

IN RE DISQUALIFICATION OF PASCHKE.

**JANE AND JOHN DOES 1 THROUGH 4 ET AL. v. UNIVERSITY HOSPITALS HEALTH
SYSTEM, INC., ET AL.**

**[Cite as *In re Disqualification of Paschke*, 165 Ohio St.3d 1267,
2021-Ohio-3235.]**

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety—If it is later determined that judge likely will be a material witness in underlying proceeding, she must disqualify herself pursuant to Jud.Cond.R. 2.11(A)(2)(d)—An affidavit-of-disqualification proceeding is not the appropriate forum in which to determine whether a trial court properly placed a document under seal—Disqualification denied.

(No. 21-AP-074—Decided July 14, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Geauga County Court of Common Pleas,
General and Domestic Relations Division, Case No. 20P000722.

O’CONNOR, C.J.

{¶ 1} Todd Petersen, counsel for the alleged contemnor, Subodh Chandra, has filed an affidavit and a supplemental affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Carolyn J. Paschke from presiding over a show-cause hearing in the above-referenced matter. For the reasons explained below, Mr. Petersen has not established that Judge Paschke’s disqualification is warranted.

Background

{¶ 2} In November 2020, several plaintiffs filed the underlying class-action complaint against University Hospitals Health System, Inc. (“UH”), its affiliates,

and individuals connected to UH, including Andrew Bhatnager, Ph.D. Although Dr. Bhatnager was initially represented by a law firm retained by UH, in early March 2021, Dr. Bhatnager hired Mr. Chandra to represent him and terminated the law firm. On April 1, 2021, Mr. Chandra filed a motion to disqualify Dr. Bhatnager's former counsel.

{¶ 3} On April 2, after the motion to disqualify appeared on the public docket, one of UH's attorneys contacted Judge Paschke's chambers by telephone and spoke to the judge's staff. Mr. Chandra was not aware of—or included on—the phone call by UH's counsel. Later that same day, Judge Paschke issued an order stating the following:

This matter is before the Court on the court's own motion. It has come to the court's attention that counsel for defendant, Dr. Andrew Bhatnager, Ph.D., may have inadvertently filed attachments to the Motion to Disqualify his Former Counsel on April 1, 2021, that may have been intended to be confidential and filed under seal.

* * *

The Court hereby orders the Clerk of Courts to remove the image of the Motion to Disqualify his Former Counsel filed on April 1, 2021, from the docket until Monday, April 5, 2021 at 4:30 p.m. in order to give the parties an opportunity to file a motion for any documents or attachments to be filed under seal. If no motion is filed, the Clerk of Courts is directed to restore the documents to the docket for public view.

{¶ 4} According to Mr. Chandra, nothing in his motion to disqualify was privileged, confidential, or subject to a protective order. But in reviewing the filing, his staff noticed that they had inadvertently failed to redact the name of a UH

patient. Mr. Chandra claims that he interpreted Judge Paschke's April 2 order as inviting him to correct that mistake. A few hours after Judge Paschke issued her April 2 order, Mr. Chandra refiled his motion to disqualify with the patient's name redacted. UH thereafter moved for an order to show cause against Mr. Chandra, and Judge Paschke scheduled a hearing and ordered him to show cause why he should not be held in contempt for refiled the motion to disqualify on the public docket only a few hours after the judge had temporarily removed it.

{¶ 5} At some point before the hearing, Mr. Chandra learned of the April 2 phone call from UH's attorney to the judge's staff, and Mr. Chandra and Mr. Petersen sought to obtain more information about the communication, including by requesting to submit interrogatories to the judge's staff. After Judge Paschke rejected that request, Mr. Petersen served subpoenas on Judge Paschke and her staff requesting that they appear as witnesses at the contempt hearing. The county prosecutor's office, on behalf of Judge Paschke, moved to quash the subpoenas. About a week before the scheduled contempt hearing, Mr. Petersen filed this affidavit of disqualification.

Allegations in the affidavits

{¶ 6} Mr. Petersen primarily alleges that for the following reasons, Judge Paschke is biased or that an appearance of impropriety would exist if she presided over the contempt hearing.¹ First, he claims that Judge Paschke violated Jud.Cond.R. 2.9, which prohibits a judge from receiving or considering ex parte communications, by allowing her staff to engage in an improper ex parte phone call with UH's counsel. Second, Mr. Petersen asserts that Judge Paschke failed to disclose the phone call and also misled the parties and misrepresented the facts in her April 2 order by stating that the order was "on the court's own motion." Third,

1. S.Ct.Prac.R. 21.01(D)(3) provides that an affidavit of disqualification shall not exceed 15 pages, exclusive of exhibits. Mr. Petersen's affidavit exceeded the page limit, and he failed to request leave to exceed the page limit.

