

JUNE 2024



INDIANA STATE BAR ASSOCIATION

# RES GESTAE

MEMBER JOURNAL



## FEATURING

# HOUSE ENROLLED ACT 1209 INCREASES MULTI- GENERATIONAL TRUSTS' MAXIMUM DURATION

## PLUS

Succession Planning: Selling the Practice  
File Storage and Data Security  
and More

VOL. 67 NO. 10

**By Margaret Christensen,  
Bryan Weese,  
and Katie Jackson**



# RED FLAGS TO HELP YOU RECOGNIZE AND AVOID CERTIFIED CHECK SCAMS

**Financial scamming attempts against attorneys are increasing not only in frequency, but also in sophistication. Most readers likely delete emails offering a handsome legal fee for simply serving as an escrow account for an unknown foreign “client” who promises future work. However, as fraudsters develop their strategies, it becomes more difficult to recognize a “representation” that is too good to be true. Understanding the structure of certified check scams and other similar efforts will help attorneys protect their clients, comply with their ethical obligations, and avoid the financial and reputational harm of being victimized by a scammer.**

Certified check scams typically commence with a seemingly innocuous call or email, often unsolicited, requesting legal representation involving handling funds on behalf of an individual or company. The modus operandi often involves receiving funds, purportedly as payment or to facilitate transactions, only to realize later—after the attorney has wired money to the recipient—that the certified check(s) involved are counterfeit.

While the sophistication of these scams may be increasing, fraudulent check scams are not a new problem for attorneys and state and federal agencies have warned the public about these type of scams for some time. For example, the FDIC issued a bulletin in August 2019 titled “Beware of Fake Checks” in which it alerted the public to the pervasiveness of fraudulent checks and tips on how to spot them.<sup>1</sup> Similarly, in Indiana, the Consumer Protection Division of the Attorney General’s Office issued a fact sheet about phishing and unsolicited emails.<sup>2</sup>

**"Financial loss may be the first thought that comes to mind when you consider falling victim to a financial crime. In fact, your ethical obligations as an attorney may not even register as a concern."**

### **ETHICAL IMPLICATIONS OF CERTIFIED CHECK SCAMS**

Financial loss may be the first thought that comes to mind when you consider falling victim to a financial crime. In fact, your ethical obligations as an attorney may not even register as a concern. However, certified check scams generally implicate attorney ethics because they result in the misallocation of client trust account funds. Because lawyers are required to hold client and third-party funds in their trust account, the purported certified check is deposited in trust. Then, a check is written, or a wire is sent from the attorney trust account to the recipient. But because the certified check was counterfeit, it gets returned by the bank. The funds sent out from the trust account are usually unrecoverable, meaning that client funds held in the trust account have been paid out to the fraudster. The attorney is on the hook to replenish the funds and has violated Rule 1.15 by misallocating client funds.

#### **Transactional Example**

Many counterfeit check scams arise in the context of a pre-arranged asset purchase, where the attorney is engaged to close a sale to which the terms have already been agreed. The purported client claims to be the buyer, delivers certified funds to the attorney to be delivered to the purported seller. But certified check scams can arise in the context of litigation as well.

#### **Litigation Example**

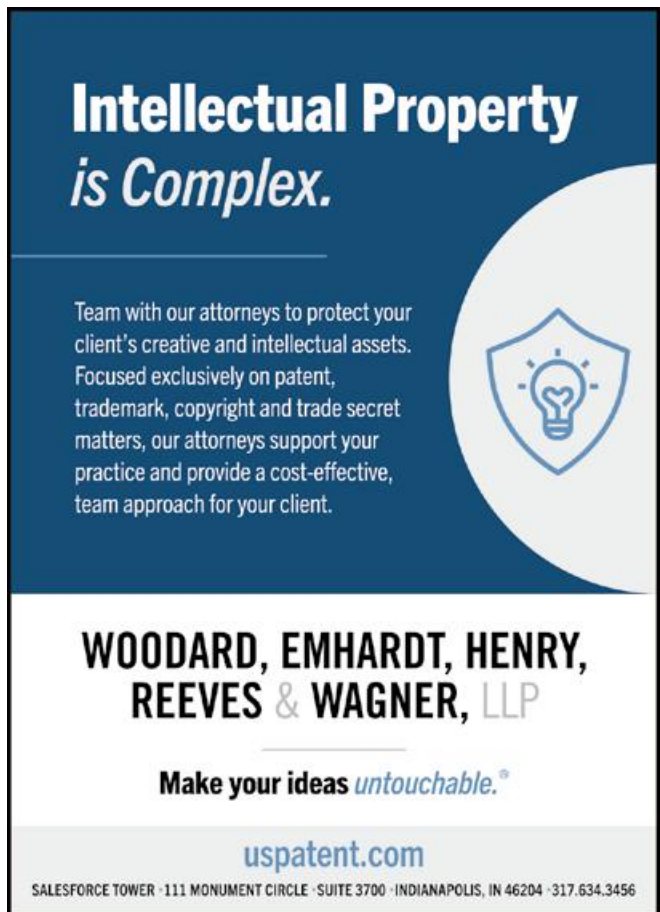
A helpful example highlighting the ethical minefield associated with certified check scams comes from the 2021 North Carolina Bar's ethics opinion<sup>3</sup> titled "A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks." Here, a lawyer was approached by a client seeking assistance in collecting a debt from a third party. The client's contact with the lawyer was unsolicited, as the lawyer does not actively advertise their services and the attorney had not done any previous business with the client. After the client provided documentation supporting his claim, the attorney verified that the third party was indeed real



