

NEW HAMPSHIRE BAR ASSOCIATION

Uncashed Trust Account Checks

Ethics Committee Opinion #2020-21/01

ABSTRACT:

New Hampshire attorneys are obligated under the Supreme Court Rules and the Rules of Professional Conduct to regularly reconcile their trust accounts. Attorneys must promptly follow up on all uncashed checks in their trust accounts. If an attorney is unable to resolve the issue with the payee, then the attorney should carefully review and utilize the provisions of the unclaimed and abandoned property act, RSA Chapter 471-C.

ANNOTATIONS:

New Hampshire attorneys are obligated under the Supreme Court Rules and the Rules of Professional Conduct to reconcile their IOLTA and other trust accounts monthly.

Attorneys who discover uncashed checks in their trust accounts should promptly notify the payee and endeavor to promptly deliver the funds.

If, after reasonable efforts, attorneys are unable to resolve the check issue with the payee, then the attorneys must follow the Unclaimed and Abandoned Property Act, RSA Chapter 471-C.

The Act process requires waiting for five years (NH RSA 471-C:2), making a reasonable attempt to locate the payee (NH RSA 471-C:3), and filing a report with the state (NH RSA 471-C:19).

Failure to timely file the report exposes attorneys to the assessment of interest and civil penalties under RSA 471-C:38.

Attorneys should not assume that an uncashed check becomes stale after some period of time, as the UCC allows banks in good faith to charge their customer's account at any time. RSA 382-A:4-404.

Attorneys should not assume that a stop payment order will indefinitely protect against late cashing, as such stop payment orders expire after six months and must be renewed. RSA 382-A:4-403(b).

BACKGROUND:

An attorney has a handful of checks drawn on an IOLTA account that have not cleared. The checks are all nominal in amount. The checks were all written over a year earlier, with the oldest being about three years old.

ISSUES PRESENTED:

What are an attorney's obligations with respect to uncashed checks in an attorney's trust account?

DISCUSSION:

The New Hampshire Supreme Court has established an "Interest on Lawyers Trust Accounts" (IOLTA) program. New Hampshire Supreme Court (SC) Rule 50. An attorney must deposit clients' funds which are nominal in amount or to be held for a short period of time in an IOLTA account. The IOLTA account must bear interest, and the interest must be paid to the New Hampshire Bar Foundation, rather than to the client. SC Rule 50(1)(C).

Attorneys may write checks on the IOLTA account, in accordance with the direction of the client. Typically, the checks will be in the nature of accounts payable. They may be filing fees, witness fees, the attorney's fees, and other expenses of one sort or another. Sometimes, however, the checks are not cashed.

Duty of regular reconciliation.

In New Hampshire, an IOLTA account is an "account for clients' funds which are **nominal in amount** or to be **held for a short period of time**," which must comply with the provisions of SC Rule 50. SC Rule 50(1)(A). This Ethics Corner does not deal with the issue of what it means to be "nominal in amount" or "held for a short period of time." We assume, for the purpose of this Corner, that these uncashed checks represent nominal amounts.

There are numerous and stringent accounting provisions in SC Rule 50, which apply to all trust accounts, including IOLTA accounts. Lawyers must maintain the trust account records even after the dissolution of a firm or the sale of a law practice. *See* SC Rules 50(2)(E) and 50(2)(F).

The Supreme Court Rules concerning trust account records are incorporated into Rule 1.15(a) of the New Hampshire Rules of Professional Responsibility (RPC).

The lawyer shall maintain the minimum financial records with respect to the client and third party funds as may be required by the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules.

RPC Rule 1.15(a).

Under SC Rule 50, lawyers are required to keep the records of all trust accounts, including their IOLTA account, current and in good order.

A lawyer who practices in this jurisdiction shall maintain current financial records . . . , and shall retain the following records for a period of six years from the time of final distribution:

(vii) copies of **monthly** reconciliations of the client trust accounts maintained by the lawyer.

SC Rule 50(2)(B) (emphasis added). The lawyer's monthly reconciliation should reveal any uncashed checks.

Duty to regularly follow up on uncashed checks.

In addition to the duties imposed by SC Rule 50, New Hampshire lawyers have an ethical duty to resolve any trust fund issues expeditiously.

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.

NH RPC Rule 1.15(e) (emphasis added).

SC Rule 50 and RPC Rule 1.15 require the lawyer to follow up with uncashed checks, regardless of whether they are "nominal in amount". The monthly reconciliation requirement (SC Rule 50) impose a duty to promptly identify all uncashed checks, and the notification and delivery requirements (RPC Rule 1.15) impose a duty to follow up on those checks. This duty would seem to encompass, at a minimum, contacting the payee. The careful lawyer will keep detailed records of all attempts to contact the payee, in case issues arise later.

Suppose the diligent lawyer has made every reasonable attempt to contact the payees and resolve the uncashed checks. Nevertheless, funds from some of the uncashed checks remain in the IOLTA or interest-bearing account for years. The lawyer will eventually need to clean up the accounts.

Ownership interest.

One might suppose that the payee on a check loses the right to the funds by failing to cash the check, perhaps when the check goes stale after six months or so. *See* NH RSA 382-A:4-404. If that were not the cutoff point, one might suppose that the right to the funds would expire with the statute of limitations. *See* NH RSA 508:4 (personal actions); NH RSA 382-A:4-111 (actions under UCC Article 4).

A statute of limitations, however, is an affirmative defense that a defendant must raise in a timely manner. Glines v. Bruk, 140 N.H. 180, 664 A.2d 79 (1995). Failure to plead the statute of

limitations, within the time allowed, constitutes waiver of such defense. NH Super. Ct. Rule 9(d). Accordingly, the statute of limitations does not technically extinguish the claim, but rather provides a defense against enforcement.

