

JUDICIAL ETHICS COMMITTEE

ADVISORY OPINION 92-JE-2

Issued August 27, 1992

Question 1: A parcel of real estate is the subject of a foreclosure action. The foreclosure is not contested and Judge A signs a judgment of foreclosure. Judge B signs the abstract of judgment. The parcel of real estate is later the subject of an auction. Can Judge B bid on that parcel at the auction?

Response: Yes, Judge B may bid. The signing of an abstract is a ministerial act, a mere formality. The obligation for a judge to sign an abstract was an anomaly created by a statute that was in existence for only a short period of time. 14 M.R.S.A. § 2401(3) (Supp. 1991), amended to delete the abstract requirement by P.L. 1991, ch. 726 and ch. 824(D-1) (eff. June 30, 1992).

The relevant portions of the current Code of Judicial Conduct are Canons 2 and 5C(1). Canon 2 provides that: "A judge should avoid impropriety and the appearance of impropriety in all his activities." Canon 5C(1) provides that: "A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, . . ." Of the proposed Code, a relevant provision is Canon 4D(1): "A judge shall not engage in financial and business dealings that (a) may reasonably be perceived to exploit the judge's judicial position, . . ."

There is no impropriety nor is there an appearance of impropriety when Judge B bids at the auction. Judge B is in a position identical to any private citizen. He has done nothing to cause the foreclosure or the auction. The signing of the abstract was not a precondition for the auction. The auction is public (14 M.R.S.A. §6323 (Supp. 1991)) as are all court documents relating to the foreclosure. The judge is not exploiting the judicial position nor would the judge appear to be exploiting the position.

Question 2: A parcel of real estate is the subject of a foreclosure action. The foreclosure is not contested, and the judge signs a judgment of foreclosure. The parcel of real estate is later the subject of an auction. Can the judge bid on that parcel at the auction?

Response: No, the judge may not bid. The relevant provisions of the Code are the same as above. Because the judge in this scenario has actually signed the judgment, there is an appearance of impropriety. The public might perceive that a judge was more willing to sign a judgment and more willing to overlook deficiencies in the plaintiff's case if the judge had an interest in obtaining the property.

Question 3: If the judge in Question 2 may not bid, can the problem be cured by obtaining releases from the mortgagor and mortgagee?

Response: No. There is no provision in the present or proposed Code of Judicial Conduct for obtaining releases from the parties after judgment. Since under the present Code the judge would have to disqualify him or herself, it does not seem that releases after the fact would be sufficient. Canon 3C(1) requires disqualification in any proceeding in which the judge's "impartiality might reasonably be questioned." Under the proposed Code, Canon 3E(2) provides that a judge *may* disqualify himself or herself if the judge's "impartiality might reasonably be questioned," and under 3E(3) if disqualification does not occur the judge must disclose the relevant fact.

If the judge realized while the foreclosure was pending that the subject property was something he or she wanted to buy, disqualification would be required under Canon 3C(1) of the present Code and would require disclosure under the proposed Code, Canon 4E(2). Given that

this is an uncontested matter for which no hearing is required, exactly how the disclosure would be made may be a problem.

The overall problem in this situation is the appearance of impropriety. Releases from the parties after judgment does not abolish the appearance. The parties may not be the only ones with an interest in whether the judge bids at the auction. Other members of the public may have an interest in bidding on the parcel. There may be other parties in interest such as lienholders, etc.