

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Joseph M. Getty
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Health and Government Operations Committee
House Economic Matters Committee

FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523

RE: House Bill 292
Occupational Licensing Boards and Commission on Judicial
Disabilities – Reporting Disciplinary Activities

DATE: January 19, 2022
(2/8)

POSITION: Oppose

The Maryland Judiciary opposes House Bill 292. The offered legislation requires that the Commission on Judicial Disabilities (“Commission”) provide certain information in an annual report to the General Assembly.

While the Judiciary appreciates the laudable goals of House Bill 292, this bill as it applies to the Commission raises significant separation of power concerns and infringes on the constitutional duties of the Judiciary concerning judicial conduct. The Maryland Constitution, Declaration of Rights, Article 8 states that "the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

If the offered legislation were to be enacted by the General Assembly, it would be repugnant to the Maryland Constitution in that it would permit the Legislative Branch of government to usurp the Judiciary's power to supervise the Judiciary Branch. Article IV, §§ 4A and 4B of the Maryland Constitution creates the Commission on Judicial Disabilities and gives it powers including to “[i]nvestigate complaints against any judge of the Court of Appeals, any intermediate courts of appeal, the circuit courts, the District Court of Maryland, or the orphans' court” and to “issue a reprimand and the power to recommend to the Court of Appeals the removal, censure, or other appropriate disciplining of a judge or, in an appropriate case, retirement.” Section 4B also gives the Court of Appeals rulemaking authority “to implement and enforce the powers of the Commission and the practice and procedure before the Commission.”

This reporting requirement as it pertains to the Commission also runs afoul of the confidentiality provisions of the Constitution pertaining to the Commission’s

investigations. The Maryland Constitution mandates that “all proceedings, testimony, and evidence before the Commission shall be confidential and privileged, except as provided by rule of the Court of Appeals.”

The provisions of House Bill 292 are in direct conflict with the rules governing the Commission as promulgated by the constitutional authority of the Court of Appeals. See Rules 18-401 through 18-442. Of particular concern is that House Bill 292 violates the Commission’s very strict confidentiality rules under Rule 18-407.

Rule 18-407(b)(2) provides, “[e]xcept as otherwise required by Rules 18-425, 18-426, and 18-427, all proceedings under Rules 18-421, 18-428, and 18-441 shall be **confidential.**” Rule 18-427 also provides that “pursuant to (b)(4), “[i]f the judge agrees to proceed in accordance with subsection (b)(2)(B), the matter shall be transmitted to the Board and the Commission pursuant to Rule 18-423. Proceedings before the Commission shall be on the record but, if the Commission issues the reprimand, those proceedings and the reprimand shall be confidential and not subject to disclosure, except as allowed by Rule 18-407(b), which allows a judge to waive confidentiality.” In addition, Rule 18-441, provides that all proceedings involving a judge’s alleged or apparent disability or impairment shall be confidential. These are just a few examples of the rules which articulate the crucial component of these proceedings which is confidentiality. This reporting requirement significantly impinges on this confidentiality.

In addition, it is unclear the impetus for this legislation. The Commission is already required to submit such a report to the Court of Appeals pursuant to Rule 18-411(i). Such report is publicly available on the Commission’s website. This Annual Report contains significant information in accordance with Rule 18-407(c) including the number of complaints received, investigations undertaken, and dispositions made by the Commission. Additionally, Rule 18-407(b)(6) specifically governs the disclosure of information to the Governor and General Assembly and limits said disclosure to certain specific information only upon written application for the purposes of “considering the nomination, appointment, confirmation, or approval of a judge or former judge.” There is no similar provision regarding the disclosure of information to any “Secretary” thus making this legislation overly broad. The proposed legislation would require the disclosure of information regardless of necessity.

Further, the information required under this legislation would potentially result in identifying the judge in violation of the confidentiality rules. While a report to the General Assembly would, on its face, contain anonymous information, jurisdictions with a small number of judges may allow for them to be easily identifiable. Current rules protect against possible identification where this legislation contains no safeguards. For example, proposed section 13-404(B) would require that the report contain information that is prohibited from disclosure. Rules 18-411(i) and 18-407(c) govern the data that may be included in the Annual Report. Notably, the report cannot include “material declared confidential under Rule 18-407” or, for non-public dispositions, “the identity of the judge” or any information that would result in the judge’s identity being “readily discernable.” Further, Rule 18-407(a)(1) prohibits the disclosure of a judge’s “personal identifying information. . .at all stages of proceedings under these Rules.” Proposed

section 13-404(B)(1)-(3) in House Bill 292 would require disclosure of judge's gender, race, and county of practice (we would note that judges cannot "practice" but rather "preside"). So as indicated above, if the one female judge in a jurisdiction was subject to discipline, disclosing her gender and county would in effect publicly identify the judge. Additionally, proposed section 13-404(B)(4)-(5) in House Bill 292 would require disclosure of the nature of the discipline imposed and the length of any disciplinary period. This information would be confidential in all but a handful of cases before the Commission as Rule 18-407(a)(2) requires that all proceedings, including complaints, investigations, and dispositions, remain confidential with certain limited exceptions.

Even if the proposed legislation could survive the confidentiality and constitutional concerns raised above, the proposed legislation contains no restrictions on the use of the information by the Governor, Secretary, and General Assembly. As presently drafted, such individuals and entities would have the unfettered ability to disclose, publish, circulate, disseminate, or otherwise distribute confidential identifying information at any time for any purpose.

The proposed legislation also includes provisions that are unenforceable from a technical perspective. For example, proposed section 13-404(B)(6) would require the disclosure of any fine imposed by the Commission. The Commission does not have fining authority. Additionally, the terms "disciplinary activities" and "discipline" are undefined. The only disposition that constitutes "discipline" under the Commission's rules is a reprimand. See Rule 18-427(c); compare Rules 18-425(b)(4), 18-426(c), 18-428(c)(2). Of course, the Court of Appeals has the ultimate authority to impose discipline on judges but such actions by the Court cannot constitute the "disciplinary activities" of the Commission. The Commission also does not currently maintain data on gender and race; indeed, that information is considered confidential. As the Commission could not and should not be required to make gender and race determinations on behalf of the judges under its authority, the only way for the Commission to obtain such information would be to request that each judge waive confidentiality and provide the information to the Commission. The Commission's small staff and heavy caseloads could not undertake such a project without debilitating its resources. In addition to the additional time and expense of creating an additional report, this proposed legislation could potentially place the Commission in a position of having to defend litigation that would undoubtedly result from the implementation of this bill's requirements as well as to publicly participate in legislative sessions to discuss any questions or issues related to the report.

cc. Hon. Debra Davis
Judicial Council
Legislative Committee
Kelley O'Connor