Mr. Petersen alleges that Judge Paschke and her staff will be witnesses at the contempt hearing to testify about the details of the phone call and to explain why the judge issued her April 2 order, which Mr. Petersen and Mr. Chandra believe was ambiguous. Fourth, Mr. Petersen claims that Judge Paschke intends to rule on her own motions to quash the subpoenas issued to her and her staff.

{¶ 7} Judge Paschke filed a response to the affidavit and denies having any bias in the matter. The judge also denies that she or her staff engaged in any improper ex parte communication. According to the judge, on the morning of April 2, her assistant advised her that an attorney in the underlying case had called and indicated that he planned to file a motion for a temporary restraining order later that day. Judge Paschke claims that she then reviewed Mr. Chandra's motion to disqualify and became concerned that the motion or its attachments disclosed information subject to protective orders that had been issued in related cases. The judge had knowledge of those protective orders because she had presided over related matters involving the same parties. The judge states that she then issued her April 2 order temporarily removing Mr. Chandra's motion from the public docket to give the parties an opportunity to place any portion of the motion under seal. The judge asserts that she did not consider any ex parte information before issuing her April 2 order, and she believes that her thought process in drafting the order has no relevance to whether Mr. Chandra was in contempt for violating the order. The judge also notes that she intends to assign the motions to quash to another judge of her court.

Merits of the affidavits of disqualification

Alleged ex parte communication

{¶ 8} Attorneys should not use a judge's staff as a conduit to pass along ex parte information to the judge, *see, e.g., Disciplinary Counsel v. Thomas*, 162 Ohio St.3d 678, 2020-Ohio-5582, 166 N.E.3d 1216, ¶ 32-33, and judges should refrain from receiving and acting on ex parte communications sent through the judge's

staff, *see, e.g., Disciplinary Counsel v. Salerno*, 156 Ohio St.3d 244, 2019-Ohio-435, 125 N.E.3d 838. Under the Code of Judicial Conduct, “[t]o the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge,” Jud.Cond.R. 2.9, Comment 1, and if a judge receives an unauthorized ex parte communication, the judge shall promptly notify the parties of the substance of the communication and provide the parties with an opportunity to respond, Jud.Cond.R. 2.9(B).

{¶ 9} However, in affidavit-of-disqualification proceedings, “the question is not whether the judge has violated the Code of Judicial Conduct, but whether the ex parte communication demonstrates bias or prejudice on the part of the judge.” *In re Disqualification of Nicely*, 135 Ohio St.3d 1237, 2012-Ohio-6290, 986 N.E.2d 1, ¶ 10; *see also In re Disqualification of Forchione*, 155 Ohio St.3d 1254, 2018-Ohio-5437, 120 N.E.3d 855, ¶ 7 (“In disqualification requests, * * * the issue is narrow and focused on the ability of a judge to fairly and impartially preside over a particular case”). “The term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956). “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8.

{¶ 10} Mr. Petersen has not established that Judge Paschke has hostile feelings toward him or Mr. Chandra or that the judge has formed a fixed

anticipatory judgment on any issue in the underlying case. Nor has Mr. Petersen set forth a compelling argument for disqualifying Judge Paschke to avoid an appearance of bias. UH’s counsel apparently contacted the judge’s chambers and requested that the court seal Mr. Chandra’s motion to disqualify pending an additional filing. Judge Paschke’s assistant passed along some of the information from the phone call to the judge. But the judge affirms that she issued her April 2 order—which merely *temporarily* sealed Mr. Chandra’s motion and gave the parties an opportunity to brief the issue—based on her own review of the motion and her prior judicial knowledge of the relevant protective orders. In determining whether an appearance of bias exists, “[t]he reasonable observer is presumed to be fully informed of all the relevant facts in the record—not isolated facts divorced from their larger context.” *In re Disqualification of Gall*, 135 Ohio St.3d 1283, 2013-Ohio-1319, 986 N.E.2d 1005, ¶ 6. Based on these facts, no objective observer would reasonably conclude that Judge Paschke is now biased against Mr. Chandra or would question her ability to impartially preside in the underlying case. Nor has Mr. Petersen established that Judge Paschke misled the parties or misrepresented any facts. Although Judge Paschke should have earlier disclosed UH’s unsolicited phone call, her failure to do so cannot be described as a product of bias warranting her removal.

