Alaska Office of Administrative Hearings
Code of Hearing Officer Conduct
Informal Opinion Abstracts

Abstract No. 1

Can a hearing officer serve in a fiduciary capacity, as the personal representative of the estate of a friend, without (1) violating the prohibition against engaging in the private practice of law or (2) violating 2 AAC 64.030(b)(4)'s duty to conduct unofficial activity so as to minimize the risk of conflict with the hearing officer's official obligations?

Your scenario assumes that the estate would hire counsel to handle court appearances and make any required probate filings. As personal representative, if you ended up "negotiating legal rights and responsibilities on behalf of another" (i.e., the estate), that activity would fall under the definition of "practice of law." If, as you propose, you would serve as personal representative without "pay or other compensation," such service would not be the prohibited "private practice of law."

Whether you would run afoul of the canons by serving as a fiduciary depends on whether the types of cases and issues you hear as a hearing officer are related to issues on which you might have to take a position as personal representative. Judicial branch judges regularly deal with probating estates, so it makes sense that the judicial canons prohibit a judge from serving as a fiduciary for an estate, other than for a member of the judge's family, and then only if the service will not interfere with the judge's official duties. The Code of Hearing Officer Conduct contains no analogous prohibition.

Under some circumstances, however, a person serving as a fiduciary might need to advocate a position for the benefit of the estate that could be at odds with a legal argument that could come before the person acting as hearing officer. For instance, if the estate included a claim for benefits of some type (e.g., Medicaid, retirement, insurance, etc.) and the hearing officer's job includes adjudicating such benefits claims, the hearing officer could run into a problem complying with the canon in 2 AAC 64.030(b)(4). I recommend that you compare the kinds of issues that could arise for the personal representative for your friend's estate to the kinds of issues you adjudicate as a hearing officer. It may be that the potential for these two groups of issues to coincide is small and that any potential conflict which arises could be avoided by recusal from a case or by stepping aside from the personal representative role and allowing the alternate to substitute in.

Abstract No. 2

Must a hearing officer take steps to avoid being, or appearing to be, too familiar with parties (e.g., agency representatives) or counsel who appear before the officer frequently?

Under 2 AAC 64.030(b)(1)&(2), a hearing officer must avoid impropriety and the appearance of impropriety, and inappropriate *ex parte* communications. Too much familiarity with parties and

counsel could invite unwitting *ex parte* discussion of issues or create an appearance of impropriety—i.e., that the hearing officer is biased in favor of the familiar party/counsel.

The Commission on Judicial Conduct found a violation of a canon for the appearance of impropriety created when a judge had lunch with one of the attorneys in a case immediately after the hearing, even though they did not discuss anything improper during the lunch. The commission found that the closeness in time between the hearing and the lunch could cause a reasonable observer to believe that the attorney had influence over the judge due to their social relationship.

This is not so very different from the appearance of impropriety that can be created when a hearing officer engages in social chit-chat with an agency advocate or a private attorney right before or right after a hearing. Talking about fishing or an upcoming vacation or an illness right after connecting the agency advocate for a telephonic hearing but before getting the others on line, or after going off the record in a default hearing, probably creates an appearance of impropriety. Giving the agency advocate the misimpression that he/she has influence with the hearing officer because of the familiarity is just as much of a problem as giving that impression to a private party.

The code of conduct does not demand that hearing officers sever all social relationships with agency advocates and attorneys who appear before them, or that hearing officers must be all business all the time in dealing with such people. The standards do require, however, that hearing officers avoid creating an appearance of impropriety. The commission's opinion provides guidance to the effect that social contact with one party/attorney in close proximity to a hearing or proceeding in which that person is appearing is a violation of the judicial canons. For the same reasons, similar conduct could be a violation of the Code of Hearing Officer Conduct.

NOTE: *See also* Alaska Stat. § 39.52.120(e).

Abstract No. 3

May the same hearing officer who mediated a successful resolution to a case function as the final decisionmaker, or one of a panel of decisionmakers, who must approve the resulting Compromise and Release?

