



State of West Virginia
Office of the Attorney General

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December 14, 2016

Eugene M. Simmons
Pocahontas County Prosecuting Attorney
900 Tenth Avenue
Marlinton, WV 24954

Dear Prosecuting Attorney Simmons:

You have asked for an Opinion of the Attorney General about whether a person may simultaneously serve in the same county as a fiduciary commissioner and as an attorney to the county commission. This Opinion is being issued pursuant to West Virginia Code § 5-3-2, which provides that the Attorney General "may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your letter raises the following legal question:

Whether one person may serve in the same county simultaneously as a fiduciary commissioner and as an attorney to the county commission.

Under the common law doctrine of incompatibility, no person may hold two government offices that have competing interests. 69 W. Va. Op. Att'y Gen. No. 1 (Sept. 26, 2002). A conflict of interest exists between two positions "if the responsibilities of one office can in any manner influence the actions of the public officer in the discharge of the duties of the second office." *Id.* (citing 55 W. Va. Op. Att'y Gen. 78 (March 28, 1973)). This rule "rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both." *State ex rel. Thomas v. Wysong*, 125 W. Va. 369, 373, 24 S.E.2d 463, 466 (1943).

We turn first to the office of fiduciary commissioner. Under West Virginia Code Section 44-3-1, the office of fiduciary commissioner is an administrative position in the state probate system established by the Legislature and appointed by the county commission within the executive branch of county government. 58 W. Va. Op. Att'y Gen. 147 (1980). It

succeeds “[t]he office previously known as commissioner of accounts.” W. Va. Code § 44-3-1. A fiduciary commissioner is responsible for the ascertainment of debts against an estate and the settlement of the accounts of an estate’s personal representative. *In re Brown’s Estate*, 123 W. Va. 504, 16 S.E.2d 801, 801 (1941). The role is not judicial but administrative. *Riley v. Bd. of Comm’rs of Ohio Cty.*, 125 W. Va. 545, 25 S.E.2d 497, 499 (1943).

The duties of a fiduciary commissioner are to supervise, examine, and report on certain probate matters, subject to the review of the county commission. By statute, “fiduciary commissioners shall have general supervision of all fiduciary matters that are referred to them, and of the fiduciaries in charge thereof, and shall make all ex parte settlements of the accounts of such fiduciaries.” W. Va. Code § 44-3-2. “[W]hensoever any controversy arises in connection with the probate of any will, or with the appointment and qualification of personal representatives, guardians, committees or curators, or with the settlement of the accounts of any fiduciary,” the county commission “may, of its own motion, or on the motion of any party thereto and shall, on the joint demand of the parties then appearing of record to the proceeding, refer the matter to a fiduciary commissioner.” *Id.* § 44-3-7. The law then requires the fiduciary commissioner “to hear proof on the same, to make findings thereon, and to advise the commission on the law governing the decision of the matter.” *Id.* To perform these duties, the fiduciary commissioner has the “power to summon and compel the attendance of witnesses, wear and examine witnesses, take their depositions and certify their testimony.” *Id.* § 44-3-2. “In hearing and reporting on any such matter the fiduciary commissioner shall be governed as to procedure by the law and practice, so far as is applicable, governing commissioners in chancery.” *Id.* § 44-3-7. After the fiduciary commissioner concludes a case, “[a]ny party may except to the commissioner’s finding of fact and law, and the [county] commission shall hear the case on the commissioner’s report and the exceptions thereto, without taking any additional evidence.” *Id.*

A fiduciary commissioner also is responsible for investigating and bringing before the county commission any personal representatives who are not properly bonded. By law, a fiduciary commissioner must examine the bonds of all personal representatives. W. Va. Code § 44-3-6. The fiduciary commissioner must summon before the county commission any non-compliant personal representative “to show cause why he should not give such bond as is required by law.” *Id.* The county commission “shall make an order as may be warranted by the facts then determined.” *Id.* An appeal of this order to the circuit court then “may be taken on request of the fiduciary or of the fiduciary commissioner.” *Id.*

