



# The Fundamentals of Loss Prevention for Lawyers

EXCERPT

► **CHAPTER 18: General Loss  
Prevention Tips You Need to Know**

**Serving Illinois Lawyers**

# Chapter 18: General Loss Prevention Tips You Need to Know

---

## Professionalism/Diversity

Lawyers should be careful to screen and/or filter their communications with clients, opposing counsel, and judges to ensure that all communications meet the high standard of professionalism. Lawyers have been disciplined for rude, obnoxious, sexist or discriminatory behavior during depositions; during a trial; or in relation to colleagues and fellow employees.

As of this writing, Rule 8.4(j) identifies professional misconduct as engaging in conduct that violates laws that prohibit discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status that reflects adversely on the lawyer's fitness as a lawyer.

If you would like to learn more about professionalism and civility you can go to the website for the Illinois Supreme Court Commission on Professionalism at [www.2civility.org](http://www.2civility.org). The Commission is charged by [Illinois Supreme Court Rule 799](#) to promote among both lawyers and judges in Illinois greater integrity, professionalism and civility; to foster commitment to the elimination of bias and divisiveness within the legal and judicial systems; and to ensure those systems provide equitable, efficient and effective service to the citizens of Illinois.

Since July 1, 2017, lawyers in Illinois have been required to complete at least one hour of continuing legal education regarding diversity and inclusion and at least one hour regarding mental health and substance abuse to satisfy their Professional Responsibility CLE obligations. Attending these programs will help us learn more about these very important topics.

## Maintaining the Lawyer-Client Privilege with Client Email

Lawyers should be careful to advise their individual clients not to use work email when communicating with them as an employee who uses their company email account to communicate with their lawyer almost certainly forfeits any claim to privilege concerning those communications. However, courts have held that communications between a lawyer and an employee using a web-based email account on a company computer may still be privileged.

## Lawyers and Claims for Defamation

Lawyers are generally protected from claims of defamation for statements they make pertaining to pending litigation under an absolute privilege as provided in the Restatement of Torts. However, lawyers should be careful not to read the contours of the privilege too broadly and should be careful with their extra-judicial statements, particularly those broadcast over the internet and through social media. Such statements may still be covered by the absolute privilege, but application of the privilege is not always clear-cut and may subject a lawyer to defamation claims.

## Email/Fraudulent Check Schemes

Recent years have seen a proliferation and variations of the same basic scheme: An lawyer is sent an email from a potential client in a foreign jurisdiction who wishes to retain a lawyer to pursue a collection matter from a customer; the lawyer agrees to the representation; the lawyer thereafter receives a message stating that the customer has agreed to pay the balance owed, that the customer will be sending a check to the lawyer, that the lawyer should deduct any fees for their services, and send the client the remainder.

Many lawyers have fallen victim to this scheme because they believe that once a deposited check has “cleared” and the funds are available there is no risk in wiring those funds. This is simply not true.

A check “clearing” and a bank’s making funds available is only provisional until the check is actually paid by the payor bank (i.e., final settlement). Prior to final settlement, the depositor’s bank merely acts as the customer’s agent for collection of the check and any advancement of funds by the depositor’s bank is provisional. If there is no final settlement (i.e., the payor bank does not pay the check), the depositor’s bank may charge back the sum of any provisional advancement of funds or demand a refund from the customer.

As applied to the illustration above, this means that the lawyer who deposits the check and wires the funds to their “client” once the check “clears” may ultimately be liable to the bank for the amount of the fraudulent check. The bank may either charge the lawyer’s account if sufficient funds are available in the lawyer’s account or demand a refund and pursue legal action against the lawyer for the amount of the check.

To prevent this scenario, lawyers should be extremely wary of taking on any representation from a foreign client who contacts you only via email. As with any new client, a lawyer should investigate the client thoroughly. This includes determining the actual existence of the client and the validity of its operations. A diligent lawyer should call references for the client, check public records, and obtain supporting documentation of the alleged debt that it owed to the client.

A prudent lawyer should also never assume that simply because a check has “cleared” and funds are available that a check has been paid by a payor bank. Upon receiving a check from a suspicious client, a diligent lawyer should call the payor bank to verify the account and determine if the check is a forgery. A lawyer should also not draw on deposited funds from a suspicious client until they receive confirmation from the bank that there has been a “final settlement” and the deposited check has actually been paid by the payor bank.

### ***Reducing the likelihood that a client acts on fraudulent wire instructions***

Another fraudulent check scheme involves someone posing as a member of your firm, possibly by phone or with an email address that looks like it comes from your firm. In an effort to avoid a problem with wire transfer instructions, we recommend that you include the following language in your correspondence with clients, including in your Retainer Agreements:

“Law Offices of \_\_\_\_\_ will no longer be delivering wire instructions. If you receive wire instructions from anyone at our firm, please notify us immediately via telephone. All wire instructions must be obtained directly from the Title Company or Lender. NO EXCEPTIONS.

For more on avoiding cybersecurity breaches and fraudulent check schemes, read Liability Minute: [Lawyers Are Increasingly the Targets of Email/Fraudulent Check Schemes](#) on our website [www.isbamutual.com](http://www.isbamutual.com).



**ISBAMUTUAL.COM**  
**(312) 379-2000**