative rights doctrine arise in two contexts. One involves freedom of contract and the rights of parties to limit their liability by contract that waives potential claims. The other is the issue of uncompensated taking of property.

The first arises in the context of the "gift card" issue. Traditionally a retail merchant or seller of goods and services offers a "gift card"−originally a paper card or gift certificate, but more recently an electronically loaded plastic card−which a customer may buy to use, or to present to another as a gift. By its express terms, the card is only redeemable for merchandise or services from the retail seller up to the limit of the amount of the value printed or loaded into the card. When the value within the "gift card" has not been fully utilized within the holding period, the remaining unused amount is deemed to be abandoned and subject to a claim by some states[23] that cash in the amount of the unused portion[24] is due to be turned over to the custody of the state. On the other hand retailers[25] point out that the terms of the gift card contracts with their customers do not provide for cash refunds, but rather only allow redemption in the form of merchandise or services priced at their retail value. In making their argument the retailers point out that they incur incremental costs in selling the card, not the least of which may be the credit card transaction fee if the purchaser pays with a credit card, and that when forced to pay off the full amount in cash rather than in goods or services, they lose the gross profit[26] earned at the time of the initial purchase of the gift card which properly would have been included in the seller's income and subjected to taxation.[27]

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[21] *See Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541 (1948).

[22] *Delaware v. New York*, 507 U.S. 490, 503 (1991).

[23] Thirty-six states have enacted one version or another of an unclaimed property exemption for "gift cards" and other forms of stored value cards.

[24] Some states have claimed a right to receive the original face amount of the card.

[25] Through the representatives of their associations such as the Retail Industry Leaders Association.

[26] The margin between the amount paid for the gift card and the retailer's average cost of goods or services delivered to the bearer of the gift card.

[27] One state trial court has held that a state's requirement that the value remaining in unclaimed gift cards be turned over to the state in cash violates both the "takings" provision of the Due Process Clause and the impairment of contract provision of the Constitution. *Service Merchandise Co., Inc. v. Adams, Treasurer*, Chancery Court of

It is an issue that is at the heart of the arguments made to the Uniform Law Commission on behalf of the retailers. They point out that 36 states have enacted some version of a "gift card" exemption. But the fourteen states, plus the District of Columbia, that do not exempt gift cards say the loss of the ability to recover unclaimed gift card proceeds will result in a loss of funds that probably will never be claimed by owners and will be fully usable by the state because by their nature gift cards are usually issued in a form which allows them to be redeemed by the bearer of the card and only rarely is the owner's name and address associated with or attached to the card. States say that in that case, they, not the holder, should receive the benefit of any windfall.

The other context in which the issue arises is the "business to business" or "B2B" exemption, which excludes from property subject to the unclaimed property rules, credit balances, debts and other transactions of record between two businesses. Fifteen states have adopted some form of a statutory B2B exemption from their unclaimed property laws which in essence recognizes that businesses, particularly those in an ongoing, continuing business relationship with each other, are in the best position to determine whether they have unclaimed property being held by the other business. These businesses say that they are not likely to lose track of their respective claims and obligations, and do not need or want the assistance of states in making such determinations. Moreover, they say that they should be allowed to enter into arm's length agreements by which each party affirms that they keep track of their accounts and agree to waive any entitlement on the part of either party to recover "unclaimed" property or obligation to turn over such "unclaimed" property to the state. A particular concern of businesses is the practice of examiners who use a statistical sample of a company's commercial accounts for a specified period of time to identify outstanding credit balances, then extrapolate the results back to a point in time, which in states with no statute of repose, can be as far back as 1981; well beyond any company's normal record retention policy. Businesses point out that frequently business credits are only promised or offered purchase price discounts which remain on the businesses' books premised upon there being future purchases, and remain uncollected or unredeemed if such future purchases are never made. Records frequently do not exist by which business can refute or rebut a presumption that commercial credit accounts represent real debts owed by the business to its business customers. The result of allowing states to assert a deficiency for unclaimed property not based on actual records, but on no more than a statistical sample relating back before the time where records still exist, often may be nothing more than a true windfall derived by the state at the expense of a holder who may not in fact have owed the extrapolated liability to any owner.

On the other side, administrators say that in their experience it is not that clear that businesses, even large businesses with sophisticated accounting systems, are always careful to keep track of credit balances and other obligations owed to them by businesses they regularly do business with. This is especially true where there is a significant disparity in the size, sophistication, and bargaining power of the two businesses. States say that they see many instances in which businesses, particularly small businesses, lose track of the claims they have

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Davidson County, Tennessee, # 97-2782-III, 2001. To avoid "taking" the gross profits some states that claim gift cards only require that the retailer remit 60% of the unclaimed value in the card.

against other businesses. Many never realize they have a claim against the other party until their property is turned over to the state, and are pleasantly surprised to learn that they are the owners of unclaimed property being held by the state for their benefit. Achieving the proper balance between these competing interests have been difficult. B2B provisions have not been incorporated into this act. However, states that have a B2B exemption will be able to keep it if they want to, and those who do not have or want a B2B exemption, will be free to leave it out without offending the goal of achieving substantial uniformity.

The revised Act also addresses less controversial issues such as procedural and process changes designed to make the system work better and more efficiently for all parties. These include administrative and judicial remedies for resolution of disputes, protection of confidential information, and procedures for voluntary interaction by state administrators with their counterparts in other states.

This revised Act is the result of the Uniform Law Commission having worked through and resolved in one fashion or another most of the preliminary issues identified by stakeholders at the outset of the drafting process. It has been read and discussed on the floor of the Uniform Law Conference at its first reading and at its second reading on the floor at the annual conference held in July 2016, and has been approved by vote of the states for adoption as a Uniform Act. The Uniform Law Conference believes that the Uniform Law Commission has produced a fair, balanced, and enactable Revised Uniform Unclaimed Property Act, and recommend it to the states for enactment.

Charles A. Trost
Reporter

REVISED UNIFORM UNCLAIMED PROPERTY ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Revised Uniform Unclaimed Property Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Administrator" means [insert name of the state official with responsibility to administer this [act]].

(2) "Administrator's agent" means a person with which the administrator contracts to conduct an examination under [Article] 10 on behalf of the administrator. The term includes an independent contractor of the person and each individual participating in the examination on behalf of the person or contractor.

(3) "Apparent owner" means a person whose name appears on the records of a holder as the owner of property held, issued, or owing by the holder.

(4) "Business association" means a corporation, joint stock company, investment company other than an investment company registered under the Investment Company Act of 1940[, as amended], 15 U.S.C. Sections 80a-1 through 80a-64, partnership, unincorporated association, joint venture, limited liability company, business trust, trust company, land bank, safe deposit company, safekeeping depository, financial organization, insurance company, federally chartered entity, utility, sole proprietorship, or other business entity, whether or not for profit.

(5) "Confidential information" means records, reports, and information that are confidential under Section 1402.

(6) “Domicile” means:

(A) for a corporation, the state of its incorporation;

(B) for a business association whose formation requires a filing with a state, other than a corporation, the state of its filing;

(C) for a federally chartered entity or an investment company registered under the Investment Company Act of 1940[, as amended], 15 U.S.C. Sections 80a-1 through 80a-64, the state of its home office; and

(D) for any other holder, the state of its principal place of business.

(7) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) “Electronic mail” means a communication by electronic means which is automatically retained and stored and may be readily accessed or retrieved.

(9) “Financial organization” means a savings and loan association, building and loan association, savings bank, industrial bank, bank, banking organization, or credit union.

(10) “Game-related digital content” means digital content that exists only in an electronic game or electronic-game platform. The term:

(A) includes:

(i) game-play currency such as a virtual wallet, even if denominated in United States currency; and

(ii) the following if for use or redemption only within the game or platform or another electronic game or electronic-game platform:

(I) points sometimes referred to as gems, tokens, gold, and similar names; and

(II) digital codes; and

(B) does not include an item that the issuer:

(i) permits to be redeemed for use outside a game or platform for:

(I) money; or

(II) goods or services that have more than minimal value; or

(ii) otherwise monetizes for use outside a game or platform.

(11) "Gift card" means:

(A) a stored-value card:

(i) the value of which does not expire;

(ii) that may be decreased in value only by redemption for merchandise, goods, or services; and

(iii) that, unless required by law, may not be redeemed for or converted into money or otherwise monetized by the issuer; and

(B) includes a prepaid commercial mobile radio service, as defined in 47 C.F.R. 20.3[, as amended].

(12) "Holder" means a person obligated to hold for the account of, or to deliver or pay to, the owner, property subject to this [act].

(13) "Insurance company" means an association, corporation, or fraternal or mutual-benefit organization, whether or not for profit, engaged in the business of providing life endowments, annuities, or insurance, including accident, burial, casualty, credit-life, contract-performance, dental, disability, fidelity, fire, health, hospitalization, illness, life, malpractice, marine, mortgage, surety, wage-protection, and worker-compensation insurance.

(14) "Loyalty card" means a record given without direct monetary consideration under an

award, reward, benefit, loyalty, incentive, rebate, or promotional program which may be used or redeemed only to obtain goods or services or a discount on goods or services. The term does not include a record that may be redeemed for money or otherwise monetized by the issuer.

(15) "Mineral" means gas, oil, coal, oil shale, other gaseous liquid or solid hydrocarbon, cement material, sand and gravel, road material, building stone, chemical raw material, gemstone, fissionable and nonfissionable ores, colloidal and other clay, steam and other geothermal resources, and any other substance defined as a mineral by law of this state other than this [act].

(16) "Mineral proceeds" means an amount payable for extraction, production, or sale of minerals, or, on the abandonment of the amount, an amount that becomes payable after abandonment. The term includes an amount payable:

(A) for the acquisition and retention of a mineral lease, including a bonus, royalty, compensatory royalty, shut-in royalty, minimum royalty, and delay rental;

(B) for the extraction, production, or sale of minerals, including a net revenue interest, royalty, overriding royalty, extraction payment, and production payment; and

(C) under an agreement or option, including a joint-operating agreement, unit agreement, pooling agreement, and farm-out agreement.

(17) "Money order" means a payment order for a specified amount of money. The term includes an express money order and a personal money order on which the remitter is the purchaser.

(18) "Municipal bond" means a bond or evidence of indebtedness issued by a municipality or other political subdivision of a state.

(19) "Net card value" means the original purchase price or original issued value of a

stored-value card, plus amounts added to the original price or value, minus amounts used and any service charge, fee, or dormancy charge permitted by law.

(20) "Non-freely transferable security" means a security that cannot be delivered to the administrator by the Depository Trust Clearing Corporation or similar custodian of securities providing post-trade clearing and settlement services to financial markets or cannot be delivered because there is no agent to effect transfer. The term includes a worthless security.

(21) "Owner" means a person that has a legal, beneficial, or equitable interest in property subject to this [act] or the person's legal representative when acting on behalf of the owner. The term includes:

(A) a depositor, for a deposit;

(B) a beneficiary, for a trust other than a deposit in trust;

(C) a creditor, claimant, or payee, for other property; and

(D) the lawful bearer of a record that may be used to obtain money, a reward, or a thing of value.

(22) "Payroll card" means a record that evidences a payroll-card account as defined in Regulation E, 12 C.F.R. Part 1005[, as amended].

(23) "Person" means an individual, estate, business association, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(24) "Property" means tangible property described in Section 205 or a fixed and certain interest in intangible property held, issued, or owed in the course of a holder's business or by a government, governmental subdivision, agency, or instrumentality. The term:

(A) includes all income from or increments to the property;

(B) includes property referred to as or evidenced by:

(i) money, virtual currency, interest, or a dividend, check, draft, deposit, or payroll card;

(ii) a credit balance, customer's overpayment, stored-value card, security deposit, refund, credit memorandum, unpaid wage, unused ticket for which the issuer has an obligation to provide a refund, mineral proceeds, or unidentified remittance;

(iii) a security except for:

(I) a worthless security; or

(II) a security that is subject to a lien, legal hold, or restriction evidenced on the records of the holder or imposed by operation of law, if the lien, legal hold, or restriction restricts the holder's or owner's ability to receive, transfer, sell, or otherwise negotiate the security;

(iv) a bond, debenture, note, or other evidence of indebtedness;

(v) money deposited to redeem a security, make a distribution, or pay a dividend;

(vi) an amount due and payable under an annuity contract or insurance policy; and

(vii) an amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit-sharing, employee-savings, supplemental-unemployment insurance, or a similar benefit; and

(C) does not include:

(i) property held in a plan described in Section 529A of the Internal Revenue Code[, as amended], 26 U.S.C. Section 529A;

(ii) game-related digital content; [or]

(iii) a loyalty card[;] [or]

[(iv) an in-store credit for returned merchandise][;] [or]

[(v) a gift card].

(25) "Putative holder" means a person believed by the administrator to be a holder, until the person pays or delivers to the administrator property subject to this [act] or the administrator or a court makes a final determination that the person is or is not a holder.

(26) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(27) "Security" means:

(A) a security as defined in [insert citation to appropriate section of Article 8 of the Uniform Commercial Code];

(B) a security entitlement as defined in [insert citation to appropriate section of Article 8 of the Uniform Commercial Code], including a customer security account held by a registered broker-dealer, to the extent the financial assets held in the security account are not:

(i) registered on the books of the issuer in the name of the person for which the broker-dealer holds the assets;

(ii) payable to the order of the person; or

(iii) specifically indorsed to the person; or

(C) an equity interest in a business association not included in subparagraph (A) or (B).

(28) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(29) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(30) "Stored-value card" means a record evidencing a promise made for consideration by the seller or issuer of the record that goods, services, or money will be provided to the owner of the record to the value or amount shown in the record. The term:

(A) includes:

(i) a record that contains or consists of a microprocessor chip, magnetic strip, or other means for the storage of information, which is prefunded and whose value or amount is decreased on each use and increased by payment of additional consideration; and

(ii) a [gift card and] payroll card; and

(B) does not include a loyalty card[, gift card,] or game-related digital content.

(31) "Utility" means a person that owns or operates for public use a plant, equipment, real property, franchise, or license for the following public services:

(A) transmission of communications or information;

(B) production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas; or

(C) provision of sewage or septic services, or trash, garbage, or recycling disposal.

(32) "Virtual currency" means a digital representation of value used as a medium of exchange, unit of account, or store of value, which does not have legal tender status recognized

by the United States. The term does not include:

(A) the software or protocols governing the transfer of the digital representation of value;

(B) game-related digital content; or

(C) a loyalty card[or gift card].

(33) "Worthless security" means a security whose cost of liquidation and delivery to the administrator would exceed the value of the security on the date a report is due under this [act].

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in paragraphs (4), (6)(C), (11)(B), and (22).*

In a state that does not refer to federal statutes or regulations, the reference in paragraph (22) to the Code of Federal Regulations should be replaced with "…means a record that evidences an account that is directly or indirectly established through an employer and to which electronic fund transfers of an employee's wages, salary, and other compensation are made on a recurring basis."

(24) "Property." - Gift cards: A state that wants to exempt gift cards may remove the brackets so as to include the words "a gift card" where they appear in paragraph (24)(C)(v) as part of the phrase beginning "but does not include." A state that does not want to exempt gift cards should do the reverse: delete the words "a gift card" in paragraph (24)(C)(v). In paragraph (30)(A)(ii) delete "a gift card", and in paragraph (30)(B) delete the brackets around the words "gift card." States that wish to exempt gift cards without regard to whether they expire may delete paragraph 11(A)(i).

In-store credits: A state that wants to exclude in-store credits for returned merchandise from unclaimed property should remove the brackets to paragraph (24)(C)(iv) and retain the language. A state that wants to include these credits should delete subparagraph (C)(iv).

Business-to-business: Fifteen states have some form of statutory exemption from "property" a right arising from transactions taking place in the course of a business-to-business relationship. A state that wants to continue to exempt this type of property will need to include in this section its definition of a business-to-business relationship and specifically state in the definition of "property" in paragraph 102(24)(C) that it does not include property arising from a business-to-business relationship.

(30) "Stored-value card." The definition of a stored-value card includes a payroll card and a gift card. A state that exempts gift cards may continue to do so by deleting "a gift card" in paragraph (30)(A)(ii). A state that does not exempt gift cards will need to remove the brackets

around the words "a gift card" in paragraph (30)(A)(ii) and retain the words, and delete the words "gift card" in brackets in paragraph (30)(B).

Comment

"Apparent owner" is defined in Section 102(3) in terms of reference to the person who appears in the holder's records to be the person entitled to the property. The right of a state to claim abandoned property depends on the information in the holder's records concerning the apparent owner's identification. It is of no consequence that without notice to the holder, the owner may have transferred title to or ownership of the property to another person. In *Nellius v. Tampax, Inc.*, 394 A.2d 333 (Del. Ch. Ct. 1978), the court held that the address of the apparent, not the actual, owner controlled. The holder is not required to ascertain the name of the current owner or resolve a dispute between the owner of record and a successor contesting ownership. However, nothing in this Act prohibits the actual owner from recovering the property from the holder or the administrator by providing proof of ownership.

"Business association" - As used in Section 102(4) the word "partnership" is intended to include all forms of partnerships, not just general partnerships. Further, certain investment companies are expressly excluded from the definition of business association.

"Domicile" - Section 102(6)(A) is based on the holding of the U.S. Supreme Court in *Texas v New Jersey*, 379 U.S. 674 (1964). Subsection (B) is consistent with the rationale of that Court providing that in cases of business associations other than corporations, such as LLC's and limited partnerships, that only come into existence upon the filing of their organizational documents with a state, domicile is the state of formation by filing. At the time the Court announced its rule with respect to corporations, LLCs did not exist in the United States. The first state to authorize the formation of LLCs was Wyoming in 1977. There is no reason to assume the Court would not have applied the same rationale to LLCs. *See, e.g., State ex rel. French v. Card Compliant LLC,* 2015 WL 11051006, at *8 (Del. Super. Ct. Nov. 23, 2015) (holding that "[i]n accordance with the *Texas* cases…the Court finds that Delaware escheat laws apply to LLCs *organized* in Delaware") (emphasis added). Limited partnerships were in existence, but at the time they were of limited use and were seldom formed in a state other than the one in which they were organized and operated and therefore are treated the same as LLCs in this Act.

"Game-related digital content" - This definition in Section 102(10) is provided because it is expressly excluded from the definition of property in Section 102(24)(c)(2). Game-related digital content has become an increasingly popular part of digital gaming. As defined in Section 102(10), they are exclusively elements of the games to which they apply, are not transferrable and hold no value outside of the game. When a player purchases digital codes for virtual items, the purchaser has obtained the end product, e.g. a limited license of use to an element of game play, which does not convey any monetizable ownership interest but only rights to use within the game.

"Gift card" - There is now a definition in Section 102(11) of gift card to take into account the various ways in which a gift card can be issued and used. It is to be distinguished from a stored value card of which it is a subset, in that unlike other stored value cards, a gift card may

only be redeemed for merchandise, goods, or services provided or sold by the issuer, and is not redeemable for money and may not otherwise be monetized.

The 1981 Act provided that the entire amount of unredeemed gift certificate balances were required to be reported as unclaimed property. The 1995 Act continued to treat unredeemed gift certificate balances as reportable property, but provided that the amount reportable was 60 percent of the unredeemed value. This was intended to address arguments that requiring the reporting of the entire unredeemed balance on gift certificates and gift cards was unfair to the issuer and perhaps unconstitutional. See, e.g., *Service Merchandise Co., Inc. v. Adams*, 2001 WL 34384462, at 6-7 (Tenn. Ch. Ct. 2001)(state statute requiring a gift certificate issuer to "deliver to the state cash in the full amount of the face value of the gift certificates violates the Takings Clause.")

Currently, thirty six states exempt gift cards from the application of their unclaimed property statutes in some manner. Some limit the exemption to gift cards with no expiration dates (e.g., CA, HI, ID, IL, IA, NE, NV, NC, PA, RI, SD, TN, TX, WA). Others have adopted outright exemptions for "gift certificates" or "gift cards", without regard to whether they contain expiration dates (e.g., AL, AZ, AR, CT, FL, IN, MD, MA, MI, MN, NH, OH, UT, VT, VA). Some states require reporting of unused gift card balances based on the unredeemed value of the gift card. For example, New Hampshire exempts gift cards with values under $100. Idaho exempts all property, including gift cards, having a value of $50 or less. Michigan exempts all property, including gift cards, having a value of $25 or less. Four states (KS, OR, ND and SC) don't expressly exempt gift cards, but have amended their laws to remove gift certificates from the definition of property subject to the unclaimed property act and do not apply their statutes to unredeemed gift certificate and gift card balances. This Act does not take a position with respect to whether unredeemed balances on gift certificates or gift cards should be covered by the Act.

The definition in Section 102(11) limits the term "gift card" to cards the value of which do not expire, which is consistent with the exemptions for gift cards currently provided in some states (e.g., CA, HI, ID, IL, IA, NE, NV, NC, PA, RI, SD, TN, TX, WA). However, other states currently exempt gift cards without regard to whether they expire (e.g., AL, AZ, AR, CT, FL, IN, KS, MD, MA, MI, MN, NH, ND, OH, OR, UT, VT, VA). States that wish to exempt gift cards without regard to whether they expire would need to delete paragraph 11(A)(i).

Holder" - This Act carries forward the definition of "holder" from the 1995 Act. There will be circumstances in which a literal application of the definition of holder could result in more than one person or entity falling within the definition of holder with respect to a particular obligation. In most instances, there should be only one holder of obligations for unclaimed property purposes—the exception being where there are multiple obligors directly liable on a specific obligation, such as co-borrowers on a loan. In circumstances where more than one party potentially meets the definition of holder, the party which is primarily obligated to the owner should be treated as the holder for purposes of application of unclaimed property laws. See, e.g., *Clymer v. Summit Bancorp*, 792 A.2d 396 (NJ 2002)(issuer of bonds, not trustee in possession of funds to be used to pay bondholders and having contractual obligation to issue such payments, is the holder for purposes of determining applicable dormancy period). Where one party has a direct legal obligation to the owner of the property, and another party has possession of funds associated with the property and an obligation to hold it for the account of, or to pay or deliver it

to, the owner solely by virtue of a contractual relationship with the party who is directly obligated to the owner, but who has not assumed direct liability to the owner, it is the party who is directly obligated to the owner who is the holder for purposes of the act. For example, the issuer of stock or bonds, and not a third party transfer agent or paying agent contracted by the issuer, would, in such circumstances, be the holder of the obligation and any unclaimed dividends on the stock or interest on the bonds. On the other hand, where a party contractually assumes direct liability to the owner for an obligation and is in possession of the funds associated with such obligation, the assuming party becomes the applicable holder for purposes of application of unclaimed property obligations. Where a corporation sells assets to another corporation and the acquiring corporation affirmatively assumes liability for obligations of the selling corporation for certain liabilities associated with the acquired assets, the acquiring corporation becomes the applicable "holder" of the assumed obligations and the selling corporation should no longer be the "holder" with respect to the assumed obligations. Section 402(d) recognizes such successor holders and requires that they include in any report of unclaimed property the name of the previous holder, if known and the address of each previous holder of the property

"Loyalty cards" - Loyalty cards are defined in Section 102(14) because they are expressly excluded from the definition of "property" which must be delivered to the administrator. (See § 102(24)(c)(ii). Loyalty cards are limited to cards given to consumers without payment of direct monetary consideration by the consumer. Some loyalty programs permit consumers to purchase additional rewards for direct monetary consideration. The burden would be on the issuer of cards under such programs to establish that unredeemed card balances for which exemption is claimed do not include balances for which the cardholder paid any direct monetary consideration.

"Money order" - The changes in Section 102(17) to the definition of "money order" from the 1995 Act are intended to prevent sophisticated issuers from creating debt instruments that technically fit within the 1995 Act definition of a "money order" to achieve the longer seven year dormancy period. It is not intended to include conventional bank issued personal or business checks.

"Municipal bonds" - A definition in Section 102(18) of municipal bond is included to differentiate municipal bonds from United States issued bonds, and relates to abandonment of unclaimed bonds other than United States issued bonds.

"Net card value" - This definition in Section 102(19) is included to make it clear that the amount of value in a stored value card subject to becoming "unclaimed property" is the original issued value of the card, less any amounts used or withdrawn from the card and any service charge, fee, or dormancy charge permitted by law, , and includes additional amounts subsequently loaded into the card which have not been withdrawn.

"Non-freely transferable security" - Under this definition in Section 102(20) there can be a variety of reasons why a custodian of securities might not be able to effect a transfer. The security might be subject to a lien or other type of restriction evidenced on the records of the holder or imposed by operation of law.

"Owner" - Legal and beneficial ownership interest are recognized in this definition in Section 102(21). When the person with legal ownership of the property is known, that person takes precedence as the "owner" for purposes of this act. For example, the legal owner of trust assets is the trustee. In situations where there is no trustee to act, the beneficiary or equitable owner is the "owner" for purposes of this act. The trustee, as legal owner, has precedence over the beneficial owner unless the beneficiary establishes that the trust has terminated or there is no trustee to take and hold the property. Similarly, for bank accounts, brokerage accounts, IRAs, and other similar property, the legal owner of the account would take precedence over a named beneficiary who does not yet have legal ownership of the account.

"Payroll cards" - Payroll cards as defined in Section 102(22) are a subset of "stored-value cards" and are intended to mean the bank account into which wages and other compensation can be paid and accessed electronically by the employee. Accordingly, payroll cards have the same three year holding period as bank accounts, rather than the one year holding period for unpaid compensation being held by the employer. Stored value cards are property subject to being turned over to the state if they are unclaimed and abandoned after the relevant three year period under Section 201(13), unless the state elects a different holding period.

"Property" - The term "bond" as used in Section 102(24)(B)(iv) includes U.S. Savings Bonds and they are intended to be included in the definition of property under this act. The decision of the Third Circuit in *Treasurer of New Jersey v U.S. Dept. of Treasury*, 684 F.3d 382 (2012) makes it clear that the right of the U.S. Treasury to hold the proceeds of U.S. Savings Bonds in its custody for the owners of the bonds preempts state claims to take custody and hold the bonds for the owners. The Court indicated that the outcome would be different where a state had become the owner of the bonds by operation of its escheat law or otherwise. In 2000 Kansas amended its unclaimed property act to establish a procedure by which the Kansas administrator can bring an action for a judgment of the state court affirming that the administrator had become by escheat the owner of U.S. Savings Bonds that had not been claimed. This matter is in litigation in the U.S. Court of Federal Claims in a suit brought by the Treasurer of Kansas in *Estes v United States*, 13-1011 (Fed. Cl. 2015). By Opinion and Order entered August 20, 2015, the trial judge denied the defendant's Motion to Dismiss the plaintiff's contract, equitable estoppel and declaratory judgment claims and Takings Clause claim, and dismissed the plaintiff's third party beneficiary claim. The matter is still pending. Logically, if an administrator is judicially declared to be the owner of U.S. Savings Bonds found in the lock box of a deceased owner by operation of the state's escheat laws, the administrator's claim to the proceeds as the "owner" should prevail. The more difficult issue before the Court is the "absent owner" bonds with respect to which there is no evidence of the continued interest or ownership of the original registered owner of the bonds. Ultimately, it will be up to the court to determine whether the Kansas procedure for obtaining such a ruling from a court is sufficient to vest legal title to the bonds in the state by escheat and is consistent with the customary means by which a state may acquire title to property under the state's escheat laws.

"Record" - The term "record" defined in Section 102(26) is meant to replace the terms "writing" or "written," and is a standard Uniform Law Commission definition.

"Security" - While prior iterations of the Act address treatment of securities, the term has not been defined. The definition in Section 102(27) intends to capture certain existing

definitions found in the Uniform Commercial Code as well as equity interests in business associations not otherwise covered.

"Virtual currency" - The definition in Section 102(32) of virtual currency is adapted from the current draft of the Uniform Regulation of Virtual Currency Act (URVCA). The drafting committee of that Act has not yet settled on a definition of "virtual currency." It is thought that the two definitions should be harmonized. Under this Act, "virtual currency" is property included in the URVCA definition and the definition in this Act specifically excludes game related digital content and loyalty cards because they are excluded from this act, in order that they not be swept back in through on over broad interpretation of "virtual currency." The same will hold true for versions of this Act that are enacted by states that elect to exclude "gift cards". See Section 102(11).

SECTION 103. INAPPLICABILITY TO FOREIGN TRANSACTION. This [act] does not apply to property held, due, and owing in a foreign country if the transaction out of which the property arose was a foreign transaction.

Comment

This exclusion for foreign held property is taken directly from Section 26 of the 1995 Act.

SECTION 104. RULEMAKING. The administrator may adopt under [insert citation to the state administrative procedure act] rules to implement and administer this [act].

[ARTICLE] 2

PRESUMPTION OF ABANDONMENT

SECTION 201. WHEN PROPERTY PRESUMED ABANDONED. Subject to Section 210, the following property is presumed abandoned if it is unclaimed by the apparent owner during the period specified below:

(1) a traveler's check, 15 years after issuance;

(2) a money order, seven years after issuance;

(3) a state or municipal bond, bearer bond, or original-issue-discount bond, three years after the earliest of the date the bond matures or is called or the obligation to pay the principal of the bond arises;

(4) a debt of a business association, three years after the obligation to pay arises;

(5) a payroll card or demand, savings, or time deposit, including a deposit that is automatically renewable, three years after the maturity of the deposit, except a deposit that is automatically renewable is deemed matured on its initial date of maturity unless the apparent owner consented in a record on file with the holder to renewal at or about the time of the renewal;

(6) money or a credit owed to a customer as a result of a retail business transaction,[other than in-store credit for returned merchandise,] three years after the obligation arose;

(7) an amount owed by an insurance company on a life or endowment insurance policy or an annuity contract that has matured or terminated, three years after the obligation to pay arose under the terms of the policy or contract or, if a policy or contract for which an amount is owed on proof of death has not matured by proof of the death of the insured or annuitant, as follows:

(A) with respect to an amount owed on a life or endowment insurance policy, three years after the earlier of the date:

(i) the insurance company has knowledge of the death of the insured; or

(ii) the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve for the policy is based; and

(B) with respect to an amount owed on an annuity contract, three years after the date the insurance company has knowledge of the death of the annuitant.

(8) property distributable by a business association in the course of dissolution, one year after the property becomes distributable;

(9) property held by a court, including property received as proceeds of a class action, one year after the property becomes distributable;

(10) property held by a government or governmental subdivision, agency, or instrumentality, including municipal bond interest and unredeemed principal under the administration of a paying agent or indenture trustee, one year after the property becomes distributable;

(11) wages, commissions, bonuses, or reimbursements to which an employee is entitled, or other compensation for personal services, other than amounts held in a payroll card, one year after the amount becomes payable;

(12) a deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable; and

(13) property not specified in this section or Section 202 through [207][208], the earlier of three years after the owner first has a right to demand the property or the obligation to pay or distribute the property arises.

Legislative Note: *A state that wants to exclude in-store credits for returned merchandise from unclaimed property should delete the brackets around the language in paragraph (6). A state that wants to include these credits should delete the bracketed language.*

A state that wants to exclude gift cards from unclaimed property should delete the bracketed reference to Section 207 in paragraph (13) and delete Section 207. Renumber the sections of Article 2 following Section 206, and delete the reference to Section 208 in paragraph (13).

Comment

Use of the phrase "subject to Section 210" here and elsewhere in Article 2 (Sections 201-208) should not be construed as creating additional required standards of owner generated activities resulting in abandonment in addition to those activities address by those sections (e.g. returned post office mail). Use of the phrase with all these sections is meant to indicate that certain types of owner generated activities rebuts the presumption otherwise triggered by the standard set forth in each section.

Fifteen states currently exclude some form of property arising from a "business-to-business" ("B2B") transaction by statute. However, most states do not. A "B2B" exemption is not in this Act because it has been adopted in a clear minority of states. However, those states that want to exempt property arising from a B2B transaction may do so by including the language from their own or another state's B2B exemption and excluding it from the definitions

of "property" in this Act. Also see Legislative Note to Section 102(24)(C).

Section 201 implements the general proposition that unless specifically excluded, all intangible property is within the coverage of this Act. The other sections of this Article 2 specify the rules applicable to particular categories or types of property. However, the bases for presuming abandonment of the property established in the 1981 Act and the 1995 Act remain unchanged.

Section 201 puts state and municipal bonds on the same footing as corporate bonds, and includes bonds issued by non-profits such as churches and schools. The principal obligation of the obligor on the bond is not accelerated by an interest payment not being claimed. An uncashed check issued in payment of an interest installment is treated like any other uncashed check.

The 1981 Act shortened the general dormancy period from seven years to five years and the 1995 Act then shortened the general dormancy period from five years to three years. Certain exceptions continue to be appropriate. For instance, experience indicates that a period of fifteen years continues to be appropriate in the case of traveler's checks, and seven years in the case of personal money orders and money orders issued by express companies. In certain instances shorter periods are appropriate. For instance, a deposit or refund owed to a utility subscriber continues to be one year.

This section also covers consumer credits owed on consumer transactions such as returns of merchandise, cancellation of layaways, and various kinds of deposits. The existence and amounts of such credits will of course be dependent on the terms of the contract between the holder and the consumer. However, in-store credits for returned merchandise are included, unless expressly excluded in the Act.

A one year dormancy period for property distributable by a business association in the course of a dissolution under subsection (8) recognizes that constraints on distribution, such as escrow or set aside to accommodate contractual indemnification obligations, must be considered in determining when the one year period commences.

Intangible property held by a utility other than subscribers' deposits and refunds are subject to the three year rule of subsection (13).

Since the holder is indemnified against any loss resulting from the delivery of the property to the administrator, no harm can result in requiring that a holder turn over the property to the administrator, even though no proof of death has been presented, nor any insurance policy, savings account passbook, gift certificate, winning racing ticket, or other memorandum of ownership has been surrendered.

What constitutes an indication of interest is addressed in Section 210.

SECTION 202. WHEN TAX-DEFERRED RETIREMENT ACCOUNT PRESUMED ABANDONED.

(a) Subject to Section 210, property held in a pension account or retirement account that qualifies for tax deferral under the income-tax laws of the United States is presumed abandoned if it is unclaimed by the apparent owner three years after the later of:

(1) the following dates:

(A) except as in subparagraph (B), the date a second consecutive communication sent by the holder by first-class United States mail to the apparent owner is returned to the holder undelivered by the United States Postal Service; or

(B) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered by the United States Postal Service; or

(2) the earlier of the following dates:

(A) the date the apparent owner becomes 70.5 years of age, if determinable by the holder; or

(B) if the Internal Revenue Code[, as amended], 26 U.S.C. Section 1 et seq., requires distribution to avoid a tax penalty, two years after the date the holder:

(i) receives confirmation of the death of the apparent owner in the ordinary course of its business; or

(ii) confirms the death of the apparent owner under subsection (b).

(b) If a holder in the ordinary course of its business receives notice or an indication of the death of an apparent owner and subsection (a)(2) applies, the holder shall attempt not later than 90 days after receipt of the notice or indication to confirm whether the apparent owner is

deceased.

(c) If the holder does not send communications to the apparent owner of an account described in subsection (a) by first-class United States mail, the holder shall attempt to confirm the apparent owner's interest in the property by sending the apparent owner an electronic-mail communication not later than two years after the apparent owner's last indication of interest in the property. However, the holder promptly shall attempt to contact the apparent owner by first-class United States mail if:

(1) the holder does not have information needed to send the apparent owner an electronic mail communication or the holder believes that the apparent owner's electronic mail address in the holder's records is not valid;

(2) the holder receives notification that the electronic-mail communication was not received; or

(3) the apparent owner does not respond to the electronic-mail communication not later than 30 days after the communication was sent.

(d) If first-class United States mail sent under subsection (c) is returned to the holder undelivered by the United States Postal Service, the property is presumed abandoned three years after the later of:

(1) except as in paragraph (2), the date a second consecutive communication to contact the apparent owner sent by first-class United States mail is returned to the holder undelivered;

(2) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered; or

(3) the date established by subsection (a)(2).

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(2)(B).*

Comment

The 1995 Act provided a three year dormancy period for unpaid distributions from retirement accounts. Section 202 retains the dormancy period of three years, but clarifies when the dormancy period is triggered for such accounts based on return of first class United States mailings, date an owner reaches the age of mandatory distribution or confirmation of apparent owner death.

There is substantial disagreement between various authorities concerning whether ERISA preempts state unclaimed property laws. For example, while several courts have held that because the unclaimed property laws are matters of traditional state powers, are laws of general application, and have only a tenuous, remote and peripheral impact on ERISA plans, they are not pre-empted by federal law, *see, e.g., Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2nd Cir. 1989); *Attorney General v. Blue Cross and Blue Shield of Michigan*, 424 N.W.2d 54 (Ct. App. 1988), the Department of Labor has taken the position that unclaimed property laws "relate to" ERISA, and are thus pre-empted, in a letter opinion issued March 3, 1995. *See* 22 BNA Pension & Benefits Reporter 743 (1995); *see also Dep't of Labor Advisory Opinion 94-41*A (Dec. 7, 1994); Dep't of Labor Advisory Opinion 79-30A (May 14, 1979); Dep't of Labor Advisory Opinion 78-32A (Dec. 22, 1978), a position not adopted by those courts.

Despite these generalized positions on preemption, authorities have also weighed in on specific portions of ERISA. For example, ERISA appears to preempt the application of state unclaimed property laws to funded "pension plans," a term that includes all tax-qualified retirement plans, tax-sheltered annuity plans described in Internal Revenue Code (I.R.C.) § 403(b), and various other retirement arrangements that are subject to ERISA. *See Commonwealth Edison Co. v. Vega*, 174 F.3d 870 (7th Cir. 1999) (Illinois' claiming of the uncashed benefit checks improperly involved the state in a plan administration function, thereby impairing the uniform administration of claims of plan participants and is therefore preempted.); *Manufacturers Life Insurance Co. v. East Bay Restaurant and Tavern Retirement Plan*, 57 F. Supp. 2d 921 (N.D. Cal. 1999) (adopting the "plan asset" analysis of the Commonwealth Edison decision, the federal district court held that California was attempting to confiscate "plan assets," which interfered with the uniform administration of the ERISA retirement plan and deprived the plan of assets (i.e., the premium refund) that could be utilized to pay benefits to other plan participants and is therefore preempted). Thus there may be a valid distinction between assets held in a defined contribution plan where each participant's portion is held separately and those held in a defined benefit plan where the assets are held in a pool or fund out of which funds are withdrawn as needed, and excess funds may be returned to the plan sponsor. The holdings in these cases were consistent with the position taken by the U.S. Department of Labor, which had filed an amicus curiae brief in support of preemption in *Commonwealth Edison* and had previously issued several pertinent advisory opinions.

SECTION 203. WHEN OTHER TAX-DEFERRED ACCOUNT PRESUMED ABANDONED. Subject to Section 210 and except for property described in Section 202 and property held in a plan described in Section 529A of the Internal Revenue Code [as amended], 26 U.S.C. Section 529A, property held in an account or plan, including a health savings account, that qualifies for tax deferral under the income-tax laws of the United States is presumed abandoned if it is unclaimed by the apparent owner three years after the earlier of:

(1) the date, if determinable by the holder, specified in the income-tax laws and regulations of the United States by which distribution of the property must begin to avoid a tax penalty, with no distribution having been made; or

(2) 30 years after the date the account was opened.

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted.*

Comment

It was determined that tax deferred accounts, like health savings or college tuition savings, may well be used by beneficiaries over a longer period of time and that, as a consequence, a policy allowing for up to thirty years before those accounts would be surrendered to the states was prudent and favored consumers. With respect to the exception for property "held in a plan described in Section 529A of the Internal Revenue Code" this provision was intended to exclude such property from being presumed abandoned under the Act due to the nature and purpose of such property.

SECTION 204. WHEN CUSTODIAL ACCOUNT FOR MINOR PRESUMED ABANDONED.

(a) Subject to Section 210, property held in an account established under a state's Uniform Gifts to Minors Act or Uniform Transfers to Minors Act is presumed abandoned if it is unclaimed by or on behalf of the minor on whose behalf the account was opened three years after the later of:

(1) except as in subparagraph (2), the date a second consecutive communication sent by the holder by first-class United States mail to the custodian of the minor on whose behalf the account was opened is returned undelivered to the holder by the United States Postal Service;

(2) if the second communication is sent later than 30 days after the date the first communication is returned undelivered, the date the first communication was returned undelivered; or

(3) the date on which the custodian is required to transfer the property to the minor or the minor's estate in accordance with the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of the state in which the account was opened.

(b) If the holder does not send communications to the custodian of the minor on whose behalf an account described in subsection (a) was opened by first-class United States mail, the holder shall attempt to confirm the custodian's interest in the property by sending the custodian an electronic-mail communication not later than two years after the custodian's last indication of interest in the property. However, the holder promptly shall attempt to contact the custodian by first-class United States mail if:

(1) the holder does not have information needed to send the custodian an electronic mail communication or the holder believes that the custodian's electronic-mail-mail address in the holder's records is not valid;

(2) the holder receives notification that the electronic-mail communication was not received; or

(3) the custodian does not respond to the electronic-mail communication not later than 30 days after the communication was sent.

(c) If first-class United States mail sent under subsection (b) is returned undelivered to

the holder by the United States Postal Service, the property is presumed abandoned three years after the later of:

(1) the date a second consecutive communication to contact the custodian by first-class United States mail is returned to the holder undelivered by the United States Postal Service; or

(2) the date established by subsection (a)(3).

(d) When the property in the account described in subsection (a) is transferred to the minor on whose behalf an account was opened or to the minor's estate, the property in the account is no longer subject to this section.

Comment

The Uniform Gift to Minors Act (UGMA) is a mechanism whereby a minor can directly own securities in his/her name without a guardian or trustee. However, a fiduciary, either the donor or another person, must be the custodian of the minor's account. The minor is not allowed access to the account until he/she reaches the age of majority (18 or 21 depending on the state). The Uniform Transfers to Minors Act (UTMA) is similar to the UGMA and allows minors to receive transfers such as patents, royalties, real estate, etc. Minors are not allowed access to the UTMA until the age of majority.

Since UGMAs and UTMAs were not specifically addressed in the 1995 Act, leaving holders to determine how to apply the "catch-all" language of the act, the treatment of UGMAs and UTMAs is expressly addressed in this act. This section provides that the three year dormancy period does not begin to run until the later of the second returned mail or the minor reaches the age of majority.

SECTION 205. WHEN CONTENTS OF SAFE-DEPOSIT BOX PRESUMED ABANDONED. Tangible property held in a safe-deposit box and proceeds from a sale of the property by the holder permitted by law of this state other than this [act] are presumed abandoned if the property remains unclaimed by the apparent owner five years after the earlier of the:

(1) expiration of the lease or rental period for the box; or

(2) earliest date when the lessor of the box is authorized by law of this state other than this [act] to enter the box and remove or dispose of the contents without consent or authorization of the lessee.

Comment

Section 205 parallels Section 3 of the 1995 Act and Section 16 of the 1981 Act. However, in this Act this section also extends the triggering of the dormancy period to the date when the lessor may remove or dispose of the contents of the safe deposit box. This section is not intended to cover property left in places other than traditional safe deposit boxes, for example, bus station and airport lockers or field warehouses and storage units. Its coverage is limited to tangible property held in safe deposit boxes maintained in banks and similar financial institutions. Intangible property such as stock certificates or certificates of deposit, for example, evidence of which is found in a safe deposit box, is covered by Section 201.

SECTION 206. WHEN STORED-VALUE CARD PRESUMED ABANDONED.

(a) Subject to Section 210, the net card value of a stored-value card, other than a payroll card [or a gift card], is presumed abandoned on the latest of three years after:

(1) December 31 of the year in which the card is issued or additional funds are deposited into it;

(2) the most recent indication of interest in the card by the apparent owner; or

(3) a verification or review of the balance by or on behalf of the apparent owner.

(b) The amount presumed abandoned in a stored-value card is the net card value at the time it is presumed abandoned.

Legislative Note: *A state that wants to exclude gift cards from unclaimed property should delete the bracketed reference to gift cards in subsection (a). A state that wants to include gift card balances as unclaimed property should delete the brackets and retain the reference to gift cards in subsection (a) to exclude them from the three year dormancy provided in this section for stored value cards generally. Gift cards would then be reportable based on the five year dormancy period provided in Section 207.*

Comment

In addition to the clarification of when stored value cards are presumed abandoned, Section 206 provides that the value of the card that is presumed abandoned is the net card value - a term defined in Section 102(19) - not the face value.

[SECTION 207. WHEN GIFT CARD PRESUMED ABANDONED. Subject to Section 210, a gift card is presumed abandoned if it is unclaimed by the apparent owner five years after the later of the date of purchase or its most recent use.]

