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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.

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