

Dinsmôre

Client Fund Management and Other Ethical Duties



Today's Agenda



- Disciplinary Process
- Trust Account Basics
- Commingling, Overdrafts, and Other Trust Account Issues
- Flat Fees
- Recent Case Law





Relevant Rules

- Rule 1.5: Fees and Expenses
- Rule 1.15: Safekeeping Funds and Property
- Rule 1.8(j): Conflict of Interest: Current Clients: Specific Rules
- Rule 5.4: Professional Independence of a Lawyer

The Disciplinary Process

- Disciplinary Counsel / Certified Grievance Committees
 - Investigation
 - Letters of Inquiry
- Board of Professional Conduct
 - Formal Complaint
 - Adjudicate Cases
- Supreme Court of Ohio
 - Final Decision

The Disciplinary Process

What To Do If You Get A Grievance

- Don't panic. Open it.
- Be responsive whether it concerns you or not
- Seek help if necessary

The Disciplinary Process

2020 Statistics

- Approximately 38,000 lawyers in Ohio
- 2,994 grievances filed in 2020
 - 69% with ODC; 31% with CGCs
- 22% dismissed on intake; 78% opened for investigation
- 72 formal complaints filed with BPC
 - Approximately 2% of total grievances

The Disciplinary Process

Top Disciplinary Offenses

1. Neglect
2. IOLTA
3. Excessive Fees
4. Personal Misconduct
5. Judicial Misconduct

Trust Account Basics

16,203+ 
7,410+ 
4,991+ 
2,007+ 



IOLTA Defined

“Interest on Lawyers’ Trust Accounts”

- Client Trust Account: checking or savings account that lawyer establishes to hold funds belonging to clients or others
- Required for all lawyers with offices in Ohio to have account with bank physically in Ohio
- All interest goes to Ohio’s legal aid fund

IOLTA Requirements

- 2 Main Rules:
 - Rule 1.5: Fees & Expenses
 - Rule 1.15: Safekeeping of Funds and Property
- Other Rules:
 - Rule 1.8: Conflicts, Specific Rules
 - Rule 5.4: Professional Independence of Lawyer
 - Rules 1.1, 1.2 and 1.4: Competence, Scope of Representation, and Communication

3 Fundamentals of IOLTA

1. Identify funds held in trust
2. Keep separate client funds and lawyer funds (2 accounts)
3. Prompt accounting upon request--R. 1.15(d).
 - Duty on lawyer, not 3rd party

6 Affirmative Duties for Lawyer Trust Accounts

1. Prompt notice to client when funds received
2. Identify and label funds and property
3. Place funds in trust
4. Maintain complete and accurate records
5. Provide accounting to client—monthly ideal
6. Promptly pay or deliver funds back to client

Important Trust Account Tips

- Implement appropriate safeguards on funds and property—avoid scams
- Promptly notify client and deliver funds
- Provide accounting promptly upon request
- Document—ledgers, bank statements, deposit slips, etc. Can be electronic

Important Trust Account Tips

- Do not let the IOLTA balance go negative
- Can use your own funds to cover bank fees
- Perform and maintain monthly reconciliation
- Be sure funds are actually available before withdrawal

Important Trust Account Tips

IOLTA Red Flags

- Checks written for clearly personal expenses (cable/internet bills, bar dues, liquor, country club dues, etc.)
- Account not titled as trust account or IOLTA
- Missing or inadequate records
- Using IOLTA to “hide” money from IRS, creditors, court, ex-spouse or soon-to-be ex-spouse

Required Records

16,203+ 
7,410+ 
4,991+ 
2,007+ 



Required Records

R. 1.15 requires all of the following:

1. Copy of fee agreements with each client;
2. Record for each client's funds;
3. Record for each bank account with name, date, amount, client credit/debit, and balance;
4. All bank statements, deposit slips, & cancelled checks for each account;
5. Perform & retain monthly reconciliation of above.

Separation of Funds

- Keep your funds and the clients' funds separate
 - Especially be cautious with checks
 - Different color
 - Different bank
 - Different numbering sequence
 - Can keep check records electronically
- Check register tracks all checks written from account, deposits, and keeps running balance
- Sloppiness is a red flag for ODC

General Ledger

- Contents
 - Lists all transactions in trust account in separate client and administrative ledgers
 - Can keep records electronically
- All deposits and withdrawals recorded here
- Each deposit and withdrawal should be recorded on each client ledger sheet
- Every transaction required to be recorded

General Ledger Example

- Client gives lawyer check for advance retainer of \$2,500, as well as \$200 in cash for filing costs. Fee agreement is for hourly fee of \$200.
- Deposit ALL funds in trust (\$2,500 + \$200)
- Lawyer then will have to write check from trust account to clerk of court for filing costs.
- As lawyer earns fees, lawyer may withdraw them from the trust account

Example of Client Ledger

Ledger for Client	Transaction	Deposit	Withdrawal	Balance
March 1, 2021	Retainer	\$2,500.00		\$2,500.00
March 1, 2021	Costs	\$200.00		\$2,700.00
March 1, 2021	Filing fee, Check No. 2415 to Clerk		\$200.00	\$2,500.00
March 31, 2021	Earned fees, Check No. 2420 to Office Acct.		\$1,200.00	\$1,300.00

