SUFFOLK ACADEMY OF LAW
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ESCROW ACCOUNTS: Ethical Obligations And Practical Tips

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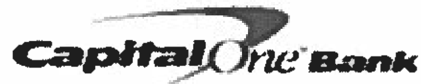
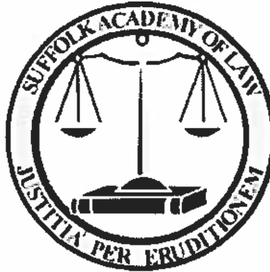
Thank You to Our Sponsor: 

June 11, 2019
Suffolk County Bar Association, New York



ESCROW ACCOUNTS

ETHICAL OBLIGATIONS AND PRACTICAL TIPS

Speaker: Barry M. Smolowitz, Esq.
Past SCBA President 2007-2008
Current Chairmen to the 10th Judicial District Grievance Committee
June 11, 2019

OUTLINE

Rules of Professional Conduct - RPC 1.15 et seq.

Lawyers Fund For Client Protection.

Reconciliation Rules (record keeping)

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Required Titling of account.

When do you need an IOLA account?

What funds go into an escrow account?

What funds go into an IOLA account?

May the bank charge fees for and escrow account?

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To whom does IOLA interest get credited to?

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The Lawyers Fund for Client Protection. What is it?

Record keeping. Computerized systems.

Dishonored check notification rules.

Bank errors.

Sua-sponte investigations by the Grievance Committee.

Bio - Barry M. Smolowitz, Esq.

Mr. Smolowitz has lectured extensively in the areas of Ethics, Criminal Law and Technology Law. He has taught law as an adjunct professor at Suffolk Community College, Nassau Community College, Long Island University - C.W. Post, Touro Law School and the NYC Police Department.

Mr. Smolowitz has been practicing law for over 30 years. He is a sole practitioner, whose practice is concentrated in Criminal Law, Education Law, Technology Law and Ethics.

Mr. Smolowitz was employed by the NYC Police Department from 1968-1985. Among his many assignments, he worked on patrol, was a youth officer, and a training officer. He retired from the NYPD while assigned to the Legal Division.

Mr. Smolowitz, has served on over 25 County Bar Association Committees. He is a Past Dean of the Suffolk Academy of Law (1997-1999), and is a Past SCBA President (2007-2008).

In addition to his practice, Mr. Smolowitz is the Suffolk County Bar Association's Director of Technology. He also sits on the board of Nassau Suffolk Law Services, The Suffolk County Pro Bono Foundation, and the Touro Law School Dean's Advisory Council. He was also is the Attorney Administrator to the Suffolk County Pro Bono Foreclosure Settlement Conference Project. Mr. Smolowitz is currently the Chair of the NYS Grievance Committee for the 10th Judicial District.

Mr. Smolowitz is a 1984 graduate of Touro Law School.

RULE 1.15:
PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts,

including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold the client's share of the funds to coerce the client into accepting the lawyer's claim for fees. While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds is to be distributed promptly.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

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WESTLAW New York Codes, Rules and Regulations

22 CRR-NY 1300.1
NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 22. JUDICIARY
SUBTITLE B. COURTS
CHAPTER IV. SUPREME COURT
SUBCHAPTER E. ALL DEPARTMENTS
PART 1300. DISHONORED CHECK REPORTING RULES FOR ATTORNEY SPECIAL, TRUST AND ESCROW ACCOUNTS

22 CRR-NY 1300.1
22 CRR-NY 1300.1

1300.1 Dishonored check reports.

(a) Special bank accounts required by rule 1.15 of the Rules of Professional Conduct (22 NYCRR 1200.0) shall be maintained only in banking institutions which have agreed to provide dishonored check reports in accordance with the provisions of this section.

(b) An agreement to provide dishonored check reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this State, and shall not be cancelled by a banking institution except on 30 days' prior written notice to the Lawyers' Fund for Client Protection.

(c) A dishonored check report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, and the banking institution dishonors the instrument for that reason. A *properly payable instrument* means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.

(d) A dishonored check report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer-generated duplicate of such notice.

(e) Dishonored check reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.

(f) The Lawyers' Fund for Client Protection shall hold each dishonored check report for 10 business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check report.

(g) After holding the dishonored check report for 10 business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.

(h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.

