

IS THE CONFIDENCE MAN YOUR CLIENT?

Con Artists Excel on the Internet at Making Lawyers Their Marks

The conditions of anonymity, confusion and an increase in movable wealth (paper currency) during the antebellum decades (1815-1860) of New York City fostered an opportunity for the likes of one genteel gentleman named William Thompson to approach complete strangers on the streets, engage them in pleasant conversation, and then walk away with their watches, which they voluntarily “loaned” him while mistaking Mr. Thompson for a trustworthy acquaintance.¹ The *New York Herald* announced the “Arrest of the Confidence Man” in the Police Intelligence section of its July 8, 1849 newspaper.² Hence the moniker, “con man” (or “con artist” for any gender) was coined. At the time, New York City was a growing urban society in some ways similar to today’s growing global society. What once was possible for Mr. Thompson among the pedestrians on the streets of New York is now possible among sophisticated con artists in the traffic on the internet. Both provide anonymity, confusion and moveable currency.

The confidence game (also known more colorfully as the con, bamboozle, flim flam, swindle, grift, hustle, gaffle and scam) involves the con artist and his or her accomplices, known as shills.³ Its marks (or victims) are from all walks of life, including educated professionals.⁴ Lawyers have become victims of increasingly sophisticated fake clients, who sometimes use shills, fake websites, and identity theft to legitimize their scams.⁵ At the heart of the scam is an unsolicited e-mail from a prospective, and typically, foreign client who needs what appears to be legitimate legal help, such as paying or collecting a debt, settling a contract dispute, or obtaining a divorce.⁶ The lawyer and fake client enter into an agreement for legal services and attorney’s

fees. A fee agreement is signed and returned to the lawyer with payment for the attorney's advance fee. For many lawyers, none of the above circumstances are unusual, because they have conducted business this way for several years with legitimate international clients.⁷ At this point in the scam, there is no reason to suspect that the prospective client is not being truthful.

The definition of a confidence game or trick "is an attempt to defraud a person or group by gaining their confidence".⁸ The con approaches the mark with the guise of legitimacy and familiarity of how attorneys practice law, including the use of client trust accounts and confidential information. Pay a large advance retainer? "No problem," the con says. In one situation, the con artist used what appeared to be a trust account check written from an Illinois lawyer's trust account to the attorney-mark.⁹ The check allegedly represented the client's refund of unearned fees made payable to the Texas attorney upon the client's request.¹⁰ Upon investigation, the mark discovered that the name on the check belonged to a Chicago attorney and it was the attorney's correct law firm address.¹¹ However, the out-of-state attorney said that he did not have a trust account at the bank upon which the check was written and had never represented the mark's prospective client.¹²

In a complicated con game reported last year in the ABA Journal online weekly newsletter, a large law firm in Nashville, Tennessee was almost scammed out of \$400,000.¹³ Bradley Arant Boult Cummings LLP was fortunate, because the wired funds were frozen before they reached the foreign bank due to the firm's quick reporting to the FBI.¹⁴ The scam included a referral to the mark from a shill, who posed as an out-of-state lawyer.¹⁵ The referral matter involved collecting a debt for a foreign corporate client, who was the con artist, posing as a real staff person at an actual foreign corporation.¹⁶ The attorney-mark wrote a demand letter on behalf of the corporate client, and the debtor (another shill, who also assumed the name of a real

staff person at a legitimate U.S. company) sent a check in response to the demand.¹⁷ The cashier's check was as phony as the con artist's and shills' assumed identities; but it, too, seemed genuine.¹⁸ Bradley Arant deposited the check into its trust account, took out its fees and expenses, and then wired the rest of the money to the client per its instructions.¹⁹ None of this sounds particularly unusual. But I have told you there are two shills, one con artist and a counterfeit check. Without this information, how would you know this is a scam?

In other bamboozles, attorneys have reported that con artists have used: (1) fake websites for real foreign companies; (2) real bank names on counterfeit checks with routing numbers that do not belong to that particular bank, thus causing the check to take longer to *not clear* the attorney's bank; and (3) fake 1-800 phone numbers with real banks' names that have automated verification systems to falsely tell the caller that the financial instrument is valid.²⁰ The con game has grown much more sophisticated than the days in 1849 when William Thompson passed himself off as an old acquaintance on the streets of New York. Instead of watches, more than \$559.7 million dollars were lost to internet fraud in 2009, which included check fraud (as noted above) and overpayment fraud.²¹ This amount represents a 111.5% increase from the \$264.6 million lost in 2008, according to the FBI's 2009 Internet Crime Report.²²