**STEVE WILLIAMS**  
**MEDIATOR**




**Registered Civil Mediator**  
**49 Years Litigation Experience**  
**646 Walnut Street, Terre Haute, IN 47807**  
**steve@williamsinjurylaw.com**  
**1-812-232-0107**



**Intellectual Property  
is Complex.**

Team with our attorneys to protect your client's creative and intellectual assets. Focused exclusively on patent, trademark, copyright and trade secret matters, our attorneys support your practice and provide a cost-effective, team approach for your client.



**WOODARD, EMHARDT, HENRY,  
REEVES & WAGNER, LLP**

**Make your ideas *untouchable.***

[uspatent.com](http://uspatent.com)

SALESFORCE TOWER · 111 MONUMENT CIRCLE · SUITE 3700 · INDIANAPOLIS, IN 46204 · 317.634.3456

**"In the face of evolving fraudulent schemes, maintaining vigilance and adhering to ethical principles are paramount."**



and verified the third party's contact information. The lawyer then agreed to represent the client by filing a lawsuit against the third party. The lawyer sent the third party a letter. Shortly thereafter, the third party expressed a desire to settle the debt outside of court and promised to arrange payment. Upon receipt of a cashier's check purportedly from the defendant, the attorney deposited it in trust and wrote a check to the client immediately, thinking that there was no need to wait for certified funds to clear the bank before issuing the proceeds to the client. Subsequently, the lawyer learned that the cashier's check was counterfeit and the "client" was nowhere to be found.

In both the transactional and litigation example above, the attorney has inadvertently invaded funds belonging to one client to pay another client. There is no malfeasance or other intentional bad act. However, the fact remains that the trust account will not balance and funds belonging to other legitimate clients have been paid out to a fraudster. This misfeasance is a violation of Indiana Rule of Professional Conduct 1.15 and Admission and Discipline Rule 23, Section 29, which require safekeeping of client funds and careful trust accounting to avoid errors.

Additionally, to the extent the lawyer failed to investigate the source of the funds, the lawyer might be violating additional rules. The North Carolina Bar opinion, for example, included the following facts: (1) the cashier's check was dated prior to the attorney's involvement in the matter or communication with the defendant; (2) the cashier's check was drawn on an out-of-country bank; and (3) the lawyer did not investigate the third party or the authenticity of the cashier's check. On these facts, the North Carolina bar opined that the lawyer violated his duties of competency (Rule 1.1) in representing a client because the scenario described raises several red flags that today's lawyer should recognize. North Carolina's Rule 1.1 is identical to Indiana's and requires, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The opinion also points to comment six to Rule 1.1, which is also identical in Indiana: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." The North Carolina bar

also opined that by not investigating the legitimacy of the cashier's check, the attorney has violated his duty of diligence (Rule 1.3). Rule 1.3 requires that "A lawyer shall act with reasonable diligence and promptness in representing a client."

In the face of evolving fraudulent schemes, maintaining vigilance and adhering to ethical principles are paramount.

### **PRACTICAL TIPS TO SPOT FRAUDULENT CHECKS**

To effectively navigate the landscape of certified check scams, attorneys must be attuned to warning signs indicative of fraudulent activity. These signs often include promises of substantial handling fees, requests solely pertaining to handling money without genuine legal services, and communications characterized by confusion, urgency, and typographical errors. Additionally, emails from unassociated accounts and exaggerated urgency from purported clients should raise red flags.