Example of General Ledger

Date	Client	Transaction	Check No.	Received	Paid	Balance
3-01-21	Smith	Retainer		\$2,500.00		\$2,500.00
3-01-21	Smith	Costs		\$200.00		\$2,700.00
3-01-21	Blue	Retainer		\$2,500.00		\$5,200.00
3-01-21	Smith	Clerk Dist. Ct.	2415		\$200.00	\$5,000.00
3-31-21	Blue	Firm Off. Acct. Earned Fees	2418		\$1,800.00	\$3,200.00
3-31-21	Smith	Firm Off. Acct. Earned Fees	2420		\$1,200.00	\$2,000.00

Commingling, Overdrafts, & Other Trust Account Issues

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Overdraft Notification

- Banks are required to notify ODC pursuant to ORC 4705.10(A)(4)
- ODC will send a letter of inquire based on overdraft notification and request a written explanation and copy of your records

Overdraft Notification

Records ODC will want:

- Monthly bank statements
- Individual client ledgers
- Proof overdraft and fees paid, and the source of the payment
- Remember, mistakes happen

Overdraft Notification

How NOT to response to a LOI:

- “I would once again emphasize to you, and state that you are missing the point. * * *.” *OCD v. Eichenberger*, 2016-Ohio-3332
- “* * * it is very unfair to attempt to blame the situation on me, or to attempt to state that I caused a deficiency in the bank account balance.” *Id.*
- “I find your threats to subpoena my bank records to be totally out of line and offensive. The authority of your office in this simple and easily explained matter surely cannot extend to such overly broad and invasive limits.” *Id.*

Overdraft Case Law

Cleveland Metro. Bar Assn. v. Gay, 2018-Ohio-2170

- Disciplinary history: 1994 indefinite suspension for stealing funds from father's estate. Reinstated in 2002
- Properly disbursed \$5,747.56 to pay fees and reimburse expenses
- Several days later, disbursed identical amount creating an overdraft

Overdraft Case Law

Cleveland Metro. Bar Assn. v. Gay, 2018-Ohio-2170

- Admitted did not maintain separate ledger sheets for clients
- Failed to have clients sign disbursement sheets and closing statements
- Admitted to making personal loan to client of \$300
- Admitted to withdrawing funds from IOLTA to pay for work before deposited settlement proceeds into account

Overdraft Case Law

Cleveland Metro. Bar Assn. v. Gay, 2018-Ohio-2170

- Sanction: One-year suspension, fully stayed
- Conditions:
 - 2 yrs monitored probation, including oversight of office management and IOLTA procedures
 - Complete at least 6 hrs CLE in law practice management and IOLTA
 - No further misconduct

Commingling

- **R. 1.15(a):** lawyer must keep client and third party funds in interest bearing account separate from that of lawyer's business and personal property
- Must separate your funds from client's funds as soon as it is earned

Commingling

- Cannot keep a “cushion” in the client trust account to avoid an overdraft
 - That equates to commingling
- R. 1.15(b) allows a lawyer to deposit own funds into trust for sole purpose of paying or obtaining waiver of bank service charges, but only in an amount necessary for that purpose
- Amount should be de minimus

Commingling

- A law firm is a business
- It is not a personal piggy bank
- Do not use it for your personal expenses and do not use client trust account for business accounts

Commingling Cases

Disciplinary Counsel v. Eichenberger, 2016-Ohio-3332

- Subpoena for 2 yrs of bank records revealed more than 200 checks for personal and business expenses taken from IOLTA
- Commingled funds, no records, noncooperation and misstatements in disciplinary process; 2-year suspension, 1 year stayed (4-3 decision)

Commingling Cases

Columbus Bar Assn. v. Sabol, 2021-Ohio-2059

- From 1983 – 2019, routinely deposited & held client funds in operating account & paid personal expenses from that account at times before fees earned
- However, she did maintain an accounting of operating account with running balances and services rendered against each client's retainer, and as a result, could refund unused retainers
- 6-month stayed suspension

Duty to Deliver Funds Promptly

- Rule 1.15 requires lawyers to “promptly” deliver funds to client or third party
- If disburse client funds from trust BEFORE check clears, then risk using funds of another client to pay the check if it is not honored
- May hold client funds for *reasonable* period of time to ensure check clears
- Reasonable time: one week to 10 days. *See, Adv. Op. 2016-7*

Duty to Deliver Funds Promptly

- Prior to disbursing funds, prudent to contact bank to ensure funds available for distribution
- Explain to clients that you cannot immediately write them a check when the settlement check is received
- This also helps to avoid a scam situation where lawyer asked to deposit check in trust and then provide funds from that deposit to a third party before check is later determined to be fraudulent

Duty to Deliver Funds Promptly

Example of Settlement Deposit:

- Lawyer settles case, on behalf of client, with the insurance company
- Lawyer receives \$100,000 check. Lawyer's fees are \$33,000, and lawyer advanced \$3,000 in costs to the client
- Can lawyer deposit entire \$100,000 check into trust account?

