STATE OF MICHIGAN

Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 20-13-GA

ANDREW A. PATERSON, P 18690,

Respondent.
_____/

OPINION AND ORDER GRANTING RESPONDENT'S MOTION TO DISQUALIFY BOARD MEMBER ALAN GERSHEL

Issued by the Attorney Discipline Board
333 W. Fort St., Ste. 1700, Detroit, MI

Respondent has moved for the disqualification of the undersigned, Attorney Discipline Board ("Board" or "ADB") Member Alan Gershel, from all Board proceedings in this matter. The Grievance Administrator has filed a response. The Board and its members look to MCR 2.003 for guidance with regard to the resolution of disqualification issues. Pursuant to MCR 2.003(D)(3)(a), I have considered the motion and the Administrator's response, and, for the reasons set forth below, the motion will be granted.

The formal complaint in this matter was filed on February 12, 2020. Thereafter, respondent filed a motion to permit prehearing depositions, which the hearing panel denied. Respondent has filed a petition for interlocutory review by the Board. Prior to consideration by the Board, the undersigned issued a disclosure and notice of intent to participate by means of a letter from the case manager assigned to this matter dated November 18, 2020 (See Ex D to Respondent's Motion to Disqualify Board Member Gershel). The November 18th letter states, in its entirety:

> To the parties:
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> Board Member Alan Gershel wishes to disclose that he served as Grievance Administrator from October 2014 through April 30, 2019. Respondent's pleadings indicate that the Request for Investigation leading to the filing of the Formal Complaint in this matter was filed on April 1, 2019. Mr. Gershel has no recollection of any participation in this matter during his tenure at the Attorney Grievance Commission. In light of this, and in accordance with MCR 2.003 and Michigan Ethics Opinion JI-034, he intends to participate in this matter as a member of the Attorney Discipline Board.

After the foregoing letter was sent, counsel for the parties exchanged emails with the ADB Case Manager and each other. Respondent's counsel asserted that the conduct referenced in Count One of the Formal Complaint in this matter had been the subject of a January 2016 request for investigation ("RI") filed by a complainant not involved in the present matter, and that the

investigation was closed. The ADB Executive Director replied to the emails on November 23, 2020, and again invited the parties to submit any evidence or documentation they may have which would indicate that the undersigned participated personally and substantially in this matter while he was the Grievance Administrator, and that such information could be conveyed to the ADB "with any motion for disqualification, response thereto, or otherwise."

On November 30, 2020, respondent filed a motion to disqualify the undersigned from all Board proceedings in this matter. The motion asserts that RI 0113-16 was filed with the Attorney Grievance Commission ("AGC") on January 7, 2016, and that, pursuant to a statement of policy in the AGC 2018 Annual Report, the undersigned, as Grievance Administrator, "was required to review the RI [and presumably did so] . . . and he determined that there were *prima facie* allegations of professional misconduct committed . . . and Respondent was therefore required to answer the RI," which was then assigned to AGC counsel for investigation. A similar assertion regarding the process is made with regard to RI 19-0954 which was filed on April 1, 2019. The motion argues that disqualification is required under MCR 2.003(C)(1)(b)(ii) and Michigan Code of Judicial Conduct (MCJC), Canon 2A. Under Canon 2A, "A judge must avoid all impropriety and appearance of impropriety." And MCR 2.003(C)(1)(b)(ii) provides that disqualification of a judge is warranted when the judge "has failed to adhere to the appearance of impropriety standard set forth in Canon 2."

In light of their overlapping nature, the following possible bases for disqualification under MCR 2.003(C) have been considered and will be addressed whether or not they were raised by respondent's motion:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
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> (a) The judge is biased or prejudiced for or against a party or attorney.
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> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.
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> (c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
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> (d) The judge has been consulted or employed as an attorney in the matter in controversy.
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> (e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

No evidence or claim that disqualification is required under MCR 2.003(C)(1)(a) has been offered, and this ground is not applicable because I am not, in fact, biased. The remaining grounds under consideration overlap somewhat in the situation presented here, i.e., where the head of a prosecutorial agency has been appointed to the tribunal that decides appeals from cases initiated by the prosecutorial agency.

