

## Utah Ethics Opinions

1976.

27. USB EAO Opinion No. 27

Utah State Bar

Ethics Advisory Opinion No. 27

Approved August 16, 1976

**Summary:** A lawyer may sue a client who pays with a postdated check which is later dishonored.

A lawyer is answerable to the court for violations of ethical conduct in matters within the purview of the court.

**Facts:** You have asked concerning the propriety of suing a client for a fee based upon the following facts:

Your law firm rendered legal services to two individuals. You requested an advance retainer. This retainer was paid by one of the individuals with a post-dated check drawn against intransit funds. The legal work was done and upon the date the check was dated it was deposited. The check was not honored by the bank, nor have funds existed in the account upon which it was drawn in an amount sufficient to cover the check at anytime since the check was drawn.

**Opinion:** The problem falls within the ambit for Canon 2 of Rule IV of the Utah Rules of Professional Conduct, the duty of an attorney to assist the legal profession in fulfilling its duty to make legal counsel available. The duty to make counsel available does not carry with it the obligation of the profession or individual lawyers to allow themselves to be defrauded by clients, nor to require lawyers to forego collection of fees owed by unscrupulous clients seeking unfair advantage by using the Code of Professional Responsibility as a shield against just obligations.

A lawyer should have as clear a fee understanding with his client as circumstances warrant, having regard to the complexities of legal matters and the unforeseen or unexpected problems which may arise, and he should approach the subject of fees frankly and openly with his client in order to avoid possible future problems. In the event a misunderstanding exists, a lawyer must necessarily assume the major burden if a problem arises or the fee becomes uncollectible.

In the present instance, it appears you have been frank with the client and proceeded in good faith to perform the legal services, based upon the fee arrangement.

Viewed in this light, a fraud or gross imposition upon

counsel may have been perpetrated. Had the funds been deposited, as represented, then counsel would have received his contracted fee. Since the account failed to produce the required funds, it is apparent that the funds were not deposited, or were nonexistent, or were never realized, hence not deposited.

The latter assumption would seem to negate fraud. Nevertheless, obviously a gross imposition has been visited upon counsel, since the negotiation for completion of the work was with a clear understanding of how and when the legal services were to be paid.

We conclude that either fraud or gross imposition is present in this instance, which would justify institution of suit to collect the fee owed.

Rule Cited:

Canon 2