

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-147
Issued: July 1976

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: A lending institution refers all prospective purchaser-mortgagors of real estate to the same law firm for title examinations. Two members of the firm are on the institution's board. May the firm properly accept the employment thus referred to them?

Answer: Yes.

References: DR 2-103(D), 5-105; Opinion KBA E-21, E-22, E-23 (all 1965); ABA Informal Opinion 544 (1962), 643 (1963), 837 (1965)

OPINION

When the purchase of real estate is to be financed by a loan, repayment of which is to be secured by a mortgage of the real estate, the purchaser-mortgagor and the mortgagee have differing interests in the state of the title to the real estate. The mortgagee may employ its own attorney to examine title and may pass its attorney fee on to the mortgagor. The fact that the fee is passed to the mortgagor does not create a lawyer-client relationship between the mortgagor and the mortgagee's attorney. Therefore, in accepting such employment, the mortgagee's attorney is not in violation of DR 2-103(D), which denounces indirect solicitation. Opinions KBA E-21, E-22, E-23; ABA Informal Opinions 544 (1962), 643 (1963), 837 (1965).

The question presented here is perennial, probably because some previous opinions have ignored or obscured the implications of the answer we have given. There is a stubborn unstated assumption that the mortgagee forces its own attorney on the mortgagor by requiring him to pay the mortgagee's attorney fee. This is plainly not so. No one has ever suggested that the mortgagor may not employ his own attorney to examine title for him. Of course if he does, he will be paying two lawyers to examine the same title at the same time. It is thought that any rule which could lead to such an absurd result cannot be correct. However, we do not regard the result as absurd at all. Lawyers are employed to examine and certify titles in order to guard against the risk of defective titles. Either the purchaser-mortgagor has a risk separate from, and in addition to, the mortgagee's risk, or he does not have. If he has no separate and additional risk, he does not need his own lawyer. If he does have a separate and additional risk, he must expect to pay separately and additionally for guarding against it, or accept the risk. If this result is

absurd, it is because the purchaser-mortgagor and mortgagee have differing interests in the state of the title.

The purchaser-mortgagor is entitled to know that his interest differs from the mortgagee's interest, and that the mortgagee's lawyer is not protecting his (the mortgagor's) interest. Opinion KBA E-21, E-23; ABA Informal Opinion 643. However, the duty to advise the mortgagor of these disagreeable facts is on the mortgagee, not its lawyer.

Because the mortgagor's and mortgagee's interests differ, some previous opinions on this question state that there must be a full disclosure of the difference to the mortgagor and his consent must be obtained before the mortgagee's lawyer may represent both mortgagor and mortgagee. Opinion KBA E-21, E-23; ABA Informal Opinion 643 (1963), 837 (1965). See DR 5-105. These opinions leave the impression that in the situation described in the question, the mortgagee's lawyer may properly represent the mortgagor too if the "conflict-of interest" evil is sanitized under DR 5-105(C). This impression is incorrect. Our answer to this question is based on the fact that the mortgagee's lawyer does not represent the mortgagor.

If the practice described in the question involved the purchaser-mortgagor's choice of lawyer, then the fact that the mortgagee's lawyer sits on its board might be relevant. But the practice described in the question involves only the mortgagee's choice of its own lawyer and its imposition of attorney fees on mortgagors by reason of superior bargaining position. We therefore consider the fact that the lawyer sits on the mortgagee's board to be irrelevant. All that does for him is make it unpleasant for the mortgagee to take its own legal business elsewhere. This is true whenever a lawyer sits on his corporate client's board. We are not prepared to state that it is *per se* unethical for lawyers to sit on the boards of corporate clients.

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.