No. _____

In The
Supreme Court of the United States

RAMIN SEDDIQ,

Petitioner,

v.

VIRGINIA INDIGENT DEFENSE COMMISSION
and
MARIA JANKOWSKI,
in her official capacity as the Deputy Executive Director of Virginia Indigent Defense Commission,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

APPENDIX

RAMIN SEDDIQ, *pro se*
PO Box 5533
McLean, VA 22103
202.412.8999
ramins2536@gmail.com

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX TABLE OF CONTENTS

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 13th day of April, 2022.

Record No. 210917
Circuit Court No. CL20005336-00

Ramin Seddiq,
Appellant,

against

Virginia Indigent Defense Commission, *et al.*,
Appellees.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:
Muriel-Theresa Pitney, Clerk
By: /S/
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON

Case No. CL20005336

RAMIN SEDDIQ,

Petitioner,

v.

VIRGINIA INDIGENT DEFENSE COMMISSION, and MARIA JANKOWSKI, in her official capacity as the deputy Executive Director of Virginia Indigent Defense Commission,

Respondents.

ORDER

On June 17, 2021, came the Petitioner, Ramin Seddiq, pro se, and came Respondents the Virginia Indigent Defense Commission and Maria Jankowski, by counsel, for the trial of Petitioner's Petition for Injunction and Writ of Mandamus.

Having previously sustained Respondents' Demurrer to Count V of the Petition, the Court heard and considered Petitioner's evidence as to Counts I, II, III, IV, VI, VII, VIII, IX, and X. At the close of Petitioner's case, Respondents moved to strike the evidence. After hearing argument regarding the motion, and considering the evidence in the light most favorable to Petitioner, the court ORDERED as follows:

1. Because Petitioner failed to present sufficient evidence, the Motion to Strike as to I, II, IV, VI, VII, VIII, IX, and X is GRANTED; and

2. Because the petitioner presented evidence of at least one document that was arguably within the scope of his original request that had not been produced pursuant to Va. Code § 2.2-3700, *et seq.*, the Motion to Strike as to Count III is DENIED.

Petitioner noted his exception.

Respondents then rested their case without presenting any evidence and renewed their Motion to Strike the Evidence. After hearing argument regarding the motion, and considering whether Petitioner has met his burden by a preponderance of the evidence, the Court ORDERED as follows:

1. Because Petitioner failed to show by a preponderance of the evidence the existence of any document within the scope of his original request pursuant to Va. Code § 2.2-3700, *et .seq.* that had not been produced, the Motion to Strike Count III is GRANTED.

Petitioner noted his exception.

In accordance with its verdict, the Court finds that the Petitioner fails to meet his burden as to each count presented in the Petition for Injunction and Writ of Mandamus. Accordingly, and having previously sustained Respondents' Demurrer as to Count V, it is hereby ADJUDGED AND DECREED as follows:

1 As to Counts I, II, III, IV, VI, VII, VIII, IX, and X, Petitioner's request for an injunction and writ of mandamus is DENIED;

2. The Petition for Injunction and Writ of Mandamus is DISMISSED WITH PREJUDICE, and

3. Each party shall bear its own costs and attorney's fees.

IT IS SO ORDERED.

Entered this 30th day of June 2021.

/s/
Hon. Louise M. DiMatteo
Judge, Circuit Court of Arlington, Virginia

I ASK FOR THIS:
/s/
Blair H. O'Brein (VSB No. 83961)
Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
804.371.0977
BO'Brien@oag.state.va.us

SEEN AND OBJECTED TO:
/s/
Ramin Seddiq, *pro se*
PO Box 5533
McLean, VA 22103
202.412.8999
ramins2536@gmail.com

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON

Case No. CL20005336

RAMIN SEDDIQ,

Petitioner,

v.

VIRGINIA INDIGENT DEFENSE COMMISSION, and MARIA JANKOWSKI, in her official capacity as the deputy Executive Director of Virginia Indigent Defense Commission,

Respondents.

ORDER

Upon consideration of Respondents' Demurrer and Motion to Dismiss the Petition for Injunction and Writ of Mandamus, the papers submitted in relation thereto, and the Parties' oral arguments presented on April 6, 2021, it is hereby ORDERED as follows:

1. Respondents' Demurrers to Counts I, II, III, IV, VI, VII, VIII, IX and X are OVERRULED;

2. Respondents' Motion to Dismiss as to Counts I, II, III, IV, VI, VII, VIII, IX and X is DENIED;

3. Respondents' Demurrer to Count V is SUSTAINED; and

4. Respondents' Motion to Dismiss Count V is GRANTED.

The Court notes Respondents' exception to Orders 1 and 2, and further notes Petitioner's exception to Orders 3 and 4, as outlined above.

IT IS SO ORDERED.

Entered this 8th day of April 2021.

/s/
Hon. Louise M. DiMatteo
Judge, Circuit Court of Arlington, Virginia

Respectfully submitted this 7th day of April 2021,

/s/
Ramin Seddiq, *pro se*
PO Box 5533
McLean, VA 22103
202.412.8999
ramins2536@gmail.com

/s/
Blair H. O'Brein (VSB No. 83961)
Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
804.371.0977
BO'Brien@oag.state.va.us

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 29th day of June, 2022.

Record No. 210917
Circuit Court No. CL20005336-00

Ramin Seddiq,
Appellant,

against

Virginia Indigent Defense Commission, et al.,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on April 13, 2022 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
Muriel-Theresa Pitney, Clerk
By: /s/
Deputy Clerk

VA Code Ann. § 2.2-3700
§ 2.2-3700. Short title; policy

A. This chapter may be cited as "The Virginia Freedom of Information Act."

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings shall be narrowly construed and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law. This chapter shall not be construed to discourage the free discussion by government officials or employees of

public matters with the citizens of the Commonwealth.

All public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.

Any ordinance adopted by a local governing body that conflicts with the provisions of this chapter shall be void.

VA Code Ann. § 2.2-3701
§ 2.2-3701. Definitions
Effective: September 1, 2022

As used in this chapter, unless the context requires a different meaning:

"All-virtual public meeting" means a public meeting (i) conducted by a public body, other than those excepted pursuant to subsection C of § 2.2-3708.3, using electronic communication means, (ii) during which all members of the public body who participate do so remotely rather than being assembled in one physical location, and (iii) to which public access is provided through electronic communication means.

"Closed meeting" means a meeting from which the public is excluded.

"Electronic communication" means the use of technology having electrical, digital, magnetic,

wireless, optical, electromagnetic, or similar capabilities to transmit or receive information.

"Emergency" means an unforeseen circumstance rendering the notice required by this chapter impossible or impracticable and which circumstance requires immediate action.

"Information," as used in the exclusions established by §§ 2.2-3705.1 through 2.2-3705.7, means the content within a public record that references a specifically identified subject matter, and shall not be interpreted to require the production of information that is not embodied in a public record.

"Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through electronic communication means pursuant to § 2.2-3708.2 or 2.2-3708.3, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body. Neither the gathering of employees of a public body nor the gathering or attendance of two or more members of a public body (a) at any place or function where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body, or (b) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions

relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting, shall be deemed a "meeting" subject to the provisions of this chapter.

"Official public government website" means any Internet site controlled by a public body and used, among any other purposes, to post required notices and other content pursuant to this chapter on behalf of the public body.

"Open meeting" or "public meeting" means a meeting at which the public may be present.

"Public body" means any legislative body, authority, board, bureau, commission, district, or agency of the Commonwealth or of any political subdivision of the Commonwealth, including counties, cities, and towns, municipal councils, governing bodies of counties, school boards, and planning commissions; governing boards of public institutions of higher education; and other organizations, corporations, or agencies in the Commonwealth supported wholly or principally by public funds. It shall include (i) the Virginia Birth-Related Neurological Injury Compensation Program and its board of directors established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 and (ii) any committee, subcommittee, or other entity however designated of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee, or entity because it has private sector

or citizen members. Corporations organized by the Virginia Retirement System are "public bodies" for purposes of this chapter.

For the purposes of the provisions of this chapter applicable to access to public records, constitutional officers and private police departments as defined in § 9.1-101 shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records.

"Public records" means all writings and recordings that consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees, or agents in the transaction of public business.

"Regional public body" means a unit of government organized as provided by law within defined boundaries, as determined by the General Assembly, which unit includes two or more localities.

"Remote participation" means participation by an individual member of a public body by electronic communication means in a public meeting where a quorum of the public body is otherwise physically assembled.

"Scholastic records" means those records containing information directly related to a student or an applicant for admission and maintained by a public body that is an educational agency or institution or by a person acting for such agency or institution.

"Trade secret" means the same as that term is defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.).

VA Code Ann. § 2.2-3704
§ 2.2-3704. Public records to be open to inspection; procedure for requesting records and responding to request; charges; transfer of records for storage, etc.
Effective: July 1, 2022

A. Except as otherwise specifically provided by law, all public records shall be open to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall be provided by the custodian in accordance with this chapter by inspection or by providing copies of the requested records, at the option of the requester. The custodian may require the requester to provide his name and legal address. The custodian of such records shall take all necessary precautions for their preservation and safekeeping.

B. A request for public records shall identify the requested records with reasonable specificity. The request need not make reference to this chapter in order to invoke the provisions of this chapter or to impose the time limits for response by a public body. Any public body that is subject to this chapter and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

1. The requested records are being entirely withheld. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

2. The requested records are being provided in part and are being withheld in part. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.

