



Committee on Professional Ethics

Opinion #457 - 1/20/77 (87-76)

Topic: Public employee engaged in private practice; conflict of interest.

Digest: Rule prohibiting State estate tax attorney from representing private client in State estate tax matters precludes representation of client in Federal estate tax matters.

Code: Canons 5 and 9
EC 5-14, 8-8, 9-6
DR 5-105(A), 5-107

QUESTION

May a New York State estate tax attorney represent a private client in Federal estate tax matters or provide independent tax counsel with information necessary to prepare the State return?

OPINION

N.Y. State 392 (1975) discusses the conditions under which State estate tax attorneys may properly represent private clients in Surrogate's Court. In that opinion, we noted the special restraints imposed upon "lawyers who accept public employment" and said:

"[T]hey 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 this principle, we found that while it was not necessary to disqualify these attorneys from representing private clients in all matters coming before the Surrogate, they should be disqualified from representing private clients in connection with any matters involving the agency by which they are employed or otherwise relating to taxes imposed by the State. Where such attorneys represent private clients in Surrogate's Court, we insisted that "other counsel [be] retained for all state tax related aspects, including the preparation and submission of tax returns," explaining:

"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. [citations omitted] 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...."

We are now asked whether or to what extent such attorneys who undertake to represent private clients in Surrogate's Court may properly handle Federal estate tax matters or assist other counsel in the preparation of their New York State returns.

Our answer to the present question is in large measure dependent upon an understanding of the manner in which the Federal estate tax return relates to a determination of the amount of tax imposed by the State. While, theoretically, the State can make an independent determination, it is common knowledge that the State authorities frequently, and to a substantial extent, rely upon the Federal return. See, Tax Law, §§ 954(a), 961(a)(3) and (c).

Because of this relationship between the State and Federal returns, as a practical matter, in seeking to minimize the amount of Federal estate taxes payable, the attorney will of necessity also effect a reduction of the amount payable to the State. The potential conflict is real and all but inescapable. Such representation must, therefore, contravene the provisions of EC 8-8, which states in relevant 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."

Also see, EC 5-2, EC 5-14, DR 5-105(A), DR 5-107 and EC 9-6.

Although the attorney may not represent private clients in preparing either the State or Federal estate tax returns, he may provide independent tax counsel with certain information necessary to prepare these returns. Such information must be purely factual and bear upon his representation of the client in those non-tax related matters for which he has properly been retained. He may not use tax counsel's request for information as an occasion to increase the scope of his original retainer or otherwise become personally involved in the preparation of the tax returns and, throughout, must refrain from offering any legal advice in connection therewith. He should not, in other words, attempt to accomplish by indirection that which N.Y. State 392 (1975) and this opinion are intended to proscribe.

We do not wish by this opinion to reflect adversely on the good faith or professional integrity of any attorney employed by the State who heretofore may have represented or may currently be representing private clients in contravention of our present ruling. Cf., N.Y. State 419 (1975). Such representation, however, should not be undertaken in the future. Personal sacrifice is often the price of

public office and no private advantage should ever be gained at the expense of the public's trust or confidence in the integrity of our profession. See, N.Y. State 323 (1974), N.Y. State 300 (1973), N.Y. State 292 (1973); also see, Canons 5 and 9.
