ATTORNEY GRIEVANCE COMMISSION, *et al.*,	*	IN THE
Petitioners,	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	September Term, 2017
TY CLEVENGER,		
Respondent.	*	Petition Docket No. 338

* * * * * * * * * * *

OPPOSITION TO MOTION TO RECUSE

Petitioners, Attorney Grievance Commission and Bar Counsel (collectively, the "Commission"), respectfully oppose Mr. Clevenger's motion asking each judge of this Court to recuse him or herself from this case. Mot. to Recuse 1-2. Mr. Clevenger argues, in essence, that because the Court enacted amendments to Maryland Rule 19-711(b), which it is now being asked to apply and interpret, the Court is inherently biased in favor of upholding the Rule and its application in this case and, correspondingly biased against Mr. Clevenger. Mot. to Recuse 5.

This motion should be denied because: (1) this Court routinely interprets and applies the Maryland Rules consistent with its constitutional and statutory responsibility to adopt rules; (2) the amendment to Rule 19-711(b) at issue here was adopted by this Court following consideration at an open meeting of the Standing Committee on Rules of Practice and Procedure on May 5, 2017, published as part of a supplement to the One Hundred Ninety-Third Report to this Court dated June 7, 2017, [1] and considered at an open meeting

[1] http://mdcourts.gov/rules/ruleschanges.html (last checked November 13, 2017).

before this Court on June 20, 2017; and (3) Mr. Clevenger's new claim that the rule permitting Bar Counsel to decline "a complaint submitted by an individual who provides information about an attorney derived from published news reports or third party sources where the complainant appears to have no personal knowledge of the information being submitted" constitutes viewpoint discrimination is irrelevant to the issue of recusal.

I. THE COURT OF APPEALS' ROUTINE INTERPRETATION AND APPLICATION OF THE MARYLAND RULES PROVIDES NO BASIS FOR RECUSAL.

A party moving for recusal bears a "heavy burden to overcome the presumption of [a judge's] impartiality." *South Easton Neighborhood Ass'n, Inc. v. Town of Easton, Maryland*, 387 Md. 468, 499 (2005) (quoting *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 297 (2003) (citations omitted)). To overcome the presumption, the party requesting recusal must prove that the judge has "a personal bias or prejudice" concerning him or "personal knowledge of disputed evidentiary facts concerning the proceedings." *Jefferson-El v. State*, 330 Md. 99, 107 (1993) (citing *Boyd v State,* 321 Md. 69, 80 (1990)). Absent grounds for mandatory recusal, a judge's decision not to recuse will be overturned only upon a showing of an abuse of discretion. *Surratt v. Prince George's County*, 320 Md. 439, 465 (1990).

A significant financial interest in a party or outcome, a pre-judicial relationship as an attorney with a party or counsel for a party, and a personal bias or prejudice concerning a party or party's attorney are expressly identified as mandatory grounds for disqualification. Md. Rule 18-102.11 (Disqualification, ABA Rule 2.11); Md. Const. art. IV, § 7 ("No Judge shall sit in any case wherein he may be interested, or where either of

the parties may be connected with him, by affinity or consanguinity, within such degrees as now are, or may hereafter be prescribed by Law, or where he shall have been counsel in the case."). Rule 18-102.11(a) also provides that a judge shall disqualify him or herself "in any proceeding in which the judge's impartiality might reasonably be questioned" including the delineated mandatory grounds for disqualification. In assessing this basis for disqualification the courts apply an objective standard – "whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney*, 311 Md. 246, 253 (1987). "Like all legal issues, judges determine appearance of impropriety—not by what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge." *Boyd,* 321 Md. at 86.

Adjudicating a matter involving the interpretation and application of a Maryland Rule, even when the constitutionality of the rule is alleged to be at issue, falls far short of demonstrating the bias or prejudice contemplated by the Rule. Nor can the impartiality of any judge reasonably be questioned under the applicable objective standard based merely on the judge's participation in the rule-making procedure and the execution of his or her constitutional and statutory responsibilities.

Article IV, § 18 of the Maryland Constitution empowers this Court to enact "rules and regulations concerning the practice and procedure in and the administration of the appellate courts. . .which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." Md. Const. art. IV, § 18(a). *See also* Md.

Code Ann., Cts. & Jud. Proc. § 1-201 ("The power of the Court of Appeals to make rules and regulations to govern the practice and procedure and judicial administration in that court and in the other courts of the State shall be liberally construed.") Thus, "[t]his Court acts both legislatively and judicially. [The Court] act[s] legislatively when [it] promulgate[s] rules of procedure and practice, *i.e.*, the Maryland Rules of Practice and Procedure, or to regulate the profession, *i.e.*, the Rules Governing Admission to the Bar of Maryland." *In re Application of Kimmer*, 392 Md. 251, 270 n.22 (2006).

