

Advisory Opinion 1983-3

You are executive director of a nonprofit corporation funded by the Legal Services Corporation. Your questions involve what to do with client trust funds when the client can no longer be found. You state that these sums are balances remaining after court costs and the like are paid. You further state that the sums are invariably minor. You wish to know: (1) the best method to follow in attempting to locate the client; (2) the period of time during which such efforts must continue; and (3) the appropriate disposition of the funds when all such efforts have failed. Because you state that your questions stem from administrative concerns, the committee is of the opinion that your questions raise two issues: (1) what should you do with funds presently in your account and (2) what can you do in the future to ease your administrative burdens in this situation.

As to the first issue, the committee is of the opinion that you should exercise a high degree of diligence in attempting to locate the client and that if such efforts fail, the appropriate disposition is as set forth in the Uniform Disposition of Unclaimed Property Act, §§ 7-8-1 through 7-8-34, N.M.S.A. 1978 and (1982 Supp.). You hold your client's funds in a fiduciary capacity. Section 7-8-8 applies the Unclaimed Property Act to fiduciaries. That section provides that intangible personal property (such as money, see § 7-8-11) is presumed abandoned unless the owner indicates an interest in it within ten years after it became payable. Section 7-8-13(A) requires you to report the existence of abandoned property, as well as other information, to the director of the revenue division of the taxation and revenue department. Before you report, you are to communicate with the owner of the property and take necessary steps to prevent abandonment from being presumed. Section 7-8-13(E). The statute requires you to "exercise due diligence to ascertain' the whereabouts of the owner." *Id.* After the director does certain things, § 7-8-14, you are to deliver to him the abandoned property. Section 7-8-15.

The committee believes that the due diligence standard required by § 7-8-13(E) may not be an appropriate standard for attorneys. The relationship between attorney and client is characterized by superlatives. See *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967). (The relation between attorney and client is one of the "highest" trust and confidence. The attorney must observe the "utmost" in good faith.) What is due or reasonable diligence in other circumstances may not suffice in the relationship between attorney and client. For example, a prosecutor may exercise reasonable diligence in notifying a grand jury target of his status when the prosecutor sends two ordinary mail letters to the address the target gave to the police when booked. *State v. Garcia*, 98 N.M. 186, 624 P.2d 1250 (Ct. App. 1982). However, for purposes of your question, the bare sending of such letters might not comply with the fiduciary duty owed to your client. If, for example, your files in the case showed communication with a relative of the client, the committee believes you should attempt to ascertain the client's whereabouts from the relative.

Thus, to answer your question, you should review your books to ascertain on behalf of which clients you are still holding trust funds. You should, then, review the client's file and attempt to communicate with the client through whatever addresses or telephone numbers might reasonably lead you to the client. You should also follow whatever leads are developed by those letters or phone calls with other letters or phone calls. If you reach a dead end, the committee does not believe you need to take further or more costly measures, such as the hiring of an investigator. You must then hold the property for the statutory period of time and then turn it over to the state.

As to the second issue, the committee believes that you may develop a procedure for future cases which would avoid the delay and expense experienced in the past. ABA Informal Opinion 1391 (1977) addresses the question of whether a legal services office may request clients to sign consent forms authorizing the program to keep unused client funds in lieu of their being escheated to the state. The program agreed that it would make reasonable efforts to locate the client and that no client would be compelled to sign the form. With the caveat that scrupulous care to avoid overreaching must be taken, the opinion approved the proposed arrangement.

This committee also believes that such an arrangement would be an ethical way of handling the problem you are now facing. To avoid any suggestion of overreaching, you may wish to counsel your clients to seek independent advice before signing such an agreement. See *Citizens Bank v. C & H Construction & Paving Co.*, 93 N.M. 422, 600 P. 2d 1212 (Ct. App. 1979) ; *Van Orman v. Nelson*, *supra*; *Toomey v. Moore*, 325 P.2d 805 (Ore. 1958). However, because the ethics of this arrangement are specifically conditioned upon its unenforceability in cases where the client eventually claims his money, it is not necessary that the client have independent advice before agreeing to make such a "gift."