

**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.

**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. The State Constitution would have to be amended to allow for the 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.

**DISCUSSION**

The Committee concludes that the issue presented involves the provisions of 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.

First Amendment rights of judges to express personal opinions is an evolving issue relative to judicial ethics. The Committee considered the need to balance First Amendment rights with the need to ensure judicial independence and impartiality. The Committee determined that a judge should not state a public position on the death penalty referendum pending before the citizens of Wisconsin. To allow such a position to be taken would cast a reasonable doubt on the judge's capacity to act impartially on cases involving the death penalty which may come before the judge.

**B. SCR 60.03(2)**

SCR 60.03(2) states in part:

A judge may not lend the prestige of judicial office to advance the private interests of . . . others or convey or permit others to convey the impression that they are in a special position to influence the judge.

The purpose of the rule is stated in the amended comment, i.e., that maintaining the prestige of judicial office is necessary to permit the judiciary to function independently. In order to do so, as the comment states:

A judge must avoid lending the prestige of judicial office for the advancement of the private interest of others.

It is the Committee's position that a judge should not publicly state a personal opinion on the death penalty under the circumstances of the development of the law as it presently exists or does not exist. Additionally, the exact nature and extent of the action to be taken legislatively is not yet known. Until the parameters of the proposed legislation, if any, is determined, it would be improper for a judge to discuss same until the true impact of the legislation on the judicial function, the administration of justice and the law itself can be properly analyzed. To do otherwise would be to allow the prestige of the judicial office to advance the private interests of either proponents or opponents of the death penalty.

**C. 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 supra, 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 the actual or perceived partisan interest swaying the judge. It is extremely important to maintain the independence of the judiciary in order to deal with matters that are likely to come before the judge.

**D. SCR 60.04 (4) and SCR 60.04(4)(a)**

SCR 60.04(4) and SCR 60.04(4)(a) state in part:

The judge has a personal bias or prejudice (from 60.04(4) which the judge knows or reasonably should know would reasonably question the judge's ability to be impartial).

A judge who has made a position on an issue known should 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 a judge's impartiality. This is especially true where, as here, a legislatively proposed law is not yet before the public to allow education about or the effect on the judicial function. Accordingly, the position of the judge in support of the proponents or opponents of the death penalty will accomplish nothing except to call the particular judge's impartiality into question.

***E. SCR 60.05(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 section expresses the concern of the Committee and the Supreme Court 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 majority of 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 such issue comes before him or her. Same may cast reasonable doubt on the judge's capacity to act impartially in such matters.

***F. 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.

As elected officials, judges are essentially running for office during their entire tenure. Even if a judge announces that he or she is not seeking re-election or appointment, the judge is still bound by other SCR sections to avoid partiality as a basic tenet of being a judge.

**OPINION 06-1**

To advance the position of proponents or opponents of the death penalty, a judge would effectively allow for the casting of reasonable doubt on the judge’s capacity to act impartially.

**CONCLUSION**

The Committee concludes that a judge may not advance the position of proponents or opponents of the death penalty. The matter is before the citizens of Wisconsin for an advisory referendum, and there is currently no legislation or proposed amendment to the State’s Constitution concerning said issue. Further, there is no fiscal note or other information available relative to proposed legislation and its corresponding affect on the function of the legal system or the administration of justice so as to allow a judge to discuss said proposed legislation in relation to its improvement of the law, the legal system and/or the administration of justice. The opinion expressed herein was based on a 5 to 4 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 06-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 22nd day of September, 2006.

/s/ George S. Curry

---

George S. Curry  
Chair