The Judicial Conduct Commission's 2006-01 advisory opinion supports the conclusion that the mediator-hearing officer could handle the Compromise and Release proceeding, as long as the parties consent (on the record orally or in writing), and the mediator-hearing officer is careful to avoid creating the appearance of impropriety in how he/she handles the Compromise and Release proceeding. This would require that the mediators recuse him or herself from participating in that proceeding if something revealed during the mediation causes the hearing officer to harbor bias for or against any party that might affect the Compromise and Release approval decision.

It would be prudent to make sure the hearing officers understand that they can recuse themselves from handling a specific Compromise and Release proceeding, even if the parties want them to,

if they have concerns about appearance of impropriety or bias under the circumstances of the particular case.

Abstract No. 4

You have asked my opinion about a series of questions regarding participation in the Alaska Judicial Council's poll of bar members concerning judicial applicants. In the context of compliance with the Code of Hearing Officer Conduct (2 AAC 64.010 – 2 AAC 64.090), you asked the following:

> May I give signed comments on the judicial candidate questionnaires sent by the Judicial Council?
> May I give anonymous comments on the judicial candidate questionnaires sent by the Judicial Council?
> May I fill in the judicial candidate questionnaire rating grid anonymously?
> Or, should I simply request the Judicial Council not to send them for the remainder of my tenure?

Nothing in the Code of Hearing Officer Conduct precludes a state hearing officer from participating in the bar poll by submitting comments (signed or unsigned) and/or responding to the numerical rating grid questions. Though it is arguable that **how** a person responds to the poll (e.g., truthfully versus untruthfully) might implicate the requirements that hearing officers "conduct unofficial activities so that they do not cast reasonable doubt on … impartiality[,]" "avoid impropriety" and "personally observe high standards of conduct[,]" neither the statutory canons (AS 44.64.050(b)) nor the implementing regulation (2 AAC 64.030(b)) requires a hearing officer to refrain from commenting on judicial applicants.

Instructive on this subject as a guide is a 1997 Advisory Opinion by the Alaska Commission on Judicial Conduct. In response to a question about whether a judge may write an unsolicited reference letter to the Alaska Judicial Council, the commission opined as follows:

> A judge may write a letter to the Judicial Council concerning the qualities and abilities of an applicant for a judicial position. The letter need not be solicited by the Council, but its content should be limited to addressing those qualities about which the judge has direct knowledge and which relate to the criteria used by the Council in evaluating the applicant. A judge may ethically permit the Council to forward the letter to the governor. The restriction on content should be extended to all official reference letters by judges, regardless of who the recipient may be. Any use of the judicial office to persuade and influence decision-makers, beyond comments addressing the qualifications of the individual concerned, is not proper. In addition, while sending an unsolicited letter to the Judicial Council is not improper, sending an unsolicited letter to the Governor is improper. The Governor's role in the selection process is political and any written unsolicited comments regarding the selection could be viewed as political.

Participating in the bar poll by writing comments or answering the numerical rating questions is similar to providing a reference.

In short, the answer to the first three questions is "yes." Receiving the bar poll questionnaire is not a problem under the Code of Hearing Officer Conduct in any event, so whether to ask the council to stop sending it to you is not for me to say.

NOTE: *See also* Alaska R. Prof. Conduct 8.2(a).

Abstract No. 5

Do post-decisional filings related to a protective order, making statutory construction arguments predicated in part on legislative history documents including statements by the hearing officer's former supervisor and by a former legislator who now holds shares in a small Alaska corporation, in which the hearing officer also holds shares, give rise to a conflict of interest that should be disclosed?

A party's post-decisional filings regarding the appropriate scope of a proposed protective order has not injected into the case a conflict of interest for you under the Code of Hearing Officer Conduct necessitating, or making advisable, that you disclose past and current relationships with two people involved in the legislative process when the statute in question was enacted. As I understand the situation, one party has made a statutory construction argument predicated in part on legislative-history documents that include committee minutes and statements by (1) a person who at the time of the legislative enactment in question was your supervisor in an executive branch department and (2) a former legislator with whom you currently have a financial relationship in the form of co-owning shares in and serving as directors/officers of a small Alaska corporation that does not do business in the state. You explained that neither of these people is a party to the appeal, and neither has appeared as a witness, but rather they simply participated many years ago in the legislative process that led to enactment of a statute material to resolution of the pending protective order motion. The protective order issue concerns the extent to which records can be ordered protected under a specific statutory "good cause" standard.

