

Utah Ethics Opinions

1979.

71. USB EAO C Opinion No. 71

Utah State Bar

Ethics Advisory Opinion No. 71

Approved November 16, 1979

Summary: An attorney may issue a notice of a dishonored check which includes statutorily required reference to criminal sanctions.

Facts: In 1977 the Utah Code was amended in regard to notice requirements prior to filing suit on a dishonored check. The notice must now include the following language.

"In addition, the criminal code provides in section 76-6-505, Utah Code Annotated 1953: Any person who issues a check for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property or other thing of value or paying for any services, wages, salary, labor, or rent, knowing that it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check. The foregoing civil action does not preclude the right to prosecute under the criminal code of the state of Utah (UCA § 7-15-3, as amended 1977)."

The question is raised of whether or not an attorney, in issuing such notices, violates Canon 7, DR 7-105(A), which states that "a lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The potential dilemma is obvious. An attorney who adheres to the legislative directive may run afoul of a disciplinary rule or if he deletes the above quoted language, the notice may well be defective.

Opinion: The Committee finds that the pivotal issue in this regard is one of motivation. If lodging a criminal complaint is accomplished or threatened by an attorney with the sole purpose of gaining an advantage in a civil matter, the action is impermissible. If, however, the possibility of criminal sanctions is mentioned in a notice because of legislative mandate, the purpose appears to be compliance with the law on behalf of the client. The attorney has a duty to so proceed, and the motivation is to effectively represent the client in proceedings leading to and including civil action.

Therefore, an attorney may adhere to the legislative

requirements without violating Canon 7, DR 7-105(A).

Rule Cited:

Canon 7

DR 7-105