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Cheque scam threatens to slow down real estate transactions

A recent spate of counterfeit certified cheques hitting Toronto-area law firms threatens to slow down the efficient processing of real estate transactions.

In the closing of a typical residential home purchase, a buyer will deliver to his or her lawyer a certified cheque for the remainder of the down payment (after deducting the deposit paid with the offer), plus legal fees, expenses and taxes.

The client's cheque is deposited into the lawyer's trust account, along with the proceeds of the mortgage. Then the buyer's lawyer certifies his or her cheques for the closing proceeds and ciphers them to the seller's lawyer.

All of this usually takes place within a matter of hours on the day of closing.

The key to the whole process is that the buyer's lawyer will accept his or her client's certified cheque without having to verify that it is genuine.

If lawyers can no longer trust their clients' certified cheques and are forced to verify them by telephone for each transaction a time-consuming and often difficult task many real estate transactions will be unacceptably delayed.

Markham lawyer Alan Garbe told me last month how he almost became a victim of a scam involving a bogus certified cheque. Garbe was approached by a client who asked him to act on a transaction in which the client would obtain financing for equipment being purchased by the client's new construction business.

The client brought in the lender's very sophisticated loan documentation to be signed. Last month an apparently certified cheque arrived by courier from the office of the lender, a non-existent financing corporation allegedly carrying on business in Toronto. The \$273,000 cheque was payable to Garbe in trust. He deposited it into his trust account and then issued a cheque for \$270,000 to the company that was supposedly selling equipment to the client's business.

Fortunately, Garbe asked his own bank to verify the cheque, only to discover that the cheque itself was valid but the certification markings were forged. The funds were never advanced.

The current issue of *The Lawyers Weekly* newspaper reports that Toronto sole practitioner Alnaz Jiwa got hit for almost \$256,000 by a similar scam, leaving him with a shortage in his trust account.

Another Toronto firm lost \$150,000 in another scam.

In all cases, the clients presented genuine-looking photo ID to the lawyers involved.

The Lawyers' Professional Indemnity Company (LawPRO) insures all Ontario lawyers. Coverage is generally available for losses experienced by the lawyer's honest clients resulting from a counterfeit certified cheque in their lawyer's trust account.

Can the lawyer report his own client to the police? The official view is that the client's activities are protected by solicitor-client privilege and cannot be reported.

My own opinion is that if a client is a crook with respect to the transaction involving a lawyer, the client waives normal confidentiality. The public interest in reporting a crime relating to a lawyer's trust account should override the dishonest client's expectation of confidentiality.

In January of this year, the Law Society issued a fraud alert to the profession warning of scams like this.

It is recommended that lawyers dealing with new clients or clients who are not well known to the lawyer should ask their own bank to contact the bank issuing the certified cheque to verify its authenticity and confirm that funds have been cleared.

Unfortunately, that is not always possible in a timely fashion for real estate deals, especially while the movers are charging by the hour and the buyers are clamouring for their keys.

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