3. The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.

4. It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period. Such response shall specify the conditions that make a response impossible. If the response is made within five working days, the public body shall have an additional seven work days or, in the case of a request for criminal investigative files pursuant to § 2.2-3706.1, 60 work days in which to provide one of the four preceding responses.

C. Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by this chapter will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.

D. Subject to the provisions of subsection G, no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

E. Failure to respond to a request for records shall be deemed a denial of the request and shall constitute a violation of this chapter.

F. Except with regard to scholastic records requested pursuant to subdivision A 1 of § 2.2-3705.4 that must be made available for inspection pursuant to the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and such requests for scholastic records by a parent or legal guardian of a minor student or by a student who is 18 years of age or older, a public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. The public body may also make a reasonable charge for the cost incurred in supplying records produced from a geographic information system at the request of anyone other than the owner of the land that is the subject of the request. However, such charges shall not exceed the actual cost to the public body in supplying such records, except that the public body may charge, on a pro rata per acre basis, for the cost of creating topographical maps developed by the public body, for such maps or portions thereof, which encompass a contiguous area greater than 50 acres. Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and

inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records. The public body shall provide the requester with a cost estimate if requested. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the cost estimate and the response of the requester. If the public body receives no response from the requester within 30 days of sending the cost estimate, the request shall be deemed to be withdrawn. Any costs incurred by the public body in estimating the cost of supplying the requested records shall be applied toward the overall charges to be paid by the requester for the supplying of such requested records.

G. Public records maintained by a public body in an electronic data processing system, computer database, or any other structured collection of data shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F. When electronic or other databases are combined or contain exempt and nonexempt records, the public body may provide access to the exempt records if not otherwise prohibited by law, but shall provide access to the nonexempt records as provided by this chapter.

Public bodies shall produce nonexempt records maintained in an electronic database in any tangible medium identified by the requester, including, where the public body has the capability, the option of posting the records on a website or delivering the records through an electronic mail address provided

by the requester, if that medium is used by the public body in the regular course of business. No public body shall be required to produce records from an electronic database in a format not regularly used by the public body. However, the public body shall make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and public body, including the payment of reasonable costs. The excision of exempt fields of information from a database or the conversion of data from one available format to another shall not be deemed the creation, preparation, or compilation of a new public record.

H. In any case where a public body determines in advance that charges for producing the requested records are likely to exceed $200, the public body may, before continuing to process the request, require the requester to pay a deposit not to exceed the amount of the advance determination. The deposit shall be credited toward the final cost of supplying the requested records. The period within which the public body shall respond under this section shall be tolled for the amount of time that elapses between notice of the advance determination and the response of the requester.

I. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

J. In the event a public body has transferred possession of public records to any entity, including but not limited to any other public body, for storage, maintenance, or archiving, the public body initiating the transfer of such records shall remain the custodian of such records for purposes of responding to requests for public records made pursuant to this chapter and shall be responsible for retrieving and supplying such public records to the requester. In the event a public body has transferred public records for storage, maintenance, or archiving and such transferring public body is no longer in existence, any public body that is a successor to the transferring public body shall be deemed the custodian of such records. In the event no successor entity exists, the entity in possession of the public records shall be deemed the custodian of the records for purposes of compliance with this chapter, and shall retrieve and supply such records to the requester. Nothing in this subsection shall be construed to apply to records transferred to the Library of Virginia for permanent archiving pursuant to the duties imposed by the Virginia Public Records Act (§ 42.1-76 et seq.). In accordance with § 42.1-79, the Library of Virginia shall be the custodian of such permanently archived records and shall be responsible for responding to requests for such records made pursuant to this chapter.

VA Code Ann. § 2.2-3704.01
§ 2.2-3704.01. Records containing both excluded and nonexcluded information; duty to redact
Effective: July 1, 2016

No provision of this chapter is intended, nor shall it be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by this chapter or by any other provision of law. A public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under this chapter or other provision of law applies to the entire content of the public record. Otherwise, only those portions of the public record containing information subject to an exclusion under this chapter or other provision of law may be withheld, and all portions of the public record that are not so excluded shall be disclosed.

VA Code Ann. § 2.2-3704.1
§ 2.2-3704.1. Posting of notice of rights and responsibilities by state and local public bodies; assistance by the Freedom of Information Advisory Council
Effective: July 1, 2022

A. All state public bodies subject to the provisions of this chapter, any county or city, any town with a population of more than 250, and any school board shall make available the following information to the public upon request and shall post a link to such

information on the homepage of their respective official public government websites:

1. A plain English explanation of the rights of a requester under this chapter, the procedures to obtain public records from the public body, and the responsibilities of the public body in complying with this chapter. For purposes of this section, "plain English" means written in nontechnical, readily understandable language using words of common everyday usage and avoiding legal terms and phrases or other terms and words of art whose usage or special meaning primarily is limited to a particular field or profession;

2. Contact information for the FOIA officer designated by the public body pursuant to § 2.2-3704.2 to (i) assist a requester in making a request for records or (ii) respond to requests for public records;

3. A general description, summary, list, or index of the types of public records maintained by such public body;

4. A general description, summary, list, or index of any exemptions in law that permit or require such public records to be withheld from release;

5. Any policy the public body has concerning the type of public records it routinely withholds from release as permitted by this chapter or other law; and

6. The following statement: "A public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records and shall make all reasonable efforts to supply the requested records at the lowest possible cost. No public body shall impose any extraneous, intermediary, or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication. Prior to conducting a search for records, the public body shall notify the requester in writing that the public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for requested records and inquire of the requester whether he would like to request a cost estimate in advance of the supplying of the requested records as set forth in subsection F of § 2.2-3704 of the Code of Virginia."

B. Any state public body subject to the provisions of this chapter and any county or city, and any town with a population of more than 250, shall post a link on its official public government website to the online public comment form on the Freedom of Information Advisory Council's website to enable any requester to comment on the quality of assistance provided to the requester by the public body.

C. The Freedom of Information Advisory Council, created pursuant to § 30-178, shall assist in the

development and implementation of the provisions of subsection A, upon request.

VA Code Ann. § 2.2-3704.2
§ 2.2-3704.2. Public bodies to designate FOIA officer
Effective: July 1, 2020

A. All state public bodies, including state authorities, that are subject to the provisions of this chapter and all local public bodies and regional public bodies that are subject to the provisions of this chapter shall designate and publicly identify one or more Freedom of Information Act officers (FOIA officer) whose responsibility is to serve as a point of contact for members of the public in requesting public records and to coordinate the public body's compliance with the provisions of this chapter.

B. For such state public bodies, the name and contact information of the public body's FOIA officer to whom members of the public may direct requests for public records and who will oversee the public body's compliance with the provisions of this chapter shall be made available to the public upon request and be posted on the respective public body's official public government website at the time of designation and maintained thereafter on such website for the duration of the designation.

C. For such local public bodies and regional public bodies, the name and contact information of the public body's FOIA officer to whom members of the public may direct requests for public records and

who will oversee the public body's compliance with the provisions of this chapter shall be made available in a way reasonably calculated to provide notice to the public, including posting at the public body's place of business, posting on its official public government website, or including such information in its publications.

D. For the purposes of this section, local public bodies shall include constitutional officers.

E. Any such FOIA officer shall possess specific knowledge of the provisions of this chapter and be trained at least once during each consecutive period of two calendar years commencing with the date on which he last completed a training session by legal counsel for the public body or the Virginia Freedom of Information Advisory Council (the Council) or through an online course offered by the Council. Any such training shall document that the training required by this subsection has been fulfilled.

F. The name and contact information of a FOIA officer trained by legal counsel of a public body shall be (i) submitted to the Council by July 1 of the year a FOIA officer is initially trained on a form developed by the Council for that purpose and (ii) updated in a timely manner in the event of any changes to such information.

G. The Council shall maintain on its website a listing of all FOIA officers, including name, contact information, and the name of the public body such FOIA officers serve.

VA Code Ann. § 2.2-3707
§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes
Effective: September 1, 2022

A. All meetings of public bodies shall be open, except as provided in §§ 2.2-3707.01 and 2.2-3711.

B. No meeting shall be conducted through telephonic, video, electronic, or other electronic communication means where the members are not physically assembled to discuss or transact public business, except as provided in §§ 2.2-3708.2 and 2.2-3708.3 or as may be specifically provided in Title 54.1 for the summary suspension of professional licenses.

C. Every public body shall give notice of the date, time, and location of its meetings by:

1. Posting such notice on its official public government website, if any;

2. Placing such notice in a prominent public location at which notices are regularly posted; and

3. Placing such notice at the office of the clerk of the public body or, in the case of a public body that has no clerk, at the office of the chief administrator.

All state public bodies subject to the provisions of this chapter shall also post notice of their meetings on a central, publicly available electronic calendar maintained by the Commonwealth. Publication of

meeting notices by electronic means by other public bodies shall be encouraged.

The notice shall be posted at least three working days prior to the meeting.

D. Notice, reasonable under the circumstance, of special, emergency, or continued meetings shall be given contemporaneously with the notice provided to the members of the public body conducting the meeting.

E. Any person may annually file a written request for notification with a public body. The request shall include the requester's name, address, zip code, daytime telephone number, electronic mail address, if available, and organization, if any. The public body receiving such request shall provide notice of all meetings directly to each such person. Without objection by the person, the public body may provide electronic notice of all meetings in response to such requests.

