OPINION 06-1R

ISSUE

May a judge publicly express a personal opinion as to the fairness, efficacy and wisdom of the death penalty which is the subject of an advisory referendum being presented to the citizens of Wisconsin?

ANSWER

No, with qualification.

FACTS

A Senate Joint Resolution allows for an advisory referendum to be presented to the citizens on whether the legislature should consider the creation of a death penalty. Both proponents and opponents of the death penalty agree that this issue implicates profound and fundamental questions of law, the legal system and the administration of justice.

This Opinion replaces Opinion 06-1 after that Opinion was reconsidered by the committee. This decision addresses only the specific question presented to the Judicial Conduct Advisory Committee and the application of our current Supreme Court Rules to that specific question. We cannot, and do not, consider constitutional issues related to interpretations of Supreme Court's Rules as such consideration is beyond this Committee's authority; The Wisconsin Supreme Court can review and modify, should it desire, its Rules in that regard. The committee interprets the Rules as written, and opinions are based on all the Rules as they apply to the specific facts in the requesting judge's question. We are aware that the Wisconsin Supreme Court did, in fact, review, modify and recreate Supreme Court Rule section 60.06(3) after the decision in *Republican Party of Minnesota v. White*, 536 U.S. 784 (2002). That specific modification is addressed in the body of this opinion.

DISCUSSION

The Committee concludes that the issue presented involves several provisions of the Supreme Court Rules. They are: SCR 60.05(2); 60.03(2); 60.04(1)(b); 60.04(4) and 60.04(4)(a); 60.05(1) and 60.05(1)(a); and 60.06(3)(b).

We will begin with the applicability of SCR 60.05(2).

A. SCR 60.05(2)

SCR 60.05 (2) states in part:

> Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects subject to the requirements of this chapter.

This rule acknowledges that the first amendment rights of judges to express personal opinions are protected by judicial ethics. The committee noted that the Supreme Court considered the need to balance first amendment rights with the need to ensure judicial independence and impartiality by subjecting this rule to the entire requirements of Chapter 60. In applying that balancing test, after reviewing all the requirements of this chapter, the Committee determined that a judge may not publicly express a personal opinion on the death penalty referendum pending before the citizens of Wisconsin.

To allow the public expression of such a personal opinion would cast a reasonable doubt on the sitting judge's capacity to act impartially on cases involving the death penalty which may come before the judge. The Committee recognizes that this is not a question about a judge running for office. It should be clear, however, that a judge can discuss the death penalty on an objective basis as allowed in SCR 60.05(2). This opinion is limited to the finding that a judge should avoid publicly expressing a personal opinion on the death penalty issue that would necessarily cast a reasonable doubt on the judge's capacity to rule impartially on that subject.

B. SCR 60.04(1)(b)

SCR 60.04(1)(b) states in part:

> A judge must not be swayed by partisan interests, public clamor or fear of criticism.

As pointed out above, it is important that a judge not indicate publicly a personal opinion in favor of a position taken by proponents or opponents of the death penalty in order to avoid an actual or perceived partisan interest swaying the judge. It is extremely important to maintain the independence of the judiciary in order to deal fairly with matters that are likely to come before the judge. Should a judge publicly take a personal stance on the issue of the death penalty, it could easily be perceived by the general public that the judge was being swayed by a partisan interest or succumbing to one side or another of the public clamor on the subject.

C. SCR 60.04 (4) and SCR 60.04(4)(a)

SCR 60.04(4) and SCR 60.04(4)(a) state in part that a judge shall recuse himself or herself in a proceeding when among other things, "[t]he judge has a personal bias or prejudice" (SCR 60.04(a)) which "the judge knows or reasonably should know would question the judge's ability to be impartial."

A judge who has taken a public position on any issue which states a clear bias is required to recuse himself or herself from deciding cases for which an actual or perceived bias, prejudice or pre-judging of an issue would reasonably call into question the judge's impartiality. This is especially true where, as here, a legislatively proposed law is not yet even before the public so as to engender the need for education about it, or its effect on the judiciary. Accordingly, the position of the judge in support of the proponents or opponents of the death penalty will accomplish little more than call into question the particular judge's impartiality.

D. SCR60.05(1) and 60.05(1)(a)

SCR 60.05(1) and 60.05(1)(a) state:

> (1) Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do none of the following:
>
> > (a) Cast reasonable doubt on the judge's capacity to act impartially as a judge.

The comment to this section expresses the concern of the Committee where it states:

"Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. See SCR 60.03(1) and (3)."

The Committee believes the overriding concern presented in this opinion involves the impact of a publicly expressed personal opinion of a judge on a particular issue and its effect on the perceived or actual bias of a judge when the death penalty issue comes before the judge, as this will cast reasonable doubt on the judge's capacity to act impartially.

E. SCR 60.06(3)(b)

SCR 60.06(3)(b) states in part:

> (b) Promises and commitments. A judge, judge-elect, or candidate for judicial office shall not make or permit or authorize others to make on his or her behalf, with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

It is important that the Committee noted that the Supreme Court modified this subsection of the judicial rules to delete the "appear to commit" provision after the *White* decision, but the other sections of the judicial rules were not changed as a result of the change to this subsection. The majority of the Committee believes that it is beyond the Committee's authority to extend the perceived impact of that single change to other sections of the Rules.

It is further noted that even after the deletion of the "appear to commit" language, and the creation of the new subsection SCR 60.06(3)(b), that the COMMENT to this section unequivocally states: "This section prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court."

To advance the position of proponents or opponents of the death penalty, a judge would effectively be casting reasonable doubt on the judge's capacity to act fairly and impartially when the issue is brought before him or her.

CONCLUSION

The Committee concludes that a judge may speak in an "avocational activity" about the death penalty referendum as allowed by SCR 60.05(2), but that activity is limited by the other sections and requirements of Chapter 60 as discussed above. Those sections, not related to campaign activity, as well as the new section related to it created after the *White* decision, still make it clear that a judge cannot interject his or her subjective personal opinion into the public debate in order to advance the position of proponents or opponents of the death penalty. He or she may, however, to the extent possible and consistent with all the judicial canons, provide objective impartial information on the subject to the public.

The opinion expressed herein is based on a majority 6 to 3 decision of the Committee.

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 06-1R issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 20th day of October, 2006.

/s/ George S. Curry

George S. Curry
Chair