22 CRR-NY 1300.1
Current through March 15, 2019

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Dishonored Check Reporting Rule

Banks in New York State which offer fiduciary accounts to attorneys are required to report all instances of bounced checks on attorney trust, special and escrow accounts. The reports are forwarded to the New York Lawyers' Fund for Client Protection, which serves as a statewide clearing house for these reports. Banks have 10 days to withdraw reports that have been issued in error. If not withdrawn, the reports are sent to the appropriate Attorney Grievance Committee for investigation. A bounced-check report generally triggers an audit of the attorney's trust, special or escrow account. The Appellate Divisions' uniform court rule is reported at 22 NYCRR Part 1300.1.

Dishonored Check Reporting Rules for Attorney Special, Trust and Escrow Accounts (22 NYCRR 1300.1):

(a) Special bank accounts required by Disciplinary Rule 9-102 (22 NYCRR 1200.46) shall be maintained only in banking institutions which have agreed to provide dishonored check reports in accordance with the provisions of this section.

(b) An agreement to provide dishonored check reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this State, and shall not be cancelled by a banking institution except on 30 days' prior written notice to the Lawyers' Fund for Client Protection.

(c) A dishonored check report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, and the banking institution dishonors the instrument for that reason. A properly payable instrument means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.

(d) A dishonored check report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer generated duplicate of such notice.

(e) Dishonored check reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.

(f) The Lawyers' Fund for Client Protection shall hold each dishonored check report for 10 business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check report.

(g) After holding the dishonored check report for 10 business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.

(h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.

Interest On Lawyer Account (IOLA) Program

New York law encourages attorneys who have been entrusted with client and escrow funds to make those funds productive in interest-bearing bank accounts. Section 497 of the Judiciary Law also authorizes practitioners to utilize special bank accounts (sometimes called IOLA bank accounts for the deposit of "qualified funds" belonging to law clients and escrow beneficiaries in the practice of law.

An IOLA bank account is a species of the attorney trust account that is required by court rule (DR 9-102). Section 497 of the Judiciary Law grants broad discretion to attorneys to participate in the IOLA program. It also immunizes them from disciplinary and civil liability should they determine not to use IOLA bank accounts.

The IOLA statute requires participating banks to remit the earned interest on IOLA bank accounts, net after bank service charges and fees, to the IOLA state agency. That fund's Trustees distribute the pooled revenue, in the form of grants, to organizations which provide civil legal services to needy persons and projects which improve the administration of justice in New York. The Trustees' regulations are reported at 21 NYCRR Part 7000.

"Qualified funds" are defined in subdivision (2) of section 497, and IOLA's Trustees have determined that a deposit of client funds is "qualified", for purposes of the statute, if the escrow deposit would not generate $150 in interest.

The offices of the IOLA Fund are located at 36 West 44th Street, New York, NY 10036. Telephone: (800) 222-IOLA (4652). Fax: (212) 944-9836.

The constitutionality of IOLA-type programs is the subject of pending litigation in the federal courts. See, Phillips v. Washington Legal Foundation, Inc., *118 S. Ct. 1925 (1998).*

Judiciary Law §497

1. An "interest on lawyer account" or "IOLA" is an unsegregated interest-bearing deposit account with a banking institution for the deposit by an attorney of qualified funds.

2. "Qualified funds" are moneys received by an attorney in a fiduciary capacity from a client or beneficial owner and which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner. In determining whether funds are qualified for deposit in an IOLA account, an attorney may use as a guide the regulation adopted by the board of trustees of the IOLA fund pursuant to subdivision four of section ninety-seven-v of the state finance law.

2-a. "Funds received in a fiduciary capacity" are funds received by an attorney from a client or beneficial owner in the course of the practice of law, including but not limited to funds received in an escrow capacity, but not including funds received as trustee, guardian or receiver in bankruptcy.

3. A "banking institution" means a bank, trust company, savings bank, savings and loan association, credit union or foreign banking corporation whether incorporated, chartered, organized or licensed under the laws of this state or the United States, provided that such banking institution conducts its principal banking business in this state.

4. (a) An attorney shall have discretion, in accordance with the code of professional responsibility, to determine whether moneys received by an attorney in a fiduciary capacity from a client or beneficial owner

shall be deposited in non-interest, or in interest-bearing accounts. If in the judgment of an attorney any moneys received are qualified funds, such funds shall be deposited in an IOLA account in a banking institution of his or her choice offering such accounts.

