

PROBATE CLERKS:

A probate clerk may not act as an attorney in fact for surety companies and sell bonds to representatives of persons and estates which are in his court.

December 15, 1938



Mr. Glen Croy
Deputy Clerk
Grundy County
Trenton, Missouri

Dear Sir:

This is reply to yours of recent date wherein you request an opinion from this department on the following letter:

"I desire an opinion as to whether an appointed Clerk of the Probate Court may act as Attorney in Fact for a Surety Company and may sell bonds to Administrators and Guardians appointed by the Judge of the Probate Court.

"I have conversed with the Probate Judge Elect of Grundy County and he has intimated that I would be appointed as Clerk of the Probate Court.

"It is not the intention to be persistent in the sale of bonds. Rather to be in a position to accommodate should inquiry be made as to bond."

A clerk of a probate court is a public officer within the meaning of the statute while an attorney in fact for a surety company is not a public officer, and the rule as to a person holding two offices, the duties

of which are incompatible would hardly apply in this case. Therefore, the reasons why you could or could not hold both of these positions would be on account of being against public policy or being against the general provisions of the statutes in such cases made and provided.

In Volume 46 Corpus Juris at pages 941 and 942, we find the reason for the rule as it applies to public officers to be as follows:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The clerk of the probate court in this state is appointed by the virtue of the provisions of Section 2049, R. S. Missouri, 1929, which is in part as follows:

"The judge of probate is required to act ex officio as his own clerk, and give bond in like amount, with like amount, with like conditions and penalties, to be approved by the judges of the county court, filed and recorded,

the same as is required of clerks filling said office by appointment; Provided, that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge.

Said clerk, when so appointed and qualified, may discharge all the duties of clerk, and shall have power and authority to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation, subject to the confirmation or rejection of said court at the next regular term held thereafter. *****"

By this section it will be noted that the probate judge may act as his own clerk or he may appoint some person as his clerk. It will also be noted by this section that the clerk discharges the same duties and has the same power and authority to do and perform all duties of the judge in vacation. Such acts are, of course, subject to the approval of the court when it convenes at the next term.

Section 2053, R. S. Missouri, 1929, provides in part as follows:

"The judge of probate, if otherwise qualified, may practice as an attorney and counselor at law in any of the courts of this state, except his own; but no judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified by affidavit;

*****" (emphasis ours)

By this section it will be seen that the judge of the probate court is prohibited from sitting in any matter in which he is interested. As the judge of the court may also be his clerk, we think the same rule would apply to the clerk that applies to the judge, therefore, the clerk of the court would not have any authority to sit in a matter in which he is interested. Then the question resolves itself into whether or not the clerk of the court, in matters pertaining to bonds filed in the probate court, would be sitting in matters in which he is interested.

You suggest in your letter that you are considering acting as attorney in fact for surety companies who expect to do business with guardians, curators and administrators who may have business in that court. The duties of the clerk of the probate court in relation to bonds filed in that court are found in Section 18, R. S. Missouri, 1929, which is as follows:

"The court, or judge or clerk in vacation, shall take a bond of the persons to whom letters of administration are granted, with two or more sufficient securities, resident in the county, to the state of Missouri, in such amount as the court or judge or clerk shall deem sufficient, not less than double the amount of the personal estate."

If the judge be the clerk or if he has appointed a clerk and if such clerk be an attorney in fact for a surety company which is offering a bond for the approval of the clerk or the court, then the judge or the clerk by performing his duties under Section 18, supra, would be sitting in a matter in which he was interested when he is passing upon the sufficiency of the bond and this would be in violation of the provisions of Section 2053, supra.

We are further fortified in our views on this matter by the provisions of Section 21, R. S. Missouri, 1929, which is as follows:

"No judge of probate, sheriff, marshal, clerk of a court, or deputy of either, and no attorney at law, shall be taken as security in any bond required to be taken by articles 1 to 13, inclusive, of this chapter."

We think this section is broad enough to include the clerk who may be acting as an attorney in fact for the bonding company and Section 22, R. S. Missouri, 1929, further evidenced the fact that the lawmakers did not intend to permit such acts by the clerk as you have suggested in your letter. Section 22, supra, provides in part as follows:

"The court, or judge or clerk in vacation, shall take special care to take as securities men who are solvent and sufficient, and who are not bound in too many other bonds; and to satisfy themselves, they may take testimony, or examine, on oath, the applicant or persons offered as his securities; and said bond shall be signed and executed in the presence of the court, judge or clerk, or acknowledged before some officer authorized to take the acknowledgments of deeds, who shall certify to the same, * * * * *

If the clerk were acting as attorney in fact for the bonding company and the bond is offered to him in vacation for approval, he would be passing upon the sufficiency of his own principal and that would be inconsistent with the duties of the court and clerk and in violation of Section 2053, supra.

It seems to us from these sections that if the judge happens to be acting as his own clerk and as an attorney in fact for a bonding company, he would be serving in a dual capacity to perform his official duty and to represent such bonding company and this would be against

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public policy and against the provisions of Section 2052, supra.

If the judge happens to appoint a clerk who is an attorney in fact for a bonding company whose bonds come before the court for approval, there is such a close relation between the judge and the clerk and their duties in relation to bonds filed in probate courts that we think the clerk would not be authorized to act in such capacity for it would be in violation of the foregoing statutes and against public policy for the clerk to represent a bonding company which is offering a bond for approval in the court in which such clerk is also appearing as attorney in fact for the bonding company.

CONCLUSION

We are, therefore, of the opinion that the clerk of the probate court may not act as attorney in fact for a surety company and sell bonds to administrators and guardians appointed by the judge of the probate court in which such person is acting as clerk of the probate court.

Respectfully submitted

TWB:DA

TYRE W. BURTON
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APPROVED:

J. E. TAYLOR
(Acting) Attorney General