STATE OF MICHIGAN

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ATTORNEY DISCIPLINE BOARD
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Attorney Discipline Board

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission,

Petitioner,

v Case No. 15-23-GA

LYLE DICKSON, P 55424

Respondent.
_____/

ORDER DENYING RESPONDENT'S MOTION
TO DISQUALIFY HEARING PANEL

Issued by the Attorney Discipline Board
211 W. Fort St., Ste. 1410, Detroit, MI

Respondent moves to disqualify the remaining members of the hearing panel in this matter following the voluntary recusal of another member. Pursuant to MCR 9.115(F)(2)(b), a motion for disqualification is to be decided by the Chairperson of the Attorney Discipline Board under the guidelines of MCR 2.003.

The formal complaint in this matter was filed on March 11, 2015. The misconduct hearing on the allegations in the formal complaint herein took place on June 24, 2015 and September 29, 2015. On or about October 22, 2015, the petitioner served a request for investigation on one of the panel members. The panelist did not disclose the investigation in a writing filed with the Board under MCR 9.115(F)(2) and the petitioner did not file a motion for disqualification within 14 days of its filing of the request for investigation.

The parties filed written closing arguments with regard to misconduct in October and November of 2015, and the panel issued its report on misconduct on March 3, 2016, concluding that respondent violated MRPC 8.4(a), 8.4(c), and MCR 9.104(1), (2), (3) and (4). A sanction hearing was held on May 19, 2016.

In June 2016, the Administrator became aware that a panel member was the subject of a request for investigation and called this fact to the attention of the Board. The panel member disclosed the pending request for investigation on June 9, 2016, and the Administrator filed a motion to disqualify that member on June 23, 2016. On June 28, 2016, a Notice of Voluntary Recusal was issued by the Board, stating in part that the panelist

> has notified the Attorney Discipline Board that he wishes to voluntarily recuse himself from further consideration of this matter. The matter having been heard and the record having been closed, [the] remaining panel members . . . shall issue their decision in accordance with MCR 9.115(J).

Respondent filed the instant motion on June 29, 2016[1], and argues that as a matter of due process, and under MCR 2.003 and Board opinions and orders, the remaining hearing panel members must be disqualified at this juncture:

> There is obvious opportunity for taint (and motive for that taint to be in favor of the Grievance Administrator) and there is no way of measuring its effect on the panel as a whole. Therefore, 'to fulfill its obligations to do justice and satisfy the appearance of justice,' this Board must disqualify the remaining members of the panel and provide a new hearing. [Quoting *Grievance Administrator v Joseph W. Moch*, ADB 131-88 (ADB 1991).]

The Due Process Clause, and applicable court rules, require disqualification when, "based on objective and reasonable perceptions" the adjudicator has "a serious risk of actual bias impacting the due process rights of the party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009)." MCR 2.003(C)(1)(b). However, "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Cain v Dep't of Corr*, 451 Mich 470, 498 n 33; 548 NW2d 210 (1996) (citations and internal quotation marks omitted). Most matters do not rise to the level of presenting constitutional questions, and "the burden is heavy for a disqualification motion grounded on the constitutional right to an unbiased and impartial tribunal." *Id.*

Where no actual prejudice or bias on the part of a panelist has been demonstrated, therefore, the question becomes solely whether there exists "a constitutionally intolerable probability of actual bias." *Caperton v Massey, supra*, 556 US at 882. To be intolerable, the risk must be a "serious" one, "based on objective and reasonable perceptions." Id., at 884; MCR 2.003(C)(1)(b). The particular facts underlying the proceedings and its participants matter greatly: "disqualifying criteria 'cannot be defined with precision. Circumstances and relationships must be considered.'" *Caperton*, 556 US at 880.

A hearing panelist must also "adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b).

> 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 U.S. at 888 quoting ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004). [*Okrie v State*, 306 Mich App 445, 472; 857 NW2d 254 (2014).]

