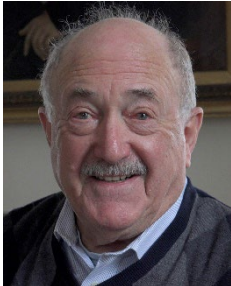


## *Ethical Issues and the BBO: Helping Conveyancers Avoid Both*



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Henry Dane is a partner in Dane Brady & Haydon, LLP of Concord. A graduate of Harvard Law School, Henry has been practicing law in Boston and Concord for 52 years. Admitted to all state and federal courts in Massachusetts and New Hampshire, he has appeared before planning and zoning boards on hundreds of occasions and has tried and argued

numerous cases before the Superior and Land Courts, the United States District Court, the Massachusetts Appeals Court and Supreme Judicial Court.

With his partners, Henry handles a substantial conveyancing practice, including both residential and commercial properties, representing private parties, mortgage lenders and title insurance underwriters. His practice areas include real estate, zoning, permitting, civil litigation, municipal law, medical ethics and research integrity, non-profit and charitable corporations.

Henry is Co-chair of the REBA Ethics Section and a Director-at-Large. He is also a member of the MBA, New Hampshire Bar Association, the Federal Bar Association and the Concord Select Board; a former Director and Vice-president of the Concord Chamber Music Society, Inc., former President of the Concord Rod & Gun Club, Inc., and former President of the Rotary Club of Concord.

Henry received a J.D. from Harvard Law School, a Ph.D. from the University of Pennsylvania, a Master's Degree from Harvard University, and a Bachelor's Degree from Haverford College.



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Robert "Bob" Daniszewski is an Assistant Bar Counsel with the Massachusetts Board of Bar Overseers since 2014.

In his prior civil practice, Bob concentrated on matters involving attorney professional responsibility, representing both lawyers and clients in such cases.

Bob received his J.D. from Boston College Law School and his B.A. from Ohio State University.

# *Ethical Issues and the BBO: Helping Conveyancers Avoid Both*

## About the Office of Bar Counsel

- ▶ The Office of Bar counsel (OBC) investigates and prosecutes complaints of professional misconduct by Massachusetts lawyers. See SJC Rule 4:01 for an explanation of the disciplinary process.
- ▶ If, after investigation, a complaint is found to merit discipline, bar counsel will file and prosecute a petition for discipline with the Board of Bar Overseers, which will assign the case to a hearing committee.
  - Lesser misconduct may warrant a (private) admonition or a diversion.
  - As an alternative to a hearing, bar counsel and the lawyer may reach a stipulation on the discipline to be imposed.
- ▶ The Attorney and Consumer Assistance Program (ACAP) is the intake unit of the Office of Bar Counsel. ACAP resolves routine concerns or minor disciplinary issues without opening a disciplinary file and promptly refers matters that raise issues of more serious misconduct for investigation.

## Disciplinary Complaints Involving Conveyancers

- ▶ OBC opens far and away more files against real estate lawyers than any other category of practitioners.
  - Other leading areas of practice in terms of bar counsel files are civil litigators, divorce lawyers, immigration lawyers; but real estate lawyers far outpace any of those groups.
- ▶ This is perhaps mostly attributable to maladministration of IOLTA accounts, of which real estate conveyancers typically have more than one, and with respect to which conveyancers tend to rely heavily on paralegals, bookkeepers, and other non-lawyer staff.
- ▶ Files are frequently opened as a result of insufficient funds notifications sent directly to OBC by banks.
  - Investigation often reveals inadequate recordkeeping and other IOLTA administrative practices.  
Key takeaway: Get your IOLTA houses in order!

## Lack of Diligence, Competence, and/or Communication

- ▶ Mass. R. Prof. C. 1.1 (Competence); 1.3 (Diligence); 1.4 (Communication). Key factors in this type of case are whether the misconduct was isolated (vs. part of a pattern) and the extent of client harm.
- ▶ Matter of Pham, 30 Mass Att’y Disc. R. 537 (2013). Public reprimand where attorney failed to advise buyer-clients that under terms of proposed purchase and sale agreement, they risked losing deposit. Clients lost \$13,000.
- ▶ Matter of Slipp, 38 Mass Att’y Disc. R. \_\_\_\_ (2022). Indefinite suspension for lawyer whose misconduct included a lack of competence and diligence in failing to pay off a mortgage following a real estate closing. The lawyer sent funds to the mortgagee in the amount shown on a payoff statement, but the payoff statement had expired, and the figures had changed. The lawyer collected additional funds from the buyers and attempted a second payoff, but again the figures had increased. Ultimately, the buyers had to retain new counsel and expend an additional \$6,600 in interest and other charges to get the mortgage paid off some ten months after the closing.

## Lack of Diligence, Competence, and/or Communication (*cont'd*)

- ▶ Matter of Kiely, 36 Mass. Att’y Disc. R. 287 (2020). Public reprimand for lawyer who, acting as settlement agent, failed to make timely distribution to mortgagors of the proceeds from real estate sale, resulting in additional per diem charges to the mortgagee.
- ▶ Matter of Kelley, 24 Mass. Att’y Disc. R. 392 (2008). Attorney failed to review title examination, negligently certified clear title, failed to pay title insurance premium, erroneously had deeds signed by unauthorized person, and failed to remit funds that had been withheld at closing to pay water and sewer.

