VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 23rd day of February, 2024.

On January 31, 2024, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 23-1 pursuant to its authority established in this Court's order of April 18, 2019. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee
Opinion 23-1

Whether a judge should recuse when an attorney is an elected member of the Board of Supervisors for the locality.

ISSUE:

Must a judge "automatically" recuse himself or herself if an attorney appearing before the judge is an elected member of the local Board of Supervisors?

Answer: No. Such recusal is not "automatic" under the facts presented. A judge must always consider the relevant facts and circumstances, considering both the true state of his or her impartiality and the public perception of his or her fairness, before deciding whether to recuse from a particular matter.

FACTS:

An attorney who practices regularly in all levels of courts in a locality – circuit and district – was recently elected to the Board of Supervisors ("Board") for that same locality. As a member of the Board, the attorney will preside over budget hearings and vote on the budgets for all three levels of the courts. The chief judge of each of those courts appears once a year before the Board to discuss the budget requests for his or her court. Additionally, the Board approved funding for a recent renovation of courtrooms, and it is anticipated that the courts will have future items and projects requiring requests for funding and approval by the Board.

Based on this background and the relationship between the courts and the Board, the chief circuit court judge has asked whether the judges in the circuit and district courts should recuse themselves from cases involving that attorney.

DISCUSSION:

The Committee has been asked to opine on the propriety of judges hearing matters involving an attorney who has been elected to the Board of Supervisors, which is responsible for reviewing and approving courts' budgets, and considering funding and approval of other court-related projects. Based on the facts presented, the question is confined solely to the attorney's identity or role as a Board member. The attorney's practice in the courts has been varied, yet

unrelated to service as a Board member. The request does not encompass any particular case involving the Board as a party to, or the subject of, a legal matter, nor as to the attorney appearing as representative or counsel for the Board. The Committee's opinion is similarly confined solely to the issue of the attorney as a Board member.

Certain financial issues such as court budgets and funding of court projects are invariably intertwined with the governance of localities, and having attorneys elected as local public officials is not unusual. But despite being commonplace, the Canons do not explicitly address the relationship between judges and practicing attorneys serving as local public officials. Instead, judges must be governed by the broader concepts involving maintaining impartiality and preserving the public trust. In conjunction with the broader ethical concepts, the Committee's opinion is also informed by the established caselaw governing recusal and disqualification.

> Our legal system is based on the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Intrinsic to these Canons are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.

Va. Sup. Ct. R., Part 6, § III, Preamble. When determining if proposed conduct is consistent with the Canons, the Preamble also advises judges to consider certain questions, including whether the action or inaction will harm public trust in the fairness of the judiciary. *Id.*

1. Applicable Canons and standards

The three broad Canons, along with their associated standards, are binding and authoritative. *Id.* The first Canon applicable to this request is Canon 1, which requires a judge to be impartial. As one aspect of impartiality, Canon 1A addresses a judge's relationships:

> A judge must not allow family, social, political, economic, or other relationships to influence the judge's conduct or judgment. A judge must use discretion in maintaining relationships with people, entities, or counsel who may appear before the judge in judicial proceedings in order to reduce the possibility that the judge will be disqualified.

Canon 1D addresses recusal or disqualification, beginning with the well-established principle that "[a] judge must recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ." Canon 1D(1). Canon 1D also includes a non-exclusive list of examples, which do not specifically deal with the issues at hand.

The Canons also recognize the individual discretion involved in arriving at a disqualification decision. "If a judge, *in exercising the judge's discretion*, determines that the judge should not preside over a matter, the judge may recuse himself or herself by so stating, but without stating the basis of the recusal on the record." Canon 1D(5) (emphasis added).

Also applicable to this request is Canon 2, which overall requires a judge to uphold the public trust. This requirement applies equally to a judge's public and private behavior.

> Judges, by virtue of their office, have been placed in a position of public trust. While judges should engage in public matters and serve their communities, they must govern their public and private behavior to ensure the greatest public confidence in the judge's independence, impartiality, integrity, and competence.

Canon 2A.