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[1] Respondent's argument that the remaining panel members should be disqualified is based on Mr. Linden's participation in the deliberations while also the subject of an investigation at the AGC. Therefore, respondent discovered the purported ground for disqualification of all panel members on June 9, 2016, when he became aware of the request for investigation against Mr. Linden. As such, a motion to disqualify would have been due on June 23, 2016. MCR 9.115(F)(2)(b). Although petitioner timely filed a motion to disqualify Mr. Linden, respondent did not file a motion to disqualify the remaining panel members until June 29, 2016. In any event, untimeliness is not dispositive, but it is a factor to consider when deciding a motion to disqualify. *Id.* See also MCR 2.003(D)(1)(d).

Many panelists and judges might, in an effort to avoid even approaching what some might view as an appearance of impropriety, voluntarily recuse themselves from participation in cases when faced with a motion to disqualify – even if the grounds are not strong. For this reason, the voluntary recusal in this case is not inconsistent with the disclosure preceding it which recited the panelist's assertion that he could remain impartial.

Among adjudicators, there are differing philosophies about recusal on motion or without a challenge. One court has concisely stated some of the competing concerns:

> In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case. . . . Litigants are entitled to an unbiased judge; not to a judge of their choosing. A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is. [*In re Drexel Burnham Lambert, Inc*, 861 F2d 1307, 1312 (CA 2, 1988) (citations omitted).]

On the other hand, in this case respondent references the Board's commitment, in *Moch, supra,* to "take extraordinary steps, where appropriate, to insure confidence in the discipline process" and argues that to fulfill its obligations to do justice and to satisfy the appearance of justice . . . this case must be assigned to a new panel." *Id.* At 3-4. It is true the Board observed in that case that "mere questions of the impartiality of a hearing panel threaten the purity of the discipline process," and that "disqualification may be appropriate even where actual prejudice or bias has not been established." *Moch, supra,* p 3.

However, not just any question or perception will require disqualification. As Board Chairperson John F. Burns stated in a decision a year after *Moch*:

> I do not believe that it is enough to speculate that a certain relationship could conceivably create an appearance of impropriety. This is especially true when no objective evidence of bias or prejudice is offered. Instead, I believe that the test for an appearance of bias is closer to the test which has been adopted under federal rules governing the disqualification of judges, that is, whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt that justice would be done in the case. [*Grievance Administrator v William D. Frey*, 92-184-GA (ADB 1992) (denying disqualification of panelist with a partner under investigation by the AGC), citing *Pepsico v McMillan*, 764 F2d 458, 460 (CA 7, 1985).]

Some years later, in a matter involving a panel member who disclosed that the Court of Appeals had recently upheld a "significant" (multi-million dollar) verdict against his employer in a case in which the respondent was the plaintiff's counsel, the respondent moved to disqualify the panelist on the grounds that the panelist's continued service on the panel would result in an appearance of impropriety. Although the panelist was employed in a different area of the general counsel's office, did not have responsibility for the case involving respondent, and believed he could remain objective in the discipline matter, the Board Chairperson determined that "under all of the circumstances, disqualification appear[ed] to be the wisest course." *Grievance Administrator v Geoffrey N. Fieger,* 01-55-GA (10/23/2002 Order) (the panel had considered and denied

respondent's motion for summary disposition but had not conducted a hearing). Among the circumstances noted by the Chairperson was that "the hearing panel has yet to conduct an evidentiary hearing and the substitution . . . would not disrupt the proceeding to any great extent." Thereafter, the respondent in that matter moved to disqualify the remaining panelists "based on a general assertion that [the disqualified panelist's participation in [the] matter prior to [his disqualification] resulted in a 'taint' on [the remaining] hearing panelists." That motion was denied. *Id.* (2/3/2003 Order).

