VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 1st day of May, 2020.

On February 11, 2020, came the Judicial Ethics Advisory Committee and presented to the Court Opinion 19-4 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 19-4

A judge may hear cases involving an attorney who co-owns a limited liability company that rents a parking space to the judge, with disclosure of the relevant facts to, and waiver of, the parties and attorneys involved.

ISSUE:

Must a judge automatically disqualify himself or herself from the cases of an attorney who co-owns a limited liability company (LLC) that rents a parking space to the judge?

Answer: No. Under the facts presented, there is no per se disqualification. However, the judge must carefully consider whether he or she may remain impartial to all parties, and the public perception of the judge's fairness, to determine whether disqualification is nonetheless required. The Committee advises that the judge must disclose the relevant facts to the parties in any case involving the attorney and obtain a waiver of the disqualification before proceeding.

FACTS:

A limited liability company (LLC) owns a private parking lot and rents out parking spaces in the lot on a monthly, first come, first served basis as they become available, for a fee of $25.00 per space, per month. There is no signed contract or agreement for the rental of the spaces, and the fees may be paid monthly or paid in other installments or intervals, including on a yearly basis. Upon moving into a new residence, the requesting judge rented spaces in the lot as the only secure and convenient options for parking. The judge later discovered that the LLC is co-owned by an attorney who appears regularly before the judge. The judge has asked whether renting a parking space from the LLC necessitates the judge's disqualification from hearing cases involving the attorney, and whether any such disqualification may be waived.

DISCUSSION:

"Judges are not expected to abandon financial and business interests upon assuming the bench." ARTHUR H. GARWIN, ET AL., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 279 (3d ed. 2016). Whether or not a judge's financial activities or business relationships warrant a judge from being disqualified in a particular case is necessarily a fact-specific inquiry. A review of

literature by legal experts on the subject yields the same conclusion, with a focus on general characteristics and guidelines as opposed to bright-line rules.

For example, "[t]he Model Code requires automatic disqualification for some business relationships," while others "are subject to disqualification if the judge's impartiality might reasonably be questioned." CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[5], at 4-32 (5th ed. 2013) (referring to the Model Code of Judicial Conduct).

Concerns regarding impartiality naturally arise when a judge's business contacts are involved as parties or attorneys in ongoing proceedings. "It is inherently problematic for a judge to preside over cases involving parties or lawyers with whom the judge has an ongoing business relationship." GEYH ET AL., *supra* at 4-32. Problems may arise because "a judge's business relationship or financial ties with a lawyer or law firm that is counsel to a proceeding or with a party to the proceeding may create an appearance of impropriety requiring disqualification." GARWIN, *supra*, at 279.

Where a judge's ability to be impartial is called into question due to his or her business contacts, the judge is expected to recuse himself or herself. *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 28.2, at 452 (3rd ed. 2017). If a judge declines to do so, the judge may be disqualified – or face other consequences – particularly "in a situation where the business relationship at issue is ongoing, or somehow related to the pending proceeding; or where there are other reasons for questioning the ability of the judge to be impartial." *Id.* at 453. But,

> [t]he mere fact that a judge has had some sort of business relationship with a person who is somehow interested in a proceeding that is pending before that judge will not, however, invariably warrant such a result. On the contrary, a judge's business relationship, without more, is ordinarily deemed to be legally insufficient to warrant such relief.

Id. Disqualification is likely to be found unwarranted "where, for other reasons, there is no cause to believe that the relationship will have any impact upon the judge's ability to be impartial in the case; as where the relationship can be characterized as inconsequential or remote." *Id.* at 454.

Against this general conceptual background, we turn to the specific Canons of Judicial Conduct for the Commonwealth of Virginia implicated by the request.

1. Applicable Canons

First and foremost, "[t]he Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances." Va. Sup. Ct. R., Part 6, § III, Preamble.

Under Canon 2, a judge shall avoid impropriety and the appearance of impropriety. "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.

