



ETHICS ALERT

Internet Scams Targeting Attorneys

*Committee on Professional Responsibility and Conduct
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Attorneys in the United States, particularly sole practitioners and lawyers with small firms, are falling prey to sophisticated, often international Internet scams that can have severe consequences, financial and otherwise. To date, the scams have been more prevalent among, although not exclusive to, collection lawyers, mainly because this practice area makes it easier for those initiating the scams to make them appear legitimate.

The fraudsters perpetrating the scams have been successful for a number of reasons, not least of all the decline in the general economy, which has led to a lull in many businesses, including that of lawyers. A lawyer's desire, and often need, for new clients and cashflow or simply quick access to cash based on relatively high profit opportunities leads to short-cuts that have severe hidden risks, including loss of money, particularly client trust account funds, bank liability, State Bar discipline, and even damage to a lawyer's reputation, standing or business.

This alert describes how the scams operate and how lawyers can protect themselves. We also address the ethical issues and challenges presented when lawyers respond to such solicitations, including after the scam is discovered. These include the ethical duties attendant to formation of the attorney-client relationship, such as conflicts checks and written fee agreements. The issues also include the existence and scope of the duty of confidentiality and the circumstances that permit a lawyer to disclose information transmitted by the ostensible client, whether to law enforcement or in defense of a State Bar investigation or civil litigation by a bank.

The common characteristics of most such scams are as follows:^{1/}

1. Lawyer receives what appears to be a legitimate solicitation email^{2/} from a prospective client, often but not always based in another country or state;

^{1/} In July 2008, the California Bar Journal published an article entitled "*Embarrassed Lawyers Fall Victim to Internet Scams*," which contained a similar list of characteristics.

^{2/} These scams can also originate via a fax or even telephonic solicitation. A sample e-mail, quoted in the above-referenced article, reads as follows: "We the management of AsiaLink Industrial, Hong Kong require your legal representation for our North American Customers. We are of the opinion that the ability to consolidate payments from North America will eradicate delays due to inter-continental monetary transaction between Asia and North America. We understand that a proper Attorney Client Retainer will provide the necessary authorization and we are most inclined to commence talks as soon as possible. Your consideration of our request is highly anticipated and we look forward to your prompt response." This sample does not contain much, if any, confidential information. Other e-mails, however, go farther. Nonetheless, *unsolicited* e-mails containing information as to the purpose of the services or other information that might normally be regarded as confidential may not be considered confidential at

2. After checking the legitimacy of the company on the Internet, the lawyer responds and relationship terms are “negotiated” between the lawyer and the prospective client, including a written fee agreement, sometimes providing for a substantial advance fee deposit;
3. Lawyer receives an email from the new client that the hiring of counsel and/or the threat of legal action has suddenly caused debtor to agree to pay up;
4. Lawyer quickly receives what seems to be a valid domestic cashier’s check from a reputable bank as a settlement payment, which is then deposited in the lawyer’s client trust account;^{3/}
5. Client requests an immediate wire distribution of the settlement funds to a foreign account and provides approval for the attorney’s retainer or fees to be deducted from the funds and paid from the trust account;
6. Lawyer retains the fee and wires the balance to a foreign bank account.

It is then discovered that the cashier’s check is fraudulent, and it is returned unpaid. By this time, however, the funds have already been wired to the foreign bank and the scammer has disappeared with the funds.^{4/} The lawyer’s client trust account is overdrawn by the amount of the counterfeit cashier’s check, which the lawyer’s bank is obligated to report to the State Bar. The attorney may now be liable to the bank for the balance of the bad check and to clients whose funds may have been withdrawn, and subject to an investigation by the State Bar that may lead to discipline.^{5/}

This chain of events leaves the victimized attorney in a precarious and vulnerable position. For all that appears, under the scenario described above, the lawyer may have been retained by a client, legitimate or otherwise, and a retainer agreement has been signed. The attorney’s duty to protect client confidences and secrets under Business and Professions Code section 6068(e)^{6/} (which includes but is

the point of receipt, depending on the circumstances. See San Diego County Bar Ethics Committee Opn. 2006-1; compare Cal. State Bar Formal Opn. No. 2005-168. Whether they are treated as such typically depends on how the attorney reacts after receipt.

