



Committee on Professional Ethics

Opinion #392 - 5/29/75 (15-75)

Topic: Part-time State employee;
Conflict of interests;
Improper solicitation

Digest: Conditions under which State
Estate Tax Attorney may
practice in Surrogate's Court

Code: Canon: 5, 6, 9
EC: 5-2, 5-14, 8-8, 9-2,
9-3, 9-6.
DR: 2-107(A)(3), 5-105,
5-105(A), 8-101(A)(2),
9-101(B) and (C).

QUESTION

May a State Estate Tax Attorney represent individual clients in Surrogate's Court?

OPINION

Lawyers who accept public employment should do more than avoid actual conflicts of interest. They should avoid the possibility of conflicting interests. They should avoid using their public employment to promote their private practice. They should avoid any activity which may give rise to an appearance of impropriety. The controlling principles are found in Canon 5, EC 5-2, EC 5-14, DR 5-105, EC 8-8, DR 8-101(A)(2), Canon 9, EC 9-2, EC 9-3, EC 9-6, and DR 9-101(B) and (C).

Lawyers whose public employment is part-time find themselves in a position of special sensitivity. They should take particular care not to engage in activities or accept any private employment which would tend to undermine public confidence in the integrity and efficiency of the legal system, or which would give an "appearance of impropriety even if none exists". Cf. EC 9-3. Thus they must avoid private employment which might involve or give rise to suspicion that unfair influence may be involved either in the securing of private clients or in representing them against the state agency by which they are employed.

Applying these principles to State Estate Tax Attorneys, we do not find it necessary to hold them disqualified from representing individual clients in Surrogate's Court in all cases. We hold that such representation may be proper, subject to compliance with the following limitations and guidelines:

1. A State Estate Tax Attorney may not represent any individual client in any matter involving the State Department of Taxation and Finance in any court, including the Surrogate's Court, or in any administrative proceeding involving that Department.

OVER---

The State Estate Tax Attorney has a duty to protect the financial interests of the State. To the extent that his responsibilities to private clients in estate matters would include State tax matters, he would have an obligation to gain the best results for his clients. Representation of private clients for State tax matters would be improper under EC 8-8, which provides in pertinent part:

"A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."

Such representation would also be potentially violative of such other Code provisions as EC 5-2, EC 5-14, DR 5-105(A), EC 9-6.

In analogous situations it has been held improper for an attorney for a town Zoning Board of Appeals to represent private clients in zoning change requests, N. Y. State 292 (1973); for a town attorney to represent private clients in matters before administrative agencies of the town, N. Y. State 143 (1970); for a councilman to represent private property owners in condemnation proceedings before an independent Urban Renewal Agency, N. Y. State 110 (1969); or for an assistant county attorney to represent private clients in matters involving the county, N. Y. State 257 (1972). See also, N. Y. State 326 (1973); N. Y. State 323 (1973); N. Y. State 364 (1974); N. Y. State 209 (1971).

It is not conducive to public confidence in the legal profession to permit a lawyer to accept any kind of a retainer for one client which would make it his duty to assert a claim against the interests of a second client whom the lawyer concurrently represents in other matters. This is especially true where a public agency like the State Department of Taxation and Finance is involved. It is not enough that the regulations of that Department purport to permit such dual representation. As we have held on many occasions, a public agency, unlike private individuals, cannot consent to dual representation where an apparent conflict of interests may be involved. See e.g.: N. Y. State 257 (1972); N. Y. State 143 (1970); N. Y. State 110 (1969). Such dual representation would involve a clear appearance of professional impropriety and would tend to undermine public confidence in the integrity of the administration of the tax laws, in violation of Canon 9 and the EC's thereunder.

2. It is also essential that State Estate Tax Attorneys safeguard against the use of their official position as an improper solicitation or feeder for legal work. Accordingly, it would be improper for a lawyer to accept, as a client in an estate tax matter, any individual whose contact with such lawyer originated as a result of his official duties as an Estate Tax Attorney. Thus, for example,

in situations initiated by virtue of the potential clients having obtained tax waivers from the attorney or because the attorney represented the state at the opening of a safety deposit box, any representation on behalf of that client in Surrogate's Court by the Estate State Attorney should be declined. DR 9-101(B). The lawyer, moreover, should be circumspect to decline any retainer which appears to have been generated because of his official position in the possible hope of gaining some improper advantage. Cf. DR 8-101(A) (2).

Reference is also made for guidance to N. Y. State 206 (1971) delineating restrictions to be followed when there is a dual practice of law and allied occupation.

3. Subject to the standards set forth above, it would not be improper for a State Estate Tax Attorney to represent clients in non-tax matters in Surrogate's Court. Such matters may include estate probate and settlement proceedings, as long as other counsel is retained for all State tax related aspects, including the preparation and submission of tax returns, and the client's interests are properly protected. Caution should be exercised in this regard to insure that the retainer and subsequent disqualification of the State Estate Tax Attorney will not infringe upon the lawyer's obligation to represent clients competently or increase the client's financial obligations. Cf. Canon 6 and DR 2-107(A) (3).

4. The lawyer should zealously endeavor to ascertain whether any conflict or appearance of impropriety exists before accepting a retainer. Any doubts as to the propriety of such retainer should be resolved against the acceptance of the retainer.

5. If one member of a firm is disqualified from representing a client, all of the partners and associates of that firm are similarly disqualified. DR 5-105(D). N. Y. State 257 (1972).