Furthermore, a judge shall not convey, "or permit others to convey the impression that [those others] are in a special position to influence the judge." *Id.*

Under Canon 3, "[a] judge shall perform the duties of judicial office impartially and diligently," which includes performing judicial duties without bias or prejudice, and performing them impartially and fairly. *See* Canon 3B(5) and Canon 3B(5), Commentary. Canon 3E(1) explains that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" and specific instances and examples are provided. And where impartiality might reasonably be questioned, such disqualification is required "regardless of whether any of the specific rules in Section 3E(1) apply." Canon 3E(1), Commentary. Furthermore, "[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." *Id.*

In cases where a judge may be disqualified pursuant to Section 3E, the judge or clerk of court may ask the parties and their lawyers to consider waiving disqualification, in accordance with Canon 3F. However, if the basis for the disqualification is personal bias or prejudice concerning a party, then waiver is not available. *See* Canon 3F.

Canon 4 governs a judge's extra-judicial activities. Canon 4A provides that:

> A judge shall conduct all of the judge's extra-judicial activities so that they do not:
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
> (2) demean the judicial office; or
> (3) interfere with the proper performance of judicial duties.

Financial activities are addressed in Canon 4E, prohibiting a judge from engaging in financial and business dealings that "(a) may reasonably be perceived to exploit the judge's judicial position, or (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." Canon 4E(1).

> A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court . . . . This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

Canon 4E1, Commentary.

2. Analysis

The Committee has not previously considered the precise issue of whether a judge paying rent to an attorney (even through another business such as an LLC) must disqualify himself or herself from that attorney's cases. The Committee has considered whether judges are required to disqualify themselves in the context of other business relationships, including where a judge owns property that may be rented to an attorney.[1]

In a case involving a judge who co-owns a building with a former law partner, the Committee opined that the judge may hear cases involving attorneys who were subleasing office space in that building. Va. JEAC Op. 01-7 (2001). However, the Committee cautioned that it would be a violation of Canon 4D(1), (now 4E(1)), for the judge to hear cases involving his former law partner due to their continuing business relationship. *Id.* The Committee also concluded that the judge should disclose the relevant facts in cases involving any sublessee attorneys. *Id.* Similarly, in Virginia JEAC Op. 03-1, the Committee opined that a judge who owns a building and leases it to a businessman who in turn subleases to attorneys (including the businessman's son) could hear cases involving those attorneys. *Id.* Again, the Committee opined that the judge should disclose the relevant facts to the parties in cases involving the subtenant attorneys. *Id.*

The Committee has considered other cases of judges with business or financial relationships with parties or attorneys. First, the Committee opined that a judge is not required to recuse himself or herself from cases involving a corporation in which the judge holds 1% or less of the outstanding stock, finding the interest to be *de minimis*. Va. JEAC Op. 00-05 (2000). Also, where a judge remains a participant in a 401(k) Plan with his or her former law firm, the judge is not required to recuse himself or herself but should disclose the Plan participation when members of the firm appear before the judge. Va. JEAC Op. 01-3 (2001).

Finally, the Committee has followed the same analysis, rejecting per se disqualification but counseling disclosure, in contexts other than business relationships. *See* Va. JEAC Op. 01-8 (2001) (cases where a party, attorney, or witness is an acquaintance of the judge); *see also* Va. JEAC Op. 16-1 (2016) (cases where an attorney who practices before a judge appears as a party or a witness).

The Canons prohibit a judge from engaging in financial and business dealings that "involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves." Canon 4E(1)(b). The Commentary to Canon 4E(1) explains that the "rule is necessary to avoid creating an <u>appearance</u> of exploitation of office or favoritism and to minimize the potential for disqualification." (Emphasis added.)

By virtue of the rental agreement for the parking spaces, the judge has entered into a business relationship with the LLC, and by extension, with the attorney who co-owns the LLC. The relationship is ongoing to the extent the judge plans to continue to rent the spaces for the foreseeable future. The Committee is not aware of the extent to which the attorney is involved in managing the LLC's business generally or the parking lot specifically, or the amount, if any, of income realized by the attorney as a result of the parking space rental. But from the information provided, the nature of the payment appears to be a routine, periodic payment of a relatively small sum of money, with no other indications of frequent contract negotiations, disputes, or entanglements.[2] There is also no indication that the business relationship is an effort to curry favor with the judge, or, conversely, to force the judge's disqualification.