As the highest court exercising appellate jurisdiction, this Court routinely interprets the Maryland Rules applying "principles of interpretation similar to those used to construe a statute." *Burson v. Simard*, 424 Md. 318, 324 (2012) (citations and quotations omitted) (interpreting Rule 14-305(g) to mean that original defaulting purchaser was liable for only a single resale). *See also Davis v. Slater*, 383 Md. 599, 604-05 (2004). Giving the words of the rule "their ordinary and natural meaning" the Court considers the plain language in light of "(1) the scheme to which the Rule belongs; (2) the purpose, aim, or policy of this Court in adopting the Rule; and (3) the presumption that this Court intends the Rules and this Court's precedent to operate together as a consistent and harmonious body of law." *Green v. State*, No. 4, Sept. Term, 2017, 2017 WL 4707528, at *14 (Md. Oct. 20, 2017) (quoting *Fuster v. State*, 437 Md. 653, 664-65 (2014)). Only "[i]f the Rule's plain language is ambiguous or not clearly consistent with the Rule's apparent purpose," does the Court look "for rulemaking intent in other indicia, including the history of the Rule or other relevant sources intrinsic and extrinsic to the rulemaking process, in light of: (1) the structure of the Rule; (2) how the Rule relates to other laws; (3) the Rule's general purpose;

and (4) the relative rationality and legal effect of various competing constructions." *Id*. *See also Duckett v. Riley*, 428 Md. 471, 486 (2012) (interpreting Rule 2-325(a) to mean that a party cannot demand a jury trial by means of a case information report).

Further, where a rule appeared to permit the garnishment of contingent settlement proceeds, which was prohibited by the General Assembly and thus, effected a substantive change in law, this Court concluded that it "lacked the power and authority to adopt such a provision" and accordingly held the garnishments to be invalid. *Consolidated Const. Servs., Inc. v. Simpson*, 372 Md. 434, 453-54 (2002). This Court's prior decisions confirm, therefore, that the Court may interpret and apply the provisions of the Maryland Rules even when the contours of the Court's underlying authority to enact a particular rule are at issue.

That is consistent with this Court's rejection of the implied assertion "that some kind of blind pride of authorship or hubris of power renders an [appellate judge or court] ipso facto unable to assess fairly and objectively the arguments that his or her decision should be revised, changed, or abandoned." *Public Serv. Comm'n v. Wilson*, 389 Md. 27, 92 (2005) (rejecting argument that administrative decision maker who made the decision to terminate employee was incapable of reviewing that decision under the statute). Thus, "[w]ithout a showing to the contrary, [appellate judges] 'are assumed to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (quoting *United States v. Morgan*, 313 U.S. 409, 421, (1941)).

Moreover, unlike the cases in which this Court and the Supreme Court have invoked the "rule of necessity" to adjudicate the validity of judicial pay and retirement legislation,

here, each judge lacks a "potential collateral interest" in the outcome of this matter (such as a personal financial interest in a judicial pay scheme) that would warrant application of the "rule of necessity" to ensure an adequate forum.[2] *Attorney Gen. of Md. v. Waldron*, 289 Md. 683, 685 n.2 (1981) (citing *United States v. Will*, 449 U.S. 200, 217 (1980)). On the contrary, this case concerns whether the circuit court has jurisdiction over Bar Counsel's discretionary decisions regarding the investigation of allegations of attorney misconduct and the application of a Maryland Rule. This Court may properly determine what a Rule means and how it is to be applied.

II. THE ADOPTION OF RULE 19-711(B) THROUGH THE RULE-MAKING PROCEDURES INCLUDED THREE PUBLIC MEETINGS AND AMPLE OPPORTUNITY FOR PUBLIC COMMENT.

By Rules order dated June 20, 2017, this Court adopted certain amendments to Rule 19-711(b) that permitted Bar Counsel to decline duplicative complaints and complaints submitted by an individual having no personal knowledge of the alleged attorney misconduct. See Ex. 1 at 1-4, 7. The amended Rule was adopted following multiple requests by both Bar Counsel and Acting Bar Counsel, consideration at two open meetings of the Standing Committee on Rules of Practice and Procedure on January 6, 2017 (duplicative complaint), and May 5, 2017 (no personal knowledge), published as part of

[2] Comment [3] to Maryland Rule 18-102.11 provides: "By decisional law, the rule of necessity may override the rule of recusal. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. When the rule of necessity does override the rule of recusal, the judge must disclose on the record the basis for possible disqualification and, if practicable, use reasonable efforts to transfer the matter to another judge."

the One Hundred Ninety-Third Report to this Court and a supplement to that report dated June 7, 2017, and considered at an open meeting before this Court on June 20, 2017. *See* Ex. 1.