F. At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. The proposed agendas for meetings of state public bodies where at least one member has been appointed by the Governor shall state whether or not public comment will be received at the meeting and, if so, the approximate point during the meeting when public comment will be received.

G. Any person may photograph, film, record, or otherwise reproduce any portion of a meeting required to be open. The public body conducting the meeting may adopt rules governing the placement and use of equipment necessary for broadcasting, photographing, filming, or recording a meeting to prevent interference with the proceedings, but shall not prohibit or otherwise prevent any person from photographing, filming, recording, or otherwise reproducing any portion of a meeting required to be open. No public body shall conduct a meeting required to be open in any building or facility where such recording devices are prohibited.

H. Minutes shall be taken at all open meetings. However, minutes shall not be required to be taken at deliberations of (i) standing and other committees of the General Assembly; (ii) legislative interim study commissions and committees, including the Virginia Code Commission; (iii) study committees or commissions appointed by the Governor; or (iv) study commissions or study committees, or any other committees or subcommittees appointed by the governing bodies or school boards of counties, cities, and towns, except where the membership of any such commission, committee, or subcommittee includes a majority of the governing body of the county, city, or town or school board.

Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.

Minutes shall be in writing and shall include (a) the date, time, and location of the meeting; (b) the members of the public body recorded as present and absent; and (c) a summary of the discussion on matters proposed, deliberated, or decided, and a record of any votes taken. In addition, for electronic communication meetings conducted in accordance with § 2.2-3708.2 or 2.2-3708.3, minutes shall include (1) the identity of the members of the public body who participated in the meeting through electronic communication means, (2) the identity of the members of the public body who were physically assembled at one physical location, and (3) the identity of the members of the public body who were not present at the location identified in clause (2) but who monitored such meeting through electronic communication means.

VA Code Ann. § 2.2-3712
§ 2.2-3712. Closed meetings procedures; certification of proceedings
Effective: July 1, 2017

A. No closed meeting shall be held unless the public body proposing to convene such meeting has taken an affirmative recorded vote in an open meeting approving a motion that (i) identifies the subject matter, (ii) states the purpose of the meeting as authorized in subsection A of § 2.2-3711 or other provision of law and (iii) cites the applicable exemption from open meeting requirements provided in subsection A of § 2.2-3711 or other provision of law. The matters contained in such motion shall be

set forth in detail in the minutes of the open meeting. A general reference to the provisions of this chapter, the authorized exemptions from open meeting requirements, or the subject matter of the closed meeting shall not be sufficient to satisfy the requirements for holding a closed meeting.

B. The notice provisions of this chapter shall not apply to closed meetings of any public body held solely for the purpose of interviewing candidates for the position of chief administrative officer. Prior to any such closed meeting for the purpose of interviewing candidates, the public body shall announce in an open meeting that such closed meeting shall be held at a disclosed or undisclosed location within 15 days thereafter.

C. The public body holding a closed meeting shall restrict its discussion during the closed meeting only to those matters specifically exempted from the provisions of this chapter and identified in the motion required by subsection A.

D. At the conclusion of any closed meeting, the public body holding such meeting shall immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body. Any member of the public body

who believes that there was a departure from the requirements of clauses (i) and (ii), shall so state prior to the vote, indicating the substance of the departure that, in his judgment, has taken place. The statement shall be recorded in the minutes of the public body.

E. Failure of the certification required by subsection D to receive the affirmative vote of a majority of the members of the public body present during a meeting shall not affect the validity or confidentiality of such meeting with respect to matters considered therein in compliance with the provisions of this chapter. The recorded vote and any statement made in connection therewith, shall upon proper authentication, constitute evidence in any proceeding brought to enforce the provisions of this chapter.

F. A public body may permit nonmembers to attend a closed meeting if such persons are deemed necessary or if their presence will reasonably aid the public body in its consideration of a topic that is a subject of the meeting.

G. A member of a public body shall be permitted to attend a closed meeting held by any committee or subcommittee of that public body, or a closed meeting of any entity, however designated, created to perform the delegated functions of or to advise that public body. Such member shall in all cases be permitted to observe the closed meeting of the committee, subcommittee or entity. In addition to the requirements of § 2.2-3707, the minutes of the committee or other entity shall include the identity

of the member of the parent public body who attended the closed meeting.

H. Except as specifically authorized by law, in no event may any public body take action on matters discussed in any closed meeting, except at an open meeting for which notice was given as required by § 2.2-3707.

I. Minutes may be taken during closed meetings of a public body, but shall not be required. Such minutes shall not be subject to mandatory public disclosure.

VA Code Ann. § 2.2-3713
§ 2.2-3713. Proceedings for enforcement of chapter
Effective: July 1, 2019

A. Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Such petition may be brought in the name of the person notwithstanding that a request for public records was made by the person's attorney in his representative capacity. Venue for the petition shall be addressed as follows:

1. In a case involving a local public body, to the general district court or circuit court of the county or city from which the public body has been elected or

appointed to serve and in which such rights and privileges were so denied;

2. In a case involving a regional public body, to the general district or circuit court of the county or city where the principal business office of such body is located; and

3. In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond.

B. In any action brought before a general district court, a corporate petitioner may appear through its officer, director or managing agent without the assistance of counsel, notwithstanding any provision of law or Rule of Supreme Court of Virginia to the contrary.

C. Notwithstanding the provisions of § 8.01-644, the petition for mandamus or injunction shall be heard within seven days of the date when the same is made, provided the party against whom the petition is brought has received a copy of the petition at least three working days prior to filing. However, if the petition or the affidavit supporting the petition for mandamus or injunction alleges violations of the open meetings requirements of this chapter, the three-day notice to the party against whom the petition is brought shall not be required. The hearing on any petition made outside of the regular

terms of the circuit court of a locality that is included in a judicial circuit with another locality or localities shall be given precedence on the docket of such court over all cases that are not otherwise given precedence by law.

D. The petition shall allege with reasonable specificity the circumstances of the denial of the rights and privileges conferred by this chapter. A single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein. If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust. In making this determination, a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.

E. In any action to enforce the provisions of this chapter, the public body shall bear the burden of proof to establish an exclusion by a preponderance of the evidence. No court shall be required to accord any weight to the determination of a public body as to whether an exclusion applies. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter.

F. Failure by any person to request and receive notice of the time and place of meetings as provided in § 2.2-3707 shall not preclude any person from enforcing his rights and privileges conferred by this chapter.

VA Code Ann. § 8.01-384

§ 8.01-384. Formal exceptions to rulings or orders of court unnecessary; motion for new trial unnecessary in certain cases

A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to

transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.

B. The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.

VA Code Ann. § 15.2-1505.3
§ 15.2-1505.3. Localities prohibited from inquiring about arrests, charges, or convictions on employment applications; exceptions
Effective: July 1, 2020

A. As used in this section, "conviction" means any adjudication that an individual committed a crime, any finding of guilt after a criminal trial by a court of competent jurisdiction, or any plea of guilty or nolo contendere to a criminal charge.

B. No locality shall request a prospective employee to complete an application for employment that includes a question inquiring whether the prospective employee has ever been arrested for, charged with, or convicted of any crime. This prohibition shall not apply to (i) law-enforcement agency positions or positions related to law-enforcement agencies, (ii) positions for employment by the local school board, (iii) sensitive positions, or (iv) any employment-related applications or

questionnaires provided during or after a staff interview. For purposes of this subsection, "sensitive positions" shall include those positions:

1. Responsible for the health, safety, and welfare of citizens or the protection of critical infrastructure;

2. That have access to sensitive information, including access to federal tax information in approved exchange agreements with the Internal Revenue Service or Social Security Administration; and

3. That are otherwise required by state or federal law to be designated as sensitive.

C. No locality shall inquire whether a prospective employee has ever been arrested for, or charged with, or convicted of any crime unless the inquiry takes place during or after a staff interview of the prospective employee.

D. Nothing in this section shall prevent a locality from considering information received during or after a staff interview pertaining to a prospective employee having been arrested for, charged with, or convicted of any crime.

Sup.Ct.Rules, Rule 5:25
RULE 5:25. PRESERVATION OF ISSUES FOR APPELLATE REVIEW
Effective: January 1, 2022

No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

Petition for Appeal filed on September 28, 2021, in the Supreme Court of Virginia

ASSIGNMENT OF ERROR VI – Preservation References:

- Primary basis: If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. Va. Code Ann. § 8.01-384 (West).
- Secondary basis: Virginia's Rule 5:25 includes an exception to the general rule of contemporaneous objection: "for good cause shown or to enable [the Court] to attain the ends of justice," the appellate courts may

review a decision not objected to. Va. Sup. Ct. R. 5:25.

- See also: Tr. 12:15-16:9.

Assignment of Error VI; Petition for Appeal; Supreme Court of Virginia (Record No. 210917); filed on September 28, 2021.

