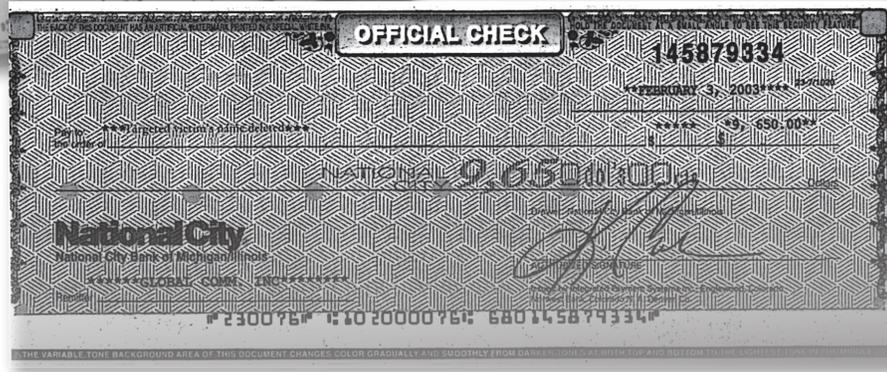


Cashier's Check Scam



Targets Attorneys

By Julie Andersen Hill*

Scammers have been swindling unsuspecting victims using various advance fee frauds for more than a century. In early versions of the fraud, victims received letters purporting to be from a wealthy individual wrongly imprisoned in Spain. The letters requested financial assistance to access money in bank accounts and promised the recipients large rewards for their help.¹ By the 1990s, variants of the scam spread through e-mail and often requested that the recipient assist a Nigerian in his attempt to access money trapped in a foreign bank account.² Regardless of the exact form of the fraud, the target loses money and the scammer disappears.

A modern version of advance fee fraud uses counterfeit cashier's checks. "This scam typically unfolds when someone, usually located outside of the country, fabricates a counterfeit check and asks a bank customer inside the country to accept the counterfeit check, deposit the check into his or her bank account, and quickly wire funds outside of the country in exchange for a portion of the funds."³ The stories scammers use to perpetrate this type of fraud are diverse. Some scammers claim they are selling goods or providing lottery winnings. Others are requesting help from mystery shoppers.⁴

Attorneys are the latest target of cashier's check advance fee fraud.⁵ In this version of the fraud, attorneys receive e-mails from purported clients asking for legal help collecting debts. Although attorneys are usually sophisticated enough to avoid fraud, this type of fraud is troublesome because scammers ask attorneys to collect debts — a task that attorneys perform often without incident. Unsurprisingly, attorneys from California to Georgia have been ensnared in cashier's check scams. Losses in such cases often amount to several hundred thousand dollars.⁶

If your e-mail address is listed in a bar directory or available on a webpage, chances are you will receive scam e-mails. In the last three months I have received eight scam e-mails. Electronic filters have probably prevented other similar messages from reaching my inbox. This article discusses how the attorney version of the fraud operates. It also discusses the legal implications for attorneys ensnared in the fraud. By understanding this fraud you can avoid becoming the next victim.

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The Fraud

The fraud begins with an e-mail requesting legal assistance in collecting a debt. The sender of the letter typically purports to be residing in a foreign country. The following e-mail is typical of those starting the scam:

After a careful review, we decided to contact you to represent our company in North America. Walex Electronic Ltd. with its head office in Hong Kong [sic] We got your contact detail from our online search for attorney [sic]

The management of Walex Electronic Ltd. requires your legal representation for our North American delinquent Customers. We are of the opinion that a reputable attorney is required to represent us in North America in order for us to recover monies due to our organization by overseas customers, and as well [sic] follow up with these accounts. In order to achieve these objectives a good and reputable law firm like yours will be required to handle this service.

