The Perfect Storm — CIR and IOLTA

by Robert W. Alcorn

"The Perfect Storm" was a 2000 blockbuster movie starring George Clooney. It was based on the true story of the fishing vessel the "Andrea Gail" and its demise in an October 1991 storm off the coast of New England, which was historic in its proportions. The storm was the result of the confluence of an "extra-tropical cyclone" and a hurricane (Grace), resulting in one superstorm. In the end, poor Mr. Clooney and his crew were sent to Davey Jones' locker when the vessel was caught on the open sea in this massive storm, which was later called "The Perfect Storm."

With CIR (comprehensive immigration reform) legislation looming on the horizon, I can see the potential for another "perfect storm" as it relates to immigration attorneys. This storm will be formed from the confluence of four factors:

1. IOLTA (Interest on Lawyers' Trust Accounts) accounting practices that are commonly used (or more accurately stated, "not used") by some immigration attorneys I have discussed this issue with across the nation;

2. the grievance process;

3. IOLTA accounting rules as promulgated by the governing bodies; and

4. potential passage of CIR legislation.

As the State Bar of Texas (SBOT) rules are the only state's rules with which I have had any direct experience, this article will be based on the SBOT IOLTA accounting rules. From a very brief survey of the IOLTA accounting rules of a few other states, the Texas IOLTA accounting rules seem to be similar to the rules of most other states, so the observations, concerns, and suggestions here should be useful in most states.

This article is not intended as a critique of the specifics of the various rules related to IOLTA accounting, but instead addresses the effects of those rules on immigration attorneys in light of the states' grievance processes and the magnifying effect CIR could have. I will stipulate that the states' IOLTA accounting rules are what they are, and all attorneys should comply with them always.

While accounting for IOLTA is easy conceptually, in practice accounting for IOLTA properly is a time-consuming, expensive, and surprisingly difficult process to the soul who has to sit down and actually do it on a daily basis. Immigration attorneys' practices tend to have a larger volume of cases open at any one time compared to practices in other areas of law. It is not uncommon for a solo practitioner immigration attorney of modest means to have 300 – 1,000 open cases at any given moment (this estimate does not include the effects of CIR).

IOLTA accounting for one client is easy. IOLTA accounting for 1,000 client cases is very difficult, especially when your clients are making payments on a weekly or monthly basis. Under CIR, I am hearing of caseloads expected to exceed 50,000 cases by a single firm, and from my experience in the immigration area, I do not bat an eyelash at such numbers, given the order of magnitude of the immigrant population that may be affected by CIR.

As difficult as it is to keep up with IOLTA accounts during ordinary times, it will be next to impossible to properly maintain the IOLTA accounting records when CIR legislation is passed if the immigration attorney is not already prepared with proper IOLTA accounting policy, procedure, personnel, and software.

The potential for an IOLTA-infraction finding is necessarily always automatically attached to each and every grievance that is filed, because each district grievance panel can add charges to the existing charges should such additional rules violations come to light during the investigatory process. If the initial grievance filed is for "neglect of a legal matter," it is impossible to be sanctioned for stealing IOLTA funds if you have not stolen IOLTA funds. However, if your IOLTA accounting is not up to speed and a grievance is filed on a non-IOLTA rule violation, it is entirely possible that the district grievance panel can add a grievance for an IOLTA violation if it comes to light during the course of the district grievance process.

As a former public member of the Dallas district grievance panel for six years, I have these observations regarding IOLTA matters:

1. The SBOT, the Chief Disciplinary Counsel's (CDC) office, and the local district grievance panel members take IOLTA infractions deadly seriously;

2. Too many of the immigration attorneys I have discussed this issue with have a seriously flawed understanding of the IOLTA accounting rules;

3. In the estimated 500-750 grievance panel cases I reviewed as a public member in the Dallas district, IOLTA rules, as the initial precipitating claim of the grievance, occurred fewer than five times during the six years;

4. IOLTA infractions, while not a part of the initial grievance filing, came to light in the course of the investigation process fewer than five times.