(b) The decision as to whether funds are nominal in amount or expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm. Ordinarily, in determining the type of account into which to deposit particular funds held for a client, a lawyer or law firm shall take into consideration the following factors:

(i) the amount of interest the funds would earn during the period they are expected to be deposited;

(ii) the cost of establishing and administering the account, including the cost of the lawyer or law firm's services;

(iii) the capability of the banking institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(c) All qualified funds shall be deposited in an IOLA account unless they are deposited in:

(i) a separate interest bearing account for the particular client or client's matter on which the interest will be paid to the client; or

(ii) an interest bearing trust account at a banking institution with provision by the bank or by the depositing lawyer or law firm for computation of interest earned by each client's funds and the payment thereof to the client.

(d) Notwithstanding the deposit requirements of this subdivision, no attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct for failure to deposit qualified funds in an IOLA account.

5. No attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys to an IOLA account pursuant to a judgment in good faith that such moneys were qualified funds.

6. a. An attorney or law firm which receives qualified funds in the course of its practice of law and establishes and maintains an IOLA account shall do so by (1) designating the account as "(name of attorney/law firm IOLA account)" with the approval of the banking institution; and (2) notifying the IOLA fund within thirty days of establishing the IOLA account of the account number and name and address of the banking institution where the account is deposited.

b. The rate of interest payable on any IOLA account shall be not less than the rate paid by the banking institution on similar accounts maintained at that institution, and the banking institution shall not impose on such accounts any charges or fees greater than it imposes on similar accounts maintained at that institution.

c. With respect to IOLA accounts, the banking institution shall:

(i) Remit at least quarterly any interest earned on the account directly to the IOLA fund, after deduction of service charges or fees, if any, are applied.

(ii) Transmit to the IOLA fund with each remittance a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of net interest remitted from such account.

(iii) Transmit to each attorney or law firm which maintains an IOLA account a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from such account.

(iv) Be permitted to impose reasonable service charges for the preparation and issuance of the statement.

(v) Have no duty to inquire or determine whether deposits consist of qualified funds.

7. a. Payment from an IOLA account to or upon the order of the attorney maintaining such account shall be a valid and sufficient release of any claims by any person or entity against any banking institution for any payments so made.

b. Any remittance of interest to the IOLA fund by a banking institution pursuant to this section shall be a

valid and sufficient release and discharge of any claims by any person or entity against such banking institution for any payment so made, and no action shall be maintained against any banking institution solely for opening, offering, or maintaining an IOLA account, for accepting any funds for deposit to any such account or for remitting any interest to the IOLA fund.

8. Nothing contained in this section shall be construed to require any banking institution to offer, accept or maintain IOLA accounts.

9. All papers, records, documents or other information identifying an attorney, client or beneficial owner of an IOLA account shall be confidential and shall not be disclosed by a banking institution except with the consent of the attorney maintaining the account or as permitted by any law, regulation or administrative requirement.

10. An attorney or law firm that can establish that compliance with subdivision six of this section has resulted in any banking service charges or fees shall be entitled to reimbursement of such expense from the interest on lawyer account fund by filing a claim with supporting documentation with the fund.

State Finance Law Section 97-v.

1. There is hereby established in the custody of the state comptroller a fiduciary fund to be known as the New York interest on lawyer account (IOLA) fund. A board of trustees shall be appointed to administer the New York IOLA fund.

2. The board shall consist of fifteen members appointed by the governor. All members shall be residents of the state of New York and shall be knowledgeable and supportive of the delivery of civil legal services to the poor and the improvement of the administration of justice. At least eight of the members shall be attorneys licensed to practice law in the state of New York. Two members shall be appointed upon the recommendation of the temporary president of the senate, at least one of whom shall be an attorney; two members shall be appointed upon the recommendation of the speaker of the assembly, at least one of whom shall be an attorney; one member shall be appointed upon the recommendation of the minority leader of the senate; and one member shall be appointed upon the recommendation of the minority leader of the assembly. Two members shall be appointed upon the recommendation of the court of appeals, each of whom shall be an attorney. The governor shall designate one of the members of the board as chairman.

a. The term of office shall be three years, provided, however, that of the members first appointed, five shall be appointed for terms expiring on December thirty-first, nineteen hundred eighty-four, five shall be appointed for terms expiring on December thirty-first, nineteen hundred eighty-five and five shall be appointed for terms expiring on December thirty-first, nineteen hundred eighty-six. Vacancies shall be filled in the manner of original appointments for the remainder of the term.

b. The members shall receive no compensation for their services as members, but shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties.

c. The members shall be considered employees of the state for the purposes of section seventeen of the public officers law.

d. No member of the senate or assembly shall be eligible to serve as a member of the board.