^{3/} Such funds do not belong to the attorney and are being held in trust pending clearance. The lawyer’s fee, payable in accordance with the terms of the fee agreement, is to be withdrawn as soon as the fees are available and payable. See Rules Prof. Conduct, rule 4-100.

^{4/} The scammers are known to change the nine-digit MICR (magnetic ink character recognition) lines at the bottom of the check. The bank check will identify a bona fide domestic bank, but the code recognizes the check as originating from another institution, which serves to delay confirmation and increase the odds that the scammers will get the client trust account money into their own hands.

^{5/} Liability to the bank would be based upon a claim for breach of contract arising from the account agreement between the financial institution and the depositor. Such agreements usually provide that the account holder will be liable for any account shortages. Grounds for discipline could include, among other grounds, breach of the attorney’s responsibilities with respect to his or her client trust account. See Rules Prof. Conduct, rule 4-100.

^{6/} Section 6068(e)(1) states that it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” See also Rules Prof. Conduct, rule 3-100(A) (“A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client...”).

broader than the attorney-client privilege^{7/}) may be implicated, along with the full panoply of duties that an attorney owes to a client, which in the wake of these adverse developments would now conflict with the lawyer's own interests and concerns after the scam has taken place. Whether an attorney is obligated to treat such communications as confidential would depend on the specific circumstances.^{8/} Generally speaking, although the attorney caught up in a scam must be thoughtful about his or her duties to the ostensible client, he or she may have legitimate grounds to conclude no duties are owed.^{9/}

^{7/} See Cal. State Bar Formal Opn. No. 1988-96 ("While the term 'secrets' is not defined in the California Rules of Professional Conduct, it has been elsewhere described as including information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. (ABA Code of Professional Responsibility DR 4-101(A).) This second aspect of section 6068(e) also forbids disclosure since criminal or fraudulent conduct is appropriately characterized as a 'secret.' (See State Bar of California Formal Opinion 1986-87.).").

^{8/} A communication from a prospective client may be entitled to protection as confidential client information in certain circumstances. See, e.g., Cal. State Bar Formal Opn. 2003-161 (discussing factors in determining whether an attorney-client relationship has formed and stating "[e]ven if no attorney-client relationship is created, an attorney is obligated to treat a communication as confidential if the speaker was seeking representation or legal advice and the totality of the circumstances, particularly the representations and conduct of the attorney, reasonably induces in the speaker the belief that the attorney is willing to be consulted by the speaker for the purpose of retaining the attorney or securing legal services or advice in his professional capacity, and the speaker has provided confidential information to the attorney in confidence."). If a client relationship has formed, despite the fraud that has taken place, the lawyer may have a duty to a client to preserve and protect information communicated by the client in confidence in accordance with section 6068(e)(1). Notably, there is no self-defense exception to section 6068(e) or the attorney-client privilege under the California Evidence Code when the claim is made by a third party, in contrast to when a claim is made by a client. See Los Angeles County Bar Assn. Formal Opn. No. 519 (2007). Compare *In re National Mortgage Equity Corp.* (C.D.Cal. 1988) 120 F.R.D. 687, 690 (discussing the attorney self-defense exception as applied under federal law). Generally speaking, however, assuming the scammer never intended to form an attorney-client relationship, but rather acted to perpetrate a fraud on the attorney, it is possible that no attorney-client relationship even has been formed. See, e.g., Cal. Evid. Code, § 951 (a "client" includes a person who "consults a lawyer for the purpose of retaining the lawyer or securing legal advice or advice from him in his professional capacity"); Cal. State Bar Formal Opn. Nos. 1984-84 (noting "a client includes a person or entity which consults a lawyer for the purpose of retention or advice . . .") and 2003-161 (explaining purpose of consultation to retain the lawyer as basis for "client" status and determination of existence and scope of ethical duty of confidentiality); see also Nev. Rules Prof. Conduct, rule 1.18(e) ("A person who communicates information to a lawyer . . . for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a "prospective client" within the meaning of this Rule."); Proposed Cal. Rules Prof. Conduct, rule 1.18, cmt. 2 ("[A] person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule"). Further, the attorney-client relationship is grounded in contract. See *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]. Thus, if the "client" fraudulently induces the attorney to enter into a purported engagement, the engagement may be subject to rescission. See, e.g., *Village Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.* (2010) 50 Cal.4th 913, 921 [114 Cal.Rptr.3d 280] (stating that where consent to contract is induced by fraud, the contract is voidable). Certainly, if the scammer enters into the relationship with the intent of engaging in a crime or fraud, communications between the scammer and the attorney may not be privileged under the crime-fraud exception. See Cal. Evid. Code, § 956 ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."); see also *In re Subpoena* (9th Cir. 1994) 39 F.3d 973, 976 (no privilege attached to fact of delivery of counterfeit money by client to attorney).