Also, in this matter, as to MCR 2.003(C)(1)(c), there is no specific assertion that I have personal knowledge of disputed evidentiary facts, and I have no such knowledge. However, respondent does argue that, while I was Grievance Administrator, I participated in decisionmaking with respect to a 2016 RI which arose from the facts alleged in Count One of the Formal Complaint (although that 2016 investigation did not lead to the filing of a Complaint during my tenure and respondent was notified that it was closed). This will be discussed further below.

As noted, respondent relies upon MCR 2.003(C)(1)(b)(ii) for his motion. I will also consider whether I should recuse myself under MCR 2.003(C)(1)(b)(i), which, like subrule (b)(ii), provides that disqualification is appropriate or required when a judge is not actually biased, but where the circumstances would raise serious concerns among reasonable persons about the judge's ability to be impartial. Thus, disqualification will be required

> "[i]f the situation is one in which 'experience teaches that the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable.'" *Hughes v Almena Twp*, 284 Mich App 50, 70; 771 NW2d 453 (2009) (citation and quotation marks omitted). For example, that risk may be present when the decision-maker:
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> > (1) has a pecuniary interest in the outcome; (2) has been the target of personal abuse or criticism from the party before him; (3) is enmeshed in [other] matters involving the petitioner ... ; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. [*Crampton v Dep't of State*, 395 Mich. 347, 351; 235 NW2d 352 (1975) (citations and quotation marks omitted; formatting altered).]
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> In evaluating this issue, [courts] consider "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 US at 883–884, 129 S Ct. 2252, quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct. 1456; 43 L Ed 2d 712 (1975).
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> In addition, the appearance of impropriety, under Canon 2 of the Michigan Code of Judicial Conduct, may provide grounds for disqualification of a judge. Canon 2 provides that judges "must avoid all impropriety and appearance of impropriety." Under this objective standard, whether an appearance of impropriety exists requires consideration of "'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'" *Caperton*, 556 US at 888, 129 S Ct 2252, quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004). [*Okrie v State of Mich*, 306 Mich App 445, 471–72; 857 NW2d 254, 270–71 (2014), lv den 497 Mich 955 (2015).]

State Bar of Michigan Informal Ethics Opinion JI-34 (1990) provides significant guidance regarding the potentially applicable provisions of MCR 2.003 (which have been renumbered) as well as MCJC 2's requirement that the appearance of impropriety be avoided – even though that standard had not been incorporated in MCR 2.003 at the time the opinion was issued. JI-34 treated

the inquiry of a chief judge regarding a former chief county prosecutor who was about to join the court. The inquiry requested an opinion on the scope of disqualification for the new judge from cases involving the prosecutor's office. JI-34 thoughtfully examines not only the role of the appearance of impropriety standard, but also the application of current MCR 2.003(C)(1)(d) and (e),

The ethics opinion starts by persuasively analyzing the predecessor of MCR 2.003(C)(1)(e) (a judge is disqualified when the judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years) and concludes that this rule is not applicable to full-time prosecutors. The committee opined that this rule

> is concerned with the likelihood of preexisting and possibly continuing economic ties which make it inappropriate for a judge to hear a case involving former partners, clients and associates for a two year period even if the judge had no prior personal involvement in the case. It is only for private practitioners that the knowledge or the allegiance of a partner, former client, or former associate is imputed to the judge necessitating a two year disqualification.

Unlike private practitioners, prosecutors do not have such economic entanglements with their former offices, co-workers, and governmental entities. The opinion's interpretation that prosecutors are not "partners" in a "firm" was also based on the fact that the types of conflicts former prosecutors would face as judges are covered by other rules.

