

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-217
Issued: May 1979

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 1: May a lawyer who is either executor/administrator and/or attorney for an estate purchase real or personal property from the estate?

Answer 1: No.

Question 2: May an attorney obtain a proprietary interest in real estate as compensation for his legal services in lieu of a monetary fee?

Answer 2: Qualified yes.

References: DR 5-101(A), 5-103(A); CJ ABA Informal Opinion 804 (1964), 1145 (1970); EC 5-2, 5-3, 5-7

OPINION

Question 1

Although DR 5-101(A) is not directly responsive to the question here, it does provide background for discussion of the issue: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." The effect of DR 5-101(A) is to call upon the attorney for the estate to predict whether he or she will want to acquire assets of the estate at a future time. Moreover, the attorney who has determined the likelihood of a prospective interest in estate assets must fully disclose the extent of that interest to the client before accepting employment. The effect of rigidly enforcing DR 5-101(A) would be for every attorney to make a full disclosure of a possible future interest in acquiring estate assets before accepting employment.

Besides the practical problems associated with DR 5-101(A), the purchase of assets of an estate by the attorney for the estate or an attorney acting as executor/administrator is fraught with obvious appearances of impropriety and potential breaches of fiduciary duty to the estate. The attorney is "in position to effect the appraisal of the property and influence prospective bidders in one manner or another...." (ABA Informal Opinion 804 (1964)).

The purchase of assets under these circumstances is probably proper when a testator has so provided in the will. Otherwise, however, the attorney would have to advise the beneficiaries to seek other counsel before he or she purchases assets. Even if counsel obtained the consent of all adult beneficiaries, a problem would arise with respect to the protection of all minor beneficiaries and unborn beneficiaries. That no unfair profit would inure to the attorney as a result of the purchase is no justification, for even the appearance of duress, fraud or deception is harmful to the legal profession. True, a personal representative may acquire an estate asset “for the best interests of the estate” and “for the best price obtainable,” KRS 395.200. True, the sale of estate assets may be conducted publicly, as is discretionary regarding personalty (per KRS 395.195(6)) and mandatory regarding realty (per KRS 395.515). Still, the appearance of abusing confidences given the attorney is detrimental to the profession. Moreover, in this situation, there is a reasonable possibility that the attorney’s professional judgment on behalf of his client before the purchase would be affected by his or her self-interest, DR 5-101(A).

Question 2

DR 5-103(A) provides that an attorney “shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may: (1) acquire a lien granted by law to secure his fee or expenses.” Unless he acquires a common law or statutory lien, an attorney cannot acquire a proprietary interest in the subject matter of litigation.

... After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interest of his client. [EC 5-2].

... After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. [EC 5-3]

The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so may acquire an interest in the outcome of litigation.... [EC 5-7]

From a reading of the Code of Professional Responsibility, it appears that a lawyer may obtain a proprietary interest in real estate as compensation for his legal services as long as the real estate was not the subject matter of litigation he is conducting for the particular client.

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.