We understand that a proper Attorney Client agreement must be entered into by both parties. This will be done immediately [sic] we receive your letter of acceptance. Attorney, you can advise us what is required to draw a proper letter of engagement that will be review [sic] by our board. We are most inclined to commence talks with you as soon as possible. We shall bring you into a detailed picture of what your responsibility is, when we receive your response.⁷

This particular e-mail provided a link to a legitimate-looking web page for a Chinese company. Sometimes the names of legitimate attorneys are provided as references for the fraudulent client.⁸ Other variants of the scam request an attorney's help collecting divorce settlement funds for a client living abroad. For example:

My name is Jennifer Wong. I am contacting your law firm with regards to a divorce settlement with my ex husband [sic] Richard Wong who reside [sic] in you [sic] jurisdiction. [W]e had an out of court agreement for him to pay me the amount of \$550,450.00 dollars. [A]t this time [I] have only received the amount of 44,000.00 dollars. I am seeking the help of your law firm to collect the balance from him. [H]e has agreed to pay me the money. [sic] but have [sic] been inconsistent with the date. I believe that with the help of your law firm he will be willing to pay in order to avoid litigation.⁹

As with e-mails from legitimate prospective clients, some of the scam e-mails appear more professional than others. Some are addressed simply to "counsel," while others address the attorney by name.

If the attorney responds to the e-mail, the scammer will often take steps that seem consistent with a legitimate attorney-client relationship. The scammer may sign a retainer agreement, provide business documents, or even discuss the case with the attorney by telephone.¹⁰ In some instances the scammer provides contact information for an alleged debtor. After the attorney sends a demand letter, the attorney receives word that the debtor has agreed to pay. In other instances, the scammer simply notifies the attorney that the debtor is willing to pay all or part of the debt.¹¹ In both instances the attorney receives a cashier's check

for the amount of the debt and deposits the check in his attorney trust account. The attorney then forwards the amount due to the client, usually via wire transfer. Unfortunately, the cashier's check eventually bounces and the supposed client mysteriously disappears.

Unraveling the Payments

For attorneys caught in the fraud, their first thought may be to attempt to pass the loss back to the banks that handled either the cashier's check or the wire transfer. However, relief through payment system laws is typically only available if the attorney discovers the fraud quickly and acts immediately. In many instances the attorney will be left bearing the entire loss.

Cashier's Checks

When people accept personal or business checks as payment, they are typically very careful. They know that if the drawer has insufficient funds in its account, the check might bounce. Similarly, if the drawer stops payment on the check, it will bounce. Cashier's checks are different. To get a cashier's check, a bank customer provides the bank with funds sufficient to cover the check up front. The bank then writes a check drawn on the bank's (rather than the customer's) account.¹² Unlike a personal check, a cashier's check will not bounce unless the bank is insolvent or the check is counterfeit. Because there is little risk of a bank becoming insolvent, many conclude that cashier's checks are "as good as cash."¹³ Unfortunately, with the advent of computers and high quality printers, it is now easy for scammers to produce convincing counterfeit cashier's checks. A counterfeit cashier's check is not as good as cash.

Because cashier's checks were historically considered safe, federal law requires that banks provide customers access to funds deposited by cashier's checks quickly. Suppose you receive a cashier's check made payable to you on behalf of one of your clients. You take that cashier's check to your bank and deposit it in your attorney trust account. Under Regulation CC, if the amount of the cashier's check is \$5,000 or less, the bank must allow you to withdraw the funds from that deposit no later than "the business day after the banking day on which" you deposited the funds.¹⁴ If the amount of the cashier's check is greater than \$5,000, the bank can hold the funds in excess of \$5,000 for "a reasonable period of time" — typically an additional five business days.¹⁵ Even if a bank is allowed by law to hold the funds, it can choose to make the funds immediately available for withdrawal.

Seeing the available funds in the account, many attorneys are tempted to immediately forward the client its portion of the money. Indeed the Rules of Professional Conduct encourage attorneys to quickly forward money by providing that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive[.]"¹⁶ It is important to remember that, even though you have access to funds from a deposited cashier's check, the issuing bank may not yet have paid the cashier's check.¹⁷ Counterfeit cashier's checks can take weeks to work their way through the collection process before being dishonored. If a deposited cashier's

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check turns out to be counterfeit, the Uniform Commercial Code (“UCC”) allows the bank to charge back the amount of the item to your attorney trust account.¹⁸ If there are insufficient funds in the account to cover the charge back, the bank is entitled to seek a refund.¹⁹ Alternatively, the bank can seek payment from you for breach of the “transfer warranty” because by depositing the item, you warranted that, among other things, “all signatures on the item are authentic and authorized.”²⁰ In short, if you have already withdrawn the money from the account and sent it to your supposed client, you will nevertheless be responsible for repayment.

