VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 28th day of April, 2016.

On April 8, 2016 came the Judicial Ethics Advisory Committee and presented to the Court Opinion 16-1 pursuant to its authority established in this Court's order of October 20, 2015. Upon consideration whereof, the Court approves the opinion as set out below.

Judicial Ethics Advisory Committee
Opinion 16-1
Recusal When a Lawyer Who Regularly Appears Before a Judge is a Party or Witness in a Proceeding Before that Judge

ISSUES:

1. Must a judge "automatically" recuse himself/herself if an attorney who regularly, or not so regularly, appears before the judge is a party or a witness in a case over which the judge is presiding?

Answer: No. Such recusal is not "automatic." However, a judge must carefully consider the relevant facts and circumstances of each particular case, considering both the true state of his/her impartiality and the public perception of his/her fairness, before making a decision whether to recuse himself/herself from a particular matter.

2. Is the recusal decision a personal one for the individual judge, or can the chief judge of the jurisdiction exercise the power to recuse for the individual judge?

Answer: Under the circumstances described, the decision whether to recuse is a matter for deliberation and decision by the individual judge.

FACTS:

On numerous occasions, lawyers who practice before a particular judge may appear before the judge either as a party or a witness in a civil or criminal matter. In such instances, judges must decide whether to automatically recuse themselves due to a perceived conflict. Additionally, a question has arisen about the role that chief judges may play in the recusal decisions of the judges in their jurisdiction.

DISCUSSION:

1. Under the facts presented, must a judge automatically recuse himself or herself?

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. CANONS OF JUDICIAL CONDUCT FOR THE STATE OF VIRGINIA Preamble (1999).

"A fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Due Process Clause requires an objective evaluation of the relevant facts of each case to determine whether "the probability of actual bias on the part of the judge or decisionmaker [sic] is too high to be constitutionally tolerable." Id. at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). While the Due Process Clause sets the "constitutional floor" for judicial disqualification, the states may "adopt recusal standards more rigorous than due process requires." Id. at 889 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002)).

In *Stamper v. Commonwealth,* 228 Va. 707, 324 S.E.2d 682 (1985), a lawyer who practiced in the trial judge's court was a defendant in a criminal proceeding in which the lawyer was convicted. The lawyer had appeared as counsel in the trial judge's court on the day of his arrest. The trial judge refused to recuse himself. The Supreme Court of Virginia affirmed the trial judge's decision not to recuse himself. The Court noted:

> A trial judge must exercise reasonable discretion to determine whether he possesses such bias or prejudice as would deny a party a fair trial, but no issue of bias is raised merely by the judge's familiarity with a party through prior judicial proceedings . . . . 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, 228 Va. at 714, 324 S.E.2d at 686 (citations omitted). *See also Prieto v. Commonwealth*, 283 Va. 149, 163, 721 S.E.2d 484, 493 (2012); *Wilson v. Commonwealth*, 272 Va. 19, 28, 630 S.E.2d 326, 331 (2006); *Deahl v. Winchester Dept. Soc. Serv.*, 224 Va. 664, 672-73, 299 S.E.2d 863, 867 (1983); *Buchanan v. Buchanan*, 14 Va. App. 53, 55, 415 S.E.2d 237, 238 (1992).

"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, 466 S.E.2d 741, 743 (1996), citing *Justus v. Commonwealth*, 222 Va. 667, 673, 283 S.E.2d 905, 908 (1981). *See also Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E.2d 451, 459-60 (1992), *aff'd,* 246 Va. 337, 437 S.E.2d 914 (1992); *Terrell v. Commonwealth*, 12 Va. App. 285, 293, 403 S.E.2d 387, 391 (1991).

The questions presented are governed by Canons 2 and 3.

Under Canon 2: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 2A states: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial

responsibilities with integrity and impartiality is impaired." Canon 2A, Commentary. "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment." Canon 2B.

Canon 3 requires that "a judge shall perform the duties of judicial office impartially and diligently." "A judge shall hear and decide promptly matters assigned to the judge except those in which disqualification is required." Canon 3B(1). Canon 3B(5) requires "that a judge perform judicial duties without bias or prejudice." "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 . . . A judge must be alert to avoid behavior that may be perceived as prejudicial." Canon 3B(5), Commentary.

Canon 3E provides specific guidance on the issue of recusal:

> E. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer . . . .

Canon 3E(1). The commentary to Canon 3E(1) provides:

> Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.
>
> A judge should disclose information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Canon 3E(1) Commentary.

Under Canon 3F:

> A judge who may be disqualified by the terms of Section 3E may ask, or have the clerk of court ask, the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification *other than personal bias or prejudice concerning a party*, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. . . .

Canon 3F (emphasis added).

Thus, the decision by a judge as to whether he or she should recuse himself or herself

from a particular matter over which the judge presides requires the application of both objective and subjective standards. From the perspective of the judge, he or she must introspectively determine if he or she can remain fair and impartial to all parties to the proceeding. However, an affirmative answer to this question does not end the inquiry. A judge must also consider how his or her decision and related conduct will be perceived by the party litigants, and by the general public. If the judge's decision is such that his or her impartiality might reasonably be questioned, then he or she should recuse himself or herself from hearing that matter.

Another consideration is whether the judge should disclose information that he or she believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge subjectively believes there is no real basis for disqualification. For example, such information might be the fact that the lawyer party/witness regularly appears before the judge as an attorney representing clients on unrelated matters.

