

Nebraska Ethics Advisory Opinion for Lawyers
No. 72-1

A COUNTY ATTORNEY FOR A COUNTY UNDER 5,000 POPULATION MAY REPRESENT A PRIVATE CLIENT IN A DETERMINATION OF NEBRASKA INHERITANCE TAX (EITHER WITH OR WITHOUT PROBATE) IF THE COUNTY BOARD HAS FIRST APPOINTED A SPECIAL ATTORNEY TO REPRESENT THE INTERESTS OF THE COUNTY AND STATE PRIOR TO THE DETERMINATION OF TAX.

CODE PROVISIONS INTERPRETED:

EC 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

FACTUAL SITUATION

A County Attorney for a County under 5,000 population represents in his capacity as a private attorney a petitioner for determination of Nebraska inheritance tax in a proceeding (either within or outside of probate). The County normally represented by the attorney as County Attorney is an interested party since the property lies within the County. Prior to the determination of inheritance taxes, a special County Attorney is appointed by the County Board to represent the County.

QUESTION

Is the County Attorney disqualified from proceeding with the inheritance tax determination above mentioned?

DISCUSSION

While the above-quoted EC 5-14 would appear to cast some doubt on the right of a County Attorney to select a private client and thus disqualify himself from representing the County in a particular proceeding, the Supreme Court of Nebraska has specifically dealt with this situation and held that it was proper for a County Attorney to conduct an inheritance tax determination for a private client if the County Board first appointed a special County Attorney to represent the interests of the County and State in connection with the inheritance tax determination. *State v. Richards*, 165 Neb. 80, 84 NW2d 136. In the *Richards* case, the Court specifically held that it would be improper for the County Attorney to act for the private client if the County Board failed to appoint special counsel; even though the County Board was informed of its right to appoint special counsel and even if the County Board took it upon themselves to approve the proposed appraisal values rather than rely upon the County Attorney's advice. In that same case, however, our Supreme Court specifically approved the practice of a County Attorney representing the private client where special counsel was appointed by the County Board and held:

"Clearly he (the County Attorney) was relieved of his responsibilities to the County and State in this matter when Wertz (special counsel) was appointed." *State v. Richards*, supra, 84 NW2d 136 at 150.

CONCLUSION

The Committee believes that the County Attorney may represent a private client in the tax determination proceedings, provided that the County Board (not the County Judge) first appoints a special County Attorney to represent the interests of the County and State prior to the determination of inheritance tax.

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