

# Disposing of Escrow Funds Belonging to a Missing Client

BY LAZAR EMANUEL

**W**hat are a lawyer's obligations in either of the following circumstances?

**Example One:** A law firm recovered a judgment in behalf of its client. The judgment provided for payment in annual installments payable to the law firm. The first two installments were paid on schedule and the firm remitted the proceeds to the client. The third and final installment was also paid and remitted to the client, but the letter enclosing the check was returned by the post office. Despite diligent efforts by the lawyers over many months, the client can no longer be found. The money remains in the firm's trust account. The law firm has an outstanding claim for legal fees.

**Example Two:** After many years of practice and shifting associations with a number of partners and associates who are now either deceased, disabled or retired from practice, an elderly practitioner finds himself with \$4,500 in his escrow account which he can no longer attribute to a specific client or a specific matter. No one has asked for the money in the last ten years and the lawyer's records disclose no existing interest by anyone.

Under either of these circumstances, the lawyer or law firm holding the funds is obligated to follow the procedure outlined in DR 9-102(F) [22 NYCRR §1200.46]. DR 9-102 is the long and detailed Rule which controls the conduct of lawyers who come into possession of funds or other property belonging to others. Section F reads as follows:

*Missing Clients.* Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any to the Lawyer's Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

## Proceeding by Motion

In both our examples, the proper procedure under DR 9-102(F) is a motion before the court supported by the affidavit of a lawyer with knowledge of the facts. In Example One, the motion will be brought before the court in which the judgment was procured. In Example Two, the motion will be brought before a Supreme Court judge in the county in which the elderly lawyer has his law office.

In his supporting affidavit, the lawyer must set forth facts supporting his statement that the owner of the funds cannot be located. Conclusory statements will not suffice. The lawyer should set forth the circumstances under which the funds were entrusted to him, the source of the funds, the terms or

agreements which control disposition of the funds, the facts supporting the client's claim to the funds, and, above all, the lawyer's diligent but unsuccessful efforts to locate the client or to identify the rightful owner to the funds.

The law firm in Example One will have no difficulty meeting these requirements. The elderly lawyer in Example Two is another matter. His recourse will be to describe in his affidavit all the circumstances which make it difficult or impossible for him to identify with certainty the owner or owners of the funds in his possession. He should include an explanation for his current lack of records identifying the owners.

### **Obligation to Maintain Records**

DR 9-102(D) obligates a lawyer to keep and maintain "for seven years after the events which they record" a record of all deposits in and withdrawals from his trust accounts "and of any other bank account which concerns or affects the lawyer's practice of law." The records should recite the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal. The lawyer in Example Two will rely on the fact that ten years have elapsed without the assertion of any claim to the funds and that the period during which record-keeping about them was required has long since elapsed.

In its motion papers, the law firm in Example One will be able to assert a claim for its legal fees and expenses. These would include fees and expenses in connection with collection of the judgment, as well as its efforts to locate the client and its preparation of the papers relating to the motion under DR 9-102(F).

The elderly lawyer in Example Two may apply to the court for his fees and expenses in connection with the preparation of the motion papers.