

MASSACHUSETTS Lawyers Weekly

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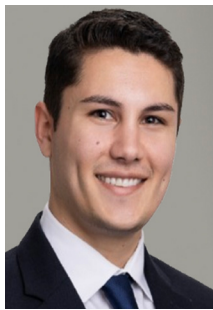
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Beware of Rule 1.15: banks are dropping a dime on you

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If you have an inactive IOLTA account, you may soon be receiving unwelcome mail from your bank.

Following the Supreme Judicial Court's ruling in *Matter of Olchowski*, the court modified Rule 1.15 to require financial institutions to first give notice to an attorney when an IOLTA account has been inactive for at least two and a half years and then notify the Board of Bar Overseers if nothing has been done within the following six months.

Rule 1.15(h)(5) provides that:

(5) The IOLTA account inactivity notification agreement shall provide that the financial institution shall give notice as follows:

(i) After two and one-half years

of inactivity in an IOLTA account, the financial institution shall notify the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account that the account has shown no activity for two and one-half years and that such inactivity shall be reported to the [BBO] if it continues for six more months.

(ii) After three years of inactivity in an IOLTA account, the financial institution shall notify the [BBO] that the account is inactive, with copies to the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account.

Accordingly, banks have started issuing letters to attorneys that trigger the requirement that attorneys take follow-up steps.

Rule 1.15(h)(7) provides that:

(7) When a lawyer receives a copy of the inactivity notification that a financial institution sent to the [BBO], the lawyer shall close the account and distribute the funds either to the owner of the funds or to the IOLTA Com-

mittee, as applicable, unless the IOLTA account contains no unidentified or unclaimed funds, and the lawyer has a valid reason for maintaining the IOLTA account. The lawyer shall notify the [BBO] in writing of the action taken or, if no action is taken, of the reason that the IOLTA account will remain open. If the IOLTA account will remain open, the lawyer shall also notify the financial institution in writing that the IOLTA account will remain open. If, within one year from the date the financial institution sent the inactivity notification to the [BBO], the lawyer neither closes the IOLTA account nor notifies the financial institution that the IOLTA account will remain open, the financial institution shall distribute the balance of the IOLTA account to the IOLTA Committee and close the IOLTA account.

There is no need to panic, but on the other hand, attorneys cannot just hide their heads in the sand. They can either close the account or explain to the BBO why the

account should remain open. Attorneys ignore this notice at their own peril as the BBO may refer the matter to the Office of Bar Counsel for disciplinary action.

Practically speaking, attorneys receiving this notice should start the (admittedly) time-consuming process of making distributions from their IOLTA account to the furthest extent that is reasonably possible. Simple, right?

With the start of the new year, practitioners should take the time to review their IOLTA accounts to confirm that they are not holding any unidentified or unclaimed funds.

The wrinkle is that these dormant IOLTA accounts often contain funds for which the attorney can no longer determine ownership. Changes to Rule 1.15 also address this circumstance. Rule 1.15(i) establishes procedures for handling undistributable funds. Violations of Rule 1.15 can lead to investigations by bar counsel, which can be costly and time consuming.

Further, these violations are the subject of numerous disciplinary decisions. Pursuant to Rule 1.15 (i), attorneys must now turn over unidentified and unclaimed funds to the Massachusetts IOLTA Committee. Unidentified funds refer to money in an IOLTA account that cannot be attributed to any owner, whereas unclaimed funds refer to money

for which the owner is known but is unable to be reached or will not accept the money and the funds cannot be returned.

Once attorneys become aware that they are holding undistributable funds, they must undertake reasonable efforts to either identify or locate the owner of the funds. The rule does not define “reasonable efforts” as they depend on the circumstances.

For example, for unidentifiable funds, reasonable efforts may include reviewing client files and bank records or engaging an outside accountant or bookkeeper. For unclaimed funds, reasonable efforts may include attempting to reach out to family or affiliates or undertaking efforts to research the owner’s current whereabouts.

Once lawyers have made a reasonable but unsuccessful effort to identify or locate an owner, they may remit the funds to the Massachusetts IOLTA Committee. That said, if the attorney decides not to remit the funds immediately, he or she must do so within three years from the date of discovery of the undistributable funds.

Under the amended rule, attorneys must submit an affidavit upon remittance of undistributable funds. There are two affidavits (each of which are completed through the IOLTA Committee’s website): a “safe harbor affidavit” that is for attorneys who remit \$500 or less within a 12-month

period, and an “over \$500 affidavit.” Each affidavit requires an attorney to explain the circumstances of the remittance and the efforts taken to identify or locate the owner of the funds. Attorneys must also provide all relevant documents regarding the efforts to identify or locate the owners.

Of importance is that, pursuant to Rule 1.15(i)(4), the IOLTA Committee is required to provide bar counsel with a copy of each over \$500 affidavit. In other words, \$500 is the magic number that a lawyer can remit to the IOLTA Committee without triggering any further action. For amounts greater than \$500, bar counsel has the discretion whether to initiate an investigation, leading to the possibility of sanctions.

Accordingly, it is crucial that an attorney planning to remit funds take proactive and diligent measures to clean up their IOLTA accounts.

With the start of the new year, practitioners should take the time to review their IOLTA accounts to confirm that they are not holding any unidentified or unclaimed funds. If you find yourself holding such funds, take steps to investigate and disburse as much as possible. Time is not your friend as client files are lost, clients change addresses, and records are lost.

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