3. a. The board shall have the power to receive, hold and manage any moneys and property received from any source. It shall distribute funds as grants and contracts to not-for-profit tax exempt entities for the purpose of delivering civil legal services to the poor and for purposes related to the improvement of the administration of justice, including, but not limited to, the provision of civil legal services to groups currently underserved by legal services, such as the elderly and the disabled, and the enhancement of civil legal services to the poor through innovative and cost-effective means, such as volunteer lawyer programs and support and training services.

b. No less than seventy-five percent of the total funds distributed in any fiscal year shall be allocated to not-for-profit tax-exempt providers for the purpose of delivering civil legal services to the poor. The funds distributed annually to legal services providers shall be allocated according to the geographical distribution of poor persons throughout the state based on the latest

available figures from the United States department of commerce, bureau of census, as prescribed by rules and regulations of the board of trustees.

c. The remaining funds shall be allocated for purposes related to the improvement of the administration of justice, including, but not limited to, the provision of civil legal services to groups currently underserved by legal services, such as the elderly and the disabled, and the enhancement of civil legal services to the poor through innovative and cost-effective means, such as volunteer lawyer programs and support and training services.

d. The board shall adopt rules and regulations for the administration of the IOLA fund to carry out the purposes and provisions of this section and of section four hundred ninety-seven of the judiciary law. Such regulations shall be adopted in accordance with article two of the state administrative procedure act.

e. The board may employ and remove such personnel as it may deem necessary for the performance of its functions and fix their compensation within the amounts made available therefor and may allocate funds for the actual and necessary nonpersonnel administrative costs of the program. No more than ten percent of the funds available in any fiscal year shall be spent on personnel and related services, and on necessary nonpersonnel administrative costs of the program provided, however, that such limitations may be waived by the board by the adoption of a resolution and such waiver shall remain in effect until the board determines by a subsequent resolution that the program is fully operational.

f. The board shall insure that grants and contracts are made with not-for-profit providers of civil legal services for the poor to provide stable, economical and high quality delivery of civil legal services to the poor throughout the state.

g. Notwithstanding any statute or rule to the contrary, the board shall maintain all papers, records, documents or other information identifying an attorney, client or beneficial owner of an IOLA account on a private and confidential basis and shall not disclose such information unless such disclosure is necessary to accomplish the purposes of this section and section four hundred ninety-seven of the judiciary law, or unless disclosure is pursuant to compulsory legal process.

h. All payments from the IOLA fund shall be made by the state comptroller upon certification and authorization of the board of trustees of the fund.

4. a. The board of trustees shall establish by regulation a specific dollar amount equivalent to the cost of administering a segregated interest bearing account for a client or beneficial owner. This dollar amount may be used by participating attorneys as a guide when determining whether the moneys are qualified funds.

b. The board of trustees shall also establish by regulation the qualifications of a recipient of funds and the nature and scope of civil legal services to be provided to poor persons by the funds disbursed under this section.

5. If it shall appear to the satisfaction of the board of trustees that, because of a mistake of fact, error in calculation or erroneous interpretation of the provisions of this chapter or of section four hundred ninety-seven of the judiciary law, or of any regulation adopted by the board, a banking institution has remitted to the IOLA fund any moneys not required by such provisions to be remitted, the board shall refund such moneys upon application of any aggrieved party. Any such refund shall be paid from the IOLA fund without interest and without the deduction of any service charge, and shall be and constitute a full satisfaction and discharge of any claim for such refund.

Peter D. Tamsen, Esq.

Mr. Tamsen received his undergraduate degree from Syracuse University and his Law degree from Seattle University. He was admitted to the Bar in the State of New York in 1982. He is admitted in the State of New York and the Southern & Eastern Districts of New York.

Mr. Tamsen has been practicing for over thirty-six years.

Mr. Tamsen is a member of the Suffolk County Bar Association and New York State Bar Association.

Mr. Tamsen is an officer is an officer of the Suffolk County Bar Association.
He is presently the Dean of the Academy and has chaired the curriculum committee for the Academy. He has also served as Treasurer. He is a frequent CLE presenter on Real Estate matters, foreclosure matters and Ethics matters.

Mr. Tamsen is past Chair of the Suffolk County Bar Association Animal Law Committee and is a member of the Bar Association Grievance Committee and District Court Committee and former Judicial Screening Committee member. He is a past co chair of the District Court Committee. He also He has also participated in the Bar Pro Bono Foreclosure program.

Mr. Tamsen received the Dorothy Paine Ceparano Award in 2017 for his service to the Academy of Law.