Under 2 AAC 64.040(a), you must "refrain from hearing or otherwise deciding a case presenting a conflict of interest." You had already heard and decided the merits of the appeal before the post-decisional protective order motion concerning the record was filed. The question, therefore, is whether as a result of the party's legislative-history filings you now have a conflict in ruling on the protective order motion. It is also prudent to consider whether your ownership interest in an Alaska corporation poses a conflict in your ruling on a motion that could set a precedent construing the "good cause" standard for issuing protective orders in appeals involving corporations.

"A conflict of interest exists if [a] financial or other personal interest reasonably could be perceived to influence the official action of the hearing officer or administrative law judge." (2 AAC 64.040(a).) Under 2 AAC 64.990(9)&(19), respectively, "'financial interest' means involvement in, or ownership of, a business or property interest, or a professional or personal relationship, that is a source of income or other economic benefit to a person [and] 'personal interest' means an interest in or involvement with an organization, whether fraternal, nonprofit,

for profit, charitable, or political, that benefits a person[.]" You do not have a "financial interest" or "personal interest" as defined in the code of conduct with regard to a former supervisor. Thus, a conflict of interest does not arise from the fact that statements by your former supervisor made during the legislative process are being relied on by a party in support of an argument about the statute's meaning.

Two other code of conduct provisions might be implicated by a personal relationship: the requirement to avoid impropriety or the appearance of impropriety and the requirement to be impartial (2 AAC 64.030(b)(2)&(3)). Impropriety (or appearance thereof) and partiality (bias) cannot be remedied by disclosure. If these exist, the solution is recusal. You were not part of the deliberative group working with your former supervisor on legislative testimony and you do not think you will be influenced in your assessment of the value, if any, of that person's statements to the legislature in your analysis of the statutory construction issue. Thus, it does not appear that your ruling on the motion would be improper or appear to be improper, or that you cannot be impartial in rendering the ruling, because your former supervisor's legislative testimony has been filed as an exhibit to the motion briefing.

You have a current financial interest in common with the former legislator whose statements have also been made an exhibit. This presents a closer question, as does the mere fact that you are part owner of an Alaska corporation which theoretically could end up in a similar dispute with the state and, if so, could seek a protective order for records analogous to some at issue in the current appeal protective order matter. From what you told me, it is highly unlikely that your small corporation, which does no business in Alaska, would end up in such an appeal. Nonetheless, prudence dictates that disclosure be made of the possibility, however remote, of such a conflict. Thus, your plan to make a disclosure to the parties in the upcoming status conference is a good one. I recommend that you follow through on that and that the disclosure focus on your ownership interest in an Alaska corporation. Disclosing also that the former legislator whose statements have been offered as an exhibit is a co-owner and fellow director/officer of the corporation, and your opinion (which you shared with me) that your relationship with him will not affect your consideration of the legislative-history based arguments, is an exercise of prudence as well.

Abstract No. 6

You have asked whether under the Code of Hearing Officer Conduct, you "have a conflict interviewing for an employment position at the Attorney General's Office, because (1) attorneys working for that office appear in front of [you]" in your capacity as a state hearing officer and (2) one of the assistant attorneys general who has appeared before you, and could again in the future, has been designated as a member of the interview panel.

The canon of conduct at AS 44.64.050(b)(5) is most directly implicated by the question. It requires that hearing officers "refrain from inappropriate activity in seeking employment with another agency or employer or in seeking reappointment[.]" The implementing regulation for this canon (2 AAC 64.030(b)(5)) provides as follows:

> to refrain from inappropriate activity in seeking employment with another agency or employer or in seeking reappointment, a hearing officer or administrative law judge may not discuss the matters that are before the hearing officer or administrative law judge with a prospective employer or take or promise any action that could be understood reasonably as using the hearing officer's or administrative law judge's official position to benefit the prospective employer, other than the benefits resulting from employing a person with the skills and experience of a hearing officer or administrative law judge.