The obvious lesson here is that an attorney should not transfer money from the trust account until he or she is sure the cashier’s check has been paid by the bank that issued the check. Unfortunately, determining when the cashier’s check has been paid is not always straightforward. Consider the cautionary tale presented in *Amthor v. Commerce Bank*.²¹ Mr. and Mrs. Amthor deposited a cashier’s check in their checking account. According to their version of the facts, the bank teller repeatedly told them that the cashier’s check had “cleared.” Based on the teller’s representations, the Amthors withdrew most of the deposit and sent the money to an individual in a foreign country. When the bank learned

that the cashier’s check bounced, it charged back the amount of the check to the Amthors’ account. The Amthors sued seeking to recover the amount of the charge-back. A New York court held that the bank was entitled to charge back the item under the UCC notwithstanding any representations by the teller. It explained

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that “[u]ntil final settlement is made, *i.e.*, until the check is finally paid by the payor bank, the risk of non-collection remained with the customer and any settlement made on the check paid by the bank is provisional only.”²² According to the court, “the customer could not shift the risk of loss to the bank by relying upon statements of the teller that the check had ‘cleared’ nor could they rely upon the fact that they were permitted to withdraw funds from their account.”²³

Although the UCC will likely be unhelpful, an attorney misled about the status of a deposited cashier’s check may have a remedy outside of the UCC. In the 2006 case *Valley Bank of Ronan v. Hughes* the Montana Supreme Court held there could be common law remedies for those misled by a bank teller.²⁴ Mr. Hughes received two official checks²⁵ and deposited them in his bank account. After receiving assurances from bank employees that the checks were good, Mr. Hughes wired the bulk of the money to an account in Amman, Jordan. When the bank discovered the official checks were counterfeit, the bank charged back the items to Mr. Hughes’ account. To cover the overdraft, Mr. Hughes signed a promissory note agreeing to pay the outstanding balance. When Mr. Hughes could not make the payments on the note, the bank sued to foreclose on property pledged as collateral. Mr. Hughes counterclaimed arguing that the bank had negligently represented that the official checks were good. The bank argued that Mr. Hughes’ claim should be dismissed because

the UCC was the sole source of law governing the transaction. The Montana Supreme Court held that Mr. Hughes was entitled to bring a negligence claim based on the bank’s representations. It reasoned that “[b]ecause such communications are not addressed with specificity by the UCC, common law and equitable principles supplement the UCC and govern the legal rights and responsibilities that apply to [the bank’s] representations[.]”²⁶ The court noted that the negligence claim could potentially allow Mr. Hughes to “obtain a judgment to compensate him for the charge-back debt.”²⁷

In some states, attorneys misled by the depository bank might also find relief in consumer protection statutes. For example, in Texas, the Deceptive Trade Practices Act protects consumers from “false, misleading, and deceptive business practices.”²⁸ Although the Act protects only “consumers” of “goods and services,”²⁹ courts have held that a depositor is a “consumer” of “banking services.”³⁰ It is, therefore, possible that if a bank wrongly advises a depositor that a counterfeit cashier’s check has been paid, the depositor would have a claim under the Deceptive Trade Practices Act.

Because there are no published Texas cases similar to *Amthor* or *Bank of Ronan*, the legal landscape in Texas is unclear.³¹ Depending on the facts of the particular case, attorneys caught in cashier’s check scams may have rights under the UCC, common law, or consumer protection statutes. Regardless of how these issues are ultimately resolved, attorneys are better off avoiding such situations. Attorneys should be careful when forwarding funds from cashier’s checks. Attorneys should not rely on the depository bank’s oral representations that the cashier’s checks are good or have “cleared.”³²

Wire Transfers

Defrauded attorneys unable to collect from the banks involved in processing the counterfeit cashier’s check might attempt to recover the wire transfer. Unfortunately, the chances of recovering a wire transfer are slim.