Legislative Note: *A state that wants to exclude gift cards from unclaimed property should delete this section and renumber the succeeding sections in Article 2. If gift cards are to be included, the brackets should be removed and the language retained.*

Comment

Certain federal legislation applies to gift cards. See Credit Card Accountability Responsibility and Disclosure Act of 2009 and amendments to Regulation E previously issued by the Federal Reserve Board. Accordingly, the dormancy period in Section 207 is the mandated five years, instead of the three years applicable to other types of stored value cards.

SECTION 208. WHEN SECURITY PRESUMED ABANDONED.

(a) Subject to Section 210, a security is presumed abandoned three years after:

(1) the date a second consecutive communication sent by the holder by first-class United States mail to the apparent owner is returned to the holder undelivered by the United States Postal Service; or

(2) if the second communication is made later than 30 days after the first communication is returned, the date the first communication is returned undelivered to the holder by the United States Postal Service.

(b) If the holder does not send communications to the apparent owner of a security by first-class United States mail, the holder shall attempt to confirm the apparent owner's interest in the security by sending the apparent owner an electronic-mail communication not later than two years after the apparent owner's last indication of interest in the security. However the holder promptly shall attempt to contact the apparent owner by first-class United States mail if:

(1) the holder does not have information needed to send the apparent owner an electronic-mail communication or the holder believes that the apparent owner's electronic-mail

address in the holder's records is not valid;

(2) the holder receives notification that the electronic-mail communication was not received; or

(3) the apparent owner does not respond to the electronic-mail communication not later 30 days after the communication was sent.

(c) If first-class United States mail sent under subsection (b) is returned to the holder undelivered by the United States Postal Service, the security is presumed abandoned three years after the date the mail is returned.

Comment

The 1995 Act was not clear on when the running of the dormancy period for securities was triggered. Section 208 clarifies the trigger event and will help to reduce compliance challenges faced by holders.

SECTION 209. WHEN RELATED PROPERTY PRESUMED ABANDONED. At and after the time property is presumed abandoned under this [act], any other property right or interest accrued or accruing from the property and not previously presumed abandoned is also presumed abandoned.

Comment

Section 209 is not intended to mean that a security is presumed abandoned as a result of a dividend payment being presumed abandoned, nor does it mean that the underlying bond will be presumed abandoned merely because an interest payment with respect to the bond is presumed abandoned. Instead, it is intended to mean that, in the event the security or bond is presumed abandoned as provided in the Act, any future dividend, interest or other property right accruing on such security or bond shall also be presumed abandoned. The section also encompasses cash distributions or accruals on, for example, securities positions, mineral rights, etc. when the underlying property is presumed abandoned.

SECTION 210. INDICATION OF APPARENT OWNER INTEREST IN PROPERTY.

(a) The period after which property is presumed abandoned is measured from the later of:

(1) the date the property is presumed abandoned under this [article]; or

(2) the latest indication of interest by the apparent owner in the property.

(b) Under this [act], an indication of an apparent owner's interest in property includes:

(1) a record communicated by the apparent owner to the holder or agent of the holder concerning the property or the account in which the property is held;

(2) an oral communication by the apparent owner to the holder or agent of the holder concerning the property or the account in which the property is held, if the holder or its agent contemporaneously makes and preserves a record of the fact of the apparent owner's communication;

(3) presentment of a check or other instrument of payment of a dividend, interest payment, or other distribution, or evidence of receipt of a distribution made by electronic or similar means, with respect to an account, underlying security, or interest in a business association.

(4) activity directed by an apparent owner in the account in which the property is held, including accessing the account or information concerning the account, or a direction by the apparent owner to increase, decrease, or otherwise change the amount or type of property held in the account;

(5) a deposit into or withdrawal from an account at a financial organization, including an automatic deposit or withdrawal previously authorized by the apparent owner other than an automatic reinvestment of dividends or interest;

(6) subject to subsection (e), payment of a premium on an insurance policy; and

(7) any other action by the apparent owner which reasonably demonstrates to the holder that the apparent owner knows that the property exists.

(c) An action by an agent or other representative of an apparent owner, other than the holder acting as the apparent owner's agent, is presumed to be an action on behalf of the apparent owner.

(d) A communication with an apparent owner by a person other than the holder or the holder's representative is not an indication of interest in the property by the apparent owner unless a record of the communication evidences the apparent owner's knowledge of a right to the property.

(e) If the insured dies or the insured or beneficiary of an insurance policy otherwise becomes entitled to the proceeds before depletion of the cash surrender value of the policy by operation of an automatic-premium-loan provision or other nonforfeiture provision contained in the policy, the operation does not prevent the policy from maturing or terminating.

Comment

It has been argued that the owner's interest in property should not be deemed abandoned if there have been any reasonable indications that the owner is aware of the existence of his or her claim and therefore it is not in fact abandoned property. The revisions in Section 210 are intended to expand and liberalize the ways in which continuing interest may be indicated, and to make clear that an owner may indicate interest by acting through an agent or representative. Section 210 requires that indications of owner interest be verifiable in order to evidence that the owner is aware of their property.

SECTION 211. KNOWLEDGE OF DEATH OF INSURED OR ANNUITANT.

(a) In this section, "death master file" means the United States Social Security Administration Death Master File or other database or service that is at least as comprehensive as the United States Social Security Administration Death Master File for determining that an individual reportedly has died.

(b) With respect to a life or endowment insurance policy or annuity contract for which an amount is owed on proof of death, but which has not matured by proof of death of the insured or annuitant, the company has knowledge of the death of an insured or annuitant when:

(1) the company receives a death certificate or court order determining that the insured or annuitant has died;

(2) due diligence, performed as required under [insert citation to applicable state law or regulations relating to the business of insurance] to maintain contact with the insured or annuitant or determine whether the insured or annuitant has died, validates the death of the insured or annuitant;

(3) the company conducts a comparison for any purpose between a death master file and the names of some or all of the company's insureds or annuitants, finds a match that provides notice that the insured or annuitant has died, and validates the death;

(4) the administrator or the administrator's agent conducts a comparison for the purpose of finding matches during an examination conducted under [Article] 10 between a death master file and the names of some or all of the company's insureds or annuitants, finds a match that provides notice that the insured or annuitant has died, and the company validates the death; or

(5) the company:

(A) receives notice of the death of the insured or annuitant from an administrator, beneficiary, policy owner, relative of the insured, or trustee or from a [insert the term or terms for personal representative in the state], [executor], or other legal representative of the insured's or annuitant's estate; and

(B) validates the death of the insured or annuitant.

(c) The following rules apply under this section:

(1) A death-master-file match under subsection (b)(3) or (4) occurs if the criteria for an exact or partial match are satisfied as provided by:

(A) law of this state other than this [act];

(B) a rule or policy adopted by [insert name of the state insurance official or department authorized to adopt rules]; or

(C) absent a law, rule, or policy under subparagraph (A) or (B) standards in the [National Conference of Insurance Legislators' "Model Unclaimed Life Insurance Benefits Act" as published in 2014].

(2) The death-master-file match does not constitute proof of death for the purpose of submission to an insurance company of a claim by a beneficiary, annuitant, or owner of the policy or contract for an amount due under an insurance policy or annuity contract.

(3) The death-master-file match or validation of the insured's or annuitant's death does not alter the requirements for a beneficiary, annuitant, or owner of the policy or contract to make a claim to receive proceeds under the terms of the policy or contract.

(4) If no provision in [insert citation to state insurance statutes or rules] which establishes a time for validation of a death of an insured or annuitant, the insurance company shall make a good faith effort using other available records and information to validate the death and document the effort taken not later than 90 days after the insurance company has notice of the death.

(d) This [act] does not affect the determination of the extent to which an insurance company before the effective date of this [act] had knowledge of the death of an insured or annuitant or was required to conduct a death-master-file comparison to determine whether amounts owed by the company on a life or endowment insurance policy or annuity contract were presumed abandoned or unclaimed.

Comment

The National Association of Insurance Commissioners (NAIC) is in the process of developing a new Model Act that may contain standards different from those contained in the current National Conference of Insurance Legislators Model Act. If these new standards are adopted, a state may elect to substitute a reference to the standards yet to be developed by NAIC.

Section 211 provides bright line rules an insurance company may rely upon to determine whether it has notice of the death of an insured or annuitant. The procedures established by these paragraphs are consistent with the Model Act adopted by the National Conference of Insurance Legislators that has been generally endorsed both by unclaimed property administrators and many insurance industry representatives. These procedures are also consistent with settlement agreements entered into between a substantial number of states and many large life insurance companies.

The Act does not require an insurance company to perform a death master file match. An insurance company may elect to so in accordance with requirements established or to be established by state insurance regulators, or as may be otherwise required by law, or receive notice of death from an administrator, beneficiary or other legal representative of the insured or annuitant and also validate the death.

Section 211 specifically avoids having any effect on the extent to which insurance companies had knowledge of death or was required to conduct a DMF comparison prior to the effective date of the Act.

SECTION 212. DEPOSIT ACCOUNT FOR PROCEEDS OF INSURANCE POLICY OR ANNUITY CONTRACT. If proceeds payable under a life or endowment insurance policy or annuity contract are deposited into an account with check or draft-writing privileges for the beneficiary of the policy or contract and, under a supplementary contract not involving annuity benefits other than death benefits, the proceeds are retained by the insurance company or the financial organization where the account is held, the policy or contract includes the assets in the account.

Comment

Section 212 clarifies that asset accounts related to or arising from an insurance policy of annuity contract will be subject to the same presumption of abandonment that is applied to the underlying policy or contract.

[ARTICLE] 3

RULES FOR TAKING CUSTODY OF PROPERTY PRESUMED ABANDONED

SECTION 301. ADDRESS OF APPARENT OWNER TO ESTABLISH PRIORITY.

PRIORITY. In this [article], the following rules apply:

(1) The last-known address of an apparent owner is any description, code, or other indication of the location of the apparent owner which identifies the state, even if the description, code, or indication of location is not sufficient to direct the delivery of first-class United States mail to the apparent owner.

(2) If the United States postal zip code associated with the apparent owner is for a post office located in this state, this state is deemed to be the state of the last-known address of the apparent owner unless other records associated with the apparent owner specifically identify the physical address of the apparent owner to be in another state.

(3) If the address under paragraph (2) is in another state, the other state is deemed to be the state of the last-known address of the apparent owner.

(4) The address of the apparent owner of a life or endowment insurance policy or annuity contract or its proceeds is presumed to be the address of the insured or annuitant if a person other than the insured or annuitant is entitled to the amount owed under the policy or contract and the address of the other person is not known by the insurance company and cannot be determined under Section 302.

Comment

Article 3 describes the circumstances under which a state may claim abandoned intangible property. This Article closely follows the language of *Texas v. New Jersey*, in which the court reasoned that unclaimed property is an asset of the creditor and should generally be paid to the creditor state, *i.e.*, the state of residence of the apparent owner. Consistent with that reasoning it held that unclaimed intangible property is subject to custody as unclaimed property first by the state of the owner's last known address. See Section 302. Consistent with the Court's

concern for a simple rule which would avoid the complexities of proving domicile and residence the Court established the priority on the basis of information contained in the holder's records. Where the holder's records do not show that the owner had an address within the state, the second priority claimant, the state of domicile of the holder, is entitled to claim the property. See Section 304.

Section 301 is meant to provide clarity and direction for determining the "last known address" of the apparent owner, a significant concept in the priority scheme. The 1981 Act defined "last known address" as "a description of the location of the apparent owner for the purpose of delivery of mail." *See* Section 1(11). Although the U.S. postal zip code associated with the apparent owner is given great weight, this Act does not limit "last known address" determinations to records of the U.S. postal service. Section 301(1) provides that any "description, code or other indication of location" is sufficient for "last known address" determinations. Indication of location could include by use of example, a state abbreviation or an internally maintained holder code which translates into a state name or abbreviation. There is some disagreement among commentators over whether the U.S. Supreme Court intended a broader definition than appears in the 1981 Act, such as the one included in this section. However, the policy underlying the rules establishing priority among contending states is that unclaimed property should be held by the administrator of the state where the owner is most likely to look for it, which is the state in which the owner resided, i.e. had his or her "last known address", if that state can be determined. It follows that limiting the first priority only to states determined by having an address suitable for mailing frustrates that policy when the owner's state of last known address can be determined another way. Lastly, Section 301(4) provides guidance in situations involving life or endowment policy proceeds, specifying that the address of the insured or annuitant is the "last known address" of the apparent owner, where someone else is entitled to the proceeds, but no address for this individual is known or can be found.

SECTION 302. ADDRESS OF APPARENT OWNER IN THIS STATE. The administrator may take custody of property that is presumed abandoned, whether located in this state, another state, or a foreign country if:

(1) the last-known address of the apparent owner in the records of the holder is in this state; or

(2) the records of the holder do not reflect the identity or last-known address of the apparent owner, but the administrator has determined that the last-known address of the apparent owner is in this state.

Comment

Section 302(1) restates the factual situation in *Texas v. New Jersey*, *supra*. As the court there said ". . . the address on the records of a debtor, which in most cases will be the only one available, should be the only relevant last known address." Section 302(2) covers the situation in which, on the basis of the holder's records, the identity of the person entitled to the property is unknown. Unlike the 1995 Act version of this provision (Section 4(2)), this Act specifies that the determination as to the "last-known address" may be made by the administrator based on extrinsic evidence and if determined to be in that state, custody of property may be taken.

SECTION 303. IF RECORDS SHOW MULTIPLE ADDRESSES OF APPARENT OWNER.

(a) Except as in subsection (b), if records of a holder reflect multiple addresses for an apparent owner and this state is the state of the most recently recorded address, this state may take custody of property presumed abandoned, whether located in this state or another state.

(b) If it appears from records of the holder that the most recently recorded address of the apparent owner under subsection (a) is a temporary address and this state is the state of the next most recently recorded address that is not a temporary address, this state may take custody of the property presumed abandoned.

Comment

Section 303 does not have an analogue in either the 1981 Act or the 1995 Act. The purpose of this Section is to provide uniform guidance as to which state may take custody of property, when the records reflect multiple addresses for an apparent owner.

SECTION 304. HOLDER DOMICILED IN THIS STATE.

(a) Except as in subsection (b) or Section 302 or 303, the administrator may take custody of property presumed abandoned, whether located in this state, another state, or a foreign country, if the holder is domiciled in this state or is this state or a governmental subdivision, agency, or instrumentality of this state, and

(1) another state or foreign country is not entitled to the property because there is

no last-known address of the apparent owner or other person entitled to the property in the records of the holder; or

(2) the state or foreign country of the last-known address of the apparent owner or other person entitled to the property does not provide for custodial taking of the property.

(b) Property is not subject to custody of the administrator under subsection (a) if the property is specifically exempt from custodial taking under the law of this state or the state or foreign country of the last-known address of the apparent owner.

(c) If a holder's state of domicile has changed since the time property was presumed abandoned, the holder's state of domicile in this section is deemed to be the state where the holder was domiciled at the time the property was presumed abandoned.

Comment

Section 304 reflects the secondary priority rule of *Texas v. New Jersey*. There the Supreme Court ruled that when property is owed to a person for whom there is no known address, the property will be subject to being taken into custody by the state of the holder's domicile, provided that another state may later claim upon a showing of proof that the last known address of the person entitled to the property was within its borders**.** Section 304(a)(1) and (a)(2) provide that if the law of the state of the owner's last known address does not provide for taking custody of the unclaimed property or if that state's unclaimed property law is not applicable to the property in question, the property is subject to claim by the state in which the holder is domiciled. If another state does claim the property, it may of course proceed to claim the property under Section 901. Similar to the 1981 Act (Section 3(5)) and the 1995 Act (Section 4(5)), this section provides, in Section 304(3)(b) that the state of domicile may claim abandoned property where the last known address of the owner is in a foreign country. The issue was not dealt with by the Supreme Court in *Texas v. New Jersey*, but is a rational extension of that ruling. Some argue that the escheat of foreign owned property is not a natural extension of the priority rules, pointing to case law outside of the unclaimed property context and employing a rationale that is not controlling in the context of unclaimed property, wherein a statute implicating foreign property was likened to an unlawful taking. *See e.g., Zschering v. Miller,* 389 U.S. 426 (1968), but the rationale used by the Court in that case is neither controlling nor compelling in the context of unclaimed property. Section 304(3)(b) adds a new provision that, if property is specifically exempt under the laws of either a state or foreign country in which the last known address of the owner is located, the state of holder's domicile cannot take custody. See *N.J. Retail Merchants Assn. v. Eristof, Treasurer*, 669 F.3d 374 (3d Cir. 2012).

SECTION 305. CUSTODY IF TRANSACTION TOOK PLACE IN THIS STATE.

Except as in Section 302, 303, or 304, the administrator may take custody of property presumed abandoned whether located in this state or another state if:

(1) the transaction out of which the property arose took place in this state;

(2) the holder is domiciled in a state that does not provide for the custodial taking of the property, except that if the property is specifically exempt from custodial taking under the law of the state of the holder's domicile, the property is not subject to the custody of the administrator; and

(3) the last-known address of the apparent owner or other person entitled to the property is unknown or in a state that does not provide for the custodial taking of the property, except that if the property is specifically exempt from custodial taking under the law of the state of the last-known address, the property is not subject to the custody of the administrator.

Comment

Section 305 provides for the situation in which neither of the claims to priority established by *Texas v. New Jersey* can be made, but the state has a genuine and important contact with the property. An example of the type of claim which might be made under Section 305 arose in *O'Connor v. Sperry & Hutchinson Co*., 412 A.2d 539 (Pa.1980). There Pennsylvania sought to claim unredeemed trading stamps sold by a corporation domiciled in New Jersey to retailers located in Pennsylvania. Pennsylvania took the position that *Texas v. New Jersey* did not create a jurisdictional bar to a claim by another state when the states which were granted priority were unable to take. There was no first priority claim since there were no last known addresses of the trading stamp purchasers. The second priority claimant, the state of corporate domicile (New Jersey), was not permitted under its law to take custody of trading stamps (*see New Jersey v. Sperry & Hutchinson Co*., 56 N.J.Super. 589, 153 A.2d 691 (1959), affirmed per curiam, 31 N.J. 385, 157 A.2d 505 (1960)). Hence, Pennsylvania urged that in order to prohibit a corporate windfall it should be allowed to claim this property. The Pennsylvania Supreme Court affirmed a lower court decision which overruled Sperry & Hutchinson's motion to dismiss but did not reach the *Texas v. New Jersey* issue. Section 305 provides the newly added provision recognizing that, if property is specifically exempt as unclaimed property under the laws of the state of the last known address of the owner, or that of the holder's domicile, then the state in which the transaction giving rise to the property occurred must recognize the higher priority state's affirmative exemption of the property and cannot take custody of the property because to do so would not give Full Faith and Credit to the laws of a

state with a higher constitutional priority to claim the property. *N.J. Retail Merchants Assn. v. Eristof, Treasurer*, 669 F.3d 374 (3d Cir. 2012). Some commentators contend that *N.J. Retail Merchants* stands as a bar to all "place of transaction" priority rules, however, the Court's ruling envisioned a conflict between so-called "third priority rules" which were non-uniform, something not applicable to this Act. *See also State v. Chubb Corp.,* 570 A.2d 1313 (N.J. Super. Ct. 1989) (permitting custodial escheat of property based on "locale of the transaction").

SECTION 306. TRAVELER'S CHECK, MONEY ORDER, OR SIMILAR INSTRUMENT. The administrator may take custody of sums payable on a traveler's check, money order, or similar instrument presumed abandoned to the extent permissible under [12 U.S.C. Sections 2501 through 2503[, as amended]] [federal law].

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted.*

Comment

Travelers checks, money orders and similar instruments are covered under Section 306 which states the rule enacted by Congress in 12 U.S.C. Sections 2501 et seq. The Congressional action was in response to the Supreme Court decision in Pennsylvania v. New York, 407 U.S. 206 (1972), which held that the state of corporate domicile was entitled to claim money orders when there was no last known address of the purchaser although the property had been purchased in other states. Pursuant to the Congressional mandate, Section 306 substitutes as the test for asserting a claim to travelers checks, money orders and similar instruments the place of purchase rather than the state of incorporation of the issuer.

SECTION 307. BURDEN OF PROOF TO ESTABLISH ADMINISTRATOR'S RIGHT TO CUSTODY. If the administrator asserts a right to custody of unclaimed property, the administrator has the burden to prove:

(1) the existence and amount of the property;

(2) the property is presumed abandoned; and

(3) the property is subject to the custody of the administrator.

Comment

Section 307 is an expansion of the concept of the administrator's burden of proof. Where the 1995 Act provided this burden of proof on the administrator when the property at issue was evidenced by a check or draft, this Act acknowledges that the burden of proof as to all items of property is on the administrator.

[ARTICLE] 4

REPORT BY HOLDER

SECTION 401. REPORT REQUIRED BY HOLDER.

(a) A holder of property presumed abandoned and subject to the custody of the administrator shall report in a record to the administrator concerning the property. The administrator may not require a holder to file a paper report.

(b) A holder may contract with a third party to make the report required under subsection (a).

(c) Whether or not a holder contracts with a third party under subsection (b), the holder is responsible:

(1) to the administrator for the complete, accurate, and timely reporting of property presumed abandoned; and

(2) for paying or delivering to the administrator property described in the report.

Comment

Section 401(a) provides that the administrator may not require a holder to file a paper report. This reflects technological advancements in unclaimed property reporting, as well as the superior efficiency of submitting reports electronically. For those states still requiring paper submissions, this provision serves as an incentive to modernize their unclaimed property reporting process.

Sections 401(b)-(c) provide that holders may contract with third parties for the preparation and filing of unclaimed property reports. Third party contracting has become a common practice within the unclaimed property area since the 1995 Act. However, Section 401(c)(1)-(2) clarifies that despite the use of a third party contractor, the holder remains ultimately responsible for the timeliness and accuracy of the report, as well as for the payment or delivery of property described in the report.

SECTION 402. CONTENT OF REPORT.

(a) The report required under Section 401 must:

(1) be signed by or on behalf of the holder and verified as to its completeness and accuracy;

(2) if filed electronically, be in a secure format approved by the administrator which protects confidential information of the apparent owner in the same manner as required of the administrator and the administrator's agent under [Article] 14;

(3) describe the property;

(4) except for a traveler's check, money order, or similar instrument, contain the name, if known, last-known address, if known, and Social Security number or taxpayer identification number, if known or readily ascertainable, of the apparent owner of property with a value of $[50] or more;

(5) for an amount held or owing under a life or endowment insurance policy or annuity contract, contain the name and last-known address of the insured, annuitant or other apparent owner of the policy or contract and of the beneficiary;

(6) for property held in or removed from a safe-deposit box, indicate the location of the property, where it may be inspected by the administrator, and any amounts owed to the holder under Section 606;

(7) contain the commencement date for determining abandonment under [Article] 2;

(8) state that the holder has complied with the notice requirements of Section 501;

(9) identify property that is a non-freely transferable security and explain why it is a non-freely transferable security; and

(10) contain other information the administrator prescribes by rules.

(b) A report under Section 401 may include in the aggregate items valued under $[50] each. If the report includes items in the aggregate valued under $[50] each, the administrator may not require the holder to provide the name and address of an apparent owner of an item unless the information is necessary to verify or process a claim in progress by the apparent owner.

(c) A report under Section 401 may include personal information as defined in Section 1401(a) about the apparent owner or the apparent owner's property to the extent not otherwise prohibited by federal law.

(d) If a holder has changed its name while holding property presumed abandoned or is a successor to another person that previously held the property for the apparent owner, the holder must include in the report under Section 401 its former name or the name of the previous holder, if any, and the known name and address of each previous holder of the property.

Comment

Sections 402(a)(2) and (c) require the protection of confidential information contained in electronically submitted reports. Article 14 of this Act is devoted to confidential information. Its inclusion is in response to the growing threat of cybersecurity breaches in recent years. Section 402(c) also recognizes the fact that reports convey sensitive, personal information and are to be protected.

Section 402(b) is a departure from the 1995 Act in that holders reporting in the aggregate items valued under $50 may not be required by the administrator to provide the name and address of an apparent owner of an item, if the information is not necessary to verify or process a claim in progress by the apparent owner. The 1995 Act requires the name and address of an apparent owner for items valued over $50 each.

Section 402(a)(9) reflects a new approach toward non-freely transferable securities, which are exempt under Section 603(h). However, such securities must still be reported, and the holder must explain why the security is non-freely transferable

SECTION 403. WHEN REPORT TO BE FILED.

(a) Except as otherwise provided in subsection (b) and subject to subsection (c), the report under Section 401 must be filed before November 1 of each year and cover the 12 months preceding July 1 of that year.

(b) Subject to subsection (c), the report under Section 401 to be filed by an insurance company must be filed before May 1 of each year for the immediately preceding calendar year.

(c) Before the date for filing the report under Section 401, the holder of property presumed abandoned may request the administrator to extend the time for filing. The administrator may grant an extension. If the extension is granted, the holder may pay or make a partial payment of the amount the holder estimates ultimately will be due. The payment or partial payment terminates accrual of interest on the amount paid.

Comment

Section 403(c) retains the flexibility provided to the holder and to the administrator by the 1995 Act in cases where the holder's timely compliance is not feasible. In the past, some administrators have felt themselves to be without authority to extend the filing deadlines, or to accept less than a final report. This Section makes clear that an extension can be had for good cause, and the holder can limit its exposure to interest by making a partial payment.

SECTION 404. RETENTION OF RECORDS BY HOLDER. A holder required to file a report under Section 401 shall retain records for 10 years after the later of the date the report was filed or the last date a timely report was due to be filed, unless a shorter period is provided by rule of the administrator. The holder may satisfy the requirement to retain records under this section through an agent. The records must contain:

(1) the information required to be included in the report;

(2) the date, place, and nature of the circumstances that gave rise to the property right;

(3) the amount or value of the property;

(4) the last address of the apparent owner, if known to the holder; and

(5) if the holder sells, issues, or provides to others for sale or issue in this state traveler's checks, money orders, or similar instruments, other than third-party bank checks, on which the holder is directly liable, a record of the instruments while they remain outstanding indicating the state and date of issue.

Comment

Section 404 does not require the holder to obtain the address of the owner. For example, a record of the address of the purchaser or donee of a gift certificate often is not obtained. However, if the address is obtained it should be retained by the holder.

Initially, the period for which records of address must be retained is established at 10 years from the date the property was first reportable as abandoned property. However, Section 404 permits a state to shorten this period by rule. Because the reporting practices of holders vary, an administrator will want to consider such factors as the burden imposed on the holder in maintaining such records, the opportunity of returning the property, and the type of business of the holder. For example, in the case of property that would be reportable in the aggregate without the name and apparent owner under Section 402(b), a state may adopt a rule providing for a relatively short record retention period on condition that the holder maintain a record sufficient to satisfy the requirements of *Texas v. New Jersey* that there be a last known address or that the state can prove that the last known address of the creditor was within its borders.

Subsections (1)-(4) of Section 404 specify the types of information that holders must retain in their records. This is intended to ensure that a state has a complete and accurate record from which to determine and assess unclaimed property liability, while, simultaneously, reducing the reliance and need for estimation.

Subsection (5) of Section 404 is designed to ensure that the information required for asserting a claim to travelers checks~~,~~ money orders, and similar instruments is retained by issuers of travelers checks, money orders and similar instruments.

SECTION 405. PROPERTY REPORTABLE AND PAYABLE OR DELIVERABLE ABSENT OWNER DEMAND. Property is reportable and payable or deliverable under this [act] even if the owner fails to make demand or present an instrument or document otherwise required to obtain payment.

Comment

Section 405 is intended to make clear that property is reportable notwithstanding that the owner, who has lost or may otherwise have forgotten his or her entitlement to property, fails to present the holder evidence of ownership or to make a demand for payment. See *Connecticut Mutual Life Ins. Co. v. Moore,* 333 U.S. 541 (1948), in which the Court stated "When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties." See also *Provident Institution for Savings v. Malone*, 221 U.S. 660 (1911), involving savings account; *Insurance Co. of N. Am. v. Marshall Field & Co*., 83 Ill. App. 3d 811 (1980), involving gift certificates; *State of West Virginia ex rel. Perdue v. Nationwide Life Ins. Co*., 777 S.E.2d 11 (W.Va. 2015), involving life insurance proceeds.

[ARTICLE] 5

NOTICE TO APPARENT OWNER OF PROPERTY PRESUMED ABANDONED

SECTION 501. NOTICE TO APPARENT OWNER BY HOLDER.

(a) Subject to subsection (b), the holder of property presumed abandoned shall send to the apparent owner notice by first-class United States mail that complies with Section 502 in a format acceptable to the administrator not more than 180 days nor less than 60 days before filing the report under Section 401 if:

(1) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be invalid and is sufficient to direct the delivery of first-class United States mail to the apparent owner; and

(2) the value of the property is $[50] or more.

(b) If an apparent owner has consented to receive electronic-mail delivery from the holder, the holder shall send the notice described in subsection (a) both by first-class United States mail to the apparent owner's last-known mailing address and by electronic mail, unless the holder believes that the apparent owner's electronic-mail address is invalid.

Comment

A version of Section 501 appears in the 1981 and 1995 Acts under sections covering holder reports of unclaimed property. This Act has extended the outermost time limit for a holder to send notice from 120 days before the report is filed to 180 days before the report is filed. And, if the property has a value of $50 or more, and the holder's records to not disclose the address to be inaccurate, the notice must also be sent by U.S. First Class Mail, even where the apparent owner has consented to notice by electronic mail. The delivery specification is intended to create uniformity and remove uncertainty as to the proper form of notice. Other efforts to locate the owner are no longer required.

SECTION 502. CONTENTS OF NOTICE BY HOLDER.

(a) Notice under Section 501 must contain a heading that reads substantially as follows: "Notice. The [State] of [insert name of state] requires us to notify you that your property may be transferred to the custody of the [state's unclaimed property administrator] if you do not contact us before (insert date that is 30 days after the date of this notice).".

(b) The notice under Section 501 must:

(1) identify the nature and, except for property that does not have a fixed value, the value of the property that is the subject of the notice;

(2) state that the property will be turned over to the administrator;

(3) state that after the property is turned over to the administrator an apparent owner that seeks return of the property must file a claim with the administrator;

(4) state that property that is not legal tender of the United States may be sold by the administrator; and

(5) provide instructions that the apparent owner must follow to prevent the holder from reporting and paying or delivering the property to the administrator.

Comment

Section 502 sets out a detailed list of items that must be contained in the notice sent to apparent owners by holders. This specificity is aimed at creating uniformity, as well as protecting the rights of apparent owners to their property, by ensuring to the extent possible, that

owners are made fully aware of the unclaimed property process.

SECTION 503. NOTICE BY ADMINISTRATOR.

(a) The administrator shall give notice to an apparent owner that property presumed abandoned and appears to be owned by the apparent owner is held by the administrator under this [act].

(b) In providing notice under subsection (a), the administrator shall:

(1) except as otherwise provided in paragraph (2), send written notice by first-class United States mail to each apparent owner of property valued at $[50] or more held by the administrator, unless the administrator determines that a mailing by first-class United States mail would not be received by the apparent owner, and, in the case of a security held in an account for which the apparent owner had consented to receiving electronic mail from the holder, send notice by electronic mail if the electronic-mail address of the apparent owner is known to the administrator instead of by first-class United States mail; or

(2) send the notice to the apparent owner's electronic-mail address if the administrator does not have a valid United States mail address for an apparent owner, but has an electronic-mail address that the administrator does not know to be invalid.

(c) In addition to the notice under subsection (b), the administrator shall:

(1) publish every [six] months in at least one newspaper of general circulation in each [county] in this state notice of property held by the administrator which must include:

(A) the total value of property received by the administrator during the preceding [six]-month period, taken from the reports under Section 401;

(B) the total value of claims paid by the administrator during the preceding [six]-month period;

(C) the Internet web address of the unclaimed property website maintained

by the administrator;

(D) a telephone number and electronic-mail address to contact the administrator to inquire about or claim property; and

(E) a statement that a person may access the Internet by a computer to search for unclaimed property and a computer may be available as a service to the public at a local public library; and

(2) maintain a website or database accessible by the public and electronically searchable which contains the names reported to the administrator of all apparent owners for whom property is being held by the administrator.

(d) The website or database maintained under subsection (c)(2) must include instructions for filing with the administrator a claim to property and a printable claim form with instructions for its use.

(e) In addition to giving notice under subsection (b), publishing the information under subsection (c)(1) and maintaining the website or database under subsection (c)(2), the administrator may use other printed publication, telecommunication, the Internet, or other media to inform the public of the existence of unclaimed property held by the administrator.

Legislative Note: *A state that does not have counties should substitute the name of its local governmental entity in subsection (c)(1).*

Comment

The administrator's notice requirement has been updated from prior acts to reflect the growing and varied forms of communicating and transmitting information used by apparent owners in contemporary times. As reflected in Section 503(b), stakeholders in the securities industry were particularly interested in allowing notice by electronic mail. Where prior acts required mere publication of lists by administrators, this Act puts a greater emphasis on facilitating administrator outreach through publication and websites or similar databases to apparent owners to increase awareness of their property and how to claim it.

SECTION 504. COOPERATION AMONG STATE OFFICERS AND AGENCIES TO LOCATE APPARENT OWNER. Unless prohibited by law of this state other than this [act], on request of the administrator, each officer, agency, board, commission, division, and department of this state, any body politic and corporate created by this state for a public purpose, and each political subdivision of this state shall make its books and records available to the administrator and cooperate with the administrator to determine the current address of an apparent owner of property held by the administrator under this [act].

Comment

This section is new and is designed to facilitate administrators under this Act accessing information in the possession of other state officials which may help identify and locate owners of unclaimed property.

[ARTICLE] 6

TAKING CUSTODY OF PROPERTY BY ADMINISTRATOR

SECTION 601. DEFINITION OF GOOD FAITH. In this [article], payment or delivery of property is made in good faith if a holder:

(1) had a reasonable basis for believing, based on the facts then known, that the property was required or permitted to be paid or delivered to the administrator under this [act]; or

(2) made payment or delivery:

(A) in response to a demand by the administrator or administrator's agent; or

(B) under a guidance or ruling issued by the administrator which the holder reasonably believed required or permitted the property to be paid or delivered.

Comment

The definition of "good faith" under this Act has been modified from the definition in the 1981 Act (Section 20) and the 1995 Act (Section 10). Section 601(1) was incorporated from the 1981 and 1995 Act definitions. However, Sections 601(2)(A)-(B) are entirely new based on holders' response to actions of or guidance from administrators.

SECTION 602. DORMANCY CHARGE.

(a) A holder may deduct a dormancy charge from property required to be paid or delivered to the administrator if:

(1) a valid contract between the holder and the apparent owner authorizes imposition of the charge for the apparent owner's failure to claim the property within a specified time; and

(2) the holder regularly imposes the charge and regularly does not reverse or otherwise cancel the charge.

(b) The amount of the deduction under subsection (a) is limited to an amount that is not unconscionable considering all relevant factors, including the marginal transactional costs incurred by the holder in maintaining the apparent owner's property and any services received by the apparent owner.

Comment

The 1995 Act provides that dormancy charges are permissible to the extent these charges are not "unconscionable." (Section 5). This limitation was drawn from Section 302 of the Uniform Commercial Code but the 1995 Act does not provide a definition of "unconscionable." This Act offers some context as to when amounts might be deemed unconscionable, such as consideration of the marginal transactional costs incurred by the holder, as well as any services received by the apparent owner, compared to the amount of charge assessed.

SECTION 603. PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.

(a) Except as otherwise provided in this section, on filing a report under Section 401, the holder shall pay or deliver to the administrator the property described in the report.

(b) If property in a report under Section 401 is an automatically renewable deposit and a penalty or forfeiture in the payment of interest would result from paying the deposit to the administrator at the time of the report, the date for payment of the property to the administrator is

extended until a penalty or forfeiture no longer would result from payment, if the holder informs the administrator of the extended date.

(c) Tangible property in a safe-deposit box may not be delivered to the administrator until [120] days after filing the report under Section 401.

(d) If property reported to the administrator under Section 401 is a security, the administrator may:

(1) make an endorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer, its transfer agent, or the securities intermediary to transfer the security; or

(2) dispose of the security under Section 702.

(e) If the holder of property reported to the administrator under Section 401 is the issuer of a certificated security, the administrator may obtain a replacement certificate in physical or book-entry form under [insert citation to Section 8-405 of the Uniform Commercial Code]. An indemnity bond is not required.

(f) The administrator shall establish procedures for the registration, issuance, method of delivery, transfer, and maintenance of securities delivered to the administrator by a holder.

(g) An issuer, holder, and transfer agent or other person acting under this section under instructions of and on behalf of the issuer or holder s not liable to the apparent owner for, and must be indemnified by the state against, a claim arising with respect to property after the property has been delivered to the administrator.

(h) A holder is not required to deliver to the administrator a security identified by the holder as a non-freely transferable security. If the administrator or holder determines that a security is no longer a non-freely transferable security, the holder shall deliver the security on the

next regular date prescribed for delivery of securities under this [act]. The holder shall make a determination annually whether a security identified in a report filed under Section 401 as a non-freely transferable security is no longer a non-freely transferable security.

Comment

Section 603 largely tracks Section 8 of the 1995 Act, with a few modifications.

Section 603(b) which permits a delay in payment to the administrator of an automatically renewable deposit that is subject to penalty or forfeiture, now allows the holder to inform the administrator of the date when the property will be payable to the administrator and obtain an extension without incurring a penalty or causing forfeiture.

Sections 603(d) and (e) particularize the general duty stated in Section 603(a) with respect to investment securities, including securities positions held directly and securities positions held indirectly through accounts with brokers or other intermediaries (referred to as a "security entitlement" under revised Article 8 of the Uniform Commercial Code). The administrator has the same rights under UCC Article 8 as other persons who succeed by operation of law to securities or security entitlements, such as the executor or administrator of a decedent. Section 603(e) deals with situations where the holder reporting abandoned property is itself the issuer of a certificated security, and hence does not have the original certificate to turn over to the administrator. And, Section 603(e) provides that the administrator can invoke the provisions of UCC Article 8 governing replacement certificates, without being required to post an indemnity bond.

Section 603(f) requires the administrator to establish procedures for the registration, issuance, method of delivery, transfer and maintenance of securities delivered to the administrator. This is intended to create clarity and to reduce conflict between holders and administrators regarding the proper form.

Section 603(g) indemnifies a person causing a replacement certificate to be issued to the administrator from any claims that the person acted wrongfully in so doing. The indemnification is desirable in that it eliminates any duty of the transferring authority to make an independent investigation into whether the listed owner of the security is in fact missing, or into other factors which might affect the administrator's right to obtain custody of the property.

Section 603(h) reflects the new exemption in this Act for non-freely transferable securities, and provides that such securities are not required to be paid or delivered to the administrator.

SECTION 604. EFFECT OF PAYMENT OR DELIVERY OF PROPERTY TO ADMINISTRATOR.

(a) On payment or delivery of property to the administrator under this [act], the

administrator as agent for the state assumes custody and responsibility for safekeeping the property. A holder that pays or delivers property to the administrator in good faith and substantially complies with Sections 501 and 502 is relieved of liability arising thereafter with respect to payment or delivery of the property to the administrator.

(b) This state shall defend and indemnify a holder against liability on a claim against the holder resulting from the payment or delivery of property to the administrator made in good faith and after the holder substantially complied with Sections 501 and 502.

Comment

When property is delivered to the administrator, the holder is relieved of all liability for any delivery made in good faith. Section 601 sets forth the definition of good faith which *inter alia* allows the holder to rely on determinations as to reportability made by the administrator.

If after property has been delivered to the administrator, a person or another state makes a claim against the holder for the property, the state, upon request, is required to defend the holder and to provide indemnification against any liability asserted against the holder with respect to the property turned over to the administrator in good faith.

SECTION 605. RECOVERY OF PROPERTY BY HOLDER FROM ADMINISTRATOR.

(a) A holder that under this [act] pays money to the administrator may file a claim for reimbursement from the administrator of the amount paid if the holder:

(1) paid the money in error; or

(2) after paying the money to the administrator, paid money to a person the holder reasonably believed entitled to the money.

(b) If a claim for reimbursement under subsection (a) is made for a payment made on a negotiable instrument, including a traveler's check, money order, or similar instrument, the holder must submit proof that the instrument was presented and payment was made to a person the holder reasonably believed entitled to payment. The holder may claim reimbursement even

if the payment was made to a person whose claim was made after expiration of a period of limitation on the owner's right to receive or recover property, whether specified by contract, statute, or court order.

(c) If a holder is reimbursed by the administrator under subsection (a)(2), the holder may also recover from the administrator income or gain under Section 607 that would have been paid to the owner if the money had been claimed from the administrator by the owner to the extent the income or gain was paid by the holder to the owner.

(d) A holder that under this [act] delivers property other than money to the administrator may file a claim for return of the property from the administrator if:

(1) the holder delivered the property in error; or

(2) the apparent owner has claimed the property from the holder.

(e) If a claim for return of property under subsection (d) is made, the holder shall include with the claim evidence sufficient to establish that the apparent owner has claimed the property from the holder or that the property was delivered by the holder to the administrator in error.

(f) The administrator may determine that an affidavit submitted by a holder is evidence sufficient to establish that the holder is entitled to reimbursement or to recover property under this section.

(g) A holder is not required to pay a fee or other charge for reimbursement or return of property under this section.

(h) Not later than 90 days after a claim is filed under subsection (a) or (d), the administrator shall allow or deny the claim and give the claimant notice of the decision in a record. If the administrator does not take action on a claim during the 90 day period, the claim is deemed denied.

(i) The claimant may initiate a proceeding under [the state administrative procedures act] for review of the administrator's decision or the deemed denial under subsection (h) not later than:

(1) Thirty days following receipt of the notice of the administrator's decision; or

(2) One hundred twenty days following the filing of a claim under subsection (a) or (d) in the case of a deemed denial under subsection (h).

(j) A final decision in an administrative proceeding initiated under subsection (i) is subject to judicial review by the [court][as a matter of right in a de novo proceeding on the record in which either party is entitled to introduce evidence as a supplement to the record].

Legislative Note: *A state that has or allows judicial review of the decision of an administrative proceeding should delete the brackets at the end of subsection (j) and retain the language creating a right to de novo review on the record with either party being free to submit additional evidence to supplement this record. If de novo review is not possible in the state, the state should delete the bracketed language.*

Comment

Section 605 modifies provisions found in the 1981 (Section 20) and 1995 Acts (Section 10). Section 605(a) and Section 605(d) reflect the added entitlement provided by this Act of holder reimbursement where money is paid or other property delivered to the administrator in error. Section 605(c) now explicitly provides in the text of the Act concepts reflected in comments to Section 20 of the 1981 Act and Section 10 of the 1995 Act, namely, that when the holder is entitled to reimbursement, any income or gain on property held by the administrator and otherwise payable to the owner under Section 607, shall also be paid to the holder.

SECTION 606. PROPERTY REMOVED FROM SAFE-DEPOSIT BOX. Property removed from a safe-deposit box and delivered under this [act] to the administrator under this [act] is subject to the holder's right to reimbursement for the cost of opening the box and a lien or contract providing reimbursement to the holder for unpaid rent charges for the box. The administrator shall reimburse the holder from the proceeds remaining after deducting the expense incurred by the administrator in selling the property.

Comment

Section 608 authorizes the administrator to take custody of property prior to the time for presuming abandonment. Administrators have expressed a need for this authority to enable them to take possession of property, such as the contents of a safe deposit box repository, when the holder is terminating business but the property is not yet reportable. Additionally, other holders which have conducted business in the state and are ceasing operations might use the provisions of that section.

SECTION 607. CREDITING INCOME OR GAIN TO OWNER'S ACCOUNT.

(a) If property other than money is delivered to the administrator, the owner is entitled to receive from the administrator income or gain realized or accrued on the property before the property is sold. If the property was an interest-bearing demand, savings, or time deposit, the administrator shall pay interest at the lesser of the rate of [insert legal rate] or the rate the property earned while in the possession of the holder. Interest begins to accrue when the property is delivered to the administrator and ends on the earlier of the expiration of 10 years after its delivery or the date on which payment is made to the owner.

(b) Interest on interest-bearing property is not payable under this section for any period before the effective date of this [act], unless authorized by [law superseded by this [act]].

Legislative Note: *A state should insert which laws are superseded by this Act in subsection (b).*

Comment

Under this section the owner of interest earning bonds or bank deposits, or dividend paying stock, will generally receive interest or income which the property earned while in the administrator's custody.

SECTION 608. ADMINISTRATOR'S OPTIONS AS TO CUSTODY.

(a) The administrator may decline to take custody of property reported under Section 401 if the administrator determines that:

(1) the property has a value less than the estimated expenses of notice and sale of the property; or

(2) taking custody of the property would be unlawful.