Overpayment fraud is described by the Internet Crime Complaint Center (IC3) as "scams in which the target is given a fraudulent monetary instrument in excess of the agreed-upon amount for the transaction, and asked to send back the overpayment using a legitimate monetary instrument."²³ Con artists are also targeting family law attorneys by the same deceptive methods they use in debt collection or by the simpler, but no less effective, method of overpayment fraud.²⁴ Steve Costello, an attorney in Angleton, Texas, received an unsolicited e-mail in January 2010 from a prospective client seeking a divorce.²⁵ The woman said she was a Texas

resident temporarily living in London with plans to return to Texas.²⁶ Costello set his retainer, the client agreed to it, and returned his fee agreement.²⁷ Costello quickly received a check from a third party for \$10,000 more than his retainer.²⁸ When Costello sent the client an e-mail about the erroneous amount, she instructed him to take out his advance fee, forward money to her travel agent in Arkansas and send her a check for the remaining amount to a London address.²⁹ Costello was apprehensive and decided to call the State Bar of Texas Ethics Helpline for advice.³⁰ Although, the Texas Disciplinary Rules of Professional Conduct do not say what to do in this particular situation, Costello decided to take his check to Bank of America, from which it appeared to be issued, and learned it was counterfeit.³¹ He never deposited the check into his trust account and wrote the client withdrawing from representation.³²

A few months later, Danny Kustoff, a lawyer in San Antonio, received this e-mail:³³

> -----Original Message-----

> From: Megumi Shimizu [<mailto:megzu@hotmail.com>]

> Sent: Monday, March 22, 2010 11:06 AM

> To: undisclosed-recipients

> Subject: Agreement Enforcement

>

>

> Dear Counsel,

> I am contacting you in regards to the agreement

> between me and my ex husband, Ian Shimizu (who lives in your

> jurisdiction with his new partner). I was married to him for over

> 20yrs of which by his instructions I was a full time house wife to

> carter [sic] for our three children. We mutually agreed under a

> Collaborative Participation Law Agreement to go our separate ways. Ian

> had agreed to pay me \$987,000.00 under terms of the agreement so that
> I can settle down and to his credit, he has paid me \$207,000.00 but
> with an outstanding balance of \$780,000.00. I have not received any
> notice in regard to when the balance payment will be remitted to me.
> Therefore, I want to proceed to the next option and have him to be
> aware of a possible litigation file in process. I am hereby requesting
> your legal assistance in collecting the balance or helping me enforce
> the agreement, and have him honor the agreement in entirety. I will be
> providing further information upon your request. I believe that one of
> the reasons he has refused to pay is because I am now living in Japan.
> I understand that living in Japan does not automatically void the
> agreement. I would like us to further discuss this matter together
> before making arrangements to receive your retainer agreement, rates
> and all other essential material regarding your firm's policies.
> Please consult me for further information needed in regard to the case
> and I have to emphasize on the importance to arbitrate these case. I
> look forward to your prompt reply.
>
> Regards,
>
> Megumi Shimizu
>
> CHOKO BOVEKI LTD
> Address: 4FLOOR, 2-12-23 MINAMI AZABU MINATO-KU, TOKYO JAPAN
> Tel: 81-8035543903
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Kustoff also received an attachment of an alleged Collaborative Law Participation Agreement.³⁴ At the time, it appeared Ms. Shimizu had a valid claim, appropriate documentation to support her claim, and used language familiar to family law practitioners, such as “collaborative law” to appear authentic.³⁵

Kustoff became suspicious when his client wanted him to wire funds as soon as he obtained and deposited funds from the debtor, her ex-husband, without allowing time for the check to clear his trust account.³⁶ Kustoff did not wire the funds to Ms. Shimizu, because he refused to do so until the check *cleared* the bank in spite of pressure from his client to the contrary.³⁷ Although Kustoff had deposited the check into his trust account, he avoided a loss of \$340,000 to his trust account as a result of the counterfeit check from the debtor-shill, Ian Shimizu.³⁸ However, if Kustoff had wired the funds as Ms. Shimizu insisted, the real monetary loss would have been to his other clients (whose real money was used to pay the con artist) as well as to Kustoff, who would have been held responsible for the trust account funds under Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct in spite of his own lack of fraudulent behavior.³⁹ Fortunately, both Costello and Kustoff avoided financial harm.⁴⁰

