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for Massachusetts
1872 Sesquicentennial 2022

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April 13, 2023

The Standing Advisory Committee on the Rules of Professional Conduct
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston MA 02108
Attn: John L. Whitlock, Chair
Chip Phinney, Deputy Legal Counsel

Re: Comments on proposed further Revisions to Rule 1.15 and 1.15A of the Rules of Professional Conduct dated January 12, 2023

Dear Committee Members:

The Real Estate Bar Association (REBA) offers the following comments on the currently proposed revisions to Rule 1.15 and 1.15A of the Massachusetts Rules of Professional Conduct (the "Second Revision"). We provided earlier comments to the Standing Committee (the "Committee") on the original proposed revision of the Rule (the "First Revision") in our letter to the Committee dated September 21, 2020. Although we repeat some of the observations on the features common to both Revisions, the primary focus of this letter is on the concerns remaining after the Second Revision or which are newly introduced by it.

Founded in 1872, the Real Estate Bar Association of Massachusetts, Inc. (formerly known as the Massachusetts Conveyancers' Association, and referred to herein as "REBA" or the "Association") includes over 2,000 lawyer members and non-lawyer Associates sharing a 150-year tradition of professionalism and excellence advancing the practice of real estate law. Our Board of Directors is composed of the most accomplished practitioners of real estate law in the Commonwealth, including experts in title and zoning; residential and commercial sales, leasing and mortgage lending; environmental and affordable housing law; conveyancing, probate, cybersecurity and registry practice. Our Title, Practice and Ethical Standards are generally accepted as authoritative guides to real estate practice in Massachusetts and elsewhere.

The Association submitted an amicus brief supporting the IOLTA Committee in the *Olchowski* case (see: Syllabus of Memorandum of Decision in which the briefs of Amici Curiae Boston Bar Association, Massachusetts Bar Association and Real estate Bar Association for Massachusetts, Inc. In Support of Appellants are acknowledged).

As directed by the SJC in its October 1, 2020 decision in the *In the Matter of Gregory M. Olchowski* (485 Mass. 807), the Standing Advisory Committee (the "Committee") on June 4, 2021 issued proposed amendments to Mass.R.Prof.C 1.15 dealing with "excess funds" in IOLTA accounts (the "First Revision"). A number of highly regarded and influential organizations provided comments to the Committee on this Revision. These included the Massachusetts Bar Association (November 17, 2021), the Boston Bar Association (November 22, 2021), the Massachusetts IOLTA Committee (October 1, 2021) and the Real Estate Bar Association (September 21, 2021). Over two years later, the Committee, acknowledging "a number of thoughtful comments from the public on the Previously Proposed Amendments," released a revised proposal on January 12, 2023 (the "Second Revision") which is the subject of this letter.

Unfortunately, the Second Revision does not successfully address the two basic misconceptions standing behind the First Revision, namely:

1. The purpose and the holding of *Olchowski* was to direct unidentified funds in IOLTA accounts to the IOLTA Committee rather than to the State Treasurer as abandoned property; and not to impose any greater or more burdensome regulation on the attorneys holding such funds than necessary to achieve this purpose; and

2. The underlying and unjustified assumption of the First Revision was that the mere existence of such unidentified or unclaimed funds in an IOLTA account was a *per se* violation of the IOLTA Rules and M.R.Prof.C 1.15; despite the fact that this situation is the necessary and normal condition in the IOLTA account of virtually any attorney engaged in real estate conveyancing. This is an assumption not required by the Decision and is made without regard to the realities of conveyancing practice as carried on in the Commonwealth by honest, reputable and diligent practitioners. The circumstances governing such practices may very well be different from those which apply to litigators, trust and probate attorneys and transactional attorneys.

In the ordinary conveyancing practice, some excess funds belong to known parties, but may not be disbursed for various reasons, sometimes because the client has moved and cannot be located (such as a holdback for conditions to be met after a sale), or because of a contingency which remains to be satisfied (such as a defective mortgage discharge). Others result from funds accumulated from the inability to accurately predict reimbursable expenses such as recording fees, electronic recording fees, CPA and other surcharges, land transfer taxes, interest and penalties on unpaid taxes, postage and fees incurred for messenger services and overnight carrier charges, many of which are not billed to the attorney's account or otherwise discovered until long after the transaction has been completed and the settlement statements have been signed and distributed. In many cases it is either not possible or is not cost-effective to properly

allocate and credit (or charge) the proper party after the fact. Over the years, the cumulative value of these discrepancies may become substantial, and unlike banks, attorneys do not maintain ledger accounts for their clients after a transaction closes to which excess funds may be credited and withdrawn. Such accumulations do not represent a misappropriation, but are the inherent and inevitable margin of error in conducting a business of this kind.