(b) A holder may pay or deliver property to the administrator before the property is presumed abandoned under this [act] if the holder:

(1) sends the apparent owner of the property notice required by Section 501 and provides the administrator evidence of the holder's compliance with this paragraph;

(2) includes with the payment or delivery a report regarding the property conforming to Section 402; and

(3) first obtains the administrator's consent in a record to accept payment or delivery.

(c) A holder's request for the administrator's consent under subsection (b)(3) must be in a record. If the administrator fails to respond to the request not later than 30 days after receipt of the request, the administrator is deemed to consent to the payment or delivery of the property and the payment or delivery is considered to have been made in good faith.

(d) On payment or delivery of property under subsection (b), the property is presumed abandoned.

Comment

Section 608 is a departure from its analogue in the 1981 Act (Section 27) and in the 1995 Act (Section 17). Section 608(b) now provides that, in addition to obtaining the consent of the administrator, the holder must meet several other requirements, including providing notice to the apparent owner (as set forth in Section 501), before the holder may deliver property to the administrator before it is presumed abandoned. Where the 1981 and 1995 Acts provide that the prematurely delivered property would not be presumed abandoned until the relevant period has run, this Act provides that the property is presumed abandoned upon delivery and meeting the requirements of this section.

SECTION 609. DISPOSITION OF PROPERTY HAVING NO SUBSTANTIAL VALUE; IMMUNITY FROM LIABILITY.

[(a)] If the administrator takes custody of property delivered under this [act] and later

determines that the property has no substantial commercial value or that the cost of disposing of the property will exceed the value of the property, the administrator may return the property to the holder or destroy or otherwise dispose of the property.

[(b) An action or proceeding may not be commenced against the state, an agency of the state, the administrator, another officer, employee, or agent of the state, or a holder for or because of an act of the administrator under this section, except for intentional misconduct or malfeasance.]

Legislative Note: *A state should determine whether subsection (b) is covered by its sovereign immunity tort claims act and decide how to proceed with subsection (b). If it chooses not to include subsection (b), the state should remove it and the brackets from around [a].*

Comment

This section provides for the disposition of property which has no commercial value. As an example, the contents of safety deposit boxes often include such items as rent receipts, personal correspondence and lapsed insurance policies. In such cases, these contents might have some personal significance to the owner, which the administrator would take into consideration in determining for what period of time the administrator will hold the property awaiting a claim by the owner. However, in the usual situation there will be no interest to be preserved by maintaining this property under state custody.

Under this section the administrator would be free to retain property having no commercial value. Further, the administrator could transfer it to other agencies or institutions which might have an interest in the property because of its historical value or other independent significance.

SECTION 610. PERIODS OF LIMITATION AND REPOSE.

(a) Expiration, before, on, or after the effective date of this [act], of a period of limitation on an owner's right to receive or recover property, whether specified by contract, statute, or court order, does not prevent the property from being presumed abandoned or affect the duty of a holder under this [act] to file a report or pay or deliver property to the administrator.

(b) The administrator may not commence an action or proceeding to enforce this [act] with respect to the reporting, payment, or delivery of property more than five years after the

holder filed a non-fraudulent report under Section 401 with the administrator. The parties may agree in a record to extend the limitation in this subsection.

(c) The administrator may not commence an action, proceeding, or examination with respect to a duty of a holder under this [act] more than 10 years after the duty arose.

Comment

Section 610(a) is consistent with Section 29 of the 1981 Act and Section 19 of the 1995 Act, the so-called "anti-limitations provisions," such as these. Some contend that anti-limitations provisions are inconsistent with the U.S. Supreme Court's recognition that priority rules are established based upon the debtor-creditor relationship, as created by state law, *see e.g., Delaware v. New York*, 507 U.S. 490, 503 (the holder's legal obligations…defin[e] the escheatable property at issue"), however, this contention is not as persuasive as the rationale which underlies the holdings of the various courts that have upheld the policy underlying anti-limitations provisions of preventing "private escheat." *See, e.g., Blue Cross of N. California v. Cory,* 120 Cal. App. 3d 723,740 (1981).

Section 610(b) is a departure from the 1981 (Section 29) and 1995 Acts (Section 19). Under this section, an administrator is precluded from bringing an action to enforce this Act five years after the holder has filed a non-fraudulent report in compliance with Article 4. Variations of this provision currently exist in several states' unclaimed property acts. *See, e.g.,* Idaho Code Ann. § 14-529; 765 Ill. Comp. Stat. Ann. 1025/23.5; Mo. Ann. Stat. § 447.548; Neb. Rev. Stat. § 69-1315; Okla. Stat. Ann. tit. 60, § 666(C); Va. Code Ann. § 55-210.17.B.-C.

Section 610(c) is a return to the limitations provision provided for in the 1981 Act, which provides for a 10 year statute of limitations, without any contingencies (Section 29 of the 1981 Act). By contrast, the 1995 Act, at Section 19, provides that the 10 year limitations period is only effective as to specifically identified property included in a report as filed. This is not the rule recognized by this Act. This 10 year limitations period provides a holder with a clear cut-off date on which it can rely.

[ARTICLE] 7

SALE OF PROPERTY BY ADMINISTRATOR

SECTION 701. PUBLIC SALE OF PROPERTY.

(a) Subject to Section 702, not earlier than [three] years after receipt of property presumed abandoned, the administrator may sell the property.

(b) Before selling property under subsection (a), the administrator shall give notice to the

public of:

(1) the date of the sale; and

(2) a reasonable description of the property.

(c) A sale under subsection (a) must be to the highest bidder:

(1) at public sale at a location in this state which the administrator determines to be the most favorable market for the property;

(2) on the Internet; or

(3) on another forum the administrator determines is likely to yield the highest net proceeds of sale.

(d) The administrator may decline the highest bid at a sale under this section and reoffer the property for sale if the administrator determines the highest bid is insufficient.

(e) If a sale held under this section is to be conducted other than on the Internet, the administrator must publish at least one notice of the sale, at least [three] weeks but not more than [five] weeks before the sale, in a newspaper of general circulation in the [county] in which the property is sold.

Comment

Section 701 corresponds to Section 22(a) of the 1981 Uniform Act and Section 12(a) of the 1995 Uniform Act. However, this section makes the sale of property by the administrator permissible rather than obligatory. Date of the proposed sale and a reasonable description is now required to be part of the notice given the public and the time frame for published notice of sale other than on the Internet or any other forum now can be no longer than the week before sale. Further, it gives the administrator the right to conduct a sale on the Internet if the administrator determines it is likely to yield the highest net proceeds.

SECTION 702. DISPOSAL OF SECURITIES.

(a) The administrator may not sell or otherwise liquidate a security until three years after the administrator receives the security and gives the apparent owner notice under Section 503 that the administrator holds the security.

(b) The administrator may not sell a security listed on an established stock exchange for less than the price prevailing on the exchange at the time of sale. The administrator may sell a security not listed on an established exchange by any commercially-reasonable method.

Comment

In order to give additional protection to the missing owner of a security which has been presumed abandoned, subsection (a) directs the administrator to hold that security for at least three years and requires that the apparent owner be given notice that the administrator holds the security. Subsection (b) is similar to Section 22(b) of the 1981 Uniform Act and Section 12(b) of the 1995 Uniform Act, except that it provides the administrator with greater latitude in selling a security which is not listed on an established exchange.

SECTION 703. RECOVERY OF SECURITIES OR VALUE BY OWNER.

(a) If the administrator sells a security before the expiration of six years after delivery of the security to the administrator, an apparent owner that files a valid claim under this [act] of ownership of the security before the six-year period expires is entitled, at the option of the administrator, to receive:

(1) replacement of the security; or

(2) the market value of the security at the time the claim is filed, plus dividends, interest, and other increments on the security up to the time the claim is paid.

(b) Replacement of the security or calculation of market value under subsection (a) must take into account a stock split, reverse stock split, stock dividend, or similar corporate action.

(c) A person that makes a valid claim under this [act] of ownership of a security after expiration of six years after delivery of the security to the administrator is entitled to receive:

(1) the security the holder delivered to the administrator, if it is in the custody of the administrator, plus dividends, interest, and other increments on the security up to the time the administrator delivers the security to the person; or

(2) the net proceeds of the sale of the security, plus dividends, interest, and other

increments on the security up to the time the security was sold.

Comment

As provided is Section 703, the administrator is permitted to sell the security after three years following delivery of the security to the administrator. If the administrator sells the security after the three-year period prescribed in Section 703, a missing owner may still make a claim for the security within six years following delivery to the administrator. If a missing owner makes a claim within this six-year period, the administrator must decide to either replace the security or give the owner the market value of the security on the date it is claimed. Thus there is a genuine incentive for an administrator to hold this property for longer than the permitted three-year period. If a claim is not made until after the six-year period, the owner is only entitled to the security, and accumulated proceeds therefrom, if it is still in the administrator's possession, or the net proceeds of the sale made in accordance with this Article.

It is intended that claims made under this section will be payable out of unclaimed property funds held by the administrator.

SECTION 704. PURCHASER OWNS PROPERTY AFTER SALE. A purchaser of property at a sale conducted by the administrator under this [act] takes the property free of all claims of the owner, a previous holder, or a person claiming through the owner or holder. The administrator shall execute documents necessary to complete the transfer of ownership to the purchaser.

SECTION 705. MILITARY MEDAL OR DECORATION.

(a) The administrator may not sell a medal or decoration awarded for military service in the armed forces of the United States.

(b) The administrator, with the consent of the respective organization under paragraph (1), agency under paragraph (2), or entity under paragraph (3), may deliver a medal or decoration described in subsection (a) to be held in custody for the owner, to:

(1) a military veterans organization qualified under the Internal Revenue Code[, as amended], 26 U.S.C. Section 501(c)(19);

(2) the agency that awarded the medal or decoration; or

(3) a governmental entity.

(c) On delivery under subsection (b), the administrator is not responsible for safekeeping the medal or decoration.

Legislative Note: *In a state in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b)(1).*

Comment

Military medals and decorations are not considered to be abandoned property appropriate for custodial taking. An alternate means of handling them is made available.

[ARTICLE] 8

ADMINISTRATION OF PROPERTY

SECTION 801. DEPOSIT OF FUNDS BY ADMINISTRATOR.

(a) Except as otherwise provided in this section, the administrator shall deposit in the [general fund of the state] all funds received under this [act], including proceeds from the sale of property under [Article] 7.

(b) The administrator shall maintain an account with an amount of funds the administrator reasonably estimates is sufficient to pay claims allowed under this [act] [in each fiscal [year] [quarter]]. If the aggregate amount of claims by owners allowed at any time exceeds the amount held in the account, an excess claim must be paid out of the general funds of the state.

Legislative Note: *A state that allows for continuing appropriations and wants to make the payment of claims out of the general fund of the state a self-executing provision should include the following sentence, or something similar, at the end of subsection (b): "Such funds are hereby appropriated on a continuing basis to the administrator for the purposes of this subsection."*

Comment

States are given the choice in Section 801(a) of where they want to deposit funds received by the administrator after depositing an amount into an account under subsection (b) to pay claims. It is intended, however, that valid claims to be paid that exceed the amount in the account will be paid out of the state's general fund as required by subsection (b**).**

Section 801(a) is a departure from the 1981 and 1995 Acts in that it does not propose a specific amount of funds to be held by the administrator in order to pay claims. The 1981 Act suggested at least $25,000 be held in the account, while the 1995 Act suggested at least $100,000. This Act leaves to the administrator's discretion what a sufficient amount of funds will be. It is contemplated that the amount of the account fund which is ultimately established will reflect a state's experience with paying owners' claims. A further addition to this Act is the requirement that, where the funds held in the account are insufficient to meet the claims of apparent owners, the state must pay the excess amounts from its general fund. This added obligation is intended to ensure that states are properly acting as custodians of these funds.

SECTION 802. ADMINISTRATOR TO RETAIN RECORDS OF PROPERTY.

The administrator shall:

(1) record and retain the name and last-known address of each person shown on a report filed under Section 401 to be the apparent owner of property delivered to the administrator;

(2) record and retain the name and last-known address of each insured or annuitant and beneficiary shown on the report;

(3) for each policy of insurance or annuity contract listed in the report of an insurance company, record and retain the policy or account number, the name of the company, and the amount due or paid; and

(4) for each apparent owner listed in the report, record and retain the name of the holder that filed the report and the amount due or paid.

SECTION 803. EXPENSES AND SERVICE CHARGES OF ADMINISTRATOR.

Before making a deposit of funds received under this [act] to the [general fund of the state], the administrator may deduct:

(1) expenses of disposition of property delivered to the administrator under this [act];

(2) costs of mailing and publication in connection with property delivered to the administrator under this [act];

(3) reasonable service charges; and

(4) expenses incurred in examining records of or collecting property from a putative holder or holder.

SECTION 804. ADMINISTRATOR HOLDS PROPERTY AS CUSTODIAN FOR OWNER. Property received by the administrator under this [act] is held in custody for the benefit of the owner and is not owned by the state.

Comment

Section 804 does not have an analogue in the 1981 Act or 1995 Act. Although the concept of the state as "custodian" is found throughout earlier versions of the Acts, an express statement such as the one in this Act does not exist. Its inclusion is intended to emphasize that states are not entitled to use these funds, without ensuring that the funds will be available to apparent owners if and when they come to claim them.

[ARTICLE] 9

CLAIM TO RECOVER PROPERTY FROM ADMINISTRATOR

SECTION 901. CLAIM OF ANOTHER STATE TO RECOVER PROPERTY.

(a) If the administrator knows that property held by the administrator under this [act] is subject to a superior claim of another state, the administrator shall:

(1) report and pay or deliver the property to the other state; or

(2) return the property to the holder so that the holder may pay or deliver the property to the other state.

(b) The administrator is not required to enter into an agreement to transfer property to the other state under subsection (a).

Comment

Section 901 spells out the requirement that administrators report, pay or deliver property to another state whose claim to the property is superior. Neither the 1981 Act nor the 1995 Act have a comparable provision, although this is implicit in those Acts.

Section 901(a) permits either delivery directly from one state to another, or the return of property to the holder to then pay or deliver the property to the other state. Section 901(b) provides that a formal agreement or record of transfer of property from one state to another is not necessary. This is intended to clarify that such agreements and transfers of property are beyond the scope of Section 1202, which deals with interstate agreements and cooperation.

SECTION 902. WHEN PROPERTY SUBJECT TO RECOVERY BY ANOTHER STATE.

(a) Property held under this [act] by the administrator is subject to the right of another state to take custody of the property if:

(1) the property was paid or delivered to the administrator because the records of the holder did not reflect a last-known address in the other state of the apparent owner and:

(A) the other state establishes that the last-known address of the apparent owner or other person entitled to the property was in the other state; or

(B) under the law of the other state, the property has become subject to a claim by the other state of abandonment;

(2) the records of the holder did not accurately identify the owner of the property, the last-known address of the owner was in another state, and, under the law of the other state, the property has become subject to a claim by the other state of abandonment;

(3) the property was subject to the custody of the administrator of this state under Section 305 and, under the law of the state of domicile of the holder, the property has become subject to a claim by the state of domicile of the holder of abandonment; or

(4) the property:

(A) is a sum payable on a traveler's check, money order, or similar instrument that was purchased in the other state and delivered to the administrator under Section 306; and

(B) under the law of the other state, has become subject to a claim by the other state of abandonment.

(b) A claim by another state to recover property under this section must be presented in a form prescribed by the administrator, unless the administrator waives presentation of the form.

(c) The administrator shall decide a claim under this section not later than [90] days after it is presented. If the administrator determines that the other state is entitled under subsection (a) to custody of the property, the administrator shall allow the claim and pay or deliver the property to the other state.

(d) The administrator may require another state, before recovering property under this section, to agree to indemnify this state and its agents, officers and employees against any liability on a claim to the property.

Comment

Section 902(a)(1) provides that if property was paid to the state of the holder's domicile because the last known address of the owner was not known and it is later established by another state that the last known address of the person entitled to the property was in the other state, the state of domicile should pay the property to the other state.

Section 902(a)(2) addresses the problem of *Nellius v. Tampax, Inc*., 394 A.2d 333 (Del. Ch. Ct. 1978) in which the holder's records did not reflect the fact that the record owner had sold the property to another. The court concluded, under *Texas v. New Jersey*, that the holder's records were controlling and that it could properly report and deliver the property to the state in which its records showed the owner to be resident. However, as provided in *Texas v. New Jersey* and in paragraph 4, the state of the owner's actual residence could then claim the property from the state to which it was initially reported.

Section 902(a)(3) provides that property initially claimed under a "contacts" test because there was no last known address and the state of domicile had no applicable unclaimed property law may be reclaimed by the state of corporate domicile if it enacts an applicable unclaimed

property law.

Section 902(d) provides that the state that initially receives property later claimed by another state may require an indemnification agreement from the claiming state.

SECTION 903. CLAIM FOR PROPERTY BY PERSON CLAIMING TO BE OWNER.

(a) A person claiming to be the owner of property held under this [act] by the administrator may file a claim for the property on a form prescribed by the administrator. The claimant must verify the claim as to its completeness and accuracy.

(b) The administrator may waive the requirement in subsection (a) and may pay or deliver property directly to a person if:

(1) the person receiving the property or payment is shown to be the apparent owner included on a report filed under Section 401;

(2) the administrator reasonably believes the person is entitled to receive the property or payment; and

(3) the property has a value of less than $[250].

Comment

This Act, at Section 903(b), for the first time provides the administrator with the option to waive the formality of a claim being filed where the property's value is below a certain monetary amount, and where the apparent owner's identity is clear.

The claim may be filed or refiled prior to commencing an action under Section 906. The administrator's decision on a claim is not intended to operate as collateral estoppel or res judicata. A person who has commenced an action under Section 906 may also reassert a claim before the administrator if the action has been dismissed without prejudice. However, a claim which has become the subject of a final judgment may not thereafter by refiled with the administrator.

In a departure from the 1981 and 1995 Acts, this Section, at 904(a), provides a standard of proof by which administrators are to evaluate evidence supporting an apparent owner's claim to property. It is a reasonableness standard that it is ultimately deferential to the administrator.

SECTION 904. WHEN ADMINISTRATOR MUST HONOR CLAIM FOR PROPERTY.

(a) The administrator shall pay or deliver property to a claimant under Section 903(a) if the administrator receives evidence sufficient to establish to the satisfaction of the administrator that the claimant is the owner of the property.

(b) Not later than [90] days after a claim is filed under Section 903(a), the administrator shall allow or deny the claim and give the claimant notice in a record of the decision.

(c) If the claim is denied under subsection (b):

(1) the administrator shall inform the claimant of the reason for the denial and specify what additional evidence, if any, is required for the claim to be allowed;

(2) the claimant may file an amended claim with the administrator or commence an action under Section 906; and

(3) the administrator shall consider an amended claim filed under paragraph (2) as an initial claim.

(d) If the administrator does not take action on a claim during the [90] day period following the filing of a claim under Section 903(a), the claim is deemed denied.

Comment

In a departure from the 1981 and 1995 Acts, this Section, at 904(a), provides a standard of proof by which administrators are to evaluate evidence supporting an apparent owner's claim to property. It is a reasonableness standard that is ultimately deferential to the administrator.

SECTION 905. ALLOWANCE OF CLAIM FOR PROPERTY.

(a) Not later than [30] days after a claim is allowed under Section 904(b), the administrator shall pay or deliver to the owner the property or pay to the owner the net proceeds of a sale of the property, together with income or gain to which the owner is entitled under

Section 607. On request of the owner, the administrator may sell or liquidate a security and pay the net proceeds to the owner, even if the security had been held by the administrator for less than three years or the administrator has not complied with the notice requirements under Section 702.

(b) Property held under this [act] by the administrator is subject to a claim for the payment of an enforceable debt the owner owes in this state for:

(1) child-support arrearages, including child-support collection costs and child-support arrearages that are combined with maintenance;

(2) a civil or criminal fine or penalty, court costs, a surcharge, or restitution imposed by a final order of an administrative agency or a final court judgment; or

(3) state [or local] taxes, penalties, and interest that have been determined to be delinquent or as to which notice has been recorded with the [Secretary of State] [or local taxing authority].

(c) Before delivery or payment to an owner under subsection (a) of property or payment to the owner of net proceeds of a sale of the property, the administrator first shall apply the property or net proceeds to a debt under subsection (b) the administrator determines is owed by the owner. The administrator shall pay the amount to the appropriate state [or local] agency and notify the owner of the payment.

(d) The administrator may make periodic inquiries of state [and local] agencies in the absence of a claim filed under Section 903 to determine whether an apparent owner included in the unclaimed-property records of this state have enforceable debts described in subsection (b). The administrator first shall apply the property or net proceeds of a sale of property held by the administrator to a debt under subsection (b) of an apparent owner which appears in the records of

the administrator and deliver the amount to the appropriate state [or local] agency. The administrator shall notify the apparent owner of the payment.

Legislative Note: *A state that wants to include payment for local taxes in subsection (b)(3) should delete the brackets around "local" and "local taxing authority" wherever they appear in the section. However, a state with many different local taxing authorities might not want to include local taxes. If so, the state should delete the bracketed language.*

The words "and local" are bracketed in subsection (d) to allow a state to choose whether to include local agencies as those of which inquiry may be made concerning debts owed by the owner.

Comment

Section 905(b)-(d) is new to this Act. The subsections provide for a priority scheme for the payment of property owed to an apparent owner, taking into account the apparent owner's outstanding obligations and debts. Under Section 905(c), the administrator is to ascertain that property is not subject to claims of certain of the apparent owner's debtors before making payment or delivering property to the owner.

If there are multiple debts of a claimant to be paid under Section 905(b), and there are not sufficient funds to pay them all, the debts should be paid, to the extent possible, in the order in which they are listed in subsection (b).

SECTION 906. ACTION BY PERSON WHOSE CLAIM IS DENIED. Not later than one year after filing a claim under Section 903(a), the claimant may commence an action against the administrator in the [appropriate court] to establish a claim that has been denied or deemed denied under Section 903(d). [On final determination of the action, the court may, on application, award to the [plaintiff] [prevailing party] its reasonable attorney's fees, costs, and expenses of litigation.]

Legislative Note: *The bracketed language at the end of this section may be included or deleted according to the public policy of the state concerning statutory awards of attorney's fees. If the state elects to include attorney's fees, the state must decide whether to restrict the award of attorney's fees to the plaintiff regardless which side prevails or only to the prevailing party.*

Comment

Section 906 largely tracks its analogue in the 1981 Act (Section 26) and the 1995 Act (Section 16). The sole change is that a one year limitation period is imposed on the time during

which a claimant may commence an action against an administrator. The previous Acts did not include such a limitations period.

[ARTICLE] 10

VERIFIED REPORT OF PROPERTY; EXAMINATION OF RECORDS

SECTION 1001. VERIFIED REPORT OF PROPERTY. If a person does not file a report required by Section 401 or the administrator believes that a person may have filed an inaccurate, incomplete, or false report, the administrator may require the person to file a verified report in a form prescribed by the administrator. The verified report must:

(1) state whether the person is holding property reportable under this [act];

(2) describe property not previously reported or about which the administrator has inquired;

(3) specifically identify property described under paragraph (2) about which there is a dispute whether it is reportable under this [act]; and

(4) state the amount or value of the property.

Comment

Section 1001 is designed to facilitate compliance with the Act and provides for the filing of a negative report by the holder if the administrator requires such a report. It allows a holder to minimize disruption which would otherwise be caused to the holder if an examination of records instead were conducted by the administrator.

SECTION 1002. EXAMINATION OF RECORDS TO DETERMINE COMPLIANCE. The administrator, at reasonable times and on reasonable notice, may:

(1) examine the records of a person, including examination of appropriate records in the possession of an agent of the person under examination, if the records are reasonably necessary to determine whether the person has complied with this [act];

(2) issue an administrative subpoena requiring the person or agent of the person to make

records available for examination; and

(3) bring an action seeking judicial enforcement of the subpoena.

Comment

Aside from the requirement that the administrator conduct the examination at reasonable times and upon reasonable notice, the principal limitations on the administrator's right to examine are constitutional limitations. *See generally Temple-Inland, Inc. v. Cook,* 2016 WL 3536710, at *9 (D. Del. June 28, 2016) (finding that, when taken together, several aspects of the State of Delaware's audit of a holder violated substantive due process, including, (1) waiting 22 years to conduct an audit, (2) failing to give holders notice they would need to retain unclaimed property records, and (3) applying a prolonged retroactive period to scope of the audit). Even though the Fourth Amendment to the federal Constitution does not extend as broadly to corporations as to individuals, [Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946)], inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of a governmental interest. [Donovan v. Dewey, 452 U.S. 594 (1980)]. This Act is believed to meet that standard. Also, since one of the dual purposes of this act is the collection of revenue, reference may be made to the cases holding that it is not an unreasonable search to require taxpayers to produce their books and records. [See Annot., "Constitutionality of statutory provisions for examination of records, books, or documents for taxation purpose," 104 ALR 522]

The Act intends that even a person that does not believe it has property in its possession subject to the Act, is nevertheless subject to an examination by the administrator or its agent. It would make no sense for a putative holder to be able to refuse to be subject to an audit on the basis that the holder doesn't have any reportable unclaimed property. That is what the audit is intended to determine or verify.

SECTION 1003. RULES FOR CONDUCTING EXAMINATION.

(a) The administrator shall adopt rules governing procedures and standards for an examination under Section 1002, including rules for use of an estimation, extrapolation, and statistical sampling in conducting an examination.

(b) An examination under Section 1002 must be performed under rules adopted under subsection (a) and with generally accepted examination practices and standards applicable to an unclaimed-property examination.

(c) If a person subject to examination under Section 1002 has filed the reports required under Section 401 and Section 1001 and has retained the records required by Section 404, the

following rules apply:

(1) The examination must include a review of the person's records.

(2) The examination may not be based on an estimate unless the person expressly consents in a record to the use of an estimate.

(3) The person conducting the examination shall consider the evidence presented in good faith by the person in preparing the findings of the examination under Section 1007.

Comment

In adopting rules under Subsection (a), administrators are encouraged to do so in a way that promotes the use of relevant national standards and uniformity of practice among the states. There are generally accepted auditing standards applicable to the conduct of unclaimed property audits based on generally accepted government auditing standards. For example, California has adopted regulations concerning these standards applicable specifically to the policies and procedures governing the activities of third-party auditors who are engaged to conduct audits of holders of unclaimed property. *See, e.g.*, Cal. Civ. Proc. Code § 1571(c). A source used by the Pennsylvania unclaimed property administrator is the generally accepted auditing standards issued by the Comptroller General of the United States. *See* 61 Pa Code § 951.31(b).

SECTION 1004. RECORDS OBTAINED IN EXAMINATION. Records obtained and records, including work papers, compiled by the administrator in the course of conducting an examination under Section 1002:

(1) are subject to the confidentiality and security provisions of [Article] 14 and are not public records;

(2) may be used by the administrator in an action to collect property or otherwise enforce this [act];

(3) may be used in a joint examination conducted with another state, the United States, a foreign country or subordinate unit of a foreign country, or any other governmental entity if the governmental entity conducting the examination is legally bound to maintain the confidentiality and security of information obtained from a person subject to examination in a manner

substantially equivalent to [Article] 14;

(4) must be disclosed, on request, to the person that administers the unclaimed property law of another state for that state's use in circumstances equivalent to circumstances described in this [article], if the other state is required to maintain the confidentiality and security of information obtained in a manner substantially equivalent to [Article] 14;

(5) must be produced by the administrator under an administrative or judicial subpoena or administrative or court order; and

(6) must be produced by the administrator on request of the person subject to the examination in an administrative or judicial proceeding relating to the property.

Comment

Third parties reportedly have sought to subpoena documents obtained by an administrator or its third-party auditors in the course of an unclaimed property audit in litigation unrelated to the audit of a holder under this Act. The provisions of Section 1004(5) are not intended to apply in such situations.

SECTION 1005. EVIDENCE OF UNPAID DEBT OR UNDISCHARGED OBLIGATION.

(a) A record of a putative holder showing an unpaid debt or undischarged obligation is prima facie evidence of the debt or obligation.

(b) A putative holder may establish by a preponderance of the evidence that there is no unpaid debt or undischarged obligation for a debt or obligation described in subsection (a) or that the debt or obligation was not, or no longer is, a fixed and certain obligation of the putative holder.

(c) A putative holder may overcome prima facie evidence under subsection (a) by establishing by a preponderance of the evidence that a check, draft, or similar instrument was:

(1) issued as an unaccepted offer in settlement of an unliquidated amount;

(2) issued but later was replaced with another instrument because the earlier instrument was lost or contained an error that was corrected;

(3) issued to a party affiliated with the issuer;

(4) paid, satisfied, or discharged;

(5) issued in error;

(6) issued without consideration;

(7) issued but there was a failure of consideration;

(8) voided [not later than 90 days] [within a reasonable time] after issuance for a valid business reason set forth in a contemporaneous record; or

(9) issued but not delivered to the third-party payee for a sufficient reason recorded within a reasonable time after issuance.

(d) In asserting a defense under this section, a putative holder may present evidence of a course of dealing between the putative holder and the apparent owner or of custom and practice.

Comment

In establishing the rules for determining the first and second priority states, the rationale used by the Court in *Delaware v. New York*, 507 U.S. 490, 501 (1993) was to analyze the relationship between the debtor who owed an unpaid obligation and was therefore the "holder" of the property, and the creditor−the person to whom the debt was owed was the "owner." In its analysis the Court said: "In framing a state's power of escheat, we must first look to the law that creates property and binds persons to honor property rights. . . First we must determine the precise debtor-creditor relationship as defined by the law that creates the property at issue. . . '[P]roperty and interest in property are creatures of state law. [The] law that creates property necessarily defines the legal relationships under which certain parties ("debtors") must discharge obligations to others [creditors].'" *Id.*

Section 1005 is intended to give greater clarity to the kinds of evidence which the holder can use to rebut the presumption if such evidence is available. It is consistent with cases which have ruled on the matter. See *Insurance Co. of North America v. Knight*, 291 N.E.2d 40 (1972), *Aetna Cas. & Sur. v. State ex rel. Eagerton*, 414 So.2d 455 (Ala. 1982); *Blue Cross of Northern Cal. v. Cory*, 120 Cal. App.3d 723 (1981), *State ex rel. McCann v. Bank of Am.*, N.A., 120 Cal. Rptr. 3d 204, 216 (Ct. App. 2011), *State ex rel. Bowen v. Bank of Am. Corp.*, 23 Cal. Rptr. 3d 746, 760 (Ct. App. 2005) and *Revenue Cabinet v. Blue Cross & Blue Shield*, 702 S.W.2d 433, 435 (Ky. 1986). See also *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229 (D.C. App.

1990). It is also consistent with Article 3-308 of the Uniform Commercial Code. Under U.C.C. Section 3-308(2), "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." The reason for requiring a plaintiff to produce the instrument is "to show that the plaintiff is in fact the holder, and in order to protect the defendant from double liability." 6 Anderson, Uniform Commercial Code, sec. 3-307:4, p. 158 (3rd ed., 1993). The administrator, by establishing issuance of the instrument, succeeds to all rights of the payee. Because the issuer is relieved of all liability on the instrument by paying the obligation to the state as unclaimed property, and is indemnified by the state, there is no chance that the issuer would be held liable twice, and therefore the administrator is not required to produce the instrument in order to possess the same rights as a holder in due course. This provision, however, combined with the statute of repose and record retention provisions, are meant to provide greater fairness in addressing the presumption of property being deemed unclaimed when significant time has lapsed between the original alleged obligation and the determination that such obligation has become unclaimed property.

SECTION 1006. FAILURE OF PERSON EXAMINED TO RETAIN RECORDS.

If a person subject to examination under Section 1002 does not retain the records required by Section 404, the administrator may determine the value of property due using a reasonable method of estimation based on all information available to the administrator, including extrapolation and use of statistical sampling when appropriate and necessary, consistent with examination procedures and standards adopted under Section 1003(a) and in accord with Section 1003(b).

Comment

If a holder has not maintained records as required by this Act, the administrator may use other existing records or reasonable estimation techniques consistent with the established standards adopted pursuant to this Act. The holding in *Texas v. New Jersey* is intended to prevent multiple liability of holders. However, adverse consequences, which might be characterized as "penalties," resulting from failure to maintain records as required by Section 404 could result and, depending on the result obtained and the methodology of estimation employed, could be consistent with that decision. The prospect of double liability should be diminished when statistical sampling is not used to establish an amount of owner addressed liability by a first priority rule state but is instead used, as noted in *Delaware v. New York,* by second priority rule states. 507 U.S. 490, 509 (1993) (rejecting the use of "a statistical surrogate instead of the debtor's records to locate the last known addresses of creditors," as such use of estimation would "vary the application of the primary rule…").

A federal district court in Delaware has recently recognized the outer limits of the use of estimation techniques in an audit. *Temple-Inland, Inc. v. Cook,* 2016 WL 3536710, at *9 (D. Del. June 28, 2016) (finding that, when taken together, several aspects of the State of Delaware's

audit of a holder violated substantive due process, including, (1) waiting 22 years to conduct an audit, (2) failing to give holders notice they would need to retain unclaimed property records, and (3) applying a prolonged retroactive period to scope of the audit).

SECTION 1007. REPORT TO PERSON WHOSE RECORDS WERE EXAMINED. At the conclusion of an examination under Section 1002, the administrator shall provide to the person whose records were examined a complete and unredacted examination report that specifies:

(1) the work performed;

(2) the property types reviewed;

(3) the methodology of any estimation technique, extrapolation, or statistical sampling used in conducting the examination;

(4) each calculation showing the value of property determined to be due; and

(5) the findings of the person conducting the examination.

Comment

Section 1007 was based on MICH. COMP. LAWS ANN. § 567.251 and is intended to promote transparency in the examination of a holder. Importantly, this record will form the basis on which a holder may contest the reasonability of administrator conduct and correctness of the findings and calculations made during the course of an examination.

SECTION 1008. COMPLAINT TO ADMINISTRATOR ABOUT CONDUCT OF PERSON CONDUCTING EXAMINATION.

(a) If a person subject to examination under Section 1002 believes the person conducting the examination has made an unreasonable or unauthorized request or is not proceeding expeditiously to complete the examination, the person in a record may ask the administrator to intervene and take appropriate remedial action, including countermanding the request of the person conducting the examination, imposing a time limit for completion of the examination, or reassigning the examination to another person.

(b) If a person in a record requests a conference with the administrator to present matters that are the basis of a request under subsection (a), the administrator shall hold the conference not later than [30] days after receiving the request. The administrator may hold the conference in person, by telephone, or by electronic means.

(c) If a conference is held under subsection (b), not later than 30 days after the conference ends, the administrator shall provide a report in a record of the conference to the person that requested the conference.

Comment

Section 1008 has been added to provide a method by which a person being examined may seek timely intervention and redress from the administrator if the putative holder believes it is being treated unreasonably or unfairly by the examiner.

SECTION 1009. ADMINISTRATOR'S CONTRACT WITH ANOTHER TO CONDUCT EXAMINATION.

(a) In this section, "related to the administrator" refers to an individual who is:

(1) the administrator's spouse, partner in a civil union, domestic partner, or reciprocal beneficiary;

(2) the administrator's child, stepchild, grandchild, parent, stepparent, sibling, step-sibling, half-sibling, aunt, uncle, niece, or nephew;

(3) a spouse, partner in a civil union, domestic partner, or reciprocal beneficiary of an individual under paragraph (2); or

(4) any individual residing in the administrator's household.

(b) The administrator may contract with a person to conduct an examination under this [article]. The contract may be awarded only under [insert citation to the state competitive procurement of services of private contractors statute].

(c) If the person with which the administrator contracts under subsection (b) is:

(1) an individual, the individual may not be related to the administrator; or

(2) a business entity, the entity may not be owned in whole or in part by the administrator or an individual related to the administrator.

(d) At least 60 days before assigning a person under contract with the administrator under subsection (b) to conduct an examination, the administrator shall demand in a record that the person to be examined submit a report and deliver property that is previously unreported.

(e) If the administrator contracts with a person under subsection (b):

(1) the contract may provide for compensation of the person based on a fixed fee, hourly fee, or contingent fee;

(2) a contingent fee arrangement may not provide for a payment that exceeds [10] percent of the amount or value of property paid or delivered as a result of the examination; and

(3) on request by a person subject to examination by a contractor, the administrator shall deliver to the person a complete and unredacted copy of the contract and any contract between the contractor and a person employed or engaged by the contractor to conduct the examination.

(f) A contract under subsection (b) is subject to public disclosure without redaction under [the state's freedom of information act].

Legislative Note: *If a state does not allow use of contingent fee examiners, subsection (e)(1) should be revised to delete the words "contingent fee" and subsection (e)(2) should be deleted.*

Comment

This section expressly permits the use of contract auditors working on a contingent fee basis. However, this section limits any actual conflict of interest, or the appearance of conflict of interest, between the administrator and the contractor conducting the examination by precluding the administrator from contracting with related persons, and requiring that such third party auditing contracts be awarded on a competitive bid basis. This provision mandates that a person who is to undergo an examination or be audited by a third party contractor be given unredacted

copies of the contract. *See* also Section 1011.

While use of contingent fee auditors can be viewed as controversial, state administrators contend these auditors are necessary for audits to be undertaken and many state laws permit use of contract auditors. One state, North Carolina, has enacted legislation banning, as a general matter, the use of contingent fee auditors. N.C. Gen. Stat. § 116B-8. Illinois and Virginia have banned the use of contingent fee examiners for in-state businesses. 765 Ill. Comp. Stat. 1025/24.5; Va. Code Ann. § 55-210.24(D).

SECTION 1010. LIMIT ON FUTURE EMPLOYMENT. The administrator or an individual employed by the administrator who participates in, recommends, or approves the award of a contract under Section 1009(b) on or after the effective date of this [act] may not be employed by, contracted with, or compensated in any capacity by the contractor or an affiliate of the contractor for [two] years after the latest of participation in, recommendation of, or approval of the award or conclusion of the contract.

Comment

Developments in Delaware caused that state to enact laws imposing post-employment constraints on administrators who have awarded contingent fee contracts to third party examiners from being able to leave state employment and go to work for the firms to whom they have awarded contingent fee examination contracts. *See* 12 *Del.C.* Section 1155(b). Section 1010 reflects what is viewed as a reasonable limit on a contract auditor's employment by state personnel involved in hiring the contract auditor, once such individuals leave state employment.

SECTION 1011. REPORT BY ADMINISTRATOR TO STATE OFFICIAL.

(a) Not later than three months after the end of the state fiscal year, the administrator shall compile and submit a report to the [Governor, Treasurer, Comptroller, Speaker of the Senate, and Speaker of the House]. The report must contain the following information about property presumed abandoned for the preceding fiscal year for the state:

(1) the total amount and value of all property paid or delivered under this [act] to the administrator, separated into:

(A) the part voluntarily paid or delivered; and

(B) the part paid or delivered as a result of an examination under Section

1002, separated into the part recovered as a result of an examination conducted by:

(i) a state employee; and

(ii) a contractor under Section 1009;

(2) the name of and amount paid to each contractor under Section 1009 and the percentage the total compensation paid to all contractors under Section 1009 bears to the total amount paid or delivered to the administrator as a result of all examinations performed under Section 1009;

(3) the total amount and value of all property paid or delivered by the administrator to persons that made claims for property held by the administrator under this [act] and the percentage the total payments made and value of property delivered to claimants bears to the total amounts paid and value delivered to the administrator; and

(4) the total amount of claims made by persons claiming to be owners which:

(A) were denied;

(B) were allowed; and

(C) are pending.

(b) The report under subsection (a) is a public record subject to public disclosure without redaction under [insert citation to the state freedom of information act].

Legislative Note: *A state should list in subsection (a) the government officials who are to receive the report.*

Comment

Section 1011 is intended to require greater transparency as to terms and use of contract auditors to other state authorities and to the public. This section establishes detailed reporting requirements intended to better inform the public and other responsible officials of the state with how much net revenue from unclaimed property is being collected through the use of contract examiners and at what cost. The current act does not require such disclosures. Contracts are awarded and amounts paid to contractors which may pass outside public notice. This section allows assessment of how effective the administrator has been in collecting unclaimed property

and returning unclaimed property to owners.

SECTION 1012. DETERMINATION OF LIABILITY FOR UNREPORTED REPORTABLE PROPERTY. If the administrator determines from an examination conducted under Section 1002 that a putative holder failed or refused to pay or deliver to the administrator property which is reportable under this [act], the administrator shall issue a determination of the putative holder's liability to pay or deliver and give notice in a record to the putative holder of the determination.

Comment

Issuance by the administrator of a determination of liability under Section 1012 starts the running of the period that gives the administrator legal remedy under Section 1201 for the failure of a putative holder to report unclaimed property, as well as the running of the period in which a holder may contest a determination it does not agree with under Section 1101.

[ARTICLE] 11

DETERMINATION OF LIABILITY; PUTATIVE HOLDER REMEDIES

SECTION 1101. INFORMAL CONFERENCE.

(a) Not later than 30 days after receipt of a notice under Section 1012, the putative holder may request an informal conference with the administrator to review the determination. Except as otherwise provided in this section, the administrator may designate an employee to act on behalf of the administrator.

(b) If a putative holder makes a timely request under subsection (a) for an informal conference:

(1) not later than [20] days after the date of the request, the administrator shall set the time and place of the conference;

(2) the administrator shall give the putative holder notice in a record of the time and place of the conference;

(3) the conference may be held in person, by telephone, or by electronic means, as determined by the administrator;

(4) the request tolls the 90-day period under Sections 1103 and 1104 until notice of a decision under paragraph (7) has been given to the putative holder or the putative holder withdraws the request for the conference;

(5) the conference may be postponed, adjourned, and reconvened as the administrator determines appropriate;

(6) the administrator or administrator's designee with the approval of the administrator may modify a determination made under Section 1012 or withdraw it; and

(7) the administrator shall issue a decision in a record and provide a copy of the record to the putative holder and examiner not later than [20] days after the conference ends.

(c) A conference under subsection (b) is not an administrative remedy and is not a contested case subject to [insert citation to the state administrative procedure act]. An oath is not required and rules of evidence do not apply in the conference.

(d) At a conference under subsection (b), the putative holder must be given an opportunity to confer informally with the administrator and the person that examined the records of the putative holder to:

(1) discuss the determination made under Section 1012; and

(2) present any issue concerning the validity of the determination.

(e) If the administrator fails to act within the period prescribed in subsection (b)(1) or (7), the failure does not affect a right of the administrator, except that interest does not accrue on the amount for which the putative holder was determined to be liable under Section 1012 during the period in which the administrator failed to act until the earlier of:

(1) the date under Section 1103 the putative holder initiates administrative review or files an action under Section 1104; or

(2) 90 days after the putative holder received notice of the administrator's determination under Section 1012 if no review was initiated under Section 1103 and no action was filed under Section 1104.

(f) The administrator may hold an informal conference with a putative holder about a determination under Section 1012 without a request at any time before the putative holder initiates administrative review under Section 1103 or files an action under Section 1104.

(g) Interest and penalties under Section 1204 continue to accrue on property not reported, paid, or delivered as required by this [act] after the initiation, and during the pendency, of an informal conference under this section.

Comment

A holder who has received a notice of determination of liability under Section 1012 it believes is incorrect or illegal has a series of optional remedies to use to challenge the determination. One of these, addressed in Section 1101, allows the holder to ask for an informal conference designed to be flexible and to allow less expensive non-litigious resolution of the matter. Requesting this conference tolls the time frame for passing administration review under Section 1103 or judicial review under Section 1104 until notice of a decision in a record by the administrator or withdrawal of the request for a conference.

SECTION 1102. REVIEW OF ADMINISTRATOR'S DETERMINATION. A putative holder may seek relief from a determination under Section 1012 by:

(1) administrative review under Section 1103; or

(2) judicial review under Section 1104.

SECTION 1103. ADMINISTRATIVE REVIEW.

(a) Not later than 90 days after receiving notice of the administrator's determination under Section 1012, a putative holder may initiate a proceeding under [insert citation to the state

administrative procedure act] for review of the administrator's determination.

(b) A final decision in an administrative proceeding initiated under subsection (a) is subject to judicial review by the [court] [as a matter of right in a de novo proceeding on the record in which either party is entitled to introduce evidence as a supplement to the record].

Legislative Note: *A state that has or allows judicial review of the decision of an administrative proceeding should delete the brackets at the end of subsection (b) and retain the language creating a right to de novo review on the record with either party being free to submit additional evidence to supplement this record. If de novo review is not possible in the state, the state should delete the bracketed language.*

Comment

If a putative holder decides not to request an informal conference or is not satisfied with the results of a conference, the holder is faced with a second choice: the holder may seek an administrative review under the state's administrative procedures act or may file suit for judicial review of the determination. This second choice must be made within 90 days of receipt by the putative holder of the notice of determination of liability. If the putative holder decides to seek administrative review and is not satisfied with the decision of the administrative judge, it may, within the time prescribed in the state's rules, file an action in the appropriate court to appeal the decision of the administrating judge. If a state has *de novo* judicial review of administrative decisions, either party has the right to supplement the record or present additional evidence at the subsequent court hearing.