## Bounced IOLTA Checks

### ○ Funds Must Clear Before They are Disbursed

- ▶ A lawyer must verify that funds have **cleared** before disbursing funds. Available and cleared are different. The lawyer must verify the funds have CLEARED before authorizing any disbursement.
- ▶ Contact a senior officer at your bank and determine the bank’s rules and policies on deposited items, holds, etc.
- ▶ DO NOT give out post-dated checks.

### ○ Common problems that cause bounced checks:

- ▶ “I grabbed the wrong checkbook.”
- ▶ “My client begged me for a post-dated check.”
- ▶ “I deposited a settlement check and disbursed against it before it cleared.”
- ▶ “My banking app showed the funds as ‘available.’”
- ▶ “I / my secretary / the bank teller deposited the funds to the wrong account.”
- ▶ “I made a mistake and wrote a check for \$1550 instead of \$1500.”
- ▶ “I ordered checks, but I hadn’t deposited personal funds into the account to pay for them.”
- ▶ “The bank made a mistake!” This might be true, but do you have the required records that would ensure that you caught the error?

## IOLTA Account Shortfalls: Disciplinary Cases

- ▶ Absent a bank error, a confirmed shortfall in a client trust account signifies that client funds have been misused, either negligently or intentionally. This is a serious situation and it’s the reason for requiring banks to notify bar counsel of a bounced check from an IOLTA.
- ▶ Regardless of the reason, when a shortfall is discovered, it is important not to continue disbursing funds from the account!
  - Matter of Dodd, 21 Mass. Att’y Disc. R. 196 (2005). Suspension for a year and a day where attorney intentionally issued checks from his IOLTA account to cover obligations at closings when he knew the account had a deficit.
  - Matter of Franchitto, 23 Mass. Att’y Disc. R. 163 (2007). Public reprimand of conveyancing attorney who suffered shortage in IOLTA account as a result of client fraud, but conducted two closings after he became aware of deficit without informing participants that he had insufficient funds to pay disbursements.

## IOLTA Recordkeeping

- You must keep CONTEMPORANEOUS records in THREE locations:
  1. IOLTA Account Check register
  2. Individual Client Ledgers for each client matter, AND
  3. Bank Ledger for any personal / firm funds to cover bank fees (and to track interest)
- Requirement One: The Overall Check Register
  - ▶ The primary check register: All transactions must be recorded contemporaneously in chronological order.
  - ▶ Date, amount and client identifier for every deposit
  - ▶ Date, check #, payee, amount and client identifier for every withdrawal
  - ▶ Date and amount of every interest debit and credit
  - ▶ Includes all types of transactions (check, wire, EFT)
  - ▶ Specific, consistent client identifier for each transaction
  - ▶ Running balance *after each transaction*
- Requirement Two: Individual Client Ledgers (The bundles that make up the whole)
  - ▶ Each individual client ledger must:
    - Name the client matter.
    - Start with a deposit for that client (No individual client ledger should ever have a negative balance!).
    - Document all the funds received or disbursed within the IOLTA account for that client matter (date, source, payee).
    - Reflect the balance held following every transaction for the client matter.
      - ◆ This allows you to (1) look at any client ledger and instantly know the client's balance and (2) avoid making a disbursement on a client matter for which the account does not contain sufficient funds.
- Requirement Three: Ledger for Bank Fees (Firm Funds)
  - ▶ The funds deposited to pay for “reasonably expected” bank fees and charges are the only personal funds a lawyer is permitted to hold in an IOLTA account.
  - ▶ Do not hold more than \$200 unless circumstances warrant doing so (e.g., multiple wiring fees each month).
  - ▶ The Bank Fees ledger is also a convenient place to record interest earned and disbursed to IOLTA, especially if your bank does not credit and debit the monthly interest on the same day.

## IOLTA Recordkeeping (*cont'd*)

- ▶ You must conduct a three-way reconciliation at least every 60 days
  - The total of all client subaccounts, plus the subaccount for bank fees, must match the overall IOLTA account balance.
  - And this total must also align with the balance shown on the most recent bank statement, adjusting for any uncashed checks or other transactions not yet shown on the bank statement.
- ▶ An attorney must REVIEW the reconciliation report. Any discrepancies between what the bank records show and what the lawyer's records show must be corrected immediately. Be sure to document where and how you made any corrections.

### ○ Software Programs

- ▶ There are many different programs.
  - Convenience of one-time input of information.
  - BUT they generally do not produce the required records "out of the box."
- ▶ You must ensure that the records generated contain the specific requirements enumerated in Rule 1.15(f)(1)(B),(C),(D) and (E). Your program's "Reconciliation" may not be compliant.
- ▶ You may need to contact the software provider to determine how to produce the records you are required to maintain.

## Undisbursed IOLTA Funds

- ▶ Watch out for and RESOLVE uncashed checks and positive balances.
- ▶ Rules implicated:
  - Mass. R. Prof. C. 1.15(c): "Prompt Notice and Delivery of Trust Property to Client or Third Person"
  - Mass. R. Prof. C. 1.3: "Diligence"
  - Mass. R. Prof. C. 1.4 "Communication"
- ▶ Uncashed checks: High volume real estate practices: recording fees, discharge fees, liens, real estate taxes.

