

FORMAL OPINION NO 2023-202
Law Firm Staff Theft of Client Funds

Facts:

Lawyer employs Bookkeeper¹ to assist with the financial aspects of Lawyer's law practice.² Unbeknownst to Lawyer, Bookkeeper steals money from Lawyer's trust account.³ Lawyer discovers the theft when the

¹ The particular employment or other contractual arrangement between Lawyer and Bookkeeper does not impact Lawyer's supervisory duties in this circumstance under Oregon RPC 5.3. *See generally* ABA Model RPC 5.3, cmt 3.

² For trust account thefts beyond a lawyer's firm and over which a lawyer has no control, such as thefts resulting from a security breach at a financial institution, see OSB Formal Ethics Opinion No. 2022-199. This opinion focuses on law firm staff who often perform administrative tasks for law firm trust accounts and for whom law firm lawyers have a duty of supervision under Oregon RPC 5.3. For discussions of thefts by law firm lawyers, *see In re Renshaw*, 353 Or 411, 298 P3d 1216 (2013) (law firm operations shareholder misappropriated law firm funds); *In re Murdock*, 328 Or 18, 968 P2d 1270 (1998) (law firm associate embezzled law firm funds). *See also* Oregon RPC 5.1 (supervisory duties over other law firm lawyers); *see, e.g., In re Connall*, S061623 (Or 2013) (Form B resignation) (law firm partner failed to supervise associate who mismanaged firm trust account), *reported in Oregon Rules of Professional Conduct Annotated* 819 (OSB Legal Pubs 2021).

³ This opinion assumes that Lawyer was not directly involved in the theft. *Cf.* Oregon RPC 8.4(a)(2)–(3) (professional misconduct involving dishonesty). This opinion does not address whether Lawyer in this scenario failed to adequately supervise Bookkeeper. *See generally* Oregon RPC 5.3 (duty to supervise law firm staff); *see, e.g., In re Strader*, 27 DB Rptr 219 (2013) (law firm managing shareholder disciplined for failure to adequately supervise law firm office manager who stole client funds); *see also In re Gassner*, 35 DB Rptr 13 (2021) (law firm managing partner disciplined for failing to supervise law firm bookkeeper in handling client funds); *In re Landerholm*, 32 DB Rptr 372 (2018) (same). Similarly, this opinion does not address the civil, criminal, or insurance coverage implications of staff theft of client funds. *See generally* Mark J. Fucile, Amer. Bar Assoc., *The Bookkeeper Did It! Lawyer Responsibility for Staff Theft of Client Funds*, 25 *The Professional Lawyer* no. 2, 2018, at 30 (surveying these topics nationally) (also available at www.frllp.com/resources/articles.html). Finally, this opinion does not address

trust account is overdrawn as a result and Lawyer's bank sends an overdraft notice to the Oregon State Bar.⁴

Question:

1. Must Lawyer inform the clients affected by the theft?
2. Must Lawyer obtain a conflict waiver from the clients affected to continue to represent them in the matters concerned?
3. May Lawyer restore the funds stolen to the trust bank account?

Conclusion:

1. Yes.
2. Yes.
3. See discussion.

Discussion:

Question 1

Oregon RPC 1.4 governs lawyer–client communications:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

confidentiality issues that may arise if a law enforcement investigation follows and the investigating agencies request client-specific information.

⁴ Under Oregon RPC 1.15-2(h)-(i), overdraft notices are sent directly from the financial institution concerned to the bar. Oregon RPC 1.15-2(l) also requires a lawyer to report receipt of an overdraft notice for the lawyer's trust account to the bar. If an overdraft is not triggered in this scenario, however, Oregon RPC 8.3 does not mandate self-reporting to the bar because that rule is limited by its terms to reporting other lawyers and judges. Lawyers may choose, however, to self-report voluntarily for practical considerations. *See, e.g., In re Landerholm*, 32 DB Rptr at 374 (noting self-report of trust account discrepancies).

Having a client's money stolen from a law firm trust account by law firm staff is an event that must be communicated to the client under Oregon RPC 1.4 within a reasonable period of time following Lawyer's discovery of the theft. *See generally* ABA Formal Ethics Op No 481 (2018) (discussing the duty to disclose errors to clients).

Question 2

Aside from any duties created by substantive law that are beyond the scope of an ethics advisory opinion, lawyers have a general duty of safekeeping client funds held in trust under Oregon RPC 1.15-1 and specific regulatory obligations for IOLTA accounts under Oregon RPC 1.15-2.

