

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-173
Issued: November 1977

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: In a mortgagor's action to foreclose a mortgage, may the mortgagor's attorney, with the mortgagor's consent, bid on the mortgaged property at the commissioner's sale where the fair market value of the property is less than the amount needed to pay the debts secured by the mortgage and all superior claims?

Answer: No.

References: Canon 9; EC 5-3; KBA Informal Opinion 27

OPINION

The conditions set forth in KBA Informal Opinion 27 for such an action were that the mortgagee's lawyer must:

- (1) Have the mortgagee's consent to bid; and
- (2) The bid must be high enough to pay the debt secured by the mortgage in full after payment of court costs and any other claims on the proceeds of sale which may be senior to the client's mortgage.

In a case where the client holds a second mortgage and the fair market value is not enough to pay more than the first mortgage and a part of the debt secured by the second mortgage, these two conditions are not met. The mortgagor's interest is to see that the debt is paid in full, if possible, and the attorney would act in conflict with that interest if he paid less than was needed to pay off all debt to client. While undoubtedly there are circumstances where this is not possible, a lawyer must avoid all appearance of impropriety.

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.