

WSR 23-03-029
RULES OF COURT
STATE SUPREME COURT
[January 5, 2023]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO) NO. 25700-A-1490
RPC 1.15A AND ELC 15.7 AND NEW)
COMMENT TO RPC 1.15B)

The Legal Foundation of Washington, having recommended the suggested amendments to RPC 1.15A and ELC 15.7 and new comment to RPC 1.15B, and the Court having approved the suggested amendments and new comment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments and new comment as shown below are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2023.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2023. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 5th day of January, 2023.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

General Rule 9 Cover Sheet

Suggested Amendments to RPC 1.15A and ELC 15.7 and Add Comment to RPC 1.15B

Proponent: Legal Foundation of Washington (LFW)

Spokesperson: Caitlin Davis, Executive Director, Legal Foundation of Washington

Purpose: The purpose of the suggested amendments to RPC 1.15A and ELC 15.7 and a new related Comment to RPC 1.15B is to instruct lawyers on how to handle unidentified property in their trust accounts and requiring transmission of unidentified property in lawyers' client trust accounts to the Legal Foundation of Washington.

The suggested amendments to RPC 1.15A to add two new sections (k) and (l) will expressly require unidentified funds held in client trust accounts to be remitted to the Legal Foundation. Suggested new section (l) expressly defines "unidentified funds" as amounts accumulated in a trust account that cannot be documented as belonging to a client, third person, or lawyer or law firm.

Suggested section (k) would require a lawyer to take periodic and diligent steps to identify the owner of unidentified funds in their

client trust account. If after a period of twelve months, the lawyer is unable to identify the owner, the lawyer must promptly remit the funds to LFW. The rule provides a safe harbor for the lawyer's exercise of reasonable judgment in good faith about whether to remit the funds, even if in error. The suggested rule further requires the lawyer to re-claim the funds from LFW if the owner subsequently becomes known.

The suggested amendment to Comment [6] adds unidentified funds to the general guidance provided by Comment [6]. It reiterates the twelve month time frame of suggested section (k) and vests LFW with responsibility to verify ownership of claimed funds. The suggested Comment further clarifies that a lawyer's duties terminate upon remittance of the funds to the Legal Foundation, unless the lawyer subsequently discovers an error or learns the identity of the client or third person to which the funds belong.

The suggested Comment also reiterates the lawyer's obligation to maintain current and accurate records of client funds, and notifies that compliance with suggested RPC 1.15A(k) is not a defense to a charge of recordkeeping violations under the Rule. The lawyer must also keep records of funds remitted to the Legal Foundation or any submission of a claim for return of funds.

Finally, suggested ELC 15.7(f) is addressed to the Legal Foundation and establishes the obligation of the Legal Foundation to treat attorney-client and other confidential client information as privileged and confidential and to maintain confidentiality of client information. It further requires the Legal Foundation to establish procedures to implement the remittance and claims process and to appropriately inform the public and bar through publishing those procedures.

The underlying goal of the suggested amendments is to increase resources for activities that provide access to justice for low-income persons in Washington. The suggested amendments are necessary to fill a gap in definitions and instructions on how to handle trust account funds that cannot be distributed to or claimed by a rightful owner because the owner is unknown and cannot be identified. The suggested amendments will, if adopted, authorize the Legal Foundation of Washington (LFW or Legal Foundation) to capture unidentified funds in client trust accounts and to use them in accordance with the purposes for which the LFW was established. Further explanation of the rationale for the suggested amendments and related Comment and how the suggested amendments will resolve gaps in existing statutes and rules is set out below.

Hearing: The proponent believes that a hearing is unnecessary. However, the proponent also believes that a period of comment is appropriate to ensure that potential competing interests are known and resolved by the Court prior to adopting the suggested rules. Even though the governance and authority over lawyers' client trust accounts in Washington is solely within the province of the Supreme Court, the Washington Department of Revenue has expressed competing interests in the suggested changes. The Department of Revenue currently receives distributions of client trust account funds when the owner is unidentified. Should the Court adopt the suggested rules to require lawyers to distribute unidentified client trust account funds to LFW, the funds will no longer go to the Department of Revenue or to the State. Although the LFW disagrees with this interpretation, the Department of Revenue has asserted that the Unclaimed Property Act (RCW 63.29, *et. seq.*) includes unidentified property within the definition

of "unclaimed property" and that unidentified property must therefore be delivered to the Department as "abandoned property." The proponent has the better interpretation under the law.