Thus, you can ensure that you comply with this requirement of the Code of Hearing Officer Conduct by refraining from answering interview questions in a way that discusses the matters before you or could be construed as taking action or making promises about matters before you or that might come before you.

Some limited guidance on the subject of interviews by screening bodies may be found in Canon 5 of the Code of Judicial Conduct. In addressing the broad subject of inappropriate political activity, that canon makes a specific exception allowing judges seeking appointment to another governmental office to "communicate with the appointing authority, including any selection, screening, or nominating bodies[.]" (Canon 5.B(2)(a)(i).)

The inquiry, however, does not end with whether you can submit to the interview, with or without inclusion of the attorney who has appeared before you in the screening body. As your question recognizes, the potential for a conflict of interest, or the appearance of a conflict of interest and hence of impropriety, must be considered as well.

Under 2 AAC 64.040(a), you must "refrain from hearing or otherwise deciding a case presenting a conflict of interest." You also must avoid impropriety or the appearance of impropriety. 2 AAC 64.030(b)(2). "A conflict of interest exists if [a] financial or other personal interest reasonably could be perceived to influence the official action of the hearing officer or administrative law judge." (2 AAC 64.040(a).) Instructive on this subject as a guide is a 1999 Advisory Opinion by the Alaska Commission on Judicial Conduct. In response to the question, when is a judge obligated to disclose discussions concerning future employment with an entity involved in litigation before the judge, the commission opined as follows:

> A judge should disclose the fact that the judge is discussing employment with an entity involved in litigation before the judge. For purposes of this opinion, "an entity involved in litigation before the judge" refers to any party, witness, attorney, government entity, or law firm directly involved in the litigation. Once disclosure has occurred, the judge should offer to recuse. Once the judge has accepted the job, the judge should recuse and disclose the basis for the recusal.

Whether the prospect of employment with the Attorney General's Office "reasonably could be perceived to influence" your official action in the cases you hear in which that office represents a party may be debatable. The perception certainly could arise, whether or not the perception would be reasonable under the circumstances. The prudent course, therefore, is to follow the guidance in the judicial conduct commission's advisory opinion.

In sum, you are not required to refrain from interviewing with a prospective employer, even if the screening panel includes an attorney who has appeared before you. You will need to take care in how you answer the questions not to discuss the matters before you or to say anything that might be construed as making promises about them. Though it might lessen any appearance of impropriety if attorneys who appear before you are removed from the interview panel, a change in the panel's make up, alone, would not eliminate the conflict/appearance of conflict. Instead, disclosure and, if necessary, recusal, in all cases in which the Attorney General's Office is appearing before you while your application is pending is advisable.

NOTE: *But see also* Alaska R. Prof. Conduct 1.11(d)(2)(ii) & 1.12(b).

Abstract No. 7

Can a hearing officer also hold a position as a local elected official?

Apart from the statutory prohibition against a full-time state hearing officer engaging in the private practice of law or serving in a judicial or another quasi-judicial capacity (AS 44.64.050(a)), which we discussed, the Code of Hearing Officer Conduct provisions most implicated by the scenario you described are the following:

> 2 AAC 64.030. Canons of Conduct
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> * * *
>
> (b) To comply with the requirement …
>
> (2) to avoid impropriety and the appearance of impropriety, a hearing officer or administrative law judge shall …(C) refrain from allowing familial, social, political or other relationships to influence the conduct of the hearing;
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> * * *
>
> (4) to conduct unofficial activities in ways that minimize the risk of conflict with the obligations of the office or the hearing function, a hearing officer or administrative law judge shall (A) seek reassignment of a case in which the hearing officer or administrative law judge has a conflict of interest under 2 AAC 64.040; and (B) conduct unofficial activities so that they do not cast reasonable doubt on the hearing officer's or administrative law judge's adjudicatory capacity or impartiality, demean the office or the hearing function, or interfere with the proper performance of the hearing officer's or administrative law judge's official duties; activities that could interfere with a hearing officer's or administrative law judge's official duties include (i) advocating a position before an executive branch agency on a subject related to decisions that may be heard by the hearing officer or administrative law judge; ….
>
> 2 AAC 64.040. Conflicts

