

WEST VIRGINIA STATE BAR JOURNAL
Spring, 1979
Volume 5, Number 1

EXPEND FUND TO LOCATE MISSING CLIENTS

LEGAL ETHICS INQUIRY 78-6

Reference is made to your letter in which you indicate that during the past two years you have represented two individuals, father and daughter, as parties in litigation as beneficiaries under various wills of deceased relatives. You state that you have received substantial sums in settlement of these cases, consisting of two checks which are now "stale-dated" (but could be renewed) and some funds in your trust account, and that you have been unable to pass the money on to your clients because you have been unable to locate them by mail or telephone. You ask for advice as to what course of action you should take and, secondly, would it be ethically proper for you to expend some of the funds to attempt to locate the missing clients. It is not clear from your letter the reason that you allowed two checks to become "stale-dated." However, it is assumed that the checks require the endorsement of your clients, which you were unable to obtain, thereby causing them to expire.

As a fiduciary holding these funds, there are certain duties and obligations imposed upon you by law. You should be mindful of the provisions of W. Va. Code § 30-2-13 concerning the liability of an attorney for failure to pay over monies collected. However, in the factual situation as you describe it, there appears to be no ethical problem and as long as you maintain the identity of the

funds from your own, adhering strictly to the provisions of DR 9-102, then there should be no such problem.

It is the recommendation of this Committee that you renegotiate the expired checks and place all of the funds belonging to those clients into a separate interest-bearing passbook account naming you as trustee for the clients. You should then petition the court in the proceedings, asking the court to direct you to pay over the funds to the general receiver of the court to be held until the clients can be located.

Concerning the question of deducting your attorney fee due for your representation prior to locating the clients, Canon 11 of the Canons of Professional Ethics entitled "Dealing with Trust Property" states:

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

DR 9-102(B) of the Code of Professional Responsibility has carried forth this same basic principle.

The ABA Committee on Legal Ethics held in its Opinion 27 (May 5, 1930) that:

There is no impropriety in an attorney deducting his fees when remitting the funds he receives for his clients. (Emphasis added)

The question of when you should deduct your fee hinges upon whether or not there has been any express written agreement with

your client as to the amount of your fee. If there has been such an agreement and you have a document evidencing such, then it is the opinion of this Committee that you may deduct your fee at any time as long as a proper accounting is rendered to the client when his funds are disbursed. In the event that there is no prior written contract concerning your fee agreement with your clients, then you should wait until you locate them and at the time the funds are remitted then you may deduct your fee.

LEGAL ETHICS INQUIRY 78-6
EXPEND FUND TO LOCATE MISSING CLIENTS

Reference is made to your letter in which you indicate that during the past two years you have represented two individuals, father and daughter, as parties in litigation as beneficiaries under various wills of deceased relatives. You state that you have received substantial sums in settlement of these cases, consisting of two checks which are now "stale-dated" (but could be renewed) and some funds in your trust account, and that you have been unable to pass the money on to your clients because you have been unable to locate them by mail or telephone. You ask for advice as to what course of action you should take and, secondly, would it be ethically proper for you to expend some of the funds to attempt to locate the missing clients. It is not clear from your letter the reason that you allowed two checks to become "stale-dated." However, it is assumed that the checks require the endorsement of your clients, which you were unable to obtain, thereby causing them to expire.

As a fiduciary holding these funds, there are certain duties and obligations imposed upon you by law. You should be mindful of the provisions of W. Va. Code § 30-2-13 concerning the liability of an attorney for failure to pay over monies collected. However, in the factual situation as you describe it, there appears to be no ethical problem and as long as you maintain the identity of the funds from your own, adhering strictly to the provisions of DR 9-102, then there should be no such problem.

It is the recommendation of this Committee that you renegotiate the expired checks and place all of the funds belonging to those clients into a separate interest-bearing passbook account naming you as trustee for the clients or some other conservative form of investment such as United States Government Bonds. You should then examine the legal aspects of your duty as a fiduciary in attempting to locate your clients and act accordingly.

Concerning the question of deducting your attorney fee due for your representation prior to locating the clients, Canon 11 of the Canons of Professional Ethics entitled "Dealing with Trust Property" states:

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

DR 9-102(B) of the Code of Professional Responsibility has carried forth this same basic principle.

The ABA Committee on Legal Ethics held in its Opinion 27 (May 5, 1930) that:

There is no impropriety in an attorney deducting his fees when remitting the funds he receives for his client. (Emphasis added)

The question of when you should deduct your fee hinges upon whether or not there has been any express written agreement with your client as to the amount of your fee. If there has been such an agreement and you have a document evidencing such, then it is

the opinion of this Committee that you may deduct your fee at any time as long as a proper accounting is rendered to the client when his funds are disbursed. In the event that there is no prior written contract concerning your fee agreement with your clients, then you should wait until you locate them and at the time the funds are remitted then you may deduct your fee.