Expedited Consideration: Notwithstanding the schedule for consideration of rules set out in GR 9(i), the proponents ask for expedited consideration and allow unidentified client trust funds to begin flowing into LFW for immediate use in grants that support access to justice in Washington. However, the proponents support a reasonable period for comment.

Discussion:

Over the last five years, Interest on Lawyer Trust Account (IOLTA) programs in several states (Pennsylvania, Texas, Louisiana, Vermont, Oregon, Oklahoma, Arkansas and Illinois) have benefitted from amended court rules and/or legislation that include changes regarding unidentified property in lawyers' client trust accounts. These changes have proven to be a new source of revenue for civil legal aid, as well as a tool that helps lawyers properly dispose of unidentified funds in their trust accounts. The proponents seek to add provisions to RPC 1.15A and ELC 17.7, and add a related Comment to RPC 1.15B, to include instructions on how lawyers must handle unidentified property in their trust accounts.

Unidentified vs Unclaimed Property:

- Unidentified property is funds or assets that cannot be traced to a specific owner.
- Unclaimed property is funds or assets that can be traced to a specific owner who cannot be located or who has affirmatively abandoned the property by failure to claim it.

See discussion of Illinois RPC 1.15 (amended 2015) pertaining to Lawyers Trust Fund of Illinois at [Unidentified Funds Information for Financial Institutions | The Lawyers Trust Fund of Illinois \(ltf.org\)](https://www.ltf.org)

Currently in Washington State, under RCW 63.29.190, all unclaimed "abandoned" property must be turned over to the State Department of Revenue after a period of due diligence in which the holder of the property attempts to locate the owner. Washington law is silent on how unidentified property should be disposed of.

The current version of Washington RPC 1.15A(i) contemplates that client trust account funds must be placed in an interest-bearing account, and if the funds will not produce a positive net return to the client or third persons, they must be placed in a pooled interest bearing account for which the pooled interest is paid to the Legal Foundation of Washington to administer in accordance with ELC 15.4 and 15.7(e). RPC 1.15B sets out the recordkeeping requirements that lawyers must establish and adhere to for client trust funds, all of which assume the clients or third persons for whom the funds are received are identified and that transactions related to the funds are clearly documented. However, notwithstanding the bar's substantial compliance, best intentions, practices, and good faith, there are many circumstances in which unidentified property in client trust accounts is discovered. These include the death of a lawyer, the dissolution of a law firm, the merger of law offices or law firms, retirement, and other situations in which records are lost or become obsolete, or were not maintained consistent with the rules. The proposed rule changes would ensure that these unidentified funds are directed to the Legal Foundation of Washington consistent with the purposes of the IOLTA program.

Experiences in Other States

Virtually every state in the country has some version of the IOLTA rules similar to Washington's. In the past few years, several states have amended their IOLTA rules to expressly include unidentified property within their IOLTA mandates. While some states include both unidentified and "unclaimed" property, due to the requirements of the Washington Unclaimed Property Act (repealed and re-enacted as the Revised Uniform Unclaimed Property Act, Ch 225, Laws 2022, eff. January 1, 2023), the suggested amendments are limited to "unidentified property" in client trust accounts.

The most comparable relevant experiences with implementation related only to unidentified property are presented by Illinois and Louisiana.

- Illinois: In March 2015, the Illinois Supreme Court adopted amendments to its IOLTA rule to direct unidentified property to the Lawyers Trust Fund of Illinois (the state's IOLTA program). The Court was persuaded that the rule change would be a law-of-office-management tool to provide clearer guidance on how lawyers could dispose of unidentified funds in their trust accounts, as well as providing a new revenue source for civil legal aid. In the first two years of the rule amendment, \$1,007,000 was generated. Washington is similar to Illinois in that the practice of law is under the supervision of the state Supreme Court and participation in the IOLTA program is mandatory for all lawyers who handle client funds. See Illinois RPC 1.15(i) at [Illinois Rule of Professional Conduct 1.15 | The Lawyers Trust Fund of Illinois \(ltf.org\)](#) and [040715.pdf \(windows.net\)](#)
- Louisiana: On March 23, 2016, the Louisiana Supreme Court amended Louisiana Rule of Professional Conduct 1.15 instructing lawyers and law firms on how to handle unidentified funds accumulated in their IOLTA accounts. The Louisiana rule directs lawyers who discover unidentified funds to remit those funds to the Louisiana Bar Foundation. The rule defines "unidentified funds" as funds in an IOLTA account for at least one year that after reasonable due diligence cannot be documented as belonging to a client, a third person or the lawyer or law firm. See LA RPC 1.15(h) and Supreme Court Order of Nov. 27, 2018 at [file \(raisingthebar.org\)](#)