It should be noted that under the current Rules, these situations do not result in a violation and the mere existence of these excess funds does not invoke disciplinary action or intervention of Bar Counsel in the absence of the *special circumstances* of death, disbarment or retirement (neither the Rules nor the IOLTA guidelines appear to deal with the responsibilities of a lawyer upon retirement) one of which is the subject of the *Olchowski* case. Under the current Rules, funds held for "longer than a short period of time" should be placed in a separate account standing in the name of the client or other owner, but that period of time is not defined, and individual non-IOLTA accounts do not enjoy the same FDIC protection as pooled IOLTA accounts. It should also be noted that funds remaining in compliant IOLTA accounts remain safe, are not subject to private use by the attorney, are insulated from creditors' claims against the attorney, and if any party subsequently comes forward to claim such funds, the attorney who handled the transaction is the best place to start looking, and may far more easily reconstruct the details of the transaction than either the State Treasurer or the IOLTA Committee. The issue addressed by *Olchowski* is not the accounting practices nor the integrity of the bar, it is simply "who gets the money" under the *special circumstances* such as those enumerated above.

The case of Gregory Olchowski, however, was one of those cases in which there were substantial funds and one of the above-referenced *special circumstances* was present. Mr. Olchowski was disbarred after pleading guilty to four counts of Federal tax evasion and in the course of the dissolution of his practice it was discovered that there were $29,927 of unidentified funds in his IOLTA account, the owners of which he was either unwilling or unable to identify. After a fruitless investigation, both the IOLTA Committee and the State Treasurer laid claim to the money and the SJC resolved the matter in favor of the IOLTA Committee for the reasons stated in the Decision. In so doing, the Court conceded that, unlike the State Treasurer, neither the IOLTA Committee nor the Rules provided a means for the distribution of such funds. In deciding the case, the issue was not so much a matter of entitlement to the revenue, but the ability of Bar Counsel and the IOLTA Committee to determine the rightful ownership of the funds without compromising the attorney-client privilege, something the Court deemed was not possible for the State Treasurer to do under G.L. c. 200A, the abandoned funds statute. It is ironic that in the *Olchowski* case, since nothing was discovered regarding the true ownership of the funds (the leading suspect had to be Mr. Olchowski himself), there was no attorney-client privilege to be compromised.

Nor would Mr. Olchowski, having already been disbarred, be influenced or deterred by the threat of disciplinary action by the BBO. In addition nothing in either of the First or Second Revisions of the Rule would have prevented the situation from arising since there is no evidence the subject funds had been in a dormant account for more than three years, and Mr. Olchowski was unlikely to "discover that [his] IOLTA

account contain[ed] funds that [he] reasonably believe[d] are unidentified funds or unclaimed funds," and therefore "promptly make reasonable and diligent efforts to identify the owner of the unidentified funds or locate the owner of the unclaimed funds and to transmit the funds to the owner (sec. (i)(1)) or to notify the Office of Bar Counsel (sec. (i)(2)) (both references are to the Second Revision of the Rules).

However, since the circumstances might be different in other cases, the SJC decided that these, and other unidentified funds should become the property of the IOLTA Committee to be dedicated to its charitable and administrative purposes rather than being turned over to the State Treasurer, and unless claimed within the allotted time, would be forfeit to the general fund like other "abandoned" property under G.L. c. 200A. In the last sentence of its Decision, the Court said:

> neither Mass.R.Prof.C . 1.15 nor any other rule of this court presently governs the disposition of such funds; and that such funds shall be transferred to the IOLTA committee for disposition under the conditions set forth in this opinion which shall later be incorporated in revisions to Mass.R.Prof.C. 1.15

As a result, the Standing Committee has offered two successive proposals for the revision of the Rule, both of which appropriately reflect the opinion of the SJC as to the rightful ownership of such funds, but also establish a process to implement that result. However, as discussed below, the cumulative effect of the process devised by the Committee far exceeds the regulation of existing practices necessary to achieve the desired result; and provide few if any incentives, immunities or protections for compliance. In addition, there is no recognition or definition of de-minimus amounts, and therefore violations may inadvertently arise on account of the failure to discover or report amounts that bear no proportion to the volume of funds handled by the average conveyancing attorney.

