

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of September, 2016.

On September 14, 2016 came the Judicial Ethics Advisory Committee and presented to the Court Opinion 16-2 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 16-2

A substitute judge who represents a local police union and its police officer members under an ongoing contract shall not preside in cases involving local police officers.

ISSUES:

Where a substitute judge who practices law has an ongoing contract with a local police union to represent its member police officers and their interests, including but not limited to representing the officers in grievance hearings:

1. May the substitute judge preside in cases involving police officers who are individual grievants in other proceedings while the grievance is pending?

Answer: No. It would be improper for a substitute judge to preside over matters involving police officers that the substitute judge represents as counsel in other pending proceedings.

2. May the substitute judge preside in cases involving a police officer whom the substitute judge has represented as a grievant in the past?

Answer: No. Under the facts presented, the police officer is not merely a past client. It would be improper for a substitute judge to preside over matters involving a local police officer where the substitute judge has an ongoing contract to represent local police officers, or their interests, in the substitute judge's law practice.

3. May the substitute judge preside in cases involving officers who are simply members of the local police union?

Answer: No. It would be improper for a substitute judge to preside over matters involving member police officers where the substitute judge has an ongoing contract to represent the union and member police officers, or their interests, in the substitute judge's law practice. Additionally, because of the close and ongoing relationship with the local police described in this matter, it would be improper for the substitute judge to preside over matters where any local police officer is involved in a case before the substitute judge, regardless of the police officer's membership in the union.

FACTS:

A substitute judge who practices law has been asked to represent a local police union and its individual members. The substitute judge will provide services in the areas of general counseling, collective bargaining, contract administration, and representation of individual officers in internal investigations, grievances, and disciplinary proceedings. The substitute judge will be paid a monthly fee on a per capita basis; that is, each month a specific amount will be paid to the substitute judge for each individual member of the union. Not every local police officer is a member of the union.

DISCUSSION:

The Commonwealth of Virginia is fortunate to have practicing attorneys who are willing to serve its citizens and its judiciary as substitute judges. Their service is vital to the efficient operation of the courts. However, the separate roles of practicing attorney and substitute judge can present unique challenges. “In situations where a [substitute] judge is allowed to maintain a concurrent law practice, several conflicts of interest may arise. Keeping the functions of a judge disassociated from those of an attorney requires an abundance of caution.” CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.14[1] at 4-55 (5th ed. 2013). The questions that are the subject of this advisory opinion demonstrate the difficulties in separating those two functions.

Under Canon 6 of the Canons of Judicial Conduct for the Commonwealth of Virginia (“the Canons”), “substitute judges . . . are required to comply with the Canons.”¹ The Commentary to Canon 6C provides: “When sitting as a substitute judge . . . the substitute judge . . . shall be bound by the Canons in the same manner as a full time judge. When a substitute judge . . . is acting as a practicing attorney, he or she will not be precluded from those activities otherwise authorized as a practicing attorney.” Consistent with that Commentary, this advisory opinion does not take a position regarding whether a substitute judge should or should not represent any particular clients in his or her law practice. Rather, this advisory opinion addresses the substitute judge’s responsibilities as a judge if he or she accepts the proposed representation.

In this advisory opinion, the terms “involved,” “involving,” and “involvement” include both (a) a police officer’s appearance in a case as a party or witness, and (b) a police officer’s relationship to a case in any other relevant way.²

The questions raised in this matter all derive from the substitute judge’s role as the attorney for a local police union and all of its members under an ongoing contract. If the substitute judge represents both the collective and the individual interests of the member police officers, the substitute judge is, or is very likely to be, perceived by the public as “the lawyer for the local police.” This close and ongoing identification of the substitute judge with the local police will raise concerns about whether the judge can be fair, unbiased, and impartial in matters involving local law enforcement. Additionally, the involvement of non-member police officers in matters before the substitute judge would raise the same perception and the same concerns.

For the reasons explained in the remainder of this opinion, it is this Committee's view that it would be improper for the substitute judge to preside over cases involving police officers who are members of the union. Additionally, that opinion extends to any cases where local police officers are involved, regardless of their membership in the union.

Multiple provisions of the Canons describe the duties of the substitute judge in this matter.

Canon 1 requires that a judge shall uphold the integrity and independence of the judiciary. The close and ongoing attorney-client relationship with the local police would raise serious questions about judicial independence.

Canon 2 requires that a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. Canon 2A provides: "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." Under the facts presented, serious concerns are likely to arise which would undermine confidence in the judge's integrity and impartiality.