Rationale for Proposed Rules in Washington

The Legal Foundation of Washington was established by the Washington Supreme Court over thirty-five years ago to administer the IOLTA program and other available funds to provide increased resources for civil legal aid. The Legal Foundation has long and deep experience of working with lawyers, financial institutions and the WSBA on issues related to IOLTA accounts and on reporting the use of those funds. It is and has been the policy of the Legal Foundation that whenever funds may have been in good faith, but mistakenly, directed to it, the Legal Foundation refunds the monies claimed. The Legal Foundation anticipates doing nothing less with respect to client trust funds for which the rightful owner is not able to be identified.

Amending RPC 1.15A and ELC 15.7 and adding the suggested Comment to RPC 1.15B to transfer unidentified property in client trust accounts to the management of the Legal Foundation of Washington is a reasonable and easy clarification. The Legal Foundation has simple remittance and refund procedures that could easily be expanded to include unidentified property in lawyer trust accounts.

Legal Framework Underlying Proposed Rules

RCW 63.29 codifies Washington's Unclaimed Property Act.¹ RCW 63.29.010(1) sets out the general rule for the treatment of "unclaimed" property as follows:

¹ Effective January 1, 2023, Title 63 RCW will be repealed and replaced in toto by Engrossed Substitute Senate Bill 5531, Ch 225, Laws 2022. The new Revised Uniform Unclaimed Property Act is to be codified in a new chapter in Title 63 RCW. See Ch 225, Laws 2022, Section 1506. Importantly, the substantive provisions related to this discussion and the suggested rule and Comment are effectively unchanged.

Except as otherwise provided by this chapter, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of the holder's business and has remained *unclaimed by the owner* for more than three years after it became payable or distributable is presumed abandoned.

(Emphasis added.) The basic requirement for intangible property (e.g., money or other non-tangible assets) to be deemed presumptively abandoned is that a specific and identifiable owner of the property has not sought to claim it for more than three years.

Current RCW 63.29.030 sets out the general rules for taking custody of intangible, unclaimed property. It provides, in relevant part, that "[u]nless otherwise provided in this chapter or by other statute of this state, intangible property is subject to the custody of this state as unclaimed property *if the conditions raising a presumption of abandonment* under RCW 63.29.020 and 63.29.050 through 63.29.160 are satisfied" and the last known address, as shown on the records of the holder, of the apparent owner or person entitled to the property is in Washington state. (Emphasis added.) This is true even if the "the records of the holder do not reflect the identity of the person entitled to the property" so long as it is established that the "last known address of the person entitled to the property is in this state; ..."

There is no specific reference to or definition of "unidentified property" in the Act. In the new Revised Uniform Unclaimed Property Act, the focus on the apparent owner of property is stronger and the language makes it even clearer that the lack of an identifying record of the apparent owner does not make the abandoned property "unidentified". See below discussion of Section 302, Ch 255, Laws 2022, effective January 1, 2023.

RCW 63.29.070 specifically governs bank deposits in financial institutions, including interest, and, such funds are presumed abandoned unless the owner communicates with the financial institution in writing or otherwise indicates an interest in the funds within three years after receiving notice of the funds. Similarly, intangible property or interest derived therefrom "held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within three years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by the fiduciary." RCW 63.29.120(1). Again, the statutes refer specifically to *the owner* or *apparent owner* of the property, and make no provision for circumstances in which the owner is unknown or unidentifiable. This is similarly true for property held by courts and public agencies. See RCW 63.29.130.

