

Unidentified and Unclaimed Funds in IOLTAs May Result in Public Discipline: *so now is a good time for lawyers to clean up their accounts.*

by

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In October 2020, the Supreme Judicial Court issued its decision in *Matter of Olchowski*, 485 Mass. 807 (2020), holding that unclaimed and unidentified IOLTA funds should be turned over to the Massachusetts IOLTA Committee (“MIC”) rather than escheat to the Commonwealth as abandoned property.¹

In 2021, the SJC’s Standing Committee on the Rules of Professional Conduct publicized proposed rule amendments and comments to facilitate the implementation of the decision. Presently, the committee is reviewing comments on the proposed new rules that it has received from a variety of interested parties. In the meantime, the *Olchowski* decision, along with recent disciplinary cases arising out of deficient IOLTA practices (discussed below), should motivate lawyers to clean up their IOLTA accounts **now**. That means removing all of the lawyer’s excess personal funds from the account, following up on unnegotiated checks, researching the source and ownership of any unidentified funds, taking all possible steps to determine the current address of clients whose funds are being held in the lawyer’s IOLTA, and isolating for transfer any funds that, even with all reasonable effort, cannot be identified or whose owners cannot be located. It may also entail hiring accountants and bookkeepers to assist with trust account administration and recordkeeping and upgrading computer systems to ensure that the lawyer’s software produces compliant reconciliation reports.

¹ As discussed by Alison Mills Cloutier and Robert M. Daniszewski in [*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 \(Dec. 2020\)*](#), *Olchowski* assigns to bar counsel at least two related roles. Before a lawyer is permitted to turn over funds to MIC (through a single justice order), bar counsel must investigate and confirm that the funds are actually either unidentified or unclaimed; i.e., that the lawyer has taken reasonable steps to identify the owner of the funds and remit the funds. If the investigation reveals that the owner of the funds cannot be identified because the lawyer failed to comply with record-keeping or other rules of professional conduct, bar counsel may seek to discipline the lawyer.

The new mandate of *Olchowski* thus highlights continuing issues about IOLTA record-keeping. To briefly review: the goal of Mass. R. Prof. C. 1.15(f) is for each lawyer who holds an IOLTA account to maintain records in sufficient detail to allow that lawyer to know, at all times, the total amount of money that is contained in the IOLTA, and **exactly** how much of that total belongs to each client or third party on whose behalf the lawyer is holding funds. To that end, the rule requires a lawyer to:

- keep an individual ledger for each distinct matter, showing contemporaneously the exact amount attributable to each client or third party, as well as to the lawyer’s bank fee allowance;
- check the accuracy of their records at least every sixty days by making sure (through performing a three-way reconciliation) that the lawyer’s adjusted bank statement balance, chronological check register and the totals of all of client and bank fee ledgers, match; and
- if they don’t match, investigate the discrepancy and correct it.

Lawyers who follow the rules by performing regular three-way reconciliations, promptly removing attorney’s fees as earned, and following through on IOLTA checks that are not timely negotiated should rarely find themselves in the position of holding unidentified and undisbursed funds. On the other hand, lawyers who fail to reconcile are likely to wind up with bounced checks, unintentional misuse of client funds, and unexplained accruals of funds that cannot be traced to a particular owner. These outcomes may well result in serious disciplinary consequences.

A lawyer’s deficient IOLTA record-keeping practices are usually discovered either upon bar counsel’s receipt from the attorney’s bank of a notice of insufficient funds or a dishonored check on an IOLTA account, or when an investigation is triggered by a client or other party who raises a concern about how the lawyer is handling client, fiduciary, or third-party funds (“trust property”). The latter may occur, *inter alia*, in the context of a real estate transaction, a trust or estate matter, a personal injury settlement or what appears to be a fee dispute.

When a violation of Mass. R. Prof. C. 1.15(f) involves significant record-keeping or operational violations, but does not involve any misuse of client funds, it most often results in a public reprimand. See, e.g. *Matter of Castillo*, 35 Mass. Att’y Disc. R. 61 (2019) (public reprimand for record-keeping violations); *Matter of Charles Maguire*, 35 Mass. Att’y Disc. R. 421 (2019) (public reprimand for

record-keeping violations); *Matter of Keaveny*, 35 Mass. Att’y Disc. R. 320 (2019) (public reprimand for failure to maintain individual client ledgers or reconcile every sixty days).

In addition to the record-keeping requirements, Rule 1.15(c) requires a lawyer who receives trust property to “promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive,” unless otherwise permitted by law, rule, or agreement. Bar counsel interprets “deliver” to mean something more than just putting a check in the mail. If a check sent to the client or third party is not negotiated within a reasonable amount of time (which should be apparent both in the lawyer’s register and in the bank records), the lawyer retains a responsibility to find out whether it actually reached the designated party.

Admittedly, the circumstances of unnegotiated checks vary widely. But the unclaimed funds cannot remain in the lawyer’s account indefinitely. Rule 1.15(c) requires that on some regular basis a lawyer take action to make sure all trust funds are delivered to the proper recipient.

This begs the question of what measure of discipline is likely for an attorney who fails to promptly deliver trust funds -- whether related or not to non-compliance with the record-keeping rules -- resulting in the attorney holding money that should have been distributed to clients or third parties. That, of course, will vary, depending on the circumstances. Relevant circumstances may include: the amount of unidentified funds, the length of time the funds have remained in an IOLTA account, the diligence of the lawyer in attempting to disburse the funds to the rightful owners, and the lawyer’s demonstrated willingness to modify or upgrade his or her IOLTA practices to prevent a recurrence of the problem.

