Enduring Ethics Opinions
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This edition of Enduring Ethics Opinions will take a new approach to identifying certain Opinions of the Professional Ethics Commission that predated the Maine Rules of Professional Conduct and that remain good authority for discussion today by looking at common Internet scams intended to divest attorneys of client trust account funds. Lawyers have been cheated out of an estimated $70 million since 2009 from such scams. Formal Opinion 2015-3: Lawyers Who Fall Victim to Internet Scams, New York City Bar Association, April 2015. They start with an email solicitation for legal services accompanied by legitimate looking contracts, letters of intent, and other legal documents concerning parties that have a website presence and that, in some cases, are real businesses. The fraud often involves a transaction or litigated matter that yields a check for a substantial sum written on an apparently genuine bank. The so-called client requests the attorney to deposit the check and forward a portion of it to a foreign bank. The lawyer’s bank eventually discovers that the check is fraudulent, but not in time to prevent the transfer of funds from the client trust account for which there is no offsetting deposit.

These scams raise a number of ethical considerations, some of which have been addressed indirectly by the Commission under the Maine Bar Rules in Opinions that remain instructive under the Maine Rules of Professional Conduct. Whether an attorney-client relationship has been formed is a natural starting point for discussion. The Professional Ethics Commission analyzed M. Bar R. 3.4, 3.6(a)(3), and 3.6(f)(2)(iv) in Opinion No. 61 and addressed when the attorney-client relationship is established, entitling the client to the protections that typically accompany that relationship. The Commission decided that whether or not the common law of contract establishes an attorney-client relationship, the relationship can exist for ethical purposes. Duties inure to the benefit of prospective clients under M. Bar R. 3.4(a), even if the relationship ultimately is not consummated. “The attorney-client privilege may extend to preliminary communications looking toward representation even if no representation is ever undertaken.” Opinion No. 61 (September 4, 1985). The Commission pointed out that the existence or non-existence of a professional relationship depends largely on the reasonable understanding and expectation of the client.

The Maine Rules of Professional Conduct, effective August 1, 2009, yield the same conclusion. Under Rule 1.18, a person who discusses with the lawyer the possibility of forming an attorney-client relationship is a prospective client. Even when no relationship ensues, the client is entitled to confidentiality, and the lawyer cannot reveal information learned during the consultation. The client in Opinion No. 61 changed his mind about the relationship after providing substantive information to the attorney, who was obligated to keep that information confidential despite the client’s decision. The confines of the duty of confidentiality today are defined more fully by M.R. Prof. Conduct 1.6.

Ethics Opinion No. 61 under the old Maine Bar Rules dealt with a situation where a client had a genuine desire to establish an attorney-client relationship and no fraudulent intent. In the case of an Internet scam, on the other hand, there is no attorney-client relationship and the “client” is not entitled to confidentiality under the rationale of Opinion No. 61 and the current Maine Rules of Professional Conduct. The purported client obviously has no reasonable expectation of confidentiality because that individual is not truly attempting to establish an attorney-client relationship, but is intending to perpetrate a fraud. See M. R. Prof. Conduct 1.8, Comment [2] (2009)(not all persons who communicate information to a lawyer are entitled to protection); M. R. Prof. Conduct 1.16(a)(1) & (b)(2) & (3)).
The Internet scam scenario targeting a lawyer’s client trust account raises the issues of the attorney’s duty to protect that account. The Commission’s Opinions Nos. 30 and 98 addressed aspects of attorney obligations in relation to client trust accounts under the Maine Bar Rules and remain good guidance under the Maine Rules of Professional Conduct. Opinion No. 30 dealt with the situation where a lawyer practicing in Maine, but near the New Hampshire border, wanted to deposit client funds in a New Hampshire bank, rather than a Maine bank. Maine Bar Rule 3.6(f)(1) was analyzed by the Commission, which decided that funds had to be deposited in an identifiable bank account maintained in the State in which the law office was situated. Consequently, the lawyer could not use a New Hampshire bank.

It remains true under the Maine Rules of Professional Conduct that client funds “shall be deposited in one or more identifiable accounts maintained in the State in which the law office is situated at a financial institution authorized to do business in such State.” M. R. Prof. Conduct 1.15(b)(1).

The Commission’s Opinion No. 98 addressed the co-mingling of lawyer and client funds and the record-keeping and accounting obligations for client trust accounts. The attorney in that Opinion received an advance against fees to commence legal work on behalf of the client. The advance was exhausted, so the attorney requested additional funds, which the client never provided. The earned attorney’s fees remained in the client trust account, and the question was whether the attorney had thereby co-mingled her funds with the client’s funds by not withdrawing the fees as they were earned. The Commission concluded that Maine Bar Rule 3.6(f)(1)(ii) permitted the lawyer to withdraw fees earned when they were due, but that the lawyer did not co-mingle funds by leaving her earned fees in the account. The client’s funds were not deposited into the lawyer’s personal account, the lawyer did not use the client trust account for personal expenses, and the attorney kept an accurate accounting of the client’s money and the attorney’s earned fees. Maine Bar Rule 3.6(f)(2)(iii) required complete records of all funds of a client coming into possession of the lawyer, which Rule was followed by the attorney.

The Commission’s conclusion would be the same under the Maine Rules of Professional Conduct. Funds from a client trust account belonging to the lawyer may be withdrawn when due unless there is a dispute with the client over the amount. M. R. Prof. Conduct 1.15(b)(1)(ii). The Rules further provide that the lawyer must maintain complete records of all funds, securities, and other properties of the client coming into the possession of the lawyer for a period of eight (8) years after termination of the representation. M. R. Prof. Conduct 1.15(b)(2)(iii).

Returning to the Internet scam scenario, Opinions Nos. 30 and 98 are relevant. The transfer of funds from a client trust account with no real corresponding deposit necessarily means that another client’s money was deposited out-of-state. The transferred funds were not earned by the attorney, who is not authorized to withdraw them or use those funds for other purposes. It is important for the attorney to have records sufficient to identify which client(s) may have suffered a loss of trust funds and how much the attorney may have to deposit into the account to make up for the void left by the fraudulent check.

For a complete discussion of the Internet scams used in this article to introduce some enduring Ethics Opinions that remain viable discussions of current ethical obligations, see the New York City Bar Association’s Formal Opinion No. 2015-3, dated April 2, 2015.