It is *imperative* to wait until a client’s financial instrument *clears* the bank in which it was deposited. An attorney must understand the difference between a bank making deposited funds *available* as opposed to the deposited funds *clearing* the bank and becoming *collected*. It may take longer than 60 days for a check to clear a bank, especially if it is an overseas account with erroneous routing numbers.⁴¹ Richard T. Howell, Jr., an attorney in Houston, who regularly represents international companies in debt collection matters, relied on his bank’s oral confirmation that the financial instrument he deposited was valid.⁴² Howell went so far as to record the telephone conversation between himself and the bank before he wired funds to the

overseas client.⁴³ The bank later reneged on its confirmation when it discovered the check was phony.⁴⁴ Howell sued Citibank, where his trust account was located, and reached a confidential, out-of-court settlement.⁴⁵ Prior to the litigation, however, Howell voluntarily repaid his law firm the \$182,500 lost from its trust account as a result of the check-fraud scam.⁴⁶ He did so through a home equity loan.⁴⁷

Because Howell wanted other lawyers to avoid becoming marks of the e-mail con game, he called the *Texas Lawyer* in January of 2009 to voluntarily tell his story, which has been retold in other media and posted for a time on the State Bar of Texas website.⁴⁸ When Howell made the decision to go public and to sue Citibank, he did not know that the experience he gained in representing himself would eventually lead to representation of other lawyers who were similarly defrauded.⁴⁹

What are some of the common factors in these scams? Usually there is a prospective overseas client, who the lawyer has never met or spoken to by phone. But that evaluation alone may differ from scam to scam and disallow legitimate overseas clients access to legal representation in the U.S. However, there are two other red flags. The first one is a significant overpayment of a retainer from the proposed client or a third party. An overpayment in the fraud sense is not a \$100 overpayment, but in the thousands of dollars. The second red flag is an eager or quick-to-pay debtor. Any combination of these factors should make the lawyer suspicious.

Remember, if the funds have been deposited, *refuse* to wire any funds or write any checks on the trust account to clients or third parties (in connection to that particular deposit) *until the deposited funds clear the bank* where the trust account is located. Once the funds have cleared the bank, they are called *collected funds* (as opposed to available funds, which have not cleared).⁵⁰ Rule 1.14 (a) of the Texas Disciplinary Rules of Professional Conduct requires a

lawyer to hold funds, belonging in whole or in part to a client or third party in connection with a representation, in a trust account; so that those funds are held separately from the lawyer's own funds.⁵¹ The trust account may be an Interest on Lawyers' Trust Account (IOLTA) or an interest-bearing trust account, in which the interest is paid to the client.⁵² The rule and comments are silent as to whether writing disbursements from the trust account must be made on collected funds or available funds. However, the policy behind Rule 1.14 is to *safeguard* funds which do not belong to the lawyer.⁵³ Clearly the only way to do so is to determine that the deposits in the trust account have *cleared* and become *collected funds* prior to making disbursements.⁵⁴ In addition, the lawyer is a fiduciary which requires this higher standard of care.⁵⁵ As a result, do not interpret the word "promptly" in Rule 1.14 (b) to mean that the lawyer has to deliver funds to a client or third party as soon as they become available.⁵⁶ Always wait until the funds have cleared the bank and become collected.⁵⁷ This is true, too, when a lawyer is required to return unearned fees under Rule 1.15 (d) when the representation is terminated.⁵⁸ It may be wise to explain this policy to clients in an initial fee agreement.

Lastly, trust one's instincts. Con artists also target lawyers because they believe that their con games will remain confidential. Rule 1.05 (a) of the disciplinary rules defines confidential information to include both privileged and unprivileged information which is learned during the representation of the client.⁵⁹ If the lawyer suspects a fraud, he or she may reveal the client's confidential information under Rule 1.05 (c) (7) in order to prevent the client from committing a criminal or fraudulent act.⁶⁰ Report the scam to the Federal Bureau of Investigations (FBI) at <http://www.fbi.gov/cyberinvest/escams.htm> or go to this website to locate a phone number for the nearest field office.

The saying that, “if it seems too good to be true, it is,” oversimplifies a well-planned and well-executed scam. These con artists are extremely deceptive and have gone to great lengths to gain a lawyer’s confidence. They use skills; install fake 1-800 bank verification phone numbers; create fake websites that look legitimate; assume the identities of real lawyers, non-lawyers and companies; talk the “talk”; and print impressively valid-looking cashier’s checks.⁶¹ As time has proven, con artists will continue to develop and adapt bamboozles as soon as the previous one becomes ineffective. Awareness is one way to prevent more scams from occurring. Thankfully, Howell, Costello and Kustoff have shared their stories to increase awareness. Educating oneself about internet fraud is another way to avoid becoming a mark. The FBI website listed above reports new scams as they develop. In addition, the U.S. Department of Justice describes various types of mass marketing fraud, which includes internet fraud, at its website, <http://www.justice.gov/criminal/fraud/internet/>.

