

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of March, 2021.

On January 19, 2021, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 20-1 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 20-1

A judge may direct the court clerk to include with unlawful detainer summonses additional materials which describe legal and financial assistance available to tenants, under specific proscribed parameters and procedures.

ISSUES:

With respect to unlawful detainer cases, a judge wants to direct his or her court clerk to include with the summonses additional materials which describe legal and financial assistance available to tenants under specific proscribed parameters and procedures, but without contemporaneous notice to landlords:

1. Would the proposed procedure constitute the judge manifesting either bias towards tenants or prejudice towards landlords?

Answer: No. Under the facts presented, including the materials would be consistent with guidance that a judge may inform unrepresented parties of free legal and/or other assistance. While the materials may serve to benefit tenants, landlords may also benefit, or at least would not be prejudiced. Finally, such materials would not suggest the judge's predisposition as to the merits of the cases filed.

2. Would the proposed procedure constitute the judge making an ex parte communication to tenants?

Answer: No. Under the procedures proposed by the judge, the materials do not address the merits of any specific case that has been filed, the process would be reported to landlords and the identical materials would be received by both parties. The procedure for preparing the materials and their content would not constitute a direct communication from the judge to the parties.

3. Would the proposed procedure otherwise violate the Canons of Judicial Conduct of the Commonwealth of Virginia?

Answer: No. Provided the actual materials included with the summonses do not substantially deviate from the representative materials provided for the Committee's review, and

the judge and court adhere to those procedures and parameters proposed in the request and outlined herein.

FACTS:

Faced with an increasing number of unlawful detainer actions, a judge wants to direct the clerk's office to attach materials to the summonses which advise parties of legal and financial resources that may be available to assist them. Based on the representative materials provided for the Committee's review, the content of the materials would generally consist of the name and contact information of an organization providing free legal assistance, and the name and contact information of a program providing financial assistance for rent or mortgage payments. The materials may also include information regarding the availability of an eviction diversion program. The materials would be prepared and copied by an entity external to the clerk's office, although the clerk's office would be responsible for associating them with the summonses before they are issued. Finally, the materials would contain a disclaimer that the information is not endorsed by the court, that the court does not require tenants to avail themselves of any resources before appearing in court, and that the materials are not an official communication of the court. The court would report the practice to plaintiff-landlords by requiring clerks to provide a copy of the materials to plaintiff-landlords when they file the requisite forms for issuance of a summons for unlawful detainer or writs of eviction and by advising the plaintiff-landlords that the materials would be included with the summonses/writs issued.

DISCUSSION:

The judge's request regarding the provision of information detailing resources which may assist one side in a legal dispute centers on the issue of impartiality. The request requires the Committee to examine several specific issues which could reflect on the judge's impartiality: bias, prejudice, and ex parte communications with parties.

The concept of impartiality and the requirement that a judge be impartial is ingrained throughout the Canons.

Canon 1 provides that a judge shall uphold the integrity and independence of the judiciary. The Commentary to Canon 1 discusses the importance of public confidence in the integrity and independence of judges, which "depends in turn upon their acting without fear or favor." Moreover, "[p]ublic confidence in the impartiality of the judiciary is maintained by the adherence of each judge" to the responsibility of being independent, while complying with the law and provisions of the Canons. *Id.*

Canon 3 requires a judge to perform his or her judicial duties impartially and diligently, and specifically Canon 3B(5) provides that:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

The Commentary to Canon 3B(5) reiterates that “[a] judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”

However, “[i]n performing the duties of his or her judicial office, a judge may explain the judicial process, while maintaining impartiality. A judge may also inform unrepresented persons of free legal aid and similar assistance that is available.” Canon 3B(3), Commentary (emphasis added).

Even in the context of explaining the judicial process and providing information to unrepresented persons, a judge must be careful to guard against any impermissible ex parte communications. Under Canon 3B(7):

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Canon 3B(7)(a).

The requirement that a judge be impartial is also frequently found in discussions of the role of the judges in the legal system.

It is a fundamental principle of our legal system that judges should perform their duties impartially, free of personal interest or bias. There is perhaps no more basic precept pertaining to the judiciary than the one holding that judges should be sufficiently detached and free from predisposition in their decision-making.

CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 4.01, at 4-2 (5th ed. 2013). “Impartiality concerns the judicial capacity to decide cases with an open mind and without bias for or against those who appear before the judge.” *Id.* at 1-3.

Ex parte communications may indicate partiality since, by definition, they involve one party to the exclusion of another. However, courts have declined to adopt a categorical rule that whenever a judge engages in an ex parte communication, the judge is deemed to be partial, biased, or prejudiced such that disqualification is mandated. Generally, to support a reasonable inference of a judge’s prejudice or appearance of prejudice

against a party or lawyer, the communication must stem from or be motivated by actual or apparent bias for or against a party or lawyer.

ARTHUR H. GARWIN, ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 304 (3d ed. 2016).

These principles provide the background for answering the specific questions raised by the judge in this matter.