5. Of the many grievance cases I reviewed in my six years on the Dallas panel, true and genuine theft of IOLTA funds occurred in only two or three, at most. All other IOLTA-related cases were technical compliance issues. What this tells me is that there is not a problem rampant among Texas attorneys in keeping their clients satisfied with the attorneys' handling of client funds. (Of course, clients have next to zero clue as to the IOLTA accounting obligations the attorneys must meet.) Therefore, there are very few grievances filed related to IOLTA infractions.

This creates the false impression among attorneys, the state regulatory bodies, and the local district grievance panels that there is not a problem industrywide with IOLTA accounting practices amongst immigration attorneys. However, the violations are chiefly technical in nature (i.e., IOLTA accounting is not being properly done, which clients are oblivious to; thus, no grievances are filed except in egregious cases of outright theft, which are rare).

6. Noncitizens, especially those with no legal status, will almost never file a grievance due to their trepidation of any law enforcement body.

This brings to light why there are so few IOLTA grievances, especially against immigration attorneys.

7. If the attorney's IOLTA accounting rules/practices/policies/procedures are not in place, the attorney is exposed by each and every client, and with any and all grievances that may be filed against him, without regard to the outcome of the grievance case. I.e., what would ordinarily be a summary disposition case could turn into a deadly serious, IOLTA-rules-violation case for the unwary attorney.

As a former member of a district grievance panel and a frequent speaker nationally at immigration law conferences, I have had the opportunity to speak with many, many immigration attorneys from across the United States.

As a non-attorney public member of the local panel I was quite surprised at the ferocity with which my attorney-member grievance panel mates would attack IOLTA violations. (Trust me, you do not want to be hauled up in front of any local grievance panel on IOLTA charges. It will not go well for you.)

At the same time, I am struck by the nonchalance given IOLTA accounting rules by many, many immigration attorneys I speak with around the country. There is a serious disconnect between what happens in the ordinary immigration attorney's office as it relates to IOLTA accounting and the reaction of the district grievance panels when they review IOLTA grievances.

The main source of confusion seems to stem from the two terms "true retainer" and "flat fee, nonrefundable retainer."

Having developed an interest, from the accountant's perspective, in matters IOLTA, I observed that, speaking strictly regarding immigration attorneys (and it has come to my attention lately that criminal attorneys exercise similar IOLTA accounting practices), the common practice is for the immigration attorney to charge a flat fee for whatever service is agreed upon to be provided. It may, or may not, be a part of the attorney's engagement letter that some or all of the flat fee is nonrefundable.

When I ask immigration attorneys whether they run the fees collected from these "flat fee, nonrefundable" cases through their IOLTA account, I consistently hear the same response from too many of them, word for word, which is "It is a flat fee, nonrefundable retainer, therefore I do not have to run the money through my IOLTA account." The second line of logic I sometime hear applied by immigration attorneys is that the entire fee is earned "on contact.," i.e., at the time the client signs the engagement letter, on "Day One"; therefore, no need to use the IOLTA account.

From where I sit, on the sidelines as an observer, this is where the rubber meets the road on this IOLTA issue. I refer first to "A Lawyer's Guide to Client Trust Accounts,"[1] published by the State Bar of Texas

[1] Available at http://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides/TrustAccounts/TrustAccountBooklet.pdf.

(updated June 22, 2012), at page 4, where the following comments are found:

- Examples of unearned fees include: . . . Flat fees that have not been earned, regardless of whether the fee is deemed "nonrefundable" in the fee agreement.
- Unearned fees are always subject to refund until earned and cannot be deemed nonrefundable by agreement.