Scammers typically request funds via wire transfer, because wires operate quickly and give the sender little opportunity to stop payment. Under Article 4A of the UCC, once the attorney’s bank has sent the wire, it is not generally obligated to attempt to recall the wire.³³ However, many banks will attempt to cancel a wire at the request of the customer. The attorney’s bank will typically be entitled to cancel the wire transfer only if the attorney’s bank requests cancellation before the scammer’s bank accepts the wire.³⁴ The scammer’s bank accepts the wire when it pays the scammer or when it notifies the scammer that the bank has received the funds on his behalf.³⁵ Acceptance by the scammer’s bank can occur in a matter of minutes.³⁶

In at least one instance an attorney’s bank discovered cashier’s check fraud and managed to cancel the wire in time. In that instance, the fraud was discovered while the scammer’s bank was closed. “The [attorney’s] bankers stayed late at work so they could contact the [scammer’s] bank in Hong Kong when it opened in the morning and they were able to stop the money from being deposited into the scammer’s account.”³⁷ Other instances are not so fortunate. Valley Bank of Ronan tried to cancel the Hughes’ wire transfer ten minutes after it was sent and was unsuccessful.³⁸ If an attorney does not discover the fraud for several days, it will usually be too late to cancel the payment order and the attorney will be liable for the amount of the wire.

Trust Accounts

Scammed attorneys who are unable to recoup losses from banks might avoid or delay replacing funds depleted from the trust account. If there were funds from other clients in the

trust account, this course of action violates attorney ethical rules.

Some states, like California and New York, use a strict liability approach. Under this approach an attorney is guilty of ethical misconduct any time the bank balance of the client trust account falls below the amount the attorney holds in trust.³⁹ Suppose you have \$100,000 in your trust account for legitimate clients. You deposit a counterfeit cashier's check for \$50,000 and wire \$50,000 to the scammer. The bank discovers that the cashier's check is fraudulent and charges back the \$50,000 leaving you with a balance of \$50,000. In states following the strict liability approach, you would be guilty of professional misconduct at the time of the charge-back because the amount you hold for legitimate clients (\$100,000) exceeds the balance of the account (\$50,000).

Texas has not adopted the strict liability approach to attorney trust accounts.⁴⁰ However, even in Texas, an attorney is guilty of professional misconduct if his or her actions result in harm to legitimate clients. Under the Texas approach an attorney commits ethical misconduct by failing to "promptly" forward money in the trust account to legitimate clients entitled to receive it.⁴¹ There is no exception in the rule that allows an attorney to delay payments owed to legitimate clients when the attorney is the victim of fraud. Banks know that attorneys have ethical duties regarding trust accounts and sometimes report overdrafts in trust accounts to the State Bar.⁴²

To avoid bar discipline and malpractice suits, attorneys who are victims of the attorney cashier's check scams should ensure that even after the fraud, their trust accounts have a sufficient balance to cover all money owed to legitimate clients. In some cases, this may be no small undertaking. A Houston lawyer had to mortgage his home in order to replace more than \$100,000 depleted from his trust account due to a cashier's check scam.⁴³ Again, it would have been better to have avoided the scam in the first place.

Best Practices

What can you do to spot fraud? How can you avoid becoming the next victim?⁴⁴

- Take steps to verify the identity of any new client. Consult reputable directories for contact information, rather than relying on information provided by the potential client. Be aware that scammers sometimes impersonate real companies.
- Inspect any cashier's check for signs of fraud or alteration.
- Verify the validity of a cashier's check by contacting the bank issuing the check. Visit the bank in person or obtain the telephone number of the bank from a reputable source — not the check itself. Have the bank verify the check number, the payee, the amount of the check, the date of the check, and the authorizing signature.
- Deposit suspicious items into a trust account separate from other attorney trust funds.
- Do not forward money from your trust account until you are sure that the cashier's check has been paid by the issuing bank. It may be best to wait for two to three weeks and obtain a written statement from your bank that the check has been paid. Update your retainer agreement to specifically allow you to hold funds from cashier's checks for this period of time.
- Immediately report suspected fraud to your bank, local authorities, and the FBI.

Above all attorneys should remember: If it seems too good to be true, it probably is.

* Assistant Professor of Law, University of Houston Law Center. I am grateful to Tim Zinnecker, Jim Hawkins, and Michael Hill for helpful comments on this article.

1 See 'Spanish Prisoner' Turns Up in Paris, N.Y. TIMES, May 10, 1914.

2 See Lily Zhang, Note, *The Can-Spam Act: An Insufficient Response to the Growing Spam Problem*, 20 BERKELEY TECH. L.J. 301, 308 n.46 (2005).