Mr. Tamsen has been an expert witness for the FDIC and the 10th Judicial Grievance Committee on real estate related matters.

He is presently engaged in private practice maintaining an office at 260 Montauk Highway # 14, Bay Shore, New York.

He represents parties in residential and commercial transactional real estate matters. He also serves as counsel to Waters Edge Abstract Inc., a title insurance company and as counsel to several mortgage lenders in New York where he advises clients on real property issues and federal and state compliance.

He is a long time resident of Brightwaters, New York.

Mr. Tamsen is actively involved in several charitable endeavors including serving as a member of the Board and on the Executive Committee of the Tomorrow's Hope

Foundation, a Charity that provides financial Assistance to stabilize and maintain enrollment in the Catholic Elementary Schools on Long Island. While involved with the Foundation Mr. Tamsen was instrumental in establishing the Catholic Middle School Athletic Association (CMSAA) that created after school sports programs for students in grades six to eight in the Catholic Schools on Long island.

He also wrote an application for a grant to obtain AED devices for all 58 Catholic Elementary Schools on Long Island. To make the program work, he also arranged for CPR and AED training for all coaches working with the CMSAA and established the practice and training protocols required for the utilization of AED devices.

He has served as Chair of the St. John the Baptist Diocesan High School Development Committee and as Chair of the Advisory Board.

He is the Chair of the St. Patrick's Church Pastoral Council.

Mr. Tamsen is also currently a Trustee of the Nora Cronin Presentation Academy a Catholic School in Newburgh, New York his former hometown that serves under privileged Hispanic students in the City of Newburgh New York.

Mr. Tamsen is also an active member of the Bay Shore Lions Club, Past President of the Bay Shore Lions Club. He has also served as a Lion's Zone Chair and Region Chair for the County of Suffolk.

Mr. Tamsen also volunteers his time with various animal rescue groups including Tri State Basset Hound Rescue and Mid Atlantic Basset Hound Rescue and ABC Basset Rescue.

CLE ESCROW ACCOUNT MANAGEMENT IN THE REAL WORLD

When asked to present at this program, I trembled. I thought to myself why would I want to share my daily fears of properly managing my escrow account with the rest of the world, let alone a room full of attorneys?

With those thoughts and the fears aside, I thought that my fears, if turned around, could be considered advantageous to those in attendance and make this a teaching experience. With that thought in mind I will carry on.

SOME BASIC THOUGHTS AND COMMENTS ON ESCROW ACCOUNTS:

It is not your money. It is not your money EVER!!

Escrow never sleeps. By this I mean it is your job, perhaps your most important job as an attorney, to watch over the funds placed in your control and custody. Don't ever take your eyes off the money. It is difficult enough to properly handle other peoples money on a good day, scoundrels and thieves will attack your accounts when you least expect it, they will attack when you are at your busiest, they will attack when you are asleep.

When working with other peoples money the basic lesson to avoid issues is to, <u>write it down. Always write it down</u>, by this I mean notate every nuance of every transaction in your ledger book, quickbooks, check register or a memo pad. Time will cloud your memory and a few months after the money comes in and has gone out, the facts of the transaction will fade. If it is written down your notes will help with your recall of the transaction if a question comes up.

Use your banks online banking software as a way to monitor your escrow accounts.

In my practice, the first thing I do on walking in my office is to check my account balance and to check recent account activity. I confirm that the amounts in the account are what they should be. I look for things that are red flags of fraud such as check numbers out of sequence, account debits or wires that were not initiated by me.

Know your banker or relationship manager. Visit with this person and get an e-mail and cell phone number. It is better to have this information in hand and not need it then to be in a panic and have to search for it.

Establish dual controls with your bank for any movement of money, transfers, wires, etc. Require security tokens with rolling access codes to help stifle fraudulent access. Set up a telephone password for telephone banking so that your telephone banker or back office bank support will not speak with any one unless they have provided the telephone password.

ACH debits are the devil! Watch for them! If anything is noted in the account that is improper, notify your banking institution immediately!!!!! Require an ACH debit block from your bank (at no charge). This will stop check payees from being able to convert a check into an

ACH debit from your account. An ACH debit happens when a creditor gets a check from your account and converts the check to a debit so they get paid faster. Your check (with all account information) is out there. Although the check should be destroyed by the payee on converting the check to an ACH debit, no guarantee exists that this will take place.

