

**In the Wake of *Olchowski*:
SJC Decision Ushers in a New Era for Unidentified and Unclaimed
IOLTA Funds While Reinforcing the Wisdom of Old Advice**

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The Supreme Judicial Court’s recent decision in *Matter of Olchowski* (SJC 12730, Oct. 1, 2020) will significantly reshape the landscape with respect to IOLTA (“Interest on Lawyer Trust Accounts”) funds that cannot be disbursed because their rightful owners cannot be identified (“unidentified funds”) or because the rightful owners can be identified but cannot be located or reached (“unclaimed funds”). In *Olchowski*, the Court held that such funds should ultimately be paid over to the Massachusetts IOLTA Committee rather than escheat to the Commonwealth as abandoned property. While the decision will set in motion dramatic changes in the handling and disposition of unidentified and unclaimed IOLTA funds, it underscores the need for Massachusetts lawyers to avoid the problem of unaccounted-for IOLTA funds in the first place by undertaking proper trust account recordkeeping pursuant to Mass. R. Prof. C. 1.15.

Matter of Olchowski – A Brief Overview

Olchowski involved a lawyer who, at the time of his temporary suspension from the practice of law, was holding almost \$30,000 in unidentified funds in his IOLTA. The attorney had failed to maintain proper records of his client trust funds and, despite subsequent investigations by both a financial investigator at the Office of Bar Counsel and an independent accountant, the rightful owners of the funds remained a mystery. The question before the SJC was whether the current holder of the unidentified funds (the suspended lawyer’s counsel) should be permitted to turn over the money to the IOLTA Committee, as a number of court-appointed commissioners had been permitted to do in the past with respect to unidentified client funds, or whether the funds should escheat to the Commonwealth as abandoned property.

The Court carefully analyzed the abandoned property statute (G.L. c. 200A) and determined that funds held by lawyers in pooled IOLTAs did not fit the act’s definitions and purposes. Invoking its superintendence powers to regulate the practice of law, the Court held that unidentified and unclaimed IOLTA funds should ultimately be disbursed to the IOLTA Committee. However, before such funds can be turned over to the Committee, the Court determined, bar counsel will need to be notified and confirm that the rightful recipient’s identity (in the case of unidentified funds) or whereabouts (in the case of unclaimed funds) cannot be determined. Thereafter, a single justice of the SJC must approve the transfer. In performing its role in this process, the Office of Bar Counsel will also evaluate whether the lawyer’s inability to identify or locate the owners of the funds came about as the result of any recordkeeping or other violations of the rules of professional conduct.

The SJC’s conclusion that funds in an IOLTA may not escheat to the Commonwealth has important ramifications that go beyond the specific facts presented in *Olchowski*. As noted in the decision, banks have for many years transferred dormant bank accounts, including IOLTAs, to

the state treasurer, pursuant to the abandoned property law (under which bank accounts are deemed inactive where no depositor-initiated transactions have occurred for three years). In the wake of *Olchowski*, banks will be foreclosed from turning over dormant IOLTAs to the treasurer, as the Court has concluded that the abandoned property statute does not apply to IOLTAs. Similarly, lawyers who have been unable to disburse funds to a *known* client or third party who is missing or unresponsive will no longer have the option to turn over the funds to the treasurer as abandoned property. Instead, the SJC's decision will result in banks' having to alert bar counsel where an IOLTA has remained dormant for an extended period of time; and lawyers' having to undertake efforts to identify or locate the owner of undisbursed funds before being able to turn them over to another entity (which will now be the IOLTA Committee). Such efforts will be subject to review by bar counsel to investigate whether the funds are truly unidentified or unclaimed and, where appropriate, to determine whether the lawyer's inability to identify the owner or disburse the funds resulted from improper recordkeeping or other rules violations.

Rule Changes on the Horizon

In its ruling, the SJC directed its Standing Committee on the Rules of Professional Conduct to draft proposed amendments to Rule 1.15 to incorporate the Court's directives regarding unidentified and unclaimed client funds held in IOLTAs. Most significantly, lawyers will be required to maintain IOLTAs only in banks that agree both to provide bar counsel with notices of dishonored checks, as is already required by Mass. R. Prof. C. 1.15(h), and to notify bar counsel on a continuing basis where no activity has taken place in such accounts (other than interest accruals and transfers) for an extended period of time. (The Court suggested that this dormancy period be set at two years.) The Court also called for an amendment of Rule 1.15 to authorize the transfer of unidentified funds to the IOLTA Committee and to memorialize the Committee's reciprocal obligation to return the funds to the rightful recipient should that person or entity later appear.

Meanwhile, Lawyers' Obligations Under Rule 1.15 Remain in Full Effect

While the rule changes and administrative implementation of *Olchowski* are being worked out, a lawyer's recordkeeping obligations under the Rules of Professional Conduct have not changed. The rules require lawyers to keep track of every cent that comes into and leaves an IOLTA by, *inter alia*, keeping a record of each payor and payee, the amount deposited or debited, and the client matter to which the transaction pertains. Rule 1.15 also requires lawyers to cross-check the accuracy of their records against the monthly bank statements for the account. A lawyer who complies with these provisions ordinarily will not encounter unidentified funds in the first instance. Conversely, a lawyer's failure to learn and consistently apply proper recordkeeping practices will only make it more difficult to uncover and resolve discrepancies in the future, and will invite the risk of disciplinary consequences.

