

AOKT 582

FILED

JUN 22 2021

COMMENTS REGARDING JUDICIAL COMMITTEE

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
CHIEF DEPUTY CLERK

The undersigned supports the formation of a commission to study the statutes and rules of the Commission on Judicial Discipline. The undersigned is concerned that the current structure and practice of the Commission creates a system that, if not inherently biased, certainly has the appearance of bias and unfairness that is counterproductive to a culture of confidence in our judiciary.

The undersigned would suggest that there are two main flaws that should be addressed through any examination of the Commission on Judicial Discipline. First, the lack of oversight by an uninterested party presents the perception of the Commission, with oversight powers, is not subject to any oversight itself. The second concern, intertwined with the first, is the multiple hats worn in certain positions within the Commission that, at the very least, reduce confidence of an objective opportunity for judges to present reasoning and justification for actions that brought them before the Commission.

By way of example, the position of Executive Director also has responsibilities related to General Counsel, investigator, and in certain instances, is the actual Complainant, as well as the Staff Supervisor, and appears to be the individual who either presents to the panel or individually makes the decision as to hiring an investigator, *i.e.*, determining whether the appropriate statutory standards were met necessitating an investigator, and in some instances negating the first investigator's findings and unilaterally presenting or making a determination to retain a second investigator on a case that the Executive Director may in fact be the Complainant and may in fact have participated in the investigation and/or spoke to the Complainant and/or other witnesses.

In fact, the same Executive Director also decides whether or not to have filings accepted in cases, and when those cases are opened to even accept filings, *i.e.*, any pre-Formal Statement of Charges motion regarding timeliness are evidently not accepted even though there may not be a notice to close a case. Moreover, the participation of the Commission itself in the investigative level and the approval to conduct an investigation and thereafter, if necessary to file a complaint and then, thereafter if necessary to attend the hearing, can be the same Commissioners.

Compare this, by way of example, to the disciplinary approach the State Bar has with regard to attorney discipline matters. Alternatively, this would be like the members of a grand jury hearing one side from a prosecutor, deciding to pursue a case, and then sitting as the jury to determine that person's guilt. It is not to say it would be impossible for those members to move forward without any presumptions from the previous presentations, however, the same not only tests human nature, but creates an appearance of unfairness and/or bias.

Moreover, the decisions and processes described hereinabove are not subject to any oversight.

Additionally, a cursory review of the filings over the last several years suggests the potential that there is a different standard held between male judges and female judges both in the matters brought before the Commission and the punishments sought in resolution by the Commission. While it is possible the skewed numbers in this case have a rational explanation, the limited number of people in control of who the Commission pursues and how aggressively, without any independent oversight, means this Executive Director, the prior Director or the next Director could pursue cases with bias, a personal agenda, or even a vendetta and there is no oversight to not only prevent the same. In fact, without oversight, no one may even notice if the same is occurring.

Thus, it seems inherently unreasonable and unfair to the judiciary to be tasked with following the laws of the state, of their jurisdiction, and in line with equity and ethical responsibilities but to have their conduct judged by an authority that acts without oversight, and has the independent ability to determine whether investigations meet the standard for further action or should be dismissed, or even if they should be reinvestigated and who conducts the investigations.

Accordingly, the undersigned would support the formation of a Commission to study the statutes and rules of the Commission for Judicial Discipline to more narrowly tailor these rules to prevent such discretion by single members of the Commission to proceed without oversight.

June 21, 2021

Marc P. Cook, Esq.  
State Bar No. 4574