The attorney in question is not appearing before the judge as a member of the LLC, as counsel for the LLC, and the LLC is not a party to any of the proceedings before the judge. Neither the parking spaces nor the rental agreements are the subject of any proceedings before the

judge. The facts as presented to the Committee are that the attorney appears before the judge frequently representing criminal defendants and occasionally civil litigants. Pursuant to Canon 3E, due to the ongoing business relationship, the judge would be disqualified from hearing a dispute regarding the parking lot or parking spaces, and similarly may be disqualified from cases in which the attorney or LLC is a party.

Given the facts presented, the general considerations regarding judges and business relationships, and the Canons involved, the Committee is of opinion that the requesting judge is not per se disqualified from the attorney's cases based solely on the existence of the rental agreement with the LLC. While the current fee for the spaces may be considered relatively small, the lack of a definitive contract for that fee amount coupled with the stated importance of securing and maintaining access to the spaces warrants additional consideration by the judge in his or her deliberation on the issue of disqualification, and in any disclosure made thereafter.

As the Committee noted in Virginia JEAC Op. 16-1, the judge's decision to recuse himself or herself also includes the application of both objective and subjective standards. Knowing now that the attorney co-owns the LLC, the judge "must introspectively determine if he or she can remain fair and impartial to all parties . . . ." Va. JEAC Op. 16-1. But the inquiry does not end there. "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" and if the judge's impartiality might reasonably be questioned, then the judge should disqualify himself or herself. *Id.*

This guidance remains appropriate pursuant to the Canons and their broad cautionary tale, where concerns about the appearances, perceptions, and impressions created by business relationships between judges and attorneys are well-founded.[3] Case law also supports this guidance. "'[I]n making the recusal decision, 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.'" *Prieto v. Commonwealth*, 283 Va. 149, 163 (2012) (quoting *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).

Thus, 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.

The same broad cautions lead the Committee to conclude that in cases involving the attorney, the judge must disclose the relevant facts to the parties and attorneys, who may waive disqualification in accordance with Canon 3F. The Commentary to Canon 3E(1) states that "[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." (Emphasis added.) As the Committee has observed in prior opinions, such an action is also good practice: "[t]his disclosure should assuage any doubt in most cases regarding the judge's ability to be impartial. A party or counsel learning of [the business relationship] directly from the judge is far less likely to question the judge's impartiality than one

who learns about it later from another source." Va. JEAC Op. 01-3 (2001). *See also* Va. JEAC Op. 01-7 (2001).

In this case, the facts available to the Committee suggest that while the judge is engaged in an ongoing business relationship with an LLC (and by extension, the attorney who co-owns the LLC), that fact alone does not require the judge to disqualify himself or herself from the attorney's cases. Instead, the judge will need to be guided by all the cautions of the Canons, the true state of his or her impartiality, and public perception to ensure there are no additional reasons to disqualify himself or herself. This includes, but is not limited to, the fact that there is not a definitive contract (and thus guarantee) of what may be considered a relatively small fee, and the personal importance to the judge of securing and maintaining access to those spaces. The judge must fully disclose the relevant facts and circumstances in accordance with Canon 3E(1) and provide the parties and the attorneys the opportunity to waive any disqualification in accordance with Canon 3F.

CONCLUSION

The Committee finds that under the facts presented, the judge is not required to disqualify himself or herself merely because an attorney who regularly appears before the judge co-owns an LLC that rents a parking space to the judge. The judge, in his or her discretion, will still need to determine that he or she may be fair and impartial to all parties and that presiding over that attorney's cases will not result in the judge's impartiality being reasonably questioned by litigants or the general public. Finally, the judge must disclose the relevant facts and circumstances to the parties and attorneys such that they may waive any disqualification.

REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia, Preamble, Canon 2, Canon 2A, Canon 2B, Canon 3, Canon 3B(5), Canon 3E(1), Canon 3F, Canon 4, Canon 4A, Canon 4E, Canon 4E(1).

RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 28.2 (3rd ed. 2017).

CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[5] (5th ed. 2013).

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

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

Va. JEAC Op. 00-05 (2000).

Va. JEAC Op. 01-3 (2001).

