
ISSUE

May a full-time court commissioner serve for hire as a neutral third person¹?

ANSWER

No.

FACTS

A full-time court commissioner has been providing services as a private mediator for compensation in civil cases. The cases have been “referred” to the court commissioner from circuit court judges.

DISCUSSION

The Committee concludes that the issue presented involves provisions of SCR 60.01(8), SCR 60.05(6), and SCR 60.05(4).

A. SCR 60.01(8)

SCR 60.01(8) defines a “judge” as “a justice of the supreme court, a judge of the court of appeals, a judge of the circuit court, a reserve judge, a municipal judge, a court commissioner” (emphasis added). The Code of Judicial Conduct expressly includes full-time court commissioners as “judges.”

B. SCR 60.05(6)

SCR 60.05(6) states as follows:

Service as Arbitrator or Mediator. A judge may not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

¹ The Committee has previously decided to use the term “neutral third person” in place of “arbitrator or mediator”. The Committee believes neutral third person is a more accurate and contemporary term. See Wis. Advisory Op. 98-6 (1998).

The requestor argues that Wis. Stat. §802.12 constitutes an express authorization by law, thereby exempting the court commissioner from the prohibition of SCR 60.05(6). Wis. Stat. §802.12(2)(c) states in part that:

[T]he judge may appoint *any person* who the judge believes has the ability and skills necessary to bring the parties together in settlement. (emphasis added.)

Even if Wis. Stat. §802.12(2)(c) were to constitute an express authorization within the meaning of SCR 60.05(6), the requestor's activity, acting as a neutral third person for pay, violates two other provisions of the Code of Judicial Conduct, SCR 60.05(4)(a)1.a. and b.

C. SCR 60.05(4)(a)1.a. and b.

SCR 60.05(4)(a)1.a. and b. states:

(4) Financial Activities.

- (a) 1. A judge may not engage in financial or business dealings that could meet any of the following conditions:
 - a. Reasonably be perceived to exploit the judge's judicial position.
 - b. Involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

The Committee concludes that a full-time judicial court commissioner acting as a neutral third person for pay violates both of these provisions. The public may reasonably view the court commissioner to have an inside advantage in receiving appointments for pay as a neutral third person under Wis. Stat. §802.12(2)(c). This appearance diminishes public

confidence in the integrity of the judiciary. The public may also reasonably perceive the court commissioner to be exploiting a judicial position for personal financial gain. Finally, acting for pay as a neutral third person will likely involve the court commissioner in frequent transactions with lawyers who are likely to appear before the court commissioner.

CONCLUSION

The Committee concludes that a full-time court commissioner may not serve for hire as a neutral third person.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60--Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 98-9 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 9th day of July, 1998.

Thomas H. Barland
Chair