

IS THE CONFIDENCE MAN YOUR CLIENT? *Con Artists Target Lawyers on the Internet*

BY ELLEN EIDELBACH PITLUK



The anonymity, confusion, and increase in moveable wealth during pre-Civil War New York City fostered an opportunity for a man named William Thompson to approach complete strangers on the street, engage them in pleasant conversation, and then walk away with their watches — which they voluntarily “loaned” him while mistaking Thompson for a trustworthy acquaintance. The *New York Herald* dubbed him the “Confidence Man.” At that time, New York City was a growing urban society similar to today’s growing global society. What once was possible on the streets of New York is now possible on the Internet.

In some scams, attorneys have reported that con artists have used fake websites for real foreign companies; real bank names on counterfeit checks with routing numbers that do not belong to that particular bank, thus causing the check to take longer not to clear the attorney’s bank; and fake 800 phone numbers with real banks’ names that have automated verification systems to falsely tell the caller that the financial instrument is valid. The con game has grown much more sophisticated since 1849. Instead of watches, more than \$559.7 million dollars were lost to Internet fraud in 2009, which included check and overpayment fraud — a 111.5 percent increase from the \$264.6 million lost in 2008, according to the FBI’s 2009 Internet Crime Report.

Con artists are also targeting family law attorneys by the same deceptive methods they use in debt collection, or by the simpler method of overpayment fraud. Angleton attorney Steve Costello received an unsolicited email in January 2010 from a prospective client seeking a divorce. The woman said she was a Texas resident temporarily living in London with plans to return to Texas. Costello set his retainer, the client agreed to it, and returned his fee agreement. Costello quickly received a check from a third party for \$10,000 more than his retainer. When Costello sent the client an email about the erroneous amount, she instructed him to take out his advance fee, forward money to her travel agent in Arkansas, and send her a check for the remaining amount to a London address. Costello was apprehensive and decided to

take his check to Bank of America, from which it appeared to be issued, and learned it was counterfeit. San Antonio attorney Danny Kustoff received an email from a woman living in Japan who requested his help in a family law case. Kustoff also received an attachment of an alleged collaborative law participation agreement. At the time, it appeared the woman had a valid claim with appropriate supporting documentation. Kustoff became suspicious when his client wanted him to wire funds as soon as he obtained and deposited funds from the debtor without allowing time for the check to clear his trust account. Kustoff refused to do so until the check *cleared* the bank, in spite of pressure from his client to the contrary. Kustoff deposited the check into his trust account, but avoided a loss of \$340,000 as a result of the counterfeit check. However, if Kustoff had wired the funds as his client insisted, the real monetary loss would have been to his other clients, as well as to Kustoff, who would have been held responsible for the trust account funds under Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct in spite of his own lack of fraudulent behavior.

It is imperative to wait until a client's financial instrument *clears* the bank in which it was deposited. An attorney must understand the difference between a bank making deposited funds *available* as opposed to the deposited funds *clearing* the bank and becoming collected. It may take longer than 60 days for a check to clear a bank, especially if it is an overseas account with erroneous routing numbers.

What are some of the common factors in these scams? Usually there is a prospective overseas client, who the lawyer has never met or spoken to. But that evaluation alone may differ from scam to scam and disallow legitimate overseas clients access to legal representation in the United States. However, there are two other red flags. The first is a significant overpayment of a retainer from

the proposed client or a third party. The second is an eager or quick-to-pay debtor. Any combination of these factors should arouse suspicious.

If the funds have been deposited, refuse to wire any funds or write any checks on the trust account (in connection to that particular deposit) *until the deposited funds clear the bank*. Once the funds have cleared the bank, they are collected funds (as opposed to available funds, which have not cleared). Rule 1.14 (a) of the Texas Disciplinary Rules of Professional Conduct requires a lawyer to hold funds belonging in whole or in part to a client or third party in connection with a representation in a trust account so that those funds are held separately from the lawyer's own funds. The trust account may be an Interest on Lawyers' Trust Account (IOLTA) or an interest-bearing trust account, in which the interest is paid to the client. The rule and comments are silent as to whether writing disbursements from the trust account must be made on collected funds or available funds.

However, the policy behind Rule 1.14 is to safeguard funds that do not belong to the lawyer. Clearly, the only way to do so is to determine that the deposits in the trust account have cleared and become collected funds prior to making disbursements. In addition, the lawyer is a fiduciary, which requires this higher standard of care. As a result, do not interpret the word "promptly" in Rule 1.14 (b) to mean that the lawyer has to deliver funds to a client or third party as soon as they become available. Always wait until the funds have cleared the bank and become collected. This is true, too, when a lawyer is required to return unearned fees under Rule 1.15 (d) when the representation is terminated. It may be wise to explain this policy to clients in an initial fee agreement.

Con artists target lawyers because they believe that their scams will remain confidential. Rule 1.05 (a) of the Rules defines

confidential information to include both privileged and unprivileged information that is learned during the representation of the client. If the lawyer suspects fraud, he or she may reveal the client's confidential information under Rule 1.05 (c) (7) in order to prevent the client from committing a criminal or fraudulent act. Report the scam to the FBI at www.fbi.gov/cyberinvest/escams.htm.

Con artists will continue to develop and adapt schemes as soon as the previous one becomes ineffective. To avoid becoming a mark, educate yourself about Internet fraud.

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