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

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

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

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

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

KY Jud. Ethics Op. JE-9 (1980).

KY Jud. Ethics Op. JE-7 (1980).

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FOOTNOTES:

[1] Like Virginia JEAC Op. 01-7, the Committee recognizes there is disagreement among the states regarding cases where attorneys or parties have a landlord-tenant or mortgage relationships with judges; whether the judge is disqualified and whether he or she is required to disclose the information. A review of those opinions suggests that such business relationships often involve real property, presumably of a substantially higher value than the transaction at issue here.

[2] While cases involving landlord-tenant relationships have had differing outcomes among the states, the Committee finds the rationale of two Kentucky opinions to be instructive in this matter. The Kentucky Judicial Ethics Committee found that a judge may ethically rent office space to lawyers, opining that "[r]ental of office space stands on a different footing because it involves routine payments of a relatively small sum and minimum of personal involvement." KY Jud. Ethics Op. JE-9 (1980). *See also* KY Jud. Ethics Op. JE-7(1980) ("periodic payment of rent is not within [the Canon's] prohibition because of its routine nature. The typical landlord-tenant relation is not one which requires the parties to enter into frequent negotiations and financial adjustments."). In citing these cases, the Committee is not extending this opinion to other business transactions or even other rental situations, but finds that the characteristics supporting the Kentucky Committee's decisions are especially pertinent to the parking space rental at issue in this matter.

[3] *See, e.g.*, Canon 2 (requiring a judge to avoid even the appearance of impropriety); Canon 2A, Commentary (explaining the test of appearance of impropriety as that conduct which "would create in reasonable minds a perception that the judge's ability to carry out judicial

responsibilities with integrity and impartiality is impaired"); Canon 2B (prohibiting a judge from "permit[ting] others to convey the impression that they are in a special position to influence the judge"); Canon 3E(1) (disqualification whenever a judge's impartiality might reasonably be questioned); Canon 4E(1)(prohibiting financial and business dealing that "may reasonably be perceived to exploit the judge's judicial position"); and Canon 4E(1) Commentary (explaining the need "to avoid creating an appearance of exploitation of office or favoritism").

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.

MINORITY OPINION

The judge needs to recuse himself or herself when involved in cases with an attorney with whom he or she has a continuing rental agreement. The Canons of Judicial Conduct make it clear that a judge should be objective in his or her decisions and ought not have business relationships with the attorneys appearing before him or her which might create a "bias" in favor of one party or another.

In this case, there is clearly an ongoing or continuing contractual relationship between the judge and an attorney who regularly appears before him or her in both criminal and civil cases. Although we do not know all the facts, we know that the charge for the car rental space is only $25. That amount appears low, and what is unclear from the facts presented is how vital the space is to the judge, whether the attorney is doing the judge a favor in charging that particular amount, and whether the judge may have concerns about the charge going up or the contract not being renewed. The circumstances present numerous questions which we as the committee may not fully anticipate or be able to ascertain the answers to, but if the judge proceeds to handle this attorney's cases, try though he or she may to set them aside, the judge may be thinking about these questions and others.

The majority opinion suggests that full disclosure of the circumstances pursuant to Canon 3E(1) and waiver of any disqualification pursuant to Canon 3F may permit the judge to hear the attorney's cases. Such a suggestion raises additional questions. For example, is the judge to make the disclosure only to the attorneys, or are the parties also to be advised directly by the judge? Should the judge put the disclosure on the record in open court? How detailed of a disclosure is required?

Even a waiver of any disqualification is not sufficient. No matter how the judge decides an issue or case involving the attorney, the judge risks being subject to a claim of bias. If the judge decides in favor of the attorney, it may be viewed as favorable treatment for a business partner. If the judge rules for the opposing side, the attorney or their client may claim the judge unfairly bent over backwards to show his or her objectivity. Either way, the perception of the court as the objective trier of the case is in jeopardy.

By entering into this rental agreement, the judge has created a situation for which the Canons do not provide an easy resolution, and the only appropriate action is for the judge to recuse himself or herself and then deal with the resulting administrative problems.

REFERENCES IN THE MINORITY OPINION

Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 3E(1), Canon 3F.