MANAGING **YOUR TRUST** ACCOUNT

BY DAVID M. KORREY, ESQ.

On June 28, 1997, Evander Holyfield and Mike Tyson fought a heavyweight championship fight at MGM Grand Arena. Before the fight started, Referee Hon. Mills Lane gave instructions to each fighter to "protect yourself at all times." This fight became known as the "ear bite fight."

> My "ear bite" consisted of my paralegal's theft of 157 checks from my office mail that I'd written from my attorney trust account to satisfy provider, insurer and governmental liens related to medical care provided to my injured clients. The amount of these checks ranged from small amounts to thousands of dollars. The following is a brief explanation of how liens become part of managing personal injury cases. First, almost all clients

involved in personal injury cases need medical care. This care may be provided through the client's own health insurance, a government program like Medicare or Medicaid, or through a medical provider willing to provide services and take payment from the proceeds of the claim. Each provider typically has a right to be paid from the proceeds of any recovery by the injured party against the party responsible for

the injuries. These rights are collectively referred to as lien rights.

When a case against the responsible party is resolved, a settlement check is made payable jointly to the client and the attorney. The settlement check is deposited into the attorney's trust account, and the attorney then prepares an accounting, setting forth details of payment for any liens, attorneys' fees and costs, and the client's share of these funds. After the client (or the court in the case of a minor) approves the accounting, the attorney will issue checks.

The procedures I used to protect myself and my clients (which worked successfully from 1973 when I was first admitted to practice in Colorado up to 2005) included:

- Not permitting anyone other than me to write any checks on any of my law office accounts;
- 2. Personally writing all of the checks;
- 3. Mailing the lien payment checks to the providers;
- 4. Reconciling the bank account and each trust account on a monthly basis from the bank statements; and
- 5. Inspecting the cancelled checks.

In addition, when identifying the payee on each check, I included the payee's taxpayer ID number (except for clients), the full address of the payee and the name of the client on whose behalf the check was written. This information was put on each check in the payee area in an easily legible type font.

Checks paid to satisfy liens were almost always mailed to the provider using U.S. Mail, with return-receipt postage guaranteed. If there was some agreement to reduce the lien amount (not uncommon for a variety of reasons), a letter confirming the reduction accompanied the check. When possible, clients' checks were personally delivered.

When a check drawn on an attorney's trust account is presented to another bank, the attorney's bank is not in a position to make sure the party seeking credit for the funds is the authorized payee. Instead, the attorney's bank must rely on the bank accepting the check to make sure the party seeking payment is authorized to receive the funds.

A safety net in this process is the responsibility imposed on banks by NRS 104.3101 et seq (Article 3 of Nevada's Uniform Commercial Code).

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NRS 104.3420 provides that the law applicable to conversion of personal property applies to negotiable instruments (checks). It also provides that a negotiable instrument "is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." NRS 104.3420 limits the bank's liability for this conversion to the total amount of the instrument. Thus, if the bank accepting the check does not do its job and accepts a stolen check and improperly presents it to the attorney's bank, that bank is responsible for any loss in the total amount of the check if the funds do not go to the right party. The statute of limitations to bring an action under Article 3 is three years. NRS 104.3118

In my experience, banks take this responsibility very seriously. What this means is that, in managing their trust accounts, all attorneys must rely on the banks that are processing the checks. The good thing is, if banks don't do their jobs, they are, for the most part, held liable for any losses relating to improperly processing these checks.

With these processes and procedures in place and having worked so well for 35 years, the question is, how did they break down in my practice, resulting in nearly \$500,000 being stolen in more than three years?

The answer is this: a felonious employee, an outside accomplice, a high-level bank employee accomplice and lien providers who did not track their receivables.

This is an example of how the paralegal perpetrated the scam:

1. I issued an IOLTA check on behalf of a client to pay a provider lien as follows:

> (PROVIDER) (TAXPAYER ID NUMBER OF PROVIDER) (FULL ADDRESS OF PROVIDER) RE: PAYMENT OF LIEN FOR (NAME OF CLIENT) DOL / /2005;

- 2. I placed the check in the office's outbound mail;
- 3. My paralegal monitored the office's outbound mail for checks to lien providers who did not track their

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receivables and stole them. (This is where the paralegal used information learned through work experience; some lien holders are very aggressive about tracking their receivables, but many are not.);

- 4. My paralegal or his accomplice deposited the checks in fraudulent bank accounts (all with assistance of a bank employee);
- 5. The lien provider did not advise my office that it did not receive payment (because the provider did not track its liens).
- 6. When I then reconciled my trust account bank statement and reviewed cancelled checks, there was no discrepancy apparent.

When stealing larger checks, the paralegal and his accomplice would even set up specific fraudulent accounts, using account names similar to the payees. My paralegal and accomplices repeated this scam four to five times a month during a 36-month period.

This is a scam that couldn't and didn't go on forever. All it took was one lien provider complaining that the provider had not been paid, my office securing the bank records showing payment had been made and the lien provider confirming with their bank that the payment had not been received. This led me to a full investigation of my bank accounts; I contacted every payee of checks I had issued for the past three years and self-reported to the bar that my trust accounts had been compromised.

Because of bank privacy laws, it was necessary to use civil discovery to "follow the money" and unravel the fraud scheme. Criminal prosecution of the parties who stole the checks and set up the fraud accounts resulted in imprisonment for the culprits.

The important point to take from this article is that it might be prudent to consider adding some steps to your office procedures and practices to reduce the chance of being similarly victimized.

My new approach is to personally deposit, write, deliver or mail (if necessary) the settlement checks I've written on my office trust account. In addition to reconciling the account and inspecting the cancelled checks, I also personally confirm receipt of the check by the payee.

Though it is not a specifically written rule that attorneys must contact each payee of their trust account checks to make sure the checks have been received, it is a practice I've implemented, because RPC 1.15(d) (safekeeping property), makes clear the attorney always bears the burden of protecting client funds. **NL**

DAVID M. KORREY graduated in 1970, from the Colorado School of Mines, with a B.S. degree in metallurgical engineering. He earned his Juris Doctorate from the University of Colorado in 1973. Korrey was first licensed in Colorado and Michigan in 1973. He has practiced consumer-based law since that time.

2017 NEVADA GOVERNMENT CIVIL ATTORNEYS CONFERENCE

Hard Rock Hotel & Casino – Lake Tahoe, NV May 10-12, 2017

The State Bar of Nevada Public Lawyers Section will sponsor the 2017 Nevada Government Civil Attorneys Conference, scheduled for May 10-12 at the Hard Rock Hotel & Casino at Lake Tahoe, NV. This conference is an annual forum for networking and education on the critical issues facing government counsel representing state, municipal, county or other public entities.

The registration fee for the conference is \$50 for members of the Public Lawyers Section and \$499 for non-members. The registration fee includes all conference materials and some meals. The conference will feature approximately 10 hours of CLE presentations (including ethics), and the Public Lawyers Section annual breakfast meeting. Attendees may register with the Nevada State Bar at www.nvbar.org.

REGISTRATION DEADLINE IS April 29, 2017.

Attendees are responsible for making their lodging reservations; contact the Hard Rock Hotel & Casino at 1-844-588-7625 prior to April 11th and request the group rate for the Nevada Government Civil Attorneys Conference.

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