VI. The Trial Court erred by not disclosing Extreme Judicial Conflict until after the Trial Court had ruled on Respondents' Motion for Recusal and the hearing was underway. The delayed and piecemeal disclosure violated the Due Process Clause of the Constitution of Virginia and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

APPELLATE STANDARD OF REVIEW: DE NOVO[1]

AUTHORITIES AND ARGUMENT

For the purpose of Assignment of Error VI, "Extreme Judicial Conflict" is defined as: a.) the fact that the presiding judge is an acquaintance of Respondent Maria Jankowski (Tr. 16-17); and b.) the fact that Lauren Brice worked as a law clerk for the Trial Court and worked closely with the presiding judge. Tr. 101-102. Brice is an employee of

[1] The Supreme Court of Virginia applies a de novo standard of review to pure questions of law involving constitutional and statutory interpretation. *Gallagher v. Commonwealth*, 284 Va. 444, 449 (2012).

Respondent VIDC who is specifically named[2] in the Petition (R16, 48-50) and was an adverse witness at the June 17 VFOIA Hearing.

When Petitioner filed the Petition on December 30, 2020, the Trial Court was aware of the Extreme Judicial Conflict, Respondents were aware of the Extreme Judicial Conflict, Petitioner was in the dark.

On April 6, 2021, when the Trial Court heard oral arguments on Respondents' demurrers and motion to dismiss (R90-125, 126-146, 189-190), the Trial Court knew of the Extreme Judicial Conflict, Respondents knew of the Extreme Judicial Conflict, Petitioner was left unaware.

When Respondents filed Respondents' Motion for Recusal (R1038-1042) on June 14, 2021 (three days before the June 17 VFOIA Hearing), Respondents knew of the Extreme Judicial Conflict. Respondents chose to not disclose the Extreme Judicial Conflict to Petitioner either in their Motion for Recusal or in any other manner.

On June 15, 2021, Petitioner filed Petitioner's Opposition to Respondent's Motion for Recusal (R1067-1077). In the course of preparing and filing Petitioner's Opposition to Respondents' Motion for Recusal, Petitioner had not been informed of the Extreme Judicial Conflict and given that discovery was not authorized in this case, Petitioner had no way of discovering the Extreme Judicial Conflict.

On June 17, 2021, the Trial Court heard arguments on Respondents' Motion for Recusal. Tr.

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[2] The Petition alleges that Bradley Haywood instructed Lauren Brice to lie to Petitioner and Brice then lied to Petitioner. R16, 48-50.

12-16. During arguments, the Trial Court had knowledge of the Extreme Judicial Conflict, Respondents knew of the Extreme Judicial Conflict, Petitioner was not informed of the Extreme Judicial Conflict.

When the Trial Court ruled on the Motion for Recusal and denied the motion (Tr. 16), the Trial Court was aware of the Extreme Judicial Conflict, Respondents were aware of the Extreme Judicial Conflict, Petitioner did not know if it.

After the Trial Court had ruled on Respondents Motion for Recusal, Respondents, for the very first time, disclosed subsection (a) of the Extreme Judicial Conflict. Tr. 16.

It was not until almost half of the June 17 VFOIA Hearing had elapsed, until after opening statements had finished and Bradley Haywood had testified, that the Trial Court announced[3] subsection (b) of the Extreme Judicial Conflict. Tr. 102.

The United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law."[4] U.S. Const. amend. XIV. Article 1, Section 11 of the Virginia Constitution states that "no person shall be deprived of his life, liberty, or property without due process of

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[3] When the Extreme Judicial Conflict was disclosed, the Trial Court provided Petitioner with an opportunity to object. Tr. at 17 and 102. The argument in Assignment of Error VI is that the significantly delayed and piecemeal disclosure violated Petitioner's Constitutional rights.

[4] The Fourteenth Amendment's explicit attestation of "due process of law" reflects our nation's commitment to an impartial judicial system, one in which judges "hold the balance nice, clear, and true." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

law...." *Menninger v. Menninger*, 64 Va. App. 616, 621 (2015).

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955). An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016).

Due process analysis involves a two-step inquiry. *Klimko v. Virginia Emp. Comm'n*, 216 Va. 750, 754 (1976). First, there must be a deprivation of a liberty or property interest. *Jackson v. W.*, 14 Va. App. 391, 406 (1992) (internal citations omitted). If there is a deprivation, the second inquiry is whether the procedures prescribed or applied are sufficient to satisfy the due process fairness[5] standard. *Klimko v. Virginia Emp. Comm'n*, 216 Va. 750, 754 (1976).

The rights and privileges conferred to the citizens of this Commonwealth by VFOIA constitute

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[5] The Due Process Clause incorporated the common-law rule requiring recusal when a judge has a direct, personal, substantial, pecuniary interest in a case, but [the United States Supreme Court] has also identified additional instances which, as an objective matter, require recusal where the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (internal citations and quotations omitted).

a statutorily[6] created liberty interest. Furthermore, the Supreme Court of the United States has stated that the right to acquire useful knowledge[7] is a liberty guaranteed by the Fourteenth Amendment. Petitioner has a liberty interest in the information he requested through VFOIA and he has recourse[8] in the courts if his rights are denied.

During the period that the deprivation of due process took place, Petitioner was not aware of the Extreme Judicial Conflict and therefore, had no opportunity to object. The existence of Extreme Judicial Conflict, the failure to timely disclose[9] the

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[6] By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. Va. Code Ann. § 2.2-3700(B) (West).

[7] See: *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[8] Any person, including the attorney for the Commonwealth acting in his official or individual capacity, denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by filing a petition for mandamus or injunction, supported by an affidavit showing good cause. Va. Code Ann. § 2.2-3713(A) (West).

[9] Canon 3E of the Cannons for Judicial Conduct for the Commonwealth of Virginia provides specific guidance on the issue of recusal. The Commentary to Canon 3E states in part: 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. Recusal Based Upon Acquaintance with Party, Att'y or Witness, Va. Eth. Op. 01-08 (July 16, 2001).

Extreme Judicial Conflict and the piecemeal[10] disclosure of the Extreme Judicial Conflict deprived Petitioner of due process during critical phases[11] of the litigation and thus constituted a violation of the Due Process Clause of the Constitution of Virginia and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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[10] As the fable goes, if a frog is placed suddenly into boiling water, it will jump out, but if the frog is put in tepid water which is then brought to a boil slowly, it will not perceive the danger and will be cooked to death.

[11] It is beyond cavil that a litigant is entitled to due process at every stage in the litigation. *Forman v. Creighton Sch. Dist. No. 14*, 87 Ariz. 329, 335, 351 P.2d 165, 169 (1960).

Argument Section IV; Petition for Rehearing; Supreme Court of Virginia (Record No. 210917); filed on April 26, 2022.

IV. Petitioner requests rehearing because the delayed and piecemeal disclosure of Extreme Judicial Conflict[1] violated the Due Process Clause of the Constitution of Virginia and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. [Assignment of Error VI]

Rule 2.11 of the Model Code of Judicial Conduct[2] identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned. ABA Comm. on Ethics & Pro. Resp., Formal Op. 488 at 1 (2019). Formal Opinion 488 identifies three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1)

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[1] For the purpose of Assignment of Error VI, "Extreme Judicial Conflict" is defined as: a.) the fact that the presiding judge is an acquaintance of Respondent Maria Jankowski (Tr. 16-17); and b.) the fact that Lauren Brice worked as a law clerk for the Trial Court and worked closely with the presiding judge. Tr. 101-102. Brice is an employee of Respondent VIDC who is specifically named in the Petition (R16, 48-50) and was an adverse witness at the June 17 VFOIA Hearing.

[2] Virginia adopted the ABA Model Rules of Professional Conduct on January 25, 1999;(https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited: April 20, 2022)).

acquaintanceships; (2) friendships; and (3) close personal relationships. Formal Op. 488 at 2 (2019).

Based on the information disclosed to date and pursuant to Formal Opinion 488, Respondent Jankowski is an acquaintance[3] of the presiding judge[4] and Lauren Brice is a friend[5] of the presiding judge. A judge should disclose[6] [emphasis added] to

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[3] A judge and lawyer should be considered acquaintances when their interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship, professional or civic organization, or the like. Formal Op. 488 at 4 (2019). A judge and party should be considered acquaintances in the same circumstances in which a judge and lawyer would be so characterized. Formal Op. 488 at 4 (2019).

[4] A judge has no obligation to disclose his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding but a judge may disclose the acquaintanceship if the judge so chooses. Formal Op. 488 at 4 (2019). Evaluated from the standpoint of a reasonable person **fully informed of the facts** [emphasis added], a judge's acquaintance with a lawyer or party, **standing alone**, [emphasis added] is not a reasonable basis for questioning the judge's impartiality. Formal Op. 488 at 4 (2019) (citing: N.Y. Jud. Adv. Op. 11-125, supra note 8, 2011 WL 8333125, at *2; Va. Judicial Ethics Advisory Comm. Op. 01-08, 2001 WL 36352802, at *1, *2 (2001)).

[5] In contrast to simply being acquainted, a judge and a party or lawyer may be friends. "Friendship" implies a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Formal Op. 488 at 4 (2019).

[6] **Disclosure is the lesser remedy**. Formal Op. 488 at 2 (2019).

the other lawyers and parties in the proceeding information about a friendship with a lawyer or party "that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification [emphasis added]. Formal Op. 488 at 6 (2019).

It is not either conflict on its own but rather the combination of the two conflicts that rises to the level of Extreme Judicial Conflict. It is not the complete absence of disclosure but the delayed and piecemeal disclosure[7] that has led to the constitutional violation[8] in this matter.

