KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-23
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 1: When an attorney represents a building and loan association and prepares a defective title which was paid for by an applicant at the request of the association, is the attorney responsible primarily to the association

Answer: Yes.

Question 2: Is the attorney in violation of Canons 6 and 35?

Answer: No.

References: Canon 6, 35

OPINION

"A" has been required to pay a title examination fee to a building and loan before he would be permitted to borrow on his property. After the transaction is closed "A" discovers a defect in his title. When "A" inquires of the lawyer who examined the title he is told by the lawyer that he does not and has not represented him, that he has been representing only the building and loan association.

1. Since the attorney is representing one party and collecting a fee for his services from another is he guilty of violating the Canons of Professional Ethics, particularly Canon 6?

2. Is the attorney permitting his services to be exploited by an intervening lay agency contrary to Canon 35?

This question assumes a defect in the title of a borrower, discovered after the loan transaction has been made. The type of defect is not stated, but the attorney who examined the title for the association who made the loan, denies responsibility to the borrower. It is necessary to first consider the nature of the legal service rendered. We must assume that the attorney in question has rendered his report and opinion to the association to the effect that the title to the property in question is good and marketable as of a certain date, being the date of his examination of the records. We may also assume, as customary in the business, that this report may contain certain exceptions concerning the title which the attorney may refer to in his report. It is possible under such circumstances that the exceptions may be of

such a nature as to not seriously affect the mortgage loan security (for example: a utility easement or restrictive covenants) and that the loan will be made with no disclosure or discussion of such matters with the borrower. The title report is given and required solely to satisfy the lender that the property when managed will give sufficient security to the lender to make the loan requested. The borrower may when he discovers these exceptions, claim that they are a cloud upon his title, and they may be, but this was not the purpose of the examination nor would this be a responsibility of the attorney who rendered the opinion.

We are advised that in most such cases as we are considering in this opinion that the title report and opinion is rendered to the lender and that the borrower is not named in the report nor furnished with a copy thereof. The report is given to and is the property of the lender. The Court of Appeals, however, in the Kentucky State Bar v First Federal case, supra, states that:

> It is apparent that the title examination is not made exclusively for the benefit of respondent. A clear title is one of the conditions upon which it will make a loan. The examination is made primarily for the benefit of the borrower so that he can comply with this essential condition. The fact that a charge is made to the borrower for this service, if such a charge is made, simply confirms the fact that the legal service is being rendered for him.

It would appear from this quoted language that to the extent the report rendered by the attorney fails to disclose a material defect in the title, that the attorney is responsible primarily to the association to whom the report was rendered and secondarily to the borrower, but only to the extent that the mortgage security is affected and thereby affects the loan security.

Under these conditions as set forth above, we are of the opinion that since both the lender and the borrower knew that the attorney in question was examining title to the subject property at the specific direction of the lender and with the acquiescence of the borrower, that there is no violation of Canon 6 and further that the attorney is not violating Canon 35.

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.