The county commission generally maintains supervisory authority over the fiduciary commissioner. By statute, every fiduciary commissioner “shall report to and settle accounts with the county clerk” and annually “file with the county clerk a report on the status and disposition of every active case referred to the fiduciary commissioner.” W. Va. Code § 44-3-1. The county clerk must give this report to the county commission and “inform the county commission of any cases referred to a fiduciary commissioner in which the fiduciary commissioner has not fulfilled duties relating to the case in accordance with deadlines established by law.” *Id.* The county commission then must “take appropriate action to ensure that all deadlines established by law will be observed, including, if necessary, the removal of fiduciary commissioners who

consistently fail to meet such deadlines.” *Id.* Finally, because fiduciary commissioners are not appointed to any definite term or tenure, the county commission retains the discretionary “power to remove a person so appointed.” *State ex rel. Archer v. Cty. Court of Wirt Cty.*, 150 W. Va. 260, 264, 144 S.E.2d 791, 794 (1965) (discussing the power to remove a commissioner of accounts, the office succeeded by the office of fiduciary commissioner); *see also* W. Va. Att’y Gen. Op., 2016 WL 3262874 (June 8, 2016) (discussing various limits, if any, on removal power of county commissions).

Although we have not previously opined on the public offices incompatible with the office of fiduciary commissioner, this Office has issued compatibility opinions concerning the predecessor office, the office of commissioners of accounts. One previous Opinion concluded that no person could serve simultaneously as the commissioner of accounts and the clerk of the county court in the same county.* The clerk of the county court had a “close and intimate association with the county court,” the body with “the power and authority to appoint the commissioners of accounts,” which gave rise to the possibility of a conflict of interest between the offices. 33 W. Va. Op. Att’y Gen. 32 (1928). In contrast, a second Opinion found that a prosecuting attorney “may legally be appointed Commissioner of Accounts,” 39 W. Va. Op. Att’y Gen. 162 (1941), because there was “no supervisory or revisory power that either the office of prosecuting attorney or the office of commissioner of accounts has over the other.” 43 W. Va. Op. Att’y Gen. 91 (1948).

Extending these opinions to our modern probate system, we conclude that no person may serve simultaneously as a fiduciary commissioner and as an attorney to the county commission. Just as the clerk of the county court held a position of trust with the county court, a lawyer for a county commission holds a position of close and intimate association with the county commission. But the county commission holds both supervisory and revisory power over the office of the fiduciary commissioner, including the discretionary power to remove a fiduciary commissioner from office. If one person seeks to simultaneously fulfill both the duties of the fiduciary commissioner and the duties of attorney to the county commission, the individual’s interest in each office may influence his or her discharge of the other.

This risk of a lack of disinterestedness in the performance of each office is present no matter the nature of the legal services the person would render to the commission as an attorney. But we note that the potential for impropriety would be unquestionably greater were the attorney to advise the county commission on his or her own appointment, removal, or performance as a fiduciary commissioner. Under state law, it is a misdemeanor for any fiduciary commissioner to participate in a case where, if the fiduciary commissioner were a judge, the fiduciary commissioner would be disqualified. W. Va. Code § 44-3-4. That means it would not only be a conflict of interest, but also unlawful, for a fiduciary commissioner to serve as an attorney advising a county commission sitting in review of his or her actions as a fiduciary commissioner. *See* W. Va. Code of Jud. Conduct R. 2.11(A)(5)(d) (“A judge shall disqualify himself or herself

* County commissions were once called county courts. *See* W. Va. Const. art. IX, § 9.

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in any proceeding in which the judge's impartiality might reasonably be questioned," including when the judge "previously presided as a judge over the matter in another court.").

Sincerely,



Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Julie Marie Blake
Assistant Attorney General