Also, I refer to Opinion No. 611, issued September 2011 by the Professional Ethics Committee for the State Bar of Texas,[2] which states in part:

> In view of Opinions 391 and 431, the result in this case is clear. A legal fee relating to future services is a non-refundable retainer at the time received only if the fee *in its entirety* is a reasonable fee to secure the availability of a lawyer's future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of employment for the client. A non-refundable retainer meeting this standard and agreed to by the client is earned at the time it is received and may be deposited in the lawyer's operating account. However, any payment for services not yet completed does not meet the strict requirements for a non-refundable retainer (as that term is used in this opinion) and must be deposited in the lawyer's trust or escrow account. Consequently, it is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with a client that a fee is nonrefundable upon receipt, whether or not it is designated a "non-refundable retainer," if that fee is not in its entirety a reasonable fee solely for the lawyer's agreement to accept employment in the matter. A lawyer is not permitted to enter into an agreement with a client for a payment that is denominated a "non-refundable retainer" but that includes payment for the *provision* of future legal services rather than solely for the *availability* of future services. Such a fee arrangement would not be reasonable under Rule 1.04(a) and (b), and placing the entire payment, which has not been fully earned, in a lawyer's operating account would violate the requirements of Rule 1.14 to keep funds in a separate trust or escrow account when funds have been received from a client but have not yet been earned.

It appears to me that the language used in the SBOT IOLTA guide, and in Opinion No. 611, is unambiguous. While a small part of the total flat fee that a client pays an immigration attorney for his service may be deemed "earned" as a result of the initial consultation, etc. and can be deposited into the attorney's operating account, the remainder of the payment has to go into the IOLTA account, without regard to whatever name is attached to it, be it "nonrefundable", etc.

Therefore, each and every immigration attorney who is not now using the proper IOLTA accounting policies, practices, and procedures is "out of compliance" with the SBOT IOLTA accounting rules and all those same immigration attorneys are fully exposed to having a summary disposition panel non-IOLTA driven grievance transmogrify into a serious IOLTA disciplinary problem.

I can say from first-hand experience that, if an IOLTA rules violation comes to light during the grievance investigation process, the immigration attorney will be subject to possible discipline, even though the IOLTA infraction was not an issue in the original complaint filed by the client. The IOLTA infraction complaint can and will be levied and acted upon by the local grievance panel, given sufficient evidence.

So,

> A. Given that the current IOLTA accounting policies and practices of what I believe to be those of many immigration attorneys are currently what they are as described above;
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> B. Given that the IOLTA accounting rules are what they currently are;
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> C. Given that the current IOLTA accounting practices of those many immigration attorneys are not in compliance the IOLTA accounting rules;

consider the following:

If the IOLTA accounting noncompliance problem is of magnitude "X" today, what will be the order of magnitude of this noncompliance problem when CIR is passed and ten to fifteen million immigrants hit the front door of every immigration attorney even pretending to provide competent immigration law services?

According to the American Immigration Lawyers Association website there are over 12,000 immigration

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[2] At http://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-611.aspx.

attorneys in the United States now (and climbing rapidly with the advent of CIR).

What will be the increase in each immigration attorney's probability of, sooner or later, having a grievance filed against him or her? What will be the increased probability that an IOLTA technical compliance infraction will come along as a result?

Heretofore, noncitizens have been most reluctant to file grievances against immigration attorneys for fear of attracting attention to themselves and maybe being deported. Once CIR legislation gives them legal status, their fear will be much less. Therefore, they will be much more likely to access the grievance process if they think that they have been abused. Thus, there will be more risk to an immigration attorney for IOLTA accounting shortcomings to be found out in any grievance filed against that attorney.

I have surveyed only briefly the available software options for accounting for immigration law firm IOLTA accounts, and it seems that most software packages tend to be "full-service" packages that encompass firm-wide financial accounting, time tracking, IOLTA tracking, client billing, payroll, and other functions. This is a good solution for the larger immigration firms, but in my experience, most immigration law service providers are fewer than four-attorney firms. These "full-service" software packages are too extensive for the smaller firms to use — thus the dearth of useful IOLTA software packages for small firms, it seems.