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About the author:

Ellen Eidelbach Pitluk is an ethics attorney at the State Bar of Texas. She regularly talks with attorneys on the Ethics Helpline, regarding questions about the Texas Disciplinary Rules of Professional Conduct, Texas Rules of Disciplinary Procedure and Professional Ethics Committee ethics opinions. The Ethics Helpline is a free service offered exclusively to all Texas-licensed attorneys and is available at (800) 532-3947.

¹ Author unknown, *Arrest of Confidence Man*, NEW YORK HERALD, July 8, 1849, <http://chnm.gmu.edu/lostmuseum/> (enter "Arrest of Confidence Man" in Keyword Search) (last visited June 22, 2010).

² *See id.*

³ Definition of confidence trick at http://en.wikipedia.org/wiki/Confidence_trick (last visited on June 22, 2010).

⁴ *See id.*

⁵ Molly McDonough, *Bad-Check Schemes Targeting Lawyers Are 'Increasingly Sophisticated'*, ABA Journal Weekly Newsletter, February 25, 2010, http://www.abajournal.com/news/article/bad_check_schemes_targeting_lawyers_are_increasingly_sophisticated/ (last visited on June 28, 2010);

Debra Cassens Weiss, *Bradley Arant Reportedly Scammed Out of More Than \$400K*, ABA Journal Weekly Newsletter, June 11, 2009, http://www.abajournal.com/news/article/bradley_arant_reportedly_scammed_out_of_more_than_400k/ (last visited July 8, 2010).

⁶ *Supra* note 5; Federal Bureau of Investigation, Cyber Investigations, *New Twist on Counterfeit Check Schemes Targeting U.S. Law Firms*, January 21, 2010, <http://www.fbi.gov/cyberinvest/escams.htm> (last visited on June 28, 2010); Washington State Bar Association, *Check-Cashing Schemes Target Lawyers*, September 2009, <http://www.wsba.org/media/publications/barnews/sept09-check-cashing+schemes.htm> (last visited June 28, 2010); Molly McDonough, *Law Firms Swindled Out of \$500K in E-Mail Scam*, ABA Journal Weekly Newsletter, February 22, 2010, http://www.abajournal.com/news/article/honolulu_law_firms_swindled_out_of_500k_in_e-mail_scam/ (last visited June 28, 2010).

⁷ Byron Harris, *Lawyers Fall Victim to Cashier's Check Scam*, WFAA-TV at WFAA.com, March 5, 2010, <http://www.wfaa.com/home/Lawyers-fall-victim-to-cashiers-check-scam-86690237.html> (last visited on June 28, 2010); Debra Cassens Weiss, *E-Mail Scam Targeting Law Firms Ensnares a Lawyer in Atlanta*, ABA Journal Weekly Newsletter, August 26, 2008, http://www.abajournal.com/news/article/e_mail_scam_targeting_law_firms_ensnares_a_lawyer_in_atlanta/ (last visited June 28, 2010).

⁸ *Supra* note 3.

⁹ Based on personal knowledge of the author due to a phone call she answered from a Texas attorney to the Ethics Helpline. Date of the phone call is unknown, but it occurred in early 2010. The attorney's name is also unknown.

¹⁰ *See id.*

¹¹ *Id.*

¹² *Id.*

¹³ Debra Cassens Weiss, *Bradley Arant Reportedly Scammed Out of More Than \$400K*, *supra* note 6.

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.; Debra Cassens Weiss, *E-Mail Scam Targeting Law Firms Ensnarers a Lawyer in Atlanta*, *supra* note 7; Debra Cassens Weiss, *Law Firm Alert: Beware of Phony 'Eagle Power' Checks*, ABA Journal Weekly Newsletter, February 6, 2009, http://www.abajournal.com/news/article/law_firm_scam_alert_beware_of_phony_eagle_power_checks/ (last visited July 8, 2010).

²¹ The Internet Crime Complaint Center (IC3), 2009 Internet Crime Report, at 2, 18-19, *available at* http://www.ic3.gov/media/annualreport/2009_IC3Report.pdf (last visited July 8, 2010).

