



“Ultimately, the best way for an attorney to avoid falling victim to a scam involving a fraudulent check is to wait for checks to actually clear before disbursing funds from those checks.”

Practice Tips

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YES VIRGINIA, ATTORNEYS CAN FALL FOR SCAMS

Shortly before Christmas, I received an unsolicited e-mail from a Mr. Sami Dawa from Burkina Faso. Dawa, who claimed to be an employee of the African Development Bank, wanted to retain my services to transfer \$10,500,000 from his country into my trust account, so that he could access the funds when he arrived in the United States. Apparently, the original owner of the funds, a citizen of Jordan, had died in a plane crash on July 31, 2000, and left no heirs. Dawa didn't want the funds deemed abandoned, and would be happy to pay me 50 percent of the amount as a fee for my assistance.

If I had responded, Dawa would have eventually asked me to transfer some monies (after sending me documents establishing the “veracity” of his claims) to him, for the purpose of either bribing an official to get the money moved, or, more likely in this case, establishing an account with his bank, into which the funds could then be transferred.

How do I know this? The e-mail incarnation of this scam (known as the “Nigerian Scam”) has been around since at least 2003, and it appears the scam itself has existed, in one form or another, since 1830. It is so prevalent that the U.S. State Department has issued a booklet on the scheme titled “Nigerian Advance Fee Fraud.”¹

If you thought the e-mail I received looked suspicious on its face, there is a reason for that. It was done intentionally to weed out all but the most gullible of recipients, including the insertion of spelling and compositional errors.² If someone is gullible enough to respond, the scammer will then invest more substantial effort, such as directly communicating with the recipient, in an effort to complete the scam.

Lawyers tend to be (or at least think of themselves as) above such gullibility. However, attorneys have fallen prey

to such scams. Not too long ago, a Nevada attorney fell for a version of this scam involving the retrieval of World War I bonds purportedly worth millions of dollars. Unfortunately this attorney also decided that misappropriating client funds was a prudent way to repeatedly pay the scammer the monies “necessary” to obtain possession of these bonds.

Still, I'd like to think that most attorneys would not fall for such a ploy. However, more sophisticated scams target attorneys.

An August 2012 Florida Bar article³ concerned an attorney who self-reported that \$80,000 had been swindled from his trust account. This attorney was retained by a realtor, with whom he had a long-term relationship, for a closing on the purchase of a house (some states require attorneys to conduct real-estate closings).

The “purchaser” of the house, with whom the attorney spoke over the phone on several occasions, claimed to be a doctor from England. This purchaser indicated that he was going to wire

transfer \$125,000 to the attorney's trust account, but later “decided” to send a cashier's check instead.

The cashier's check was drawn on a Canadian bank in the amount of \$205,000 (U.S. dollars, not Canadian dollars). The purchaser advised the attorney to retain the funds over the purchase price for expenses associated with the closing. The purchaser then sent an e-mail to the attorney requesting that \$80,000 be sent to an account in Japan, where the “doctor” was opening a new clinic.

Before the lawyer wired the \$80,000 to the Japanese bank, he checked with his own bank to confirm that the cashier's check had cleared. The bank advised him that the funds were available, so he wired the money to Japan. However, the attorney's bank subsequently rejected the cashier's check, advising him that it

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was either “altered or fictitious.” This left an \$80,000 shortage in the attorney’s trust account.

One of the main ways attorneys get caught up in, and fall victim to, such scams is by disbursing funds when the bank indicates the funds are “available,” instead of waiting until the funds actually clear the bank from which the funds are being drawn. Banks, as a courtesy, often make some or all of a deposit available before it clears, especially if the customer has sufficient funds to cover the check.

The unsuspecting attorney is usually asked to wire the funds over *as soon as possible*, often to a foreign country. A few days later, the bank reverses the credit after determining that the check is fraudulent. Sometimes, as the Florida case demonstrates, even cashier checks can be forged.

Once the reversal occurs, the funds withdrawn actually belong to another client. The early disbursement of the funds and its effect on unrelated clients implicates Rule of Professional Conduct (RPC) 1.15 (Safekeeping Property). Although RPC 1.15 requires that an attorney promptly distribute funds being held for a client or third-party, an attorney is not violating the rule by waiting until the check clears. In fact, that is exactly what the attorney should do.⁴

One suggestion for catching a scam is to independently verify the facts of the communication in question, such as addresses, phone numbers, etc. In dealing with Dawa’s e-mail, I searched for plane crashes that occurred on July 31, 2000. Although there was a crash on that date, it did not involve the type of plane referenced in Dawa’s e-mail, and none of the passengers were from Jordan. The African Development Bank appears to be a legitimate entity. Still, while visiting its website to verify its legitimacy, I spotted a section discussing scams that falsely implied a connection with the institution.

Michael Kennedy, Vermont Bar Counsel, advised our office of a relatively new scam targeting attorneys. The scam begins with a legitimate case, with the scam itself commencing when the

lawyer disburses a trust account check to a client or third-party. The scammer picks up the check in person, leaves the office, returns a few minutes later and tells the attorney, “I have a bad habit of losing checks. Can you wire the money instead?” The lawyer takes back the check, rips it up and wires the funds as requested.

Unfortunately for the lawyer, during those few minutes between leaving the office and returning, the client or third party used a banking app on a mobile device to scan the trust account check and deposit it. Once the wire was sent, the scammer collected again.

Depending on how often an attorney reconciles the firm’s trust account, it may take a while to discover the scam; it might go undiscovered until a future disbursement results in an overdraft due to the double dipping. Even if the attorney eventually discovers the fraud, the attorney may be unable to get the monies back from the scammer.

Ultimately, the best way for an attorney to avoid falling victim to a scam involving a fraudulent check is to wait for checks to actually clear before disbursing funds from those checks. Also, regularly reconciling the trust account will reveal if someone has improperly removed/ accessed funds from the account. Not only do such steps help avoid being taken for a ride, these measures constitute an attorney’s obligation under RPC 1.15.

As to avoiding those scams that don’t involve the use of checks, it helps to remember the old adage, *if something sounds too good to be true, it probably is*. ■

1. See <http://www.state.gov/www/regions/africa/naffpub.pdf>.
2. See http://www.cbsnews.com/8301-205_162-57458163/why-do-nigerian-email-scammers-say-theyre-from-nigeria/.
3. See Mark D. Killian, *Lawyer Bilked Out of \$80K*, The Florida Bar News, August 15, 2012, available at www.floridabar.org.
4. Sometimes banks reverse funds even after a check has cleared. Unsurprisingly, lawsuits result. See Debra Cassens Weiss, *Minnesota Law Firm Milavetz Gallop Files Suit Blaming Wells Fargo for Loss in Nigerian Scam*, ABA Journal, April 11, 2012, available at www.abajournal.com.

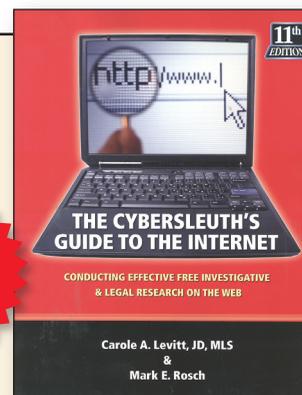
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