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McGrane defends JQC's confidentiality

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Just two weeks after his appearance at the House Civil Justice Subcommittee meeting, former Bar President Miles McGrane spoke to the Bar Board of Governors at its March meeting, advocating again on behalf of the Judicial Qualifications Commission and its right to confidentiality.

On March 9, the House panel moved HJR 11-05, a bill that would amend the Florida Constitution and make JQC proceedings public. Currently, nearly all JQC records are confidential. Complaints are only released to the public once formal charges are filed. HJR 11-05 would change that, requiring the JQC to match the standards of the Florida Commission on Ethics. McGrane, chair of the JQC, argued that improved transparency of the JQC process could occur without hindering attorneys — particularly younger attorneys and those in smaller counties — from filing complaints.

"I'm not here to protect bad judges," said McGrane during his presentation to the board. "If it was only about transparency in government, I wouldn't be here, because obviously you can't win that battle. What I need to do is discuss with you why there is confidentiality in complaints of the JQC and why a system that was established in 1966 and has operated well needs to go on as the same system."

Right now, under JQC guidelines, all complaints are confidential until charges are filed against the judge, in contrast to the Bar's own disciplinary actions. The Bar maintains confidentiality of complaints only until probable cause is or isn't found, and that issue raised questions from some board members.

"The Bar's grievance process allows for the confidentiality to go away either upon a finding of probable cause or upon a finding of no probable cause. The Florida Ethics Commission has the same confidentiality provision. . . ." said Board of Governors member Ed Scales. "Why is that same standard not appropriate for the JQC?"

The reasoning behind the difference, McGrane said, is simple.

"We don't waive confidentiality because we use the window between finding probable cause and charging the judge in an effort to negotiate resignation with the judge. . . . What we do in return for a judge where we have a finding of probable cause is say, 'If you resign right now and you agree in writing that you will never apply to be a judge again, and you agree in writing

that you will never serve as a senior judge, we won't file charges, and this will go away.'"

In addition, McGrane mentioned that judges are required to maintain silence when faced with complaints or accusations.

"Judges cannot defend themselves publicly. A lawyer, in private practice, can say, 'Look, this is all bogus.' But if confidentiality is lifted, and this complaint becomes public, the judge still can't speak for himself or herself unless in the form of an election. And you're going to see horrible misuse of this.

"Judges are different. They respond differently; they have different ethics; they have different canons to respond to. And what's going to happen is this is going to invite more recusals. Just think about this: In the case of a not-so-ethical litigator — and we've seen some lawyers who are not very ethical — what if you just hate your judge? Well, have your client file a complaint to the JQC, and then we'll recuse the judge, because in this instance, when a complaint is dismissed, even the judge doesn't know that the complaint was filed. No one knows about a complaint. I daresay any judge who has sat in family court, any judge who has sat in criminal court, any judge who has ruled on foreclosures, has complaints against him or her, I promise you as I stand here."

The concern, said McGrane, is that under the proposal by HJR 11-05, once past the probable cause phase, all complaints become public, even the ones where there is a finding of no probable cause.

"Last year, about 90 percent of the complaints filed ended with the finding of no probable cause, or the complaint was not within our jurisdiction," said McGrane. "Of the 90 percent of the complaints where no probable cause was found, about half of those are individuals complaining about 'I didn't like the outcome of my case.' 'The judge didn't rule in my favor.' 'The judge took my child away from me.'

"Basically they're trying to turn us into another appellate court."

For McGrane, though, perhaps the biggest issue is protecting individuals who make the complaints.

"Most of the valid complaints come from court personnel," said McGrane. "They come from court reporters. They come from bailiffs. They come from young lawyers, young prosecutors, young public defenders who are in their first or second year. And we tell them that 'your complaint will be confidential.'

"If you take a young prosecutor or public defender who just got his or her job and works in a small county for $36,000 a year, and you're going to ask that young lawyer to take on a judge and not give them confidentiality, in reality you're not going to get these complaints.

"What we face is a true chilling effect on the system, and that is why we oppose the complete waiver of confidentiality."

For Bar members, said McGrane, removing the veil of confidentiality could also potentially affect judicial elections and the politicizing of the campaign process.

Later in the meeting, the Board of Governors adopted a Bar legislative position opposing HJR 11-05 as drafted. The board was also told the current bill will likely be changed to give the Speaker of the House access to JQC records as long as the speaker maintains the confidentiality of those records, unless they are needed in connection with an impeachment investigation.

News HOME

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