^{9/} One protective step that could be taken in communicating with the "client" is to indicate that there is reason to believe the solicitation may be part of a fraudulent scheme against the lawyer and unless the "client" responds within a specified period of time with information confirming the genuineness of the solicitation, the lawyer will conclude that no genuine attorney-client relationship exists and report the matter to law enforcement. This approach may be considered where the would-be "client" professes a sense of urgency in the wire transfer of funds to its account or as a protective measure once the scam is revealed and the attorney is proposing to cooperate with law

Adding to the attorney's woes, claims by a bank or others arising from the scam are generally denied by malpractice insurers based on the argument that the claim does not arise from "professional services" or the disgorgement or reimbursement claims do not represent "damages" as typically defined in the policies. See *Nardella Chong, P.A. v. Medmarc Cas. Ins. Co.*, No. 8:08-cv-1239, 2009 WL 4855737 (M.D. Fla. 2009); *Fidelity Bank v. Stapleton*, Civil Action No. 07A-11482-2 (Georgia 2009) (copy on file with the State Bar); *Fleet National Bank v. Wolsky*, Civil Docket CV2004-05075 (Mass. Superior Ct. 2006) (copy on file with the State Bar).

In a recent alert regarding Internet scams,^{10/} then State Bar President, Holly Fujie, said: "Attorneys should be the last people to fall for these scams, Be Careful!" The best approach is to ignore such solicitations altogether. However, for those who believe the inquiry may be legitimate and worth pursuing, the following non-exhaustive steps should be taken by attorneys to protect themselves and their practices and to avoid falling victim to the scam:

1. **Know the Client:** The initial response to the unsolicited communication should be to seek additional information to carry out a conflicts check and admonish the prospective client to abstain from providing confidential information until conflicts have cleared and the engagement has been accepted. The attorney should seek to verify the accuracy and genuineness of information contained in the solicitation, including phone numbers, addresses^{11/} and, if provided, websites.^{12/} The same would be true for referral sources as some solicitations feign having obtained the attorney's name from another attorney. Diligently perform conflict checks on all prospective clients, especially unknown foreign clients and particularly if the introduction comes via email and the main mode of communication is through the Internet. Referral sources, if any, should be included in the conflict check process, as should all relevant contact information for the prospective client and all related parties. To the extent possible, references should be obtained and researched thoroughly.
2. **Comply with Business & Professions Code sections 6147-6148:** Retainer agreements should be in writing and contain all of the terms specified by these statutes. In addition, the agreement should include all pertinent information, including a valid billing street address, and as much contact information as possible, including an email address, phone and fax numbers. If the purported client is a corporate entity, an authorizing resolution of the shareholders or board of directors of the entity should be requested. However, the lawyer should be careful to complete a diligent investigation of the client before transmitting an engagement letter, as the letter could potentially be used to perpetrate additional scams. For example, the letter could be used to convince third parties that the

enforcement, the State Bar or others. This approach may also serve to ensure that the "client" cannot have any reasonable expectation of representation by the lawyer at that point. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. It is important to note, however, if a true client relationship is determined to exist, the attorney has a duty to refrain from furthering a fraud and from disclosing confidential client information. See Cal. State Bar Formal Opn. No. 1996-146. This should be considered before making any disclosures to law enforcement or otherwise.

^{10/} State Bar Fraud Alert to California Attorneys, dated May 29, 2009.

^{11/} For example, one can run the address through a standard Internet search engine to see if it comes up in the context of reported Internet scams.

^{12/} Many such e-mails contain a reference to a company name followed by a URL for the company website. The website often is legitimate and so is the company, but the solicitation is from someone not connected with the company.

“client” is a legitimate business represented by reputable counsel. To test the soliciting party’s sincerity and, for unknown foreign or out-of-state clients in particular, the lawyer would be well advised to require a more substantial than usual advanced fee deposit.