While this may seem like an overly technical distinction, it is important to properly answer the question of who “has an interest” and who “is entitled to receive” the funds represented by the uncashed checks. NH RPC Rule 1.15(e). The Committee concludes that unless and until the payee affirmatively relinquishes the claim, the right remains with the payee.

Statutory obligation with respect to abandoned property.

While the payee may not have relinquished the claim, at some point the payee will be presumed to have abandoned the funds. The Committee has faced a somewhat similar question for clients who cannot be located, and whose funds remain in the lawyer’s possession. See “[What to Do With Unclaimed Client Funds](#)” (December 13, 2013). That article essentially suggested that the lawyer could use the process established by the [Abandoned Property Division](#) of the New Hampshire State Treasury. Briefly, that process requires waiting for five years (NH RSA 471-C:2), making a reasonable attempt to locate the client (NH RSA 471-C:3), and filing a report with the state (NH RSA 471-C:19).

It is important to remember that these reports are **not** optional.

- A person holding property, tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this chapter **shall** report to the administrator concerning the property as provided in this section. NH RSA 471-C:19,I (emphasis added.)
- The report **shall** be filed before November 1 of each year for property presumed to be abandoned as of June 30 of that year. NH RSA 471-C:19, IV (emphasis added.)
- A person who fails to pay or deliver property within the time prescribed by this chapter may be **assessed interest** by the administrator at the annual rate of 18 percent on the property or value thereof from the date the property should have been paid or delivered, or \$25, whichever is greater. NH RSA 471-C:38,I (emphasis added.)
- A person who willfully fails to render any report or perform other duties required under this chapter may be **assessed a civil penalty** of \$100 for each day the report is withheld or the duty is not performed, but not more than \$5,000. NH RSA 471-C:38,II (emphasis added.)

If that were not enough to make a lawyer uncomfortable, the State has a right to “require any person who has not filed a report to file a verified report stating whether or not the person is holding any unclaimed property.” RSA 471-C:34,I. The State also has the right to examine records to determine compliance. RSA 471-C:34,II,III.

Additional issues.

1. Relinquishment of claim.

If the payee has relinquished her claim on the money, it should probably revert to the person or entity that provided the funds, in many cases the client.

Some of the uncashed checks may have represented expenses, such as witness fees, that may have been recovered as costs. *See* NH Super. Ct. Rule 45(b) (civil actions). If so, one might then argue that, when the witness no longer has a claim, the money belongs to the other side, as those costs were not actually incurred. Then, under NH RPC Rule 1.15(e), the lawyer would have a duty to “promptly notify” the person having an interest in those funds.

In addition, since the costs were not actually incurred, the lawyer’s statement to the court becomes false. If that statement of fact is deemed material, the lawyer may have a duty to correct it. NH RPC 3.3(a)(1). Checks of nominal amount, such as for witness fees, might not be considered material.

Finally, if you cannot determine who has the right to the fees, you should be mindful of NH RPC Rule 1.15(f):

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.

2. Additional banking considerations.

While the checks may appear to be stale, one cannot rely solely on the six-month limit on cashing checks.

A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than 6 months after its date, **but it may charge its customer's account for a payment made thereafter in good faith.**

NH RSA 382-A:4-404 (emphasis added). Therefore, you should probably proceed under the assumption that the payee may at some point present the check.

If the check is cashed, the lawyer’s trust account would become out of balance, creating a significant problem under the SC Rules. One might try to prevent that problem by issuing a stop-payment order. Unfortunately, that may not permanently solve the problem.

A stop-payment order is effective for six months A stop-payment order may be **renewed for additional six-month periods** by a record given to the bank within a period during which the stop-payment order is effective.

NH RSA 382-A:4-403(b) (emphasis added). Therefore, to be safe, you may have to keep renewing the stop-payment order, since a bank could in good faith make payment on the check at any time as suggested above.

3. Take only proper steps.

One may be tempted to clean up the account by simply withdrawing cash in the amount of the check and placing that cash in an envelope addressed to the payee. If the mail is not returned, one might assume it was received. Unfortunately, “withdrawals shall be made only by check payable to a named payee and not to cash.” SC Rule 50(2)C(v).

CONCLUSION:

New Hampshire lawyers have an obligation under SC Rule 50 to regularly and frequently monitor their IOLTA account. As a result, any uncashed checks should be discovered within a few months.

New Hampshire lawyers have an obligation under RPC Rule 1.15 to promptly follow up on uncashed checks with the people to whom those checks have been written. Reasonable attempts must be made, and should be documented, to locate the payees and ascertain if and when they intend to cash the checks.

If all efforts to put the funds in the proper hands fail, remember that the provisions of the abandoned property statute provide an opportunity, and impose a duty on the lawyer, to resolve the situation.

Uncashed checks present many pitfalls for the New Hampshire lawyer. The safest and most practical advice seems to be to locate the payees and see if they will cash the checks.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.15

Rule 1.15(a)

Rule 1.15(e)

Rule 1.15(f)

Rule 3.3(a)(1)

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Ethics Corner, “[What to Do With Unclaimed Client Funds](#)” (December 13, 2013).

SUBJECTS:

Abandoned Property

Candor to the Tribunal

Fairness to Opposing Parties, Counsel, and Third Parties

IOLTA

Nominal in Amount

Safeguarding Client Property

Statute of Limitations

Trust Account

UCC

- **By the NHBA Ethics Committee**

This opinion was submitted for publication to the NHBA Board of Governors at its October 15, 2020.