The same concerns would exist under Canon 3, which requires that "[a] judge shall perform the duties of judicial office impartially and diligently." When a substitute judge is acting as such, "the judicial duties of a judge take precedence over all of the judge's other activities." Canon 3A. "A judge shall perform judicial duties without bias or prejudice." Canon 3B(5). "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." Commentary, Canon 3B(5). Canon 3E(1) provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ." In this instance, recusal would be necessary. Bias is not subject to remittal of disqualification under Canon 3F.

Impartiality must be maintained in a substitute judge's extra-judicial activities, including the practice of law. Canon 4A provides:

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.

Canon 4D(1)(b) provides that "a judge shall not engage 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*" (emphasis added). In the present matter, the substitute judge's ongoing contract to represent local police officers would constitute a continuing business relationship with people likely to come before the court on which the substitute judge serves. The Commentary to Canon 4D(1)(b) indicates that "[t]his rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification."

The Supreme Court of the United States has recently summarized the need to assure an absence of judicial bias in the context of due process requirements under the 14th Amendment to the United States Constitution:

Due process guarantees “an absence of actual bias” on the part of a judge Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court’s precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, “the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias. . . .’”

Williams v. Pennsylvania, 136 S.Ct. 1899, 1905 (2016) (citations omitted).

In Virginia JEAC Op. 01-8 (2001) and Va. JEAC Op. 16-1 (2016), this Committee discussed the law and parameters of disqualification and recusal decisions under Canon 3E. Such decisions are based not only on the judge’s own reasonable discretion about whether the judge possesses bias, prejudice, or a lack of impartiality; but, they also must take into account the public’s perception of the judge’s fairness in order that public confidence in the integrity of the judiciary may be maintained. *See Stamper v. Commonwealth*, 228 Va. 707, 714, 324 S.E.2d 682, 686 (1985).

These principles provide the background for answering the specific questions raised in this matter. The first two questions are related to presiding over cases involving specific police officers in specific circumstances. The third question relates to the ability of the substitute judge to preside over matters involving police officers who have never been directly or individually represented by the substitute judge, but are simply members of the union.

1. May the substitute judge preside in cases involving police officers who are individual grievants during the time the grievance is pending?

The substitute judge shall not preside under these circumstances. This question is directed to situations where police officers are involved in cases before the substitute judge, while the substitute judge also represents the officers in pending grievance proceedings. Such instances would not merely create the appearance of impropriety, but they actually would be improper in violation of Canons 2 and 2A. Recusal would be necessary under Canon 3E(1).

2. May the substitute judge preside in cases involving a police officer whom the substitute judge has represented as a grievant in the past?

The substitute judge shall not preside under the facts that have been presented.

Generally, the fact that a judge’s past or former client may be involved in a later proceeding before the judge does not necessarily require the judge’s recusal or disqualification. The judge would have to go through an analysis of the factors set forth in Canons 2 and 3E(1),

and its subsections, to determine if sufficient grounds exist for recusal. “Typically, disqualification in this instance will be required because of a general appearance of partiality rather than specific statutory provisions.” GEYH ET AL., *supra*, § 4.14[1] at 4-57.³

However, under the facts that have been presented, a police officer whom the substitute judge has represented as a grievant in the past is not merely a “past” or “former” client. The substitute judge would be under contract to represent that officer, or that officer’s interests, in a variety of ways and on an ongoing basis, not only in grievance or disciplinary cases. Question 2, therefore, presents the same issues as question 1. Additionally, the close association and identification of the substitute judge with local law enforcement would exist. Therefore, it would be improper for the substitute judge to preside over such a matter under Canons 2, 2A, and 3. Recusal would be necessary under Canon 3E(1).

3. May the substitute judge preside in cases involving officers who are simply members of the local police union?

The substitute judge shall not preside in cases where members of the union are involved. There is an ongoing business relationship between the substitute judge and the union which includes representing the interests of all of the members of the union. This arrangement is the sort of ongoing business arrangement addressed in Canon 4D(1)(b). In light of that close and ongoing relationship, presiding over matters involving the substitute judge’s clients would violate Canons 2, 2A, 3, 4A(1), and 4D(1)(b).