2. Analysis

The Committee has previously reviewed and analyzed questions as to whether judges may ethically preside over matters involving attorneys with various personal or business relationships with a sitting judge. *See, e.g.*, Va. JEAC Op. 99-4 (1999) (judge not required to recuse where the judge filed a bar complaint against an attorney appearing in the case); Va. JEAC Op. 01-7 (2001) (judge not required to recuse where attorney in a case subleases an office from the judge's former law partner in a building co-owned by the judge); Va. JEAC Op. 01-8 (2001) (judge not required to recuse merely because he or she is an acquaintance of a party, attorney, or witness); Va. JEAC Op. 03-1 (2003) (judge not required to recuse from the cases of attorneys who sublease an office building owned by the judge if the lessee has a close familial relationship with one of the subtenant attorneys); Va. JEAC Op. 16-1 (2016) (no automatic recusal when an attorney who regularly appears before the judge is a party or witness); and Va. JEAC Op. 19-4 (2020) (no per se disqualification where judge leases a parking space from an attorney's LLC).

Despite each of those prior opinions having dealt with the judge's personal or business relationship with an attorney appearing before the judge, the Committee nonetheless found no per se disqualification. In the matter at hand, the judge's relationship with the attorney as Board member is not personal. Rather, it derives from concerns regarding the budget and funding process of a local governing body and its Board members as that process impacts the courts.

Regardless of the absence of a per se disqualification, as the Committee has previously opined, a judge's decision to recuse himself or herself requires deliberation pursuant to well-established principles. Although the Canons were revised in 2022, the overarching standard for disqualification remains the same, as does the caselaw interpreting and applying that standard:

> The Canons of Judicial Conduct provide that the judge should disqualify himself if "his impartiality might reasonably be questioned." . . . In exercising his discretion in this regard, the judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness, in order that public confidence in the integrity of the judiciary may be maintained.

Stamper v. Commonwealth, 228 Va. 707, 714 (1985) (citations omitted). *See also Prieto v. Commonwealth*, 283 Va. 149, 163 (2012); *Wilson v. Commonwealth*, 272 Va. 19, 28 (2006). "Exactly when a judge's impartiality might reasonably be called into question is a determination

to be made by that judge in the exercise of his or her sound discretion." *Davis v. Commonwealth*, 21 Va. App. 587, 591 (1996).

As the Committee outlined in Virginia JEAC Op. 16-1, and reaffirmed in Virginia JEAC Op. 19-4, a judge's decision to recuse himself or herself includes determining introspectively if the judge can remain fair and impartial to all parties, and considering how the decision and related conduct will be perceived by party litigants and the general public. In Virginia JEAC Op. 16-1, the Committee opined that "a decision to recuse oneself from a case is a decision to be made by the individual judge exercising sound discretion given the totality of the circumstances in the individual case."

This conclusion is consistent with the understanding that the Canons and standards are meant to be rules of reason. Va. Sup. Ct. R., Part 6, § III, Preamble. Attorneys frequently serve in executive and legislative positions, both locally and at the state level. Finding a per se disqualification based solely on those positions would result in an inordinate number of conflict cases needing to be heard by judges from other circuits and districts, or by retired recall judges. Such an influx of conflict cases may prove unworkable and also be at odds with the Canons' goal to minimize disqualifications whenever possible.[1] For example, extending such a per se disqualification to an attorney serving in the General Assembly would disqualify every judge in the Commonwealth due to the election and review process of judges.[2]

This conclusion is also consistent with other jurisdictions that have considered similar questions. The Maryland Judicial Ethics Committee opined that judges are not required to recuse themselves in proceedings in which a party is represented by an attorney who is also an elected county commissioner with control over a portion of the court's budget. Md. Jud. Eth. Comm. 2011-07 (2011). "Recusal is not required because the only connection between the judge and the attorney is that they are officers of different branches of government. It is not a personal relationship and has no bearing on the judges' personal finances because judges are State employees." *Id.* The Maryland Committee also noted that

> The authority of a county commissioner creates no more of a conflict than an elected member of the Maryland General Assembly appearing before the court, given that the legislature controls much of the court's budget, as well as the judges' salary and benefits. Indeed, deference to legislator-lawyers is required by statute, which provides that their cases must be scheduled so as not to interfere with the legislative session. Md. Code Ann., Courts and Judicial Proceedings Article, § 6-402. *See also* Md. Rule 2-508(d). Yet it is accepted that the appearance of a legislator on behalf of a client does not require recusal. Viewed objectively, then, the circumstances presented by the appearance in court of the county commissioner do not require recusal.