A critical component of proper IOLTA recordkeeping is the three-way reconciliation. Lawyers are obligated to conduct a three-way reconciliation at least every sixty days. Upon each reconciliation, the lawyer must make sure that three figures for that period of reconciliation are in alignment: (1) the adjusted balance of the account as shown on the bank statement; (2) the amount of funds in the account according to the lawyer's check register; and (3) the total of all

individual subaccounts (which consist of all individual client ledgers plus the separate ledger used to keep track of funds in the account to cover bank fees). As part of this process, the lawyer must also determine whether there are any outstanding checks or deposits in the IOLTA that need attention.

What are typical “outstanding” items? For example, if you conducted a real estate transaction several months ago that included a holdback for post-closing repairs, and you haven’t heard from the parties since the closing, the undisbursed funds set aside for the repairs is an outstanding item that will need to be resolved. Or, if (with the client’s knowledge and agreement) you were holding unused retainer funds on a concluded hourly-fee matter in anticipation of another case coming in for the same client, but the second matter never materialized, the unused portion of the retainer would be an outstanding item to be resolved.

A major source of unidentified funds that can accrue in an IOLTA if not promptly addressed is checks that are properly issued to the rightful recipients but, for whatever reason, are not cashed or deposited. For example, if your check register reflects that you sent a recording fee to the registry for a filing fee several months ago, but the check is still outstanding, you must follow up to determine what happened. Examine the file to make sure the check was actually mailed. Consult the registry to make sure that the document was in fact recorded. Review your records to make sure the filing fee wasn’t inadvertently sent from your operating account.

In every situation of this kind, if you do not follow up promptly to disburse the funds, you run the risk of subsequently not being able to identify or locate the proper recipient. Keep in mind that, if you were to die or become incapacitated, another person attempting to close out the account would have even greater difficulty in determining to whom the funds belonged.

If any of the above situations sounds unhappily familiar to you because you find yourself currently holding funds that you cannot attribute to a specific client or third party, funds that you can’t disburse because the recipient’s current whereabouts are unknown, or funds that remain in your IOLTA only because the intended payee has failed to deposit your check, you should take immediate steps to resolve these issues. Delaying action will not make the situation any easier to resolve and is likely to invite more serious consequences for your practice.

If you have balances for which you are unsure of the owners, take the time now to go back and make a diligent search through your records to try to identify the owners. If you want to be able to transfer these funds to the IOLTA Committee in the future, you will be required to demonstrate that you have undertaken diligent efforts, and the passage of time will not make the process any easier. You may happily discover that, with patience and commitment, you are able to identify and disburse most or all of these funds.

If you are holding funds for clients that you can identify but simply cannot locate, the internet is your friend. There is a tremendous amount of information online that may help you obtain the person’s current contact information. (For a further discussion of the issue of missing clients, see “[VANISHED: What to Do When a Client Goes Missing](#),” by Christine P. Deshler (Sept. 2020).)

If you have an IOLTA that you cannot reconcile, you should consider opening a new account for all future transactions and discontinuing the use of the old account. Winding down the old account will make it easier to isolate those funds or transactions that are the underlying source of the problem. Naturally, you should make sure that you are keeping meticulous records and conducting regular three-way reconciliations on your new IOLTA to avoid a repeat of the problems that prompted the closing of the old account.

Finally, if you currently have an IOLTA that you are not using because you no longer receive client funds or have opened a new IOLTA, don't let the old account lie dormant indefinitely. Take steps to close it. Begin by conducting a three-way reconciliation and identifying any outstanding items. Disburse funds to the proper clients or third parties. Disburse to yourself any earned fees, along with funds that you held in the account to cover bank fees. Contact your bank to confirm the amount of any interest in the account that has accrued but has not yet been transferred to the IOLTA Committee and leave that amount in the account. Finally, be sure to update your IOLTA account information with the BBO Registration Department, as required by SJC Rule 4:02(2), as part of your next registration renewal.

Get it Right!

The rules on three-way reconciliation of IOLTAs have been in effect since 2004. Bar counsel is working actively to increase compliance with the rules, which we hope will minimize the ripple effect that poor recordkeeping creates, which may include the misuse of client funds. (Needless to say, even *inadvertent* misuse can have serious disciplinary consequences.) If you are unsure whether your current trust account recordkeeping practices are sound, or if you simply wish to gain a more thorough understanding of how IOLTAs are to be maintained and administered, we suggest that you visit the Massachusetts IOLTA Committee's website (maiolta.org). You should also plan to attend the free trust account training class presented by the Office of Bar Counsel and the BBO in conjunction with participating bar associations. A schedule of upcoming trainings can be found on the calendar section of the Board of Bar Overseers website (massbbo.org).