SECTION 1104. JUDICIAL REMEDY.

(a) Not later than 90 days after receiving notice of the administrator's determination under Section 1012, the putative holder may:

(1) file an action against the administrator in the [appropriate court] challenging the administrator's determination of liability and seeking a declaration that the determination is unenforceable, in whole or in part; or

(2) pay the amount or deliver the property determined by the administrator to be paid or delivered to the administrator and, not later than six months after payment or delivery, file an action against the administrator in the [appropriate court] for a refund of all or part of the amount paid or return of all or part of the property delivered.

(b) If a putative holder pays or delivers property the administrator determined must be paid or delivered to the administrator at any time after the putative holder files an action under subsection (a)(1), the court shall continue the action as if it had been filed originally as an action for a refund or return of property under subsection (a)(2).

[(c) On the final determination of an action filed under subsection (a), the [court] may, on application, award to the [plaintiff] [prevailing party] its reasonable attorney's fees, costs, and expenses, of litigation.]

[(d)]A putative holder that is the prevailing party in an action under subsection (a)(2) for refund of money paid to the administrator is entitled to interest on the amount refunded, at the same rate a holder is required to pay to the administrator under Section 1204(a), from the date paid to the administrator until the date of the refund.

Legislative Note: *The bracketed language of subsection (c) may be included or deleted according to the public policy of the state concerning statutory awards of attorney's fees. If the state elects to include attorney's fees, the state must decide whether to restrict the award of attorney's fees to the plaintiff regardless of which side prevails or only to the prevailing party.*

Comment

If the putative holder decides not to seek administrative review, it may nevertheless, within 90 days following receipt of the notice of determination (unless extended by requesting an informal conference) file an action in the appropriate court seeking either a declaration of whether it is required to pay the determined liability or a refund of any sums paid to the administrator together with interest at the same rate of interest required to be paid to the administrator.

Article 11 adds for the first time remedies to a holder who does not agree with the administrator's determination of liability. Neither the 1981, the 1995 nor any prior Acts provided a procedure by which holders could dispute or appeal determinations of unclaimed property liability by administrators. Although various states have enacted some sort of review and/or appeals process, *see e.g.,* 12 *Del. C.* § 1156; Tenn. Code Ann. § 66-29-125, this Act provides a far more comprehensive process, uniquely permitting the holder to choose among various forms of remedy.

[ARTICLE] 12

ENFORCEMENT BY ADMINISTRATOR

SECTION 1201. JUDICIAL ACTION TO ENFORCE LIABILITY.

(a) If a determination under Section 1012 becomes final and is not subject to administrative or judicial review, the administrator may commence an action in the [court] or in an appropriate court of another state to enforce the determination and secure payment or delivery of past due, unpaid, or undelivered property. The action must be brought not later than [one] year after the determination becomes final.

(b) In an action under subsection (a), if no court in this state has jurisdiction over the defendant, the administrator may commence an action in any court having jurisdiction over the defendant.

Legislative Note: *A state that requires approval of its Attorney General of the action to be taken by an administrator under this section should include language that requires approval to be obtained before to proceeding with the desired action.*

Comment

The administrator may enforce a determination of liability that has become final by bringing an enforcement action in court against the holder within one year after the determination becomes final. After that, it is time barred.

SECTION 1202. INTERSTATE AND INTERNATIONAL AGREEMENT; COOPERATION.

(a) Subject to subsection (b), the administrator may:

(1) exchange information with another state or foreign country relating to property presumed abandoned or relating to the possible existence of property presumed abandoned; and

(2) authorize in a record another state or foreign country or a person acting on behalf of the other state or country to examine its records of a putative holder as provided in

[Article] 10.

(b) An exchange or examination under subsection (a) may be done only if the state or foreign country has confidentiality and security requirements substantially equivalent to those in [Article] 14 or agrees in a record to be bound by this state's confidentiality and security requirements.

Comment

Section 1202 continues the policy of the 1981 Act and 1995 Act to increase the efficiency of state unclaimed property program administration by promoting interstate cooperation, in both the realms of reporting compliance and enforcement. Newly added is the expansion of the cooperation to include foreign countries.

Reciprocal agreements envisioned by Section 1202 do not require the consent of Congress under the Compact Clause of the Constitution, Art. I, § 10, cl. 3. The Supreme Court has held that the restriction of the Compact Clause is limited to combinations or agreements that tend to increase the political power of the states to such an extent that it interferes with the supremacy of the United States. *United States Steel v. Multi-State Tax Commission,* 434 U.S. 452 (1978).

SECTION 1203. ACTION INVOLVING ANOTHER STATE OR FOREIGN COUNTRY.

(a) The administrator may join another state or foreign country to examine and seek enforcement of this [act] against a putative holder.

(b) On request of another state or foreign country, the [Attorney General] may commence an action on behalf of the other state or country to enforce, in this state, the law of the other state or country against a putative holder subject to a claim by the other state or country, if the other state or country agrees to pay costs incurred by the [Attorney General] in the action.

(c) The administrator may request the official authorized to enforce the unclaimed property law of another state or foreign country to commence an action to recover property in the other state or country on behalf of the administrator. This state shall pay the costs, including

reasonable attorney's fees and expenses, incurred by the other state or foreign country in an action under this subsection.

(d) The administrator may pursue an action on behalf of this state to recover property subject to this [act] but delivered to the custody of another state if the administrator believes the property is subject to the custody of the administrator.

(e) The administrator may retain an attorney in this state, another state or a foreign country to commence an action to recover property on behalf of the administrator and may agree to pay attorney's fees based in whole or in part on a fixed fee, hourly fee, or a percentage of the amount or value of property recovered in the action.

(f) Expenses incurred by this state in an action under this section may be paid from property received under this [act] or the net proceeds of the property. Expenses paid to recover property may not be deducted from the amount that is subject to a claim under this [act] by the owner.

Legislative Note: *A state that requires approval of its Attorney General of the actions to be taken by an administrator under this section should include language that requires approval to be obtained before to proceeding with the desired action.*

Comment

Similar to Section 1202, Section 1203 continues the policy of the 1981 Act and 1995 Act to increase the efficiency of state unclaimed property program administration by promoting interstate cooperation, in both the realms of reporting compliance and enforcement. Newly added is the expansion of the cooperation to include foreign countries.

SECTION 1204. INTEREST AND PENALTY FOR FAILURE TO ACT IN TIMELY MANNER.

(a) A holder that fails to report, pay, or deliver property within the time prescribed by this [act] shall pay to the administrator interest at an annual rate of [[ ] percent] [the rate of interest payable to the department of revenue of this state on delinquent taxes] on the property or value

of the property from the date the property should have been reported, paid, or delivered to the administrator until the date reported, paid, or delivered.

(b) Except as otherwise provided in Section 1205 or 1206, the administrator may require a holder that fails to report, pay, or deliver property within the time prescribed by this [act] to pay to the administrator, in addition to interest included under subsection (a), a civil penalty of $[200] for each day the duty is not performed, up to a cumulative maximum amount of $[5,000].

Legislative Note: *In subsection (a), a state needs to decide a rate of interest to impose on a holder that has not performed in a timely manner. If a variable rate is chosen, the rate should be tied to a rate that is calculable on its face, such as the prime rate or London Interbank Official Rate (LIBOR).*

Comment

In order to facilitate compliance with unclaimed property reporting and remitting obligations, this Act includes moderate penalties and interest where failure to comply is non-willful and non-fraudulent.

SECTION 1205. OTHER CIVIL PENALTIES.

(a) If a holder enters into a contract or other arrangement for the purpose of evading an obligation under this [act] or otherwise willfully fails to perform a duty imposed on the holder under this [act], the administrator may require the holder to pay the administrator, in addition to interest as provided in Section 1204(a), a civil penalty of $[1,000] for each day the obligation is evaded or the duty is not performed, up to a cumulative maximum amount of $[25,000], plus [25] percent of the amount or value of property that should have been but was not reported, paid, or delivered as a result of the evasion or failure to perform.

(b) If a holder makes a fraudulent report under this [act], the administrator may require the holder to pay to the administrator, in addition to interest under Section 1204(a), a civil penalty of $[1,000] for each day from the date the report was made until corrected, up to a cumulative maximum of $[25,000], plus [25] percent of the amount or value of any property that

should have been reported but was not included in the report or was underreported.

Comment

As opposed to the compliance incentivizing penalties and interest in Section 1204, the penalties and interest in this section are more severe, reflecting the fact that non-compliance under this, Section 1205, is a result of willful or fraudulent conduct on the part of the holder. It would seem appropriate that in instances where a holder has acted in good faith penalties should not apply.

SECTION 1206. WAIVER OF INTEREST AND PENALTY. The administrator:

(1) may waive, in whole or in part, [interest under Section 1204(a) and] penalties under Section 1204(b) or 1205; and

(2) shall waive a penalty under Section 1204(b) if the administrator determines that the holder acted in good faith and without negligence.

Legislative Note: *In a state in which interest on unpaid taxes is not permitted to be waived, the bracketed language in paragraph (1) should be deleted. Otherwise, the state should make a policy decision whether the administrator should have the authority to waive payment of interest.*

Comment

Recognizing that not all instances of non-compliance with unclaimed property reporting and remitting obligations are the result of neglect or bad faith, Section 1206 provides administrators the discretion to waive penalties and interest where the holder acted in good faith and without negligence.

[ARTICLE] 13

AGREEMENT TO LOCATE PROPERTY OF APPARENT OWNER HELD BY ADMINISTRATOR

SECTION 1301. WHEN AGREEMENT TO LOCATE PROPERTY ENFORCEABLE. An agreement by an apparent owner and another person, the primary purpose of which is to locate, deliver, recover, or assist in the location, delivery, or recovery of property held by the administrator, is enforceable only if the agreement:

(1) is in a record that clearly states the nature of the property and the services to be provided;

(2) is signed by or on behalf of the apparent owner; and

(3) states the amount or value of the property reasonably expected to be recovered, computed before and after a fee or other compensation to be paid to the person has been deducted.

Comment

Section 1301 reflects the common practice of an apparent owner entering into a contract with a third party, whereby the third party locates property of the apparent owner held in custody by administrators for a fee. Such agreements are consistent with the overall policy of this Act of reuniting owners with their property. However, in order to provide protection for apparent owners, such agreements are subject to certain restrictions, as reflected in Section 1302.

SECTION 1302. WHEN AGREEMENT TO LOCATE PROPERTY VOID.

(a) Subject to subsection (b), an agreement under Section 1301 is void if it is entered into during the period beginning on the date the property was paid or delivered by a holder to the administrator and ending 24 months after the payment or delivery.

(b) If a provision in an agreement described in subsection (a) applies to mineral proceeds for which compensation is to be paid to the other person based in whole or in part on a part of the underlying minerals or mineral proceeds not then presumed abandoned, the provision is void regardless of when the agreement was entered into.

(c) An agreement under subsection (a) which provides for compensation in an amount that is unconscionable is unenforceable except by the apparent owner. An apparent owner that believes the compensation the apparent owner has agreed to pay is unconscionable or the administrator, acting on behalf of an apparent owner, or both, may file an action in [the appropriate court] to reduce the compensation to the maximum amount that is not unconscionable. [On the final determination of an action filed under this subsection, the [court] may, on application, award the [plaintiff] [prevailing party] its reasonable attorney's fees, costs,

and expenses of litigation.]

(d) An apparent owner or the administrator may assert that an agreement described in this section is void on a ground other than it provides for payment of unconscionable compensation.

(e) This section does not apply to an apparent owner's agreement with an attorney to pursue a claim for recovery of specifically identified property held by the administrator or to contest the administrator's denial of a claim for recovery of the property.

Legislative Note: *The bracketed language at the end of subsection (c) may be included or deleted according to the public policy of the state concerning statutory awards of attorney's fees. If the state elects to include attorney's fees, the state must decide whether to restrict the award of attorney's fees to the plaintiff regardless of which side prevails or only to the prevailing party.*

Comment

Section 1302 provides protection for apparent owners entering into fee agreements for the location of property held by state administrators. This ensures that such agreements promote rather than hinder the policy of reuniting owners with their property.

SECTION 1303. RIGHT OF AGENT OF APPARENT OWNER TO RECOVER PROPERTY HELD BY ADMINISTRATOR.

(a) An apparent owner that contracts with another person to locate, deliver, recover, or assist in the location, delivery, or recovery of property of the apparent owner which is held by the administrator may designate the person as the agent of the apparent owner. The designation must be in a record signed by the apparent owner.

(b) The administrator shall give the agent of the apparent owner all information concerning the property which the apparent owner is entitled to receive, including information that otherwise is confidential information under Section 1402.

(c) If authorized by the apparent owner, the agent of the apparent owner may bring an action against the administrator on behalf of and in the name of the apparent owner.

Comment

Section 1303 is meant to facilitate the operation of agreements between an apparent owner and a third party agent, who has contracted to recover property on behalf of the apparent owners. Providing a uniform procedure by which such agents are permitted to act on behalf of apparent owners facilitates property ending up with the rightful owners.

[ARTICLE] 14

CONFIDENTIALITY AND SECURITY OF INFORMATION

SECTION 1401. DEFINITIONS; APPLICABILITY.

(a) In this [article], "personal information" means:

(1) information that identifies or reasonably can be used to identify an individual, such as first and last name in combination with the individual's:

(A) social security number or other government-issued number or identifier;

(B) date of birth;

(C) home or physical address;

(D) electronic-mail address or other online contact information or Internet provider address;

(E) financial account number or credit or debit card number;

(F) biometric data, health or medical data, or insurance information; or

(G) passwords or other credentials that permit access to an online or other account;

(2) personally identifiable financial or insurance information, including nonpublic personal information defined by applicable federal law; and

(3) any combination of data that, if accessed, disclosed, modified, or destroyed without authorization of the owner of the data or if lost or misused, would require notice or

reporting under [insert citation to state statute regarding privacy and security] and federal privacy and data security law, whether or not the administrator or the administrator's agent is subject to the law.

(b) A provision of this [article] that applies to the administrator or the administrator's records applies to an administrator's agent.

Comment

Certain holders are obligated by law to maintain the confidentiality of non-public personal information in their possession. *See* the Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801 et seq., the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., the Telecommunications Act of 1996, 47 U.S.C. § 222 and the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952. However, during the course of an examination a holder may be required under this Act to provide to the administrator certain confidential or non-public personal information. Article 14 is intended to reinforce that administrators (and their representatives) have a duty to maintain the confidentiality of such confidential or non-public personal information provided by holders, including, without limitation, information relating to apparent owners, the holder's business and the holder's employees. Some state unclaimed property laws already have confidentiality provisions. See, e.g., Del. Code tit. 12, § 1141; Nev. Rev. Stat. § 120A.500; Wash. Rev. Code § 63.29.380.

SECTION 1402. CONFIDENTIAL INFORMATION.

(a) Except as otherwise provided in this [act], the following are confidential and exempt from public inspection or disclosure:

(1) records of the administrator and the administrator's agent related to the administration of this [act];

(2) reports and records of a holder in the possession of the administrator or the administrator's agent; and

(3) personal information and other information derived or otherwise obtained by or communicated to the administrator or the administrator's agent from an examination under this [act] of the records of a person.

(b) A record or other information that is confidential under law of this state other than this [act], another state, or the United States continues to be confidential when disclosed or delivered under this [act] to the administrator or administrator's agent.

Comment

Section 1402 identifies the categories of information that are deemed to be sensitive and must be kept confidential in accordance with this Act and other laws. It is intended that such information in the possession of the administrator be protected from improper disclosure, including any disclosure required under freedom of information laws.

SECTION 1403. WHEN CONFIDENTIAL INFORMATION MAY BE DISCLOSED.

(a) When reasonably necessary to enforce or implement this [act], the administrator may disclose confidential information concerning property held by the administrator or the administrator's agent only to:

(1) an apparent owner or the apparent owner's [insert the term or terms for personal representative in the state], attorney, other legal representative, relative, or agent designated under Section 1303 to have the information;

(2) the [insert the term or terms for personal representative in the state] [executor], other legal representative, relative of a deceased apparent owner, agent designated under Section 1303 by the deceased apparent owner, or a person entitled to inherit from the deceased apparent owner;

(3) another department or agency of this state or the United States;

(4) the person that administers the unclaimed property law of another state, if the other state accords substantially reciprocal privileges to the administrator of this state if the other state is required to maintain the confidentiality and security of information obtained in a manner substantially equivalent to [Article] 14;

(5) a person subject to an examination as required by Section 1004(6).

(b) Except as otherwise provided in Section 1402(a), the administrator shall include on the website or in the database required by Section 503(c)(2) the name of each apparent owner of property held by the administrator. The administrator may include in published notices, printed publications, telecommunications, the Internet, or other media and on the website or in the database additional information concerning the apparent owner's property if the administrator believes the information will assist in identifying and returning property to the owner and does not disclose personal information except the home or physical address of an apparent owner.

(c) The administrator and the administrator's agent may not use confidential information provided to them or in their possession except as expressly authorized by this [act] or required by law other than this [act].

Comment

In the process of determining any potential unclaimed property held by a holder or reuniting an apparent owner with property, effective administration of this Act requires that certain disclosures of confidential information be made. This is not unlike Federal and State laws regarding the disclosure of confidential tax information in the possession of the government. See, e.g., 26 U.S.C. § 6103; Tenn. Code § 67-1-1704. Section 1403 is intended to codify such permitted disclosures without expanding such disclosures beyond what is necessary to administer the Act and within the confines of applicable confidentiality laws. This includes permitting the administrator to publish information on a website accessible to apparent owners in order to facilitate the return of property to the owner and permitting the administrator to provide holders with confidential information that is obtained in connection with the examination of such holder.

SECTION 1404. CONFIDENTIALITY AGREEMENT. A person to be examined under Section 1002 may require, as a condition of disclosure of the records of the person to be examined, that each person having access to the records disclosed in the examination execute and deliver to the person to be examined a confidentiality agreement that:

(1) is in a form that is reasonably satisfactory to the administrator; and

(2) requires the person having access to the records to comply with the provisions of this

[article] applicable to the person.

Comment

Section 1404 codifies the existing practice in many jurisdictions of permitting confidentiality and non-disclosure agreements between holders and the administrator (and its representatives) in order to protect any non-public personal information or other confidential information provided by holders over the course of the examination.

SECTION 1405. NO CONFIDENTIAL INFORMATION IN NOTICE. Except as otherwise provided in Sections 501 and 502, a holder is not required under this [act] to include confidential information in a notice the holder is required to provide to an apparent owner under this [act].

Comment

Section 1405 is meant to provide holders and owners with additional safeguards by limiting the disclosure of confidential or non-public information to persons that are not under a duty to maintain the confidentiality of such information, as may be required by Federal or State law.

SECTION 1406. SECURITY OF INFORMATION.

(a) If a holder is required to include confidential information in a report to the administrator, the information must be provided by a secure means.

(b) If confidential information in a record is provided to and maintained by the administrator or administrator's agent as required by this [act], the administrator or agent shall:

(1) implement administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of the information required by [insert citation to state statute regarding privacy and security] and federal privacy and data security law whether or not the administrator or the administrator's agent is subject to the law;

(2) protect against reasonably anticipated threats or hazards to the security, confidentiality, or integrity of the information; and

(3) protect against unauthorized access to or use of the information which could result in substantial harm or inconvenience to a holder or the holder's customers, including insureds, annuitants, and policy or contract owners and their beneficiaries.

(c) The administrator:

(1) after notice and comment, shall adopt and implement a security plan that identifies and assesses reasonably foreseeable internal and external risks to confidential information in the administrator's possession and seeks to mitigate the risks; and

(2) shall ensure that an administrator's agent adopts and implements a similar plan with respect to confidential information in the agent's possession.

(d) The administrator and the administrator's agent shall educate and train their employees regarding the plan adopted under subsection (c).

(e) The administrator and the administrator's agent shall in a secure manner return or destroy all confidential information no longer reasonably needed under this [act].

Comment

Section 1406 provides that if a holder is required to include confidential information in a report to the administrator that is otherwise subject to Federal or State confidentiality laws, additional safeguards must be employed. For example "secure means" can be such things as a password-protected website or another form of encrypted mechanism for delivering information, securely.

SECTION 1407. SECURITY BREACH.

(a) Except to the extent prohibited by law other than this [act], the administrator or administrator's agent shall notify a holder as soon as practicable of:

(1) a suspected loss, misuse or unauthorized access, disclosure, modification, or destruction of confidential information obtained from the holder in the possession of the administrator or an administrator's agent; and

(2) any interference with operations in any system hosting or housing confidential information which:

(A) compromises the security, confidentiality, or integrity of the information; or

(B) creates a substantial risk of identity fraud or theft.

(b) Except as necessary to inform an insurer, attorney, investigator, or others as required by law, the administrator and an administrator's agent may not disclose, without the express consent in a record of the holder, an event described in subsection (a) to a person whose confidential information was supplied by the holder.

(c) If an event described in subsection (a) occurs, the administrator and the administrator's agent shall:

(1) take action necessary for the holder to understand and minimize the effect of the event and determine its scope; and

(2) cooperate with the holder with respect to:

(A) any notification required by law concerning a data or other security breach; and

(B) a regulatory inquiry, litigation, or similar action.

Comment

Section 1407 requires that notice be provided to holders and their customers of any improper or inadvertent disclosure of confidential or non-public personal information, including such disclosures that could lead to holder liability unrelated to the unclaimed property examination. This notice requirement is similar to data breach notifications mandated under Federal law, see, e.g., the Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801 et seq., the Office of Management and Budget's "Breach Notification Policy," the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, and state law, see, e.g., Ariz. Rev. Stat. § 44-7501; Ark. Code § 4-110-101 et seq.; Cal. Civ. Code §§ 1798.29, 1798.80 et seq.; Colo. Rev. Stat. § 6-1-716; Del. Code tit. 6, § 12B-101 et seq.; Fla. Stat. §§ 501.171, 282.0041, 282.318(2)(i); Haw. Rev. Stat. § 487N-1 et seq.; Ind. Code §§ 41-11 et seq.,

24-4.9 et seq.; Iowa Code §§ 715C.1, 715C.2; Kan. Stat. § 50-7a01 et seq.; KRS § 365.732, KRS §§ 61.931 to 61.934; Me. Rev. Stat. tit. 10 § 1347 et seq.; Md. Code Com. Law §§ 14-3501 et seq., Md. State Govt. Code §§ 10-1301 to -1308; Mass. Gen. Laws § 93H-1 et seq.; Mich. Comp. Laws §§ 445.63, 445.72; Minn. Stat. §§ 325E.61, 325E.64; Mo. Rev. Stat. § 407.1500; Neb. Rev. Stat. §§ 87-801 to -807; Nev. Rev. Stat. §§ 603A.010 et seq.; N.H. Rev. Stat. §§ 359-C:19 et seq.; N.J. Stat. § 56:8-161, -163; N.D. Cent. Code §§ 51-30-01 et seq., 51-59-34(4)(d); 73 Pa. Stat. § 2301 et seq.; Tenn. Code § 47-18-2107; § 8-4-119 (2015 S.B. 416, Chap. 42); Vt. Stat. tit. 9 § 2430, 2435; Va. Code § 18.2-186.6, § 32.1-127.1:05, § 22.1-20.2; W.V. Code §§ 46A-2A-101 et seq.

SECTION 1408. INDEMNIFICATION FOR BREACH.

[(a) If a claim is made or action commenced arising out of an event described in Section 1407(a) relating to confidential information possessed by the administrator, this state shall indemnify, defend, and hold harmless a holder and the holder's affiliates, officers, directors, employees, and agents as to:

(1) any claim or action; and

(2) a liability, obligation, loss, damage, cost, fee, penalty, fine, settlement, charge, or other expense, including reasonable attorney's fees and costs, established by the claim or action.]

[(b)] If a claim is made or action commenced arising out of an event described in Section 1407(a) relating to confidential information possessed by an administrator's agent, the administrator's agent shall indemnify, defend, and hold harmless a holder and the holder's affiliates, officers, directors, employees, and agents as to:

(1) any claim or action and

(2) a liability, obligation, loss, damage, cost, fee, penalty, fine, settlement, charge, or other expense, including reasonable attorney's fees and costs, established by the claim or action.

[(c)] The administrator shall require an administrator's agent that will receive

confidential information required under this [act] to maintain adequate insurance for indemnification obligations of the administrator's agent under subsection (b). The agent required to maintain the insurance shall provide evidence of the insurance to:

(1) the administrator not less frequently than annually; and

(2) the holder on commencement of an examination and annually thereafter until all confidential information is returned or destroyed under Section 1406(e).

Legislative Note: *Section 1408(a) is bracketed to indicate that states which may not provide for blanket indemnification may delete this section.*

Comment

The indemnification provided in Section 1408 is meant to encourage administrators to employ proper safeguards to prevent the disclosure of confidential or non-public personal information and to protect holders from liability resulting from such disclosures.

[ARTICLE] 15

MISCELLANEOUS PROVISIONS

SECTION 1501. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform [act] consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1502. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 1503. TRANSITIONAL PROVISION.

(a) An initial report filed under this [act] for property that was not required to be reported

before the effective date of this [act], but that is required to be reported under this [act], must include all items of property that would have been presumed abandoned during the 10-year period preceding the effective date of this [act] as if this [act] had been in effect during that period.

(b) This [act] does not relieve a holder of a duty that arose before the effective date of this [act] to report, pay, or deliver property. Subject to Section 610(b) and (c), a holder that did not comply with the law governing unclaimed property before the effective date of this [act] is subject to applicable provisions for enforcement and penalties in effect before the effective date of this [act].

[SECTION 1504. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.*

SECTION 1505. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 1506. EFFECTIVE DATE. This [act] takes effect . . . .

West's Arkansas Code Annotated Arkansas Rules of Professional Conduct (Refs & Annos) Client-Lawyer Relationship (Rules 1.1 to 1.19)

Rules of Prof.Conduct, Rule 1.15

RULE 1.15. SAFEKEEPING PROPERTY AND TRUST ACCOUNTS

Currentness

(a) Safekeeping Property.

(1) A lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(2) Property, other than funds of clients or third persons, shall be identified as such and appropriately safeguarded.

(3) Complete records of trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of the representation or the last contact with a prospective client.

(4) A lawyer shall maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law, rule, or court order.

(5) 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 in writing. 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 written accounting regarding such property to the client or third persons.

(6) 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.

(b) Trust Accounts: IOLTA Trust Accounts and Non-IOLTA Trust Accounts.

(1) Funds of a client shall be deposited and maintained in one or more separate, clearly identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

(2) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer may deposit funds belonging to the lawyer or the law firm in a client trust account for the sole purposes of paying bank services charges on that account, or to comply with the minimum balance required for the waiver of bank charges, but only in the amount necessary for those purposes, but not to exceed $500.00 in any case. Such funds belonging to the lawyer or law firm shall be clearly identified as such in the account records.

(4) Each trust account referred to in section (b)(1) shall be an interest- or dividend-bearing account held at an eligible institution.

(5) Each such trust account shall provide overdraft notification to the Executive Director of the Office of Professional Conduct for the purpose of reporting whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution shall report simultaneously with its notice to the lawyer the following information:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(6) A lawyer who receives client funds which, in the judgment of the lawyer, are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing, multi-client trust account (“IOLTA” account) for such funds. The account shall be maintained in compliance with the following requirements:

(i) The trust account shall be maintained in compliance with sections (b)(1)-(b)(5) of this Rule and the funds shall be subject to withdrawal upon request and without delay;

(ii) No earnings from the account shall be made available to the lawyer or law firm; and,

(iii) The interest accruing on this account, net of allowable reasonable fees, shall be paid monthly to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm. Payment must be made by Automated Clearing House (ACH) method, wire transfer, or other electronic transfer.

(7) All client funds shall be deposited in the account specified in section (b)(6), unless they are deposited in a separate interest-bearing account (“non-IOLTA” account) for a specific and individual matter for a particular client. There shall be a separate account opened for each such particular client matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in this Rule.

(8) The decision whether to use an “IOLTA” account specified in section (b)(6) or a “non-IOLTA” account specified in section (b)(7) is within the discretion of the lawyer. In making this determination, consideration should be given to the following:

(i) The amount of interest which the funds would earn during the period they are expected to be deposited; and,

(ii) The cost of establishing and administering the account, including the cost of the lawyer's or law firm's services.

(9) Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, be conclusively deemed to have consented to the reporting requirements mandated by this rule. All lawyers shall certify annually that they, their law firm or professional corporation is in compliance with all sections and subsections of this Rule.

(10) A lawyer shall certify, in connection with the annual renewal of the lawyer's license, that the lawyer is complying with all provisions of this rule. Certification shall be made on a form provided by and in a manner designated by the Clerk of the Supreme Court.

(11) A lawyer or a law firm may be exempt from the requirements of this rule if the Arkansas IOLTA Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the Program for a period of no more than two years when service charges on the lawyer's or law firm's trust account equal or exceed any interest generated.

(c) Unclaimed or Unidentifiable Trust Account Funds.

(1) When a lawyer, law firm, or estate of a deceased lawyer cannot, using reasonable efforts, identify or locate the owner of funds in its Arkansas IOLTA or non-IOLTA trust account for a period of at least two (2) years, it shall pay the funds to the Arkansas Access to Justice Foundation. At the time such funds are remitted, the lawyer shall submit to the Arkansas Access to Justice Foundation and the Office of the Committee on Professional Conduct the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, if known; a description of the efforts undertaken to identify or locate the owner; and the amount of any unclaimed or unidentified funds.

(2) If, within two (2) years of making a payment of unclaimed or unidentified funds to the Arkansas Access to Justice Foundation, the lawyer, law firm, or deceased lawyer's estate identifies and locates the owner of funds paid, the Arkansas Access to Justice Foundation shall refund the sum to the lawyer, law firm, or deceased lawyer's estate. The lawyer, law firm, or deceased lawyer's estate shall submit to the Foundation a verification attesting that the funds have been returned to the owner. The Arkansas Access to Justice Foundation shall maintain sufficient reserves to pay all claims for such funds.

Credits

[Amended effective February 1, 2007; January 1, 2014; November 5, 2015.]

Editors' Notes

COMMENT:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the trust account funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fee owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed of the funds shall be promptly distributed.

[4] Paragraph (a)(6) 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 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.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

CODE COMPARISON (MODEL RULES)

With regard to Rule 1.15(a), DR 9-102(A) provides that “funds of clients” are to be kept in a trust account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provides that a lawyer shall “identify and label securities and properties of a client ... and place them in ... safekeeping....” DR 9-102(B)(3) requires that a lawyer “maintain complete records of all funds, securities and other properties of a client....” Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

Notes of Decisions (41)

Rules of Prof. Conduct, Rule 1.15, AR R RPC Rule 1.15
Current with amendments received through November 1, 2019.

End of Document

West's Colorado Revised Statutes Annotated West's Colorado Court Rules Annotated Colorado Rules of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos) Client-Lawyer Relationship

Rules of Prof.Cond., Rule 1.15B

RULE 1.15B. ACCOUNT REQUIREMENTS

Currentness

(a) Every lawyer in private practice in this state shall maintain in the lawyer's own name, or in the name of the lawyer's law firm:

(1) A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer's care and any advance payment of fees that have not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit, or cause the law firm to deposit, all funds received for legal services. Each business account, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "business account," an "office account," an "operating account," or a "professional account," or with a similarly descriptive term that distinguishes the account from a trust account and a personal account.

(b) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account. A "COLTAF account" is a pooled trust account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, and as such would not be expected to earn interest or pay dividends for such clients or third persons in excess of the reasonably estimated cost of establishing, maintaining, and accounting for trust accounts for the benefit of such clients or third persons. Interest or dividends paid on a COLTAF account shall be paid to COLTAF, and the lawyer and the law firm shall have no right or claim to such interest or dividends.

(c) Each trust account, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account," provided that each COLTAF account shall be designated as a "COLTAF Trust Account." A trust account may bear any additional descriptive designation that is not misleading.

(d) Except as provided in this paragraph (d), each trust account, including each COLTAF account, shall be maintained in a financial institution that is approved by the Regulation Counsel pursuant to Rule 1.15E. If each client and third person whose funds are in the account is informed in writing by the lawyer that Regulation Counsel will not be notified of any overdraft on the account, and with the informed consent of each such client and third person, a trust account in which interest or dividends are paid to the clients or third persons need not be in an approved institution.

(e) Each trust account, including each COLTAF account, shall be an interest-bearing, or dividend-paying, insured depository account; provided that, with the informed consent of each client or third person whose funds are in the account, an account in which interest or dividends are paid to clients or third persons need not be an insured depository account. For the purpose of this provision, an "insured depository account" shall mean a government insured account at a regulated financial institution,

on which withdrawals or transfers can be made on demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(f) The lawyer may deposit, or may cause the law firm to deposit, into a trust account funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of the account. Such funds shall be clearly identified in the lawyer's or law firm's records of the account.

(g) All funds entrusted to the lawyer shall be deposited in a COLTAF account unless the funds are deposited in a trust account described in paragraph (h) of this Rule. The foregoing requirement that funds be deposited in a COLTAF account does not apply in those instances where it is not feasible for the lawyer or the law firm to establish a COLTAF account for reasons beyond the control of the lawyer or law firm, such as the unavailability in the community of a financial institution that offers such an account; but in such case the funds shall be deposited in a trust account described in paragraph (h) of this Rule.

(h) If funds entrusted to the lawyer are not held in a COLTAF account, the lawyer shall deposit, or shall cause the law firm to deposit, the funds in a trust account that complies with all requirements of paragraphs (c), (d), and (e) of this Rule and for which all interest earned or dividends paid (less deductions for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited. The lawyer and the law firm shall have no right or claim to such interest or dividends.

(i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF, for the benefit of such client or third persons, of the interest or dividends in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(j) Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 1.15E and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

(k) If a lawyer discovers that the lawyer does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account, or the lawyer discovers that the owner of the funds is deceased, the lawyer must make reasonable efforts to identify and locate the owner or the owner's heirs or personal representative. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, or the owner's heirs or personal representative, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule 1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Note: See comments following Rule 1.15A.

Credits

Former Rule 1.15 repealed and readopted in part as Rule 1.15B, eff. June 17, 2014. Amended effective Nov. 3, 2016.

Rules of Prof. Cond., Rule 1.15B, CO ST RPC Rule 1.15B
Current with amendments received through November 1, 2019.

West's Delaware Code Annotated Delaware Rules of Court Rules of the Supreme Court Part V. Attorneys Subpart C. Other Provisions

Sup.Ct.Rules, Rule 73

RULE 73. ABANDONED OR UNCLAIMED TRUST FUNDS HELD BY ATTORNEYS

Currentness

When, for a continuous period of 5 years, an attorney's trust or escrow account contains trust or escrow funds, including funds held in the form of balances owed and funds for which disbursement has been attempted by issuing a check, which are either unidentifiable, unclaimed, or which are held for missing or unknown owners, the funds shall be deemed abandoned in accordance with the provisions of the Delaware escheats statute for unclaimed property, 12 Del.C. Chapter 11. The attorney shall make reasonable efforts to identify and locate the beneficial owner of the abandoned funds. With regard to funds for which the attorney has issued a check that has remained outstanding for six months or more, the attorney shall comply with the procedures set forth in Rule 1.15(d)(9)(E) of the Delaware Lawyers' Rules of Professional Conduct. The attorney shall then file an abandoned property report under 12 Del. C. 1199. If, 90 days after the filing of the report, the attorney is still unable to identify and locate the owner of the abandoned funds, the funds shall be paid to the State Escheator according to the provisions of the Escheat Statute.

Credits

[Adopted effective December 30, 1996; amended effective January 1, 2004.]

Sup.Ct.Rules, Rule 73, DE R S CT Rule 73

Delaware Uniform Rules of Evidence, Rules of the Supreme Court, Delaware Supreme Court Internal Operating Procedures, Chancery Court Rules, Superior Court Rules of Civil Procedure, Superior Court Rules of Criminal Procedure, and The Delaware Lawyers' Rules of Professional Conduct are current with amendments received through November 15, 2019. All other state and local court rules are current with amendments received through November 15, 2019.

End of Document

West's Florida Statutes Annotated Rules Regulating the Florida Bar (Refs & Annos) Chapter 5. Rules Regulating Trust Accounts 5-1. Generally

West's F.S.A. Bar Rule 5-1.1

Rule 5-1.1. Trust Accounts

Currentness

(a) Nature of Money or Property Entrusted to Attorney.

(1) *Trust Account Required; Location of Trust Account; Commingling Prohibited.* A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, must be kept in a separate federally insured bank, credit union, or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account except:

(A) A lawyer may maintain funds belonging to the lawyer in the lawyer's trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account; and

(B) A lawyer may deposit the lawyer's own funds into trust to replenish a shortage in the lawyer's trust account. Any deposits by the lawyer to cover trust account shortages must be no more than the amount of the trust account shortage, but may be less than the amount of the shortage. The lawyer must notify the bar's lawyer regulation department immediately of the shortage in the lawyer's trust account, the cause of the shortage, and the amount of the replenishment of the trust account by the lawyer.

(2) *Compliance with Client Directives.* Trust funds may be separately held and maintained other than in a bank, credit union, or savings and loan association account if the lawyer receives written permission from the client to do so and provided that written permission is received before maintaining the funds other than in a separate account.

(3) *Safe Deposit Boxes.* If a lawyer uses a safe deposit box to store trust funds or property, the lawyer must advise the institution in which the deposit box is located that it may include property of clients or third persons.

(b) Application of Trust Funds or Property to Specific Purpose. Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over the property on demand is conversion.

(c) Liens Permitted. This subchapter does not preclude the retention of money or other property on which the lawyer has a valid lien for services nor does it preclude the payment of agreed fees from the proceeds of transactions or collection.

(d) Controversies as to Amount of Fees. Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive, extortionate, or fraudulent. In a controversy alleging a clearly excessive, extortionate, or fraudulent fee, announced willingness of an attorney to submit a dispute as to the amount of a fee to a competent tribunal for determination may be considered in any determination as to intent or in mitigation of discipline; provided, such willingness shall not preclude admission of any other relevant admissible evidence relating to such controversy, including evidence as to the withholding of funds or property of the client, or to other injury to the client occasioned by such controversy.

(e) Notice of Receipt of Trust Funds; Delivery; Accounting. On receiving funds or other property in which a client or third person has an interest, a lawyer must 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 must promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, on request by the client or third person, must promptly render a full accounting regarding the property.

(f) Disputed Ownership of Trust Funds. When in the course of representation a lawyer is in possession of property in which 2 or more persons (1 of whom may be the lawyer) claim interests, the property must be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm must be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute must be kept separate by the lawyer until the dispute is resolved. The lawyer must promptly distribute all portions of the property as to which the interests are not in dispute.

(g) Interest on Trust Accounts (IOTA) Program.

(1) *Definitions.* As used in this rule, the term:

(A) "Nominal or short term" describes funds of a client or third person that the lawyer has determined cannot earn income for the client or third person in excess of the costs to secure the income.

(B) "Foundation" means The Florida Bar Foundation, Inc.

(C) "IOTA account" means an interest or dividend-bearing trust account benefiting The Florida Bar Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons.

(D) "Eligible institution" means any bank or savings and loan association authorized by federal or state laws to do business in Florida and insured by the Federal Deposit Insurance Corporation, any state or federal credit union authorized by federal or state laws to do business in Florida and insured by the National Credit Union Share Insurance Fund, or any successor insurance entities or corporation(s) established by federal or state laws, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Florida, all of which must meet the requirements set out in subdivision (5), below.

(E) "Interest or dividend-bearing trust account" means a federally insured checking account or investment product, including a daily financial institution repurchase agreement or a money market fund. A daily financial institution repurchase agreement must be fully collateralized by, and an open-end money market fund must consist solely of, United States Government

Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and have total assets of at least $250 million. The funds covered by this rule are subject to withdrawal on request and without delay.

(2) *Required Participation.* All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing law from an office or other business location within the state of Florida must be deposited into one or more IOTA accounts, unless the funds may earn income for the client or third person in excess of the costs incurred to secure the income, except as provided elsewhere in this chapter. Only trust funds that are nominal or short term must be deposited into an IOTA account. The Florida bar member must certify annually, in writing, that the bar member is in compliance with, or is exempt from, the provisions of this rule.

(3) *Determination of Nominal or Short-Term Funds.* The lawyer must exercise good faith judgment in determining on receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer must consider such factors as the:

(A) amount of a client's or third person's funds to be held by the lawyer or law firm;

(B) period of time the funds are expected to be held;

(C) likelihood of delay in the relevant transaction(s) or proceeding(s);

(D) lawyer or law firm's cost of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and

(E) minimum balance requirements and/or service charges or fees imposed by the eligible institution.

The determination of whether a client's or third person's funds are nominal or short term rests in the sound judgment of the lawyer or law firm. No lawyer will be charged with ethical impropriety or other breach of professional conduct based on the exercise of the lawyer's good faith judgment.

(4) *Notice to Foundation.* Lawyers or law firms must advise the foundation, at its current location posted on The Florida Bar's website, of the establishment of an IOTA account for funds covered by this rule. The notice must include: the IOTA account number as assigned by the eligible institution; the name of the lawyer or law firm on the IOTA account; the eligible institution name; the eligible institution address; and the name and Florida Bar number of the lawyer, or of each member of The Florida Bar in a law firm, practicing from an office or other business location within the state of Florida that has established the IOTA account.

(5) *Eligible Institution Participation in IOTA.* Participation in the IOTA program is voluntary for banks, credit unions, savings and loan associations, and investment companies. Institutions that choose to offer and maintain IOTA accounts must meet the following requirements:

(A) Interest Rates and Dividends. Eligible institutions must maintain IOTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOTA account customers when IOTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(B) Determination of Interest Rates and Dividends. In determining the highest interest rate or dividend generally available from the institution to its non-IOTA accounts in compliance with subdivision (5)(A), above, eligible institutions may consider factors, in addition to the IOTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that these factors do not discriminate between IOTA accounts and accounts of non-IOTA customers, and that these factors do not include that the account is an IOTA account.

(C) Remittance and Reporting Instructions. Eligible institutions must:

(i) calculate and remit interest or dividends on the balance of the deposited funds, in accordance with the institution's standard practice for non-IOTA account customers, less reasonable service charges or fees, if any, in connection with the deposited funds, at least quarterly, to the foundation;

(ii) transmit with each remittance to the foundation a statement showing the name of the lawyer or law firm from whose IOTA account the remittance is sent, the lawyer's or law firm's IOTA account number as assigned by the institution, the rate of interest applied, the period for which the remittance is made, the total interest or dividend earned during the remittance period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period; and

(iii) transmit to the depositing lawyer or law firm, for each remittance, a statement showing the amount of interest or dividend paid to the foundation, the rate of interest applied, and the period for which the statement is made.

(6) *Small Fund Amounts.* The foundation may establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short term when their nominal or short-term trust funds cannot reasonably be expected to produce or have not produced interest income net of reasonable eligible institution service charges or fees.

(7) *Confidentiality and Disclosure.* The foundation must protect the confidentiality of information regarding a lawyer's or law firm's trust account obtained by virtue of this rule. However, the foundation must, on an official written inquiry of The Florida Bar made in the course of an investigation conducted under these Rules Regulating The Florida Bar, disclose requested relevant information about the location and account numbers of lawyer or law firm trust accounts.

(h) Interest on Funds That Are Not Nominal or Short-Term. A lawyer who holds funds for a client or third person and who determines that the funds are not nominal or short-term as defined in this subchapter may not receive benefit from any interest on funds held in trust.

(i) Unidentifiable Trust Fund Accumulations and Trust Funds Held for Missing Owners. When a lawyer's trust account contains an unidentifiable accumulation of trust funds or property, or trust funds or property held for missing owners, the funds or property must be designated as unidentifiable or held for missing owners. The lawyer must make a diligent search and inquiry

to determine the beneficial owner of any unidentifiable accumulation or the address of any missing owner. If the beneficial owner of an unidentified accumulation is determined, the funds must be properly identified as trust property in the lawyer's possession. If a missing beneficial owner is located, the trust funds or property must be paid over or delivered to the beneficial owner if the owner is then entitled to receive the funds or property. Trust funds and property that remain unidentifiable and funds or property that are held for missing owners must be disposed of as provided in applicable Florida law after diligent search and inquiry fail to identify the beneficial owner or owner's address.