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[7] An impartial decision maker is essential. *Klimko v. Virginia Employment Com'n*, 216 Va. 750, 762 (1976) (internal citations omitted). A judge shall avoid impropriety and the appearance of impropriety. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) (Citing: ABA Ann. Mod. Code of Judicial Conduct, Canon 2 (2004)).

[8] Procedural due process rights attach to liberty interests that are created by non-constitutional law, such as a statute. *Kerry v. Din*, 576 U.S. 86, 97-98 (2015).

Oral argument (by Petitioner Ramin Seddiq) held before the Supreme Court of Virginia on April 5, 2022 (Record No. 210917).

Section of transcript addressing Assignment of Error VI [misspellings and grammatical errors in transcript].

"Assignment's of Error 6 is about delay and piecemeal disclosure which violated due process. The due process clause requires a stringent standard because our system of law has always endeavored to prevent even the probability of unfairness. The Supreme Court of the United States has stated that justice must satisfy the appearance of justice. Until the disclosures were made, petitioner had no opportunity to object because petitioner did not know about the extreme judicial conflict. Furthermore, a person who has had no opportunity to object at the time a ruling is made, is not required under Section 8.01-384, to preserve the issue for appellate review by stating the issue in a motion to reconsider. The extreme judicial conflict was important enough and serious enough, such that respondents felt the need to raise it at the VFOIA hearing, and such that the Trial Court deemed it necessary to issue disclosures, albeit delayed ones. Petitioners opposition to respondents motion for recusal made note of the guidance regarding disclosure. As such, the Trial Court was aware of the guidance and was thus protected from an appeal based on undisclosed grounds. The rights and privileges conferred to the citizens of this Commonwealth by VFOIA constitute a statutorily created liberty interest. There was a deprivation of a liberty interest and the procedures

applied were insufficient to satisfy the due process fairness standard. Regarding the secondary basis upon which petitioner argues that assignment of Error 6 is, reserved for appeal, this Court considers two questions when deciding whether to apply the ends of justice exception. One, whether there is error as contended by the appellant, and two, whether the failure to apply ends of justice provision would result in a grave injustice. In Commonwealth V. Bass, this court ruled in part that a variance between indictments in evidence presented did not warrant a consideration of unpreserved error under the ends of justice exception to the contemporaneously objection rule because the error did not result in a grave injustice but noted, "there is no error of constitutional magnitude at issue." With respect to assignment of Error 6, there is an error of constitutional magnitude. The Supreme Court of Virginia should grant this petition on all six assignments of Error. Thank you."

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

Case No. CL20-5336

RAMIN SEDDIQ,
Petitioner,
v.

VIRGINIA INDIGENT DEFENSE COMMISSION
and
MARIA JANKOWSKI,
Respondents.

MOTION FOR RECUSAL

Come now, the Virginia Indigent Defense Commission (the "VIDC") and its Deputy Director Maria Jankowski (collectively, "Respondents"), by counsel, who respectfully move, in light of witnesses recently subpoenaed by Petitioner, that the Judges of this Honorable Court recuse themselves and request the appointment of a judge designate from the Supreme Court of Virginia.

I. PROCEDURAL HISTORY

On October 26, 2020, Petitioner sent a request to Respondents pursuant to the Virginia Freedom of Information Act ("VFOIA"), Va. Code § 2.2-3700, et seq. On October 28, 2020, Respondents responded that they had received the request and asked for further clarification. Respondents timely responded

to the request on November 9, 2020. On November 17, 2020, Petitioner sent a message to Respondents further inquiring about certain categories of documents he believed had been omitted from the original production. Having received this clarifying information from Petitioner, Respondents produced a second set of documents on November 18, 2020. Six weeks later, on December 30, 2020, Petitioner filed this action, alleging that Respondents had not complied with their obligations under VFOIA. The Petition was served on Respondents on January 21, 2021.

Respondents demurred to the Petition on February 11, 2021. Oral argument on the Demurrer was heard on April 6, 2021 by the Honorable Louise M. DiMatteo. Judge DiMatteo sustained the Respondents' demurrer as to one count but held that the remaining counts of the Petition should be set for a hearing. Judge DiMatteo further indicated that discovery in this action would not be necessary and declined to enter an order providing for discovery. On April 14, 2021 and pursuant to Judge DiMatteo's instructions, the parties submitted an agreed order setting this case for a hearing on June 17, 2021 at 10:00 A.M.

On June 11, 2021, only six days before the hearing and without notice to opposing counsel, Petitioner served a witness subpoena on Lauren Brice, an attorney in the Arlington Public Defender's Office. On June 14, 2021, only three days before the hearing and without notice to opposing counsel, Petitioner served a witness subpoena on Chief Arlington Public Defender Bradley Haywood.

II. ARGUMENT

"In Virginia, whether a trial judge should recuse himself or herself is measured by whether he or she harbors such bias or prejudice as would deny the defendant a fair trial." *Welsh v. Commonwealth*, 14 Va. App. 300, 315 (Va. App. 1992). The decision to recuse rests within the discretion of the trial judge. *Commonwealth v. Jackson*, 267 Va. 226, 229 (2004).

Here, a decision to recuse is appropriate in light of Petitioner's decision to subpoena as witnesses two attorneys who regularly appear as advocates before each judge of this Honorable Court. Respondents do not believe that either proposed witness is necessary to fulsomely present the issues to the Court in the upcoming proceeding. Should Petitioner nonetheless pursue testimony from these witnesses, however, it will require the Court to hear testimony from and evaluate the credibility of two attorneys who appear before the Court every day. Requiring the Court to hear testimony under these circumstances implicates not only the outcome of this case, but also the hundreds of other cases involving clients these attorneys represent in this Honorable Court.

Moreover, one of these recently subpoenaed witnesses has filed civil actions against the judges of this Honorable Court, one of which remains pending in the Supreme Court of Virginia. Although this attorney is an employee of the VIDC, he pursues his litigation advocacy independently of any direct oversight from the VIDC. As Petitioner intends to call these witnesses at trial, the appointment of a designate judge to hear this matter will avoid potential prejudice against the VIDC.

III. CONCLUSION

Respondents respectfully move the Court to transfer this case to the Circuit Court for the City of Richmond. Respondents bring this motion now, having only just learned of Petitioner's intention to call two witnesses who may jeopardize the Court's ability to provide a full and timely resolution of this action.

Respectfully submitted,

Virginia Indigent Defense Commission
Maria Jankowski, Deputy Director

By: *Blaire Hawkins O'Brien*
Blaire Hawkins O'Brien

Mark R. Herring
Attorney General
Samuel T. Towell (VSB No. 71512)
Deputy Attorneys General
Marshall H. Ross
Senior Assistant Attorney General
Blaire O'Brien (VSB No. 83961)*
Assistant Attorneys General
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 317-0977 – Telephone
(804) 371-0200 – Facsimile
bo'brien@oag.state.va.us
*Counsel of Record

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON

Case No.: CL20005336-00

RAMIN SEDDIQ
Petitioner,

v.

VIRGINIA INDIGENT DEFENSE COMMISSION, and
MARIA JANKOWSKI, in her official capacity as the Deputy Executive Director of Virginia Indigent Defense Commission
Respondents.

PETITIONER'S OPPOSITION TO MOTION FOR RECUSAL

Petitioner Ramin Seddiq, pro se, respectfully opposes Respondents' Motion for Recusal, filed with this Court on June 14, 2021. As grounds for this opposition, Petitioner relies on the following points and authorities and any other points that may be raised at a hearing.

BACKGROUND

On December 30, 2020, Petitioner filed with this Court, a Petition for Injunction and Writ of Mandamus (Virginia FOIA). On February 11, 2021, Respondents filed a Demurrer and Motion to Dismiss. On February 19, 2021, Petitioner filed Petitioner's Opposition to Respondents' Demurrers

and Motion to Dismiss. On March 26, 2021 Respondents filed the Brief Reply in Support of Demurrer and Motion to Dismiss. On March 30, 2021, after it became apparent that Respondents intended to postpone further the hearing on Respondents' Demurrer and Motion to Dismiss, Petitioner filed Petitioner's Emergency Motion to Preserve Hearing Date.

On April 6, 2021, this Court held a hearing on Respondents' Demurrers and Motion to Dismiss (Hon. Louise M. DiMatteo presiding). This Court overruled Respondents' Demurrers as to Counts I, II, III, IV, VI, VII, VIII, IX and X and denied Respondents' Motion to Dismiss as to the same counts. This Court sustained Respondents' Demurrer as to Count V and granted Respondents' Motion to Dismiss as to the same count. The Court instructed the parties to coordinate and schedule a date for a Virginia FOIA hearing. The parties agreed to schedule the Virginia FOIA hearing for June 17, 2021 at 10:00 AM.

At 7:52 PM on June 14, 2021, less than three days before the scheduled Virginia FOIA hearing, Respondents notified Petitioner that they have filed with this Court a Motion for Recusal.

At 11:49 PM on June 14, 2021, less than three days before the scheduled Virginia FOIA hearing, Respondents notified Petitioner that they have filed with this Court a Motion for Leave to File Late Pleading.

ARGUMENT

A. The Motion for Recusal Lacks Merit

The motion to recuse all Arlington Circuit Court judges from this matter lacks merit and should not be granted because there is no evidence that this Court would be unable to be impartial due to the fact that two of Petitioner's witnesses are attorneys who regularly appear before each judge of this Court.

