

## **ISSUE**

May a circuit court judge serve as a panel member on a Wisconsin State Bar Fee Arbitration Panel?

## **ANSWER**

No

## **FACTS**

A judge has been requested by the President of the State Bar of Wisconsin to continue to serve as a member of the State Bar of Wisconsin Fee Arbitration Panel. The judge served as a panel member prior to assuming the bench. The State Bar of Wisconsin Fee Arbitration Panel is a service provided by the state bar to arbitrate fee disputes between lawyers and clients. All parties to the fee dispute must agree in advance to the arbitration. A sliding scale fee is charged based upon the fee amount in dispute. The determination is made either by one person if the amount disputed is under \$5000, or three person panel if greater than \$5000. The decision is binding upon the attorney and the client. There is no right of appeal from the panel decision. Even though a fee is charged, the arbitrators are volunteers who receive no compensation for their work.

## **DISCUSSION**

The Committee concludes that the issue presented involves provisions of SCR 60.03(1) and 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.

The committee concludes that participation by a judge in a fee arbitration panel is prohibited by SCR 60.05(6). "This rule provides for an absolute prohibition against a judge's acting as an arbitrator, mediator, or otherwise performing judicial functions in a private capacity. The only exception to this absolute prohibition is the judge's action being 'expressly authorized by law'." [Wis Advisory Op. 99-1 (1999)] There is no express authority permitting a judge to participate on fee arbitration panels.

SCR 60.05(6) is one of several subsections of SCR 60.05 that restrict performance of judicial functions in a private capacity. It distinguishes judicial functions from extra-judicial functions. A judge serving on a fee arbitration panel would be engaged in an extra-judicial function which is not otherwise expressly authorized by law.

Even though the fee arbitration service is being provided through the State Bar of Wisconsin, the limitations of SCR 60.05(6) apply. While the State Bar of Wisconsin was created by SCR 10.01(1) and membership in the bar is a condition precedent to the practice of law in Wisconsin, the fee arbitration services are extra-judicial and have a private characteristic to them. Decision-making by a panel member, judge or otherwise, requires deciding a private dispute in a non-judicial context. Such extra-judicial decision-making is prohibited by SCR 60.05(6).

SCR 60.03 (1) states:

A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The private attributes of the fee arbitration panel and the perception that the public might have of that panel could impact the public's perception of the judge and thus of the judiciary. The private attributes of the fee arbitration service are: (1) a fee is charged to the participants; (2) a member of the public may not understand that panel members serve as uncompensated volunteers, and instead may erroneously believe that parties to the fee dispute are paying for the services of a judge; and (3) the public could perceive the judge as acting in a judicial-like capacity in an extra-judicial setting.

## **CONCLUSION**

The committee concludes that a judge may not act as a fee arbitrator in a State Bar of Wisconsin Fee Arbitration Panel as such activity is private in nature and is not expressly authorized by law.

## **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. 01-3 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 19th day of September, 2002.

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Thomas H. Barland, Chair