I see this problem arising most often in my practice with payments to homeowners insurance companies. Often times the insurance company will be sent a check for a renewal insurance premium coming due within sixty (60) days of the loan closing. These checks generally get held until the premium is actually due. When due, they attempt to convert the check to an ACH debit, be wary. I have also had an issue with credit card companies that convert checks to an ACH debit and then attempt to debit the account over and over again. This is improper and can place you out of trust. An ACH debit block is essential.

Safeguard blank check stock. Always keep your check stock under lock and key. You would not want to check a bank statement or your online account and see a check drawn against your account out of sequence by a few hundred numbers. Same goes for any signature stamp you may use. Only attorneys can be signatories on an IOLA trust account but facsimile signature stamp is allowed. Keep that stamp secure!

Invest in fraud protection check stock. Gone are the days of plain old paper checks. Demand security protection on any printed check stock. This will prevent checks from being photo copied and reproduced for fraudulent purposes. If an attempt to copy or scan is made, secure check stock comes up with "void" on the copy.

Bring down your balance daily after each transaction. As part of my due diligence, the first thing I do each morning is to check my online bank profile and it is the last thing I do at night before I leave my office. This affords me peace of mind that as much as possible things are in order. Reconcile your account the day the bank statement is available on line. This is a habit I have developed. Be ready to complete the bank reconciliation the day the bank releases the statement. I print the statement online, complete the reconciliation, and if any discrepancy exists or it uncovered, I report it to the bank immediately. It is essential to be proactive and in control of your accounts.

Use a void stamp. The use of a "void" stamp helps prevent check alteration and also provides information for your reference as to the replacement check and the reason a check was voided in the first place. It is a great tool to provide information to augment your memory.

Put disclaimers in your e-mail. One of the biggest scams in the market place is the creation of a "cloned e-mail address" from a fraudulent e-mail account which results in a spam e-mail going to a party involved in a transaction requesting a wire of funds. The unsuspecting client may wire monies to the improper account creating a liability to you. E-mail security is essential to client protection and can result in liability to you.

Obtain cyber security insurance coverage to protect against cyber attacks and fraud on your accounts. Add a rider to your professional liability insurance policy or obtain a distinct

employee theft fiduciary coverage policy to cover in the event of a fraud attack.

Request your bank to set transaction alerts for your account. Many banks will provide daily account balance alerts and transaction alerts. It is always helpful to be able to check daily balances at the start of the day if you are otherwise unable to access online banking use the banks telephone banking to access your account.

Know your phone access phone number and access numbers. I can from a telephone easily call into telephone banking and with the entry of an account number and my tax ID number, obtain recent account activity. This is very helpful if you are out of the office and want to verify an incoming or outgoing wire.

Request that the bank provide e-mail confirmations of all wire activity once a wire has processed through your account. This is so helpful in documenting transactions in your account. If the bank can't provide this service (look for another bank) but in the alternative, create your own confirmation forms to detail the transactions. (Copies provided)

Keep a ledger separate and apart from your bookkeeping software of all wire transactions. While I backup my Quickbook files in two different methods daily, I will backup to a removable thumb device and also to a distinct cloud server backup nightly. There is something comforting about a hand written ledger for quick reference on wire activity.

I augment the ledger with funding sheets and my own wire confirmations for all transactions funded through escrow. These same sheets are attached to the checkbook stubs for reference to each transaction although this seems to be duplicative and perhaps a bit obsessive, but it has helped countless times and prevents you from making errors and mistakes. These same sheets also go into the ledger book.

USE A WIRE AUTHORIZATION FORM:

When funding a transaction, I require a written authorization form to be signed by the party receiving the funds or who has requested funds to be wired to a third party to authorize me to send those funds. I require that I be provided with a copy of a check for routing and account information. I will not accept an e-mail containing this information. If paying off a mortgage I require a payoff letter with wiring instructions. While this request is often met with opposition, it is the only way to limit liability if the information provided by e-mail is inaccurate or worse, stems from a hacked e-mail.

Watch for Office of Foreign Assets Control holds or bank administrative holds. This may delay your wire. Often times names of wire recipients may appear on an Office of Foreign Assets Control (OFAC) watch list and a wire maybe held. This can be critical if you are wiring a payoff that is good to that day and the wire is delayed.

I have also encountered that my bank may hold a wire for "quality control" purposes. If either of these issues arise, you will need to be able to speak to the wire recipient to obtain

personal information such as date of birth, place of birth and address. Some recipients are reluctant to provide this information which can delay the wire from being completed for a longer period of time.