The Minnesota State Bar Association has published a forty-four-page guide, "Keeping Clients' Trust Accounts with QuickBooks 2010 Professional," which is a very clear step-by-step "how to" manual. The only useful software that I have heard about, at the small firm level, is home-made Excel programs for very low-volume firms (fewer than 100 client accounts); however, I think, having worked with Excel for thirty years, that Excel becomes unworkable once you get over fifty or a hundred cases. With CIR, for an immigration law firm to have over 5,000 active client IOLTA accounts at any given time will not be uncommon, I truly believe.

So, "What to do?!?!?"

There is no "silver bullet" to make your pain go away, I am so sorry to say. For you immigration attorneys out there, if you want to comply, there is only one answer: You must build into your office operations the labor, software, and administrative costs to maintain your IOLTA account as per the governing rules. It is that simple. No way around it. Period!

My mission with this article has been to bring to the forefront this looming problem, in advance of a flood of CIR cases, so that immigration attorneys have time to try to prepare for "The Perfect Storm." Get ready now, and do not let a massive opportunity, such as CIR, also bring you exposure to serious IOLTA discipline.

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REMINDER:

The correct citation form for the BIB is Author, *Title*, 18 Bender's Immigr. Bull. 941 (Aug. 15, 2013).

THE PROFESSIONAL ETHICS COMMITTEE FOR THE STATE BAR OF TEXAS Opinion No. 611

September 2011

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount initially paid by a client with respect to a matter is a "non-refundable retainer" that includes payment for all the lawyer's services on the matter up to the time of trial?

STATEMENT OF FACTS

A lawyer proposes to enter into an employment agreement with a client providing that the client will pay at the outset an amount denominated a "non-refundable retainer" that will cover all services of the lawyer on the matter up to the time of any trial in the matter. The proposed agreement also states that, if a trial is necessary in the matter, the client will be required to pay additional legal fees for services at and after trial. The lawyer proposes to deposit the client's initial payment in the lawyer's operating account.

DISCUSSION

Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer shall not enter an arrangement for an illegal or unconscionable fee and that a fee is unconscionable "if a competent lawyer could not form a reasonable belief that the fee is reasonable." Rule 1.04(b) sets forth certain factors that may be considered, along with any other relevant factors not specifically listed, in determining the reasonableness of a fee for legal services. In the case of a non-refundable retainer, the factor specified in Rule 1.04(b)(2) is of particular relevance: "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer . . . ."

Rule 1.14 deals in part with a lawyer's handling of funds belonging in whole or in part to the client and requires that such funds when held by a lawyer be kept in a "trust" or "escrow" account separate from the lawyer's operating account.

Two prior opinions of this Committee have addressed the relationship between the rules now embodied in Rules 1.04 and 1.14.

In Professional Ethics Committee Opinion 391 (February 1978), this Committee concluded that an advance fee denominated a "non-refundable retainer" belongs entirely

to the lawyer at the time it is received because the fee is earned at the time the fee is received and therefore the non-refundable retainer may be placed in the lawyer's operating account. Opinion 391 also concluded that an advance fee that represents payment for services not yet rendered and that is therefore refundable belongs at least in part to the client at the time the funds come into the possession of the lawyer and, therefore, the amount paid must be deposited into a separate trust account to comply with the requirements of what is now Rule 1.14(a). Opinion 391 concluded further that, when a client provides to a lawyer one check that represents both a non-refundable retainer and a refundable advance payment, the entire check should be deposited into a trust account and the funds that represent the non-refundable retainer may then be transferred immediately into the lawyer's operating account.

This Committee addressed non-refundable retainers again in Opinion 431 (June 1986). Opinion 431 concluded that Opinion 391 remained viable and that non-refundable retainers are not inherently unethical "but must be utilized with caution." Opinion 431 additionally concluded that Opinion 391 was overruled "to the extent that it states that every retainer designated as non-refundable is earned at the time it is received." Opinion 431 described a non-refundable retainer (sometimes referred to in Opinion 431 as a "true retainer") in the following terms:

> "A true [non-refundable] retainer, however, is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment. . . . . If the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received. If, however, the client discharges the attorney for cause before any opportunities have been lost, or if the attorney withdraws voluntarily, then the attorney should refund an equitable portion of the retainer."