## Recordkeeping/Undisbursed Funds: Disciplinary Cases

- ▶ The typical sanction for recordkeeping violations under Rule 1.15 is a public reprimand. *See, e.g.,* Matter of Matuzek, 34 Mass. Att’y Disc. R. 303 (2018) (13-year failure to maintain adequate records, remit unearned fees to clients, and promptly withdraw earned fees from IOLTA); Matter of Weiner, 34 Mass. Att’y Disc. R. 562 (2018) (12-year failure to perform three-way reconciliations and keep required IOLTA records; lawyer also deposited and retained personal funds in the account); Matter of Coyne, 28 Mass. Att’y Disc. R. 162 (2012) (lawyer failed to keep required IOLTA records, notify client of receipt of funds, and promptly remit funds due client).
- ▶ However, recordkeeping violations, coupled with long-term accruals of undisbursed funds, have been met with stayed, three-month suspensions, with conditions. *See* Matter of Murray, 36 Mass. Att’y Disc. R. 341 (2020); Matter of Barrett, 36 Mass. Att’y Disc. R.63 (2020) and Matter of Mahoney, 35 Mass. Att’y Disc. R.423 (2019).

### *Matter of Olchowski*, 485 Mass. 807 (2020)

- ▶ IOLTA funds are not within the Abandoned Property statute.
- ▶ IOLTA funds cannot escheat to the Treasurer.
- ▶ If you have such funds, they will be transferred to the IOLTA Committee upon bar counsel’s motion to the SJC.
- ▶ See the OBC article at [massbbo.org](http://massbbo.org): “*Olchowski Decision and the Disposition of Unidentified and Unclaimed IOLTA Funds*”

## Engagement Letters

- ▶ Rule 1.5 - Engagement letters are required for any matter where the lawyer reasonably expects the fee to exceed \$500.
- ▶ Purpose –
  - State fees to be charged, and more importantly, how and when they will be collected.
  - Accurately describe the limits of your representation.
  - If fixed fee, describe any exceptions or potential additions to this fixed fee.
  - Are you representing the lender as well? Clearly outline the relationship and how you will handle a conflict of interest.

## Conflicts of Interest

- ▶ Pitfalls of Representing the Buyer and the Bank
  - Most common – the so-called “repair rider” attached to the P&S and not sent to the lender.
  - Funds provided to buyer through an undisclosed loan from a family member.
  - Changes in buyer’s circumstances that have not been disclosed to the lender.
  - Issue in the title or shown on the survey or plot plan – lender gets title insurance coverage but buyer does not.
- ▶ What do you do? Pick one client? Leave both?
- ▶ Remember who your client is!
  - Representing siblings – make sure that you have consent from all, in writing, before following any course of conduct.
  - Beware unintended expansion of representation – in the course of handling sale of a trust property, one beneficiary starts asking questions about a second piece that she owns individually.
- ▶ Unrepresented sellers when you are representing buyer and lender
  - How far do you go to “help out”?

## Conflicts of Interest: Disciplinary Cases

- ▶ Matter of Strojny, 28 Mass. Att’y Disc. R. 827 (2012). Nine-month suspension for violation of rules including 1.7(b) and 8.4(c) and (h). Attorney represented a lender in a real estate transaction at the same time as he was seller’s real estate broker and entitled to a 5% cut and had a 50% interest in the mortgage broker firm to whom he referred the buyer, all without informed consent.
- ▶ Matter of Pike, 408 Mass. 740 (1990). Six-month suspension where attorney represented landlord and tenant in real estate transaction in which he also acted as broker for landlord, thus earning broker’s fee.
- ▶ Matter of Brady, 7 Mass. Att’y Disc. R. 18, 22 (1991). Public reprimand and one-year probation where attorney had represented both buyer and seller in real estate transaction, and did not zealously represent the seller, resulting in her loss of a substantial asset.

## Supervision

- ▶ Rule 5.3(b) – “[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer[.]”
  - Rule 5.3(a) imposes the same responsibility on partners toward associates.
- ▶ Compliance with Rule 1.15 is a Non-Delegable Duty
  - Hiring a bookkeeper or office manager to maintain billing and/or financial records does not absolve the lawyer of the responsibility to comply with Mass. R. Prof. C. 1.15.
  - Many title insurance companies audit their agents’ accounts for compliance with their requirements. This does not mean the records are compliant with Mass. R. Prof. C. 1.15.

## Supervision: Disciplinary Cases

- ▶ Admonition No. 03-06, (2003). Attorney failed to supervise real estate paralegal. Paralegal, unknown to respondent, recorded lender's mortgage when funds were not good and delayed four additional days before fully dispersing those funds.
- ▶ Matter of Goldberg, 23 Mass. Att'y Disc. R. 191 (2007). One year and a day suspension of attorney who engaged in negligent misuse when he delegated all responsibility for checkbooks and closing-related mail to inexperienced office manager, gave her authority to sign checks, and failed to have any controls in place.
- ▶ Matter of Heartquist, 28 Mass. Att'y Disc. R. 446 (2012). Suspension of six months and a day for attorney who negligently misused client funds due to theft by office manager, who failed to deliver checks to title insurance companies and others to whom funds were due. Attorney questioned employee who provided various explanations for IOLTA checks made out to herself and lawyer accepted explanations. Attorney also violated record-keeping rules.

