

## Check Scams Target Lawyers

Recently, lawyers have been the target of an alarming number of schemes involving fraudulent checks. The fraud can take many forms, but essentially it consists of some variation of the following scenario: Client hires lawyer, either by phone or by e-mail. Client gives lawyer a retainer in the form of a negotiable instrument (e.g., a standard check, a cashier's check, a certified check, or a money order – collectively referred to in this article as a “check,” unless otherwise noted). Alternatively, lawyer receives payment from a third party for the legal matter in the form of a check. Lawyer then deposits the retainer or third-party check into lawyer's trust account. Shortly thereafter, client requests that lawyer wire the funds to a particular bank account for purposes of the legal representation (e.g., payment of a loan to a third party, payment for a real estate deal, payment for the sale of a business, or payment owed to the client for a debt). Lawyer thinks the check has “cleared” and follows client's instruction to wire the funds into the specified bank account. After the funds have been wired, the bank discovers that the check lawyer deposited into lawyer's trust account is fraudulent and recalls the funds released to lawyer's trust account. This either overdraws lawyer's trust account or draws on the funds of another client, which is a violation of ORCP 1.15-1.

What's a lawyer to do?

### How to Avoid Being Scammed

- Scrutinize the form of retainer and payment arrangement. If a third party is providing the retainer, find out more information about the party.
- Train staff to be aware that retainers received from clients or checks received from third parties may be fraudulent.
- If your suspicion is raised, don't accept the case or

the money. At a minimum, do some background research about your client, such as asking for supporting documents regarding the legal matter (e.g., loan documents, judgments, contracts). If the client is a business, verify that the company is legitimate by using directory assistance or doing an Internet search for the phone number. Call the phone number to verify that the business is legitimate and ascertain whether your “client” is employed by the company and has authority to retain your services. In many scams, the business may be real, but your “client” is either not an employee of the company or using his or her position for fraudulent purposes.

- Call the issuing bank branch of the check to verify that the check is legitimate. Use the phone book, the bank's Web site, or directory assistance to obtain the phone number of the issuing bank branch. Do NOT use the telephone number printed on the check – it could be fraudulent.
- If the issuing bank will not or cannot verify the authenticity of the check, *ask your bank to call the issuing bank and make this inquiry* before depositing the check into your trust account. It helps to have a good relationship with your banker.
- If you cannot verify that the check you have is legitimate, consider terminating the legal representation of the client or waiting until the check has cleared and the funds are not subject to a chargeback (see the next section on “Available Funds” Isn't Guaranteed Payment). Instruct your bank to notify you immediately if it suspects fraud.
- Verify money orders by calling the issuing company. Keep in mind that scammers might use a legitimate number on numerous money orders, so there is no guarantee that the money order is legitimate.

#### DISCLAIMER

*IN BRIEF* includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

- If possible, avoid wiring funds. Make any payments from your bank accounts with a standard check. Wired funds cannot be recalled, but if you write a check, you may have a short window of time to recall it if you discover fraud.
- Be especially cautious in accepting legal work initiated by overseas parties you do not know.
- From the outset, make your clients aware of your office policy on check clearing and release of funds. It might be a good idea to put this policy in your retainer agreement so your clients will know when to expect payment.
- Do not rely on your own eyes or expertise to assess the validity of a check. With the rise of color printers and scanners, check scammers can easily produce a check that looks and feels authentic.

Keep your eyes and ears open, trust your instincts, and don't ignore red flags. If a case looks and sounds too good to be true, it probably is.

## **“Available Funds” Isn’t Guaranteed Payment**

The Expedited Funds Availability Act (a.k.a. Reg. CC; 12 U.S.C. 4001; 12 CFR 229) requires banks to disclose to their customers when deposited funds will be made *available*. However, there is a difference between the time when banks make the funds available and the time when final payment by the issuing bank has been honored and collected (i.e., “cleared”). When an attorney is given a cashier’s check, amounts under \$5,000 will be available in one banking day. For checks over \$5,000, the bank will notify the customer when the funds will be available; generally, this is 7 to 11 business days. Some banks make the funds available sooner and give the customer “provisional credit.” As a result, in some situations an attorney may be allowed to draw upon these funds very quickly – yet it may turn out that the money hasn’t actually been collected from the issuing bank.

Cashier’s checks present a special opportunity for scammers because they are widely perceived to be as good as cash, and, in fact, *legitimate* cashier’s checks *are* guaranteed by the issuing bank. However, cashier’s checks are still checks, and banks can still recall the funds from a “cleared” check if subsequent processing finds it to be fraudulent. Many scams exploit the misconceptions surrounding cashier’s checks. Consequently, it is safest to follow the guidelines on check clearing outlined below, even for cashier’s checks.