Unlawful detainer actions generally arise in the context of landlord-tenant situations, whereby landlords seek to evict tenants for nonpayment of rent or other violations of lease agreements. At least in part due to the financial repercussions of the global pandemic COVID-19, courts are seeing an increase in the number of unlawful detainer actions. As noted in the Facts, above, the requesting judge proposes to provide certain materials advising parties of resources which may be available to assist them upon issuance of an unlawful detainer summons. The judge has provided the Committee representative materials showing the general form and content of the materials. The judge has also proposed specific procedures and parameters by which the proposed materials would be made available to the parties.

1. Does the proposed procedure constitute the judge manifesting either bias towards tenants or prejudice towards landlords?

The representative materials include information about available legal and financial resources, such as a local legal aid office providing free legal assistance, and available programs that may assist with rent or mortgage payments. On its face those resources may appear to disproportionately benefit tenants, as they are only available to one party. Any benefits realized by tenants who avail themselves of the listed resources would not necessarily result in a corresponding prejudice to the landlords, especially where financial assistance is involved. Resources which enhance a tenant's ability to pay may ultimately benefit a landlord.

More importantly, such information is entirely consistent with the letter and spirit of the Canons. The Commentary to Canon 3B(3) provides that a judge may "inform unrepresented persons of free legal aid and similar assistance that is available." The Committee's understanding based on the representative materials is that the materials would do just that, no more and no less.

Information about available eviction diversion programs benefits both parties, especially if litigation can be avoided and a satisfactory resolution reached. Regardless of whether the programs are ultimately utilized, simply providing information of the existence, purpose, and function of such a program as an alternative to litigation demonstrates neither bias for, nor prejudice against, either party.

The representative materials reviewed by the Committee and the resource information provided therein do not suggest any predisposition regarding the merits of the cases filed, and the procedures outlined by the requesting judge ensure that both parties are equally informed of available resources that may be beneficial. The Committee is therefore of the opinion that the proposed procedure does not constitute the judge manifesting bias towards tenants or prejudice towards landlords.

2. Does the proposed procedure constitute the judge making an ex parte communication to tenants?

Ex parte communications are those made to or by a judge which do not include all the parties to a case. Because a party is by definition excluded from the communication, it is not permitted except in limited circumstances. *See* Canon 3B(7).

In this matter, the type of information being attached to unlawful detainer summonses issued to tenants does not address the merits of any specific case that has been filed. Instead, the dissemination to all tenants of available, but not required, resources is more closely related to the type of administrative information and resources provided by Virginia courts to assist self-represented litigants as permitted by Canon 3B(7)(a).

The requesting judge has proposed a procedure by which the court clerks would notify landlords about the practice and provide the identical materials to landlords when they file the unlawful detainer actions. Thus, the information would be received by both of the parties, albeit at different times in the process.

The procedures outlined by the judge also include measures to distance the court from direct communication with the parties. An entity external to the court will prepare and copy the materials. The materials will contain a disclaimer that the information is not endorsed by the court, that the court does not require tenants to avail themselves of any of the resources, and that the materials are not an official communication of the court. The only “communication” would be the actions of the court clerk in disseminating the proposed materials to the parties.*

Although not explicitly required by the Canons, the materials must also make clear that the parties may not seek legal advice and assistance from the court clerks. *See* Va. Sup. Ct. R., Part 6, § I(3)(O) (an exception to the unauthorized practice of law is “[p]roviding assistance as a court clerk to litigants in completing for filing, forms prescribed by the Supreme Court or other tribunal; information shall be limited to description of forms, instructions for use, and required sections to complete. Court clerks shall not engage in providing legal advice, recommendations or opinions as part of the court clerk’s assistance.”).

For these reasons, the Committee is of the opinion that the inclusion of the resource materials does not constitute impermissible ex parte communications.

3. Does the proposed procedure otherwise violate the Canons of Judicial Conduct of the Commonwealth of Virginia?

The Committee is of the opinion that the proposed procedure would not violate the Canons, so long as the actual materials included with the summonses do not substantially deviate from the representative materials provided for its review, are neutral, and do not advocate for either party. The Committee also cautions that its opinion is dependent on the judge and the court adhering to the proposed procedures and parameters outlined in the request and within this Advisory Opinion.

CONCLUSION:

The Committee cautions that its opinion is limited to the facts presented, opining only on unlawful detainer actions and the representative materials provided for its review. Should the actual materials utilized substantially deviate from the examples reviewed, the Committee’s

opinion may change. The Committee finds that under the facts presented, the judge may direct his or her court clerk to include with unlawful detainer summonses additional materials which describe legal and financial assistance available to assist the parties. The judge and the court must maintain the appropriate safeguards and procedures to ensure the impartiality of the judge and the court. As presented, the representative materials would not manifest bias, prejudice, or constitute ex parte communications, would provide valuable information to otherwise self-represented litigants, and may result in an alternative resolution of disputes.

A Copy,

Teste:



Clerk

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 1, Canon 3, Canon 3B(3), Canon 3B(5), Canon 3B(7).

CHARLES GARDNER GEYH, ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02, § 4.01 (5th ed. 2013).

ARTHUR H. GARWIN, ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (3d ed. 2016).

Va. Sup. Ct. R., Part 6, § I(3)(O).

FOOTNOTE:

* Even though the actions would be undertaken by clerks of the court, the question is nevertheless important to examine, because judges must make reasonable efforts to ensure that the prohibitions against impermissible ex parte communications are not violated by court personnel or judicial staff. *See* Canon 3B(7), Commentary.

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.