## Escrow Disputes

- ▶ Try to avoid holding a deposit – better practice is to have the funds held by the broker.
- ▶ No broker – funds are usually held by the seller's attorney with escrow protection provisions for the seller's attorney included in the P&S.
- ▶ In the event of a dispute over a deposit – don't pick a side! – place funds in escrow with a third party or file interpleader action in court, just as a broker would do.
- ▶ Obtain signed instructions and releases from everyone before making any disbursements.

## Escrow Disputes: Disciplinary Cases

- ▶ Matter of Lacet, 24 Mass. Att'y Disc. R. 409 (2008). Public reprimand for buyers' counsel in home sale for unilaterally deciding to withhold in escrow \$10,000 in sale proceeds in order to see if the sellers damaged the home during move-out. After learning of damage, the lawyer then released the \$10,000 to the buyers even though the monies belonged to the seller under the deal.
- ▶ Admonition No. 15-25, 31 Mass. Att'y Disc. R. 791 (2015). Violations of 1.3, 1.15(c), and 1.15(e)(6). Respondent was the settlement agent in a real estate transaction. Under the terms of the escrow agreement, he withheld a portion of the sale proceeds pending the removal of a neighbor's shed encroaching on the subject property. Respondent did not subsequently release the funds as dictated by the escrow agreement but rather held the funds in his IOLTA account for three years until the buyer lodged a complaint with bar counsel. Respondent was found to have failed to act with reasonable diligence, failed to promptly deliver the funds, and wrongly holding trust funds in a non-interest-bearing client trust account for three years.



## Notarization Practice

Moving target at this time – REBA legislation House No. 4716 on remote online notarization, allowed in 40 states.

“Old way” – in person, with identification confirmed, with active assent of party executing documents.

Bar counsel has prosecuted many lawyers for false notarizations, usually under Rule 8.4(c) (prohibiting conduct involving “dishonesty, fraud, deceit, or misrepresentation”).

- Matter of Driscoll, 447 Mass. 678 (2006). A lawyer represented his employee and her bank at a loan closing. The employee forged her spouse’s signature on a loan document and lied to the lawyer about it. The lawyer notarized the spouse’s signature. The lawyer was found guilty of one count of making a false statement to a bank in violation of 18 U.S.C. § 1014 and sentenced to probation. The bank suffered no harm, but the SJC found that the lawyer had a conflict in representing the employee that resulted in his placing too much confidence in her to the detriment of the bank/client, thus warranting a one-year suspension.

## Avoiding Scammers

► Rules implicated (a non-exclusive list):

- Rule 1.15(b) and (c) – Lawyer’s duty to safeguard funds in trust pending disbursement to the client or rightful owner
- Rule 1.1 – (“Competence”): As reflected in Comment [8] to the rule, competence requires a lawyer to “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”
- Rule 5.3(b) – “[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]” (Rule 5.3(a) imposes the same responsibility on partners toward associates.)

► Ways to Avoid:

- Make Sure You Have Good Funds
- Wire instructions
- Positive Pay
- Limiting Access to Your Accounts

## Resources

- If you have ethical questions, you can call the Office of Bar Counsel at 617-728-8750, on Monday, Wednesday, and Friday, from 2:00 p.m. to 4:00 p.m., and speak to an assistant bar counsel.
- Check out our website at [www.mass.gov/obcbbo](http://www.mass.gov/obcbbo) (includes links to the rules; answers to frequently asked questions; articles on ethics prepared by assistant bar counsel; disciplinary decisions dating back to 1999; information on upcoming programs and new developments; and other resources).
- Trust account training programs – monthly free programs (check our website); also training/information is available through LOMAP, the Mass IOLTA Committee, and periodic MCLE and bar association courses.
- Ethics Helpline – The REBA Ethics Section offers individual, one-on-one advice to members who encounter conflicts concerns or ethical issues in their day-to-day practice. This program is intended to offer confidential, practical and pragmatic advice to members with immediate, fact-based concerns. For more information, email [ethics@reba.net](mailto:ethics@reba.net).

## **RULES OF PROFESSIONAL CONDUCT RULE 1.5 (FEES)**

(b) (1) Except as provided in paragraph (b)(2), the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

### **REBA ETHICS SECTION RULE 1.5 FEE DISCLOSURE**

#### **THE RULE: 1.5 FEES**

*SCOPE OF REPRESENTATION  
BASIS OF FEES  
SHALL BE COMMUNICATED  
TO THE CLIENT  
IN WRITING*

#### **NO MORE REQUIRED:**

NO LETTER  
NO CLIENT SIGNATURE  
MAY BE FROM 3<sup>RD</sup> PARTY, NOT THE ATTORNEY (E.G. BANK)