Oregon RPC 1.7(a)(2), in turn, governs conflicts between the interest of a lawyer and a client:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer[.]

The theft of a client's money held in trust by law firm staff creates a conflict under Oregon RPC 1.7(a)(2) stemming from the possibility of claims or other material adverse roles (such as being a witness in a criminal investigation or a complainant in a bar proceeding) between the client and the lawyer. The lawyer must, therefore, evaluate whether, as required by Oregon RPC 1.7(b)(1), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" going forward and, if so, must obtain a conflict waiver

under Oregon RPC 1.7(b) based on the client’s informed consent to continue representing the client in the matter concerned.⁵ *See generally* OSB Formal Ethics Op No 2005-61 (discussing conflicts arising from possible errors by lawyer); *see also* OSB Formal Ethics Op No 2022-199, at 2–3 (addressing conflicts arising from, among other things, thefts of client funds in circumstances outside a lawyer’s control).⁶ If Lawyer cannot meet the standard noted in Oregon RPC 1.7(b)(1), the client declines to grant a waiver, or the client discharges Lawyer in light of the theft, Lawyer must withdraw. *See* Oregon RPC 1.16(a)(1), (3).⁷

Question 3

OSB Formal Ethics Opinion No. 2022-199 addresses whether a lawyer may use the lawyer’s own funds to restore client funds that have been stolen by a third-party theft, such as a security breach at a financial institution, and similar circumstances beyond the lawyer’s control. It should be read carefully in conjunction with this opinion. In brief, Formal Opinion 2022-199 concludes that a lawyer may not unilaterally deposit the lawyer’s own funds into trust to replace stolen client funds.⁸ Rather, Formal Opinion 2022-199 counsels that a lawyer in this circumstance must

⁵ Oregon RPC 1.0(g) defines “informed consent”:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

⁶ The Oregon State Bar Professional Liability Fund has a template waiver form addressing conflicts arising from potential errors available on its website at www.osbplf.org.

⁷ Oregon RPC 1.16(c) requires lawyers to seek any necessary court permission to withdraw.

⁸ *See generally* OSB Formal Ethics Op No 2005-145 (concluding that lawyers are prohibited from depositing their own funds into trust to create “cushions” intended to prevent overdraft notification).

inform the client of the loss and may—with the client’s permission—write a check to the client for deposit into the trust account or pay those funds directly to the client:

To comport with the duty to hold and safeguard client property found in Oregon RPC 1.15-1(a), however, upon notice to the affected client(s) as described below [*i.e.*, timely communication of the circumstances to the client under Oregon RPC 1.4], Lawyer may write a check to the affected client(s), drawn on the Lawyer’s own funds, to restore the funds, or otherwise repay those funds to the client(s).

Oregon Formal Ethic Op No 2022-199, at 2.

Although the circumstances analyzed in this opinion are different than those on which Formal Opinion 2022-199 is predicated, they share sufficient commonality on this point that its reasoning applies to this situation as well. Therefore, upon discovery of a theft of client funds from trust by law firm staff and following disclosure of the circumstances to the client as discussed above, Lawyer may offer either to write a check to the client to restore the funds in trust or to pay those funds directly to the client.⁹

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⁹ *See, e.g., In re Strader*, 27 DB Rptr at 223 (noting lawyer contributed own funds to restitution). *See also* Oregon RPC 1.8(h)(2), (4) (prohibiting, respectively, settling a potential claim with an unrepresented current or former client without advising in writing of the desirability of consulting independent counsel and also prohibiting attempting to limit the right of a current or former client from filing a bar complaint). Repayment may come before or after the clients concerned have made decisions on conflict waivers, but whether the client can provide informed consent for the lawyer to continue the representation pending repayment may depend on the facts. Lawyer cannot predicate repayment on a client granting conflict waiver for Lawyer to remain on the matter involved. *See* Oregon RPC 1.0(g) (definition of “informed consent” for conflict waivers).

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 4.2 (withdrawal), § 7.4 (client communications), ch 9 (economic and personal conflicts), § 16.4-14(a) (conflicts and liability exposure), § 16.4-14(b) (waiving potential conflicts), ch 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 32 (discharge by a client and withdrawal by a lawyer), § 44 (safeguarding and segregating property), §§ 121–122, 125 (conflicts of interest) (2000).