In the last few years, the Board of Bar Overseers has disciplined several attorneys who were holding in an IOLTA account many thousands of dollars, the owners of which they could no longer identify. Although bar counsel appreciates, as stated above, that small amounts of IOLTA funds may accumulate over the years for a variety of reasons, the office cannot overlook the harm to clients and third parties that may result when lawyers fail to keep adequate records and/or fail to ensure that funds are promptly remitted to the parties to whom they are due. Here are summaries of some recent disciplinary matters:

In Re Thomas Barrett, 36 Mass. Att’y Disc. R. 63 (2020), where the lawyer was suspended for three months, with the suspension stayed for one year subject to the lawyer’s compliance with certain conditions. As of the fall of 2019, Barrett was holding \$77,000 in his IOLTA, representing disbursements that were due and owing in approximately 100 matters. The IOLTA also held over \$221,000 in earned fees and expense reimbursements that belonged to Barrett. The accumulation of funds resulted from bad record-keeping practices, and the attorney’s failure to promptly remove *earned* fees from his IOLTA and refund *unearned* fees to clients. The respondent was instructed to cease use of the IOLTA account and, as a condition of the stayed suspension, was required to audit the account, remit as much of the money as could be identified, and enter into a probation agreement under which he would submit compliant reconciliation records on his new IOLTA account to bar counsel for one year.

In *Matter of Mahoney*, 35 Mass Att’y Disc. R. 423 (2019) another lawyer was suspended for three months, on a three-count petition for discipline. One count involved the lawyer’s failure to maintain required IOLTA records, including a chronological check register with client identifiers and individual client ledgers. Because of his long-time failure to maintain those records and perform routine three-way reconciliations with his bank statements, Mahoney was holding \$119,000 in his IOLTA, the owners of which he could not identify.

In *Matter of Matuzek*, 34 Mass. Att’y Disc. R. 303 (2018), an attorney was publicly reprimanded for failing to remit unearned fees to clients and allowing the funds to accumulate in her IOLTA. After bar counsel instructed her to locate the clients and remit the funds due to them, Matuzek was able to distribute some, but not all, of the money because by the time she undertook this audit, many of the clients could not be located. As this matter preceded the *Olchowski* decision, Matuzek escheated the remaining funds to the Commonwealth.

Lawyers who have maintained compliant records but had still failed to disburse multiple thousands of dollars, have received admonitions. E.g., Admonition No. 21-09 (conveyancing lawyer consistently maintained more than \$20,000 in undisbursed funds in IOLTA); Admonition No. 21-13 (accumulation of undisbursed funds in IOLTA, even after bar counsel warning).

Advice and Resources

Lawyers who are still having trouble with IOLTA record-keeping can take steps to help themselves and their clients, while avoiding discipline. Here are some suggestions:

- Make sure your software is up to the job. Many lawyers are using software, including Quicken and QuickBooks, that may not readily create the reconciliation report required by Rule 1.15(f). If your software reports do not contain the specific components listed in Rule 1.15, you may need to either contact your software provider for instruction as to how to produce compliant reports or purchase software designed to produce compliant IOLTA records.
- Engage a bookkeeper or accountant with knowledge of the IOLTA rules. The Massachusetts Society of Certified Public Accountants (MSCPA) maintains a list of its members who understand the rules and provide IOLTA-related services to lawyers and firms. Check with the MSCPA for a referral to such an accountant or bookkeeper. A link to MSCPA appears on our website under “Resources/External Links”.
- Follow through with unnegotiated checks on a timely basis. After a pre-determined length of time (no more than three months), contact any person or entity who has not negotiated your IOLTA check. Stop payment on the original check and issue a replacement if necessary. If the payee cannot be located after diligent attempts to do so, the new rules will establish procedures for reporting those unclaimed funds to bar counsel.
- Get your own money out of your IOLTA account. Your regular practice should be to immediately withdraw legal fees when earned on all hourly and contingent cases. If you maintain flat fees in your IOLTA (which is permitted but not required), they should be withdrawn when earned or otherwise promptly refunded at the end of the representation. The rules permit you to keep personal funds in the account only to the extent necessary to pay fees that your bank deducts from the account. Holding anything in excess of that amount is a violation of Mass. R. Prof. C. 1.15(b)(2)(i).
- Discontinue use of an unreconcilable IOLTA. If you are currently using an IOLTA account that contains funds you cannot identify, let that account wind down, and retain the unidentified and

unclaimed funds in the account until procedures for remitting funds to the MIC are in place. Start fresh with a new IOLTA, preferably with adequate software and/or bookkeeping help, but at the least with a thorough understanding of the records required and the need for three-way reconciliation.

- Take advantage of available resources on the Board of Bar Overseer’s website, www.massbbo.org. Click the Resources tab, then “External Links,” which takes you to a variety of IOLTA-related resources, programs and manuals, including:

- the Massachusetts IOLTA Committee “Client Funds Manual 2018”;
- IOLTA FAQs;
- Trust Accounting Training Dates: a schedule of the monthly on-line trust accounting classes provided by bar counsel and assistant bar counsel, and
- MCLE: *Handling IOLTA Accounts and Other Trust Property in Massachusetts* (Training and Testing Module).