

Nebraska Ethics Advisory Opinion for Lawyers
No. 81-6

A COUNTY ATTORNEY, NOT PROHIBITED BY THE COUNTY BOARD FROM ENGAGING IN THE PRIVATE PRACTICE OF LAW, MAY ACT AS A PERSONAL REPRESENTATIVE IN AN ESTATE OR AS A PRIVATE ATTORNEY FOR A CLIENT IN AN INHERITANCE TAX DETERMINATION (WITH OR WITHOUT PROBATE) WHERE A SPECIAL COUNTY ATTORNEY HAS BEEN APPOINTED, BY RESOLUTION OF THE COUNTY BOARD, TO REPRESENT THE INTERESTS OF THE COUNTY AND THE STATE OF NEBRASKA.

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 have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

FACTUAL SITUATION

A county attorney is named as personal representative in a decedent's will. A special county attorney has been appointed to represent the county and State of Nebraska for the determination of inheritance tax, if any, by resolution of the County Board of Supervisors (Commissioners). The county involved is an interested party in the estate proceedings because the property in the estate lies within its boundaries.

QUESTION

May the county attorney of the county involved serve as a personal representative of the decedent's estate?

DISCUSSION

This problem was partially decided in [Opinion No. 72-1](#) of this Committee. Confusion has resulted from that opinion because it was limited to representing private clients in proceedings for determination of inheritance taxes in the counties having a population of less than 5,000.

One of the powers of a personal representative is to apply to the probate court for determination of any inheritance tax that may be due the State of Nebraska. Section 77-2018.01(2)(b) R.R.S. Nebraska, 1943. As a matter of practice, the personal representative files such an application and conducts the hearing thereon during the administration of the estate.

It is the duty of the county attorney to prosecute and defend all civil suits, applications, or motions on behalf of the county and state which arise under the laws of the state and in which the county or state is a party or is interested. Section 23-1201, R.R.S. Nebraska, 1943. This includes all matters involving the determination of inheritance tax. Section 77-2018.03 R.R.S. Nebraska, 1943.

The duties of a county attorney are the same in large counties as they are in counties of less than 5,000 people.

Standing alone, EC 5-14, quoted above, would prohibit a county attorney from acting as a personal representative or representing a private client who is serving as a personal representative regardless of the county size. The Nebraska Supreme Court has held, however, that it is proper for a county attorney under no prohibition from practicing law privately, to represent a private client in inheritance tax proceedings so long as the county board of the county involved has appointed a special county attorney for the purpose of representing the interests of the county and state in those proceedings. See *State ex rel. Nebraska State Bar Association v. Richards*, 165 Neb. 80, 84 N.W. 2d 136. The Richards decision is not limited to counties having a

population of less than 5,000.

There cannot be a rational distinction existing which would allow a county attorney in a county having less than 5,000 people to act for a private client in inheritance tax proceedings but yet make similar representation unethical by the county attorney in the next county that may have more than 5,000 inhabitants. Similarly, we cannot proscribe a rule of ethical conduct which will permit the county attorney to represent a private client in such proceedings but will prohibit the county attorney from acting as the principal.

CONCLUSION

The Committee believes that a county attorney, not prohibited from engaging in the private practice of law by his or her county board, may act as a personal representative in an estate or as a private attorney for a client in an inheritance tax determination (with or without probate) where a special county attorney has been appointed, by resolution of the county board, to represent the interests of the county and the State of Nebraska.