(j) Disbursement against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client for purposes of carrying out the business of another client without the permission of the owner given after full disclosure of the circumstances. However, certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on these deposits without disclosure to and permission of affected clients. Except for disbursements based on any of the 6 categories of limited-risk uncollected deposits enumerated below, a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds. For purposes of this provision, “collected funds” means funds deposited, finally settled, and credited to the lawyer's trust account. The lawyer may disburse uncollected funds from the trust account in reliance on the deposit when the deposit is made by a:

(1) certified check or cashier's check;

(2) check or draft representing loan proceeds issued by a federally or state-chartered bank, savings bank, savings and loan association, credit union, or other duly licensed or chartered institutional lender;

(3) bank check, official check, treasurer's check, money order, or other instrument issued by a bank, savings and loan association, or credit union when the lawyer has reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;

(4) check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;

(5) check issued by the United States, the state of Florida, or any agency or political subdivision of the state of Florida;

(6) check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Florida and the lawyer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time.

A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those set forth above, when it results in funds of other clients being used, endangered, or encumbered without authorization, may be grounds for a finding of professional misconduct. In any event, disbursement is at the risk of the lawyer making the disbursement. If any of the deposits fail, the lawyer, on obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's other clients. However, the lawyer will not be guilty of professional misconduct if the lawyer accepting any check that is later dishonored personally pays the amount of any failed deposit or secures or arranges payment from sources available to the lawyer other than trust account funds of other clients.

(k) Overdraft Protection Prohibited. A lawyer must not authorize overdraft protection for any account that contains trust funds.

Credits

Amended July 20, 1989, effective Oct. 1, 1989 (547 So.2d 117); Oct. 10, 1991, effective Jan. 1, 1992 (587 So.2d 1121); July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); July 1, 1993 (621 So.2d 1032); July 20, 1995 (658 So.2d 930); April 24, 1997 (692 So.2d 181); June 14, 2001, effective July 14, 2001 (797 So.2d 551); April 25, 2002 (820 So.2d 210); May 20, 2004 (875 So.2d 448); March 23, 2006, effective May 22, 2006 (933 So.2d 417); Dec. 20, 2007, effective March 1, 2008 (978 So.2d 91); Nov. 19, 2009, effective Feb. 1, 2010 (24 So.3d 63); July 7, 2011, effective Oct. 1, 2011 (167 So.3d 1037); June 11, 2015, effective Oct. 1, 2015 (167 So.3d 412); Nov. 9, 2017, effective Feb. 1, 2018 (234 So.3d 577).

Editors' Notes

COMMENT

A lawyer must hold property of others with the care required of a professional fiduciary. This chapter requires maintenance of a bank or savings and loan association account, clearly labeled as a trust account and in which only client or third party trust funds are held.

Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if money, in 1 or more trust accounts, unless requested otherwise in writing by the client. Separate trust accounts may be warranted when administering estate money or acting in similar fiduciary capacities.

A lawyer who holds funds for a client or third person and who determines that the funds are not nominal or short term as defined elsewhere in this subchapter should hold the funds in a separate interest-bearing account with the interest accruing to the benefit of the client or third person unless directed otherwise in writing by the client or third person.

Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds must be promptly distributed.

Third parties, such as a client's creditors, may have lawful claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect these third-party claims against wrongful interference by the client. When the lawyer has a duty under applicable law to protect the third-party claim and 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. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, and, where appropriate, the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated.

The Supreme Court of Florida has held that lawyer trust accounts may be the proper target of garnishment actions. *See Arnold, Matheny and Eagan, P.A. v. First American Holdings, Inc.*, 982 So. 2d 628 (Fla. 2008). Under certain circumstances lawyers may have a legal duty to protect funds in the lawyer's trust account that have been assigned to doctors, hospitals, or other health care providers directly or designated as Medpay by an insurer. *See The Florida Bar*

v. Silver, 788 So. 2d 958 (Fla. 2001); *The Florida Bar v. Krasnove*, 697 So. 2d 1208 (Fla. 1997); *The Florida Bar v. Neely*, 587 So. 2d 465 (Fla. 1991); Florida Ethics Opinion 02-4.

The obligations of a lawyer under this chapter are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule. However, where a lawyer is an escrow agent and represents a party to a transaction involving the escrowed funds, the Supreme Court of Florida has held that lawyers acting as escrow agents have a fiduciary duty to protect the interests of all parties having an interest in escrowed funds whether the funds are in a lawyer's trust account or a separate escrow account. *The Florida Bar v. Golden*, 566 So. 2d 1286 (Fla. 1990); *see also The Florida Bar v. Hines*, 39 So. 3d 1196 (Fla. 2010); *The Florida Bar v. Marrero*, 157 So. 3d 1020 (Fla. 2015).

Each lawyer is required to be familiar with and comply with the Rules Regulating Trust Accounts as adopted by the Supreme Court of Florida.

Money or other property entrusted to a lawyer for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over the property on demand must be a conversion. This does not preclude the retention of money or other property on which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

Advances for fees and costs (funds against which costs and fees are billed) are the property of the client or third party paying same on a client's behalf and are required to be maintained in trust, separate from the lawyer's property. Retainers are not funds against which future services are billed. Retainers are funds paid to guarantee the future availability of the lawyer's legal services and are earned by the lawyer on receipt. Retainers, being funds of the lawyer, may not be placed in the client's trust account.

The test of excessiveness found elsewhere in the Rules Regulating The Florida Bar applies to all fees for legal services including retainers, nonrefundable retainers, and minimum or flat fees.

Notes of Decisions (163)

West's F. S. A. Bar Rule 5-1.1, FL ST BAR Rule 5-1.1
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 12/1/19. All other State Court Rules are current with amendments received through 12/1/19.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated Court Rules Illinois Supreme Court Rules (Refs & Annos) Article VIII. Illinois Rules of Professional Conduct of 2010 (Refs & Annos)

ILCS S Ct Rules of Prof.Conduct Rule 1.15
Formerly cited as IL ST CH Rule 1.15; IL ST S CT RPC Rule 1.15

Rule 1.15. Safekeeping Property

Currentness

(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 deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. For the purposes of this Rule, a client trust account means an IOLTA account as defined in paragraph (j)(2), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Maintenance of complete records of client trust accounts shall require that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Each client trust account shall be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term “advance payment retainer” to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(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.

(f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more IOLTA accounts, as defined in paragraph (j)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest- or dividend-bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Each IOLTA account shall comply with the following provisions:

(1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.

(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest-yield bank product:

(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.

(b) for accounts with balances of $100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).

(c) for accounts with balances of $100,000 or more, a money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least $250 million.

(4) As an alternative to the account options in paragraph (f)(3), the financial institution may pay a “safe harbor” yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.

(5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph (j)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:

(1) A lawyer shall maintain trust accounts only in eligible financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph (j)(8).

(i) A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If after 12 months of the discovery of the unidentified funds the lawyer determines that ascertaining the ownership or securing the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Lawyers Trust Fund, which after verification of the claim will return the funds to the lawyer.

(j) Definitions

(1) “Funds” denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.

(2) “IOLTA account” means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of nominal or short-term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.

(3) “Eligible financial institution” is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.

(4) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(5) “Money market fund” is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(6) “U.S. Government securities” refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement (“repo”) may be established only with an institution that is deemed to be “well capitalized” or “adequately capitalized” as defined by applicable federal statutes and regulations.

(7) “Safe harbor” is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

(8) “Allowable reasonable fees” for IOLTA accounts are per-check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment (“sweep”) fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(9) “Unidentified funds” are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

(k) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the “good-funds” requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account

for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Credits

Adopted July 1, 2009, eff. Jan. 1, 2010. Amended Nov. 23, 2009, eff. Jan. 1, 2010; July 1, 2011, eff. Sept. 1, 2011; April 7, eff. July 1, 2015.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as "client trust account" or "client funds account" or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis complete records of client trust account funds as required by paragraph (a), including subparagraphs (1) through (8). These requirements articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the attorney and the client or third party as these fiduciary funds will be safeguarded and documentation will be available to fulfill the lawyer's fiduciary obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.

[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the

parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[3D] The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.

[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.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] Paragraphs (a), (f) and (g) requires that nominal or short-term funds belonging to clients or third persons be deposited in one or more IOLTA accounts as defined in paragraph (j)(2) and provide that the interest earned on any such accounts shall be submitted to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund of Illinois will disburse the funds so received to qualifying organizations and programs to be used for the purposes set forth in its by-laws. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois. The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm. Client and third-person funds that are neither nominal or short-term shall be deposited in separate, interest- or dividend-bearing client trust accounts for the benefit of the client as set forth in paragraphs (a) and (f).

[7] Paragraph (h) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[8] Paragraph (i) applies when accumulated balances in an IOLTA account cannot be documented as belonging to an identifiable client or third party, or to the lawyer or law firm. This paragraph provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois.

The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (i) will be distributed to qualifying organizations and programs according to the purposes set forth in the by-laws of the Lawyers Trust Fund. When a lawyer learns that funds have been remitted in error or later identifies the owner of remitted funds, the lawyer may make a claim to the Lawyers Trust Fund for the return of the funds. After verification of the claim, the Lawyer Trust Fund will return the funds to the lawyer who then ensures the funds are restored to the owner.

Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts--funds whose owner is known but have not been claimed--should be handled according to applicable statutes including the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025 et seq.).

[9] Paragraph (j) provides definitions that pertain specifically to Rule 1.15. Paragraph (1) defines expansively the meaning of "funds," to include any form of money, including electronic fund transfers. Paragraph (2) defines an IOLTA account and paragraph (3) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (4) defines "properly payable," a term used in the overdraft notification provisions in paragraph (h)(1). Paragraphs (5) through (8) define terms pertaining to IOLTA accounts. Paragraph (9) defines "unidentified funds" as that term is used in paragraph (i).

[10] Paragraph (k) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

Commentary adopted July 1, 2009, eff. Jan. 1, 2010. Amended July 1, 2011, eff. Sept. 1, 2011; April 7, 2015, eff. July 1, 2015.

Notes of Decisions (224)

I.L.C.S. S Ct Rules of Prof.Conduct Rule 1.15, IL R S CT RPC Rule 1.15
Current with amendments received through 11/1/19

End of Document

2020 KENTUCKY COURT ORDER 0002 (C.O. 0002)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included inthis database. Because all changes may not have been supplied, thecourt clerk should be consulted to determine current rules.Pub. Note: Additions are indicated by **Text**; deletions by~~Text~~ .Stricken material is indicated by **~~Text~~** .

KY ORDER 0002
C.O. 0002
COURT RULES

Effective: ENTERED: January 13, 2020 to ENTERED: January 13, 2020

COMMONWEALTH OF KENTUCKY
RULES OF THE SUPREME COURT
RULES OF THE SUPREME COURT (SCR), RULE 3.130

ENTERED: January 13, 2020

Supreme Court of Kentucky

IN RE: ORDER AMENDING RULES OF THE SUPREME COURT OF KENTUCKY (SCR)

2020–03

The following Rules of the Supreme Court (SCR) shall become effective March 1, 2020:

2019 AMENDMENTS TO THE RULES OF THE SUPREME COURT OF KENTUCKY (SCR)

I. SCR 2.009 Immunity

Section (1) and new section (2) of SCR 2.009 shall read:

<< KY ST S CT Rule 2.009 >>

(1) Any person who communicates information to a member of the Board, Committee or its affiliates concerning an applicant for admission to the Kentucky Bar shall be granted immunity from all civil liability which might result from said communications.

(2) The Office of Bar Admissions, the Board, the Committee, their officers, members, employees, and agents, are immune from any and all civil liability for conduct and communications occurring in the performance of their duties. This includes but is not limited to, character and fitness qualification and investigations; eligibility for admission, reinstatement, or restoration of licensure; preparation and/or administration of examinations; and licensing of persons seeking to be admitted or readmitted to the practice of law.

II. SCR 2.018 (1), (2), (3) and (4) Application process

Sections (1), (2), (3) and (4) of SCR 2.018 shall read:

<< KY ST S CT Rule 2.018 >>

Subsection (d) of section (5) of SCR 3.820 shall read:

<< KY ST S CT Rule 3.820 >>

(5) Composition and Officers of the Board

(d) The Board shall select a chairperson and such other officers as they deem appropriate.

XLIV. SCR 3.830 (21)(A), (B), (C) and (D) Kentucky IOLTA Fund

New subsections (A), (B), (C) and (D) of new section (21) of SCR 3.830 shall read:

<< KY ST S CT Rule 3.830 >>

(21)(A) If a lawyer does not know the identity or the location of the owner of funds held in the lawyer's IOLTA account, or the lawyer discovers that the owner of the funds is deceased, the lawyer must make reasonable efforts to identify and locate the owner or the owner's heirs or personal representative. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, or the owner's heirs or personal representative, the lawyer shall either continue to hold the unclaimed funds in an IOLTA account, or remit the unclaimed funds to the Kentucky IOLTA Fund in accordance with written procedures published by the Kentucky IOLTA Fund and available through its website or upon request.

(B) A lawyer remitting unclaimed funds to the Kentucky IOLTA Fund shall keep a record of the remittance that includes the name and last known address of the owner of the funds, if the owner of the funds is known; the date of death of the deceased owner; the efforts made to identify and locate the owner of the funds or deceased owner's heirs, or personal representatives; the amount of funds remitted; the period of time during which the funds were held in the lawyer's or law firm's IOLTA account; and the date the funds were remitted.

(C) If, after remitting unclaimed funds to the Kentucky IOLTA Funds, the lawyer determines the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate in accordance with written procedures that the Kentucky IOLTA Fund shall publish and make available through its website or upon request.

(D) What constitutes reasonable efforts, as set out in paragraph (A), would depend on whether the lawyer knows the identity of the owner of certain funds held in the IOLTA account, or the lawyer knows the identity of the owner of the funds, but not the owner's location or the location of the deceased owner's heirs or personal representative. When the lawyer does not know the identity of the owner of the funds or the deceased owner's heirs or personal representative, reasonable efforts shall include an audit of the IOLTA account to determine how and when the funds lost their association to a particular owner or owners, and whether they constitute attorney's fees earned by the lawyer or expenses to be reimbursed to the lawyer or third person. When the lawyer knows the identity, but not the location of the owner of the funds, or the location of the owner's heirs or personal representative, reasonable efforts shall include attempted contact using last known contact information, reviewing the file to identify and contact third parties who may know the location of the owner or the owner's heirs or personal representative, or conducting internet searches. After making reasonable, but unsuccessful efforts in identifying and locating the owner of the funds or the owner's heirs or personal representative, a lawyer's decision to continue to hold the funds in the IOLTA account, as opposed to remitting the funds to the Kentucky IOLTA fund, does not relieve the lawyer of the obligation to maintain records pursuant to paragraph (B), or to determine whether it is appropriate to maintain the funds in an IOLTA account.

All sitting. All concur, except Keller and Lambert, JJ., would not adopt SCR 3.130(8.3) (f) and (g).

ENTERED: January 13, 2020.

CHIEF JUSTICE

KY ORDER 20-0002

Louisiana Rules of Professional Conduct

With amendments through November 27, 2018

Published by the
Louisiana Attorney Disciplinary Board
2800 Veterans Memorial Boulevard
Suite 310
Metairie, Louisiana 70002
(504) 834-1488 or (800) 489-8411

Rule 1.15. 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. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest-bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account or obtaining a waiver of those charges, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).

(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. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. 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.

(f) Every check, draft, electronic transfer, or other withdrawal instrument or authorization from a client trust account shall be personally signed by a lawyer or, in the case of electronic, telephone, or wire transfer, from a client trust account, directed by a lawyer or, in the case of a law firm, one or more lawyers authorized by the law firm. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a client trust account. On client trust accounts, cash withdrawals and checks made payable to "Cash" are prohibited. A lawyer shall subject all client trust accounts to a reconciliation

process at least quarterly, and shall maintain records of the reconciliation as mandated by this rule. **[Last sentence added 1/13/2015 and effective 4/1/2015]**

(g) A lawyer shall create and maintain an "IOLTA Account," which is a pooled interest-bearing client trust account for funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(1) IOLTA Accounts shall be of a type approved and authorized by the Louisiana Bar Foundation and maintained only in "eligible" financial institutions, as approved and certified by the Louisiana Bar Foundation. The Louisiana Bar Foundation shall establish regulations, subject to approval by the Supreme Court of Louisiana, governing the determination that a financial institution is eligible to hold IOLTA Accounts and shall at least annually publish a list of LBF-approved/certified eligible financial institutions. Participation in the IOLTA program is voluntary for financial institutions. IOLTA Accounts shall be established at a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government or at an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Louisiana which shall be invested solely in or fully collateralized by U.S. Government Securities with total assets of at least $250,000,000 and in order for a financial institution to be approved and certified by the Louisiana Bar Foundation as eligible, shall comply with the following provisions:

(A) No earnings from such an account shall be made available to a lawyer or law firm.

(B) Such account shall include all funds of clients or third persons which are nominal in amount or to be held for such a short period of time the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(C) Funds in each interest-bearing client trust account shall be subject to withdrawal upon request and without delay, except as permitted by law.

(2) To be approved and certified by the Louisiana Bar Foundation as eligible, financial institutions shall maintain IOLTA Accounts which pay an interest rate comparable to the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that

such factors do not discriminate between IOLTA Accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA Account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers, but the eligible institution may elect to pay a higher interest or dividend rate on IOLTA Accounts.

(3) To be approved and certified by the Louisiana Bar Foundation as eligible, a financial institution may achieve rate comparability required in (g)(2) by:

(A) Establishing the IOLTA Account as:

(1) an interest-bearing checking account; (2) a money market deposit account with or tied to checking; (3) a sweep account which is a money market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or (4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(B) Paying the comparable rate on the IOLTA checking account in lieu of establishing the IOLTA Account as the higher rate product; or

(C) Paying a "benchmark" amount of qualifying funds equal to 60% of the Federal Fund Target Rate as of the first business day of the quarter or other IOLTA remitting period; no fees may be deducted from this amount which is deemed already to be net of "allowable reasonable fees."

(4) Lawyers or law firms depositing the funds of clients or third persons in an IOLTA Account shall direct the depository institution:

(A) To remit interest or dividends, net of any allowable reasonable fees on the average monthly balance in the account, or as otherwise computed in accordance with an eligible institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;

(B) To transmit with each remittance to the Foundation, a statement, on a form approved by the LBF, showing the name of the lawyer or law firm for whom the remittance is sent and for each account: the rate of interest or dividend applied; the amount of interest or dividends earned; the types of fees deducted, if any; and the average account balance for each account for each month of the period in which the report is made; and

(C) To transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.

(5) "Allowable reasonable fees" for IOLTA Accounts are: per check charges; per deposit charges; a fee in lieu of minimum balance; sweep fees and a reasonable IOLTA Account administrative fee. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Fees or service charges that are not "allowable reasonable fees" include, but are not limited to: the cost of check printing; deposit stamps; NSF charges; collection charges; wire transfers; and fees for cash management. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA Accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA Accounts.

(6) A lawyer is not required independently to determine whether an interest rate is comparable to the highest rate or dividend generally available and shall be in presumptive compliance with Rule 1.15(g) by maintaining a client trust account of the type approved and authorized by the Louisiana Bar Foundation at an "eligible" financial institution.

(7) "Unidentified Funds" are funds on deposit in an IOLTA account for at least one year that after reasonable due diligence cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

(8) "Unclaimed Funds" are client or third person funds on deposit in an IOLTA account for at least two years that after reasonable due diligence the owner cannot be located or the owner refused to accept the funds.

(h) A lawyer who learns of Unidentified or Unclaimed Funds in an IOLTA account must remit the funds to the Louisiana Bar Foundation. No charge of misconduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (h).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds, or the owner thereof, may make a claim to the Louisiana Bar Foundation, which after verification of the claim will return the funds to the lawyer or owner, as appropriate.

IOLTA Rules

(1) The IOLTA program shall be a mandatory program requiring participation by lawyers and law firms, whether proprietorships, partnerships, limited liability companies or professional corporations.

(2) The following principles shall apply to funds of clients or third persons which are held by lawyers and law firms:

(a) No earnings on the IOLTA Accounts may be made available to or utilized by a lawyer or law firm.

(b) Upon the request of, or with the informed consent of a client or third person, a lawyer may deposit funds of the client or third person into a non-IOLTA, interest-bearing client trust account and earnings may be made available to the client or third person, respectively, whenever possible upon deposited funds which are not nominal in amount or are to be held for a period of time long enough that the funds would be expected to earn income for the client or third person in excess of the costs incurred to secure such income; however, traditional lawyer-client relationships do not compel lawyers either to invest such funds or to advise clients or third persons to make their funds productive.

(c) Funds of clients or third-persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income shall be retained in an IOLTA Account at an eligible financial institution as outlined above in section (g), with the interest or dividend (net of allowable reasonable fees) made payable to the Louisiana Bar Foundation, Inc., said payments to be made at least quarterly.

(d) In determining whether the funds of a client or third person can earn income in excess of costs, a lawyer or law firm shall consider the following factors:

(1) The amount of the funds to be deposited;

(2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) The rates of interest or yield at financial institutions where the funds are to be deposited;

(4) The cost of establishing and administering non-IOLTA accounts for the benefit of the client or third person including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(5) The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons;

(6) Any other circumstances that affect the ability of the funds of the client or third person to earn a positive return for the client or third person. The determination of whether funds to be invested could be utilized to provide a positive net return to the client or third person rests in the sound judgment of each lawyer or law firm. The lawyer or law firm shall review its IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(e) Although notification of a lawyer's participation in the IOLTA Program is not required to be given to clients or third persons whose funds are held in IOLTA Accounts, many lawyers may want to notify their clients or third persons of their participation in the program in some fashion. The Rules do not prohibit a lawyer from advising all clients or third persons of the lawyer's advancing the administration of justice in Louisiana beyond the lawyer's individual abilities in conjunction with other public-spirited members of the profession. The placement of funds of clients or third persons in an IOLTA Account is within the sole discretion of the lawyer in the exercise of the lawyer's independent professional judgment; notice to the client or third person is for informational purposes only.

(3) The Louisiana Bar Foundation shall hold the entire beneficial interest in the interest or dividend income derived from client trust accounts in the IOLTA program. Interest or dividend earned by the program will be paid to the Louisiana Bar Foundation, Inc. to be used solely for the following purposes:

(a) to provide legal services to the indigent and to the mentally disabled;

(b) to provide law-related educational programs for the public;

(c) to study and support improvements to the administration of justice; and

(d) for such other programs for the benefit of the public and the legal system of the state as are specifically approved from time to time by the Supreme Court of Louisiana.

(4) The Louisiana Bar Foundation shall prepare an annual report to the Supreme Court of Louisiana that summarizes IOLTA income, grants, operating expenses and any other problems arising out of administration of the IOLTA program. In addition, the Louisiana Bar Foundation shall also prepare an annual report to the Supreme Court of Louisiana that summarizes all other Foundation income, grants, operating expenses and activities, as well as any other problems which arise out of the Foundation's implementation of its corporate purposes. The Supreme Court of Louisiana shall review, study and analyze such reports and shall make recommendations to the Foundation with respect thereto.

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.4

Section 4.4. Investigatory Subpoenas

Currentness

(a) At any stage of the investigation, Bar Counsel may request that the Board issue a subpoena requiring the attendance and testimony of a witness, including the Respondent, and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the investigation.

(b) The request shall be made in writing to a member of the Board, who may forthwith issue the subpoena.

(c) The subpoena shall require a witness to appear before Bar Counsel at a specified date and time and shall specify any evidence to be produced. Bar Counsel may take the testimony electronically or otherwise. Respondent shall not be entitled to be present, but Bar Counsel shall provide Respondent with a copy of any recorded testimony prior to any hearing on a petition for discipline.

(d) If a subpoena is issued subsequent to the filing of a petition for discipline and if the testimony is to be recorded electronically or otherwise, the Respondent shall be entitled to be present and participate in the examination of any such witness whose testimony is to be recorded and in the examination of any documents produced by such subpoena. No investigatory subpoenas shall be issued after expedited disciplinary proceedings are commenced pursuant to Section 2.12 of these Rules.

Credits
Adopted effective April 9, 2009.

Rules of the Board of Bar Overseers § 4.4, MA R BAR OVERSEERS § 4.4
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.5

Section 4.5. Hearing Subpoenas

Currentness

(a) Bar Counsel and the Respondent may request that the hearing committee, hearing panel, special hearing officer, or the Board issue a subpoena requiring the attendance and testimony of a witness, including the Respondent, and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding.

(b) The request shall be made in writing to a member of the hearing committee or panel, or to the special hearing officer, or to a member of the Board who may forthwith issue the subpoena.

(c) The subpoena shall require a witness to appear before the Board, a hearing panel, the hearing committee, or the special hearing officer, or at a deposition conducted pursuant to Sections 4.9 to 4.15 of these Rules, at a specified date and time. The subpoena shall also specify the evidence, if any, to be produced and the date for production, which may be prior to the hearing. The parties shall each be entitled to inspect or copy any materials produced pursuant to such subpoena.

(d) The Board, the hearing committee, hearing panel, or special hearing officer may, on its own motion, subpoena any witness to appear and give testimony or produce evidence at any hearing.

Credits
Adopted effective April 9, 2009.

Rules of the Board of Bar Overseers § 4.5, MA R BAR OVERSEERS § 4.5
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.5A

Section 4.5A. Reciprocal Subpoenas

Currentness

(a) Whenever a subpoena has been duly approved under the law of another jurisdiction for use in lawyer discipline or disability proceedings, Bar Counsel may request that the Board issue a subpoena requiring the attendance and testimony of the witness in this Commonwealth and the production of any evidence, including books, records, correspondence or documents, relating to the matter in question.

(b) The request shall be made in writing to a member of the Board, who may forthwith issue the subpoena.

(c) The subpoena shall require a witness to appear before Bar Counsel at a specified date and time and shall specify any evidence to be produced. Bar Counsel may take the testimony electronically or otherwise.

Credits
Adopted effective April 9, 2009.

Rules of the Board of Bar Overseers § 4.5A, MA R BAR OVERSEERS § 4.5A
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.5B

Section 4.5B. Taking Out-of-State Depositions Pursuant to Subpoena

Currentness

(a) Implementing the provisions of Subchapter E regarding the taking of depositions pursuant to Sections 4.9 and 4.10 out of state, Bar Counsel and/or the respondent may request that the hearing committee, hearing panel, special hearing officer, or the Chair approve the taking of out-of-state depositions pursuant to subpoena requiring the attendance of a witness and/or the production of any evidence, including books, records, correspondence, or documents, relating to any matter in question in the proceeding.

(b) Upon such approval having been given, the Board shall issue a request, addressed to the disciplinary board or entity in the jurisdiction in which the deposition is to be taken, that the latter issue a subpoena requiring the attendance and testimony of the witness in the out-of-state jurisdiction and the production of any evidence, including books, records, correspondence, or documents, relating to the matter in question. The request shall state that the Board has approved the taking of such deposition and shall specify the date, time, and place for the taking of the deposition.

(c) In the event that the disciplinary board in the out-of-state jurisdiction in which the deposition is to be taken either cannot issue, or declines to issue, a subpoena for the taking of such deposition, Bar Counsel and/or the respondent may apply to the Supreme Judicial Court for Suffolk County, citing such approval; for leave to take such deposition pursuant to the provisions of G.L. c. 223A, § 10 (Letters Rogatory). For purposes of such application, a disciplinary matter before the Board shall be considered "an action pending in this Commonwealth" within the meaning of G.L. c. 223A, § 10.

(d) Depositions in an out-of-state jurisdiction shall be taken before an officer, not being counsel for any of the parties, authorized to administer oaths by the laws of the United States or of the place where the examination is held.

Credits

Adopted effective September 1, 2011.

Rules of the Board of Bar Overseers § 4.5B, MA R BAR OVERSEERS § 4.5B
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.6

Section 4.6. Service

Currentness

Each subpoena issued in accordance with this subchapter shall be served in the manner provided for service of summonses in the Courts of the Commonwealth. Alternatively, service may be made upon any lawyer in hand or by certified, registered, or first class mail addressed to the lawyer at either the residence or office address furnished in the last registration statement filed by the lawyer in accordance with S. J. C. Rule 4:02. A copy of each investigative subpoena served on a person other than the Respondent shall be mailed to the Respondent. No witness fee or travel allowance shall be paid or tendered to any Respondent subpoenaed hereunder.

Credits
Adopted effective April 9, 2009.

Rules of the Board of Bar Overseers § 4.6, MA R BAR OVERSEERS § 4.6
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.7

Section 4.7. Confidentiality of Investigatory Subpoenas

Currentness

(a) Each investigatory subpoena shall clearly indicate on its face that it is issued in connection with a confidential investigation under Bar Disciplinary Rules of Chapter Four of the Supreme Judicial Court, and the Board and the Office of Bar Counsel will conduct themselves so as to maintain the absolute confidentiality of the investigation.

(b) Each subpoena shall state on its face that a person subpoenaed may consult with counsel.

(c) Whenever records of a lawyer's clients' trust fund account are subpoenaed, all steps necessary to maintain the confidentiality to which clients are entitled shall be taken by Bar Counsel and the Board, hearing committee, hearing panel, or special hearing officer.

Credits
Adopted effective April 9, 2009.

Rules of the Board of Bar Overseers § 4.7, MA R BAR OVERSEERS § 4.7
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Board of Bar Overseers Chapter 4. Miscellaneous Matters
Subchapter D. Subpoenas

Rules of the Board of Bar Overseers § 4.8

Section 4.8. Motions to Quash

Currentness

A motion to quash any subpoena issued hereunder may be filed with the Board. The motion shall state the grounds on which it is based, and any fact alleged shall be supported by affidavit filed with the motion. The motion and affidavit shall be served upon the Respondent or Bar Counsel or both as the case may be, who shall within seven days after receipt thereof file any opposition thereto with the Board. The motion shall be promptly decided by the Chair of the Board, the Chair of the hearing committee or the hearing panel, or the special hearing officer, either upon the documents or after any hearing held.

Credits
Amended effective April 9, 2009.

Rules of the Board of Bar Overseers § 4.8, MA R BAR OVERSEERS § 4.8
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Supreme Judicial Court (Refs & Annos) Chapter Three. Ethical Requirements and Rules Concerning the Practice of Law Rule 3:07. Massachusetts Rules of Professional Conduct and Comments (Refs & Annos) Client-Lawyer Relationship

Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.), Rule 1.6

Rule 1.6. Confidentiality of Information

Currentness

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

(1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;

(2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;

(3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to the extent permitted or required under these Rules or to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.

(d) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this Rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this Rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (d) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this Rule.

Credits

Adopted June 9, 1997, effective January 1, 1998. Amended December 30, 1997, effective March 1, 1998. Amended March 26, 2015, effective July 1, 2015. Amended March 10, 2016, effective May 1, 2016.

Editors' Notes

COMMENT

[1] This Rule governs the disclosure by a lawyer of confidential information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to confidential information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal confidential information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent or as otherwise permitted by these Rules, the lawyer must not reveal confidential information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

[3] The principle of client-lawyer confidentiality established by this Rule is broader than the attorney-client privilege and the work-product doctrine. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality also applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

[3A] “Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential. “Confidential information” does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. A lawyer may not disclose confidential information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. Information that is “generally known in the local community or in the trade, field or profession to which the information relates” includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret

marriage would be protected even if a matter of public record because such information was not "generally known in the local community." As another example, a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews. The accumulation of legal knowledge that a lawyer gains through practice ordinarily is not client information protected by this Rule. In addition, the factual information acquired about the structure and operation of an entire industry during the representation of one entity within the industry would not ordinarily prevent an attorney from undertaking a successive representation of another entity in a matter when the attorney had no other relevant confidential information from the earlier representation and there was no other conflict of interest at issue.

[3B] All these examples explain the addition of the word "confidential" before the word "information" in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words "or is generally known" in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in Rule 1.9(c)(1) has been achieved more generally throughout the Rules by the addition of the word "confidential" in this Rule.

[4] Paragraph (a) prohibits a lawyer from revealing confidential information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other confidential information relating to a client of the firm, unless the client has instructed that particular confidential information be confined to specified lawyers. Before accepting or continuing representation on such a basis, the lawyers to whom such restricted confidential information will be communicated must assure themselves that the restriction will not contravene firm governance rules or prevent them from discovering disqualifying conflicts of interests.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities, even if the information is confidential information, if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] The use of the term "substantial" harm or injury in paragraphs (b)(1), (b)(2) and (b)(3) of this Rule restricts permitted revelation by limiting the permission granted to instances when the harm or injury is likely to be more than trivial or small. The reference to bodily harm in paragraph (b)(1) is not meant to require physical injury as a prerequisite. Acts of statutory rape, for example, fall within the concept of bodily harm. Rule 1.6(b)(1) also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been

sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal confidential information to the extent necessary to enable affected persons or appropriate authorities to prevent the commission of a crime or fraud that the lawyer reasonably believes is likely both to occur and to result in substantial injury to the interests or property of another. The lawyer should not ignore facts that would lead a reasonable person to conclude that disclosure is permissible. Although paragraph (b)(2) does not require the lawyer to reveal the misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal confidential information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose confidential information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter consults or employs a lawyer for the purpose of representation concerning that offense.

[8A] Paragraphs (b)(2) and (b)(3) each permit a lawyer to disclose client confidential information under certain circumstances to prevent or ameliorate harm caused by the commission of a crime or fraud. Disclosure is permitted only when the harm constitutes substantial injury to property, financial, or other significant interests of another. The modifier “significant” is added to emphasize that a substantial injury to an insignificant interest is not an adequate basis for disclosure. Unlike the corresponding ABA Model Rule, this rule permits disclosure to prevent or ameliorate harm to non-financial interests as well as to property or financial interests. For example, the kidnapping of a child by a non-custodial parent may result in substantial injury to the vital interest of the other parent in maintaining custody of or even contact with his or her child. A criminal trespasser might invade a significant privacy interest of another. A person by crime or fraud might deprive someone of the right to vote or some other significant right of participation in the political process. These interests are not financial interests, but are sufficiently important that lawyers should have the discretion to disclose client confidential information to prevent or ameliorate crimes and frauds that substantially injure those interests.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose confidential information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited confidential information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment 7. Under these circumstances, lawyers and law firms are permitted to disclose limited confidential information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, the general extent of the lawyer's involvement in the matter, and information about whether the matter has terminated. Even this limited confidential information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any such information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.*, the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information received pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment 5, such as when a lawyer in a firm discloses confidential information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See also Rule 1.16.

[15] A lawyer may be ordered to reveal confidential information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the confidential information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the confidential information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. See also Rule 1.16, Comment 3.

[17] Paragraph (b) permits but does not require the disclosure of confidential information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as: (1) the seriousness of the potential harm to others; (2) the degree of certainty that the harm will occur, including the attorney's assessment of the accuracy of the information; (3) the imminence of the harm; (4) the apparent absence of any other feasible way to prevent the potential harm; (5) the extent to which the client may be using or has used the lawyer's services to bring about the harm, or the lawyer's own involvement in the transaction; (6) the circumstances under which the lawyer acquired the confidential information, including if the information is protected by the attorney-client privilege; and (7) the nature of the lawyer's relationship with the client and with those who might be injured by the client. Some of these factors may also be relevant to the exercise of discretion under paragraphs (b)(4) through (b)(7). In any instance, disclosure should be no greater than the lawyer reasonably believes necessary to prevent the harm. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. The reference to Rules 3.3, 4.1(b), 8.1 and 8.3 in the opening phrase of Rule 1.6(b) has been added to emphasize that Rule 1.6(b) is not the only provision of these Rules that deals with the disclosure of confidential information. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Notice of Disclosure to Client

[17A] Whenever these Rules permit or require the lawyer to disclose a client's confidential information, the issue arises whether the lawyer should, as a part of the confidentiality and loyalty obligation and as a matter of competent practice, advise the client beforehand of the plan to disclose. It is not possible to state an absolute rule to govern a lawyer's conduct in such situations. In some cases, it may be impractical or even dangerous for the lawyer to advise the client of the intent to reveal confidential information either before or even after the fact. Indeed, such revelation might thwart the reason for creation of the exception. It might hasten the commission of a dangerous act by a client or it might enable clients to prevent lawyers from defending themselves against accusations of lawyer misconduct. But there will be instances, such as the intended delivery of whole files to prosecutors to convince them not to indict the lawyer, where the failure to give notice would prevent the client from making timely objection to the revelation of too much confidential information. Lawyers will have to weigh the various factors and make reasonable judgments about the demands of loyalty, the requirements of competent practice, and the policy reasons for creating the exception to confidentiality in order to decide whether they should give advance notice to clients of the intended disclosure.

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard confidential information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments 3 and 4.

[19] When transmitting a communication that includes confidential information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the confidential information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Notes of Decisions (5)

S.J.C. Rule 3:07, Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.), Rule 1.6, MA R S CT RULE 3:07 RPC Rule 1.6
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Supreme Judicial Court (Refs & Annos) Chapter Three. Ethical Requirements and Rules Concerning the Practice of Law Rule 3:07. Massachusetts Rules of Professional Conduct and Comments (Refs & Annos) Client-Lawyer Relationship

Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.), Rule 1.15

Rule 1.15. Safekeeping Property

Currentness

(a) Definitions:

(1) "Trust property" means property of clients or third persons that is in a lawyer's possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as "trust funds."

(2) "Trust account" means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this Rule.

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer's own property.

(1) Trust funds shall be held in a trust account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer's interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

(3) A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred.

(4) All trust property shall be appropriately safeguarded. Trust property other than funds shall be identified as such.

(c) Prompt Notice and Delivery of Trust Property to Client or Third Person. Upon receiving trust funds or other trust 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 as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, 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.

(d) Accounting.

(1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.

(2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client's funds in the trust account after the withdrawal.

(e) Operational Requirements for Trust Accounts.

(1) All trust accounts shall be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this Rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.

(2) Each trust account title shall include the words “trust account,” “escrow account,” “client funds account,” “conveyancing account,” “IOLTA account,” or words of similar import indicating the fiduciary nature of the account.

(3) For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within the meaning of this Rule. The lawyer shall retain a copy executed by the bank and the lawyer for the lawyer's own records. The notice shall identify the bank, account, and type of account, whether pooled, with interest paid to the IOLTA Committee (IOLTA account), or individual account with interest paid to the client or third person on whose behalf the trust property is held. For purposes of this Rule, one notice is sufficient for a master or umbrella account with individual subaccounts.

(4) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to “cash” or “bearer” or by any other method which does not identify the recipient of the funds.

(5) Every withdrawal from a trust account for the purpose of paying fees to a lawyer or reimbursing a lawyer for costs and expenses shall be payable to the lawyer or the lawyer's law firm.

(6) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest bearing accounts: either (i) a pooled account (“IOLTA account”) for all trust funds which in

the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this Rule.

(7) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this Rule. As used in this paragraph, “family member” refers to those individuals specified in Rule 7.3(a)(3).

(f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this paragraph. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph (1)G of this paragraph (f) or they may be prepared manually.

(1) *Trust Account Records*. The following books and records must be maintained for each trust account:

A. **Account Documentation.** A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. **Check Register**. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. **Individual Client Records**. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or ledger for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. **Bank Fees and Charges**. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this Rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. **Reconciliation Reports**. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

(i) The balance which appears in the check register as of the reporting date

(ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.

(iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. **Account Documentation**. For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

(i) bank statements.

(ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.

(iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

G. **Electronic Record Retention**. A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

(2) *Business Accounts.* Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) *Trust Property Other than Funds.* A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(4) *Dissolution of a Law Firm.* Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.

(g) Interest on Lawyers' Trust Accounts.

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of $100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm which deposited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest applied, and the method by which the interest was computed.

(3) Lawyers shall certify their compliance with this Rule as required by S.J.C. Rule 4:02, § 2.

(4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

(ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under this Rule;

(iii) the encouragement of the banking community and the public to support the IOLTA program;

(iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;

(v) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;

(vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and

(vii) reporting to the court in such manner as the court may direct.

(5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.

(6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this Rule.

(h) Dishonored Check Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Rule, and shall establish rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(6) The following definitions shall be applicable to this subparagraph:

(i) “Financial institution” includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

Credits

Adopted June 9, 1997, effective January 1, 1998. Amended September 5, 2003, effective July 1, 2004. Amended March 26, 2015, effective July 1, 2015.

Editors' Notes

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. Separate trust accounts are warranted when administering estate monies or acting in similar fiduciary capacities.

[2] In general, the phrase “in connection with a representation” includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument or by court appointment holds property “in connection with a representation”. Likewise, a lawyer serving as an escrow agent in connection with litigation or a transaction holds that property “in connection with a representation”. However, a lawyer serving as a fiduciary who is not actively practicing law does not hold property “in connection with a representation.”

[2A] Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered or for expenses subsequently incurred are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account. These fees and expenses can be withdrawn by a lawyer only as fees are earned or expenses incurred. The Rule does not require flat fees to be deposited to a trust account, but a flat fee that is deposited to a trust account is subject to all the provisions of this Rule, including paragraphs (b)(2) and (d)(2). A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted. For the obligation to refund an unearned fee in the event of a discharge or withdrawal, see Rule 1.16(d).

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] 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 the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[6] How much time should elapse between the receipt of funds by the lawyer and notice to the client or third person for whom the funds are held pursuant to paragraph (c) depends on the circumstances. By example, notice must be furnished immediately upon receipt of funds in settlement of a disputed matter, but a lawyer acting as an escrow agent or trustee routinely collecting

various items of income may give notice by furnishing a complete statement of receipts and expenses on a regular periodic basis satisfactory to the client or third person. Notice to a client or third person is not ordinarily required for payments of interest and dividends in the normal course, provided that the lawyer properly includes all such payments in regular periodic statements or accountings for the funds held by the lawyer.

[6A] Paragraph (d)(2) provides that, on or before the date of any withdrawals from a trust account to pay fees due, the lawyers must provide the client in writing with, among other information, an itemized bill or other accounting showing the services rendered. Because the definition of "trust property" in paragraph (a)(1) includes funds held in a fiduciary capacity, lawyers who represent themselves as fiduciaries(such as personal representatives, executors, conservators, guardians or trustees) must comply with paragraph (d)(2) by creating, prior to or contemporaneous with any withdrawal of fees, the bills or accountings required by the rule to justify payment. Such accountings may consist of itemized written time records, formal written bills, or other contemporaneous written accountings that show the services rendered and the method for calculating the fees. The lawyer is also required to maintain all trust account records specified in paragraphs (e) and (f) of this rule.

[7] Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer's own records. Forms for opening an IOLTA account (called an Attorney's Notice of Enrollment) may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. See the IOLTA Guidelines for additional procedures to be used when opening IOLTA accounts. Forms for notice to a bank when opening an individual (i.e., non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these forms shall not prevent the use of other forms consistent with this Rule.

[8] Paragraph (e)(4) states the general rule that all withdrawals and disbursements from trust account must be made in a manner which permits the recipient or payee of the withdrawal to be identified. It does not prohibit electronic transfers or foreclose means of withdrawal which may be developed in the future, provided that the recipient of the payment is identified as part of the transaction. When payment is made by check, the check must be payable to a specific person or entity. A prenumbered check must be used, except that starter checks may be used for a brief period between the opening of a new account and issuance of numbered checks by the bank or depository.

[9] Paragraph (f) lists records that a lawyer is obliged to keep in order to comply with the requirement that "complete records" be maintained. Additional records may be required to document financial transactions with clients or third persons. Depending on the circumstances, these records could include retainer, fee, and escrow agreements and accountings, including RESPA or other real estate closing statements, accountings in contingent fee matters, and any other statement furnished to a client or third person to document receipt and disbursement of funds.

[10] The "Check Register," "Individual Client Ledger" and "Ledger for Bank Fees and Charges" required by paragraph (f)(1) are all chronological records of transactions. Each entry made in the check register must have a corresponding entry in one of the ledgers. This requirement is consistent with manual record keeping and also comports with most software packages. In addition to the data required by paragraph (f)(1)(B), the source of the deposit and the purpose of the disbursement should be recorded in the check register and appropriate ledger. For non-IOLTA accounts, the dates and amounts of interest accrual and disbursement, including disbursements from accrued interest to defray the costs of maintaining the account, are among the transactions which must be recorded. Check register and ledger balances should be calculated and recorded after each transaction or series of related transactions.

[11] Periodic reconciliation of trust accounts is also required. Generally, trust accounts should be reconciled on a monthly basis so that any errors can be corrected promptly. Active, high-volume accounts may require more frequent reconciliations. A lawyer must reconcile all trust accounts at least every sixty days.

The three-way reconciliation described in paragraph (f)(1)(E) must be performed for any account in which funds related to more than one client matter are held. The reconciliation described in paragraph (f)(1)(E)(iii) need not be performed for accounts which only hold the funds of a single client or third person, but the lawyer must be sure that the balance in that account corresponds to the balance in the individual ledger maintained for that client or third person.

