

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Joseph M. Getty
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: Senate Judicial Proceedings Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: Senate Bill 69
Courts – Standing Committee on Rules of Practice and Procedure
DATE: January 12, 2022
(2/3)
POSITION: Oppose

The Maryland Judiciary opposes Senate Bill 69. This bill proposes to ensure that members of the Standing Committee on Rules and Procedure: 1) are representative of the various practice areas of the law as practiced in the State, 2) can be removed by the Court of Appeals for good cause, 3) publicly disclose conflicts of interest and recuse themselves appropriately, 4) are subject to removal for failure to disclose a conflict or recusing themselves, and 5) are not directly or indirectly compensated for their work save as noted in the bill.

Senate Bill 69 would be an unconstitutional interference with the Court’s exercise of its rule-making authority and would violate the principle of separation of powers of the three branches of government. Under Article IV § 18(a) of the Maryland Constitution, the Court of Appeals is empowered to regulate the practice and procedure in, and the judicial administration of, the courts of this State. To assist the Court in this endeavor, the Court has appointed its Standing Committee on Rules of Practice and Procedure [the “Rules Committee”]. The Rules Committee has no independent powers of its own. Its sole function is advisory. The Court of Appeals, in the exercise of its rule-making authority provided by the Maryland Constitution, may accept, reject, remand, or modify any rule recommendation of the Committee. That Constitutional delegation does not contemplate interference with the exercise of that authority by the General Assembly. It is a judicial function. The Court’s authority to create and regulate its Rules Committee is derived directly from the Maryland Constitution and has been recognized as such by the General Assembly in §§ 13-101 and 1-201 of the Courts Article. Just as the Court of Appeals is not empowered to tell the Governor or the members of the General Assembly who should provide advice to them, neither should the General Assembly have a role in the selection of the Court’s advisors.

In addition, Title 18, Chapters 100 and 200, and Title 19, Chapter 300 of the Maryland Rules govern the ethical obligations of the judges, judicial appointees, and attorneys who

serve on the Rules Committee. Rule 19-306.4, for example, governs the conduct of an attorney whose client may benefit from the actions of an organization of which the attorney is a member. Where Senate Bill 69 requires the attorney to “publicly disclose any personal or professional interests of any client,” Maryland Rule 19-306.4 preserves client confidentiality, as mandated by other ethical requirements. Existing ethical rules pertaining to judges, judicial appointees, and attorneys adequately address the conduct of those individuals who serve on the Rules Committee.

Subsection (e) is particularly troubling. Proposed Rules that come before the Committee may be helpful or hurtful to existing or prospective clients of attorney members. Those members are, and need to continue to be, guided by the existing ethical rules that govern their practice and behavior, not by a mandated public disclosure of confidential information that can be hurtful to the attorney’s client. The knowledge and experience that attorneys have in their practices is often invaluable in attempting to understand the problem sought to be addressed by a proposed Rule, and experience has shown that the attorney (and judicial) members understand the ethical constraints on whether and how such information may be imparted to the Committee or the Court and whether recusal is required. The recusal requirements in the bill will result in recusal by the Committee members who have the most knowledge and experience in a subject matter area. If, for example, amendments to a Rule in Title 4 of the Maryland Rules are under consideration, a State’s Attorney or criminal defense attorney who is a member of the Committee should not be required to “recuse from all proceedings related to the matter.” Such recusal would have the adverse operational effect of preventing the Court from receiving balanced rule-related advice that includes input from the Committee’s members who are most qualified to provide that advice.

Maryland Rule 16-701 specifies the composition of the Rules Committee. The current membership comprises eminent attorneys, judges, and others highly competent in judicial practice, procedure, and administration. The Committee is diverse racially and geographically, and by gender. It includes individuals with expertise in many different areas of the law. The Rules Committee consists of 25 persons selected and appointed exclusively by the Court. There are 3 District Court judges, 3 Circuit Court judges, 2 appellate judges, 15 practicing attorneys, the State Court Administrator, and one Circuit Court clerk. Seven of the members are people of color. Ten are women. The members come from every part of the State and from a variety of practice areas. Two of the attorney members are members of the Legislature, one chosen from nominations by the Senate President and one from nominations by the Speaker of the House of Delegates. All of the members are acutely aware of the ethical constraints to which they are bound, both as members of the Rules Committee and in their individual practices as judges, attorneys, or other officials. In those practices, they do or might receive direct or indirect compensation from other persons – clients, State or local agencies for whom they work – which would seem to be prohibited, or disclosable, by Senate Bill 69.

Senate Bill 69 would require that the Committee membership “include equal and balanced representation of members from various practice areas.” Even if it were possible to measure “equal” in this context, or determine which practice areas must be included in

the measurement, implementation of this requirement would not improve upon the diversity that currently exists. Senate Bill 69 also requires that “constituents” of the Maryland Judiciary be represented on the Committee. The bill does not specify whether particular groups of constituents, such as prisoners, are to be included or may be excluded from service on the Committee.

Senate Bill 69 may also have adverse operational effects on the Judiciary by adversely affecting the ability of the Court to find highly qualified individuals who are willing to serve on the Rules Committee. In addition to the imposition of an ethical obligation that is in conflict with other ethical obligations, Senate Bill 69 contains vague requirements, the violation of which could result in a Committee member’s public removal from the Committee. The meaning of “conduct that consciously or unconsciously casts a negative perception on the committee” is unclear, but Senate Bill 69 provides that it is grounds for public removal of a member “for good cause shown.”

If “for good cause shown” means that a due process hearing is contemplated prior to removal of a member from the Committee, no procedure for holding an evidentiary hearing is specified in the bill. If hearings are to be held, the cost of doing so would have a fiscal impact, albeit a small one, on the budget of the Judiciary. If no due process hearing is contemplated, the operational adverse effect of the bill is that well-qualified individuals may be reluctant to risk their professional reputations by serving on the Committee because there is no assurance of the opportunity to contest an alleged violation of a vague standard and the resultant public removal of the individual from the Committee.

Imposition of the arbitrary membership requirements set forth in Senate Bill 69 would have an adverse operational impact on the ability of the Court of Appeals to fulfill its constitutionally mandated duties. In summary, Senate Bill 69 not only is not needed to solve an assumed problem that experience has not been shown to exist but can significantly impede the very kind of discussion that is necessary to allow the Rules Committee and the Court to perform their assigned functions.

cc. Hon. Charles Sydnor
Judicial Council
Legislative Committee
Kelley O’Connor