As Canon 3F makes clear, the parties cannot waive disqualification if the basis of such disqualification is the personal bias or prejudice of a judge concerning a party.

In providing guidance on the application of Canons 2 and 3 to decisions about recusal, a prior opinion of this Committee concluded that a judge is not required to recuse himself or herself when the judge has previously filed an ethics complaint with the Virginia State Bar against a lawyer who now appears in the judge's court representing a party. Va. JEAC Op. 99-4 (1999). Additionally, Va. JEAC Op. 01-8 (2001) concluded that a judge is not automatically required to recuse himself or herself merely because a party, attorney, or witness is an acquaintance of the judge. Opinion 01-8 contains a helpful list of examples and cases where recusal was not required within the context of some degree of familiarity between judge and lawyer.

Under the facts that have been presented, the Committee is of the opinion that a judge is not required to recuse himself or herself merely because a lawyer who regularly appears before the judge is a party or a witness in a proceeding over which the judge is presiding, so long as the judge, in the exercise of sound discretion, determines that he or she does not harbor bias or prejudice which would impair the judge's ability to give all parties to the proceeding a fair trial. The judge's decision must also take into account the possible public perception of whether the judge's impartiality and fairness could reasonably be questioned.

2. Is the recusal decision a personal one for the individual judge, or can the chief judge of the jurisdiction exercise the power to recuse for the individual judge?

With regard to the second question asked, the Committee is of the opinion 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. Although the question whether other justices or judges can compel a colleague to recuse oneself from a particular matter is not settled from jurisdiction to jurisdiction,[1] the Committee's conclusion is consistent with the case law cited above.[2]

Chief judges have significant authority with regard to the administration of their respective courts, judges, and court personnel. *See* Va. Code §§ 17.1-400, 17.1-105, 16.1-69.35, 1993 Op. Atty. Gen. Va. 91 (July 15, 1993)(chief district court judge "is ultimately responsible for the management of the courts, all operational aspects, other judges and personnel within the district. Within the guidelines established by policy or legislation, the chief judge sets operating procedures and policies in the district."). However, a decision whether or not to recuse must be an individual decision, and that ethical decision-making responsibility has not been delegated by statute. If all of the judges of any court make a decision to recuse themselves (Va. Code § 17.1-105 (B)), it should be because each judge has made that decision for himself or herself individually. At the same time, a judge should recognize that in considering how the litigants or general public may perceive the judge's conduct and decision regarding recusal, the opinions and suggestions of the chief judge or fellow judges regarding recusal may be considered by the judge making that decision.

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Teste:

Patricia L Harrington

Clerk

REFERENCES:

Canons of Judicial Conduct for the State of Virginia Preamble, Canon 2, Canon 2A, Canon 2B, Canon 3B(1), Canon 3B(5), Canon 3E, Canon 3F.

U.S. Const. amend. XIV, § 1.

Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009).

In re Murchison, 349 U.S. 133 (1955).

Withrow v. Larkin, 421 U.S. 35 (1975).

Republican Party of Minn. v. White, 536 U.S. 765 (2002).

Stamper v. Commonwealth, 228 Va. 707, 324 S.E.2d 682 (1985).

Prieto v. Commonwealth, 283 Va. 149, 721 S.E.2d 484 (2012).

Wilson v. Commonwealth, 272 Va. 19, 630 S.E.2d 326 (2006).

Deahl v. Winchester Dept. Soc. Serv., 224 Va. 664, 299 S.E.2d 863, 867 (1983).

Buchanan v. Buchanan, 14 Va. App. 53, 415 S.E.2d 237 (1992).

Davis v. Commonwealth, 21 Va. App. 587, 466 S.E.2d 741 (1996).

Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981).

Welsh v. Commonwealth, 14 Va. App. 300, 416 S.E.2d 451 (1992), *aff'd,* 246 Va. 337, 437 S.E.2d 914 (1992).

Terrell v. Commonwealth, 12 Va. App. 285, 403 S.E.2d 387 (1991).

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

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

Va. Code §§ 17.1-400, 17.1-105, 16.1-69.35.

1993 Op. Atty. Gen. Va. 91 (July 15, 1993).

Wisconsin v. Allen, 322 Wis.2d 372, 778 N.W.2d 518 (2010).

In re Carlton, 378 So.2d 1212 (Fla. 1979).

Cheney v. United States Dist. Court, 540 U.S. 1217 (2004).

Hanrahan v. Hampton, 446 U.S. 1301 (1980).

Model Code of Judicial Conduct Rule 2.2, Rule 2.3, Rule 2.4, Rule 2.11.

FOOTNOTES

[1] *See Wisconsin v. Allen,* 322 Wis.2d 372, 778 N.W.2d 518 (2010) for extensive discussion of the approaches used by various states. *See also In re Carlton,* 378 So.2d 1212, 1216-17 (Fla. 1979): "[We] hold that each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances. This procedure is in accord with the great weight of authority . . . and it reinforces the modern view of disqualification as a matter which is 'personal and discretionary with individual members of the judiciary . . . .'" (citations omitted).

[2] It is also consistent with the practice of the United States Supreme Court. *See, e.g., Cheney v. United States Dist. Court,* 540 U.S. 1217 (2004); *Hanrahan v. Hampton,* 446 U.S. 1301 (1980) (the Court "as an institution leaves motions to recuse individual Justices of the court, even though they are addressed to the court, to the decision of the individual justice whose recusation is sought.").

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 October 20, 2015.