In our earlier commentary submitted to the Committee in our letter dated September 21, 2020, we reviewed the conditions in effect prior to the Decision when it was generally believed that the excess, unattributed or unclaimed funds in IOLTA accounts (as opposed to the interest earned on them) was "abandoned" property, like dormant bank accounts, subject to the claims of the State Treasurer under G.L. c. 200A and 960 CMR 4.0 According to the State Treasurer, anyone holding such funds is required to file an annual report (sec. 7) and remit the funds to the Treasurer (sec. 8A). However, virtually no attorneys complied, (see: *Olchowski* at 820 reporting that only 13 such reports were filed by attorneys in 2019) and the Treasurer made no serious efforts to enforce the requirements of the law with regard to attorneys. Aside from the nuisance value and the lack of enforcement, the nominal penalties (960 CMR 4.03 (6) and (10)) and the absence of disciplinary sanctions from the BBO were likely factors in the widespread non-compliance.

However, the value of the State Treasurer's "abandoned property" vehicle was that, on the one hand, it gave an attorney an easy and legitimate way to clear IOLTA account problems that was not in conflict with Rule 1.15, and thus provided a *de facto* safe haven in cases where one was necessary; and, on the other hand, failure to comply with the provisions of chapter 200A was not a disciplinary matter subject to the jurisdiction of Bar Counsel. In addition, as the Court observed, prior to *Olchowski*, "[b]ecause attorneys are not routinely required to submit reconciliation reports to anyone, neither a bank

nor bar counsel will immediately learn if an attorney has failed to keep proper records." (at 812). Generally, such circumstances would be an IOLTA check being dishonored for insufficient funds, a credible complaint of a party filed with the BBO; or a *special circumstance* of the *Olchowski* type: death, disbarment or retirement.

In reviewing and commenting on both the First Revision and the Second Revision of the proposed Rules embodied, primarily in sec. (h) and (i) of Revised Rule 1.15, the position of REBA is that any changes that affect either the burdens or liabilities of real estate conveyancers should be *the minimum necessary* to accomplish the SJC's holding that the beneficiary is to be the IOLTA committee rather than the State Treasurer. The process allowing the appropriation of IOLTA funds from an attorney's account must be fair and appropriate, and the mere change in beneficiary should not give rise any greater exposure to bar discipline than under the current Rule.

I. UNIDENTIFED FUNDS

1. *Olchowsk*i deals only with "unidentified" funds and not with "unclaimed" funds. Therefore, to the extent that the proposed rule includes "unclaimed" funds in its scope, it exceeds the mandate of the Court:

   . . .we conclude that *unidentified client funds* on deposit in an IOLTA account do not fall within the statutory definition of "abandoned property" under L.L.C. 200A; that neither L.L.C. 1.15 nor any other rule of this court presently governs the disposition of such funds; and that *such funds* shall be transferred to the IOLTA committee for disposition, under the conditions set forth in this opinion which shall later be incorporated in revisions to Mass.R.Prof.C. 1.15. (at 824, emphasis supplied)

   Footnote 13 has been cited as evidence that the Court intended to deal with unclaimed funds. However, the context indicates otherwise:

   > but as this case [*Olchowski*] demonstrates there will still be *unidentified fund*s in IOLTA accounts that despite exhaustive forensic investigation, will elude all reasonable efforts to determine and locate their true owner (footnote 13 at 822, emphasis supplied);

   and the footnote itself merely points out that it was not clear whether Bar Counsel was alerted to funds other than "unidentified" funds, and says that "it is unclear whether bar counsel has conducted, or will be able to conduct investigations into whether the funds in those 572 accounts are truly unidentified or simply unclaimed." (the "572 accounts" referred to in the footnote are the 572 unclaimed "IOLTA type properties" in the State Treasurer's abandoned property data base) (see *Olchowski* at 820).

2. The holding of *Olchowski* does not call into question the effectiveness of the current Rule, and does not suggest that greater regulation or oversight is required to ensure the integrity of IOLTA funds. It only recognizes that for the limited category of cases like *Olchowski,* there currently exists no adequate means to determine which organization should be the beneficiary of the funds.

3. In addition, the events that trigger the involvement of Bar Counsel should be no more extensive than at present, and compliance with the Revised Rules should impose no greater burdens on conveyancers who routinely handle substantial sums of money ancillary to transactions largely at their own personal risk. Under the current Rule these trigger events are a) dishonored checks presented against insufficient funds, b) disbarment, c) death or retirement without satisfactory arrangement for continuance of practice or retention of records and custody of IOLTA funds; or d) receipt by Bar Counsel of a credible complaint involving the management of IOLTA funds.