#### **WITHOUT COMPLIANCE**

POSSIBLE DISCIPLINE  
NO STANDING IN EVENT OF FEE DISPUTE  
POSSIBLE SOURCE OF MALPRACTICE REGARDING SCOPE

#### **KEEP CLEAR WHO IS THE CLIENT?**

SELLER  
BUYER/BORROWER  
LENDER

## **CLIENTS:**

IF SELLER: CANNOT REPRESENT LENDER OR PROVIDE TITLE SERVICES TO BUYER

IF LENDER: RULE SATISFIED BY COMMITMENT LETTER OR TRANSCRIPT

NO REASON WRITTEN COMMUNICATION CANNOT BE FROM THE CLIENT

RELATIONSHIP WITH BUYER:

FREE P&S  
DEED FREE OR OTHERWISE

RELATIONSHIP WITH SELLER:

DISCHARGE TRACKING AND TITLE CLEARING

IF LENDER WHERE FEES PAID BY BORROWER AND FEES NOT STATED  
(R. 4.1 Truthfulness in Statements to Others)

UNREPRESENTED BUYER: RELIANCE ON LENDER COUNSEL FOR TITLE

## **IMPORTANCE OF NOTICE OF NON-REPRESENTATION TO APPROPRIATE PARTIES**

### **WHY GO BEYOND THE RULE?**

INFORM CLIENT

AVOID LIABILITY (WHAT IS EXCLUDED FROM SCOPE?)

AVOID OR RESOLVE FEE DISPUTE

ESSENTIAL FOR FIXED FEE ENGAGEMENTS (WHAT DOES THE FEE COVER?)

ADDITIONAL PROVISIONS

RETAINER, TIME OF PAYMENT AND INTEREST

OWNERSHIP AND DISPOSITION OF FILES

WIRE TRANSFER WARNING

ESCROW MANAGEMENT AND DISPUTE RESOLUTION

### **BBO ACTION:**

Virtually no BBO cases involving real estate transactions, and in the non-real estate cases, it rarely stood alone as the only offense (See: Public Reprimand No 2021-3 Stefan J. Rozembersky)

**Written Fee Arrangement:  
Representation of Seller in a Residential Purchase Transaction**

Addressee Name

Re: Sale of (property address)

Dear \_\_\_\_\_:

Thank you for the opportunity to represent you in matters relating to the sale of the above referenced premises. I/We write to you in accordance with Massachusetts Rules of Professional Conduct 1.5(b) which requires me/us to communicate to you in writing the scope of my/our representation and the basis or rate of my/our fees and expenses charged.

**Scope of Representation**

The scope of my/our representation will include some or all of the following services:

- Reviewing offers to purchase and any other related documentation;
- Drafting, reviewing, and/or negotiating the purchase and sale agreement;
- Calculating adjustments;
- Attending the closing and supervising the sale;
- Consulting with you as to the terms and particulars of the transaction;
- Communicating with brokers, attorneys and/or the buyer;
- Drafting the deed and power of attorney;
- Obtaining a copy of the current deed from the appropriate Registry of Deeds or Land Court District.

Unless otherwise expressly agreed in writing, the scope of my/our engagement shall be limited to the foregoing and shall not include issues of valuation; advice on structural, mechanical, building code, septic, engineering or survey issues; or matters relating to zoning, wetlands or hazardous substances.

**Fees and Costs**

In contemplation of the above-described services, you have agreed to pay a flat fee of \_\_\_\_\_ plus costs for my/our services in this matter which will be payable at [time of closing, date certain, etc.]. Costs are likely to include the following:

\_\_\_\_\_.

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

**OR**

In contemplation of the above-described services, you have agreed to pay my/our hourly rate of \_\_\_\_\_ for each hour worked on this matter, plus costs. Costs are likely to include the following:

\_\_\_\_\_.

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

My/Our fees and costs will be payable at [time of closing, date certain, etc.].

**OR**

I/we will bill you for my/our services on a monthly basis and payment will be due within \_\_\_\_\_ days of [the date of the bill, receipt of the bill].

I/We appreciate the opportunity to be of service to you in this transaction. Please do not hesitate to call me/us with any questions you may have about any aspect of my/our representation.

I/We would also appreciate your signature below acknowledging your receipt and understanding of the terms of this letter and my/our prospective representation.

Sincerely,

Agreed to and acknowledged:

\_\_\_\_\_  
Seller

*Comments*

*Revisions to Mass. R. P. C. 1.5 went into effect on January 1, 2013. With limited exceptions, the amended rule requires that for all representation commenced on or after January 1, 2013, a lawyer must, “within a reasonable time” after commencement of the representation, provide the client with a writing which sets forth “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible.” The “writing” does not have to be in letter form so long as it contains the two required pieces of information.*

*A writing is not required under the following four (4) circumstances:*

- *Where the lawyer regularly represents a client, originally fulfilled the writing requirement and there has been no change in the basis or rate of the fee.*
- *Where the representation will consist of a “single-session legal consultation.”*
- *Where the lawyer reasonably expects the total fee to the client will be under \$500.*
- *Where an indigent fee is imposed by a court.*

*In the absence of one of the four enumerated exceptions, a lawyer who represents either a buyer or a seller in a real estate transaction is required to provide the client with a written fee arrangement as described in Rule 1.5(b).*

*In transactions where the lawyer represents the lender, the lender is often – although not always – a regularly represented client and thus a writing is not required for each new transaction. However, if the lawyer does not regularly represent the lender, a written fee arrangement is necessary.*

Adopted May 6, 2013

**Written Fee Arrangement:  
Representation of Buyer in a Residential Purchase Transaction**

Addressee Name

Re: Purchase of (property address)

Dear \_\_\_\_\_:

Thank you for the opportunity to represent you in matters relating to the purchase of the above referenced premises. I/We write to you in accordance with Massachusetts Rules of Professional Conduct 1.5(b) which requires me/us to communicate to you in writing the scope of my/our representation and the basis or rate of my/our fees and expenses charged.