Id. Finally, the Maryland Committee also differentiated between the attorney appearing as counsel in a case and the subject of litigation: "There may be, however, instances where the *subject matter* of litigation concerns the relationship of the court and county government. In those cases recusal may be required." *Id.* (Emphasis added). While not binding, the Committee finds this Maryland decision particularly instructive.

The New York Advisory Committee on Judicial Ethics also found that a county-level judge, whose court is financed by the state, need not disqualify himself or herself when a member of state legislature appears as an attorney for a party, even though that legislature establishes the judges' salaries. NY Jud. Adv. Op. 89-93 (1989).[3]

Under the facts presented, the Committee is of the opinion that the requesting judge is not per se disqualified from the attorney's cases based solely on that attorney's identity or role as a Board member for the locality. In accordance with Virginia caselaw and prior opinions, the Committee reaffirms its guidance in Virginia JEAC Op. 19-4: "while the facts as presented do not necessitate a per se disqualification, the judge must carefully examine from both a subjective and objective standpoint whether disqualification is nonetheless required."

CONCLUSION

The Committee finds that under the facts presented, there is no per se disqualification; the judge is not automatically recused from a case simply because the attorney is a member of the Board. The judge, in his or her discretion, will still need to determine from both a subjective and objective standpoint whether his or her impartiality may reasonably be questioned, and thus, whether disqualification is required.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Preamble, Canon 1, Canon 1A, Canon 1D, Canon 1D(1), Canon 1D(5), Canon 2, Canon 2A, Canon 2L(2), Canon 2U(1), and Canon 2U(3).

Va. JEAC Op. 99-4 (1999).

Va. JEAC Op. 01-7 (2001).

Va. JEAC Op. 01-8 (2001).

Va. JEAC Op. 03-1 (2003).

Va. JEAC Op. 16-1 (2016).

Va. JEAC Op. 19-4 (2020).

Stamper v. Commonwealth, 228 Va. 707 (1985).

Prieto v. Commonwealth, 283 Va. 149 (2012).

Wilson v. Commonwealth, 272 Va. 19 (2006).

Davis v. Commonwealth, 21 Va. App. 587 (1996).

Ford v. Ford, 412 So.2d 789 (1982).

Md. Jud. Eth. Comm. 2011-07 (2011).

NY Jud. Adv. Op. 89-93 (1989).

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FOOTNOTES:

[1] *See, e.g.*, Canon 1A, Canon 2L(2), Canon 2U(1), and Canon 2U(3).

[2] *See, e.g., Ford v. Ford*, 412 So.2d 789, 791 (1982) (appellate court declining to find bias, in part, because "the wife's theory that the judge might be prejudiced because the husband [a member of state legislature] supported a pay increase for circuit judges would serve only to disqualify every circuit judge in the state.")

[3] The New York Committee differentiated the matter from an earlier opinion finding that a town or village justice *should* recuse when a town or village councilman appears as an attorney, where that councilman participates in setting the justice's salary. *Id.* (citing New York Advisory Committee on Judicial Ethics Opinions 88-17(b), 88-41, and 88-126). The New York Committee cited a major difference, notably, that the relationship between the judge and salary-setting attorney is perceived by the public to be much closer in a town or village than at the state level. *Id.*

AUTHORITY:

The [Judicial Ethics Advisory] Committee is established to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct. . . . A request for an advisory opinion may be made by any judge or any person whose conduct is subject to the Canons of Judicial Conduct. The Judicial Inquiry and Review Commission and the Supreme Court of Virginia may, in their discretion, consider compliance with an advisory opinion by the requesting individual to be a good faith effort to comply with the Canons of Judicial Conduct provided that compliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same. Order of the Supreme Court of Virginia entered April 18, 2019.