3. **Don’t Jump the Gun:** The lawyer should make clear to the prospective client that no attorney-client or other relationship has been created and no services shall be performed until (a) the lawyer has completed the engagement process in accordance with his/her firm’s policies, (b) the lawyer receives confirmation from his/her bank that the advance fee deposit check or wire transfer has cleared in accordance with bank policy, and (c) the lawyer has accepted the representation.
4. **Wait for the All Clear:** Third party funds, particularly those to be deposited in the client trust account,^{13/} should not be accepted until the lawyer is satisfied that the client is legitimate, the process of engagement is complete and the lawyer has been retained. Assuming the foregoing criteria are met, all funds deposited into the trust account should be held until the bank confirms that payment of such funds has been honored by the payor bank. Banks often accommodate good customers by making deposited funds available before receiving such confirmation from the payor bank. This is considered by the bank to be a provisional settlement, which may be revoked by the bank^{14/} and is not the same as the funds having cleared (which may take weeks depending on the nature and location of the originating bank).^{15/} Banks are generally only required to follow their own prescribed procedures in collecting and processing deposits and are not considered to have acted negligently by failing to discover a fraudulent instrument.^{16/}

In addition, members of the bar should review their business-related insurance policies with their brokers to determine what, if any, insurance options might be available to provide coverage (indemnity or defense) relating to claims arising from Internet scam activities.

^{13/} To avoid impacting other clients, and where the amount of the cashier’s check is substantial, the attorney should consider opening a special client trust account and depositing the check in that account, rather than the attorney’s general client trust account.

^{14/} In pertinent part, section 4214 of the California Uniform Commercial Code states the following regarding the right of a bank to charge back an item: “If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer’s account, or obtain a refund from its customer A collecting bank’s right to charge back is not affected by the customer’s previous use of the provisional credit given, or even the bank’s own negligence in handling the check.”

^{15/} When calling a bank to determine if the funds have cleared, the bank employee may say that the funds are “available,” but that is not the same thing as saying they have “cleared.” In *Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 499 [66 Cal.Rptr.3d 142], in deciding a demurrer to a claim of negligence on the part of a bank, the court stated, “We caution, however, that a bank should not incur liability for simply telling a depositor that he or she may write checks against deposited funds where the depository bank has granted the depositor a provisional settlement and not yet received a notice of dishonor from the payor or intermediary bank.”

^{16/} In *Chino Commercial Bank, N.A. v. Peters* (2010) 190 Cal.App.4th 1163 [118 Cal.Rptr.3d 866], the defendant was the victim of a Nigerian-style email scam similar to the types of scams being targeted against attorneys, which ultimately led to his bank account being overdrawn in the amount of \$458,782.60. The court affirmed the grant of a writ of attachment against the victim, even though the bank had represented to the victim that the counterfeit checks had cleared before he withdrew any funds.

Finally, if a lawyer finds that he or she has become a victim of one of these scams, the lawyer should consider how best to balance self-protection and mitigation with ethical duties stemming from the ostensible attorney-client relationship. First, the attorney should take steps to withdraw from further representation to avoid any implication that the attorney has aided and abetted a crime or fraud and because there is now an actual conflict between the interests of the ostensible client and the attorney. See Cal. State Bar Formal Opn. Nos. 1996-146 and 1988-96.^{17/} Second, subject to careful consideration of the confidentiality issues discussed above, the attorney may wish to consider whether reporting the crime to appropriate law enforcement authorities is permissible. Doing so promptly upon discovery of the fraud may be a strong indication that the lawyer was not involved in the perpetration of the scam and also illustrate the lawyer's desire to mitigate the damage he/she has suffered. Furthermore, law enforcement investigators may be the only resource available to trace funds or to establish the existence of the scam or the scammers. However, as noted above, care must be taken to avoid disclosing confidential client information in the course of such investigation or in defense of claims for reimbursement by a bank. Because it may be unclear if the scammer ever truly was a client, the attorney must be thoughtful about his or her duties to the ostensible client.

In choosing clients and accepting to represent them, it is better to err on the side of caution and remember that if it is too good to be true, it usually is. Hitting the delete button may be the best course of action for the attorney, not to mention those caught up in the cascade of adverse consequences of a successful scam.

^{17/} As explained in the cited opinions, the attorney should consider whether first to admonish the client to return the funds and cease any illegal or fraudulent activity, though in most instances, the ostensible client will likely disappear without further communications.

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