

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-21
Issued: January 1965

This opinion was decided under the Canons of Professional Ethics, which were in effect from 1946 to 1971. Lawyers should consult the most recent version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a building and loan association refuse to accept a title opinion from an attorney other than their own without their attorney aiding and abetting the unauthorized practice of law where both parties agree to the dual representation?

Answer: Yes

References: Canon 6, 35, 47

OPINION

“A” negotiates with a realtor to purchase a piece of property and employs an attorney to examine the title and prepare the purchase contract. “A” immediately takes his title report to a building and loan, that advertises its business of lending money, in order to borrow a part of the purchase price. The building and loan refuses to accept the title report of “A’s” attorney and states that it will not lend any money unless the title is examined by the attorney representing the building and loan.

1. Is the attorney for the building and loan aiding and abetting the unauthorized practice of law?

This question involves Sections 35 and 47 of the Canons of Professional Ethics. It should first be noted that the attorney for the building and loan is the attorney for the association that will be lending its money on the property which is to be the security for the loan. The lender has every right to protect itself and to require that it be furnished with a title report and legal opinion satisfactory to it. Our Court of Appeals recognizes this right and practice in the leading case on this subject, Kentucky State Bar Assn v. First Federal Savings and Loan Assn, 342 S.W.2d 397, wherein it is stated:

It is not questioned that a “title examination” (which includes an analysis of recorded interests in land coupled with an opinion as to its legal status) is a service which lawfully can be performed for others only by a licensed attorney. Customarily in this business such service may be rendered by a lawyer representing the borrower (whose certification will be accepted by the lender), or it may be performed by a lawyer of the lender’s selection (who is paid an attorney’s fee for each such service rendered).

The attorney for a building association is rendering a legal service and the association has the right to choose the lawyer it wishes to have examine the title to property which will be mortgaged to it to secure a loan. It would clearly appear that the association might not want the attorney representing the borrower to examine the title and render an opinion as to the marketability of such title to the association, and thereby be representing both parties to the transaction. There is a possible conflict of interest (Canon 6) and both parties must agree to the dual representation. The right of every person seeking legal representation to a lawyer of his own choice, is a right all lawyers should defend at all costs.

In our opinion the lawyer is not aiding and abetting the unauthorized practice of law.

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). The Rule provides that formal opinions are advisory only.