

ISSUE

May a judge appear before the Legislature and testify on the issue of the compensation rate for criminal defense representation for the indigent when the State Public Defender's office must contract out cases to private counsel?

ANSWER

Yes, with qualification.

FACTS

A judge has been invited to appear before the Wisconsin Legislature to provide information on the issue of the low compensation rate for criminal defense representation for the indigent when the State Public Defender's Office must contract out cases to private counsel. This invitation to the judge is from a private group who is sponsoring specific legislation to increase that compensation rate. The current hourly rate for such appointments is \$40.00 and travel time is compensated at \$25.00 per hour. Some areas of the state are currently experiencing a shortage of private counsel willing to accept such appointments because of that rate which is creating a delay in eligible indigent defendants receiving prompt criminal representation in their pending cases.

DISCUSSION

The Committee concludes the issue presented involves the provisions of SCR 60.05(2) and 60.05(3)(a). The Committee in 2006 issued Opinion No. 06-1R which dealt with a judge's ability to express a personal opinion as to fairness, efficiency and wisdom of the death penalty, which was the subject of an advisory referendum being presented to Wisconsin's citizens. The Committee concludes the issue presented in this request for an opinion is different than the issue in Opinion No. 06-1R.

SCR 60.05(2) provides as follows:

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 nonlegal subjects, subject to the requirements of this chapter.

The COMMENT to SCR 60.05(2), in part, provides as follows:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

SCR 60.05(3)(a), under the heading of Governmental, Civic or Charitable Activities, provides as follows:

A judge may not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

The Committee concludes that under these SCR sections a judge may appear before the Legislature and testify regarding the issue referenced in this opinion. A prevalent shortage of private attorneys being unwilling to accept State Public Defender appointments for indigent criminal defendants is a situation which is having a significant dilatory effect on the criminal justice system in Wisconsin. The administration of justice requires that the demands of indigent criminal defendants who are seeking and are eligible for legal representation be met. If those constitutionally protected demands are not being met, judges have the right to bring those issues to the appropriate executive and/or legislative bodies or officials. The Committee does not perceive there is any differentiation in this right to inform and educate whether such contact is to the executive and/or legislative body as a whole or to individual members of those bodies.

The Committee affirmatively answers this request with qualification for two reasons. First, the Committee would counsel a judge to refrain from advocating for specific legislation or policy. As has already been summarized in this opinion, a judge may frame and educate the executive and/or legislative branches on what the impacting issue is and what effect it is having on the legal system or administration of justice. Such education could even include an opinion about the underlying cause of that problem or issue. But the Committee would caution a judge from proposing specific legislation or policy which could be perceived as invading upon the other branches of government's purview or authority or which could come before that judge for review in their official capacity.

Secondly, the Committee would caution judges from working directly with independent advocacy groups who may be sponsoring specific policies or legislation. The COMMENT to SCR 60.05(2) provides some direction to what organizations or groups a judge may appropriately associate with in such efforts. But again caution should be exercised in affiliating or advocating with entities proposing specific legislation or advocating certain agendas or policies.

CONCLUSION

The Committee concludes that a judge in Wisconsin may appear and testify before the Legislature on the issue of the compensation rate for criminal defense representation for the indigent when the State Public Defender's office must contract out cases to private counsel. That testimony may include education and information regarding the current problems with such appointments, how those problems are impacting the administration of justice and the criminal justice system and what the perceived causes of those problems are. A judge is cautioned, though, from proposing or advocating for specific legislation or policy and from working in concert with independent groups or agencies who may be advocating for such legislation or policy.

The opinion expressed herein is dissented to by one member of the Committee.

APPLICABILITY

This opinion is advisory only. It is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee and is limited to the questions arising under the Supreme Court Rules, Chapter 60, *Code of Judicial Conduct*. This opinion is not binding on the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary 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. 19-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 1st day of March, 2019.

The Honorable D. Todd Ehlers
Chair