The method of preparation and form of the periodic reconciliation report will depend upon the volume of transactions in the accounts during the period covered by the report and whether the lawyer maintains records of the account manually or electronically. By example, for an inactive single-client account for which the lawyer keeps records manually, a written record that the lawyer has reconciled the account statement from the financial institution with the check register maintained by the lawyer may be sufficient.

[12] Lawyers who maintain records electronically should back up data on a regular basis. For moderate to high-volume trust accounts, weekly or even daily backups may be appropriate.

[13] Paragraph (f)(4), along with Rule 1.17(e), provides for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. These provisions reflect the supervisory responsibilities of partners under Rule 5.1. Regardless of the arrangements the partners make among themselves for maintenance of the client trust records, each partner can be held responsible for ensuring the availability of these records. For the definition of “law firm,” “partner,” and “reasonable,” see Rules 1.0(d), (h), and (k).

Notes of Decisions (31)

S.J.C. Rule 3:07, Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.), Rule 1.15, MA R S CT RULE 3:07 RPC Rule 1.15
Current with amendments received through November 1, 2019.

End of Document

Massachusetts General Laws Annotated Rules of the Supreme Judicial Court (Refs & Annos) Chapter Four. Bar Discipline and Clients' Security Protection

S.J.C. Rule 4:01

Rule 4:01. Bar Discipline

Currentness

Section 1. Jurisdiction.

(1) Any lawyer or foreign legal consultant admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to this court's exclusive disciplinary jurisdiction and the provisions of this rule as amended from time to time.

(2) Any Information, report, or other pleading filed in the Supreme Judicial Court pursuant to this rule shall be filed with the clerk of this court for Suffolk County. It shall be presented to the chief justice, who shall designate a justice to hear the matter.

Section 2. Venue of Disciplinary Hearings.

Unless the Board Chair or the Chair's designee specifies a different venue, a hearing on a petition for discipline shall take place at the offices of the Board. The Board Chair or the Chair's designee shall consider the convenience of the complainant, witnesses, the respondent and hearing committee in selecting a hearing location.

Section 3. Grounds for Discipline.

(1) Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute misconduct and shall be grounds for appropriate discipline even if the act or omission did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court. A violation of this Chapter 4 by a lawyer, including without limitation the failure without good cause (a) to comply with a subpoena validly issued under section 22 of this rule; (b) to respond to requests for information by the Bar Counsel or the Board made in the course of the processing of a complaint; (c) to comply with procedures of the Board consistent herewith for the processing of a petition for discipline or for the imposition of public reprimand or admonition (see section 4 of this rule); or (d) to comply with a condition of probation or diversion to an alternative educational, remedial, or rehabilitative program shall constitute misconduct and shall be grounds for appropriate discipline.

(2) Failure to comply with (a) or (b) of subsection (1) or failure to file an answer as required by section 8(3) of this rule or to appear at a hearing before a hearing committee, special hearing officer, or panel of the Board shall result in the entry of an order of administrative suspension upon the bar counsel's filing with this court of a petition for administrative suspension which sets forth the violation of this section and an affidavit of the bar counsel affirming that the lawyer was served with the request for information, the subpoena, the petition for discipline, or the notice of hearing in accordance with the provisions of section 21 of this rule; that the lawyer was afforded a reasonable period of time for compliance with the request for information or the subpoena, or to answer the petition, or with reasonable notice of the hearing and had failed to comply, to answer, or to appear; and that the request for information, subpoena, petition, or notice of hearing was accompanied by a statement advising

the respondent-lawyer that failure to comply with the request for information or subpoena, or to answer timely the petition, or to appear at the hearing would result in administrative suspension without further hearing.

(3) Any suspension under the provisions of subsection (2) above shall be effective forthwith upon entry of the suspension order and shall be subject to the provisions of section 17(4) of this rule. If not reinstated within thirty days after entry, the lawyer shall become subject to the other provisions of section 17 of this rule. As a condition precedent to reinstatement, such lawyer shall file with the Board and with the bar counsel an affidavit stating the extent to which he or she has complied with subsection (1) of this section and with the applicable provisions of section 17 of this rule. The lawyer shall also as a condition of reinstatement pay all expenses incurred by the Office of Bar Counsel and the Board in obtaining compliance with this section and in seeking suspension, including an administrative fee of twenty-five dollars.

Section 4. Types of Discipline. Discipline of lawyers may be (a) by disbarment, resignation pursuant to section 15 of this rule, or suspension by this court; (b) by public reprimand by the Board; or (c) by admonition by the bar counsel.

Section 5. The Board of Bar Overseers.

(1) This court shall appoint a Board of Bar Overseers (Board) to act, as provided in this Chapter Four, with respect to the conduct and discipline of lawyers and in such matters as may be referred to the Board by any court or by any judge or justice. The Board shall consist of such number of members as the court may determine from time to time. The court, by order, shall request the submission of nominations to fill vacancies in such manner as it may determine. The Massachusetts Bar Association and each county bar association (including, for the purposes of this section, the Boston Bar Association as the bar association for Suffolk County) may submit to this court in writing the names of two nominees for each vacancy in the Board. Any lawyer may submit in writing the names of nominees. The court may, but need not, make appointments to the Board from the nominees so submitted and, in making appointments, shall give appropriate consideration to a reasonable geographical distribution of appointees among disciplinary districts. The court shall from time to time designate one member of the Board as Chair and another as Vice Chair. The Vice Chair shall perform the duties of the Chair in the Chair's absence or incapacity to act.

(2) Appointments to the Board shall be for a term of four years. No member shall be appointed to more than two consecutive full terms but (a) a member appointed for less than a full term (originally or to fill a vacancy) may serve two full terms in addition to such part of a full term, and (b) a former member shall again be eligible for appointment after a lapse of one or more years. A member whose term has expired shall continue in office until a successor is appointed and, in any event, shall continue to serve on any hearing or appeal panel to which he or she has been appointed until the panel completes its duties and may be recalled to serve on the panel in the event of a remand by the Board or the court.

(3) The Board of Bar Overseers

(a) may consider and investigate the conduct of any lawyer within this court's jurisdiction either on its own motion or upon complaint by any person;

(b) shall appoint a chief Bar Counsel (the Bar Counsel) who shall, with the concurrence of the Board, hire such assistants to the Bar Counsel as may be required, all to serve at the pleasure of the court, the appointment of the Bar Counsel to be with the approval of the court; and may employ and compensate such other persons as may be required or appropriate in the performance of the Board's duties;

(c) shall appoint one or more hearing committees, each committee to consist of three or more individuals, to perform such functions as may be assigned by the Board with reference to charges of misconduct; provided, however, that each hearing committee shall be chaired by a lawyer and no hearing committee shall consist of more than one nonlawyer;

(d) may appoint a special hearing officer, who shall be a lawyer, to hear charges of misconduct when, in view of the anticipated length of the hearing or for other reasons, the Board determines that a speedy and just disposition would be better accomplished by such appointment than by referring the matter to a hearing committee or panel of the Board;

(e) may, through its Chair, refer charges to an appropriate hearing committee, to a special hearing officer, or to a hearing panel of the Board;

(f) shall review, and may revise, the findings of fact, conclusions of law, and recommendations of hearing committees, special hearing officers, or hearing panels. The Board in its discretion may refer an appeal taken pursuant to section 8(5) of this rule to a panel of its own members for its recommendation;

(g) may issue a public reprimand to lawyers for misconduct, and in any case where disbarment or suspension of a lawyer is to be sought or recommended, or where the Bar Counsel or the Respondent-lawyer appeals pursuant to section 8(6) of this rule, shall file an Information with this court;

(h) with the approval of this court, may adopt and publish rules of procedure and other regulations not inconsistent with this rule;

(i) may lease office space and make contracts and arrangements for the performance of administrative and similar services required or appropriate in the performance of the Board's duties;

(j) may, but need not, consult with local bar associations in the several counties and their officers concerning any appointments which it is herein authorized to make;

(k) may invest or direct the investment of the fees or any portion thereof, paid pursuant to Rule 4:03, section (1), and may cause funds to be deposited in any bank, banking institution, savings bank, or federally insured savings and loan association in this Commonwealth provided, however, that the Board shall have no obligation to cause these fees or any portion thereof to be invested; and

(l) may perform other acts necessary or proper in the performance of the Board's duties.

(4) For any action requiring a vote of the Board, the Board shall act only with the concurrence of a majority of the Board who are present and voting, provided, however, that a quorum shall be present. A quorum shall consist of a majority of the Board, including members who are recused or abstain.

Section 6. Hearing Committees.

(1) Hearing committee members shall be appointed for a term of three years, and no member shall serve for more than two successive three-year terms. A member whose term has expired shall continue in office until a successor is appointed, and, in any event, shall continue to serve on any committee to which he or she has been appointed until the committee completes its duties and may be recalled to serve on the committee in the event of a remand by the Board or the court. A former member may be again appointed after the expiration of one year from his or her last service.

(2) The Board shall designate one member of each committee, who shall be a lawyer, to serve as chair. The committee shall act only with a concurrence of a majority of its members who are present, provided, however, that two members shall constitute a quorum.

(3) Hearing committees

(a) shall conduct hearings on formal charges of misconduct upon reference by the Board or its chair, and

(b) may recommend that the matter be concluded by dismissal, admonition, public reprimand, suspension, or disbarment.

(4) If a special hearing officer is appointed to hear disciplinary charges, that officer shall perform all the duties imposed upon a hearing committee by this rule or by the rules of the Board. Unless otherwise provided herein, the words “hearing committee” used throughout this rule shall also mean a special hearing officer or hearing panel.

Section 7. The Bar Counsel.

The Bar Counsel

(1) shall investigate all matters involving alleged misconduct by a lawyer coming to his or her attention from any source, except matters involving alleged misconduct by the Bar Counsel, assistant Bar Counsel, or any member of the Board, which shall be forwarded to the Board for investigation and disposition, provided that Bar Counsel need not entertain any allegation that Bar Counsel in his or her discretion determines to be frivolous, to fall outside the Board's jurisdiction, or to involve conduct that does not warrant further action;

(2) shall dispose of all matters involving alleged misconduct by a lawyer in accordance with this rule and any rules and regulations issued by the Board for his or her guidance which may provide

(a) that Bar Counsel need not pursue or may close a complaint whenever the matter complained of is frivolous, falls outside the jurisdiction of the Board, or involves allegations of misconduct that do not warrant further action,

(b) for adjustment of complaints found by the Bar Counsel to be of a minor character by informal conference, admonition, or by diversion to an alternative educational, remedial, or rehabilitative program, and

(c) for disposition by recommending to the Board the institution of formal proceedings in which the Bar Counsel seeks public discipline,

but, except as to a complaint that is closed by Bar Counsel or that Bar Counsel determines need not be pursued, no disposition shall be recommended or undertaken by the Bar Counsel until the accused lawyer shall have been afforded opportunity to state his or her position with respect to the allegations against him or her;

(3) shall prosecute all disciplinary proceedings before hearing committees, special hearing officers, the Board, and this court;

(4) shall appear, with full rights to participate as a party, at hearings conducted with respect to petitions for reinstatement by suspended or disbarred lawyers, lawyers who have resigned, or lawyers on disability inactive status;

(5) shall maintain permanent records of all matters presented to him or her and the disposition thereof, except that (a) the Board may provide by rule for the expunction of the records of a complaint against a lawyer which has been docketed solely on account of a report made by a financial institution that has dishonored an instrument presented against a lawyer's trust account when the instrument was dishonored solely due to the error of the financial institution, and (b) the Bar Counsel shall destroy and expunge the records of a complaint against a lawyer which has been closed and not subsequently reopened within six years of the date of closing unless a complaint has been filed in the intervening six-year period. In the event a complaint is so filed or reopened, the records shall not be destroyed and expunged until the expiration of six years from the date on which all complaints have been closed and not reopened and all complaints have been dismissed and not reopened;

(6) shall, with the concurrence of the Board, hire such assistants to the Bar Counsel as may be required; and

(7) may delegate any duties or functions to a duly appointed assistant acting under his or her general supervision.

Section 8. Procedure.

(1) **Investigation.** In accordance with any rules and regulations of the Board, investigations (whether upon complaint or otherwise) shall be conducted by the Bar Counsel, except as otherwise provided by section 7(1) of this rule. Following completion of any investigation, or of a determination pursuant to section 7(1) that an investigation is not warranted, the Bar Counsel shall take further action, which may include, among others,

(a) closing or declining to pursue a complaint and informing the complainant in writing of the reasons for not investigating a complaint or for closing the file and of the complainant's right to request review by a member of the Board;

(b) closing a matter after adjustment, informal conference, or diversion to an alternative educational, remedial, or rehabilitative program;

(c) recommending to the Board that

(i) an admonition of the lawyer be administered;

(ii) formal proceedings be instituted; or

(iii) public discipline be imposed by agreement.

Except in the case of a recommendation that public discipline be imposed by agreement, a designated Board member may approve, reject, or modify the recommended action, but the Bar Counsel may appeal to the Board Chair from any modification or rejection of a recommendation that an admonition be administered, or that formal proceedings be instituted. The Board Chair may approve or modify the recommended action. A recommendation that formal discipline be imposed by agreement shall be submitted directly to the full Board.

(2) **Admonition.**

(a) On appeal by Bar Counsel pursuant to subsection (1), the decision of the Board Chair to approve, modify, or reject the recommendation of an admonition shall be final.

(b) If an admonition is approved by either the designated Board member or the Board Chair on appeal, the Bar Counsel shall make service of the admonition on the Respondent-lawyer together with a summary of the basis for the admonition. Bar Counsel shall also provide written notice to the Respondent-lawyer of the right to demand in writing within fourteen days of the date of service that the admonition be vacated and a hearing provided; the requirement that the Respondent-lawyer submit with the demand a written statement of objections to the factual allegations and disciplinary violations set forth in the summary and all matters in mitigation; that failure of the Respondent-lawyer to demand within fourteen days after service that the admonition be vacated and to submit a statement of objections constitutes consent to the admonition; and that failure to set forth matters in mitigation constitutes a waiver of the right to present evidence in mitigation at the hearing.

(c) In the event of a demand that the admonition be vacated, the matter shall be disposed of in accordance with the procedure set forth in section 8(4) for expedited hearings.

(d) Eight years after the administration of an admonition, it shall be vacated, and the complaint which gave rise to it dismissed, unless during such period another complaint has resulted in the imposition of discipline or is then pending.

(3) **Formal Proceedings.**

(a) As to matters for which formal proceedings have been approved pursuant to section 8(1) of this rule, disciplinary proceedings shall be instituted by the Bar Counsel's filing a petition for discipline with the Board setting forth specific charges of alleged misconduct. A copy of the petition shall be served, together with a notice from the Board, setting a time for answer which shall not be less than twenty days after such service upon the Respondent-lawyer and advising the Respondent-lawyer that the failure to file an answer shall be grounds for administrative suspension pursuant to section 3(2) of this rule. The Respondent-lawyer shall file his or her answer with the Board and serve a copy thereof on the Bar Counsel. In the event the Respondent-lawyer fails to file a timely answer to the petition, the charges shall be deemed admitted. Averments in the petition are admitted when not denied in the answer.

(b) The matter shall be assigned to a hearing committee, to a special hearing officer, or to the Board or a panel of the Board, and the Board shall give notice to the Bar Counsel, and to the Respondent-lawyer's counsel, if any, and, if not, to the Respondent-lawyer of the date and place set for hearing. The notice of hearing shall be served at least fifteen days in advance thereof. The notice shall advise the Respondent-lawyer that the failure to appear for hearing will be grounds for administrative suspension pursuant to section 3(2) of this rule.

(c) In the event the Respondent-lawyer files an answer admitting the charges and does not request the opportunity to be heard in mitigation, the Bar Counsel and the Respondent-lawyer may jointly recommend to the Board that the Respondent-lawyer receive a public reprimand or a suspension. If the Board accepts a joint recommendation for a public reprimand, it shall issue such reprimand. If the Board accepts a joint recommendation for suspension, the Board shall file with the clerk of this court for Suffolk County an Information, together with the record of its proceedings. If the parties do not make such a joint recommendation, or if the Board rejects such recommendation, the matter shall be assigned to an appropriate hearing committee, to a special hearing officer, or to the Board or a panel of the Board, for hearing. A tie vote of the Board on such a recommendation shall constitute a rejection of the recommendation.

(d) The hearing committee, special hearing officer, or panel of the Board shall file promptly with the Board a written report containing its findings of fact, conclusions of law, and recommendations, together with a record of the proceedings before it.

(4) **Expedited Hearing**

(a) When the Respondent-lawyer has requested a hearing within fourteen days of service of an admonition in accordance with the requirements of section 8(2) of this rule, Bar Counsel shall file the admonition summary with the Board, along with the Respondent-lawyer's demand for hearing and statement of objections and matters in mitigation, if any, and the matter shall be assigned to a special hearing officer. After hearing, the special hearing officer shall file with the Board a report containing his or her written findings of fact and conclusions of law, and shall recommend that: (1) the Respondent-lawyer receive an admonition, (2) the charges be dismissed, or (3) the matter warrants a more substantial sanction than admonition and should be remanded for formal proceedings in accordance with section 8(3) of this rule.

(b) Respondent-lawyer and Bar Counsel shall have the right to seek review by the Board of the decision by the special hearing officer in accordance with the procedure set forth in subsection (5)(a) of this rule, but any such review shall be on the briefs only and there shall be no oral argument. In the event the Board determines that the matter shall be remanded for formal proceedings, it shall assign the matter to a hearing committee or special hearing officer other than the one who heard the case initially. The Board's decision shall otherwise be final and there shall be no right by either Bar Counsel or the Respondent-lawyer to demand after conclusion of an expedited hearing that an Information be filed.

(5) **Review by the Board**

(a) Upon receipt of a hearing committee's, special hearing officer's, or hearing panel's report after formal proceedings, if there is objection by the Respondent-lawyer or by the Bar Counsel to the findings and recommendations, the Board shall set dates for submission of briefs and for any further hearing which the Board in its discretion deems necessary. The Board shall review, and may revise, the findings of fact, conclusions of law and recommendation of the hearing committee, special hearing officer, or hearing panel, paying due respect to the role of the hearing committee, the special hearing officer, or the panel as the sole judge of the credibility of the testimony presented at the hearing.

(b) In the event that the Board determines that the proceedings should be dismissed, it shall so notify the Respondent-lawyer.

(c) In the event that the Board determines that the proceedings should be concluded by admonition or public reprimand, it shall so notify the Respondent-lawyer.

(6) **Review by the Supreme Judicial Court.** The Board shall file an Information whenever it shall determine that formal proceedings should be concluded by suspension or disbarment; or whenever either the Bar Counsel or the Respondent-lawyer objects to having formal proceedings concluded by dismissal, admonition or by public reprimand, by filing a written demand with the Board for the filing of an Information within twenty days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The subsidiary facts found by the Board and contained in its report filed with the Information shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(7) **Disbarment by Consent.** A lawyer accused of professional misconduct who does not wish to contest the charges may waive the foregoing provisions of this section and consent to the entry of a judgment of disbarment. Upon satisfying itself that the lawyer has given such consent freely and voluntarily, with full awareness of the implications of consenting to disbarment, and has acknowledged under oath that the material facts upon which the charges are based are true or can be proved by a preponderance of the evidence, the court may enter a judgment disbarring the lawyer from the practice of law.

Section 9. Immunity.

(1) Complaints submitted to the Board or to the bar counsel shall be confidential and absolutely privileged. The complainant shall be immune from civil liability based upon his or her complaint; provided, however, that such immunity from suit shall apply only to communications to the Board or the bar counsel and shall not apply to public disclosure of information contained in or relating to the complaint.

(2) The complainant and each witness giving sworn testimony or otherwise communicating with the Board or the bar counsel during the course of any investigation or proceedings under this rule shall be immune from civil liability based on any such testimony or communications; provided, however, that such immunity from suit shall apply only to testimony given or communications made to the Board or the bar counsel and shall not apply to public disclosure of information attested to or communicated during the course of the investigation or proceedings.

(3) The Board, members of the Board and its staff, members of hearing committees, special hearing officers, and the bar counsel and members of his or her staff shall be immune from liability for any conduct in the course of their official duties.

Section 10. Refusal of Complainant to Proceed; Compromise; or Restitution. Abatement of an investigation into the conduct of a lawyer or other related proceedings shall not be required by the unwillingness or neglect of the complainant to cooperate in the investigation, or by any settlement, compromise or restitution. A lawyer shall not, as a condition of settlement, compromise or restitution, require the complainant to refrain from filing a complaint, to withdraw the complaint, or to fail to cooperate with the bar counsel.

Section 11. Matters Involving Related Pending Civil, Criminal, or Administrative Proceedings. The investigation or prosecution of complaints involving material allegations which are substantially similar to the material allegations of pending criminal, civil, administrative, or bar disciplinary proceedings in this or another jurisdiction shall not be deferred unless the Board or a single member designated by the Chair, in its discretion, or the court, for good cause shown, shall authorize such deferment, as to which either the court or the Board may impose conditions. The acquittal of the Respondent-lawyer on criminal charges, or a verdict, judgment, or ruling in the lawyer's favor in civil, administrative, or bar disciplinary proceedings shall not require abatement of a disciplinary investigation predicated upon the same or substantially similar material allegations.

Section 12. Lawyers Convicted of Crimes.

(1) The term "conviction" shall include any guilty verdict or finding of guilt and any admission to or finding of sufficient facts and any plea of guilty or nolo contendere which has been accepted by the court, whether or not sentence has been imposed.

(2) A conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.

(3) The term "serious crime" shall include (a) any felony, and (b) any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit a "serious crime."

(4) Upon the filing with this court of a certificate establishing a lawyer's conviction of a serious crime, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law, regardless of the pendency of an appeal, pending final disposition of any disciplinary proceeding commenced upon such conviction. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. The court shall also refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. A disciplinary proceeding so instituted need not be brought to hearing until all appeals from the conviction are concluded.

(5) Upon receipt of a notice of a conviction of a lawyer for a crime not constituting a serious crime, this court may refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. This court need make no reference with respect to convictions for minor offenses.

(6) A lawyer suspended under the provisions of subsection (4) above will be reinstated immediately upon the filing of a certificate that the underlying conviction for a serious crime has been reversed or set aside, but the reinstatement need not terminate any formal proceedings then pending against the lawyer.

(7) The clerk of any court within the Commonwealth in which a lawyer is convicted shall transmit a certificate thereof to this court and to the Board within ten days of said conviction.

(8) Within ten days of a lawyer's conviction of a crime, as defined in subsection 12(1) of this rule, the lawyer shall notify the bar counsel of the conviction.

(9) Upon being advised that a lawyer has been convicted of (a) a crime within this Commonwealth and that no certificate has been filed under subsection (7) above, or (b) a crime in another jurisdiction, the bar counsel shall obtain a certificate of the conviction and transmit it or a copy to the court and to the Board.

Section 12A. Lawyer Constituting Threat of Harm to Clients. Upon the filing with this court of a petition by the bar counsel alleging facts showing that a lawyer poses a threat of substantial harm to clients or prospective clients, or that the lawyer's whereabouts are unknown, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law pending final disposition of any disciplinary proceeding commenced by the bar counsel. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. In the interest of justice, the court, upon application of the lawyer, may terminate such suspension at any time after affording the bar counsel an opportunity to be heard.

Section 13. Disability Inactive Status.

(1) *Involuntary Commitment, Adjudication of Incompetence, or Transfer to Disability Inactive Status.* Where a lawyer has been judicially declared incompetent or committed to a mental hospital after a judicial hearing, or where a lawyer has been placed by court order under guardianship or conservatorship, or where a lawyer has been transferred to disability inactive status in another jurisdiction, the court, upon proper proof of the fact, shall enter an order transferring the lawyer to disability inactive status. A copy of such order shall be served, in the manner the court may direct, upon the lawyer, his or her guardian or conservator, and the director of the institution to which the lawyer is committed.

(2) *Investigation of Incapacity.* The bar counsel shall investigate information that a lawyer's physical or mental condition may adversely affect his or her ability to practice law, except information involving the physical or mental condition of the bar counsel, assistant bar counsel, or any member of the Board, which shall be forwarded to the Board for investigation and disposition. In the event that the lawyer admits that he or she is incapacitated, the court may, upon petition of the bar counsel, enter an order placing the lawyer on disability inactive status, accepting the lawyer's resignation, or temporarily suspending the lawyer from the practice of law. With the approval of the Board chair or a member of the Board designated by the chair, the bar counsel may initiate formal proceedings pursuant to subsection (4) of this section to determine whether the lawyer shall be transferred to disability inactive status.

(3) *Inability to Assist in Defense.* If during the course of a disciplinary investigation or proceeding under this rule the respondent-lawyer alleges an inability to assist in the defense due to mental or physical incapacity, the court, upon petition by the bar counsel or the respondent-lawyer, shall immediately transfer the respondent-lawyer to disability inactive status until further order of the court. If the bar counsel contests the respondent-lawyer's allegation, then a determination shall be made concerning the incapacity pursuant to subsection (4) of this section.

(4) *Proceedings to Determine Incapacity.*

(a) Proceedings to adjudicate contested allegations of disability or incapacity shall be held before a hearing committee, special hearing officer, or a panel of the Board and shall be commenced upon petition by the bar counsel. The proceedings shall be conducted in the same manner as disciplinary hearings and shall be open to the public as provided in section 20.

(b) The court, Board, hearing committee, special hearing officer, or hearing panel may require the examination of the respondent-lawyer by qualified medical experts designated by them.

(c) The court or the Board may appoint a lawyer to represent the respondent-lawyer if the lawyer is without adequate representation.

(d) The hearing committee, special hearing officer, or panel of the Board shall report promptly to the Board its findings and recommendations, together with a record of the proceedings before it. The lawyer and the bar counsel shall have the rights of appeal provided for in section 8 of this rule. The Board shall file an Information with the clerk of this court for Suffolk County together with its recommendation and the record of the proceedings before it.

(e) If, after hearing and upon due consideration of the record including the recommendation of the Board as provided in subsection (6) of section 8 of this rule, the court concludes that the respondent is incapacitated from continuing to practice law, it shall enter an order transferring the respondent to disability inactive status until further order of the court.

(f) Disciplinary proceedings shall not be stayed unless the court finds that the respondent-lawyer is so incapacitated by reason of mental or physical infirmity that he or she is incapable of assisting in his or her defense as provided in subsection (3) of this section. If the court determines the respondent-lawyer's claim of incapacity to defend to be invalid, the disciplinary investigation or proceedings shall resume, and the court shall immediately temporarily suspend the respondent-lawyer from the practice of law pending final disposition of the matter. The court may direct that the expense of the independent examinations be paid by the lawyer.

(5) *Public Notice of Transfer to Disability Inactive Status.* The Board shall cause a notice of transfer to disability inactive status to be published in the same manner as a disciplinary sanction imposed under section 8 of this rule is published.

(6) *Reinstatement from Disability Inactive Status.*

(a) Reinstatements from disability inactive status shall be subject to the provisions of section 18 of this rule except as herein provided.

(b) A lawyer shall be entitled to petition for transfer to active status from disability inactive status once a year or at such intervals as this court may direct in the order transferring the respondent to disability inactive status or any modifications thereof.

(c) The Board, upon referral from the court, may direct an examination of the lawyer by qualified medical experts designated by the Board.

(d) Where a lawyer placed on disability inactive status under subsection (1) of this section has been judicially declared to be competent or returned to active status by the other jurisdiction, this court, after hearing, may dispense with referring the matter to the Board pursuant to subsection (5) of section 18 for the taking of further evidence that his or her disability has

been removed and may immediately direct the lawyer's reinstatement to active status upon such terms as are deemed proper and advisable.

(e) A lawyer seeking reinstatement under this section shall have the burden of demonstrating that his or her physical or mental condition does not adversely affect the lawyer's ability to practice law and that he or she has the competency and learning in law required for admission to practice.

(7) *Waiver of Privilege.* A lawyer who files for reinstatement pursuant to the provisions of subsection (6) of this section or who alleges incapacity to defend himself or herself in a disciplinary investigation or proceedings pursuant to the provisions of subsection (3) shall be required to disclose the name of each medical provider, hospital, or other institution by whom or in which the lawyer has been examined or treated since the time of transfer to disability inactive status or during the period of the alleged incapacity. The lawyer shall furnish to this court and to the bar counsel written consent to the release of information and records relating to the disability upon request by the court or Board, court- or Board-appointed medical experts, or the bar counsel.

Section 14. Appointment of Commissioner to Protect Clients' Interests When Lawyer Disappears or Dies, or is Placed on Disability Inactive Status.

(1) Whenever a lawyer is placed on disability inactive status, or disappears or dies, and no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist, this court, after giving the bar counsel an opportunity to be heard and upon proper proof of the fact, may appoint a lawyer or lawyers as commissioner to make an inventory of the files of the inactive, disappearing, or deceased lawyer and to take appropriate action to protect the interests of clients of the inactive, disappearing, or deceased lawyer, as well as such lawyer's interest.

(2) The commissioner so appointed shall not disclose any information contained in any files listed in such inventory without the consent of the client to whom such file relates except as necessary to carry out the order of this court to make such inventory. The commissioner shall be reimbursed for reasonable expenses and may be awarded fair compensation. The commissioner's expenses and fees shall be paid by the lawyer unless otherwise ordered by the court.

Section 15. Resignations by Lawyers under Disciplinary Investigation.

(1) A lawyer who is the subject of an investigation under this Chapter Four may submit a resignation by delivering to the Board an affidavit stating that he or she desires to resign, and that:

(a) the resignation is freely and voluntarily rendered; the lawyer is not being subjected to coercion or duress and is fully aware of the implications of submitting the resignation;

(b) the lawyer is aware that there is currently pending an investigation into allegations that he or she has been guilty of misconduct, the nature of which shall be specifically set forth; and

(c) the lawyer acknowledges that the material facts, or specified material portions of them, upon which the complaint is predicated are true or can be proved by a preponderance of the evidence.

(d) the lawyer waives the right to hearing as provided by this rule.

(2) Upon receipt of the required affidavit, the Board shall file it, together with its recommendation thereon, with this court which may enter an order.

(3) All proceedings under this section shall be public as provided in section 20 of this rule.

(4) Any lawyer whose resignation under this section has been accepted must comply with the provisions of section 17 of this rule regarding notice.

Section 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been suspended or disbarred from the practice of law in another jurisdiction (including any federal court and any state or federal administrative body or tribunal) or has resigned during the pendency of a disciplinary investigation or proceeding, this court shall issue a notice directed to the respondent-lawyer containing: (a) a copy of the order from the other jurisdiction; and (b) an order directing that the respondent-lawyer inform the court within thirty days from service of the notice of any claim that the imposition of the identical or other discipline in this Commonwealth would be unwarranted and the reasons therefor. The bar counsel shall cause this notice to be served on the respondent-lawyer in accordance with this rule.

(2) In the event that the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in the Commonwealth may (but need not) be deferred.

(3) Upon the expiration of thirty days from service of the notice under subsection (1) above, the court, after hearing, may enter such order as the facts brought to its attention may justify. The judgment of suspension or disbarment shall be conclusive evidence of the misconduct unless the bar counsel or the respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity of proof establishing the misconduct. The court may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth.

(4) Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been subjected to public discipline other than suspension or disbarment in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), the Board and the clerk of this court for Suffolk County shall file it and make it available to the public to the extent that the record of any other public disciplinary proceeding would be made available.

(5) A final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or an admission in connection with a resignation in another jurisdiction may be treated as establishing the misconduct for purposes of a disciplinary proceeding in the Commonwealth.

(6) A lawyer subject to public or private discipline in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), or whose right to practice law has otherwise been curtailed or limited in such other jurisdiction, shall provide certified copies of the order imposing such discipline or other disposition to the Board and to the bar counsel within ten days of the issuance of such order.

(7) A lawyer admitted to practice in this Commonwealth who is denied admission to the bar of another jurisdiction (including any federal court and any state or federal administrative body or tribunal), for reasons other than failure to pass the bar examination, shall provide certified copies of any such decision, notice or order to the Board and the bar counsel within ten days of its issuance.

Section 17. Action by Attorneys after Disbarment, Suspension, Resignation or Transfer to Disability Inactive Status.

(1) In every case where a lawyer has been disbarred, suspended, temporarily suspended, or placed on disability inactive status, or where a lawyer has resigned pursuant to the provisions of section 15 of this rule, the lawyer shall, within fourteen days of the date of entry of the disbarment, suspension, temporary suspension, transfer to disability inactive status, or resignation, take the following actions:

(a) file a notice of withdrawal as of the effective date thereof with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs (c) and (d) of this subsection, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

(b) resign as of the effective date thereof all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs (c) and (d) of this subsection, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

(c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has resigned or that the lawyer has been disbarred, suspended, temporarily suspended, or transferred to disability inactive status; that he or she is disqualified from acting as a lawyer after the effective date thereof; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

(d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has resigned, been disbarred, suspended, or transferred to disability inactive status and, as a consequence, is disqualified from acting as a lawyer after the effective date thereof;

(e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

(f) refund any part of any fees paid in advance that have not been earned;

(g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his or her possession, custody or control.

(h) give such other notice of the court's action as the court may direct in the public interest.

Unless otherwise ordered by the court, all notices required by this section shall be served by certified mail, return receipt requested, in a form approved by the Board.

(2) Whenever the court deems it necessary, it may appoint a commissioner to take appropriate action in lieu of, or in addition to, the action directed in subsection (1) of this section. The appointment of the commissioner shall be at the expense of the lawyer unless otherwise ordered by the court.

(3) Orders imposing temporary suspension shall be immediate and forthwith, and orders imposing disbarment or suspension or accepting the resignation of the lawyer or placing a lawyer on disability inactive status shall be effective thirty days after entry, unless otherwise ordered by the court. After entry of such order, the lawyer shall not accept any new retainer or engage as lawyer for another in any new case or matter of any nature. During the period between the entry date of the order and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) The Board shall promptly transmit a copy of the order of temporary suspension, suspension, disbarment, resignation, or transfer to disability inactive status to the clerk of each court in the Commonwealth, state or federal, in which it has reason to believe the disciplined lawyer has been engaged in practice.

(5) Within twenty-one days after the entry date of the disbarment, suspension, temporary suspension, resignation, or disability inactive status order, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of the order and with bar disciplinary rules. Appended to the affidavit of compliance shall be

(a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court.

(b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of the order any client, trust or fiduciary funds;

(c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of the order or thereafter;

(d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

(e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice;

(f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice provisions of this rule.

(6) Within twenty-one days after the entry date of the disbarment, suspension, temporary suspension, resignation, or disability inactive status order, the lawyer shall file with the clerk of this court for Suffolk County:

(a) a copy of the affidavit of compliance required by subsection 5, above.

(b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice;

(c) the residence or other street address where communications to the lawyer may thereafter be directed.

(7) Except as provided in section 18(3) of this rule, no lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under the provisions of this rule shall engage in legal or paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status.

(8) Any lawyer who is disbarred, suspended for a definite or an indefinite period, or who has resigned and who is found by the court to have violated the provisions of this rule by engaging in legal or unauthorized paralegal work prior to reinstatement under this rule may not be reinstated until after the expiration of a specified term determined by the court after a finding that the lawyer has violated the provisions of this rule. A lawyer on disability inactive status who knowingly violates the provisions of this rule by engaging in legal or paralegal work shall be removed from disability inactive status and temporarily suspended pending the outcome of the disciplinary investigation and proceedings.

Section 18. Reinstatement.

(1) Eligibility for Reinstatement--Short-term suspensions.

(a) A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has paid any required fees and costs, and (iii) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.

(b) A lawyer who has been suspended for more than six months but not more than one year pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has taken the Multi-State Professional Responsibility Examination during the period of suspension and received a passing grade as

established by the Board of Bar Examiners, (iii) has paid any required fees and costs, and (iv) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.

(c) Reinstatement under this subsection (1) will be effective automatically ten days after the filing of the affidavit unless the Bar Counsel, prior to the expiration of the ten-day period, files a notice of objections with the court. In such instances, the court shall hold a hearing to determine if the filing of a petition for reinstatement and a reinstatement hearing as provided elsewhere in this section 18 shall be required.

(d) The right to automatic reinstatement under this subsection (1) shall not apply to any lawyer who fails to file the required affidavit within six months after the original term of suspension has expired. In such a case the lawyer must file a petition for reinstatement under paragraph (2) of this section.

(2) Eligibility for Reinstatement--Disbarment, Resignation, and Long-term Suspensions.

(a) Except as the court by order may direct, a lawyer who has been disbarred, or whose resignation has been allowed under section 15 of this rule, may not petition for reinstatement until three months prior to the expiration of at least eight years from the effective date of the order of disbarment or allowance of resignation.

(b) Except as the court by order may direct, a lawyer who has been suspended for an indefinite period may not petition for reinstatement until the expiration of at least three months prior to five years from the effective date of the order of suspension.

(c) Except as the court by order may direct, a lawyer who has been suspended for a specific period of more than one year may not petition for reinstatement until three months prior to the expiration of the period specified in the order of suspension.

(3) Employment as Paralegal.

At any time after the expiration of the period of suspension specified in an order of suspension, or after the expiration of four years in a case in which an indefinite suspension has been ordered, or after the expiration of seven years in a case in which disbarment has been ordered or a resignation has been allowed under section 15 of this rule, a lawyer may move for leave to engage in employment as a paralegal. When the term of suspension or disbarment or resignation has been extended pursuant to the provisions of section 17(8) of this rule, the lawyer may not petition to be employed as a paralegal until the expiration of the extended term. The court may allow such motion subject to whatever conditions it deems necessary to protect the public interest, the integrity and standing of the bar, and the administration of justice.

(4) Petitions for Reinstatement.

Petitions for reinstatement required under this section 18 and those required under section 13 of this rule shall be filed with the clerk of this court for Suffolk County and

(a) shall state whether the petitioner has complied with all the terms and conditions of the order imposing suspension or disbarment, accepting a resignation, or placing the petitioner on disability inactive status, as the case may be;

(b) shall state whether the petitioner has paid any costs assessed by the court under section 23 of this rule;

(c) shall state the extent to which the petitioner has made restitution to, or otherwise made whole, all clients or others injured by the petitioner's misconduct;

(d) shall state whether the petitioner has repaid the Clients' Security Board any funds awarded on account of the petitioner's misconduct;

(e) shall state that the petitioner has taken the Multi-State Professional Responsibility Examination after entry of the order of suspension, disbarment, or acceptance of resignation, and has received a passing grade as established by the Board of Bar Examiners;

(f) shall state that the petitioner has posted with the Board any bond it has required under paragraph 6 of this section 18; and

(g) shall state that the petitioner has filed with the Board and served upon the Bar Counsel copies of the petition and the completed questionnaire required by the Board under its rules.

(5) Procedure on Petitions for Reinstatement.

The clerk shall transmit a copy of the petition for reinstatement to the Board within three days after filing. Except with the written consent of the Board or the Bar Counsel, no hearing upon the merits of such a petition shall be held prior to the expiration of the full term of suspension, indefinite suspension, disbarment, or resignation pursuant to section 15 of this rule and in no event earlier than sixty days after transmittal of the petition to the Board or such further time as the court may allow to permit reasonable consideration of the petition by the Board. Upon receipt of such a petition the Board may hear the petition itself or may refer it to an appropriate hearing committee, to a special hearing officer, or to a panel of the Board designated by the Chair. On any petition the Board, the hearing committee, special hearing officer, or panel shall promptly hear the petitioner who shall have the burden of demonstrating that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest. On any petition referred, the hearing committee, special hearing officer, or panel shall transmit to the Board its findings and recommendations, together with any record. The Board shall file the Board's recommendations and findings with the court, together with any record. The subsidiary facts found by the Board shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(6) Costs and Expenses.

The court in its discretion may direct that the petitioning lawyer pay all necessary expenses incurred in connection with a petition for reinstatement, and the Board may require the posting of a reasonable bond to cover such expenses before acting on any petition assigned for hearing under this section 18.

(7) Waiver of Hearing.

The court may, on motion of the Bar Counsel, assented to by the Board and the petitioner, waive hearing under this section and allow the petition for reinstatement.

(8) Further Petitions for Reinstatement.

Except as the court by order may direct, no lawyer shall be permitted to reapply for reinstatement or readmission within one year following the final disposition of an adverse judgment upon a petition for reinstatement or readmission.

Section 19. Expenses. The salary of the bar counsel, the bar counsel's expenses, the expenses of the Board, hearing committees, and special hearing officers, and other expenses incurred in the administration of this rule, may be paid by the Board out of the funds collected under the provisions of Rule 4:03, or, where the court deems that appropriate, from state funds as the court may order. The Board shall annually obtain an independent audit by a certified public accountant of the funds entrusted to it and their disposition, and shall file a copy of such audit with this court.

Section 20. Confidentiality and Public Proceedings.

(1) Except as the court shall otherwise order or as otherwise provided in this rule, the Board and the bar counsel shall keep confidential all information involving allegations of misconduct by a lawyer and all information that a lawyer's physical or mental condition may adversely affect his or her ability to practice law until the occurrence of one of the following events:

(a) Submission of a resignation pursuant to section 15 of this rule;

(b) Submission of a recommendation that formal discipline be imposed by agreement;

(c) Service upon the respondent-lawyer of a petition for discipline instituting formal charges against the lawyer or of a petition seeking to place the lawyer on disability inactive status.

This section shall not prevent the members of the Board or the bar counsel from disclosing such information to this court or as they deem necessary to carry out their duties under this rule.

(2) Notwithstanding subsection (1) of this section, the bar counsel or the Board may disclose the pendency, subject matter, and status of an investigation if:

(a) the respondent-lawyer has formally waived confidentiality or made the matter public;

(b) the investigation is predicated upon a conviction of the respondent-lawyer for a serious crime as defined in section 12 herein;

(c) the investigation is based upon allegations that have become generally known to the public; or

(d) there is a need to notify another person or organization in order to protect the public, the administration of justice, or the legal profession.

(3) Upon the submission of an affidavit of resignation pursuant to section 15 of this rule or upon the submission of a stipulation between the bar counsel and the respondent-lawyer which recommends public discipline or after the service upon the respondent-lawyer of a petition for discipline instituting formal disciplinary charges or of a petition seeking to place the lawyer on disability inactive status, the proceedings are open to the public except for:

(a) deliberations of the hearing committee, the special hearing officer, the hearing panel, the appeal panel, the Board, or this court;

(b) information with respect to which the Board has issued a protective order under subsection (4) hereof;

(c) information with respect to which this court has issued a protective order on appeal from a Board decision denying such order under subsection (4) hereof; or

(d) further proceedings following the recommendation by a hearing committee, a special hearing officer, a hearing panel, or an appeal panel, or following an order of the Board or this court, that an admonition be imposed or that a petition for discipline be dismissed. In such event, the record shall be sealed and the proceedings shall be closed until and unless the Board or this court orders otherwise.

(4) In order to protect the interests of a complainant, witness, third party, or respondent-lawyer, the Board may, upon application of the bar counsel or any affected person and for good cause shown, issue a protective order prohibiting the public disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. If bar discipline or other professional discipline has been imposed on the respondent-lawyer on a prior occasion, in this Commonwealth or elsewhere, the fact that the discipline imposed is or has been confidential shall not constitute good cause for the issuance of a protective order. The bar counsel or any affected person may appeal from an order granting or denying an application for a protective order by filing a notice of appeal with the clerk of this court for Suffolk County within seven days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The pendency of such an appeal shall not be grounds to stay proceedings before a hearing committee, a special hearing officer, or any panel of the Board.

(5) The provisions of this section shall not be construed to prohibit the Board from notifying a complainant concerning the Board's disposition of the complaint and the reasons therefor, or to deny access to relevant information to the Clients' Security Board, or to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or considering reciprocal disciplinary action, or to law enforcement agencies investigating qualifications for government employment where discipline under this Chapter Four has been imposed, or, except as the court may direct, where the proceedings are pending and the Board in its discretion believes disclosure is warranted. In addition, the clerk of this court for Suffolk County shall transmit notice of all public discipline imposed by this court to the National Discipline Data Bank maintained by the American Bar Association.

(6) When an investigation by the bar counsel or the Board concerns allegations of a serious crime as defined in section 12 herein, or disciplinary charges in another jurisdiction, the bar counsel or the Board may disclose information not otherwise public under this rule to the appropriate agency responsible for criminal or disciplinary enforcement and exchange such information with such agency during the course of its investigation of the same lawyer. When requested by an appropriate disciplinary agency investigating disciplinary charges in another jurisdiction, the bar counsel or the Board may also disclose the existence of any prior discipline.

Section 21. Service. Any notice or pleading required to be served under this Chapter Four may be served upon the respondent-lawyer in hand or by addressing it by certified, registered or first class mail to the address furnished in the last registration statement filed by the respondent-lawyer in accordance with Rule 4:02. Service by mail is complete upon mailing.

Section 22. Subpoena Power.