Sec. (i) of the First Revision of the Rules provided authority for Bar Counsel to proceed against funds held by an attorney as "presumptively abandoned" if he determined "after reasonable investigation" that an IOLTA account contained "unidentified funds" or "unclaimed funds." The phrases "presumptively abandoned" and "reasonable investigation" left the barn door wide open and gave Bar Counsel undefined investigatory powers which were not limited to the circumstances identified in *Olchowski*: a) dishonored checks presented against insufficient funds, b) disbarment, c) death or retirement without satisfactory arrangement for continuance of practice or retention of records and custody of IOLTA funds; or d) receipt by Bar Counsel of a credible complaint involving the management of IOLTA funds.

The attempt of the Committee to address this concern in the Second Revision appeared promising when "presumptively abandoned" and "after reasonable investigation" were replaced by a provision for self-reporting:

> When a lawyer discovers that an IOLTA account contains funds that the lawyer reasonably believes are unidentified funds or unclaimed funds, the lawyer shall make reasonable and diligent efforts to identify the owner of the unidentified funds or locate the owner of the unclaimed funds and transmit the funds to the owner (sec. (i)(1))

If those efforts are unsuccessful, and less than three years have passed since the funds were so identified:

1. the attorney *may notify* Bar counsel "by completing a form provided by the Office of Bar counsel that the lawyer has not been able to identify the owner or unidentified (sec. (i)(2)) or unclaimed (sec. (i)(3)) funds and wishes to remit the funds to the IOLTA Committee;"

2. If Bar Counsel does not *object* within 120 days, the lawyer must remit the funds to the IOLTA Committee promptly together with a report on a form provided by the Office of Bar Counsel;

3. If Bar Counsel *objects*, then the lawyer continues to hold funds and attempt to find the rightful owner.

4. When three years have passed, then the funds must be remitted to the IOLTA Committee (sec. (i)(3), but again when a lawyer remits funds to the IOLTA Committee it must be with a "form provided by the Office of Bar counsel. (sec. (i) (5)).

In addition, under sec. (i)(6), in all the foregoing cases of such unidentified and unclaimed funds, the lawyer must:

1. respond to request from Bar Counsel with regard to the efforts made to identify or locate the owner;

2. "cooperate" in any investigation of a claim for ownership of funds previously remitted to the IOLTA Committee; and

3. notify Office of Bar Counsel and the IOLTA Committee if the lawyer identifies or locates the owner of funds previously remitted to the IOLTA committee and "*make diligent efforts to assist the owner in reclaiming the funds*"

Unfortunately, these provisions of the Second Revision do not specify the contents of the "Form Provided by Office of Bar Counsel," and if the form currently in use by Bar Counsel pending the adoption of the Revised Rules ("Interim Application To Transmit Unclaimed Or Unidentified Trust Account funds to Massachusetts IOLTA Committee" Jan-2023) (APPENDIX A) is any indication, it will contain the following provisions which not only go beyond what is required by the *Olchowski* Decision, but beyond what is required by the Second Revision itself:

1. The information to be provided will be subject to the pains and penalties of perjury with regard to every detail of the attorneys' efforts and record-keeping practices;

2. It requires agreement to retain the client file "until the Supreme Judicial Court codifies the time required to retain such files" rather than referring to the existing provisions of Rule 1.15A, and

3. It requires a declaration under oath with regard to the

    a. efforts made to identify or locate the owners;

    b. *that all Trust accounts* are compliant with the record-keeping requirements of the Rule;

    c. whether or not the attorney has attended one of bar counsel's Rule 1.15 trust account seminars, and

    d. that the lawyer understands "that filing this application does not entitle me to immunity from prosecution for violation of any Massachusetts Rule of Professional Conduct."

Since such requirements, going far beyond what is necessary to accomplish the objectives of the Rule, are likely to be imposed by the Office of Bar Counsel if left to its own devices, and such undertakings will create additional and unwarranted exposure of discipline or prosecution with regard to circumstances and activities which are a part of the regular and accepted practice of their trade; such would be an abuse of discretion as well as a serious disincentive for attorneys to "discover" or forward funds otherwise due to the IOLTA Committee (if no funds are forwarded, no form need be completed under pains and penalties of perjury). Therefore, because of the demonstrated inclination of the Office of Bar Counsel to expand the scope of its authority under the Revised Rule, it is essential that the Revised Rule itself clearly define (and also limit) the representations necessary in connection with the transmission of funds for deposit with the IOLTA Committee.

Once again, the position of REBA is that the burdens and jeopardy imposed on practitioners by the Rule should be no greater than what is reasonably required to accomplish the holding of the Court in the *Olchowski* Decision.

Since the SJC made the choice between the IOLTA Committee and the State Treasurer, it might be instructive to look at the requirements imposed and the immunities conferred by the Treasurer on holders of presumptively abandoned funds who, like attorneys, are legally obligated to remit funds under G.L. ch. 200A.

