

#2018-002

**ATTORNEY GENERAL
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August 15, 2018

Ms. Carolyn Koegler
New Hampshire Supreme Court
Advisory Committee on Rules
One Charles Doc Drive
Concord, NH 03301

Re: Advisory Committee on Rule Proposal – Rule of
Professional Conduct 1.15 (Safekeeping Property)

Dear Ms. Koegler:

This responds to your June 6, 2018 request on behalf of the New Hampshire Supreme Court Advisory Committee on Rules regarding the Committee's proposed amendment to the Rule of Professional Conduct 1.15 ("Safekeeping Property"). The Committee requested the Attorney General's Office to comment on whether the proposed amendment regarding client trust accounts was consistent with New Hampshire statutes relating to lost or abandoned property.

The proposed rule sets forth four scenarios of unclaimed client trust funds and how the funds should be handled by an attorney or law firm in each situation. The first three scenarios involve a trust account where the owners of the funds are unknown. The last scenario involves a trust account where the owners can be identified, and instructs that the funds be handled in accordance with the abandoned property statute, RSA chapter 471-C, Custody and Escheat of Unclaimed and Abandoned Property

For the reasons set forth below, the proposal with regard to the unknown owner funds is not consistent with chapter 471-C, Custody and Escheat of Unclaimed and Abandoned Property. A statutory change, however, could accomplish the same goal set forth in the proposed rule of directing the unclaimed funds to the Bar Foundation and/or the Public Protection Fund. As detailed below, such statutory provisions exist in other States for this same purpose and are present in New Hampshire with regard to unclaimed utility deposits.

Unclaimed Property Law

New Hampshire's law on unclaimed property is set forth in chapter 471-C. The statute specifically provides that "[u]nless otherwise provided, intangible property is subject to the custody of this state as unclaimed property," if the property is presumed abandoned under the relevant statutory provisions and certain other criteria are satisfied. RSA 471-C:3.

With regard to client trust accounts, it is clear that the lawyer and/or law firm are a "holder"¹ of property under RSA 471-C:1. The funds within the client trust account fit within the definition of "intangible property."² Further, the funds within the client trust account are subject to the provisions of the statute for determining when the funds are presumed abandoned. See RSA 471-C:2 (general presumption of abandonment) and RSA 471-C:12 (presumption of abandonment of property held by agents and fiduciaries).

The fact that the ultimate owners of the funds within the trust account are unknown does not remove these funds from the abandoned property statute. Rather, where the owner is unknown, the funds are still subject to the custody of the state where the holder of the property is incorporated. RSA 471-C:3, III(b); *Delaware v. New York*, 507 U.S. 490, (2003)(reaffirming the two rules intended to settle the question of which State is entitled to escheat intangible property: the primary rule is that the right to escheat is with the State of the owner's last known address as shown by the books and records of the holder; the secondary rule awards the right to escheat to the holder's state of corporate domicile where there is no record of the owner or the owner's last known address.). Thus, under RSA 471-C, where the owner of the funds is unknown, the statute looks to where the holder is incorporated or the physical location of the business.

Accordingly, state law currently requires abandoned client trust accounts to be subject to the custody of the state when the last known address of the owner of the account is in the state, RSA 471-C:3, I, and when the owner is unknown, but the holder of the property is incorporated or located in the state, RSA 471-C:3, III(b).

¹ IX. "Holder" means a person, wherever organized or domiciled, who is:

- (a) In possession of property belonging to another;
- (b) A trustee; or
- (c) Indebted to another on an obligation.

² XI. "Intangible property" includes:

- (a) Moneys, checks, drafts, deposits, interest, dividends, and income;
- (b) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;
- (c) Stocks and other intangible ownership interests in business associations;
- (d) Moneys deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;
- (e) Amounts due and payable under the terms of insurance policies, except amounts due under claims instruments which require acceptance by the claimant or which, by their terms, are void if not presented within a definite time; and
- (f) Amounts 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 similar benefits.

Alternative Treatment for Certain Unclaimed Property

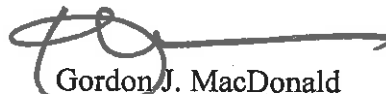
At least two states have recently amended their respective state abandoned property laws to provide differing treatment of abandoned client trust accounts to achieve similar results as set forth in the proposed rule. In 2015, the California legislature adopted Senate Bill 134, which amended the California unclaimed property statute so that unclaimed funds in IOLTA accounts escheat to a specific fund in the state for the administration of a public interest attorney loan repayment program. See CA Code of Civil Procedure §1564.5. In 2009, the Oregon legislature adopted Senate Bill 687, which amended the Oregon unclaimed property statute so that unclaimed funds in lawyer trust accounts are paid to the Oregon state bar to be used for the funding of legal services provided through the legal service program. See ORS 98.302-98.436.

A similar program currently exists in New Hampshire regarding unclaimed deposits and other payments held by utilities. NH RSA 471-C:8. Under this provision, 85% of the unclaimed funds are paid to a financial assistance program and the remaining 15% is paid to the State Treasurer to cover administration costs. This provision could serve as a potential model for achieving the same results as the proposed rule.

Of note, both the statute regarding utility deposits and the California and Oregon statutes regarding lawyer trust accounts provide for the ability of an owner of the property to continue to make a claim for his or her property. Such a provision may be necessary to avoid an unconstitutional taking. *Cf. Brown v. Legal Found.*, 538 U.S. 216 (2003); *In re New Hampshire Bar Ass'n.*, 122 N.H. 971 (1982).

Please let me know if the Committee has any further questions regarding New Hampshire's Unclaimed and Abandoned Property statutes. In addition, Tom McAnespie is the Director of the State's Abandoned Property Division of the New Hampshire State Treasury and is an excellent resource for both technical questions and to discuss any potential legislative changes. Tom can be reached at tmcanespie@treasury.state.nh.us and 271-1499.

Sincerely,


Gordon J. MacDonald
Attorney General