
ISSUE

May a court commissioner conducting initial appearances in criminal, small claims, civil traffic and forfeiture cases also act as counsel in small claims and as a prosecutor in municipal traffic and forfeiture cases that are processed through the same court.

ANSWER

Yes, as long as the court commissioner does not conduct the initial appearance in any case in which he or she is, or may become, counsel, and provided the court is careful to minimize the chances of the public's viewing the court commissioner in the roles of both prosecutor and magistrate.

FACTS

The requestor of this opinion is currently a part-time Family Court Commissioner in a small county. The Circuit Court Judge for the county has proposed expanding the court commissioner's duties to include conducting initial appearances in criminal, small claims, civil traffic and forfeiture cases. The court commissioner also is in private practice and represents a municipality that does not have a municipal court. The municipality prosecutes civil traffic and forfeiture cases in the same circuit court. The court commissioner's private practice also includes representing litigants in small claims matters in the same circuit court.

The court commissioner will not conduct any civil traffic or forfeiture initial appearances that involve the municipality. The court commissioner will also not conduct any small claim initial appearances if the commissioner represents a litigant. It is proposed that a Circuit Court Judge will continue to conduct the initial appearances in these cases where a conflict exists.

DISCUSSION

The Committee concludes that the issue presented involves the provisions of SCR 60.03(1), 60.04(1)(a) and (4).

SCR 60.04(1)(a) states:

A judge shall hear and decide matters assigned to the judge, except those in which recusal is required under sub. (4)

Subsection (4) of this Rule sets forth a general rule concerning recusal. It also lists a number of specific rules requiring recusal. The general rule is summarized in the commentary to the subsection.

... a judge must recuse himself or herself whenever the facts and circumstances the judge knows or reasonably should know raise reasonable question of the judge's ability to act impartially,

The Committee believes that the proposed expansion of the court commissioner's duties will not violate this general rule concerning recusal. The court commissioner will not hear, or have any involvement in processing, any of the cases where he or she may be acting as counsel. To do otherwise would clearly raise a legitimate question concerning the commissioner's ability to act impartially. It is essential that a Circuit Court Judge, or other court commissioner, continue to preside over all cases where the court commissioner is, or may be, counsel for one of the parties. This, of course, does not preclude the court commissioner from conducting initial appearances in other cases where he or she is not acting, or not likely to act, as counsel. The court commissioner's ability to act impartially in the cases he or she hears is not reasonably questioned simply because he or she acts as counsel in similar types of cases in the same circuit court.

Further, the Committee believes that the proposed conduct will not violate any of the specific rules requiring recusal as set forth in SCR 60.04 (4)(a) through (e).

The Committee also believes it is important for the court commissioner to avoid the **appearance** of partiality when conducting these initial appearances.

SCR 60.03(1) states:

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

The court must be careful to schedule initial appearances to minimize the chances of the public's viewing the court commissioner in the roles of both prosecutor and magistrate. Public confidence in the integrity and impartiality of the judiciary could reasonably be questioned if the court commissioner's dual roles were simultaneously presented to the public.

CONCLUSION

The Committee concludes that as long as the court commissioner does not hear or participate in any manner in the processing of the cases where he or she may be retained as counsel or act as a prosecutor, the proposed expansion of the court commissioner's authority does not violate the Code of Judicial Conduct, provided the court is careful to minimize the chances of the public's viewing the court commissioner in the roles of both prosecutor and magistrate.

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. 98-2 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 19th day of February, 1998.

Thomas H. Barland
Chair