The State Treasurer's "Voluntary Disclosure Agreement" under which a Holder of such property "has voluntarily come forward and in good faith wishes to comply with the Commonwealth's statutes (Massachusetts Unclaimed Property Law) in reporting and delivering to the Commonwealth monies presumed abandoned, and therefore, subject to claim by the Commonwealth" (APPENDIX B) provides, in part as follows:

> The Commonwealth releases the Holder from all claims, demands, interest, penalties, actions or cause of action the Commonwealth may have for the reporting years stipulated in this agreement [dated] regarding the aforementioned property presumed abandoned and delivered to the Commonwealth pursuant to this agreement; and upon payment indemnifies the Holder pursuant to Sections 15A and 15D of Chapter 200A of Massachusetts General Laws. (Para. 2 of Agreement); and
>
> The Commonwealth releases the Holder from the reporting requirements of the Massachusetts Unclaimed Property Law for the property identified through [date] (Para. 3 of Agreement);

By contrast, there is no provision whatever in the Revisions for immunity or indemnification when an attorney has remitted funds in compliance with the Rule; and Bar Counsel in its current form "For Unidentified Funds" expressly provides that the remitting attorney understands "that filing this application does not entitle me to immunity from prosecution for violation any Massachusetts Rule of Professional Conduct" which, presumably would include violation of the Rule with which the attorney is complying by remitting the funds.

II. DORMANT TRUST ACCOUNTS

Subsection (h) of the First Revision introduced the dormant or inactive account requirement into the Rule. This is carried through into the Second Revision with some clarification and elaboration. In particular, the Second Revision clarifies that the period of inactivity is measured in "consecutive years" and is measured from the date of opening or the date of notice to Bar Counsel justifying continued maintenance of the account under sec. (h) (6). The Bank is required to notify the attorney and Office of Bar Counsel of such inactivity, and when such notice is given, the lawyer must either close the account and distribute the funds or inform Bar Counsel in writing of the action taken or the reason for keeping the account active.

The Court took no exception to the management of accounts under the current Rule, and therefore *Olchowski* provides no rationale for the imposition of new burdens and additional opportunities for non-compliance and disciplinary action. In addition, the longer funds are held in an IOLTA account, the more interest is paid to the IOLTA committee. In addition, the Revisions do not take into account or recognize the current realities of the banking environment. Many lenders require an attorney to hold such an account in their bank in order to close mortgage loans for them. However, under banking, currency and counter-terrorism regulations enacted in recent years, it is difficult and time consuming to open any kind of account with a new bank, and especially an IOLTA account and even more so an account with many of the features that conveyancers include to provide the necessary security such as multiple signatures, ACH block and positive pay. Therefore, especially for IOLTA accounts for which no fees are charged, it is convenient to keep dormant accounts open indefinitely, and there is nothing inherently suspicious in such a situation. In addition, since *Olchowski* did not invalidate G.L. ch. 200A, IOLTA accounts, like all other accounts are already subject to dormancy monitoring under which (unlike the proposed rule) the bank must give notice to the holder of the account as the forfeiture date approaches.

III. RECOMMENDATIONS AND CONCLUSIONS

The Association believes that the drafters of the proposed Revised Rules, focusing on the particular and unfortunate fact situation of the *Olchowski* case, may not fully recognize the scope of the unidentified IOLTA funds issue, or the sheer number of IOLTA accounts and attorneys that could be immediately become subject to the proposed rule. There are, no doubt, many hundreds if not thousands of blameless real estate lawyers with small amounts of unidentified funds in their IOLTA accounts who have operated in full compliance with the Rules for many years. There is nothing to be gained by placing these people in jeopardy for reasons having nothing to do with the circumstances that gave rise to the *Olchowski* case. We believe that the proposed regulations are unduly intrusive and, because of the requirement of participation of Bar Counsel in the most minor or commonplace situations, the processing of the required notices and forms, the investigation and enforcement on these matters will distract the attention of Bar Counsel from more important matters.

Because we believe that the proposed rule, its necessary implications and its potential adverse impact on a profession that is already well regulated has strayed so far from addressing the circumstances presented by the *Olchowski* case, it should be substantially revised to achieve its intended result, namely the transfer of unidentified funds to the IOLTA committee rather than the State Treasurer, and otherwise have no more than the minimum impact necessary to achieve that result.

Since we believe that the revisions necessary to address these issues remain significant, we suggest that the current Revision be subject to a further review and comment period before adoption. The Association will be glad to participate in such further review in order to achieve a result that is beneficial to the legal profession and the administration of justice.

Sincerely,

Peter Wittenborg, Esq.

Cc: REBA Board of Directors