Evaluation of such situations demands swift detective work, especially when confronted with unexpected, certified checks. Attorneys should conduct thorough investigations, scrutinizing account details, verifying entities' existence and legitimacy, and assessing any inconsistencies or discrepancies. Proactive measures, including asking pertinent questions to potential clients and confirming the authenticity of provided information, can serve as effective deterrents against falling victim to scams. Below are some practical tips:

- There is usually the promise of a substantial "handling fee" or other payment in excess of the value of the attorney's typical hourly services.
- There is usually no request for legal services other than handling of money.
- The initial e-mails and other communications:
  - » are often confusing or don't make sense;
  - » don't fully explain the structure of the transaction;
  - » contain multiple syntax and typographical errors;
  - » include an unnecessary sense of urgency;
  - » greet the attorney by last name or with an inappropriate title (e.g., Mr. in lieu of Ms.).
- The e-mails are usually from a Gmail or other account that is not associated with the alleged client company.

- The fraudulent certified check is usually for far more than was agreed to commence the engagement (with the "extra money" to be wired to a third party or back to the "new client").
- The "new client" expresses urgency: (1) to have the check deposited; and (2) to have the firm immediately wire funds out (before the fraudulent certified check fails to clear, which may take up to two weeks).

Evaluation of these situations requires prompt attention, particularly if the firm has accepted an engagement and then receives the fraudulent certified check for more than was expected. By examining the check that you believe may be fraudulent, the below tips may help you confirm as such:

- Some of the account numbers do not match;
- The address of the bank is not correct and not properly capitalized;
- Conduct an online search of the remitter to confirm whether the entity actually exists and is in the line of business the "new client" purports to represent;
- Review the remitter's website to confirm whether the individual you are dealing with is actually an employee of the company (or can get you to someone who can provide this information); and
- Evaluate any other information that simply does not pass the smell test.

The best approach is to avoid the engagement in the first instance by sniffing out the scam on the front end. Below are a list of questions or requests to pose to a purported client with whom you have never interacted:

- How did you find out about me?



**"Finally, when all else fails, you can protect the integrity of your trust account and funds you are holding on behalf of clients and third parties by refusing to issue any payment until the certified check has cleared the bank."**



- Who referred you to me?
- Why have you contacted this office? (Especially pertinent for matters that do not involve any Indiana parties or facts.)
- Why don't you wire the funds directly?
- Please confirm the company you are with (and then review the website or consider calling the company to confirm).
- If the company name is not unique, request the full name of the entity for the engagement and a contact person at the main office or headquarters.

It may be necessary to require real-time contact with your client or even the purported opposing party to verify necessary facts. If your client refuses a phone call or virtual meeting, there is an issue. (Of course, if you need to contact the opposing party, your initial communication should seek to confirm that they are not represented by counsel with respect to the matter).

Finally, when all else fails, you can protect the integrity of your trust account and funds you are holding on behalf of clients and third parties by refusing to issue any payment until the certified check has cleared the bank. Do not rely on the check showing up in your account balance, as certified funds will show up immediately. Call the bank and confirm that the check has cleared before you issue the funds. By remaining vigilant, adhering to ethical standards, and adopting proactive measures to thwart certified check scams, attorneys can safeguard themselves and their clients from the perils of fraudulent schemes.

#### **TIPS FOR AVOIDING FINANCIAL SCAMS**

- Exercise skepticism: If a check exceeds expected amounts or involves unfamiliar transactions, skepticism is warranted.
- Clarify engagement terms: Ensure that engagements align with standard legal services and refrain from engaging in financial transactions unrelated to legal representation.
- Never issue funds from trust until you confirm that the check, certified check, or wire transfer is funded.
- Prioritize client interests: Uphold the duty to act in clients' best interests by safeguarding their financial well-being and avoiding involvement in dubious financial dealings.
- Pass on opportunities that are too good to be true. ☹️

#### **ENDNOTES**

1. The bulletin can be found at this website: <https://www.fdic.gov/consumers/consumer/news/august2019.html>.
2. The fact sheet can be found at this website: [https://www.in.gov/attorneygeneral/consumer-protection-division/files/CPD\\_Fact\\_Sheet-phishing.pdf](https://www.in.gov/attorneygeneral/consumer-protection-division/files/CPD_Fact_Sheet-phishing.pdf).
3. NCSB Opinion 2, 2021 can be found at this website: <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2021-formal-ethics-opinion-2/#:~:text=A%20Lawyer's%20Professional%20Responsibility%20in%20Identifying%20and%20Avoiding%20Counterfeit%20Checks,-Adopted%3A%20July%202016&text=Opinion%20discusses%20a%20lawyer's%20professional,purported%20transactions%20involving%20counterfeit%20checks>.