3 George Brandon & Matthew J. Ohre, *The Nigerian Check Scam: An Oldie Revisited*, 126 BANKING L.J. 223 (2009).

4 See Gene A. Marsh, *Counterfeit Cashier's Check Scams — Bank Liability. "The Check Is Good." Or Is It?*, 40 NO. 4 UCC L. J. ART. 1 (2008); Kathy H. Chang, Comment, *Online Counterfeit Check Scams: Should There Be Increased Liability for Banks?*, 23 GEO. J. LEGAL ETHICS 505 (2010).

5 See Office of the Comptroller of the Currency, Alert 2008-37, *Fictitious Official Checks of First Century Bank, N.A., Bluefield, WV, Aug. 21, 2008* (alerting banks to counterfeit checks issued to attorneys who were retained to collect debts for a "client"); Clark H.C. Lacy, Comment, *The Witch's Brew: Nigerian Schemes, Counterfeit Cashier's Checks, and Your Trust Account*, 61 S.C. L. REV. 753 (2010); Phil Pattee, *There's a New Scam Out There, and It's Targeting Our Lawyers*, NEV. LAW., Sept. 2008, at 31.

6 See Brenda Sapino Jeffreys, *Too Good to Be True? Consumer Counsel Warn Lawyers to Be Wary of Client E-Mail Scams*, TEX. LAW., Jan. 26, 2009, at 1; R. Robin McDonald, *Lawyer Falls Prey to Pricey Internet Scam*, FULTON CO. DAILY REP., Aug. 26, 2008, at 1.

7 E-mail received by Julie Andersen Hill on July 28, 2010.

8 Diane Curtis, *E-mail Scams Continue to Successfully Target Lawyers*, CAL. BAR J., July 2009, available at <http://archive.calbar.ca.gov/Archive.aspx?articleId=95676&categoryId=95674&month=7&year=2009>; Diane Curtis, *Embarrassed Lawyers Fall Victim to Internet Scams*, CAL. BAR J., July 2008, available at <http://archive.calbar.ca.gov/Archive.aspx?month=7&year=2008> [hereinafter Curtis, *Embarrassed Lawyers*].

9 E-mail received by Julie Andersen Hill on Sept. 30, 2010.

10 See Jeffreys, *supra* note 6, at 1; McDonald, *supra* note 6, at 1.

11 *Beware the Chinese E-mail Scam*, 97 ILL. B.J. 390 (2009).

12 In other words, a cashier's check is "a draft with respect to which the drawer and the drawee are the same bank or branches of the same bank." TEX. BUS. & COM. CODE § 3.104(g) (Vernon 2007). See also 12 C.F.R. § 229.2(i) (2009).

13 See, e.g., *California Golf, L.L.C. v. Cooper*, 78 Cal. Rptr. 3d 153, 169 (Cal. Ct. App. 2008).

14 12 C.F.R. § 229.10(c)(1)(v).

15 See *id.* §§ 229.12(b)(4), 229.13(b), (h). "A longer extension may be reasonable, but the bank has the burden of so establishing." *Id.* § 229.13(h)(4).

16 TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.14(b) (1989); MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2010).

17 The Uniform Commercial Code refers to this stage as "provisional settlement." TEX. BUS. & COM. CODE § 4.201(a) (Vernon 2007).

18 *Id.* § 4.214(a). If the bank fails to act within a "reasonable time after it learns the facts," the bank will be liable for damages caused by the delay. *Id.* Such delays are probably rare and difficult to establish. See McDonald, *supra* note 6, at 1 (discussing an attorney's difficulties in gathering facts about the check collection process).

19 TEX. BUS. & COM. CODE § 4.214(a).

20 *Id.* § 4.207(a). If the attorney depositor indorses the cashier's

check, the bank may also seek payment from the attorney based on indorser liability. *Id.* § 3.415.

21 *Amthor v. Commerce Bank*, 15 Misc.3d 1130(A), 2007 WL 1299235, (N.Y. Dist. Ct. 2007) (unreported).