Duty to Deliver Funds Promptly

Example of Settlement Deposit:

- Yes, the lawyer and client must both endorse the check, and then deposit into trust account
- When lawyer knows funds are available, then can disburse funds to self and to the client
- Again, important to ensure that check is honored to avoid inadvertently taking money from other clients

Inability to Locate Client

- Follow the statutory procedure for the disposition of unclaimed funds in ORC Ch. 169. *See, Adv. Op. 2008-3*
- Reporting unclaimed funds of a client whose identity or whereabouts is unknown does not violate the ethical duties of safekeeping a client's funds under R. 1.15 or to protect a client's confidentiality under R. 1.6.

Lawyer Scams Involving IOLTA

Scams to Avoid:

- *ODC v. Denicola*, Bd. Case. No. 2014-007
- *Iowa Disciplinary Board v. Wright*, 840 N.W.2d 295 (2013)
- Be vigilant to avoid scams

Fees

16,203+ ▲
7,410+ ▲
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Credit Cards

- Lawyers can accept payment of costs and expenses by a client via credit card. See, Adv.Op. 2007-3
- Lawyer responsible for brokerage charges or fees associated with use of credit card
- Credit card fee, like other service charges must be paid from operating account, NOT trust account
- Be cautious when using payment apps, such as Venmo, PayPal, etc.

Advanced Fees

- R. 1.15(c): trust account legal fees, and expenses paid in advance required to be deposited in trust and withdrawn only as fees are earned or expenses are incurred
- Earned fees should be disbursed from trust account into office account promptly
- Disbursement should be done on a regular billing cycle of 30 days
 - Can be done more often
- If earned fees are not disbursed, then risk commingling

Advanced Fees and Expenses

- Must deposit all client funds into trust
- Lawyer will have to write a check from the trust account to pay expenses on behalf of client
- Lawyer can withdraw fees from trust as they are earned, and then deposit into operating account of the firm

Advanced Fees and Expenses

- Notify client when you disburse funds from trust account, i.e. send statement
- Send bill showing disbursement and balance of account, or amount due and owing
- Best practice is to send a monthly statement to each client

Flat Fees

- Flat fee: legal service billed at fixed amount
- Lawyer can enter flat fee agreement with client. Adv. Op. 2016-1
- R. 1.15(c): required to deposit flat fee & expenses paid in advance into IOLTA, unless designated "earned upon receipt"
 - Only may withdraw as fees earned
- R. 1.5: Return any unearned portion of fee promptly

Flat Fees

Flat Fee Example:

- Lawyer receives \$5,000 flat fee from mother of defendant (i.e. client) in criminal case on December 1. Lawyer has done no work. Lawyer puts all of fee in the office account.
- Is this proper?

Flat Fees

Flat Fee Example:

- The \$5,000 does not yet belong to the lawyer
- Until the lawyer conveys some benefit/service to the client, the lawyer has not earned any fee.
- As a result, the \$5,000 must go into the trust account.

Trust Account Cases

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IOLTA, Fees, and Supervision Issues

Cincinnati Bar Assn. v. Kathman, 2021-Ohio-2189

- Supervision issues with paralegal, who issued herself a check from the firm and stole a settlement check
- Lawyer provided improper financial assistance to on 5 occasions and reimbursed himself with settlement proceeds
- Lawyer did not create separate record for each transaction in the client accounts, and kept at least \$150,000 of his own funds in the IOLTA
- Payed checks from IOLTA before bank received payment on deposits

Sanction: One-year, six months stayed

IOLTA, Fees, and Supervision Issues

Lorain Cty. Bar Assn. v. Berta, 2021-Ohio-1264

- Lawyer retained to represent client in divorce, but never gave client written fee agreement, and instead wrote "\$2,500 flat" on back of business card
- Client paid \$200 for consult and \$1,500 a month later
- Lawyer filed for divorce and client paid balance of quoted fee plus \$280 filing fee
- Monthly statements sent to client with \$0 balance
- Client awarded proceeds from marital home, and \$7,730 deducted from client's share for additional attorney's fees, of which client was never informed that fee changed if case was divorce v. dissolution

Sanction: Public Reprimand

IOLTA, Fees, and Supervision Issues

Cleveland Metro. Bar Assn. v. Heller, 2021-Ohio-2211

- Lawyer hired non-lawyer to assistant, who met with clients, prepared bankruptcy petitions with supervision and accepted client payments
- Dec 2016, lawyer discovered assistant was collecting cash payments but didn't keep records or remit all funds to the lawyer
- After investigation, estimated the assistant stole \$19,000 from the firm, but no charges brought
- Other count involved improper handling of bankruptcy case, and eventual refund of fees

Sanction: One-year suspension, six months stayed

IOLTA Resources

- OLAF: <https://www.olaf.org/lawyers/iolta-iota-for-lawyers/ioltaiota-faqs/>
- Board of Professional Conduct: <https://www.bpc.ohio.gov/>
- OBLIC: <https://www.oblic.com/>

Questions?



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