**Scope of Representation**

The scope of my/our representation will require some or all of the following services:

- Drafting offers to purchase and any other related documentation;
- Drafting, reviewing, and/or negotiating the purchase and sale agreement;
- Calculating adjustments;
- Attending the closing and supervising the purchase;
- Consulting with you as to the terms and particulars of the transaction;
- Communicating with brokers, attorneys and/or the seller;
- Drafting and negotiating any extension(s) for financing and closing dates, if necessary;

Unless otherwise expressly agreed in writing, the scope of my/our engagement shall be limited to the foregoing and shall not include issues of valuation; advice on structural, mechanical, building code, septic, engineering or survey issues; or matters relating to zoning, wetlands or hazardous substances.

**Fees and Costs**

In contemplation of the above-described services, you have agreed to pay a flat fee of \_\_\_\_\_ plus costs for my/our services in this matter which will be payable at [time of closing, date certain, etc.]. Costs are likely to include the following:

\_\_\_\_\_

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

**OR**

In contemplation of the above-described services, you have agreed to pay my/our hourly rate of \_\_\_\_\_ for each hour worked on this matter, plus costs. Costs are likely to include the following:

\_\_\_\_\_

Although I/we have endeavored to identify all likely costs, you will be responsible for paying all costs that are incurred in the course of the representation, whether or not the costs are identified herein.

My/Our fees and costs will be payable at [time of closing, date certain, etc.].

**OR**

I/we will bill you for my/our services on a monthly basis and payment will be due within \_\_\_\_\_ days of [the date of the bill, receipt of the bill].

I/We appreciate the opportunity to be of service to you in this transaction. Please do not hesitate to call me/us with any questions you may have about any aspect of my/our representation.

I/We would also appreciate your signature below acknowledging your receipt and understanding of the terms of this letter and our prospective representation.

Sincerely,

\_\_\_\_\_

Agreed to and acknowledged:

\_\_\_\_\_  
Seller

*Comments*

*Revisions to Mass. R. P. C. 1.5 went into effect on January 1, 2013. With limited exceptions, the amended rule requires that for all representation commenced on or after January 1, 2013, a lawyer must, "within a reasonable time" after commencement of the representation, provide the client with a writing which sets forth "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible." The "writing" does not have to be in letter form so long as it contains the two required pieces of information.*

*A writing is not required under the following four (4) circumstances:*

- Where the lawyer regularly represents a client, originally fulfilled the writing requirement and there has been no change in the basis or rate of the fee.*
- Where the representation will consist of a "single-session legal consultation."*
- Where the lawyer reasonably expects the total fee to the client will be under \$500.*
- Where an indigent fee is imposed by a court.*

*In the absence of one of the four enumerated exceptions, a lawyer who represents either a buyer or a seller in a real estate transaction is required to provide the client with a written fee arrangement as described in Rule 1.5(b).*

*In transactions where the lawyer represents the lender, the lender is often – although not always – a regularly represented client and thus a writing is not required for each new transaction. However, if the lawyer does not regularly represent the lender, a written fee arrangement is necessary.*

Adopted May 6, 2013

## APPLICATION OF INTEREST

Statements, when rendered, are payable upon receipt. We reserve the right to apply interest at the rate of 1.5% percent per month on balances outstanding more than 30 days.

## DISPOSITION OF FILES

The contents of our files (other than internal notes and memoranda), belong to you, the client, and, at the conclusion of our engagement, if you would like to have the file delivered to you or another designated person, you are requested to provide us with delivery instructions and pay all copy and delivery charges within one year of the conclusion of our engagement. After that time, we reserve the right to send the original file to storage, to electronically scan and retain it in digital format or to destroy it at our option.

## WIRE TRANSFER WARNING

Please be advised that we will never provide, accept or honor wire instruction sent by email, and you are advised to do the same.

## REPRESENTATION OF LENDER (FOR BUYER ONLY)

If, in addition to the foregoing, you ask us to close your mortgage loan for the lender, you should be aware that, while you may benefit from such an arrangement, our primary obligation in the mortgage transaction is to the lender.



## **REBA Ethical Standard No. 5**

### **Wire Transfer Funds**

Any attorney who has been asked to wire transfer funds in connection with a closing may, in the case of reasonable doubt as to the authenticity or correctness of the wire instructions, refuse to execute the wire transfer.

Adopted November 6, 2017

SPECIMEN

## REBA Practice Standard No. 25

### Electronic Funds Transfers

It is better practice for the conveyancing attorney to require receipt of significant funds and, upon a request that is reasonable under the circumstances, to make disbursement of significant funds by way of an electronic funds transfer (an “EFT” or “wire transfer”) rather than by bank check or cashiers check, both of which are subject to various holding periods as set forth in Regulation J at 12 CFR 210 and Regulation CC at 12 CFR 229.