22 *Id.* (citations omitted)

23 *Id.* The UCC does offer some protection if non-payment of the cashier's check results from the bank's negligence or bad faith. *See* TEX. BUS. & COM. CODE §§ 4.214 cmts. 5-6, 4-103(e). However, in the case of a fraudulent cashier's check the non-payment will typically result from the fraudulent nature of the check rather than the depository bank's negligence.

24 *Valley Bank of Ronan v. Hughes*, 147 F.3d 185 (Mont. 2006).

25 The term "official check" is not defined in either the UCC or Regulation CC. Nevertheless, banks sometimes use the term "official check" when referring to both cashier's checks and teller's checks. *See Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.* 793 S.W.2d 652 (Tex. 1990).

26 *Valley Bank of Ronan*, 147 F.3d at 191. *See also* TEX. BUS. & COM. CODE § 1.103.

27 *Valley Bank of Ronan*, 147 F.3d at 192.

28 TEX. BUS. & COM. CODE ANN. § 17.44(a).

29 *Id.* § 17.45.

30 *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 28 n.12 (5th Cir. 1992). *See also* *La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 564 (Tex. 1984). *See generally*, Richard M. Alderman, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT*, § 2.033[B] (2010).

31 It is possible that the issue will be resolved soon. A Texas attorney caught in a cashier's check scam is currently seeking damages from his bank based on a negligence theory similar to the one employed in *Bank of Ronan*. *Buckley, White, Castaneda & Howell, LLP v. Citibank, NA*, Cause No. 2008-66714 (Dist. Ct., Harris County, TX, 61st Judicial Dist.) (Plaintiff's First Amended Petition) (Dec. 24, 2008).

32 It is unclear what a teller means when he or she states that an item has "cleared." *Compare* *Call v. Elenville Nat. Bank*, 5 A.D.3d 521, 524 (N.Y. App. Civ. 2004) (stating that the "term 'cleared' is not employed in the UCC and, as commonly used, is not the equivalent of 'final settlement'") *with* *Valley Bank of Ronan*, 147 F.3d at 193 n.6 (stating that "[i]f the term 'cleared' means anything in common banking usage, it is that final settlement has occurred.").

33 *See* TEX. BUS. & COM. CODE ANN. § 4A.211(b).

34 *See id.* A sender may be permitted to cancel a wire after the receiving bank's acceptance if the receiving bank agrees or if a "funds-transfer system rule allows cancellation." *Id.* at § 4A.211(c). However, in many circumstances the receiving bank will be reluctant to agree to the cancellation and the system rules will be unhelpful.

35 *Id.* § 4A.209(b)(1). The wire is also accepted when the scammer's bank received payment from the attorney's bank, or at the beginning of the next business day after the order was received if the scammer's bank has access to funds sufficient to cover the order. *Id.* § 4A.209(b)(2), (3).

36 The amount of time it takes for the wire to be accepted depends on a variety of factors including the method used to send the wire.

37 *Curtis, Embarrassed Lawyers*, *supra* note 8. The attorney reported that "the 29 hours from the time he learned the cashier's check was fraudulent to the time he'd learned [the bank had] gotten the money back was 'the darkest day of my life.'" *Id.*

38 *Valley Bank of Ronan v. Hughes*, 147 P.3d 185, 188 (Mont. 2006).

39 *Giovanazzi v. State Bar of California*, 619 P.2d 1005, 1009 (Cal. 1980); *Iversen v. New York State Bar Ass'n*, 51 A.D.2d 244, 381 N.Y.S.2d 711, 713 (1976).

40 *Texas State Bar v. Gailey*, 889 S.W.2d 519, 520-21 (Tex. App. 1994).

41 TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.14(b) (1989); MODEL RULES OF PROF'L CONDUCT R. 1.15(d) (2010).

42 A Georgia securities lawyer's attorney trust account was depleted after he was caught in a cashier's check scam. His bank not only sued him to recover the money, it reported him to the State Bar of Georgia. Robert J. Ambrogi, *The Great Lawyer E-mail Scam*, LAW.COM, Sept. 12, 2008, available at http://legalblogwatch.typepad.com/legal_blog_watch/2008/09/the-great-lawyer.html.

43 *See* *Jeffreys*, *supra* note 6.

44 For suggestions about fraudulent cashier's checks in general see *Comptroller of the Currency, Consumer Advisory 2007-1, Avoiding Cashier's Check Fraud*, Jan. 16, 2007.