(a) A hearing officer or administrative law judge shall refrain from hearing or otherwise deciding a case presenting a conflict of interest. A conflict of interest may arise from a financial or other personal interest of the hearing officer or administrative law judge, or of an immediate family member. A conflict of interest exists if

(1) the financial or other personal interest reasonably could be perceived to influence the official action of the hearing officer or administrative law judge; or

(2) a hearing officer or administrative law judge previously represented or provided legal advice to a party on a specific subject before the hearing officer or administrative law judge.

(b) For purposes of this section, to determine whether membership in an organization whose interests may be affected by a decision in a case before a hearing officer or administrative law judge is a conflict of interest, the hearing officer or administrative law judge shall consider

(1) the impact of the decision on the organization's interests;

(2) the beneficial or harmful effect on a financial or other personal interest described in (a) of this section; and

(3) whether the hearing officer's or administrative law judge's official position requires membership in the organization.

(c) As soon as a hearing officer or administrative law judge discovers a conflict of interest, the hearing officer or administrative law judge shall disclose the conflict to the parties and, unless the parties waive the conflict on the record orally or in writing, shall notify the chief administrative law judge or other state official who assigned the case of the need for reassignment. Noncompliance with the requirements of this subsection may be grounds for corrective or disciplinary action under AS 44.64.050 (d) and 2 AAC 64.060.

(d) Nothing in this section prohibits a hearing officer or administrative law judge from performing, as part of the hearing officer's or administrative law judge's employment, general legal work such as drafting, reviewing or proposing legislation or regulations, conducting training or continuing education courses, drafting or negotiating contracts, or supervising employees, even if the work is related to a subject that may come before the hearing officer or administrative law judge acting as an adjudicator.

"Personal interest" is defined as "an interest in or involvement with an organization, whether fraternal, nonprofit, for profit, charitable, or political, that benefits a person." 2 AAC 64.990(19).

None of these provisions creates an absolute bar to a hearing officer also filling the function you described (local elected official), but the person would have to take care to avoid conflicts and not to make statements in the course of the other function that are inconsistent with the quasi-judicial duties of a hearing officer. Thus, as we discussed, the potential for an absolute bar for the person to serve as a hearing officer and as a local elected official would be if the other function includes quasi-judicial duties, as is sometimes the case in certain political subdivisions. If the elective office requires the office holder to perform quasi-judicial duties, a full-time hearing officer could not hold both positions, but a part-time hearing officer could.

Abstract No. 8

Is a person hired into a full-time position with the title "hearing officer," but for which the state agency employer has informally redefined the duties such that the person does not actually hear cases, barred from continuing to serve as an occasional contract hearing officer for another state agency?

As we discussed, the job title would not govern over the actual job duties. As you have described the situation to me in our telephone conversation and below, the duties you perform are not those of a "hearing officer" within the meaning of AS 44.64.200(4) and thus it would not be a violation of the prohibition against a full-time hearing officer serving in another quasi-judicial capacity (AS 44.64.050(a)) for you to continue as one of the pool of potential contract hearing officers for certain occasional cases. Instead, the duties you describe are more akin to serving as a staff attorney/judicial clerk.

Nevertheless, the job title for your position could invite a complaint from someone concerned about compliance with AS 44.64.050(a). I was not able to access the position description itself in the On-line Position Description System, to see how the duties are described there. I suspect that the Division of Personnel classifications staff would not have placed the position in the hearing officer class if it did not call for the incumbent to preside over hearings. Your employing agency may want to consider reviewing the position description and job classification, and update them, to reduce the risk of a complaint under the Code of Hearing Officer Conduct being made.