

Ethically Speaking



By Charles Slanina, Esquire

Are You Really too Smart to be Scammed?: Internet Scams and Attorney Trust Accounts

You wouldn't steal client funds. Good. But, would you give client funds away to a stranger? Before you say "no," read on.

Delaware has not adopted a bright line rule for disbarment for misappropriation of client funds although it has come very close. *Matter of Carey*, Del. Supr., 809 A.2d 563 (2002). However, attorneys are also sanctioned for simply failing to safeguard client funds. Typically, this occurs when attorneys fail to safeguard client property (in violation of Rule 1.15) by inadequately supervising non-attorney employees (in violation of Rule 5.3) and those employees steal client funds. However, there is a current internet scam operating which permits non-employees of the attorney to steal client funds with the unwitting assistance of the attorney.

We are all familiar with the Nigerian widow or corrupt bank official who sends an unsolicited email asking the recipient to assist in a fraudulent transfer of funds. We are promised a share of the funds in exchange for the use of our bank account to accept a transfer of the funds. Usually, there are substantial fees and costs that the recipient is asked to advance prior to the transfer that never occurs. A new variation of this scheme has emerged which specifically targets attorneys and their escrow accounts.

Typically, the scenario is a variation of the following: a U.S. lawyer receives an e-mail from an overseas company offering work. That employment usually involves a debt collection or simple contractual matter against another company on very generous terms. The attorney who takes the bait and agrees to the engagement is

soon pleased to find that the defendant is immediately willing to settle the matter without litigation and on the terms of the demand. Thus, the trap is set.

The defendant quickly sends a settlement check to the lawyer who deposits it into the firm's escrow account. On instructions of the client, a wire transfer is sent to the "client" after the attorney deducts his or her fee. Everything unravels when it is discovered that the settlement check is counterfeit.

To avoid getting ensnared in such a scheme, attorneys need to carefully review the Rule 1.15(n) requirement that they disburse only "good funds" from their fiduciary account as that term is defined in the Rules. However, they also need to be aware that, under federal law, the bank upon which the check is drawn (even a cashier's check) has three days to notify the bank in which the funds are deposited that the check will not be honored.

Lest you think that this is urban legend, that such schemes could never work or that attorneys are always protected by bank regulations, the sad case of Atlanta attorney Gregory Bartko serves as a cautionary tale. According to an August 29, 2008 article by R. Robin McDonald writing for the *Fulton County Daily Report*, Mr. Bartko is now a defendant in a federal suit brought by Wachovia Bank seeking reimbursement of nearly \$200,000 that the bank wired on Bartko's instructions to a Korean bank on behalf of a company that hired him via the Internet. Adding potential professional insult to economic injury, Wachovia also notified the State Bar of Georgia that Bartko's firm's escrow account was overdrawn by more than

\$190,000 as a result of the fraud.

It is reported that Bartko was first contacted by e-mail in February 2008 by the Tah Tong Textile Company in Taiwan seeking representation to collect a large debt from a U.S. company. Mr. Bartko occasionally handles international legal transactions for clients in Asia and did not find it unusual that such transactions be conducted by e-mail because of the twelve to thirteen hour time difference. He even exercised some diligence by confirming that the prospective client was a real company trading on the Taiwanese Stock Exchange. He entered into a fee agreement with the purported client on March 12 and within approximately one month received a SunTrust cashier's check for \$197,530 payable to his firm from the purported debtor. The "client," pretending to be a Tah Tong executive, instructed Bartko to wire the money to the company's account at the Woori Bank in South Korea.

According to the article, Bartko deposited the cashier's check in his escrow account at Wachovia on April 8 and was advised that he could not draw on the funds until April 10 to permit the bank to confirm that the funds were available. On April 11, Bartko returned to Wachovia and arranged for a \$192,530 wire transfer to the Woori Bank. On April 14, Wachovia advised him that he had a \$197,530 debit to his escrow account. He then discovered that SunTrust had returned the cashier's check as counterfeit and that Wachovia had unsuccessfully attempted to recall the wire on the same day that it issued. The bank claimed that it had provided Bartko "provisional

credit” when it wired the funds to South Korea. Wachovia seized \$7,000 of other client funds in Bartko’s escrow account, closed it, and billed him the \$191,619.95 negative balance.

Wachovia initially blamed SunTrust for failing to meet a midnight deadline for the three-day notification that the check was counterfeit. However, Wachovia’s claim against SunTrust failed and Wachovia renewed its claim that Bartko had an obligation to repay the overdraft.

This does not appear to be an isolated incident. Bartko noted in the article that Wachovia’s Loss-Management Team was already working on a similar fraud involving the same alleged Tah Tong representative. The July issue of the *California Bar Journal* reported that two unnamed California attorneys fell for a similar pitch, but their banks detected that the checks were counterfeit before any money was sent abroad. Wells Fargo Bank in San Francisco and City National Bank in Los Angeles have reported that at least six other lawyers were similarly targeted.

There are several morals to this story. Beware of e-mails bearing gifts. Review the “good funds” rule. Remember that your bank may have a different definition of “good funds” than the Professional Conduct Rules.

**“Ethically Speaking” is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at www.delawgroup.com. ©*

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