



# Ethical Issues and the BBO: Helping Conveyancers Avoid Both

A PRESENTATION OF THE OFFICE OF BAR COUNSEL AND THE REAL  
ESTATE BAR ASSOCIATION – NOVEMBER 14, 2022



# 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.
- ▶ 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.



# Bounced 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:
  - ▶ IOLTA Account Check register
  - ▶ Individual Client Ledgers for each client matter, AND
  - ▶ Bank Ledger for any personal / firm funds to cover bank fees (and to track interest)



# IOLTA Recordkeeping

- ▶ 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*



# IOLTA Recordkeeping

- ▶ 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



# IOLTA Recordkeeping

- ▶ 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 \$200.00 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

- ▶ 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.



# IOLTA Recordkeeping

## ▶ 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 a 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)

- ▶ Case Holding:
- ▶ IOLTA funds are not within the Abandoned Property statute. The disposition of such funds within the Court's exclusive jurisdiction to regulate the practice of law.
- ▶ Abandoned IOLTA funds cannot escheat to the Treasurer because investigating whose funds could be invasive of client confidentiality.
- ▶ Therefore, OBC will investigate, and the Court will order the funds to be transferred to the Massachusetts IOLTA Committee ("MIC")
- ▶ See the OBC article at [massbbo.org](https://massbbo.org): "*Olchowski Decision and the Disposition of Unidentified and Unclaimed IOLTA Funds*"



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

- ▶ Implementation:
- ▶ OBC is now processing applications to turn over unclaimed or unidentified funds to the Massachusetts IOLTA Committee.
  - ▶ “Unclaimed”: The lawyer cannot locate the owner of the funds.
  - ▶ “Unidentified”: The lawyer cannot determine whom the funds belong to.

Applicants must show they have made diligent efforts to identify and locate the owners of the funds.

No amnesty: Coming forward in this way does not guaranty that the lawyer will avoid discipline for any recordkeeping or other deficiencies that led to the accrual of the unclaimed or unidentified funds.



# Matter of Olchowski

- ▶ To request an application form to turn over funds to the MIC, go to our website, or contact Donna Waite at the OBC:
- ▶ 617-728-8782
- ▶ [d.waite@massbbo.org](mailto:d.waite@massbbo.org)



# Engagement Letters

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- ▶ Rule 1.5(b) - Engagement letters are required for any matter unless the lawyer reasonably expects that the fee will be less than \$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
    - ▶ Note: Under the MRPCs, any conflict waiver must be informed and consented to in writing. See Mass. R. Prof. C. 1.7(b).



# Conflicts of Interest

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- ▶ 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?



# Conflicts of Interest

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- ▶ 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 3 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 3 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.



# Failure to Disclose Fees and Terms

- ▶ Matter of Barry Greene, 33 Mass. Att'y Disc. R. 163 (2017) and Matter of Evan Greene, 33 Mass. Att'y Disc. R. 169 (2017). These were also conflict of interest cases: the respondents represented the lender in multiple purchase transactions in which the respondents themselves were the purchasers and borrowers. Even worse, although serving as lender's counsel, they misrepresented and failed to disclose to the lender the terms of the transactions, which included a lease to the sellers (who were financially distressed homeowners from whom they also collected fees for buying their properties) that included an option to purchase. Both lawyers received multi-year suspensions.
- ▶ Undisclosed Expense Markups: In a pending matter, a conveyancer is charged with regularly marking up his fee for plot plans \$75 each above the \$125 he paid to the survey company, without disclosing that he was getting this additional money. Charged violations include Rule 1.5(a) (unreasonable amount of expenses) and Rule 1.4 (client communication).



# Failure to Disclose Fees and Terms (continued)

- ▶ Owner's Title Insurance Coverage: A lawyer's sale of owner's title insurance coverage to a client is a transaction that is subject to the provisions of Mass. R. Prof. C. 1.8, which generally covers financial or business transactions between a lawyer and client. See Rule 1.8, Comment [1] and Rule 5.7, Comment [9].
  - ▶ Requirements:
    - ▶ (i) The transaction must be fair to the client and its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood.
    - ▶ (ii) The client must be advised, in writing, of the desirability of seeking the advice of independent legal counsel; and given a reasonable opportunity to obtain such advice.
      - ▶ "Reasonable opportunity" implies that these requirements be met well in advance of the closing. As with a fee agreement or a conflict waiver to permit dual (buyer-lender) representation, the lawyer cannot just present the client with a boilerplate form at closing.
    - ▶ (iii) The lawyer must obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role.



# Avoiding Scammers/Cybersecurity

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- ▶ 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.)



# Avoiding Scammers/Cybersecurity

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- ▶ Ways to Avoid Scams:
  - ▶ Make Sure You Have Good Funds
  - ▶ Wire instructions
  - ▶ Positive Pay
  - ▶ Limiting Access to Your Accounts



# Resources

- OBC 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 the BBO/OBC 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 the BBO/OBC website); also training/information is available through LOMAP, the Mass IOLTA Committee, and periodic MCLE and bar association courses.
- REBA 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 practices. This program offers confidential, practical, and pragmatic advice to members with immediate, fact-based concerns. For more information, email [ethics@reba.net](mailto:ethics@reba.net).



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