#### *Comment*

*Money received via EFT enables immediate use of those funds to provide seller proceeds, as well as mortgage payoffs and eliminates delay as well as the inadvertent “kiting” of funds in the closing attorney’s IOLTA account while awaiting checks to be credited.*

*See R.E.B.A. v NREIS, 459 Mass. 512, 687 (2011) which expresses the duties and related ethical obligations of the closing attorney concerning loan proceeds:*

*“In addition to marketability of title, a closing attorney has a duty to effectuate a valid transfer of the interests being conveyed at the closing. This includes not only the actual transfer of title on behalf of the attorney's client, but also the transfer of the consideration for the conveyance—typically mortgage loan proceeds in the case of the mortgage transactions at issue here. With respect to such loan proceeds, the duty derives in part from rules of professional conduct. See Matter of Franchitto, 448 Mass. 1007, 1008, 860 N.E.2d 656 (2007), citing Mass. R. Prof. C. 1.15(a), 426 Mass. 1363 (1998), and G.L. c. 183, § 63B.<sup>FN48</sup>*

*FN48. See Part 4(a)(iii), supra, where we discuss the good funds statute. The statute, among other things, stipulates that mortgage proceeds owed to a borrower may be disbursed to “the mortgagor, the mortgagor's attorney or the mortgagee's attorney.”*

*G.L. c. 183, § 63B. If the funds are disbursed to one of the attorneys, that attorney is obligated under the statute as well as professional conduct rules to see to it that such disbursements are properly and timely transferred to the appropriate recipient or recipients. See Matter of Franchitto, 448 Mass. 1007, 1008, 1010, 860 N.E.2d 656 (2007) (upholding public reprimand of attorney whose lender client fraudulently failed to fund loans it had engaged attorney to close; attorney violated both disciplinary rules and good funds statute).”*

Adopted May 7, 2012

HENRY J. DANE

PROPOSED ETHICS/PRACTICE STANDARD  
RE: DELIVERY OF PROCEEDS

DRAFT JUNE 5, 2017

“The sole obligation of a conveyancing attorney with regard to the delivery of the seller's proceeds in a residential transaction is to deliver a check after the deed has been recorded on the attorney's Massachusetts IOLTA account (or, upon request and the payment of an additional fee, a bank cashier's or treasurer's check) drawn to the exact names of seller(s) as set forth in the deed, or in accordance with written instructions delivered at the closing, signed by all sellers shown on the deed. Any other means of delivery shall be in the discretion of the conveyancing attorney who may impose an appropriate charge for such service.”

WE WILL NEVER SEND YOU WIRE INSTRUCTION BY EMAIL

Henry J. Dane, J.D., Ph.D.  
Dane Brady & Haydon, LLP, Attorneys-at-Law  
PO Box 540 Concord, Massachusetts 01742  
Email: [hdane@danelaw.com](mailto:hdane@danelaw.com)  
Phone: 978-369-8333 Ext. 18  
Fax: 978-369-3106

# DB&H

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PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

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PLEASE CALL DANE BRADY & HAYDON, LLP AT 978-369-8333 FOR INSTRUCTIONS BEFORE YOU SEND ANY FUNDS TO OUR OFFICE. BECAUSE OF THE POTENTIAL FOR FRAUD, PLEASE DO NOT HONOR ANY WIRE INSTRUCTIONS SENT TO YOU BY E-MAIL INCLUDING THOSE THAT APPEAR TO COME FROM OUR OFFICE. IF YOU REQUEST THAT ANY FUNDS BE SENT BY WIRE, WE CAN ONLY ACCEPT YOUR INSTRUCTIONS IF GIVEN ON OUR OWN FORM. NEITHER ORIGINAL INSTRUCTIONS NOR ANY CHANGES WILL BE ACCEPTED WHETHER BEFORE OR AFTER THE CLOSING IF DELIVERED BY E-MAIL (EITHER OPEN OR SECURE).

7. **PURCHASE PRICE:**

The agreed purchase price for said premises is Two Million Nine-Hundred and Seventy Thousand (\$2,970,000.00) Dollars and 00/100, of which

\$	10,000.00	has been paid with the Offer to Purchase
\$	138,500.00	have been paid as a deposit this day and
\$	2,821,500.00	are to paid at the time of delivery of the deed by <u>wire transfer,</u>
\$	2,970,000.00	<b><u>in accordance with signed hard copy instructions given by the Seller or the Seller's Attorney at or prior to such time.</u></b>

**Neither the Seller nor the Seller's attorney will ever provide wire instruction by means of email, and the Buyer is advised not to accept wire instructions transmitted by email regardless of the source**

# Outline for Safe and Compliant Distribution of Closing Funds

## I. IS THE MONEY THERE?

Good funds law 183 sec. 16B - re: mortgage proceeds (binding on lenders only?)

Certified check, bank treasurer's check, cashiers check, transfer between accounts in same bank, or wire [FR or automated clearing house]

Good Funds standards apply to non-mortgage funds?