In Tex. Jud. Ethics Op. No. 288 (2003), the Texas Committee on Judicial Ethics (“the Texas Committee”) opined that a part-time municipal judge of a city may not represent a police officer of that city in connection with a criminal investigation. The Texas Committee specifically applied Texas Canons 2A, 4A, and 4D(1) (similar, and in some cases identical, to the Virginia Canons) in reaching its conclusion. In an analysis well-suited to the present matter the Texas Committee reasoned:

Defendants charged with criminal offenses in municipal court should be able to reasonably anticipate that when they appear before the court their case will be heard by an entirely fair and unbiased judge. In the vast majority of municipal cases, the municipality’s main witness is often one of its police officers. A defendant who is aware of the fact that the judge hearing his case also privately represents police officers employed by that very same municipality could reasonably doubt that the judge was impartial when considering the testimony of any police officer and the weight to be given thereto.⁴

We believe that the logic of the Texas opinion also applies to civil matters involving police officers.

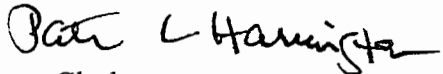
Furthermore, the same concerns, and public perception, will exist when police officers who are not members of the union are involved in cases before the substitute judge. The membership of the union is likely to change with some frequency. Even if the judge can distinguish “member officers” from “non-members,” the public and those persons with matters

before the court will not be able to make the same distinction. Therefore, the substitute judge must not preside over matters involving any local police officers.

CONCLUSION

The Committee finds that if the substitute judge accepts the proposed representation of the police union, such a close and ongoing relationship would not only create the appearance of impropriety, but it would be a direct violation of several of the Canons. Given the unique role of law enforcement in our legal system, any judge who appears biased in their favor would diminish the public's trust in the fundamental fairness and impartiality of our legal system. Therefore, the substitute judge is disqualified from presiding in each of the scenarios described in the substitute judge's questions.

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REFERENCES:

Canons of Judicial Conduct for the Commonwealth of Virginia Canon 1, Canon 2, Canon 2A, Canon 3, Canon 3A, Canon 3E(1), Canon 4A, Canon 4E(1)(b), Canon 6B.

CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.14[1] (5th ed. 2013).

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

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

Williams v. Pennsylvania, 136 S.Ct. 1899, 1905 (2016).

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

Walker v. Helmrich, 23 Va. Cir. 150 (Fairfax County 1991).

In re Edwards, 694 N.E.2d 701 (Ind. 1998).

Tex. Jud. Ethics Op. No. 288 (2003).

Wash. Ethics Adv. Comm. Op. 96-08 (1996).

Ala. Jud. Inq. Comm'n Op. 98-706 (1998).

N.Y. Adv. Comm. Jud. Ethics Op. 93-110 (1993).

N.Y. Adv. Comm. Jud. Ethics Op. 91-29 (1991).

FOOTNOTES

¹“A substitute judge . . . is not required to comply with 4C(1)(2) and (3) except that he shall not use or permit the use of the prestige of judicial office for fund raising or membership solicitation. A substitute judge . . . is not required to comply with 4D(3), E, F, and G.” Canon 6B. None of those provisions would be applicable to the present matter.

² For example, a police officer may be “involved” without an appearance. Examples could include, but are not limited to, a witness referring to an officer’s involvement in an incident; a witness making allegations about an officer who is not present in court; an officer who was part of an investigative team or arresting team who is not called to testify at a preliminary hearing; an officer as the spouse or partner of a party.

³ The passage of time between the legal representation and any appearance before the former counsel/judge may be an important consideration. Some jurisdictions require the passage of a specific period of time. Virginia does not. *See generally Walker v. Helmrich*, 23 Va. Cir. 150 (Fairfax County 1991); *In re Edwards*, 694 N.E.2d 701 (Ind. 1998) (general discussion about factors in determining the need to recuse or not recuse in cases involving former clients).

⁴ Although the Virginia courts in which substitute judges serve are state courts, and local police officers are local rather than state employees, the central point that a judge would be employed by and identified with the police remains the same. *See generally* Wash. Ethics Adv. Comm. Op. 96-08 (1996) (part-time judge may continue to act as city attorney provided that the judge does not preside over any matters involving the municipality or members of its police department); Ala. Jud. Inq. Comm’n Op. 98-706 (1998) (a municipal court judge may not represent a municipal police lieutenant in a federal civil rights action; it would reflect adversely on the judge’s impartiality). *See also* N.Y. Adv. Comm. Jud. Ethics Op. 93-110 (1993) (judge may not accept position as standing legal counsel to Police Chiefs’ Foundation); N.Y. Adv. Comm. Jud. Ethics Op. 91-29 (1991) (part-time judge should not serve as counsel to an organization of police juvenile officers due to an impermissible appearance of partiality).

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.