In considering a motion for recusal, a judge must exercise reasonable discretion in determining whether he or she possesses such bias or prejudice that would deny a litigant a fair trial. *Wilson v. Commonwealth*, 272 Va. 19, 28 (2006) (internal citations omitted). The party moving for recusal of a judge has the burden of proving the judge's bias or prejudice. *Commonwealth v. Jackson*, 267 Va. 226, 229 (2004). In the absence of proof of actual bias, recusal is properly within the discretion of the trial judge. *Commonwealth v. Jackson*, 267 Va. 226, 229 (2004).

The judge must also consider "the public's perception of his or her fairness, so that the public's confidence in the integrity of the judicial system is maintained." *Buchanan v. Buchanan*, 14 Va. App. 53, 55 (1992). It is, however, the public's perception, not the litigant's, that a judge must consider when deciding whether recusal is required to preserve the judicial system's integrity. *Scott v. Rutherfoord*, 30 Va. App. 176, 189 (1999). "Judges should be keenly aware that frequent recusal by a judge may lead the public to conclude that the judge is avoiding unpleasant cases or that the judge is not carrying his or her appropriate share of the court's work.

Further, when a judge recuses himself or herself frequently, attorneys and litigants may well be encouraged to use recusal motions as a means of judge shopping."[1]

"None of the [Judicial] Canons or Commentaries thereto expressly suggests that recusal is warranted simply because a witness or party is an acquaintance of the judge. In such situations, however, it is advisable for the judge to inform counsel and the parties of the situation. Disclosure of this information does not, of itself, trigger the provisions of Canon 3F dealing with remittal of disqualification."[2]

In *Commonwealth v. Jackson*, the Virginia Supreme Court considered whether a trial judge must recuse himself from presiding over a probation revocation hearing if he was the Commonwealth's Attorney for the jurisdiction at the time and place of the defendant's original criminal conviction. *Commonwealth v. Jackson*, 267 Va. 226, 226 (2004).

In 1997, pursuant to a plea agreement, Kenneth Jackson pled guilty in the Norfolk Circuit Court two counts of possession of cocaine with intent to distribute and was sentenced to 20 years in the penitentiary with 18 years suspended. *Commonwealth v. Jackson*, 267 Va. 226, 228 (2004). After his release, he was accused of violating the terms of his suspended sentence and ordered to show

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[1] Recusal Based upon Acquaintance with Party, Attorney or Witness; Commonwealth of Virginia Judicial Ethics Advisory Committee; Opinion 01-8; Date Issued: July 16, 2001; 2001 WL 36352802 (VA Jud. Eth. Adv. Comm.).

[2] Recusal Based upon Acquaintance with Party, Attorney or Witness; Commonwealth of Virginia Judicial Ethics Advisory Committee; Opinion 01-8; Date Issued: July 16, 2001; 2001 WL 36352802 (VA Jud. Eth. Adv. Comm.).

cause why the suspended sentence should not be revoked. *Commonwealth v. Jackson*, 267 Va. 226, 228 (2004).

Judge Charles D. Griffith, Jr. was the presiding judge at Jackson's revocation hearing. Counsel for Jackson requested Judge Griffith to recuse himself because he was the elected Commonwealth's Attorney in Norfolk at the time Jackson was convicted of the offenses resulting in the suspended sentence (Judge Griffith took the oath of office as a judge of the Norfolk Circuit Court after the date of Jackson's original sentencing). *Commonwealth v. Jackson*, 267 Va. 226, 228 (2004). "Judge Griffith denied Jackson's motion, and after hearing the evidence found that Jackson had violated the terms of his suspended sentence. Judge Griffith revoked the previously suspended sentence." *Commonwealth v. Jackson*, 267 Va. 226, 228 (2004).

The Supreme Court of Virginia held that Judge Griffith did not abuse his discretion and that there was no evidence that Judge Griffith treated Jackson in a biased or prejudicial manner at the revocation hearing. *Commonwealth v. Jackson*, 267 Va. 226, 230 (2004). The court noted that Jackson's argument would result in per se disqualification of any judge who had served as Commonwealth's Attorney in any matter involving individuals who had committed a crime or been prosecuted at the time that the judge was Commonwealth's Attorney without any indication of the judge's actual prior involvement in the case or other evidence of bias or prejudice. *Commonwealth v. Jackson*, 267 Va. 226, 229 (2004).

First, it should come as no surprise to Respondents that Bradley Haywood (hereinafter, "Haywood") and Lauren Brice (hereinafter, "Brice") are witnesses in this matter. The Respondents are Virginia Indigent Defense Commission ("VIDC") and Maria Jankowski, the Deputy Executive Director of VIDC. Haywood and Brice work at the Office of the Public Defender for Arlington County and the City of Falls Church (hereinafter, "Arlington Public Defender") which operates under the direction and authority of VIDC. Furthermore, the Petition filed with this Court on December 30, 2020 makes it abundantly clear that Haywood and Brice are intricately and extensively involved in this matter.

Second, Petitioner approached Respondents' counsel on June 4, 2021 – thirteen days prior to the scheduled Virginia FOIA hearing – offering to voluntarily[3] exchange witness lists, Respondents' counsel stated that they had not yet decided on who they were going to call as witnesses and therefore were not prepared to exchange witness lists (see Exhibit A). Since that date, Respondents have not contacted Petitioner to exchange witness lists. Petitioner filed with the Clerk's Office, requests for subpoenas for both Haywood and Brice on June 2, 2021 – more than two weeks before the scheduled hearing date.

Third, in their Motion for Recusal, Respondents state that they "do not believe that either proposed witness is necessary to fulsomely present the issues to the Court in the upcoming proceeding."

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[3] There is no pretrial scheduling order entered in this case and during the April 6, 2021 hearing on Respondents' Demurrers and Motion to Dismiss, the Court advised the parties to coordinate and collaborate on any outstanding issues.

(Respondents' Motion for Recusal at p. 2). It is not up to the Respondents to determine how Petitioner presents his case before this Court. That one of the aforementioned witnesses has filed civil actions against the judges of this Court should not mean that all Arlington Circuit Court judges must recuse themselves from this matter. Otherwise, by that same rationale, the witness who has filed civil actions against the judges of this Court should not be arguing before this Court at all on any case.

Respondents have not presented one iota of evidence or a single valid argument to meet their burden of proving that the judges of this Honorable Court harbor bias or prejudice in this matter.

B. The Motion for Recusal is Untimely

"The [Judicial] Canons, when read as a whole, encourage the prompt disposition of cases in the courts. Recusal, when not required by the canons, necessarily delays the business of the court, and judges should not routinely recuse themselves merely because they may know an attorney, party or witness. Whether required or not, recusal imposes additional stress on parties and witnesses, increases the expense of litigation, and delays the resolution of issues before the court. Recusal is particularly disfavored where replacing the judge would cause a significant waste of judicial resources."[4]

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[4] Recusal Based upon Acquaintance with Party, Attorney or Witness; Commonwealth of Virginia Judicial Ethics Advisory Committee; Opinion 01-8; Date Issued: July 16, 2001; 2001 WL 36352802 (VA Jud. Eth. Adv. Comm.) (internal citations omitted).

This Virginia FOIA hearing was placed on the docket by agreed order on April 14, 2021, signed by Judge DiMatteo. Petitioner has expended significant time and expense preparing for the Virginia FOIA hearing on June 17, 2021. Petitioner has sent subpoenas to a number of witnesses who expect to appear on June 17, 2021. Those witnesses have made plans and preparations in anticipation of a June 17, 2021 Virginia FOIA hearing. Respondents have waited until less than three days before the hearing date to file a motion flippantly requesting that the entire Arlington Circuit Court recuse itself from this matter. Petitioner is a resident of Arlington and the Arlington Circuit Court is the proper venue for this Virginia FOIA hearing.[5] Petitioner would incur considerable additional cost if he were forced to litigate this matter in the City of Richmond and such a decision may have the effect of preventing Petitioner from seeking redress in the courts.

CONCLUSION

Petitioner has been deprived of his rights under Virginia FOIA (Va. Code Ann. § 2.2-3700 et seq.). Respondents' Motion for Recusal is utterly without merit, intended to cause unnecessary delay and prevent the administration of justice. Respondents,

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[5] In a case involving a board, bureau, commission, authority, district, institution, or agency of the state government, including a public institution of higher education, or a standing or other committee of the General Assembly, to the general district court or the circuit court of the residence of the aggrieved party or of the City of Richmond. Va. Code Ann. § 2.2-3713(A)(3) (West).

concerned about their image and believing themselves to be above the law are flooding the docket with frivolous motions as a tactic to prevent this Virginia FOIA hearing from taking place as scheduled and as directed by this Court.

For the reasons stated and upon the authorities cited, Respondents' Motion for Recusal should be denied with prejudice.