²² *See id* at 2.

²³ Id.

²⁴ Federal Bureau of Investigation, Cyber Investigations, *New Twist on Counterfeit Check Schemes Targeting U.S. Law Firms*, January 21, 2010, <http://www.fbi.gov/cyberinvest/escams.htm> (last visited on June 28, 2010); U.S. Department of Justice Federal Bureau of Investigation, *Honolulu Law Firms Targeted in Financial Crime Wave*, February 22, 2010, http://www.abajournal.com/files/FBI_Press_Release.pdf (last visited on July 9, 2010).

²⁵ Telephone interview with Steve Costello, Attorney, Law Office of Steven Costello, PLLC, in Angleton, Tex. (July 15, 2010).

²⁶ *See id*.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Based on personal knowledge of author.

³¹ *See id*.

³² *Supra* note 25.

³³ E-mail from Megumi Shimizu to Undisclosed Recipients (March 22, 2010), reprinted with permission from Danny Kustoff, Partner, Kustoff and Phipps L.L.P.

³⁴ Telephone interviews with Danny Kustoff, Partner, Kustoff and Phipps L.L.P., in San Antonio, Tex. (April 13, 2010 and July 15, 2010).

³⁵ *See id*.

³⁶ Id.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Tex. Gov't Code Ann., tit. 2, subtit. G, app. A, art. x, § 9, (1990) (Tex. Disciplinary R. of Prof'l Conduct 1.14 (a), cmt. 1).

⁴⁰ *Supra* notes 25 and 34.

⁴¹ Aaron Morris, *Don't Believe Your Bank When It Reports a Check Has Cleared*, Aaron Morris' Business Law Alert, January 25, 2009, http://www.businesslawalert.com/2009/01/articles/general-business/dont-believe-your-bank-when-it-reports-a-check-has-cleared/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+AaronMorrisBusinessLawAlert+%28Aaron+Morris%27+Business+Law+Alert%29 (last visited July 12, 2010); and Brenda Sapino Jeffreys, *Too Good to Be True: Consumer Counsel Warn Lawyers to Be Wary of Client E-Mail Scams*, Tex. Lawyer, Jan. 26, 2009, available at: <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202427689784&slreturn=1&hbxlogin=1> (last visited July 12, 2010).

⁴² Byron Harris, *Lawyers Fall Victim to Cashier's Check Scam*, *supra* note 7; and Brenda Sapino Jeffreys, *Too Good to Be True: Consumer Counsel Warn Lawyers to Be Wary of Client E-Mail Scams*, *supra* note 20.

⁴³ *See id.*; telephone interview with Richard T. Howell, Partner, Buckley White Castaneda & Howell, in Houston, Tex. (July 16, 2010).

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ Brenda Sapino Jeffreys, *Too Good to Be True: Consumer Counsel Warn Lawyers to Be Wary of Client E-Mail Scams*, *supra* note 41.

⁴⁷ *See id.*

⁴⁸ *Supra* note 41; Byron Harris, *Lawyers Fall Victim to Cashier's Check Scam*, WFAA-TV at WFAA.com, *supra* note 7; and Debra Cassens Weiss, *Law Firm Alert: Beware of Phony 'Eagle Power' Checks*, *supra* note 20.

⁴⁹ *Supra* note 43.

⁵⁰ *A Lawyer's Guide to Client Trust Accounts*, State Bar of Texas, June 21, 2010, at 10, http://www.texasbar.com/AM/Template.cfm?Section=Trust_Accounts&Template=/CM/HTMLDisplay.cfm&ContentID=10305 (last visited on August 3, 2010); and Aaron Morris, *Don't Believe Your Bank When It Reports a Check Has Cleared*, *supra* note 43.

⁵¹ *Supra* note 39.

⁵² *A Lawyer's Guide to Client Trust Accounts*, State Bar of Texas, at 5-6, *supra* note 50.

⁵³ *See id.* at 2.

⁵⁴ *Id.* at 8.

⁵⁵ Id at 2.

⁵⁶ *Supra* note 39.

⁵⁷ *A Lawyer's Guide to Client Trust Accounts*, State Bar of Texas, at 8, *supra* note 50..

⁵⁸ Tex. Disciplinary R. of Prof'l Conduct 1.15 (d).

⁵⁹ Tex. Disciplinary R. of Prof'l Conduct 1.05 (a).

⁶⁰ Tex. Disciplinary R. of Prof'l Conduct 1.05 (c) (7).

⁶¹ *Supra* at note 5.