Next, the opinion examines the applicability of MCR 2.003(C)(1)(d)'s predecessor (a judge is disqualified when the judge has been consulted or employed as an attorney in the matter in controversy). I will quote at length the text of the opinion as it contains several important points:

> [A] prosecutor has ultimate statutory responsibility to act as the lawyer for the county and the state in all cases in the county, both civil and criminal. The prosecutor is by statute counsel "for the state or county . . . in all cases" (emphasis supplied) whether appearing personally or, as is more common, through an assistant prosecutor, and without regard to whether the prosecutor's name appears on the court pleadings.
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> Accordingly, a prosecutor who becomes a judge would be subject to disqualification under MCJC 3C and MCR 2.003(B)(3) [currently MCR 2.003(C)(1)(d)] in any civil or criminal matter involving the county or the state in which that judge had acted as [a] lawyer for the government unit involved. This disqualification is imposed even in cases in which the prosecutor was not personally involved in any active capacity because the prosecutor is by statute lawyer for the county or the state in all cases in the prosecutor's county. Indeed, *Bradshaw v. McCotter*, 785 F2d 1327 (CA 5 1986), provided habeas corpus relief where a state judge on the case was earlier a prosecuting attorney whose name appeared on a brief even though the judge had no substantial participation in the case while prosecutor. "The separation between the roles of prosecutor and judge must be certain and inflexible." 785 F2d at 1329.

This disqualification of the chief local law enforcement lawyer is consistent with the disqualification of a federal judge who was the United States Attorney from all cases pending while that judge served as United States Attorney. The United States Attorney has statutory duties similar to Michigan prosecutors which makes the United States Attorney "of counsel" on all cases involving the United States in his or her district. 28 USC Sec 547; *United States v Maher*, 88 F Supp 1007 (ND Maine 1950).

Disqualification of judges who were the United States Attorney in their districts does not apply to Assistant United States Attorneys who were not personally involved in the investigation or prosecution of the case. *United States v De Luna*, 763 F2d 897, 907 (CA 8 1985). Nor does it apply to the Attorney General or an Assistant Attorney General who was not personally involved "of record," or in an advisory or supervisory role. See Mr. Justice Rehnquist's opinion in *Laird v Tatum*, 93 S Ct 7 (1972), regarding his 1971 Congressional testimony as Assistant Attorney General on an issue that was involved in the *Laird v Tatum* case that was then pending before the D.C. Circuit Court of Appeals but in which he had no personal involvement.

The policy of more restrictive treatment for purposes of disqualification of higher ranking chief prosecutors is also parallel to the differential disqualification treatment for higher and lower ranking officials in the Ethics In Government Act, 18 USC Sec 207(b) and (c).

Because the disqualification under MCR 2.003(B)(3) is triggered only when the judge was earlier "consulted or employed as an attorney in the matter in controversy," and because the chief prosecutor's statutory representation under MCLA 49.153 applies only to matters "in all the courts of the county," a former chief prosecutor would not be disqualified from hearing a case that was being investigated while the judge was chief prosecutor if the judge was not personally and substantially involved in that investigation.

Also, the state is not a party to a case under MCLA 49.153 until the case is formally begun. Thus, it is only when the prosecutor's office initiates the first formal prosecutorial proceeding (complaint, information or indictment) designed to bring the named alleged offender before the court that disqualification rule MCR 2.003(B)(3) would apply to a former prosecutor who was not personally and substantially involved prior to that time. See, e.g., *United States v Wilson*, 426 F2d 268 (CA 6 1970).

General supervisory responsibilities of an assistant prosecutor or the chief prosecutor prior to the initiation of the charging document is not sufficient to require a disqualification because the judge would have had no personal involvement gaining access to confidential, inadmissible or prejudicial information.

Disqualification is not required for a prosecution commenced after the judge left the prosecutor's office, but under a general policy guideline or statutory interpretation established by the judge while the chief prosecutor, unless the judge felt so strongly about the issues that it demonstrated a personal bias. *Barry v United States*, 528 F2d 1094 (CA 7 1976).

> Nor is disqualification required if the judge was involved as prosecutor of the same defendant in a different case unless there was a lingering personal bias or prejudice against the defendant. See, e.g., *United States v Di Pasquale*, 864 F2d 271 (CA 3 1988); *In re Grand Jury Investigation*, 486 F2d 1015 (CA 3 1973); *Gravenmier v United States*, 469 F2d 66 (CA 9 1972); *United States v Vasilick*, 160 F2d 631 (CA 3 1947). [Michigan Ethics Opinion, JI-34.]