The Department of Revenue has notified the Washington State Bar Association of its belief that "unclaimed" property includes "unidentified" property. However, the Department's analysis relies on a strained reading of the statute that governs the reporting requirement for holders of abandoned property, without regard to the actual definition of abandoned property or notice requirements. RCW 63.29.170 de-

scribes the contents for the required report of presumed abandoned property by the holder. RCW 63.29.170 subsection (2) (a) reads:

The report must be verified and must include:

(a) Except with respect to travelers checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of property with a value of more than fifty dollars presumed abandoned under this chapter;

The Department asserts that the phrase "the name, if known" is a clear statutory statement that unclaimed property may include property for which the apparent owner is unknown. However, the Department ignores the definition of "abandoned property" - the only property governed by the Unclaimed Property Act (and as Revised) and the only property that can be claimed by the State. "Abandoned property" by definition is "property that has remained unclaimed by the owner for more than three years after it became payable or distributable ..." RCW 63.29.020(1). See also, Section 201(14) of Revised Uniform Unclaimed Property Act, Ch 225, Laws 2022, eff. January 1, 2023.

The fact that the owner must be known or traceable, with or without an identifiable last known address, before property can be deemed abandoned under the Act, is necessary because of the Notice and Publication requirements under RCW 63.29.180. The property cannot be claimed by the Department until after the apparent owner receives notice of the potential claim to property contained in the holder's required report, either through direct mail "to each person whose last known address is listed in the report and who appears to be entitled to property with the value of more than seventy-five dollars" (RCW 63.29.180(3)), or by publication "in the printed or on-line version of a newspaper of general circulation within this state, which the department determines is most likely to give notice to the apparent owner of the property." RCW 63.29.180(1). Absent notice and opportunity for the owner to claim reported abandoned property, the Department cannot proceed to claim the property for the State. See Section 501, et. seq. of Revised Uniform Unclaimed Property Act, Ch 255, Laws 2022, eff. January 1, 2022 re revised notice requirements.

New Section 302 of Ch. 225, Laws 2022, effective January 1, 2023 provides expressly for the situation in which the holder's records do not reflect the identity of the apparent owner. In such a case, the new section provides as follows:

NEW SECTION. Sec. 302. ADDRESS OF APPARENT OWNER IN THIS STATE. The administrator may take custody of property that is presumed abandoned, whether located in this state, another state, or a foreign country if:

- (1) The last known address of the apparent owner in the records of the holder is in this state; or
- (2) The records of the holder do not reflect the identity or last known address of the apparent owner, but the administrator has determined that the last known address of the apparent owner is in this state.

Under new section 302, the property is presumed abandoned only when the apparent owner is either known because their identity is in the records of the holder or neither the identity of the apparent owner nor their last known address is in the record but the "administrator [i.e. the Department of Revenue] has determined that the apparent owner's last known address is in the state. There is no way for either the holder or the Department of Revenue to notify or have a last known address for an owner or apparent owner who is not identifiable. The new Revised Unclaimed Property Act, like the existing one, makes no

reference whatsoever to property for which the owner or apparent owner is unknown and unidentifiable from the holder's records. Thus, the Department and the state have no lawful claim to take custody of such property.

The whole statutory scheme assumes the identity of the owner of property subject to the Act is either known or is potentially locatable through a last known address. The Act does not address or govern property, for which the owner is unidentifiable, and thus, no notice can be given either by direct mail or publication, and no apparent failure to claim the property can be attributed. In such cases, the property simply is not abandoned. Much like the interest on small, short-term deposits in client trust accounts that cannot be reasonably apportioned among individual clients, and/or would not produce a positive net return on their own, funds not assignable to a specific identifiable client or third person should be remitted to the Legal Foundation. The Legal Foundation's desire that such funds are used to provide access to justice is not inconsistent with any statute or rule and is wholly consistent with LFW's mission and stated purposes as established by this Court. The Suggested Rule changes and Comment will effectuate those purposes.