(1) Upon request by the bar counsel or a respondent-lawyer for testimony or the production of evidence at a hearing, or upon request by the bar counsel for testimony or the production of evidence at any stage of an investigation, witnesses may be summoned by subpoenas issued at the direction of a Board member, the chair of a hearing committee, or a special hearing officer. Witnesses shall be examined under oath or affirmation. Testimony may be taken by a hearing committee, a special hearing officer, or a hearing panel outside the Commonwealth if the ends of justice so require. Where appropriate, testimony may be taken within or without the Commonwealth by deposition or by Commission. So far as practicable a stenographic, electronic, or videotape record shall be made and preserved for a reasonable time.

(2) Whenever a subpoena is sought in this state pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, and where the issuance of a subpoena has been duly approved under the law of the other jurisdiction, a member of the Board may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents.

Section 23. Costs. The court, in its discretion, may direct that a respondent-lawyer pay the costs incurred in connection with the processing of a disciplinary proceeding and information, as well as the costs incurred by the bar counsel and the Board in attempting to gain information from the respondent-lawyer in connection with the processing of a complaint against said lawyer.

Section 24. Restitution. The court or the Board, in its discretion, may order a respondent-lawyer to make restitution to those persons financially injured by his or her conduct and to reimburse the Clients' Security Fund for any payments made on account of misappropriation.

Credits

Adopted June 3, 1974, effective September 1, 1974. Amended September 17, 1975, effective January 1, 1976; amended effective April 20, 1976; amended July 28, 1976, effective September 1, 1976; amended effective October 11, 1977; amended August 10, 1978, effective September 1, 1978; December 22, 1978, effective January 1, 1979; amended effective April 12, 1979; amended May 15, 1979, effective July 1, 1979; June 26, 1980, effective January 1, 1981; July 29, 1980, effective September 1, 1980; April 13, 1982, effective April 30, 1982; August 4, 1982, effective August 30, 1982; January 2, 1985, effective March 1, 1985; April 1, 1986, effective May 1, 1986; March 29, 1988, effective July 1, 1988; amended effective September 3, 1991; January 6, 1993; July 1, 1993; amended December 3, 1993, effective December 6, 1993; amended effective July 1, 1997; amended June 9, 1997, effective January 1, 1998; amended effective December 2, 1997; amended July 28, 1999, effective January 1, 2000; amended effective October 27, 1999; amended December 15, 1999, effective January 3, 2000; November 2, 2000, effective

January 2, 2001; November 29, 2001, effective January 1, 2002; November 5, 2002, effective December 2, 2002; April 9, 2009, effective September 1, 2009.

Notes of Decisions (54)

S.J.C. Rule 4:01, MA R S CT Rule 4:01
Current with amendments received through November 1, 2019.

2019 MONTANA COURT ORDER 0012 (C.O. 0012)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included inthis database. Because all changes may not have been supplied, thecourt clerk should be consulted to determine current rules.Pub. Note: Additions are indicated by **Text**; deletions by~~Text~~ .Stricken material is indicated by ~~**Text**~~ .

MT ORDER 0012
C.O. 0012
COURT RULES

Effective: Effective January 1, 2020 to Effective January 1, 2020

IN THE SUPREME COURT OF THE STATE OF MONTANA
RULES OF PROFESSIONAL CONDUCT

Effective January 1, 2020

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 09–0688

IN RE THE RULES OF PROFESSIONAL CONDUCT

ORDER

On March 1, 2019, the State Bar of Montana, together with its Ethics Committee, petitioned the Court for revisions to eighteen of the Montana Rules of Professional Conduct and a portion of its preamble. The revisions would make the Rules more consistent with the model rules of the American Bar Association, although some differences would remain.

The Court opened a 90–day comment period on the petition, and after review and consideration of the petition at a public meeting on August 6, 2019, the Court determined that the revisions were well taken.

IT IS ORDERED that the proposed revisions as approved by the Court are ADOPTED. The Montana Rules of Professional Conduct are amended to read as shown in the attachment to this Order, effective January 1, 2020.

This Order and the attached rules shall be posted on the Court's website. In addition, the Clerk is directed to provide copies of this Order and the attachment to the State Law Library, to Todd Everts and Connie Dixon at Montana Legislative Services, to Chad Thomas at Thomson Reuters, to Patti Glueckert and the Statute Legislation department at LexisNexis, and to the State Bar of Montana, with the request that the State Bar provide notice of the revised rules on its website and in the next available issue of the *Montana Lawyer*.

DATED this 29th day of October, 2019.

/S/ MIKE McGRATH/S/ LAURIE McKINNON/S/ JAMES JEREMIAH SHEA/S/ DIRK M. SANDEFUR/S/ INGRID GUSTAFSON/S/ BETH BAKER/S/ JIM RICE

MONTANA RULES OF PROFESSIONAL CONDUCT

(c) Except as provided in paragraph (d), if:

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee, or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

<< MT R RPC Rule 1.14 >>

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

<< MT R RPC Rule 1.15 >>

Rule 1.15. 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, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(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 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. If a dispute arises concerning their respective interests, the portion in dispute 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.

(f) Unclaimed or unidentifiable Trust Account Funds.

(1) When a lawyer, law firm, or estate of a deceased lawyer cannot, using reasonable efforts, identify or locate the owner of funds in its Montana IOLTA or non-IOLTA trust account for a period of at least two (2) years, it may pay the funds to the Montana Justice Foundation (MJF). At the time such funds are remitted, the lawyer may submit to MJF the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, if known; a description of the efforts undertaken to identify or locate the owner; and the amount of any unclaimed or unidentified funds.

(2) If, within two (2) years of making a payment of unclaimed or unidentified funds to MJF, the lawyer, law firm, or deceased lawyer's estate identifies and locates the owner of funds paid, MJF shall refund the funds it received to the lawyer, law firm, or deceased lawyer's estate. The lawyer, law firm, or deceased lawyer's estate shall submit to MJF a verification attesting that the funds have been returned to the owner. MJF shall maintain sufficient reserves to pay all claims for such funds.

<< MT R RPC Rule 1.16 >>

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(i). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs involved.

<< MT R RPC Rule 1.17 >>

Rule 1.17. Government Employment

An attorney employed full time by the State of Montana or a political subdivision shall not accept other employment during the course of which it would be possible to use or otherwise rely on information obtained by reason of government employment that is injurious, confidential or privileged and not otherwise discoverable.

<< MT R RPC Rule 1.18 >>

Rule 1.18. Interest on Lawyer Trust Accounts (IOLTA) Program

(a) Purpose. The purpose of the Interest on Lawyer Trust Accounts (IOLTA) program is to provide funds for the Montana Justice Foundation to pay the reasonable costs of administering the program and to make grants to entities with missions within the following general categories:

(1) Providing legal services, through both paid staff program(s) and pro bono program(s), to Montana's low income citizens who would otherwise be unable to obtain legal assistance;

(2) promoting a knowledge and awareness of the law; and

(3) improving the administration of justice.

(b) Required participation. IOLTA program participation is mandatory, except as provided in subsection (d), below. Every non-exempt lawyer admitted to practice in Montana, and/or every law firm composed of any such lawyers, which receives client funds, shall establish and maintain an interest-bearing trust account for pooled client funds, termed an “IOLTA Trust Account.” Each lawyer/firm shall also establish separate interest-bearing trust accounts for individual clients, termed “Client Trust Accounts,” when appropriate pursuant to this Rule.

(c) Administration.

(1) Deposits of clients' funds.

(A) All client funds paid to a lawyer/firm, including advances for costs and expenses, shall be deposited and maintained in one or more identifiable interest-bearing trust accounts (Trust Accounts) in the State of Montana. No funds belonging to the lawyer/firm shall be deposited into a Trust Account except:

(i) funds reasonably sufficient to pay account charges not offset by interest;

(ii) an amount to meet a minimum balance requirement for the waiver of service charges; and/or

(iii) funds belonging in part to a client and in part presently or potentially to the lawyer/firm, but the portion belonging to the lawyer/firm shall be withdrawn when due unless the right of the lawyer/firm to such funds is disputed by the client, in which event the disputed portion shall remain in the account until the dispute is resolved.

(B) The lawyer/firm shall comply with all Rules relating to preserving the identity of clients' funds and property.

(C) Every Trust Account shall be established with a federally-insured and state or federally regulated financial institution authorized by federal or state law to do business in Montana. Funds in each Trust Account shall be subject to immediate withdrawal.

(D) The interest rate payable on a Trust Account shall not be less than the rate paid to non-lawyer depositors. Higher rates offered for deposits meeting certain criteria, such as certificates of deposit, may be obtained on Trust Account funds if immediate withdrawal is available.

(E) Every Trust Account shall bear the name of the lawyer/firm and be clearly designated as either an IOLTA Trust Account or a Client Trust Account established under this Rule.

(2) IOLTA Trust Accounts. Every IOLTA Trust Account shall comply with the following provisions:

(A) The lawyer/firm shall maintain all client funds that are either nominal in amount or to be held for a short period of time in an IOLTA Trust Account.

(B) No client may elect whether his/her funds should be deposited in an IOLTA Trust Account, receive interest or dividends earned on funds in an IOLTA Trust Account, or compel a lawyer/firm to invest funds that are nominal in amount or to be held for a short period of time in a Client Trust Account.

(C) The determination of whether a client's funds are nominal in amount or to be held for a short period of time rests solely in the sound judgment of each lawyer/firm. No charge of professional misconduct or ethical impropriety shall result from a lawyer's exercise of good faith judgment in that regard.

(D) To determine if a client's funds should be deposited in an IOLTA Trust Account, a lawyer/firm may be guided by considering:

(i) the amount of interest the funds would earn during the period they are expected to be deposited;

(ii) the costs of establishing and administering the account, including the lawyer's/firm's fees, accounting fees and tax reporting requirements;

(iii) the amount of funds involved, the period of time they are expected to be held and the financial institution's minimum balance requirements and service charges;

(iv) the financial institution's ability to calculate and pay interest to individual clients; and

(v) the likelihood of delay in the relevant transaction or proceeding.

(E) The lawyer/firm shall require the financial institution in which the IOLTA Trust Account is established to:

(i) remit to the Montana Justice Foundation, at least quarterly, all interest or dividends on the average monthly balance in the IOLTA Trust Account, or as otherwise computed according to the institution's standard accounting practices, less reasonable service fees, if any;

(ii) with each remittance, provide the Montana Justice Foundation and the lawyer/firm with a statement showing for which lawyer/firm the remittance is sent, the period covered, the rate of interest applied, the total amount of interest earned, any service fees assessed against the account and the net amount of interest remitted;

(iii) charge no fees against an IOLTA Trust Account greater than fees charged to non-lawyer depositors for similar accounts, or which are otherwise unreasonable; and

(iv) collect no fees from the principal deposited in the IOLTA Trust Account.

(F) Annually the Montana Justice Foundation shall make available a list of all financial institutions offering IOLTA accounts and meeting this Rule's IOLTA depository qualifying requirements. Lawyers/firms shall be entitled to rely on the most recently published list for purposes of IOLTA Rule compliance. The Montana Justice Foundation shall pay all service charges incurred in operating an IOLTA Trust Account from IOLTA funds, to the extent the charges exceed those incurred in operating non-interest-bearing checking accounts at the same financial institution.

(G) Confidentiality. The Montana Justice Foundation shall protect the confidentiality of information regarding Trust Accounts pursuant to this Rule.

(3) Non–IOLTA client Trust Accounts. All client funds shall be deposited in an IOLTA Trust Account, unless they are deposited in a separate interest-bearing account for a particular client's matter with the net interest paid to the client. Such interest must be held in trust as the property of the client as provided in this Rule for the principal funds of the client.

(d) A lawyer/firm is exempt from this Rule's requirements if:

(1) the nature of their practice is such that no client funds are ever received requiring a Trust Account;

(2) the lawyer practices law in another jurisdiction and not in Montana;

(3) the lawyer is a full-time judge, or government, military or inactive lawyer; or

(4) the Montana Justice Foundation's Board of Directors, on its own motion, exempts the lawyer/firm from participation in the program for a period of no more than two years when:

(A) service charges on the lawyer's/firm's Trust Account equal or exceed any interest generated; or

(B) no financial institution in the county where the lawyer/firm does business will accept IOLTA accounts.

(e) Unclaimed or unidentifiable trust account funds. Disposition of unclaimed or unidentifiable IOLTA or non-IOLTA trust account funds shall be handled in accordance with Rule 1.15(d).

(f) Lawyer filings and records.

(1) Filings. Each lawyer/firm shall file an annual certificate of compliance with or exemption from this Rule with the Montana Justice Foundation. The certification must include the name of the lawyer/firm listed on the account, the account number, and the financial institution name and address. The certification may be made in conjunction with the annual dues billing process. Failure to provide the certification may result in suspension from the practice of law in this state until the lawyer complies with the requirements of this Rule. Such suspension will be effected pursuant to the Rules of the State Bar of Montana governing a lawyer's failure to pay dues and assessments.

(2) Records. Lawyer trust accounts shall be maintained as prescribed by the Montana Supreme Court in the "Trust Account Maintenance and Audit Requirements" (adopted February 27, 1989).

(g) Implementation. Implementation will be effected through this Rule and the Rules of the State Bar of Montana, all as amended and approved by the Montana Supreme Court.

<< MT R RPC Rule 1.19 >>

Rule 1.19. Sale of Law Practice
A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted.

(b) The entire practice is sold to one or more lawyers or law firms.

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

<< MT R RPC Rule 1.20 >>

Rule 1.20. Duties to Prospective Clients
(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had consultations with a prospective client shall not use or reveal information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from

West's North Carolina General Statutes Annotated North Carolina Rules of Court North Carolina State Bar Rules Chapter 2. The Revised Rules of Professional Conduct of the North Carolina State Bar Client-Lawyer Relationship

State Bar Rules, Ch. 2, Rule 1.15-2

Rule 1.15-2. General Rules

Currentness

(a) Entrusted Property. All entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1,15.

(b) Deposit of Trust Funds. All trust funds received by or placed under the control of a lawyer shall be promptly deposited in either a general trust account or a dedicated trust account of the lawyer. Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term. General trust accounts are to be administered in accordance with the Rules of Professional Conduct and the provisions of 27 NCAC Chapter 1, Subchapter D, Section.1300.

(c) Deposit of Fiduciary Funds. All fiduciary funds received by or placed under the control of a lawyer shall be promptly deposited in a fiduciary account or a general trust account of the lawyer.

(d) Safekeeping of Other Entrusted Property. A lawyer may also hold entrusted property other than fiduciary funds (such as securities) in a fiduciary account. All entrusted property received by a lawyer that is not deposited in a trust account or fiduciary account (such as a stock certificate) shall be promptly identified, labeled as property of the person or entity for whom it is to be held, and placed in a safe deposit box or other suitable place of safekeeping. The lawyer shall disclose the location of the property to the client or other person for whom it is held. Any safe deposit box or other place of safekeeping shall be located in this state, unless the lawyer has been otherwise authorized in writing by the client or other person for whom it is held.

(e) Location of Accounts. All trust accounts shall be maintained at a bank in North Carolina or a bank with branch offices in North Carolina except that, with the written consent of the client, a dedicated trust account may be maintained at a bank that does not have offices in North Carolina or at a financial institution other than a bank in or outside of North Carolina. A lawyer may maintain a fiduciary account at any bank or other financial institution in or outside of North Carolina selected by the lawyer in the exercise of the lawyer's fiduciary responsibility.

(f) Funds in Accounts. A trust or fiduciary account may only hold entrusted property. Third party funds that are not received by or placed under the control of the lawyer in connection with the performance of legal services or professional fiduciary services may not be deposited or maintained in a trust or fiduciary account. Additionally, no funds belonging to the lawyer shall be deposited or maintained in a trust account or fiduciary account of the lawyer except:

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any tax levied on the account; or

(2) funds belonging in part to a client or other third party and in part currently or conditionally to the lawyer.

(g) Mixed Funds Deposited Intact. When funds belonging to the lawyer are received in combination with funds belonging to the client or other persons, all of the funds shall be deposited intact. The amounts currently or conditionally belonging to the lawyer shall be identified on the deposit slip or other record. After the deposit has been finally credited to the account, the lawyer shall withdraw the amounts to which the lawyer is or becomes entitled. If the lawyer's entitlement is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.

(h) Items Payable to Lawyer. Any item drawn on a trust account or fiduciary account for the payment of the lawyer's fees or expenses shall be made payable to the lawyer and shall indicate on the item by client name, file number, or other identifying information the client from whose balance the item is drawn. Any item that does not include this information may not be used to withdraw funds from a trust account or a fiduciary account for payment of the lawyer's fees or expenses.

(i) No Bearer Items. No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer and no cash shall be withdrawn from a trust account or fiduciary account by any means.

(j) Debit Cards Prohibited. Use of a debit card to withdraw funds from a general or dedicated trust account or a fiduciary account is prohibited.

(k) No Benefit to Lawyer or Third Party. A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property.

(l) Bank Directive. Every lawyer maintaining a trust account or fiduciary account with demand deposit at a bank or other financial institution shall file with the bank or other financial institution a written directive requiring the bank or other financial institution to report to the executive director of the North Carolina State Bar when an instrument drawn on the account is presented for payment against insufficient funds. No trust account or fiduciary account shall be maintained in a bank or other financial institution that does not agree to make such reports.

(m) Notification of Receipt. A lawyer shall promptly notify his or her client of the receipt of any entrusted property belonging in whole or in part to the client.

(n) Delivery of Client Property. A lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled.

(o) Property Received as Security. Any entrusted property or document of title delivered to a lawyer as security for the payment of a fee or other obligation to the lawyer shall be held in trust in accordance with this Rule 1.15 and shall be clearly identified as property held as security and not as a completed transfer of beneficial ownership to the lawyer. This provision does not apply to property received by a lawyer on account of fees or other amounts owed to the lawyer at the time of receipt; however, such transfers are subject to the rules governing legal fees or business transactions between a lawyer and client.

(p) Duty to Report Misappropriation. A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel. Discovery of intentional theft or fraud must be reported to the TACC immediately. When an

accounting or bank error results in an unintentional and inadvertent use of one client's trust funds to pay the obligations of another client, the event must be reported unless the misapplication is discovered and rectified on or before the next quarterly reconciliation required by Rule 1.15-3(d)(1). This rule requires disclosure of information otherwise protected by Rule 1.6 if necessary to report the misappropriation or misapplication.

(q) Interest on Deposited Funds. Under no circumstances shall the lawyer be entitled to any interest earned on funds deposited in a trust account or fiduciary account. Except as authorized by Rule .1316 of subchapter 1D of the Rules and Regulations of the North Carolina State Bar, any interest earned on a trust account or fiduciary account, less any amounts deducted for bank service charges and taxes, shall belong to the client or other person or entity entitled to the corresponding principal amount.

(r) Abandoned Property. If entrusted property is unclaimed, the lawyer shall make due inquiry of his or her personnel, records and other sources of information in an effort to determine the identity and location of the owner of the property. If that effort is successful, the entrusted property shall be promptly transferred to the person or entity to whom it belongs. If the effort is unsuccessful and the provisions of G.S. 116B-53 are satisfied, the property shall be deemed abandoned, and the lawyer shall comply with the requirements of Chapter 116B of the General Statutes concerning the escheat of abandoned property.

(s) Check Signing and Electronic Transfer Authority.

(1) Every trust account check must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(2) Every electronic transfer from a trust account must be initiated by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(3) Prior to exercising signature or electronic transfer authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature or transfer authority.

(4) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures other than “digital signatures” as defined in 21 CFR 11.3(b)(5).

Credits

[Adopted July 24, 1997. Amended effective March 6, 2008; amended effective February 5, 2009; amended effective August 23, 2012; amended effective June 9, 2016; amended effective April 5, 2018.]

State Bar Rules, Ch. 2, Rule 1.15-2, NC R BAR Ch. 2, Rule 1.15-2
Current with amendments received through September 15, 2019

New Jersey Statutes Annotated New Jersey Rules of Court Part I. Rules of General Application Chapter III. Practice of Law and Admission to Practice Rule 1:21. Practice of Law

R. 1:21-6

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

Currentness

(a) Required Trust and Business Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

(1) a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

One or more of the trust accounts shall be the IOLTA account or accounts required by Rule 1:28A.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all attorney trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as an "Attorney Business Account," an "Attorney Professional Account," or an "Attorney Office Account." The IOLTA account or accounts shall each be designated "IOLTA Attorney Trust Account."

The names of institutions in which such primary attorney trust and business accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to Rule 1:20-1(b) and Rule 1:28-2, to the Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph (h) of this rule. For all IOLTA accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the registration statement. The signed annual registration statement required by Rule 1:20-1(c) shall constitute authorization to depository institutions to convert an existing non-interest bearing account to an IOLTA account.

(b) Account Location; Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty days' notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the

report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one, and must from its income on such IOLTA accounts remit to the Fund the amount remaining after providing such institution a just and reasonable return equivalent to its return on similar non-IOLTA interest-bearing deposits. These remittances shall be monthly unless otherwise authorized by the Fund.

Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records on receipt of a subpoena therefor.

Digital images of these records may be maintained by financial institutions provided that: (a) imaged copies of checks shall, when printed (including, but not limited to, when images are provided to the attorney with a monthly statement or otherwise or when subpoenaed by the Office of Attorney Ethics), be limited to no more than two checks per page (showing the front and back of each check) and (b) all digital records shall be maintained for a period of seven years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(c) Required Bookkeeping Records.

(1) Attorneys, partnerships of attorneys and professional corporations who practice in this state shall maintain in a current status and retain for a period of seven years after the event that they record:

(A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph (a) of this rule and of any other bank account which concerns or affects their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorney shall be permitted to authorize electronic transfers as above provided; and

(B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial

balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed; and

(C) copies of all retainer and compensation agreements with clients; and

(D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(E) copies of all bills rendered to clients; and

(F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered cancelled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawals and deposit slips, when related to a particular client, shall include, and attorneys shall complete, a distinct area identifying the client's last name or file number of the matter; and

(H) copies of all records, showing that at least monthly a reconciliation has been made of the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(I) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(2) ATM or cash withdrawals from all attorney trust accounts are prohibited.

(3) No attorney trust account shall have any agreement for overdraft protection.

(d) Type and Availability of Bookkeeping Records. The financial books and other records required by paragraphs (a) and (c) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further that printed copies and computer files in industry-standard formats can be made on demand in accordance with this section or section (h). They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with this Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by direction of the Supreme Court, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

(e) Dissolutions. Upon the dissolution of any partnership of attorneys or of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (c) of this rule.

(f) Attorneys Practicing With Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related in any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

(g) Attorneys Associated With Out of State Attorneys. An attorney who practices in this state shall maintain and preserve for seven years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(h) Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing pursuant to R. 1:20-1 to 1:20-11, or shall be produced at the direction of the Disciplinary Review Board or the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. Every attorney shall be required to cooperate and to respond completely to questions by the Office of Attorney Ethics regarding all transactions concerning records required to be kept under this rule. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege. When produced or examined during the course of a disciplinary or random audit, both the attorney or law firm and the producers and licensors of computerized software shall be conclusively deemed to have consented to the use of said software by disciplinary authorities as evidence during the course of the disciplinary proceeding.

(i) Disciplinary Action. An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of R.P.C. 1.15(d) and R.P.C. 8.1(b).

(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners. When, for a period in excess of two years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney to determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner of an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be delivered to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may, after the passage of one year during which time a diligent search and inquiry fails to identify the beneficial owner or the whereabouts of a missing owner, be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court. All applications for payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section.

Credits

Note: Source--R.R. 1:12-5A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective

immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed on trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (e)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (e) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(2) amended September 15, 1992, to be effective January 1, 1993; former paragraph (e) deleted and new paragraph (e) adopted November 18, 1996, to be effective January 1, 1997; paragraph (a) amended, new paragraph (b) added, former paragraphs (b) through (i) redesignated as paragraphs (c) through (j), and redesignated paragraphs (c), (d), (e), (h), and (i) amended July 12, 2002 to be effective September 3, 2002; caption of Rule and paragraphs (a) and (b) amended February 6, 2003 to be effective March 1, 2003; paragraph (c), (e), (f), (g), and (j) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended July 9, 2008 to be effective September 1, 2008.

R. 1:21-6, NJ R GEN APPLICATION R. 1:21-6
New Jersey rules are current with amendments received through November 15, 2019.

End of Document

Purdon's Pennsylvania Statutes and Consolidated Statutes Rules of Professional Conduct (Refs & Annos) Client-Lawyer Relationship (Refs & Annos)

Rules of Prof. Conduct, Rule 1.15, 42 Pa.C.S.A.

Rule 1.15. Safekeeping Property

Currentness

(a) The following definitions are applicable to Rule 1.15:

(1) Eligible Institution. An Eligible Institution is a Financial Institution which has been approved as a depository of Trust Accounts pursuant to Pa.R.D.E. 221(h).

(2) Fiduciary. A Fiduciary is a lawyer acting as a personal representative, guardian, conservator, receiver, trustee, agent under a durable power of attorney, or other similar position.

(3) Fiduciary Funds. Fiduciary Funds are Rule 1.15 Funds which the lawyer holds as a Fiduciary. Fiduciary Funds may be either Qualified Funds or Non-Qualified Funds.

(4) Financial Institution. A Financial Institution is an entity which is authorized by federal or state law and licensed to do business in the Commonwealth of Pennsylvania as one of the following: a bank, bank and trust company, trust company, credit union, savings bank, savings and loan association or foreign banking corporation, the deposits of which are insured by an agency of the federal government, or as an investment adviser registered under the Investment Advisers Act of 1940 [1] or with the Pennsylvania Securities Commission, an investment company registered under the Investment Company Act of 1940, [2] or a broker dealer registered under the Securities Exchange Act of 1934. [3]

(5) Interest On Lawyer Trust Account (IOLTA) Account. An IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law. Qualified Funds are to be held or deposited in an IOLTA Account.

(6) IOLTA Board. The IOLTA Board is the Pennsylvania Interest On Lawyers Trust Account Board.

(7) Non-IOLTA Account. A Non-IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law in which a lawyer deposits Rule 1.15 Funds. Only Nonqualified Funds are to be held or deposited in a Non-IOLTA Account. Non-IOLTA Account shall be established only as:

(i) a separate client Trust Account for the particular client or matter on which the net income will be paid to the client or third person; or

(ii) a pooled client Trust Account with sub-accounting by the Eligible Institution or by the lawyer which will provide for computation of net income earned by each client's or third person's funds and the payment thereof to the client or third person.

(8) Nonqualified Funds. Nonqualified Funds are Rule 1.15 Funds, whether cash, check, money order or other negotiable instrument, which are not Qualified Funds.

(9) Qualified Funds. Qualified Funds are Rule 1.15 Funds which are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient income will not be generated to justify the expense of administering a segregated account.

(10) Rule 1.15 Funds. Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. When the term “property” appears with “Rule 1.15 Funds,” it means property of a client or third person which the lawyer receives in any of the foregoing capacities.

(11) Trust Account. A Trust Account is an account in an Eligible Institution in which a lawyer holds Rule 1.15 Funds. A Trust Account must be maintained either as an IOLTA Account or as a Non-IOLTA Account.

(b) A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

(c) Required records. Complete records of the receipt, maintenance and disposition of Rule 1.15 Funds and property shall be preserved for a period of five years after termination of the client-lawyer or Fiduciary relationship or after distribution or disposition of the property, whichever is later. A lawyer shall maintain the writing required by Rule 1.5(b) (relating to the requirement of a writing communicating the basis or rate of the fee) and the records identified in Rule 1.5(c) (relating to the requirement of a written fee agreement and distribution statement in a contingent fee matter). A lawyer shall also maintain the following books and records for each Trust Account and for any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l):

(1) all transaction records provided to the lawyer by the Financial Institution or other investment entity, such as periodic statements, cancelled checks in whatever form, deposited items and records of electronic transactions; and

(2) check register or separately maintained ledger, which shall include the payee, date, purpose and amount of each check, withdrawal and transfer, the payor, date, and amount of each deposit, and the matter involved for each transaction; provided, however, that where an account is used to hold funds of more than one client, a lawyer shall also maintain an individual ledger for each trust client, showing the source, amount and nature of all funds received from or on behalf of the client, the description and amounts of charges or withdrawals, the names of all persons or entities to whom such funds were disbursed, and the dates of all deposits, transfers, withdrawals and disbursements.

(3) The records required by this Rule may be maintained in hard copy form or by electronic, photographic, or other media provided that the records otherwise comply with this Rule and that printed copies can be produced. Whatever method is used

to maintain required records must have a backup so that the records are secure and always available. If records are kept only in electronic form, then such records shall be backed up on a separate electronic storage device at least at the end of any day on which entries have been entered into the records. These records shall be readily accessible to the lawyer and available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in a timely manner upon a request or demand by either agency made pursuant to the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board Rules, the Pennsylvania Lawyers Fund for Client Security Board Rules and Regulations, agency practice, or subpoena.

(4) A regular trial balance of the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client, and deducting the total of all moneys disbursed. On a monthly basis, a lawyer shall conduct a reconciliation for each fiduciary account. The reconciliation is not complete if the reconciled total cash balance does not agree with the total of the client balance listing. A lawyer shall preserve for a period of five years copies of all records and computations sufficient to prove compliance with this requirement.

(d) Upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law. Notification of receipt of Fiduciary Funds or property to clients or other persons with a beneficial interest in such Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of confidentiality and notice applicable to the Fiduciary entrustment.

(e) Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, 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 the property; Provided, however, that the delivery, accounting and disclosure of Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of Fiduciary administration, confidentiality, notice and accounting applicable to the Fiduciary entrustment.

(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute.

(g) The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a Trust Account or any other account in which Fiduciary Funds are held pursuant to Rule 1.15(l).

(h) A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.

(i) A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.

(j) At all times while a lawyer holds Rule 1.15 Funds, the lawyer shall also maintain another account that is not used to hold such funds.

(k) All Nonqualified Funds which are not Fiduciary Funds shall be placed in a Non-IOLTA Account or in another investment vehicle specifically agreed upon by the lawyer and the client or third person which owns the funds.

(l) All Fiduciary Funds shall be placed in a Trust Account (which, if the Fiduciary Funds are also Qualified Funds, must be an IOLTA Account) or in another investment or account which is authorized by the law applicable to the entrustment or the terms of the instrument governing the Fiduciary Funds.

(m) All Qualified Funds which are not Fiduciary Funds shall be placed in an IOLTA Account.

(n) A lawyer shall be exempt from the requirement that all Qualified Funds be placed in an IOLTA Account only upon exemption requested and granted by the IOLTA Board. If an exemption is granted, the lawyer must hold Qualified Funds in a Trust Account which is not income producing. Exemptions shall be granted if:

(1) the nature of the lawyer's practice does not require the routine maintenance of a Trust Account in Pennsylvania;

(2) compliance with this paragraph would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographical distance between the lawyer's principal office and the closest Eligible Institution or on other compelling and necessitous factors; or

(3) the lawyer's historical annual Trust Account experience, based on information from the Eligible Institution in which the lawyer deposits funds, demonstrates that the service charges on the account would significantly and routinely exceed any income generated.

(o) An account shall not be considered an IOLTA Account unless the Eligible Institution at which the account is maintained shall:

(1) Remit at least quarterly any income earned on the account to the IOLTA Board;

(2) Transmit to the IOLTA Board with each remittance and to the lawyer who maintains the IOLTA Account a statement showing at least the name of the account, service charges or fees deducted, if any, the amount of income remitted from the account, and the average daily balance, if available; and

(3) Pay a rate of interest or dividends no less than the highest interest rate or dividend generally available from the Eligible Institution to its non-IOLTA customers when the IOLTA Account meets the same minimum balance or other eligibility qualifications, and comply with the Regulations of the IOLTA Board with respect to service charges, if any.

(p) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility because monies are deposited in an IOLTA Account pursuant to the lawyer's judgment in good faith that the monies deposited were Qualified Funds.

(q) There is hereby created the Pennsylvania Interest On Lawyers Trust Account Board, which shall administer the IOLTA program. The IOLTA Board shall consist of nine members who shall be appointed by the Supreme Court. Two of the appointments shall be made from a list provided to the Supreme Court by the Pennsylvania Bar Association in accordance with its own rules and regulations. With respect to these two appointments, the Pennsylvania Bar Association shall submit three names to the Supreme Court, from which the Court shall make its final selections. The term of each member shall be three years and no member shall be appointed for more than two consecutive three year terms. The Supreme Court shall appoint a Chairperson. In order to administer the IOLTA program, the IOLTA Board shall promulgate rules and regulations consistent with this Rule for approval by the Supreme Court.

(r) The IOLTA Board shall comply with the following:

(1) The IOLTA Board shall prepare an annual audited statement of its financial affairs.

(2) The IOLTA Board shall submit to the Supreme Court for its approval a copy of its audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program and the IOLTA Board's proposed annual budget, designating the uses to which IOLTA Funds are recommended.

(3) Upon approval of the Supreme Court, the IOLTA Board shall distribute and/or expend IOLTA Funds.

(s) Income earned on IOLTA Accounts (IOLTA Funds) may be used only for the following purposes:

(1) delivery of civil legal assistance to the poor and disadvantaged in Pennsylvania by non-profit corporations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

(2) educational legal clinical programs and internships administered by law schools located in Pennsylvania;

(3) administration and development of the IOLTA program in Pennsylvania; and

(4) the administration of justice in Pennsylvania.

(t) The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P.L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P.L. 469, No. 117).

(u) Every attorney who is required to pay an active annual assessment under Rule 219 of the Pennsylvania Rules of Disciplinary Enforcement (relating to annual registration of attorneys) shall pay an additional annual fee of $25.00 for use by the IOLTA Board. Such additional assessment shall be added to, and collected with and in the same manner as, the basic annual assessment. All amounts received pursuant to this subdivision shall be credited to the IOLTA Board.

(v) Unclaimed or Unidentifiable IOLTA Funds

(1) When a lawyer or law firm cannot, using reasonable efforts for a minimum of two (2) years, identify or locate the owner of funds in either its Pennsylvania IOLTA account or the Pennsylvania IOLTA account of a deceased lawyer whose estate is represented by the lawyer or law firm, it shall pay the funds to the Pennsylvania IOLTA Board. At the time such funds are remitted, the lawyer or law firm shall submit to the IOLTA Board the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, and the amount of unclaimed funds to which each owner is entitled, if known; the amount of any unidentifiable funds; and a description of the efforts undertaken to identify and locate the owner(s).

(2) If, after making a payment of unclaimed or unidentifiable funds to the Pennsylvania IOLTA Board, the lawyer or law firm identifies and locates the owner of funds paid, the IOLTA Board shall refund the sum to the lawyer or law firm. The lawyer or law firm shall submit to the IOLTA Board a verification attesting that the funds have been returned to the owner. The IOLTA Board shall review claims submitted by purported owners of funds when the lawyer or law firm that originally remitted the funds to the IOLTA Board is no longer available. The IOLTA Board shall maintain a sufficient reserve to pay all claims for such funds.

(3) Should the Pennsylvania Lawyers Fund for Client Security pay an award to a former client of a lawyer, law firm, or deceased lawyer who has remitted funds under this Rule to the IOLTA Board, the Pennsylvania Lawyers Fund for Client Security may pursue a reimbursement of such award from unclaimed funds remitted by the lawyer, law firm, or deceased lawyer to the IOLTA Board in which the former client held an ownership interest. In no event would a reimbursement to the Pennsylvania Lawyers Fund for Client Security exceed the amount of funds remitted to the IOLTA Board by the subject lawyer, law firm, or deceased lawyer.

(4) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility as a result of his or her good faith adherence to the unclaimed or unidentifiable IOLTA fund requirements in this subsection.

Credits

Adopted Oct. 16, 1987, effective April 1, 1988. Amended July 17, 1996, effective Sept. 1, 1997; Oct. 15, 1998, imd. effective; April 5, 2005, effective April 23, 2005; Sept. 4, 2008, effective upon publication in the *Pennsylvania Bulletin* [38 Pa.B. 5157, Sept. 20, 2008]; April 2, 2009, imd. effective; April 9, 2012, effective for the 2012-13 assessment and thereafter shall revert to the provisions effective for the 2011-12 assessment; June 4, 2012, effective in 30 days [July 5, 2012]; April 9, 2012 amendments extended February 12, 2013, effective for the 2013-14 annual assessment and thereafter shall revert to the provisions effective on April 8, 2012; May 1, 2014, imd. effective; Dec. 30, 2014, effective in 60 days [March 2, 2015]; Feb. 9, 2015, imd. effective for the 2015-16 annual assessment; April 30, 2018, effective in 60 days [June 29, 2018]; Feb. 7, 2019, imd. effective for the 2019-20 annual assessment.

Editors' Notes

EXPLANATORY COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. The obligations of a lawyer under this Rule apply when the lawyer has come into possession of property of clients or third persons because the lawyer is acting or has acted as a lawyer in a client-lawyer relationship, or when the lawyer is acting as a Fiduciary, or as an escrow agent, a settlement agent or a representative payee, or as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. Securities should be appropriately safeguarded. All property which is the property of clients or third persons, including

prospective clients, must be kept separate from the lawyer's business and personal property and, if Rule 1.15 Funds, in one or more Trust Accounts, or, if a Fiduciary entrustment, in an investment or account authorized by applicable law or a governing instrument. The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Whenever a lawyer holds Rule 1.15 Funds, the lawyer must maintain at least two accounts: one in which those funds are held and another in which the lawyer's own funds may be held.

[2] A lawyer should maintain on a current basis books and records in accordance with sound accounting practices consistently applied and comply with any recordkeeping rules established by law or court order, including those records identified in paragraph (c). With little exception, funds belonging to a client or third party must be deposited into a Trust Account as defined in paragraph (a)(11), and funds belonging to the lawyer must be deposited in a business operating account maintained pursuant to paragraph (j). Thus, unless the client gives informed consent, confirmed in writing, to a different manner of handling funds advanced by the client to cover fees and expenses, the lawyer must deposit those funds into a Trust Account pursuant to paragraph (i). If the lawyer pools such funds belonging to more than one client, under paragraph (c)(2) the lawyer must keep a ledger for each individual client, regularly recording all funds received from the client and their purpose, and all disbursements of earned fees and expenses incurred. As fees become earned, the lawyer must promptly transfer those funds to the operating account. If the lawyer pools client funds after settlement or verdict in a single Trust Account, the lawyer must maintain a ledger of receipts and disbursements for each individual client, regularly recording the dates of each transaction, the identity of payors and payees, and the purpose of each disbursement, withdrawal or transfer of funds. The requirement of monthly reconciliations should deter situations where an attorney's Trust Account contains a shortfall for any significant period of time. Additionally, if a lawyer fails to maintain the records identified in paragraph (c) or to perform the required monthly reconciliations, later claims by the lawyer that a shortfall (i.e., misappropriation) resulted from negligence, even if credible, will necessarily be balanced against the lawyer's abdication of responsibility to comply with essential requirements associated with acting as a fiduciary and serving in a position of trust. The failure to maintain or timely produce the records required by paragraph (c) hampers rule-mandated or agency-promulgated investigative inquiries by the Pennsylvania Lawyers Fund for Client Security and the Office of Disciplinary Counsel and may serve as a basis for emergency temporary suspension of the lawyer's license to practice law. See Pa.R.D.E. 208(f)(1), 208(f)(5), 213(g)(2) and 221(g)(3).

[3] While normally it is impermissible to commingle the lawyer's own funds with Rule 1.15 Funds, paragraph (h) provides that it is permissible when necessary to pay service charges on that account. Accurate records must be kept regarding the funds.

[4] A lawyer's obligations with respect to funds of clients and third persons depend on the capacity in which the lawyer receives them, on whether they are Fiduciary Funds as defined in paragraph (a)(3) and on whether they are Nonqualified Funds or Qualified Funds as defined in paragraphs (a)(8) or (9) respectively. If the lawyer receives them in one of the capacities identified in paragraph (a)(10), the obligations in paragraphs (b) through (h), such as safeguarding, notification, and recordkeeping, apply. Nonqualified Funds other than Fiduciary Funds are to be placed in a Non-IOLTA Account, as defined in paragraph (a)(7), in an Eligible Institution, as defined in paragraph (a)(1), unless the client or third person specifically agrees to another investment vehicle for the benefit of the client or third person. Qualified Funds other than Fiduciary Funds must, subject to certain exceptions, be placed in an IOLTA Account defined in paragraph (a)(5).

[5] If the funds, whether Qualified Funds or Nonqualified Funds, are Fiduciary Funds, they may be placed in an investment or account authorized by the law applicable to the entrustment or authorized by the terms of the instrument governing the Fiduciary Funds. In such investment or account they shall be subject to the obligations of safeguarding, notification and recordkeeping. This Rule is not intended to change the substantive law or procedural rules that govern Fiduciary Funds or property with the exception of the specific recordkeeping requirements, segregation of Fiduciary Funds or property, and where Fiduciary Funds are kept in an Eligible Institution, overdraft reporting pursuant to

Pa.R.D.E. 221, to the extent that those requirements underscore or supplement the requirements regarding Fiduciary Funds or property. The goal of the amendments is to require all attorneys to keep appropriate records of entrusted funds, segregate such funds from the attorney's funds, account to those with an interest in the funds, and distribute the funds when due, and to permit the disciplinary system to respond when lawyers fail to comply with these standards.

[6] This Rule does not require a Fiduciary to liquidate entrusted investments or investments made in accordance with applicable law or a governing instrument or to transfer non-income producing fiduciary account balances to an IOLTA Account. This Rule does not prohibit a Fiduciary from making an investment in accordance with applicable law or a governing instrument. Funds which are controlled by a non-lawyer professional co-fiduciary shall not be considered to be Rule 1.15 Funds for the purposes of this Rule.

[7] Lawyers often receive funds from which the lawyer's fee will be paid. Unless the fee is non-refundable, it should be deposited to a Trust Account and drawn down as earned. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a Trust Account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[8] 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 unless the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. 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.

[9] Other applicable law may impose pertinent obligations upon a lawyer independent of and in addition to the obligations arising from this Rule. For example, a lawyer who receives funds as an escrow agent, a representative payee, or a Fiduciary remains subject to the law applicable to the entrustment, such as the Probate, Estates and Fiduciaries Code, Orphans' Court Rules, the Social Security Act, and to the terms of the governing instrument. If, during the final year of a Fiduciary entrustment, the lawyer who is serving as a Fiduciary reasonably expects that the funds cannot earn income for the client or third person in excess of the cost incurred to secure such income while the funds are held, the lawyer may, in the discretion of the lawyer, deposit the funds into the IOLTA Account of the lawyer, or may arrange to discontinue the payment of interest on the segregated Trust Account.

[10] A lawyer must participate in the Pennsylvania Lawyers Fund for Client Security established in Rule 503 of the Pennsylvania Rules of Disciplinary Enforcement. It is a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.

[11] Paragraphs (q) through (t) provide for the Interest on Lawyer Trust Account (IOLTA) program There are further instructions relating to the IOLTA program in Rules 219 and 221 of the Pennsylvania Rules of Disciplinary Enforcement and in the Regulations of the Interest On Lawyers Trust Account Board, 204 Pa. Code, § 81.1 et seq., which are referred to as the IOLTA Regulations.

[12] For purposes of subsection (v), unidentifiable funds refers to funds accumulated in an IOLTA account that cannot be reasonably documented as belonging to a client, former client, third party, or the lawyer or law firm. Unclaimed funds refers to funds for which a client, former client, or third party appear to have an interest, but have not responded to the lawyer or law firm's reasonable efforts to encourage the client, former client, or third party to claim their rightful funds. A lawyer or law firm's reasonable efforts to identify the owner of funds include a review of transaction records,

client ledgers, case files, and any other relevant fee records. Reasonable efforts to locate the owner of funds include periodic correspondence of the type contemplated by the lawyer or law firm's relationship with the client, former client, or third party. Should such correspondence prove unsuccessful, a lawyer or law firm's reasonable efforts include efforts similar to those that would be undertaken when attempting to locate a person for service of process, such as examinations of local telephone directories, courthouse records, voter registration records, local tax records, motor vehicle records, or the use of consolidated online search services that access such records. Lawyers must maintain records of the disposition of unclaimed or unidentifiable funds and make such records available for production to the Pennsylvania Lawyers Fund for Client Security or the Office of Disciplinary Counsel in accordance with Pa. R.P.C. 1.15(c). The IOLTA Board shall make a standardized form with instructions available on the IOLTA Board's website or by request for use by lawyers submitting unclaimed or unidentifiable funds to the IOLTA Board. Conservators appointed pursuant to Pa.R.D.E. 321 should follow the procedure in Pa.R.D.E. 324(c)(1) for distributing unclaimed and unidentifiable funds.

