

Nebraska Ethics Advisory Opinion for Lawyers
No. 80-5

IT IS NOT ETHICAL FOR AN ATTORNEY WHOSE LAW FIRM REPRESENTS THE PERSONAL REPRESENTATIVE OF AN ESTATE WHICH IS SELLING REAL ESTATE AT PUBLIC AUCTION TO BID AT THE SALE ON HIS OWN BEHALF.

APPLICABLE CODE PROVISIONS

Canon 5: "A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT."

E.C. 5-1 "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

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

D.R. 9-101 "AVOIDING EVEN THE APPEARANCE OF IMPROPRIETY."

E.C. 9-6 "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; ...and to strive to avoid not only professional impropriety but also the appearance of impropriety."

FACTUAL SITUATION

The inquiring attorney states that one of his partners represents a bank in its capacity as personal representative of a decedent's estate. An estate asset is a farm which will be sold at public auction pursuant to an order of the court for sale of the real estate. The personal representative intends to request court

approval after the auction, and he inquires if he can personally bid on the farm at the sale.

DISCUSSION

One of the basic tenets of fiduciary law is that a trustee cannot deal with the trust res, and self dealing is strictly prohibited. The obvious reason for this rule is because of the fact that the fiduciary is necessarily in a position where he could take advantage of the situation for his personal gain.

The confidential relationship which exists between attorney and client places the attorney in the same position as the trustee in creating the possibility of the attorney being able to benefit himself personally by taking advantage of his inside information. Notwithstanding the factual situation here involved calls for a public rather than a private sale, the attorney is in a position to influence prospective bidders at the sale one way or another, and should he turn out to be the successful bidder, even though approved by the court, the suspicion is immediately raised in the minds of the general public that the attorney was favored because of his position. As was stated by the Nebraska Supreme Court in *State ex rel. Nebraska State Bar Association vs. Richard*, 165 Neb. 80, 93:

"An attorney should not only avoid impropriety but should avoid the appearance of impropriety."

In 1964 the Committee on Ethics and Professional Responsibility of the American Bar Association considered this question, and in Informal Opinion C-804 reached the same conclusion that the attorney should not bid on the property. Wise, in his book on Legal Ethics (2nd Edition) states at page 259: "...nor can he (attorney) bid on real estate or personalty offered for sale by his administrator client."

This Committee is aware that the Nebraska Probate Code which became effective January 1, 1977, provides in Section 30-2474 that any sale to the attorney for the

personal representative "is voidable by any person interested in the estate except one who has consented after fair disclosure, unless: (1) the will or a contract entered into by the decedent expressly authorized the transaction; or (2) the transaction is approved by the court after notice to interested persons."

The fact, however, that the legislature has seen fit to exonerate a violation of the self-dealing prohibition under certain circumstances does not necessarily make ethical what would otherwise be unethical. The Code of Professional Responsibility as adopted by the Nebraska Supreme Court and presently in effect is what governs the conduct of Nebraska lawyers, and in the opinion this Committee, the Code does not permit the attorney for the Personal Representative of an estate or any member of his firm to purchase estate assets from the personal representative either at public or private sale.

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