Listed below are a few of the most common incidents of fraud that I have encountered. The stories of issues with bank/escrow funds are many, but hopefully this program will alert you to what you can expect in the course of maintaining your escrow account.

ESCROW SCAMS I HAVE ENCOUNTERED

THE COMPUTER GENERATED CHECK:

One of the scams that I have encountered involved computer generated fraudulent checks.

This was revealed to me at 4:50 p.m. on a Friday evening when a teller at a Bank of America branch in San Diego, California called my office to authenticate a check that was purportedly drawn on my account. The check was dated the same date as the day is was presented.

The party presenting the check stated it was from a closing in New York that same day. The check was fraudulent and was not paid. The teller faxed me a copy of the check and mailed the original to my office.

The check was a computer generated check and it was out of my check number sequence. The check had two signatures lines. It was pure fraud. Shortly, thereafter, I received phone calls from several other states. Fraudulent checks were presented for payment in Tennessee, Michigan, Wyoming, Pennsylvania and multiple checks in California.

HOW THE FRAUD WAS PERPETRATED:

The persons perpetrating the fraud would search Craiglist ads for vendors in assorted communities. The vendors would offer services such as babysitting, interior design, landscape design, handyman services and the like.

The persons perpetrating the fraud would contact the service provider and spin the following story:

"I just closed on my house and I have a small check payable to me in the amount of $2,900.00. I will send it to you. Please cash the check and take the fee for your services of $300.00 and send me back the rest of the money. (I will provide a UPS return envelop or please deposit the rest of the money in my bank at Bank of America, account #XXX)".

As soon as the deposit was made, the account was closed. This went on for a few weeks. Approximately $500,000.00 in fraudulent checks were presented.

My bank immediately covered the checks. My account was placed on a positive pay mode which required that I fax copies of checks actually written to the banks so they could be paid and a new account was set up immediately.

Since it was an IOLA account it took about ten (10) days to get a new account up and running and verified by lending clients for use.

I had to self report the fraud immediately to the Grievance Committee. I was fearing the worst but since it was fraud, it was not held against me as all parties got paid. No funds went missing.

THE ONLINE ACCESS GAME:

I have been told that I have the highest level of security my bank offers. In order to transfer money, I have to sign on to online banking with one set of credentials to initiate a wire transfer. I then need to log out and log in under a second set of credentials with a second security token code to approve the wire I had initiated.

Even with the highest level of security, there was a tremendous hole that was uncovered. I returned to the office from court one day to see a few fax confirmations in my fax machine. The confirmations were indicative of what we would normally see with one exception, the recipient bank account for the named client was at another bank. The persons perpetrating the fraud knew exactly what information to include in the wire fields. They had my clients name and address. The account was with Wells Fargo and not T.D. Bank.

I knew that I did not have any outgoing wires on that day. I immediately called the wire department at my bank. They acknowledged wire activity but could not discuss it with me as I lacked my telephone password. When I stated that I did not have a telephone password, I was told that I had set one up that very morning! This was the work of the fraudulent parties.

I immediately went to my bank branch and my manager called the wire department with me present. The wire department wanted the unknown telephone password from me once again. My branch manager was able to get the wire department to agree to lock the account and prevent additional wires. It was a struggle as the wire department was insistent that I had setup a password and demanded it from me.

It was later revealed that the persons perpetrating the fraud were able to call telephone banking and with only my name, date of birth and place of birth, set up telephone banking access to initiate wires over the phone!

The best security protocols I had in place were useless, as easily available information was used to gain access to my accounts. This fraud resulted in a loss of $50,000.00, which the bank covered. Again, I self reported the fraud to the Grievance Committee and was absolved of any liability or investigation as a proven case of fraud.

THE FAKE E-MAIL SCAM:

In a few instances, Lenders communicate with the borrowers and copy my office on the e-mails. This gives persons perpetrating fraud access to crucial details to commit fraud. The borrowers e-mail account is often not secure and information obtained is used to copy my office e-mail address.

The persons perpetrating the fraud will use this information to create a false e-mail address and e-mail the borrower giving them wire instructions to send a wire for a specific sum of money for a transaction to an account with an indication it is to the attorney for a pending closing.

Fortunately, none of the parties associated with my transactions took the bait and wired the money. I know of instances where the innocent parties have taken the bait and wired money to someone not involved with the transaction. The money is gone!

I had a litigated matter in my office where an attorney conducted a large scale commercial closing and had to wire the broker the $60,000.00 commission to the broker. The e-mail was compromised and the money was wired to the account listed in the fake e-mail.