Suggested Amendments to RPC 1.15A and Comment [6]

New subsections (k) and (l) to RPC 1.15A

(k) If a lawyer knows of the existence of unidentified funds in a trust account established under this Rule, the lawyer must take periodic and reasonably diligent steps to identify the person entitled to receive the funds and return the funds to that person. If, after learning of the existence of unidentified funds, the lawyer is unable to ascertain the identity of the person entitled to receive the funds, after a period of twelve months the lawyer must promptly remit the funds to the Legal Foundation of Washington. A lawyer's reasonable judgment, made in good faith, about whether to remit the funds to the Legal Foundation of Washington, does not constitute a violation of this paragraph, even if subsequently determined to have been erroneous. If unidentified funds subject to this paragraph are remitted in error or if the person entitled to receive the funds is subsequently ascertained, the lawyer shall submit a claim to the Legal Foundation of Washington, unless the person entitled to receive the funds has already done so. After verification of the claim, the Legal Foundation of Washington will return the funds.

(l) "Unidentified funds" are amounts accumulated in a trust account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

Amendment to Comment [6] to RPC 1.15A

[6] If a lawyer is holding fund or property for an identifiable client or third person, the lawyer has a duty to take reasonable steps to locate the client or third person for whom the lawyer is holding funds or property. If after taking reasonable steps, the lawyer is still unable to locate the client or third person, the lawyer should treat the funds as unclaimed property under the Uniform Unclaimed Property Act, RCW 63.29. If, after twelve months of reasonably diligent effort, the lawyer cannot identify the client or third person entitled to receive funds held in a trust account, the lawyer must promptly remit the funds to the Legal Foundation of Washington. Verification of the ownership of remitted funds under paragraph (k) of this Rule, as well as the processes under which claims are submitted and decided, is reserved solely to the Legal Foundation of Washington.

The Legal Foundation of Washington may also consider claims submitted by the lawyer, lawyer's client, lawyer's former client, or a third party seeking a return of funds from the Legal Foundation of Washington, provided the claimant can verify the claim of entitlement to receive the funds remitted by a lawyer. A lawyer's duty concerning unidentified funds terminates on remittance of the funds to the Legal Foundation of Washington, except that if it is determined that funds were remitted in error or if the person entitled to receive the funds is subsequently ascertained, the lawyer shall take reasonably prompt and practicable steps to assure that the funds are returned to the lawyer or directly to the person entitled to receive them, which may include submission of a claim to the Legal Foundation of Washington or assistance in the verification of such a claim. Paragraph (k) of this Rule shall also apply to the actions of a custodian appointed under Rule 7.7 of the Rules for Enforcement of Lawyer Conduct.

Suggested New Section to RPC 1.15B

[4] This Rule requires a lawyer to maintain current and accurate records that identify the client and matter for which trust funds were received, disbursed or transferred, the payor or payee, as well as other information set forth in the Rule. Rule 1.15B(a). If there are unidentified funds in a lawyer's trust account, the lawyer is required to comply with Rule 1.15A(k), but remittance of the unidentified funds to the Legal Foundation of Washington is not a defense to a charge of recordkeeping violations under this Rule. If a lawyer remits funds to, or submits a claim for return of funds to, the Legal Foundation of Washington under Rule 1.15A(k), records relating to the remittance or claim are subject to the recordkeeping requirements of this Rule.

Suggested New Section to ELC 15.7

(f) Duties Governing Unidentified Funds. As the recipient of unidentified funds under the authority of RPC 1.15A(k), the Legal Foundation is governed by the provisions set forth in this section. (1) Privileged Information. The Legal Foundation receives and holds attorney-client privileged and other confidential client information under and in furtherance of the Supreme Court's authority to regulate the practice of law. Disclosure of information to the Legal Foundation is not prohibited by RPC 1.6 or 1.9, and such disclosure does not waive any attorney-client privilege. If a lawyer or a claimant identifies specific information that is privileged or confidential and requests that it be treated as confidential, the Legal Foundation must maintain the confidentiality of information the information provided. (2) Procedures. The Legal Foundation must promulgate procedures to implement the remittance and claim processes governed by RPC 1.15A(k) and ensure compliance with section (1) of this rule. The Legal Foundation shall publish those procedures, along with sufficient information to adequately inform the public and members of the Association about the process of remitting unidentified funds and submitting claims for return of funds.

Reviser's note: The typographical errors in the above material occurred in the copy filed by the state supreme court and appear in the Register pursuant to the requirements of RCW 34.08.040.