Thus a non-refundable retainer (as that term is used in this opinion) is not a payment for services but is rather a payment to secure a lawyer's services and to compensate him for the loss of opportunities for other employment. See also *Cluck* v. *Commission for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App.-Austin 2007, no pet.).

It is important to note that the Texas Disciplinary Rules of Professional Conduct do not prohibit a lawyer from entering into an agreement with a client that requires the payment of a fixed fee at the beginning of the representation. The Committee also notes that the term "non-refundable retainer," as commonly used to refer, as in this opinion, to an initial payment solely to secure a lawyer's availability for future services, may be misleading in some circumstances. Opinion 431 recognized in the excerpt quoted above that a retainer solely to secure a lawyer's future availability, which is fully earned at the time received, would nonetheless have to be refunded at least in part if the lawyer were discharged for cause after receiving the retainer but before he had lost opportunities for other employment or if the lawyer withdrew voluntarily. However, the fact that an amount received by a lawyer as a true non-refundable retainer may later in certain

unusual circumstances have to be at least partially refunded does not negate the fact that such amount has been earned and under the Texas Disciplinary Rules may be deposited in the lawyer's operating account rather than being subject to a requirement that the amount must be held in a trust or escrow account.

In view of Opinions 391 and 431, the result in this case is clear. A legal fee relating to future services is a non-refundable retainer at the time received only if the fee in its entirety is a reasonable fee to secure the availability of a lawyer's future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of employment for the client. A non-refundable retainer meeting this standard and agreed to by the client is earned at the time it is received and may be deposited in the lawyer's operating account. However, any payment for services not yet completed does not meet the strict requirements for a non-refundable retainer (as that term is used in this opinion) and must be deposited in the lawyer's trust or escrow account. Consequently, it is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to agree with a client that a fee is non-refundable upon receipt, whether or not it is designated a "non-refundable retainer," if that fee is not in its entirety a reasonable fee solely for the lawyer's agreement to accept employment in the matter. A lawyer is not permitted to enter into an agreement with a client for a payment that is denominated a "non-refundable retainer" but that includes payment for the provision of future legal services rather than solely for the availability of future services. Such a fee arrangement would not be reasonable under Rule 1.04(a) and (b), and placing the entire payment, which has not been fully earned, in a lawyer's operating account would violate the requirements of Rule 1.14 to keep funds in a separate trust or escrow account when funds have been received from a client but have not yet been earned.

When considering these issues it is important to keep in mind the purposes behind Rule 1.14. Segregating a client's funds into a trust or escrow account rather than placing the funds in a lawyer's operating account will not protect a client from a lawyer who for whatever reason determines intentionally to misuse a client's funds. Segregating the client's funds in a trust or escrow account may however protect the client's funds from the lawyer's creditors in situations where the lawyer's assets are less than his liabilities and the lawyer's assets must be liquidated to attempt to satisfy the lawyer's liabilities. In those situations, client funds in an escrow or trust account may be protected from the reach of the lawyer's creditors.

Accordingly, if a lawyer proposes to enter into an agreement with a client to receive an appropriate non-refundable retainer meeting the requirements for such a retainer and also to receive an advance payment for future services (regardless of whether the amount for future services is determined on a time basis, a fixed fee basis, or some other basis appropriate in the circumstances), the non-refundable retainer must be treated separately from the advance payment for services. Only the payment meeting the requirements for a true non-refundable retainer may be so denominated in the agreement with the client and deposited in the lawyer's operating account. Any advance payment amount not meeting the requirements for a non-refundable retainer must be deposited in a

trust or escrow account from which amounts may be transferred to the lawyer's operating account only when earned under the terms of the agreement with the client.

CONCLUSION

It is not permissible under the Texas Disciplinary Rules of Professional Conduct for a lawyer to include in an employment contract an agreement that the amount paid by a client with respect to a matter is a "non-refundable retainer" if that amount includes payment for the lawyer's services on the matter up to the time of trial.