Finally, Ethics Opinion JI-34 discusses what constitutes "personal and substantial participation" in a matter, observing that such a determination is highly dependent upon the context and that, to maintain public confidence in the administration of justice, avoidance of the appearance of impropriety (as is required by MCR 2.003 and MCJC 2) is relevant to the determination. "[A]ctually signing the complaint and warrant would be "substantial," because that act entails a determination regarding probable cause that the defendant committed a crime."

The conclusion of JI-34 provides a helpful summary of the opinions expressed therein which can translate fairly easily, with appropriate adaptations, to guidance for those who have had roles in both the prosecutorial and adjudicative branches of the Michigan discipline process:

> [A] judge who was the chief prosecutor in the county is disqualified from hearing any portion of a criminal or civil case involving the state or county which was initiated or pending while the judge served as prosecutor.
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> A judge who was the chief prosecutor in the county may hear civil or criminal cases involving the county or state if these cases were initiated after the judge resigned as prosecutor, even if the judge had acted as lawyer for the county or state within the prior two years.
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> A judge who was the chief prosecutor in the county may hear civil or criminal cases involving the county or state if these cases were initiated after the judge resigned as prosecutor even if the charge was initiated under a policy set by the judge while prosecutor, or even if the case was under investigation while the judge was prosecutor, so long as the judge as prosecutor did not have any personal and substantial involvement in the investigation.
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> A criminal case is "initiated" for purposes of this professional obligation with the first formal prosecutorial pleading designed to bring the named alleged offender before the court. Personal and substantial involvement in a matter means being personally involved to an important, material degree. Determination of what constitutes substantial participation on a matter depends on the context, and it need not involve a determination on the merits, direct contact with the witnesses, the parties or their lawyers, or actual appearance before a tribunal.

The pronouncements in JI-34 are not only well-reasoned, but are also consistent with jurisprudence dealing with similar disqualification questions. For example, in *People v Delongchamps*, 103 Mich App 151; 302 NW2d 626 (1981), the Court of Appeals interpreted the predecessor to 2.003(C)(1)(e) and held that a "judge is not an attorney for a party within the meaning of the court rule by virtue of his former employment by the county as a prosecutor where the judge did not appear personally and participate in the action."

Federal caselaw is also instructive. In *United States v Wilson*, 426 F2d 268 (CA 6, 1970), cited in JI-34, the court held that the federal disqualification statute did not require a judge who had previously served as US Attorney to be disqualified, absent actual bias, "because of some prior general supervisory responsibilities as United States Attorney over all federal criminal investigations in his district." 426 F2d at 269. Although the investigation regarding defendant Wilson was pending during the judge's prior tenure as US Attorney, the indictment was issued by the US Attorney who succeeded the judge. The court held that mandatory disqualification is required "where the trial judge has previously been 'of counsel' in the same 'case,'" and "a case begins with the first formal prosecutorial proceeding (arrest, complaint, or indictment) which is designed to bring a named alleged offender before the court." *Id.*

Turning to the instant motion, it is argued that MCR 2.003(C)(1)(b)(ii) and MCJC 2A require my disqualification. Ethics Opinion JI-34, *Delongchamps*, and *Wilson* are not discussed by the parties. However, the motion does cite a case and passage referenced in JI-34: *Bradshaw v McCotter*, 785 F2d 1327 (CA 5) is cited for the proposition that "[t]he separation between the roles of prosecutor and judge must be certain and inflexible." 785 F2d at 1329. *Bradshaw* is distinguishable from the instant situation, however, because the case in *Bradshaw* had been pending in court when the name of the former State Prosecuting Attorney (who was later appointed judge) appeared on a brief.[1] The Fifth Circuit panel initially hearing the case found that this presented a Due Process violation and affirmed the trial court's grant of habeas corpus. On rehearing, the panel revisited this holding in light of a subsequently issued Supreme Court decision bearing on the issue and reversed the trial court's grant of habeas, holding that this did not establish a Due Process violation. However, two of the three judges adhered to the view that the judge should have recused himself notwithstanding his lack of participation in the prosecution, though the basis for recusal is not apparent from the opinion. Judge Gee, concurring specially, wrote, in part, "Further reflection has persuaded me that a rule which requires recusal on the basis of appearances alone is too broad . . . . In this case, there is not even a claim that Judge Vollers had anything to do with resisting Bradshaw's appeal, only that an uninformed observer might believe that he did." *Bradshaw v McCotter (on reh)*, 796 F2d 100 (CA 5, 1986).