Respectfully submitted this 15th day of June 2021,

/s/ RAMIN SEDDIQ

Ramin Seddiq, pro se
PO Box 5533
McLean, VA 22103
202.412.8999
ramins2536@gmail.com

EXHIBIT A
PETITIONER'S OPPOSITION TO MOTION FOR RECUSAL

Gmail **Ramin Seddiq <ramins2536@gmail.com>**

CL20005336-00 - SEDDIQ v. VIDC et al. - Remote Testimony
4 messages

Ramin Seddiq <ramins2536@gmail.com> Thu, Jun 3, 2021 at 5:58 PM
To: "O'Brien, Blaire" <BO'Brien@oag.state.va.us>

Blaire:

I hope you're well. My fact witness would like to testify remotely on June 17. The rules permit it. In lieu of placing the request on the court's motions docket, I would like to file a motion with a proposed agreed order that the court could sign without hearing. Let me know your thoughts

Best regards,

Ramin Seddiq
ramins2536@gmail.com
202.412.8999

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O'Brien, Blaire <BO'Brien@oag.state.va.us> Fri, Jun 4, 2021 at 2:34 PM
To: Ramin Seddiq <ramins2536@gmail.com>

Ramin –

Thanks for your message. Without knowing who your witness is and the substance of the witness's proposed testimony, I can't consent to remote testimony. Can you give me more information?

Thanks,

Blaire

Blaire H O'Brien
Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219

(804) 371-0977 Office
BO'Brien@oag.state.va.us
http://www.ag.virginia.gov

[Quoted text hidden]

Ramin Seddiq <ramins2536@gmail.com> Fri, Jun 4, 2021 at 3:42 PM
To: "O'Brien, Blaire" <BO'Brien@oag.state.va.us>

Would you like us to voluntarily exchange witness lists? As far as I know, no pretrial scheduling order has been entered in this case and per Judge DiMatteo, there is no discovery. Exchanging witness lists can prevent undue surprise and reduce the possibility of chaos during the hearing.
[Quoted text hidden]

O'Brien, Blaire <BO'Brien@oag.state.va.us> Fri, Jun 4, 2021 at 3:47 PM
To: Ramin Seddiq <ramins2536@gmail.com>

Ramin –

I haven't conclusively decided whom I'm going to call yet.

You're welcome to file a motion if you'd like to have your witness testify remotely, but the Court will also want you to identify him/her for purposes of the factors in Rule 1:27(b).

[Quoted text hidden]

VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

IN RE: CRIMINAL DOCKETS BEGINNING MARCH 10, 2020

Misc. No. CM20000239-00

ORDER GOVERNING CRIMINAL DOCKET PROCEDURES

THIS MATTER came before the Court *sua sponte* concerning motions in criminal cases for compliance with the Court's previously established procedures for motions, as provided in the 17th Judicial Circuit Local Rules and Preferred Practices, adopted on July 1, 2014 and amended effective August 1, 2016.

UPON CONSIDERATION WHEREOF, it appearing to the Court for the efficient administration of justice; for the Court to properly consider the issues presented and the representations being made to the Court; for the Court to make all required statutorily required findings; to facilitate full consideration of parties' substantive rights; to permit parties the opportunity to present their positions on pending matters; and for clarity of the record; it is hereby,

ORDERED that all motions to: (1) amend an indictment pretrial, (2) enter a *nolle prosequi* or (3) dismiss a case shall be in writing; said motion shall provide in detail all factual and not purely conclusory bases in support thereof; said motion

shall be signed by Counsel to the best of counsel's belief after reasonable inquiry and warranted by existing law; and it shall be filed with the Clerk of Court, with a courtesy copy in paper form submitted to Judges' Chambers, consistent with 17th Cir. R. P. 2.3(A)(iv)(b); and it is further,

ORDERED, for continuity of established practices and consistent with 17th Cir. R. P., that all sentencing guidelines and justification for upward or downward departures of any applicable sentencing guidelines supporting a recommended sentence shall be in writing and filed with the Clerk of Court, with a courtesy copy in paper form submitted to Judges' Chambers no later than 3:.30 p.m. preceding the hearing date, as well as all written plea agreements.

ENTERED THIS 4th Day of March 2020.

/s/ William T. Newman, Chief Judge
Arlington County Circuit Court

/s/ Daniel S. Fiore, II, Judge
Arlington County Circuit Court

/s/ Louise M. DiMatteo, Judge
Arlington County Circuit Court

/s/ Judith L. Wheat, Judge
Arlington County Circuit Court

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 488 September 5, 2019

Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure

Rule 2.11 of the Model Code of Judicial Conduct identifies situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned— including cases implicating some familial and personal relationships—but it is silent with respect to obligations imposed by other relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in evaluating ethical obligations those relationships may create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In short, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be

waived in accordance and compliance with Rule 2.11(C) of the Model Code.[1]

I. Introduction

The Committee has been asked to address judges' obligation to disqualify[2] themselves in proceedings in which they have social or close personal relationships with the lawyers or parties other than a spousal, domestic partner, or other close family relationship. Rule 2.11 of the Model Code of Judicial Conduct ("Model Code") lists situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including cases implicating some specific family and personal relationships—but the rule provides no guidance with respect to the types of relationships addressed in this opinion.[3]

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[1] This opinion is based on the Model Code of Judicial Conduct as amended by the House of Delegates through February 2019. Individual jurisdictions' court rules, laws, opinions, and rules of professional conduct control. The Committee expresses no opinion on the applicable law or constitutional interpretation in a particular jurisdiction.

[2] The terms "recuse" and "disqualify" are often used interchangeably in judicial ethics. *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2011) [hereinafter MODEL CODE] (noting the varying usage between jurisdictions). We have chosen to use "disqualify" because that is the term used in the Model Code of Judicial Conduct.

[3] *See* MODEL CODE R. 2.11(A) (listing relationships where a judge's impartiality might reasonable be questioned, including where (1) the judge has "a personal bias or prejudice" toward a lawyer or party; (2) the judge's spouse, domestic partner, or a person within the third degree of relationship to the judge or the judge's spouse or domestic partner is a party or

Public confidence in the administration of justice demands that judges perform their duties impartially, and free from bias and prejudice. Furthermore, while actual impartiality is necessary, the public must also perceive judges to be impartial. The Model Code therefore requires judges to avoid even the appearance of impropriety in performing their duties.[4] As part of this obligation, judges must consider the actual and perceived effects of their relationships with lawyers and parties who appear before them on the other participants in proceedings.[5] If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself from the proceeding.[6] Whether a judge's relationship with a lawyer or party may cause the judge's impartiality to reasonably be questioned and thus require disqualification is (a) evaluated against an objective reasonable person standard;[7] and (b) depends on the facts of the case.[8] Judges are presumed to be impartial.[9] Hence,

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a lawyer in the proceeding; or (3) such person has more than a de minimis interest in the matter or is likely to be a material witness).

[4] MODEL CODE R. 1.2.

[5] *See* MODEL CODE R. 2.4(B) (stating that a judge shall not permit family or social interests or relationships to influence the judge's judicial conduct or judgment).

[6] MODEL CODE R. 2.11(A).

[7] Mondy v. Magnolia Advanced Materials, Inc., 815 S.E.2d 70, 75 (Ga. 2018); State v. Payne, 488 S.W.3d 161, 166 (Mo. Ct. App. 2016); Thompson v. Millard Pub. Sch. Dist. No. 17, 921 N.W.2d 589, 594 (Neb. 2019).

[8] N.Y. Advisory Comm. on Judicial Ethics Op. 11-125, 2011 WL 8333125, at *1 (2011) [hereinafter N.Y. Jud. Adv. Op. 11-125].

[9] Isom v. State, 563 S.W.3d 533, 546 (Ark. 2018); L.G. v. S.L., 88 N.E.3d 1069, 1073 (Ind. 2018); State v. Nixon, 254 So.3d 1228, 1235 (La. Ct. App. 2018); *Thompson*, 921 N.W.2d at 594.

judicial disqualification is the exception rather than the rule.

Judges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned when lawyers or parties with whom they have relationships outside of those identified in Rule 2.11(A) appear before them.[10] After all, relationships vary widely and are unique to the individuals involved. Furthermore, a variety of factors may affect judges' decisions whether to disqualify themselves in proceedings. For example, in smaller communities and relatively sparsely-populated judicial districts, judges may have social and personal contacts with lawyers and parties that are unavoidable. In that circumstance, too strict a disqualification standard would be impractical to enforce and would potentially disrupt the administration of justice. In other situations, the relationship between the judge and a party or lawyer may have changed over time or may have ended sufficiently far in the past that it is not a current concern when viewed objectively. Finally, judges must avoid disqualifying themselves too quickly or too often lest litigants be encouraged to use disqualification motions as a means of judge-shopping, or other judges in the same court or judicial circuit or district become overburdened.

Recognizing that relationships vary widely, potentially change over time, and are unique to the people involved, this opinion provides general guidance to judges who must determine whether their relationships with lawyers or parties require their disqualification from proceedings, whether the

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[10] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2.

lesser remedy of disclosing the relationship to the other parties and lawyers involved in the proceedings is initially sufficient, or whether neither disqualification nor disclosure is required. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations Rule 2.11 imposes: (1) acquaintanceships; (2) friendships;[11] and (3) close personal relationships. Judges need not disqualify themselves in proceedings in which they are acquainted with a lawyer or party. Whether judges must disqualify themselves when they are friends with a party or lawyer or share a close personal relationship with a lawyer or party or should instead disclose the friendship or close personal relationship to the other lawyers and parties, depends on the nature of the friendship or close personal relationship in question. The ultimate decision of whether to disqualify is committed to the judge's sound discretion.

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[11] Social media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either generally or for purposes of this opinion. For example, Facebook uses the term "friend," but that is simply a title employed in that context. A judge could have Facebook "friends" or other social media contacts who are acquaintances, friends, or in some sort of close personal relationship with the judge. The proper characterization of a person's relationship with a judge depends on the definitions and examples used in this opinion.