The suggestion, therefore, that Acting Bar Counsel's request to the Chair of the Standing Rules Committee on Rules of Practice and Procedure constitutes an impermissible ex parte communication with this Court flies in the face of the well-established procedures for promulgating rules. *See* Md. Rule 16-701 (the Rule Committee "shall review relevant new legislation, Executive initiatives, judicial decisions, and proposals from persons and groups interested in the Maryland judicial system to determine whether any new Rules of Procedure or changes to existing Rules may be advisable."). Where, as here, the Rules prescribe certain procedures for the consideration and adoption of proposed rule changes, it cannot be said that requesting a rule change that is then vetted by the entire Rules Committee and finally considered by this Court at an open meeting constitutes an impermissible ex parte communication by Acting Bar Counsel. Nor is there any merit to Mr. Clevenger's assertion that he was entitled to personal notice of the proposed rule. Mot. to Recuse 6. The Rules Committee meetings and this Court's meeting were open to the public, and notice of the meetings and the Rules Committee agendas were posted on the website.

Mr. Clevenger's unsupported assertion that the Rule was changed expressly to thwart him and his "viewpoint" is belied by (1) the plain language of the Rule which permits Bar Counsel to decline a complaint that is "derived from published news reports or third party sources where the complainant appears to have no personal knowledge of the

information" irrespective of the motivation or ideology of the complainant; and (2) the history of the rule change. *See* Ex. 1. For example, in the April 17, 2017 letter accompanying the One Hundred Ninety-Third Report it is clear that the first proposed rule change—permitting Bar Counsel to decline duplicative complaints—likewise arose out of the filing of complaints by individuals with no personal knowledge of the alleged misconduct. Ex. 1 at 31, 12, 14. Certain matters such as high-profile prosecutions, and cases receiving significant coverage in the press, often generate the filing of numerous duplicative complaints. Thus, under the subsequent rule change Bar Counsel may decline a duplicative complaint and "a complaint submitted by an individual who provides information about an attorney derived from published news reports or third party sources where the complainant appears to have no personal knowledge of the information being submitted." Md. Rule 19-711(b) (2).[3]

Mr. Clevenger now contends that this Rule constitutes viewpoint discrimination, even though, on its face, the Rule does not distinguish between complainants based on any "viewpoint" —political or otherwise—but on whether the complainant has "personal knowledge" of the alleged attorney misconduct. Moreover, nothing in the Rule prohibits Mr. Clevenger from filing a complaint derived from a media report. Contrary to his assertion, the rule-amendment history confirms that the rule change enables Bar Counsel

[3] Effective August 1, 2017, this Court amended Rule 19-711 to clarify, consistent with Bar Counsel's long-standing practice, that Bar Counsel may decline to investigation "duplicative" complaints and complaints "derived from public news reports." Bar Counsel may, of course, initiate her own complaint based on information she receives from any source. Md. Rule 19-711(a).

to decline a complaint "from an individual who has no personal knowledge of the subject matter of a complaint but seeks to be designated as a complainant by filing a complaint based on publicly available information, often with some political motivation or agenda." Ex. 1 at 28. Regardless of a person's motivation for filing a complaint or ideology, the mechanism for declining the complaint is whether the complaint is derived from publicly available sources or personal knowledge.

CONCLUSION

The motion for recusal should be denied.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/Michele J. McDonald

MICHELE J. MCDONALD
CPF No. 9212160211
Assistant Attorney General

/s/Alexis B. Rohde

ALEXIS B. ROHDE
CPF No. 0412150224
Assistant Attorney General

200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
arohde@oag.state.md.us
mmcdonald@oag.state.md.us
(410) 576-6576 (telephone)
(410) 576-6393 (facsimile)

Attorneys for Petitioners

November 13, 2017

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This document contains 2,335 words, excluding the parts exempted from the word count by Rule 8-503.

2. This document complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/Michele J. McDonald

Michele J. McDonald

RULE 20-201 CERTIFICATION

I certify that this document does not contain any restricted information.

/s/Michele J. McDonald

Michele J. McDonald

CERTIFICATE OF SERVICE

I certify that on this 13th day of November 2017, a copy of the foregoing was filed and served electronically through the MDEC system on all persons entitled to service and mailed, via first-class mail, postage prepaid, to the following:

Ty Clevenger
P.O. Box 20753
Brooklyn, New York 11202-0753
Respondent Pro Se

/s/Michele J. McDonald
Michele J. McDonald