The United States Supreme Court announced last year that an unconstitutional failure of a judge on a multimember court to recuse is a defect not amenable to harmless error review even if the judge's vote was not dispositive. *Williams v Pennsylvania*, __US __; 136 S Ct 1899; 195 L Ed 2d 132 (2016). The Court determined that the participation of Pennsylvania Chief Justice Castille in the Pennsylvania Supreme Court's decision to vacate a lower court's postconviction stay of Terrance Williams' death penalty presented an unconstitutional risk of bias where, as prosecutor years before, Castille specifically approved seeking the death penalty in that case. The Court concluded:

> Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused." [136 S Ct at 1910.]

The form this remedy took can be seen in the specific relief ordered by the Court: remand for further proceedings not inconsistent with the Court's opinion. This meant that the remaining justices of the Pennsylvania Supreme Court would rehear the case, even though, as the Commonwealth argued, this relief would be incomplete because the "judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case." In remanding, the Court noted:

> Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations. [*Id.*]

In considering respondent's argument that the remaining panel members must be disqualified because of the "taint" of the now-recused panel member's participation, it must be noted that the panelist under investigation was not actually disqualified. Rather, he voluntarily recused himself after the *Administrator* moved for his disqualification.

Respondent's argument that disqualification of the entire panel is *required* because of the participation of the panelist with a pending request for investigation by the petitioner is undercut by the fact that there is no authority for the proposition that a panel member under investigation must not hear an unrelated matter. To the contrary, the rules governing procedure in discipline matters, subchapter 9.100, specifically contemplate the continued participation of a panel member who is the subject of a request for investigation:

> A hearing panelist or master who becomes the subject of an otherwise confidential request for investigation must disclose that investigation to the parties in the matter before the panelist or master, or must disqualify himself or herself from participation in the matter. [MCR 9.111(B)(2).]

This provision is consistent with State Bar of Michigan Ethics Opinion RI-131 (April 28, 1992), which, like the aforementioned rule, concludes that a panelist subject to an investigation by the AGC must disclose that fact to the parties, and a panelist who is charged with misconduct in formal proceedings is disqualified. Although the opinion does not explain the basis for treating the two situations differently, the lines drawn in RI-131 were codified by the Court in its 2011 amendments to MCR 9.111.

Moreover, it is quite common for a panel member to disclose the pendency of an otherwise confidential request for investigation and indicate, as was done here, that the panel member "do[es] not believe that th[e] investigation has impaired or will impair [his or her] ability to serve as a hearing panelist in this case without bias or prejudice." In many instances, neither the petitioner nor respondent objects to the panelist's continued participation. If a party does file a motion to disqualify the panelist, the motion will ordinarily be denied absent a showing of actual bias or prejudice. See *Grievance Administrator v David H. Trombley*, 00-163-GA (4/1/2004 order) ("In addition to its untimeliness, the respondent's motion fails to allege any actual bias or prejudice on the part of [the panelist] and the motion is subject to denial on that ground alone.")

The undersigned is mindful of the fact that timely disclosure by the affected panelist would have enabled motions for disqualification to have been brought, or objections waived, before the issuance of the report on misconduct. However, as has been noted above: the panelist with a request for investigation pending was not found to have been biased, prejudiced, or otherwise disqualified; our Court has not seen fit to adopt a blanket rule requiring recusal or disqualification in every instance in which a panelist is under investigation; and, the Board and its Chairpersons have not been inclined to disqualify panel members with pending requests for investigation absent something more to establish bias or the serious probability thereof. Disqualification of co-panelists with no investigations pending is an even more remote, and certainly less appropriate, outcome in these circumstances.

Respondent's motion, the Grievance Administrator's response, and respondent's reply have been considered by the undersigned.

NOW THEREFORE,

IT IS ORDERED that respondent's motion for the disqualification of the remaining members of Tri-County Hearing Panel #57 is **DENIED** for the reason that the undersigned is not persuaded that, based on objective and reasonable perceptions, that the previous participation of the hearing panelist under investigation or the continued participation of the remaining panelists in this matter present a serious risk of actual bias.

ATTORNEY DISCIPLINE BOARD

By: 

Louann Van Der Wiele, Chairperson

DATED: March 9, 2017