Safe to take IOLTA Checks?

worry about other attorney being rendered insolvent by scam

Will you bank wire out uncollected funds - subject to reversal

Can you close on uncollected funds

Funds wired in - what if your instructions to buyer or lender are hacked

Confirmation of funding with your bank: telephone, online, email

## II. IS THE MONEY SAFE

FDIC protection of IOLTA Accounts - limits?

Safer than individual, insured accounts for amounts in excess of \$250,000

Protection of accounts from unauthorized access

Separate from recording and Simplifile accounts

No ACH

On-line access – “view only”

# Outline for Safe and Compliant Distribution of Closing Funds *(cont'd)*

## III. DISTRIBUTION

Who gets it: name on deed or mortgage note

Or by written direction of the above

Or "Attorney For" (?) with or without a power of attorney

What if seller won't accept IOLTA check as provided in P&S

Wire instructions

Signed

Complete

As early as possible

Limitations on alteration

Mailed, or delivered in person at closing

No email or fax:

Indemnification

## OUTGOING WIRE TRANSFER PROCEDURE

1. NO WIRE INSTRUCTIONS OR CHANGE TO THEM ARE TO BE GIVEN OR ACCEPTED IF TRANSMITTED VIA EMAIL. NO EXCEPTIONS.
2. Instructions for outgoing wire transfers must be given on our own "Wire Transfer Authorization" form (Exhibit A) which must be signed by the verified recipient. If signed under a Power of Attorney, the POA must be reviewed for due authority and attached to the Authorization Form.
3. Wire instructions for Outgoing Mortgage Discharge payments may be accepted if received via fax (but not email), but ABA and account number must be verified by independent phone or by reference to our list of approved wire information for that lender. Funding must be verified by reference to settlement statement/funds reconciliation ledger.
4. All Outgoing Wire Transfers will be from our IOL TA XYZ account with ABC Bank only in writing on the Bank's Faxed Wire Transfer Order Form (Exhibit B) signed by an authorized signatory and delivered to the bank via fax or by hand to the bank branch.
5. After funds are verified, and Registry Recording (if necessary to the funding of the transaction) is confirmed, the Bank's Faxed Wire Transfer Order Form will be sent to the Wire Room via fax at the number on the Form.
6. After the form is faxed to the Bank, the Wire Room is called at the phone number on the form to verify and confirm the faxed instructions. The person making the call will be required to give their own individual PIN number.
7. Before initiating the Wire Transfer, the Wire Room will call back to confirm the originating phone call from our office. Again, the PIN number of the confirming party will be required by the Bank.
8. The transaction will be confirmed by an email sent to us from [ewire@abcbank.com](mailto:ewire@abcbank.com).



**Black & Blue, LLP**  
Phone (617) 555-1212; Fax (617) 555-1213  
**WIRE TRANSFER AUTHORIZATION**

PROPERTY ADDRESS: \_\_\_\_\_

NAME OF REQUESTOR: \_\_\_\_\_

PHONE NO. & EMAIL OF REQUESTOR: \_\_\_\_\_

NAME OF RECEIVING BANK: \_\_\_\_\_

ADDRESS OF RECEIVING BANK: \_\_\_\_\_

ACCOUNT NUMBER: \_\_\_\_\_

ABA/ROUTING NUMBER OF RECEIVING BANK: \_\_\_\_\_

TITLE OF DESTINATION ACCOUNT: \_\_\_\_\_

ADDRESS OF ACCOUNT HOLDER: \_\_\_\_\_

IN THE EVENT THE RECEIVING ACCOUNT REQUIRES FURTHER CREDIT INFORMATION:

FOR FURTHER CREDIT TO ACCOUNT NUMBER: \_\_\_\_\_

FOR FURTHER CREDIT TO ACCOUNT NAME: \_\_\_\_\_

OTHER SPECIAL INSTRUCTIONS: \_\_\_\_\_

We hereby request that a wire transfer of our funds be initiated in accordance with these instructions. We have confirmed and assume full responsibility for the legibility, accuracy and completeness of this information. We agree to promptly reimburse Black & Blue, LLP for any costs or expenses incurred in carrying out these instructions, and will defend, indemnify and hold said law firm, its members and employees harmless on account of any loss, damage or delay from whatever source in completing the requested transfer.

NOTE: ORIGINAL AUTHORIZATIONS OR CHANGES SENT BY EMAIL **WILL NOT BE ACCEPTED**. A NEW AUTHORIZATION FORM WILL BE REQUIRED FOR **ANY** CHANGES TO PREVIOUSLY GIVEN INSTRUCTIONS.

\_\_\_\_\_  
Signature \*

\_\_\_\_\_  
Signature \*

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Printed Name

Date: \_\_\_\_\_

\*If Executed under a **Power of Attorney**, please attach a copy to this form.

FOR OFFICE USE ONLY:

ABA # VERIFIED ONLINE \_\_\_\_\_ (<http://www.checkcomposer.com/fnnbanksearch.aspx>)

TELEPHONE VERIFICATION OF BANK INFORMATION \_\_\_\_\_  
Initials

\$\$ AMOUNT VERIFIED AGAINST RECONCILIATION \_\_\_\_\_  
Initials