{¶ 11} A judge’s improper ex parte communication may be grounds for removal, *see, e.g., In re Disqualification of Sheward*, 134 Ohio St.3d 1226, 2012-Ohio-6289, 982 N.E.2d 717, but Mr. Petersen has not established that any disqualifying circumstances are present in this matter.

The judge as a witness

{¶ 12} Jud.Cond.R. 2.11(A)(2)(d) requires a judge’s disqualification if the judge is “[l]ikely to be a material witness in the proceeding.” However, the chief justice has previously “ ‘declined to establish a rule “requiring disqualification of a judge based solely on suppositions that the judge may be called as a witness or

allegations that the judge possesses evidence material to the case.” ’ ’ *In re Disqualification of Hedric*, 127 Ohio St.3d 1227, 2009-Ohio-7208, 937 N.E.2d 1016, ¶ 9, quoting *In re Disqualification of Stuard*, 113 Ohio St.3d 1236, 2006-Ohio-7233, 863 N.E.2d 636, ¶ 6, quoting *In re Disqualification of Gorman*, 74 Ohio St.3d 1251, 657 N.E.2d 1354 (1993). Here, Mr. Petersen has failed to establish that Judge Paschke’s disqualification is required because she will be a material witness at the contempt hearing. If Mr. Petersen believes that the judge’s April 2 order was ambiguous, he may raise those arguments before the court and, if applicable, on appeal. But Mr. Petersen has failed to sufficiently explain why Judge Paschke’s or her staff’s testimony would be necessary to understand Mr. Chandra’s interpretation of—or any assumptions he made about the meaning of—the April 2 order. *See In re Disqualification of Unruh*, 127 Ohio St.3d 1244, 2010-Ohio-5960, 937 N.E.2d 1030 (disqualifying a judge from a hearing on a motion to enforce a settlement agreement when there was a significant likelihood that the judge would be called to testify as to her recollection and understanding of the terms of the parties’ settlement agreement).

{¶ 13} In addition, Judge Paschke intends to transfer the motions to quash to another judge. Therefore, contrary to Mr. Petersen’s allegations, Judge Paschke will not be deciding any of her own motions.² If it is later determined that Judge Paschke likely will be a material witness in the underlying proceeding, she must disqualify herself, as Jud.Cond.R. 2.11(A)(2)(d) directs. “Every litigant is entitled to have his or her case decided by a judge who can approach the case in an objective and impartial manner, and a judge who possesses personal knowledge of evidentiary facts that are in dispute may not be able to meet this criterion.” *In re Disqualification of Matia*, 135 Ohio St.3d 1246, 2012-Ohio-6343, 986 N.E.2d 8,

2. This decision regarding Mr. Petersen’s affidavit is limited to the issue of judicial disqualification and shall not serve as precedent as to the decisions on the pending motions to quash.

¶ 11. However, Mr. Petersen’s affidavit does not establish that Judge Paschke presently possesses evidence that is necessary for resolution of the pending issues.

{¶ 14} The affidavit of disqualification is denied. The case may proceed before Judge Paschke.

Sealing of the affidavit of disqualification

{¶ 15} Mr. Petersen filed his affidavit and supplemental affidavit under seal, but he also objects to the documents remaining under seal. S.Ct.Prac.R. 3.02(A)(1)(b) provides that “[a] document that has been sealed pursuant to a court order, administrative agency order, or board order, or is the subject of a motion to seal pending in the Supreme Court, shall remain under seal and not be made available for public access unless ordered by the Supreme Court.” In his affidavit, Mr. Petersen admits that Mr. Chandra’s motion to disqualify—which Mr. Petersen submitted as exhibit D to his affidavit of disqualification—remains under seal in the trial court. An affidavit-of-disqualification proceeding is not the appropriate forum in which to determine whether a trial court properly placed a document under seal. Therefore, in accordance with S.Ct.Prac.R. 3.02(A)(1)(b), it is ordered that the clerk of this court place under seal the entirety of exhibit D to Mr. Petersen’s affidavit.

{¶ 16} However, Mr. Petersen has not indicated that other portions of his affidavits are confidential, and unless sealed, affidavit-of-disqualification files are public records. Accordingly, Mr. Petersen’s affidavit, including the remaining exhibits, and supplemental affidavit shall become available for public access in ten days unless any party to the underlying case—or Judge Paschke—files a motion to seal any portion of the affidavits. Pursuant to S.Ct.Prac.R. 3.02(A)(1)(b), any documents subject to a motion to seal shall remain sealed and shall not be made available for public access until the motion to seal is decided. Any party may file a response to the motion to seal within ten days after the date the motion is filed. No reply briefs will be permitted.

January Term, 2021
