

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-222
Issued: November 1979

Question: Can an attorney employed by a bank to perform a title examination sign a dual certification acknowledging his responsibility to both the bank and the customer requesting and financing the examination?

Answer: Yes.

References: Canon 5; EC 5-1, 5-19; *In re Advisory Opinion of Kentucky Bar Assn*, 526 S.W.2d 306 (Ky. 1974); *In re Advisory Opinion of Kentucky Bar Assn*, 361 S.W.2d 111 (Ky 1962); *Kentucky Bar Assn v. Roberts*, 579 S.W.2d 107 (Ky 1979)

OPINION

Canon 5 of the ABA Code of Professional Responsibility sets the foundation for the ethical issue brought up by these facts. Pursuant to that Canon, a lawyer should exercise independent professional judgment on behalf of a client. This ethical duty of course, precludes an attorney from accepting employment for representation from two parties with conflicting interests in the same matter. The majority of ethical considerations drafted under this Canon deal with the representation of multiple clients in a litigation situation. However, EC 5-1 and EC 5-19 provide some guidance to the attorney involved in matters other than litigation.

EC 5-1 provides:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free from compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

According to EC 5-19:

A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

In order for a lawyer to breach his ethical duty to exercise independent judgment in representing two parties in the same matter, it must be proven that the interests of those parties are in fact conflicting. The highest court of Kentucky has dealt with the issue of "conflict of interest" on several occasions. In *In re Advisory Opinion of Kentucky Bar Assn*, 361 S.W.2d 111 (Ky 1962), the court quoted Canon 6 of the Canons of Professional Ethics governing the practice of law in Kentucky, which states:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

The court went on to further state that within the meaning of Canon 6, “a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.”

In In re Advisory Opinion of Kentucky Bar Assn, 526 S.W.2d 306 (Ky 1974), the court reaffirmed its previous decision on this issue. It should be noted that both of these cases have their factual footing in situations involving litigation.

It is the Committee’s feeling that the interest of the bank and the consumer are in unison; therefore, there is no possibility of a potential conflict of interest within Kentucky Bar Assn v. Roberts, 579 S.W.2d 107 (Ky 1979).

Unlike the interests of parties involved in litigation, which is the most adversarial of all legal situations, the interests of parties involved in a real estate transaction are much less likely to conflict. The parties in a real estate transaction employ the attorney not as an advocate, but as an investigator. They employ him to examine the records of a piece of property to determine whether there are any clouds or defects in the title and to check for any liens, easements, mortgages, or other encumbrances which affect the property.

Whether the party requesting the title examination is the buyer or seller of a piece of property, or the bank involved in the transaction, the primary interest of all the parties is the status of the property. This is what the attorney is employed to determine and report. Therefore, the interests of the party or parties to whom the attorney is professionally responsible are not in conflict.

In practicing law an attorney has the duty to fulfill legal and ethical duties. In the facts set forth, the attorney would have the legal duty to exercise due professional care in performing the title examination and the ethical duty not to represent or be employed by two parties if their interests conflict. However, the breach of one of these types of duties would not necessarily result in the breach of the other type.

Often the distinction between an ethical and legal duty is unclear and confused, and this situation could lend itself to such confusion. However, the focus of this opinion is on the attorney’s ethical duties, since these are the only issues within the province of the Ethics Committee.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: “Both informal and formal opinions shall be advisory only;

however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”