Generally, when receiving any check, you should wait for the funds to be honored and collected by the issuing bank. This is often referred to as “waiting for the check to clear.” For an ordinary transaction with an established client or third party known to you, follow the PLF’s three-, five- and ten-day recommendation: Wait three banking days for local checks,

five banking days for in-state checks, and ten banking days for out-of-state checks to allow the money to “clear.” However, you should wait at least ten banking days before authorizing any disbursements from your lawyer’s trust account in any of the following circumstances: (1) the transaction is with a new client or a client you are unsure about; (2) the amount of the check is very large (especially compared with the extent of legal services provided, if the check is a retainer); (3) the check is from an unknown third party; or (4) any aspect of the transaction raises (or should raise) your suspicions.

A July 2008 article in the *Oregon State Bar Bulletin* by Sylvia Stevens, “Trust Account Lessons,” discusses that a check is not “payment” until it has been presented and honored by the originating bank. It may take a bank several weeks (or months if the check is drawn on a foreign bank) to discover that a check is fraudulent, because check forgers know how to delay confirmation that the check is not legitimate. For example, check forgers may change the nine-digit MICR (magnetic ink character recognition) lines at the bottom of the check. The check may say the name of one particular bank, but the code on the check is drawn from a different institution. This causes the check to be misrouted, which causes delays in processing the check. There is no banking regulation deadline as to how long a bank may wait to “charge back” your account and recall funds previously deposited. However, ten banking days for allowing a check to “clear” will usually be sufficient time for a bank to determine whether a check is legitimate. For more information about Reg. CC, read “Waiting for ‘Go’ Dough: A Primer on Disbursing Client Funds,” by Sylvia Stevens, *Oregon State Bar Bulletin*, June 2006.

Generally, malpractice claims associated with attorney fees or trust accounts are not covered under the PLF’s Claims Made Plan, because these claims do not pertain to the legal advice provided but rather to the business aspects of the law practice. A copy of the PLF Primary Plan can be found on the PLF Web site at [www.osbplf.org](http://www.osbplf.org), under Primary Coverage, Coverage Plan. For more information about PLF coverage, contact Jeff Crawford at 503-639-6911, 800-452-1639, or [jeffc@osbplf.org](mailto:jeffc@osbplf.org).

To protect yourself against these check scams, use your best professional judgment to determine whether accepting a particular matter is worth the risk of: (1) a bank chargeback that you are responsible for, (2) a potential malpractice claim, and (3) a potential ethics complaint. Given that there is no guarantee the check you are getting has money behind it and the real facts may take time to surface, your best approach is to carefully scrutinize the money, the client, and the nature of the transaction.

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## Other Resources

"Trust Account Lessons," by Sylvia Stevens, *Oregon State Bar Bulletin*, July 2008.

"Waiting for 'Go' Dough: A Primer on Disbursing Client Funds," by Sylvia Stevens, *Oregon State Bar Bulletin*, June 2006.

"Embarrassed Lawyers Fall Victim to Internet Scams," by Diane Curtis, *California Bar Journal*, July 2008.

"Lawyer Falls Prey to Pricey Internet Scam," by R. Robin McDonald, Aug. 26, 2008, [www.law.com/jsp/article.jsp?id=1202424058323](http://www.law.com/jsp/article.jsp?id=1202424058323).

"Fraud Scam Alert," by Deborah Gillis, *LAWPRO Magazine*, Winter 2008 (vol. 7 no. 1). [www.practicepro.ca/LAWPROMag/fraud\\_scam\\_alert.pdf](http://www.practicepro.ca/LAWPROMag/fraud_scam_alert.pdf).

A Guide for Financial Institutions: Compliance with Regulation CC, from the Federal Reserve Board. [www.federalreserve.gov/Pubs/regcc/regcc.htm](http://www.federalreserve.gov/Pubs/regcc/regcc.htm).

Expedited Funds Availability Act (EFAA – a.k.a. Reg. CC). 12 U.S.C. 4001; 12 CFR 229. [www.federalreserve.gov/bankinfo/reg/reglisting.htm](http://www.federalreserve.gov/bankinfo/reg/reglisting.htm).

Check Clearing for the 21st Century Act (a.k.a. Check 21). [www.federalreserve.gov/paymentsystems/truncation/](http://www.federalreserve.gov/paymentsystems/truncation/)