Again, I note that *Bradshaw* is by and large consistent with the Sixth Circuit's decision in *United States v Wilson*, *supra,* which holds that recusal is required when a judge is hearing a case that was pending before a court while he or she was the US Attorney. In this case, the Formal Complaint was filed on February 12, 2020, some ten months after I concluded my service with the Attorney Grievance Commission. In accordance with the great weight of the authority I have reviewed, the fact that an investigation may have been pending during my tenure as Grievance Administrator does not in and of itself require disqualification absent my personal and substantial participation in the matter.

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[1] The *Bradshaw* court held that: "Whether or not [Judge] Vollers actually participated in Bradshaw's prosecution must be found to be immaterial. The appearance of Vollers' name on the prosecuting attorney's brief undermined a fundamental aspect of our criminal justice system: a judge's neutrality." 785 F2d at 1329. *Compare*, *State v Ellis*, 349 Mont 317; 206 P3d 564 (2009) (appearance of judge's name on brief as the Attorney General, does not itself serve to trigger a disqualification; case-by-case determination as to personal and substantial participation; required; oversight and approval of all appellate filings constitutes personal and substantial participation).

Respondent argues, based on procedures set forth in the AGC's 2018 Annual Report, that I must have participated in the investigation of both the 2016 RI and the RI filed on April 1, 2019, one month before my departure on April 30, 2019. Essentially, respondent contends that the Administrator is the first person at the AGC to review a request for investigation, and that the RI is then routed to staff for investigation before it is submitted to the Commission for disposition. One can see how this impression may have been created by the Annual Report. Notwithstanding the summary of procedures in the Report, I can assure you that such a process is nearly exactly backwards. During my administration, the RI's were initially reviewed by staff counsel serving in an intake unit. Even if an RI was addressed to me, staff would still route it directly to the intake unit.

After that review, a determination was made by intake counsel to either, recommend that the RI be rejected as inadequate, incomplete, or insufficient to warrant the further attention of the Commission, pursuant to MCR 9.112(C)(1)(a); serve the RI and request an answer, and upon receipt of same recommend that the RI be dismissed, pursuant to MCR 9.114(A)(1); or recommend that a further investigation be conducted, pursuant to MCR 9.114(A)(2). All recommendations made by intake counsel were reviewed and approved by the Deputy Administrator.

If an RI was rejected or dismissed, the letter advising the parties of the same was most often signed by intake counsel; in certain infrequent instances it was signed by me as Grievance Administrator. If intake counsel determined that further investigation was warranted, the RI was assigned by the Deputy Administrator to staff counsel outside of the intake unit for investigation and eventual submission to the Commission for its review and decision. I, as Grievance Administrator, may, on occasion, have had some involvement in the investigation being conducted by the staff counsel assigned to the RI file. I, as Grievance Administrator, always substantively reviewed the recommendations made by staff counsel before the matter was submitted to the Commission for its review and decision.

In this case, Exhibit B to respondent's motion, a May 17, 2017 letter from an Attorney Grievance Commission Associate Counsel, states that, following investigation the matter was submitted to the Commission for review and decision and that the Commission directed that the investigative file be closed pursuant to MCR 9.114(A)(2). In accordance with the procedures in place during my tenure as Grievance Administrator, I would have closely reviewed the recommendation made by staff counsel, any documents contained in the file, if necessary, and would have supported that recommendation before RI File No. 0113-16 was submitted to the Commission for its review and decision.

NOW THEREFORE,

IT IS ORDERED that respondent's motion for the disqualification of Alan Gershel is **GRANTED** for the reason that the documentation submitted with the motion demonstrates that I participated in recommending action to the Attorney Grievance Commission regarding the 2016 Request for Investigation, apparently pertaining to facts and circumstances which are the subject of Count One of the instant Formal Complaint, and that I consider such participation to be substantial within the meaning of State Bar of Michigan Ethics Opinion JI-34 and other relevant authorities.

ATTORNEY DISCIPLINE BOARD

By: /s/ Alan Gershel
Member

Dated: January 20, 2021