

**IN RE DISQUALIFICATION OF O'TOOLE.**

**LRC REALTY, INC. v. B.E.B. PROPERTIES ET AL.**

**[Cite as *In re Disqualification of O'Toole*, 151 Ohio St.3d 1222,  
2017-Ohio-7053.]**

*Judges—Affidavits of disqualification—R.C. 2701.03 and 2501.13—Judge is party to federal lawsuit defended by same law firm involved in underlying appeal—Attorney representing party in underlying appeal also worked on federal case to which judge is a party—Judge's removal is necessary to avoid the appearance of impropriety—Disqualification granted.*

(No. 16-AP-100—Decided January 26, 2017.)

ON AFFIDAVIT OF DISQUALIFICATION in Eleventh District Court of Appeals Case  
No. 2016-G-0076.

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**O'DONNELL, J.**

{¶ 1} James P. Schuck, counsel for appellee New Par, d.b.a. Verizon Wireless, has filed an affidavit with the clerk of this court under R.C. 2701.03 and 2501.13 seeking to disqualify Judge Colleen Mary O'Toole from participating in the above-captioned appeal. Pursuant to Ohio Constitution, Article IV, Section 5(C) and R.C. 2701.03, Chief Justice O'Connor designated the undersigned to hear the disqualification request.

{¶ 2} Attorney Schuck avers that Judge O'Toole should be removed from the underlying appeal because the judge filed an ongoing federal lawsuit defended by Schuck's law firm. In 2015, Judge O'Toole filed a federal lawsuit challenging the constitutionality of several provisions of the Code of Judicial Conduct and named Chief Justice O'Connor as one of the defendants. Schuck's law firm, Bricker & Eckler, L.L.P., represents the state defendants in that federal case,

including Chief Justice O'Connor. Schuck claims that because Bricker & Eckler is not only counsel for the parties opposing Judge O'Toole in federal court but also for New Par in the underlying appeal and because he has represented in a brief filed in the appellate court that he has participated in working on that federal case, an appearance of impropriety exists that requires Judge O'Toole to be disqualified.

{¶ 3} Judge O'Toole has denied that she has any actual bias or prejudice against Schuck, New Par, or Bricker & Eckler, stating that her federal lawsuit is an attempt to reach a ruling on the constitutionality of certain rules in the Code of Judicial Conduct and that she has no personal interest in her constitutional challenge. And she also denies that an appearance of impropriety would exist if she were to remain on the appellate panel.

{¶ 4} Although the record does not contain evidence of actual bias or prejudice on the part of Judge O'Toole necessitating disqualification pursuant to the Code of Judicial Conduct, in order to avoid an appearance of impropriety, the affidavit to disqualify is granted.

{¶ 5} Judge O'Toole is currently a party to a federal lawsuit being defended by Bricker & Eckler, the same law firm involved in the underlying appeal. And Schuck—an attorney at Bricker & Eckler who represents one of the parties in the appellate case before Judge O'Toole—has also worked on the federal case filed by Judge O'Toole. These factors suggest removal from the underlying appeal is necessary to avoid the appearance of impropriety and to assure the parties, their counsel, and the public that the appellate panel is impartial. *See In re Disqualification of Floyd*, 101 Ohio St.3d 1215, 2003-Ohio-7354, 803 N.E.2d 816, ¶ 10.

{¶ 6} This outcome squares with *In re Disqualification of Morley*, 74 Ohio St.3d 1257, 657 N.E.2d 1358 (1994), in which attorney William Kish had previously served as a defense counsel in an unrelated case—referred to as the *Lake Milton* case—in which Judge Morley had been a party. A few years later, attorney

Kish sought to disqualify Judge Morley based on an appearance of impropriety stemming from the *Lake Milton* case. Chief Justice Moyer disqualified Judge Morley from all cases involving Kish and his law firm to avoid the appearance of impropriety. *Id.* at 1258-1259. Similarly, disqualification was ordered to avoid an appearance of impropriety where a current attorney-client relationship existed between the judge and a lawyer who represented a party in an unrelated case before the judge. *See In re Disqualification of Badger*, 47 Ohio St.3d 604, 546 N.E.2d 929 (1989).

{¶ 7} And in a parallel situation, Judge O’Toole has named Chief Justice O’Connor as a defendant in a federal lawsuit relating to a ruling on the constitutionality of certain rules in the Code of Judicial Conduct. Due to that filing, the chief justice has recused on this matter—obviously not because of actual bias or prejudice, as that federal litigation relates to the rules of conduct for judicial candidates and office holders—but in order to avoid any appearance of impropriety in ruling on this affidavit of disqualification. Similarly, because counsel for the chief justice in that matter is also counsel in the instant matter, disqualification of Judge O’Toole is also warranted to avoid an appearance of impropriety.

{¶ 8} Accordingly, the affidavit of disqualification is granted, and it is ordered that Judge O’Toole participate no further in the appeal. The matter is returned to the administrative judge of the Eleventh District Court of Appeals for reassignment of another judge of that court to this case.

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