II. Analysis

Rule 2.11(A) of the Model Code provides that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned and identifies related situations. Perhaps most obviously, under Rule 2.11(A)(1), judges must disqualify themselves when they have a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. The parties may not waive a judge's disqualification based on personal bias or prejudice.[12]

Beyond matters in which the judge's alleged or perceived personal bias or prejudice is at issue, Rule 2.11(A) identifies situations in which a judge's personal relationships may call into question the judge's impartiality. Under Rule 2.11(A)(2), these include proceedings in which the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person (a) is a party to the proceeding, or is a party's officer, director, general partner, or managing member; (b) is acting as a lawyer in the proceeding; (c) has more than a de minimis interest that could be affected by the proceeding; or (d) is likely to be a material witness in the proceeding. Under Rule 2.11(A)(4), a judge may further be required to disqualify himself or herself if a party, the party's lawyer, or that lawyer's law firm has made aggregate contributions to the judge's election or retention campaign within a specified number of

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[12] MODEL CODE R. 2.11(C).

years that exceed a specified amount or an amount that is reasonable and appropriate for an individual or entity. But, while Rule 2.11(A) mandates judges' disqualification in these situations, Rule 2.11(C) provides that a judge may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers whether they waive disqualification. If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding.[13]

Apart from the personal relationships identified in Rule 2.11(A), a judge may have relationships with other categories of people that, depending on the facts, might reasonably call into question the judge's impartiality. These include acquaintances, friends, and people with whom the judge shares a close personal relationship.

A. Acquaintances

A judge and lawyer should be considered acquaintances when their interactions outside of court are coincidental or relatively superficial, such as being members of the same place of worship, professional or civic organization, or the like.[14] For example, the judge and the lawyer might both attend bar association or other professional meetings; they may have represented co- parties in litigation before the judge ascended to the bench; they may meet each other at school or other events involving their

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[13] Disqualification may not be waived where the judge harbors a personal bias or prejudice toward a party or a party's lawyer. See MODEL CODE R. 2.11(A)(1) & (C).

[14] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2.

children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. Generally, neither the judge nor the lawyer seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect.[15]

A judge and party should be considered acquaintances in the same circumstances in which a judge and lawyer would be so characterized. Additionally, a judge and party may be characterized as acquaintances where the party owns or operates a business that the judge patronizes on the same terms as any other person.

Evaluated from the standpoint of a reasonable person fully informed of the facts,[16] a judge's acquaintance with a lawyer or party, standing alone, is not a reasonable basis for questioning the judge's impartiality.[17]A judge therefore has no obligation to disclose his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding. A

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[15] *Id.*

[16] *See* State v. Mouelle, 922 N.W.2d 706, 713 (Minn. 2019) ("In deciding whether disqualification is required, the relevant question is 'whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality.'" (quoting *In re* Jacobs, 802 N.W.2d 748, 753 (Minn. 2011)).

[17] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2; Va. Judicial Ethics Advisory Comm. Op. 01- 08, 2001 WL 36352802, at *1, *2 (2001).

judge may, of course, disclose the acquaintanceship if the judge so chooses.

B. Friendships

In contrast to simply being acquainted, a judge and a party or lawyer may be friends. "Friendship" implies a degree of affinity greater than being acquainted with a person; indeed, the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others. For example, a judge and lawyer who once practiced law together may periodically meet for a meal when their busy schedules permit, or, if they live in different cities, try to meet when one is in the other's hometown. Or, a judge and lawyer who were law school classmates or were colleagues years before may stay in touch through occasional calls or correspondence, but not regularly see one another. On the other hand, a judge and lawyer may exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues before the judge was appointed or elected to the bench; share confidences and intimate details of their lives; or, for various reasons, be so close as to consider the other an extended family member.

Certainly, not all friendships require judges' disqualification,[18] as the Seventh Circuit explained over thirty years ago:

> In today's legal culture friendships among judges and lawyers are common. They are more than common; they are desirable. A judge need not cut himself off from the rest of the legal community. Social as well as official communications among judges and lawyers may improve the quality of legal decisions. Social interactions also make service on the bench, quite isolated as a rule, more tolerable to judges. Many well-qualified people would hesitate to become judges if they knew that wearing the robe meant either discharging one's friends or

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[18] *See, e.g.*, *In re* Complaint of Judicial Misconduct, 816 F.3d 1266, 1268 (9th Cir. 2016) (stating that "friendship between a judge and a lawyer, or other participant in a trial, without more, does not require recusal"); Schupper v. People, 157 P.3d 516, 520 (Colo. 2007) (reasoning that friendship between a judge and a lawyer is not a per se basis for disqualification; rather, a reviewing court should "look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised"); *In re* Disqualification of Park, 28 N.E.3d 56, 58 (Ohio 2014) ("[T]he existence of a friendship between a judge and an attorney appearing before her, without more, does not automatically mandate the judge's disqualification....."); *In re* Disqualification of Lynch, 985 N.E.2d 491, 493 (Ohio 2012) ("The reasonable person would conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party's counsel."); State v. Cannon, 254 S.W.3d 287, 308 (Tenn. 2008) ("The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal.").

> risking disqualification in substantial numbers of cases. Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer.[19]

Judicial ethics authorities agree that judges need not disqualify themselves in many cases in which a party or lawyer is a friend.[20]

There may be situations, however, in which the judge's friendship with a lawyer or party is so tight that the judge's impartiality might reasonably be questioned. Whether a friendship between a judge and a lawyer or party reaches that point and consequently requires the judge's disqualification in the proceeding is essentially a question of degree.[21] The answer depends on the facts of the case.[22]

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[19] United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985).

[20] U.S. Judicial Conf., Comm. on Codes of Conduct Advisory Op. No. 11, 2009 WL 8484525, at *1 (2009); Ariz. Supreme Ct., Judicial Ethics Advisory Comm. Op. 90-8, 1990 WL 709830, at *1 (1990) [hereinafter Ariz. Jud. Adv. Op. No. 11]; N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *2. *But see* Fla. Supreme Ct., Judicial Ethics Advisory Comm. Op. No. 2012-37, 2012 WL 663576, at *1 (2012) (stating that a judge "must recuse from any cases in which the judge's [close personal] friend appears as a party, witness or representative" of the bank where the friend was employed).

[21] *See Schupper*, 157 P.3d at 520 (explaining that friendship between a judge and a lawyer is not an automatic basis for disqualification; rather, a reviewing court should "look for those situations where the friendship is so close or unusual that a question of partiality might reasonably be raised"); Ariz. Jud. Adv. Op. No. 11, *supra* note 20, 1990 WL 709830, at *1 (suggesting that in weighing disqualification where a lawyer

A judge should disclose to the other lawyers and parties in the proceeding information about a friendship with a lawyer or party "that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."[23] If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record.

C. Close Personal Relationships

A judge may have a personal relationship with a lawyer or party that goes beyond or is different from common concepts of friendship, but which does not implicate Rule 2.11(A)(2). For example, the judge may be romantically involved with a lawyer or party, the judge may desire a romantic relationship with a

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who is a friend appears in the judge's court, the judge should consider as one factor "the closeness of the friendship"); CHARLES G. GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 4.07[4], at 4-27 (5th ed. 2013) ("Whether disqualification is required when a friend appears as a party to a suit before a judge depends on how close the personal . . . relationship is between the judge and the party.").

[22] N.Y. Jud. Adv. Op. 11-125, *supra* note 8, 2011 WL 8333125, at *1.

[23] *See* Model Code R. 2.11 cmt. 5 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.").

lawyer or party or be actively pursuing one, the judge and a lawyer or party may be divorced but remain amicable, the judge and a lawyer or party may be divorced but communicate frequently and see one another regularly because they share custody of children, or a judge might be the godparent of a lawyer's or party's child or vice versa.

A judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship. As the New Mexico Supreme Court has observed, "the rationale for requiring recusal in cases involving family members also applies when a close or intimate relationship [between a judge and a lawyer appearing before the judge] exists because, under such circumstances, the judge's impartiality is questionable."[24] A judge should disclose other intimate or close personal relationships with a lawyer or party to the other lawyers and parties in the proceeding even if the judge believes that he or she can be impartial.[25] If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or to disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record.

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[24] *In re* Schwartz, 255 P.3d 299, 304 (N.M. 2011).

[25] See Model Code R. 2.11 cmt. 5. A judge who prefers to keep such a relationship private may disqualify himself or herself from the proceeding.

D. Waiver

In accordance and compliance with Rule 2.11(C), a judge subject to disqualification based on a friendship or close personal relationship with a lawyer or party may disclose on the record the basis for the judge's disqualification and may ask the parties and their lawyers to consider whether to waive disqualification.[26] If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement that the judge may participate in the proceeding must be put on the record of the proceeding.

III. Conclusion

Judges must decide whether to disqualify themselves in proceedings in which they have relationships with the lawyers or parties short of spousal, domestic partner, or other close familial relationships. This opinion identifies three categories of relationships between judges and lawyers or parties to assist judges in determining what, if any, ethical obligations those relationships create under Rule 2.11: (1) acquaintanceships; (2) friendships; and (3) close personal relationships. In summary, judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or

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[26] Disqualification may not be waived if the judge has a personal bias or prejudice concerning a party or a party's lawyer. MODEL CODE R. 2.11(C).

parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.