The parties insurance carrier covered part of the loss but no one was made whole. Fraud is rampant. Include a disclaimer on all e-mails about cloned e-mail accounts and that wire information will not be requested by e-mail.

Good Luck and remember escrow never sleeps!

WIRE AUTHORIZATION FORM

I, ____________________________ hereby authorize, PETER D. TAMSEN, P.C. to wire proceeds received from a Real Estate transaction to my account as reflected on the attached check copy.

My Financial Institution Information

Name of Bank: ____

Routing Number: ____

Account Number: ____

123

YOUR NAME
1234 Main Street
Anywhere, OH 00000

DATE ____________

PAY TO THE
ORDER OF ______________________________ $

______________________________________ DOLLARS

044072324 000123456789 123

ROUTING NUMBER

ACCOUNT NUMBER

CHECK NUMBER

I have been advised that although wire transfers should be instantaneous, there may be a delay in the receipt of these funds. Do not write checks against the funds until confirmed that these monies have been received by your bank.

Dated: ______________________________

Signature

A copy of a voided check is attached

Closing:

Borrower/Lender:

INCOMING WIRE:		**$0.00**
OUTGOING WIRE:		
	BROKER	**$0.00**
Bank Checks:		
0		**$0.00**
0		**$0.00**
0		**$0.00**

Additional BROKER Wires:

Borrower:	**Amount:**
0	$0.00
	$0.00
	$0.00
	$0.00
	$0.00
Total BROKER Wire Amount:	**$0.00**

WIRE CONFIRMATION FORM

Funding Date ______________________

Purchase

BORROWER: ______________________

LENDER: ______________________

Loan Amount: $0.00

Wire Amount: $0.00

Wire Confirmed: [ ]

Wire Receipt and Confirmation

	Payee	Amount	Sent	Confirmed
	BROKER	$0.00		
Payoff				
Payoff				
Payoff				
	Total Wired Funds:	$0.00		

Additional Wires funding the same day

Borrower Name	Amount
0	$0.00
TOTAL:	*$0.00*

PURCHASE CHECKLIST

Closing: ______
Time: ______
location: ______

Attorney: ______
Loan Officer: ______

BORROWER: ______

SETTLEMENT DATE: ______ FUNDING DATE: ______

PREMISES: ______

LENDER: ______ LOAN #: ______

LOAN AMOUNT: $0.00 WIRE AMOUNT: $0.00

NET AMOUNT: $0.00

ADDITIONS TO LOAN AMOUNT

LENDER PAID TO BROKER:	+	$0.00
LENDER CREDIT TO BORROWER:	+	$0.00
LENDER'S PORTION OF MTG TAX	+	$0.00
Bank Additions	=	***$0.00***
BANK CHARGES + LOAN AMOUNT *new total:*		*$0.00*

REDUCTIONS TO LOAN AMOUNT

BANK CLOSING COSTS:	-	$0.00
BANK INTEREST:	-	$0.00
BANK ESCROWS:	-	$0.00
UPFRONT MIP (except RESMAC):	-	$0.00
OTHER:	-	$0.00
POINTS:	-	$0.00
Bank Reductions	=	**$0.00**
WIRE AMOUNT	*total:*	***$0.00***
LENDER CREDIT TO BORROWER:	-	$0.00
LENDER Payment: 0 on Checklist	total:	$0.00

CHECKS DISBURSED

Lawyer Fee	-	$0.00
Broker Fee	-	$0.00
1/4 Point payable to: ______ title number: ______	-	$0.00
NET AMOUNT	$	$0.00

This is how I calculate the Brokers check amount:

Broker Commisson		$0.00
Credit report fee	+	$0.00
Other	+	$0.00
CHECK TO BROKER	TOTAL:	$0.00

CHECK DISBURSEMENTS

Closing Date: ____________________
Closing Time: ____________________
Location: ____________________
____

BORROWER: ____________________

LENDER: ____________________

PRINCIPAL AMOUNT OF NEW LOAN	**$0.00**
CREDITOR/PAYEE	
Attorney Fee	**$0.00**
BROKER FEE	**$0.00**
LENDER:	**$0.00**
AMOUNT REMAINING TO BE DISBURSED	**$0.00**
TOTAL AMOUNT DISBURSED	**$0.00**

DATED: ____________________

QUARTER POINT: $0.00 *Title:* 0

WIRE AMOUNT: $0.00

____
PURCHASER

____
SELLER

____
PURCHASER

____
SELLER