CODE OF PROF. RESP. COMPARISON

With regard to Rule 1.15(a), DR 9-102(A) provides that "funds of clients" are to be kept in a trust account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provides that a lawyer shall "Identify and label securities and properties of a client ... and place them in ... safekeeping ...." DR 9-102(B)(3) requires that a lawyer "Maintain complete records of all funds, securities, and other properties of a client ...." Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

Notes of Decisions (11)

Footnotes

1 15 U.S.C.A. § 80b-1 et seq.

2 15 U.S.C.A. § 80a-1 et seq.

3 15 U.S.C.A. § 78a et seq.

Rules of Prof. Conduct, Rule 1.15, 42 Pa.C.S.A., PA ST RPC Rule 1.15
Current with amendments received through October 15, 2019.

End of Document

West's Tennessee Code Annotated State and Local Rules Selected from West's Tennessee Rules of Court Rules of the Supreme Court of the State of Tennessee Rule 8. Rules of Professional Conduct (Refs & Annos) Chapter 1. The Client-Lawyer Relationship

Sup.Ct.Rules, Rule 8, RPC 1.15

Rule 1.15. Safekeeping Property and Funds

Currentness

(a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds.

(b) Funds belonging to clients or third persons shall be deposited in a separate account maintained in a financial institution, deposits of which are insured by the Federal Deposit Insurance Corporation (FDIC) and/or National Credit Union Association (NCUA), having a deposit-accepting office located in the state where the lawyer's office is situated (or elsewhere with the consent of the client or third person) and which participates in the required overdraft notification program as required by Supreme Court Rule 9, Section 35.1. A lawyer may deposit the lawyer's own funds in such an account for the sole purpose of paying financial institution service charges or fees on that account, but only in an amount reasonably necessary for that purpose. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(1) Except as provided by subparagraph (b)(2), interest earned on accounts in which the funds of clients or third persons are deposited, less any deduction for financial institution service charges or fees (other than overdraft charges) and intangible taxes collected with respect to the deposited funds, shall belong to the clients or third persons whose funds are deposited, and the lawyer shall have no right or claim to such interest. Overdraft charges shall not be deducted from accrued interest and shall be the responsibility of the lawyer.

(2) A lawyer shall deposit all funds of clients and third persons that are nominal in amount or expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client or third persons in excess of the costs incurred to secure such income in one or more pooled accounts known as an “Interest on Lawyers' Trust Account” (“IOLTA”), in accordance with the requirements of Supreme Court Rule 43. A lawyer shall not deposit funds in any account for the purpose of complying with this sub-section unless the account participates in the IOLTA program under Rule 43.

(3) The determination of whether funds are required to be deposited in an IOLTA account pursuant to subparagraph (b)(2) rests in the sound discretion of the lawyer. No charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's exercise of good faith judgment in making such a determination.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(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 funds or other property.

(e) When in the course of representation a lawyer is in possession of property or funds 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 or funds as to which the interests are not in dispute.

Credits

[Adopted September 29, 2010, effective January 1, 2011. Amended August 18, 2014; October 4, 2016.]

Editors' Notes

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted and reasonable internal control procedures and comply with any recordkeeping rules established by law or court order. See, e.g., Tenn. Sup. Ct. R. 9.

[2] Paragraph (b) of this Rule contains the fundamental requirement that a lawyer maintain funds of clients and third parties in a separate trust account. All such accounts, including IOLTA accounts, must be part of the overdraft notification program established under Supreme Court Rule 9, Section 35.1.

[3] Under Supreme Court Rule 43, Tennessee lawyers are required to report their compliance with their obligations concerning their IOLTA accounts and the handling of client funds and to comply with the technical requirements for establishing and operating such accounts. This RPC requires Tennessee lawyers to establish IOLTA accounts only at eligible financial institutions. Tennessee lawyers may rely upon the list of eligible financial institutions maintained pursuant to Rule 43 in establishing an IOLTA account to comply with subparagraph (b)(2).

[4] A lawyer is also responsible for assuring the payment of any financial institution service charges or fees on such trust accounts. Subparagraph (b)(1) of this Rule makes clear that any interest earned on non-IOLTA trust accounts belongs to the client or third party whose funds generate the interest, and that the interest earned on them may be used by a lawyer to pay bank charges or fees. A detailed accounting of such interest and fees may be necessary to avoid the payment of any client-or matter-specific financial institution service charges or fees (for example, charges for a certified check obtained solely for the benefit of one client) by a client other than the one on whose behalf the charge or fee was incurred.

[5] In determining whether client or third-person funds should be deposited in an IOLTA account or non-IOLTA trust account, a lawyer should take into consideration a number of factors, including the amount of funds to be deposited; the expected duration of the deposit; the rate of interest or yield available from the financial institution where the funds are to be deposited; the service charges, fees, and other costs that are reasonably expected to be associated with the deposit of funds; the cost of establishing and administering a non-IOLTA trust account for the benefit of the client or third person, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to the benefit of a client or third person; the capability of financial institutions or lawyers or law firms to calculate and pay interest to individual clients or third persons; and any other circumstances that are reasonably likely to affect the ability of the client or third person to earn income, in excess of any service charges, fees, or other costs incurred to secure such income from the funds.

[6] Subparagraph (b)(3) expressly recognizes that a lawyer's decision concerning whether funds are required to be deposited in an IOLTA account pursuant to subparagraph (b)(2) is a discretionary one, and provides that a lawyer who makes such a determination in good faith shall not be subject to any disciplinary sanction for this decision. A lawyer or law firm should review the account at reasonable intervals to determine if the amount of the funds or expected duration changes the type of account in which funds should be deposited.

[7] In no event may overdraft charges imposed upon a trust account be paid from interest on a trust account.

[8] In order to allow a lawyer to pay appropriate financial institution service charges or fees on a trust account, paragraph (b) of the Rule expressly relaxes the prohibition on commingling lawyer and client funds in a trust account to permit a lawyer to deposit the lawyer's own funds in the trust account for the sole purpose of paying financial institution service charges or fees, but only in an amount reasonably necessary for that very limited purpose. Lawyers should exercise great care in using this limited permission to deposit funds in a trust account, given the cardinal importance of the principle otherwise banning commingling of funds.

[9] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's position. The disputed portion of the funds must be kept in trust, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[10] Whether a fee that is prepaid by a client should be placed in the client trust account depends on when the fee is earned by the lawyer. An advance payment of funds upon which the lawyer may draw for payment of the lawyer's fee when it is earned or for reimbursement of the lawyer for expenses when they are incurred must be placed in the client trust account. When the lawyer earns the fee, the funds shall be promptly withdrawn from the client trust account, and timely notice of the withdrawal of funds should be provided to the client. RPC 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated. See RPC 1.5, Comment [4] for a discussion of two situations in which an advance payment from a client is properly treated as an earned fee and therefore cannot be placed in the lawyer's client trust account.

[11] 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 funds or other property to the client. However, a lawyer should not unilaterally assume to resolve a dispute between the client and the third party.

[12] When two or more persons (one of whom may be the lawyer) have substantial grounds for dispute as to the person entitled to the funds or other property held by the lawyer, the lawyer, with due regard to his or her confidentiality obligations under RPC 1.6, may file an action to have a court resolve the dispute, including an interpleader action.

[13] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[14] In certain circumstances, Tennessee law governing abandoned property may apply to monies in lawyer trust accounts or other property left in the hands of lawyers and may govern its disposition. See Tenn. Code Ann. §§ 66-29-101 to 66-29-204 (Uniform Disposition of Unclaimed Property Act).

[15] Paragraph (a) of this Rule requires a lawyer to hold property and funds of clients or third persons separate from the lawyer's own property and funds. In addition, paragraph (b) provides that a lawyer may deposit the lawyer's own funds in a separate trust account "for the sole purpose of paying financial institution service charges and fees ..., but only in an amount reasonably necessary for that purpose." Taken together, those provisions require a lawyer to promptly withdraw from the lawyer's trust account any legal fees earned by the lawyer. Additionally, the lawyer may not pay his or her own personal or professional expenses directly from the trust account, even if the trust account temporarily contains legal fees earned by the lawyer; instead, the lawyer must withdraw earned legal fees from the trust account and deposit those funds into the lawyer's own account, from which the lawyer will pay his or her expenses. See, e.g., Bd. of Prof'l Responsibility v. Allison, 284 S.W.3d 316, 324-25 (Tenn. 2009).

DEFINITIONAL CROSS-REFERENCE

"Reasonably" See RPC 1.0(h)

Notes of Decisions (6)

Sup. Ct. Rules, Rule 8, RPC 1.15, TN R S CT Rule 8, RPC 1.15
State court rules are current with amendments received through December 1, 2019.

West's Revised Code of Washington Annotated Part I. Rules of General Application Rules of Professional Conduct (Rpc) (Refs & Annos) Title 1. Client-Lawyer Relationship

Rules Of Professional Conduct, RPC 1.15A

RULE 1.15A. SAFEGUARDING PROPERTY

Currentness

(a) This Rule applies to (1) property of clients or third persons in a lawyer's possession in connection with a representation and (2) escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction.

(b) A lawyer must not use, convert, borrow or pledge client or third person property for the lawyer's own use.

(c) A lawyer must hold property of clients and third persons separate from the lawyer's own property.

(1) A lawyer must deposit and hold in a trust account funds subject to this Rule pursuant to paragraph (h) of this Rule.

(2) Except as provided in Rule 1.5(f), and subject to the requirements of paragraph (h) of this Rule, a lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

(d) A lawyer must promptly notify a client or third person of receipt of the client or third person's property.

(e) A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds.

(f) Except as stated in this Rule, a lawyer must promptly pay or deliver to the client or third person the property which the client or third person is entitled to receive.

(g) If a lawyer possesses property in which two or more persons (one of which may be the lawyer) claim interests, the lawyer must maintain the property in trust until the dispute is resolved. The lawyer must promptly distribute all undisputed portions of the property. The lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

(h) A lawyer must comply with the following for all trust accounts:

(1) No funds belonging to the lawyer may be deposited or retained in a trust account except as follows:

(i) funds to pay bank charges, but only in an amount reasonably sufficient for that purpose;

(ii) funds belonging in part to a client or third person and in part presently or potentially to the lawyer must be deposited and retained in a trust account, but any portion belonging to the lawyer must be withdrawn at the earliest reasonable time; or

(iii) funds necessary to restore appropriate balances.

(2) A lawyer must keep complete records as required by Rule 1.15B.

(3) A lawyer may withdraw funds when necessary to pay client costs. The lawyer may withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document.

(4) Receipts must be deposited intact.

(5) All withdrawals must be made only to a named payee and not to cash. Withdrawals must be made by check or by electronic transfer.

(6) Trust account records must be reconciled as often as bank statements are generated or at least quarterly. The lawyer must reconcile the check register balance to the bank statement balance and reconcile the check register balance to the combined total of all client ledger records required by Rule 1.15B(a)(2).

(7) A lawyer must not disburse funds from a trust account until deposits have cleared the banking process and been collected, unless the lawyer and the bank have a written agreement by which the lawyer personally guarantees all deposits to the account without recourse to the trust account.

(8) Disbursements on behalf of a client or third person may not exceed the funds of that person on deposit. The funds of a client or third person must not be used on behalf of anyone else.

(9) Only a lawyer admitted to practice law or an LLLT may be an authorized signatory on the account. If a lawyer is associated in a practice with one or more LLLT's, any check or other instrument requiring a signature must be signed by a signatory lawyer in the firm.

(i) Trust accounts must be interest-bearing and allow withdrawals or transfers without any delay other than notice periods that are required by law or regulation and meet the requirements of ELC 15.7(d) and ELC 15.7(e). In the exercise of ordinary prudence, a lawyer may select any financial institution authorized by the Legal Foundation of Washington (Legal Foundation) under ELC 15.7(c). In selecting the type of trust account for the purpose of depositing and holding funds subject to this Rule, a lawyer shall apply the following criteria:

(1) When client or third-person funds will not produce a positive net return to the client or third person because the funds are nominal in amount or expected to be held for a short period of time the funds must be placed in a pooled interest-bearing trust account known as an Interest on Lawyer's Trust Account or IOLTA. The interest earned on IOLTA accounts shall be paid to, and the IOLTA program shall be administered by, the Legal Foundation of Washington in accordance with ELC 15.4 and ELC 15.7(e).

(2) Client or third-person funds that will produce a positive net return to the client or third person must be placed in one of the following two types of non-IOLTA trust accounts, unless the client or third person requests that the funds be deposited in an IOLTA account:

(i) a separate interest-bearing trust account for the particular client or third person with earned interest paid to the client or third person; or

(ii) a pooled interest-bearing trust account with sub-accounting that allows for computation of interest earned by each client or third person's funds with the interest paid to the appropriate client or third person.

(3) In determining whether to use the account specified in paragraph (i)(1) or an account specified in paragraph (i)(2), a lawyer must consider only whether the funds will produce a positive net return to the client or third person, as determined by the following factors:

(i) the amount of interest the funds would earn based on the current rate of interest and the expected period of deposit;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client or third person's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients or third persons if the account in paragraph (i)(2)(ii) is used.

(4) The provisions of paragraph (i) do not relieve a lawyer or law firm from any obligation imposed by these Rules or the Rules for Enforcement of Lawyer Conduct.

(j) In any transaction in which a lawyer has selected, prepared, or completed legal documents for use in the closing of any real estate or personal property transaction, where funds received or held in connection with the closing of the transaction, including advances for costs and expenses, are not being held in that lawyer's trust account, the lawyer must ensure that such funds, including funds being held by a closing firm, are held and maintained as set forth in this rule or LPORPC 1.12A. This duty shall not apply to a lawyer whose participation in a matter is incidental to the closing if (i) the lawyer or lawyer's law firm has a preexisting lawyer-client relationship with a buyer or seller in the transaction, and (ii) neither the lawyer nor the lawyer's law firm has an existing client-lawyer relationship with a closing firm or LPO participating in the closing.

Credits

[Former Rule 1.14 was amended effective July 1, 1988; July 14, 1989; March 1, 1991; October 1, 2002. Renumbered and amended effective September 1, 2006. Amended effective September 1, 2007; November 18, 2008; January 1, 2009; December 1, 2009; September 1, 2011; December 10, 2013; April 14, 2015.]

Editors' Notes

WASHINGTON COMMENTS

[1] A lawyer must also comply with the recordkeeping rule for trust accounts, Rule 1.15B.

[2] Client funds include, but are not limited to, the following: legal fees and costs that have been paid in advance other than retainers and flat fees complying with the requirements of Rule 1.5(f)), funds received on behalf of a client, funds to be paid by a client to a third party through the lawyer, other funds subject to attorney and other liens, and payments received in excess of amounts billed for fees.

[3] This Rule does not apply to property held by a lawyer acting solely in a fiduciary capacity such as attorney in fact, trustee, guardian, personal representative, executor, administrator, or in any similar capacity where the lawyer's investment duties as a fiduciary are controlled by statute or other law. If a lawyer is acting as both a fiduciary and as the lawyer for the fiduciary, the character of the funds controls whether funds should be deposited in a fiduciary account or the lawyer's trust account. In some cases, it may be permissible to put funds received in either the lawyer's trust account or the fiduciary account. That determination depends in part on the substantive law of fiduciary obligations, which is beyond the scope of these rules. The conflict of interest rules determine whether it is appropriate for a lawyer who is the fiduciary to also serve as the attorney for the fiduciary. *See generally* RPC 1.7; RPC 1.8(a) and cmt. [8]; *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 866 n.12, 64 P.3d 1226 (2003).

[4] The inclusion of ethical obligations to third persons in the handling of trust funds and property is not intended to expand or otherwise affect existing law regarding a Washington lawyer's liability to third parties other than clients. See, e.g., *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999).

[5] Property covered by this Rule includes original documents affecting legal rights such as wills or deeds.

[6] A lawyer has a duty to take reasonable steps to locate a client or third person for whom the lawyer is holding funds or property. If after taking reasonable steps, the lawyer is still unable to locate the client or third person, the lawyer should treat the funds as unclaimed property under the Uniform Unclaimed Property Act, RCW 63.29.

[7] A lawyer may not use as a trust account an account in which funds are periodically transferred by the financial institution between a trust account and an uninsured account or other account that would not qualify as a trust account under this Rule or ELC 15.7.

[8] If a lawyer accepts payment of an advanced fee deposit by credit card, the payment must be deposited directly into the trust account. It cannot be deposited into a general account and then transferred to the trust account. Similarly, credit card payments of earned fees, of retainers meeting the requirements of Rule 1.5(f)(1), and of flat fees meetings the requirements of Rule 1.5(f)(2) cannot be deposited into the trust account and then transferred to another account.

[9] Under paragraph (g), the extent of the efforts that a lawyer is obligated to take to resolve a dispute depend on the amount in dispute, the availability of methods for alternative dispute resolution, and the likelihood of informal resolution.

[10] The requirement in paragraph (h)(4) that receipts must be deposited intact means that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, commonly known as a split deposit.

[11] Paragraph (h)(7) permits Washington lawyers to enter into written agreements with the trust account financial institution to provide for disbursement of trust deposits prior to formal notice of dishonor or collection. In essence the trust account bank is agreeing to or has guaranteed a loan to the lawyer and the client for the amount of the trust deposit pending collection of that deposit from the institution upon which the instrument was written. A Washington lawyer may only enter into such an arrangement if 1) there is a formal written agreement between the attorney and the trust account institution, and 2) the trust account financial institution provides the lawyer with written assurance that in the event of dishonor of the deposited instrument or other difficulty in collecting the deposited funds, the financial institution will not have recourse to the trust account to obtain the funds to reimburse the financial institution. A lawyer must never use one client's money to pay for withdrawals from the trust account on behalf of another client who is paid subject to the lawyer's guarantee. The trust account financial institution must agree that the institution will not seek to fund the guaranteed withdrawal from the trust account, but will instead look to the lawyer for payment of uncollectible funds. Any such agreement must ensure that the trust account funds or deposits of any other client's or third person's money into the trust account would not be affected by the guarantee.

[12] The Legal Foundation of Washington was established by Order of the Supreme Court of Washington.

[13] A lawyer may, but is not required to, notify the client of the intended use of funds paid to the Foundation.

[14] If the client or third person requests that funds that would be deposited in a non-IOLTA trust account under paragraph (i)(2) instead be held in the IOLTA account, the lawyer should document this request in the lawyer's trust account records and preferably should confirm the request in writing to the client or third person.

[15] A lawyer may not receive from financial institutions earnings credits or any other benefit from the financial institution based on the balance maintained in a trust account.

[16] The term “closing firm” as used in this rule has the same definition as in ELPOC 1.3(g).

[17] The lawyer may satisfy the requirement of paragraph (j), that the lawyer must ensure that all funds received or held by a closing firm in connection with the closing of the transaction are held and maintained as set forth in this rule or LPORPC 1.12A, by obtaining a certification or other reasonable assurance from the closing firm that the funds are being held in accordance with RPC 1.15A and/or LPORPC 1.12A. The lawyer is not required to personally inspect the books and records of the closing firm.

The last sentence of Paragraph (j) is intended to relieve a lawyer from the duties of the paragraph only if the lawyer or the lawyer's law firm has a previous client-lawyer relationship with one of the parties to the transaction and that party is a buyer or seller. Lawyers may be called on by clients to review deeds prepared during the escrow process, or may be asked to prepare special deeds such as personal representative's deeds for use in the closing. A lawyer may also be asked by a client to review documents such as settlement statements or tax affidavits that have been prepared for the closing. Such activities are limited in scope and are only incidental to the closing. This exception does not apply if the lawyer or the lawyer's law firm has an existing client-lawyer relationship with the closing firm or with a limited practice officer who is participating in the closing.

[18] When selecting a financial institution for purposes of depositing and holding funds in a trust account, a lawyer is obligated to exercise ordinary prudence under paragraph (i). All trust accounts must be insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration up to the limit established by law for those types of accounts or be backed by United States Government Securities. Trust account funds must not be placed in stocks, bonds, mutual funds that invest in stock or bonds, or similar uninsured investments. See ELC 15.7(d).

[19] Only those financial institutions authorized by the Legal Foundation of Washington (Legal Foundation) are eligible to offer trust accounts to Washington lawyers. To become authorized, the financial institution must satisfy the Legal Foundation that it qualifies as an authorized financial institution under ELC 15.7(c) and must have on file with the Legal Foundation a current Overdraft Notification Agreement under ELC 15.4. A list of all authorized financial institutions is maintained and published by the Legal Foundation and is available to any person on request.

[20] Upon receipt of a notification of a trust account overdraft, a lawyer must comply with the duties set forth in ELC 15.4(d) (lawyer must promptly notify the Office of Disciplinary Counsel of the Washington State Bar Association and include a full explanation of the cause of the overdraft).

[21] A unilateral deposit of funds belonging in part to a client or third party into a lawyer's non-trust account does not constitute a violation of paragraph (c) of this Rule if the lawyer promptly identifies the portion of the funds belonging to the client or third party, deposits those funds into a trust account, and notifies the client or third party of the deposit. A unilateral deposit of funds belonging in part to a lawyer into a trust account does not constitute a violation of paragraph (h) of this Rule if the lawyer promptly identifies the lawyer-owned funds and withdraws them from the trust account. For purposes of this provision, a unilateral deposit refers to funds deposited directly by a client or third party by means of electronic funds transfer where the lawyer has not directed, invited, or encouraged a deposit that would constitute a violation of this Rule and has taken reasonable precautions to prevent such a deposit.

[22] An LLLT who is signatory to a trust account under paragraph (h)(9) is subject to independent professional-ethical obligations that correspond to a lawyer's obligations under this Rule. See LLLT RPC 1.15A. Partners and lawyers who individually or together with other lawyers possess comparable managerial authority in a law firm that employ LLLTs, or in which LLLTs are members, should also be aware of their obligations under Rule 5.10. These obligations extend to making reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that an LLLT's conduct in relation to the firm's trust account(s) is compatible with these Rules of Professional Conduct. A lawyer with managerial or supervisory authority over an LLLT who is signatory to a trust account under paragraph (h)(9) is also ethically obligated to make reasonable efforts to ensure that the LLLT's conduct is compatible with the LLLT's professional-ethical obligations. When a lawyer is a joint signatory on a trust account with an LLLT, a lawyer should exercise direct supervisory authority over the activities of the LLLT with respect to the account.

[Comment amended effective April 14, 2015; September 1, 2018.]

Notes of Decisions (30)

RPC 1.15A, WA R RPC 1.15A
Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 11/1/19. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 11/1/19.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on September 29, 2014, the following order was made and entered:

RE: APPROVAL OF STATE BAR ADMINISTRATIVE RULE 10

By order of April 14, 2014, the Court approved a sixty-day period of public comment on proposed State Bar Administrative Rule 10, which will form part of a new set of rules that will replace the existing West Virginia State Bar Rules and Regulations. The public comment period closed on June 13, 2014, and the Court expresses its gratitude to the members of the bar who provided comments.

Upon consideration whereof, the Court of is the opinion to and does hereby approve State Bar Administrative Rule 10, **effective immediately**, to read as follows:

WEST VIRGINIA STATE BAR ADMINISTRATIVE RULES

Rule 10 — Client Trust Accounts; IOLTA Program

Rule 10.01 Obligation to Maintain Client Trust Account

In accordance with Rule 1.15 of the Rules of Professional Conduct, a lawyer or law firm that receives client funds must keep those funds in a separate account. Client trust accounts must conform with the requirements in R.P.C. 1.15 and be maintained at an eligible financial institution as set forth in Rule 10.04.

Rule 10.02 Obligation To Maintain Separate IOLTA Trust Account, Reporting

In accordance with Rule 1.15(f) of the Rules of Professional Conduct, a lawyer or law firm that receives client funds that are nominal in amount or are expected to be held for a brief period shall establish and maintain a pooled, interest or dividend-bearing account for the deposit of such funds, at an eligible financial institution. The separate IOLTA trust account must comply with this rule and participate in the Interest on Lawyers Trust Accounts (IOLTA) Program administered by the West Virginia State Bar. On a yearly basis, each lawyer must provide an IOLTA report to the West Virginia State Bar, disclosing: (1) whether the lawyer is exempt under Rule 10.07; (2) whether the lawyer is a member of a law firm that maintains an IOLTA trust account; and, if applicable (3) the name of the financial institution, the routing number and the account number of the IOLTA trust account. The West Virginia State Bar is authorized to assess an administrative penalty of two hundred dollars ($200) to any lawyer who does not comply with the yearly reporting requirement.

Rule 10.03 Determining What Funds to Deposit in an IOLTA Trust Account

The IOLTA trust account shall include only such client funds that are so nominal in amount or are expected to be held for such a brief period of time such that the funds cannot earn income for the client in excess of the costs of securing that income. The lawyer shall review the account at reasonable intervals to determine whether circumstances warrant further action with respect to the funds of any client. In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm shall consider the following factors:

(a) the amount of the funds to be deposited;

(b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(d) the cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

(e) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients;

(f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

A lawyer may not be charged with any breach of the Rules of Professional Conduct or other ethical violation with regard to a good faith determination of whether client funds are nominal in amount, are expected to be held for a brief period, or in applying the factors (a) through (f) in this rule.

Rule 10.04 Eligible Financial Institutions

Lawyers may only establish and maintain a Client Trust Account or an IOLTA Trust Account at an eligible financial institution. To qualify as eligible, the financial institution must:

(a) be certified by the West Virginia State Bar to be in compliance with this Rule; and

(b) be a federally-insured and state or federally-regulated financial institution authorized by federal or state law to do business in West Virginia, or an open-end investment company registered with the federal Securities and Exchange Commission and authorized by federal or state law to do business in West Virginia.; and

(c) agree to provide overdraft notification as provided in Rule 10.08; and

(d) with respect to IOLTA accounts, offers such accounts within the requirements of Rule 10.04.

Rule 10.05 IOLTA Account Requirements

Participation by banks, savings and loan associations, and investment companies in the IOLTA program is voluntary. An eligible financial institution that elects to offer and maintain IOLTA accounts shall meet the following requirements:

(a) The eligible financial institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts. Interest and dividends shall be calculated in accordance with the eligible institution's standard practices for non-IOLTA customers. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an eligible institution may consider, in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is an IOLTA account. Nothing in this rule shall preclude an eligible institution from paying a higher interest rate or dividend than described above or electing to waive any fees and services charges on an IOLTA account.

(b) An eligible institution may choose to pay the highest interest or dividend rate in Rule 10.05(a), less allowable reasonable fees as set forth in Rule 10.05(d), if any, on an IOLTA account in lieu of establishing it as a higher rate product.

(c) The IOLTA Trust Account shall be an interest or dividend-bearing account. Interest- or dividend-bearing account means: (1) an interest-bearing checking account; (2) a checking account paying preferred interest rates, such as money market or indexed rates; (3) a government interest-bearing checking account such as accounts used for municipal deposits; (4) a business checking account with an automated investment sweep feature which is a daily (overnight) financial institution repurchase agreement or an open-end money market fund; or (5) any other suitable interest or dividend-bearing account offered by the institution to its non-IOLTA customers. A daily financial institution repurchase agreement must be fully collateralized by or invested in Securities and may be established only with an eligible institution that is well-capitalized or adequately capitalized as those terms are defined by applicable federal statutes and regulations. An open-end money market fund must be invested in U.S. Government Securities and must hold itself out as a money-market fund as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. United States Government Securities are defined to include debt securities of Government Sponsored Enterprises, such as, but not limited to, debt securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation.

(d) Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest or dividends earned on an IOLTA account. Allowable reasonable fees are defined as per check charges, per deposit charges, a fee in lieu of minimum balances, sweep fees, FDIC insurance fees, and a reasonable IOLTA account administrative fee. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges shall be collected from the principal balance deposited in an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm

maintaining the IOLTA account, including bank overdraft fees and fees for check returns for insufficient funds. Fees and service charges in excess of the interest or dividends earned on one IOLTA account for any period shall not be taken from interest or dividends earned on any other IOLTA account or accounts or from the principal of any IOLTA account.

(e) As an alternative to the rates required under Rule 10.05(a), an eligible institution may choose to pay on IOLTA accounts an amount equal to 65% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first calendar day of the month. The amount is net of all allowable reasonable fees under Rule 10.05(d). This initial benchmark rate of 65% of the Federal Funds Target Rate may be adjusted once a year by the West Virginia State Bar, upon 90 days' written notice to financial institutions participating in the IOLTA program at which time financial institutions may elect to pay the new benchmark amount or may choose among the other options at Rule 10.05(a).

(f) The name of the IOLTA trust account shall be in the following format: "(*Attorney or Firm Name*), IOLTA Trust Account".

Rule 10.06 Lawyer Instructions to IOLTA Account Institution

The lawyer shall direct the eligible financial institution as follows with regard to an IOLTA account:

(a) To remit interest or dividends, on at least a quarterly basis, net of allowable reasonable service charges or fees, if any, to the West Virginia State Bar; and

(b) To transmit with each remittance to the West Virginia State Bar, a statement in any form and through any manner of transmission approved by the State Bar showing the name of the lawyer or law firm on whose account the remittance is sent and the amount of the remittance attributable to each, the account number for each account, the rate and type of interest or dividend, the amount and type of allowable reasonable service charges or fees; and the average account balance for the reporting period; and

(c) To transmit to the depositing lawyer or law firm a report in accordance with the institution's normal procedures for reporting to depositors.

Rule 10.07 Exemptions from the IOLTA Program

An attorney or the law firm with which the attorney is associated may be exempt from the requirement to maintain an IOLTA Trust Account in accordance with this Rule if:

(a) the nature of the attorney's or law firm's practice is such that the attorney or law firm never receives client funds that would require an IOLTA Trust Account;

(b) the attorney is a full-time judge, government attorney, military attorney, or inactive attorney; or

(c) the West Virginia State Bar's Board of Governors, having received a petition requesting an exemption, may exempt the attorney or law firm from participation in the program for a period of no more than two years when service charges on the attorney's or law firm's Trust Account

equal or exceed any interest generated or when compliance with the Rule would create an undue hardship on the lawyer and would be extremely impractical.

Rule 10.08 Overdraft Notification

(a) In the event any properly payable instrument is presented against a Client Trust Account or an IOLTA Trust Account containing insufficient funds, irrespective of whether or not the instrument is honored, the eligible financial institution must provide a report to the West Virginia State Bar. Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(b) The eligible financial institution shall file an overdraft notification agreement with the State Bar. The agreement shall apply to all branches of the financial institution and cannot be canceled except upon 30-day notice in writing to the West Virginia State Bar. The West Virginia State Bar shall annually publish a list of financial institutions that have agreed to comply with this Rule and may establish operational guidelines governing amendments to the list of eligible financial institutions.

(c) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

(d) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule. Fees charged for the reasonable cost of producing the reports and records required by this Rule are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as defined in Rule 10.05(d).

Rule 10.09 Disposition of IOLTA Funds Whose Owners Cannot Be Located or Cannot Be Identified

(a) When an executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or a lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure holds funds in an IOLTA account for a client or third party, and cannot locate that client or third party after four or more months of reasonable efforts to do so, it shall pay the funds to the West Virginia State Bar, while at the same time notifying the Executive Director, under oath, of the efforts made to locate the owner, whether client or third party.

(b) When an executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or a lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure cannot identify the owner or owners of funds in an IOLTA account, whether client or third party, after four or more months of reasonable efforts to do so, the lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure shall petition the Supreme Court of Appeals for leave to pay the funds to the West Virginia State Bar, together with a statement, under oath, of the efforts made to identify and locate the owner or owners.

(c) The executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure shall have a continuing responsibility for returning the funds to the owner or owners. If the owner of such funds remitted to the West Virginia State Bar is identified and located within two years after the funds have been remitted to the West Virginia State Bar, then the lawyer, law firm, or trustee shall notify the West Virginia State Bar IOLTA Advisory Committee; and request, pursuant to procedures adopted by the West Virginia State Bar IOLTA Advisory Committee for that purpose, a refund of the amounts paid. The lawyer, law firm, or trustee shall be responsible for proper distribution of any funds that are refunded.

(d) The procedures in Rule 10.09(a) and (b) shall apply in cases where the amount of the funds is $500 or more. In cases where the amount of the funds is $500 or less, the executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or the lawyer, law firm or trustee appointed under the Rules of Lawyer Disciplinary Procedure, shall remit the funds directly to the West Virginia State Bar.

Rule 10.10 Distribution of IOLTA Funds by the West Virginia State Bar

All IOLTA funds remitted to the West Virginia State Bar shall be distributed by that entity as follows:

(a) an annual fee not to exceed thirty thousand dollars shall be retained by the West Virginia State Bar, for administration of the fund, with a detailed annual accounting of services performed in consideration for such fee to be filed for public inspection with the Supreme Court of Appeals;

(b) special grants not to exceed fifteen percent of the fund's annual receipts to WV CASA Network, coordinating agency for court-appointed special advocate programs, in the amount of 43.5 percent of special grant funds available; to the West Virginia Fund for Law in the Public Interest, Inc., in the amount of 19.3 percent of special grant funds available; to the Appalachian Center for Law and Public Service, in the amount of 7.72 percent of special grant funds available; to West Virginia Senior Legal Aid, Inc., in the amount of 24.125 percent of special grant funds available; and to ChildLaw Services of Mercer County 5.355 percent of special grant funds available; and

(c) Seventy-five percent (75%) of the remaining funds to Legal Aid of West Virginia and twenty-five percent (25%) of the remaining funds to Mountain State Justice or such other method of distribution as may hereinafter be adopted by order of the Supreme Court of Appeals. Any

funds distributed by the West Virginia State Bar pursuant to this subdivision shall not be used by the recipient organization to support any lobbying activities.

Rule 10.11 IOLTA Advisory Committee

(a) The State Bar Board of Governors shall appoint an IOLTA Advisory Committee ("Committee") to assist in the administration of the IOLTA Program.

(b) The Committee shall meet at least quarterly and shall advise the Board of Governors, the Executive Director, and the Supreme Court on issues related to the administration of the IOLTA Program, including, but not limited to: providing proposed distributions of IOLTA funds to the Board of Governors for approval; the amount of the annual administrative fee; the procedures related to the annual audit; receipts and requests for refunds under Rule 10.09; and other matters as requested by the Board, the Executive Director, or the Supreme Court.

(c) The Committee shall provide an annual summary of its activities to the Board of Governors.

* * * *

Cross references to Rule 1.15 of the Rules of Professional Conduct should be read as references to the language of the amendments to that rule approved by order of September 29, 2014. The remaining State Bar Administrative Rules are under development and will be addressed in due course by a separate order.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

2019 WYOMING COURT ORDER 0010 (C.O. 0010)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included inthis database. Because all changes may not have been supplied, thecourt clerk should be consulted to determine current rules.Pub. Note: Additions are indicated by **Text**; deletions by~~Text~~ .Stricken material is indicated by ~~**Text**~~ .

WY ORDER 0010
C.O. 0010
COURT RULES

Effective: Order dated June 25, 2019, amending the Rules of Professional Conduct for Attorneys At Law, Rules 1.5, 1.15, 1.15A, 1.16, 7.1, 7.2, 7.3, 7.4, and 7.5, effective September 1, 2019.
to Order dated June 25, 2019, amending the Rules of Professional Conduct for Attorneys At Law, Rules 1.5, 1.15, 1.15A, 1.16, 7.1, 7.2, 7.3, 7.4, and 7.5, effective September 1, 2019.

STATE OF WYOMING
RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW

Order dated June 25, 2019, amending the Rules of Professional Conduct for Attorneys At Law, Rules 1.5, 1.15, 1.15A, 1.16, 7.1, 7.2, 7.3, 7.4, and 7.5, effective September 1, 2019.

IN THE SUPREME COURT, STATE OF WYOMING

April Term, A.D. 2019

In the Matter of the Amendments to Wyoming Rules of Professional Conduct for Attorneys at Law

ORDER AMENDING THE RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW

The Officers and Commissioners of the Wyoming State Bar have recommended that the Wyoming Supreme Court amend the Rules of Professional Conduct for Attorneys at Law. That recommendation was made following a joint proposal from the Board of Professional Responsibility and the Review and Oversight Committee, in collaboration with the Office of Bar Counsel. The proposed amendments were also submitted to the members of the Wyoming State Bar for comment. Now, having carefully reviewed the proposed amendments to the Rules of Professional Conduct for Attorneys at Law, the Court finds the proposed amendments should be adopted. It is, therefore,

ORDERED that the amendments to the Rules of Professional Conduct for Attorneys at Law, attached hereto, be, and hereby are, adopted by the Court to be effective September 1, 2019; and it is further

ORDERED that this order and the amendments be published in the advance sheets of the Pacific Reporter; the amendments be published in the Wyoming Court Rules Volume; and that this order and the amendments be published online at the Wyoming Judicial Branch's website, http://www.courts.state.wy.us. The amendments to the Rules of Professional Conduct for Attorneys at Law shall also be recorded in the journal of this Court.

DATED this 25th day of June, 2019.

BY THE COURT:/s/**MICHAEL K. DAVISChief Justice**

RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW

* * * * *

<< WY R RPC Rule 1.5 >>

Rule 1.5. Fees
* * *

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer ~~and,~~ **or** each lawyer assumes joint responsibility for the representation;

* * * * *

<< WY R RPC Rule 1.15 >>

Rule 1.15. Safekeeping Property
* * *

(j) If the owner of property being held in trust by a member of the Wyoming State Bar cannot be located after reasonable efforts, such property shall be remitted to the ~~Wyoming State Treasurer pursuant to the Wyoming Uniform Unclaimed Property Act, W.S. § 34–24–101 et seq.~~ **Client Protection Fund of the Wyoming State Bar.**

* * * * *

<< WY R RPC Rule 1.15A >>

Rule 1.15A. Client Files
(a) For purposes of this Rule, the client's file consists of the following physical and electronically stored materials:

(1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer;

(2) all correspondence relating to the matter, whether in physical or electronic form;

(3) all pleadings and other papers filed with or by the court, administrative tribunal, arbitrator or mediator or served by or upon any party relevant to the client's claims or defenses;

(4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence; and

(5) all intrinsically valuable documents of the client.

Paragraph (a) does not impose an obligation to preserve documents that a lawyer following customary practices would not normally preserve in the client's file. For purposes of subparagraph (5), documents are intrinsically valuable where they constitute trust property as defined in Rule 1.15 or have legal, operative, personal, historical or other significance in themselves, including wills, trusts and other executed estate planning documents, deeds, securities, negotiable instruments, and official corporate or other records.

Code of Massachusetts Regulations Title 960: Office of the State Treasurer and Receiver General Chapter 4.00: Procedures for the Administration of Abandoned Property (Refs & Annos)

960 CMR 4.07

4.07: Audit Program

Currentness

Pursuant to M.G.L. c. 200A, § 12, the Treasurer, his/her designee or agent may at any reasonable time and upon reasonable notice examine or audit a holder's books, papers or other records to verify proper compliance with the reporting requirements of M.G.L. c. 200A.

(1) Period of Limitation. Pursuant to M.G.L. c. 200A, § 12, the Treasurer may examine the records of a holder at any time within six years of the date upon which an annual abandoned property report was due to be filed with the Division, or the date upon which such report was received by the Division pursuant to an extension granted under the provisions of M.G.L. c. 200A, § 13B, whichever is later. In the case of a holder who has filed abandoned property reports with the Division as required by law, the scope of the examination of the holder's records will be limited to property that had become reportable during the six-year period of limitation defined in M.G.L. c. 200A, § 12(f). In the case of a holder who fails to file abandoned property reports with the Division as required by law, or who files a false, fraudulent or insufficient report, the six-year period of limitation shall be waived for purposes of record retention and the conducting of examinations.

(2) Records Retention. In accordance with M.G.L. c. 200A, § 12(f), holders are required to maintain abandoned property records for nine years from the date of last activity for any property which has been reported to the Division, or six years from the date such property is reported to the Division.

(3) Failure to Maintain Records. In the case of a holder that has met the annual reporting requirement of M.G.L. c. 200A, § 7(d), but where the holder does not meet the records retention requirements of M.G.L. c. 200A, § 12(f), the Treasurer, his designee or his agent may employ such estimation techniques in the conduct of an audit as are customary and reasonable in the area of regulatory compliance and enforcement to fairly and accurately estimate the liability for property category types that may not have been reported or fully reported by the holder.

(4) Audit Process.

(a) Excluding any state-authorized multi-state abandoned property audit/examination, the Treasurer may conduct either a "desk audit" or a "field audit" of holder records pursuant to M.G.L. c. 200A, § 12 and the provisions of 960 CMR 4.07.

(b) A "desk audit" shall consist of the Treasurer, his/her designee or agent examining the books, papers or other records of a holder at the office of the Division to determine compliance with the abandoned property reporting requirements of M.G.L. c. 200A, § 7. The person authorized to conduct this audit may request any information necessary to complete the audit and may require the holder or his/her representative to appear in person. Performance of a desk audit does not preclude the Division from the subsequent performance of any future desk or field audit, provided however, that following the conclusion of a field audit as defined in 960 CMR 4.07(4)(c) and upon payment by the holder of any assessments issued

in such audit, or upon payment of any assessments upheld in an appeal of such audit assessments, the period audited shall be closed to any future Massachusetts abandoned property audit in perpetuity.

(c) A "field audit" shall consist of the Treasurer, his/her designee or agent conducting an examination of the books, papers or other records of a holder at the holder's place of business. The holder shall be notified in advance that he or she has been selected for audit and shall be instructed as to the books, papers and other records which should be made available to complete the audit.

(5) Audit Procedures.

(a) Excluding any state-authorized multi-state abandoned property audit/examination, every abandoned property audit conducted in accordance with M.G.L. c. 200A, § 12, shall include, but not be limited to, the following audit procedures:

1. A Notice of Intent to Audit shall be issued to the holder. The notice will provide the holder notification in writing that the Division intends to commence an examination of the holder's records pursuant to M.G.L. c. 200A, § 12, and that the holder will be required to provide certain records to facilitate the examination.

2. An Opening Meeting will be held. This meeting will be attended by the holder and/or his representative, the Treasurer or his/her designee or agent will be present to discuss how the examination will be conducted.

3. A Field Review will be undertaken, at which holder records made available for the opening meeting will be briefly discussed and examined.

4. A Pre-Engagement Analysis will be conducted by the Division or its agent to determine whether the examination should be continued or concluded.

(b) If it is determined by the Director and Assistant Treasurer that an examination/audit should be continued, the audit shall be deemed a "field audit." The field audit will include, but not be limited to, the following audit procedures:

1. A Letter of Engagement shall be prepared by the Treasurer's agent and, upon approval by the Director and Assistant Treasurer, shall be sent to the holder prior to the commencement of the actual examination. The Letter of Engagement shall inform the holder of the Treasurer's intent to commence a "field audit".

2. The Field Work shall be conducted under Audit Program Guidelines established by the Director and updated yearly as needed.

3. A Monthly Progress Report shall be prepared by the Treasurer's agent and forwarded to the Director detailing the status of the examination/audit.

4. A Holder Conference shall be held, at which the holder and/or his representative shall be afforded the opportunity to discuss the preliminary results with the Director and the Treasurer's agent. At this time, the holder shall be provided

with a 30-day Review Period in order to perform additional due diligence or to present documentation to negate the presumption of abandonment. At the holder's request, a second conference may be held prior to the issuance of a Draft Report.

5. A Draft Report shall be prepared by the Treasurer's agent and forwarded to the Director for final review after all field work is completed.

6. A Final Report to the Division shall then be prepared by the Treasurer's agent and forwarded to the Director who, upon approval, shall transmit the Final Report to the holder by certified mail. The Final Report shall detail the results, methodology and objectives of the audit and shall be accompanied by a Letter of Demand, which will express to the holder the terms and conditions under which any findings are to be reported to the Division, and outline the right of appeal to the holder should he/she choose to appeal any findings.

(c) An audit shall be deemed closed when all property identified as abandoned property in the Final Report is remitted to the Division, or all adjustments made by the holder during the Review Period are confirmed by the Treasurer's agent and all remaining properties are remitted to the Division in the prescribed format.

(6) Order of Priority of Audits. Excluding any state-authorized multi-state abandoned property audit/examination, all audits undertaken pursuant to M.G.L. c. 200A, c. 12, shall be conducted in the following order of priority, unless otherwise directed by the Treasurer:

(a) First Priority - holders who have never reported abandoned property to the Division;

(b) Second Priority - holders who have reported abandoned property to the Division in a previous year or years, but who are not currently reporting, or holders whose current reporting levels appear deficient;

(c) Third Priority - holders who are currently in compliance with the reporting requirements of M.G.L. c. 200A, § 7.

(7) Appeals. Appeals of the findings of any abandoned property audit conducted by or on behalf of the Treasurer shall be undertaken in accordance with the provisions of M.G.L. c. 200A, § 12.

The Massachusetts Administrative Code titles are current through Register No. 1406, dated December 13, 2019

Mass. Regs. Code tit. 960, § 4.07, 960 MA ADC 4.07

End of Document