

IN RE DISQUALIFICATION OF MACKEY.

IN RE GUARDIANSHIP OF BOTTORFF.

**[Cite as *In re Disqualification of Mackey*, 168 Ohio St.3d 1226,
2022-Ohio-2837.]**

Judges—Affidavits of disqualification—R.C. 2701.03 and 2101.39—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety or to substantiate allegation that judge received prejudicial ex parte information about her or underlying matter—Disqualification denied.

(No. 22-AP-064—Decided June 23, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Franklin County Court of Common Pleas,
Probate Division, Case No. 596101.

O’CONNOR, C.J.

{¶ 1} Susan Wasserman, the former attorney for the deceased ward, has filed an affidavit pursuant to R.C. 2701.03 and 2101.39 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Jeffrey D. Mackey from the above-referenced guardianship case. This is the second affidavit of disqualification that Ms. Wasserman has filed against Judge Mackey in the last two months. Her prior affidavit, which involved a different case, was denied in an entry dated June 3, 2022. *In re Disqualification of Mackey*, 167 Ohio St.3d 1249, 2022-Ohio-2267, 194 N.E.3d 390.

{¶ 2} Ms. Wasserman alleges that Judge Mackey is hostile to her and that she needs a neutral court in order to recover her attorney fees in the underlying case. In support, she alleges that in January 2022, she filed objections to a magistrate’s decision but the court has not yet ruled on them. She also suggests that the court’s scheduling of a hearing is evidence of bias because, she believes, the court should

have already ordered payment of her attorney fees. In addition, Ms. Wasserman avers that Judge Mackey “has been prejudiced by ex parte information on [her] practice and this matter based on the continued attack on [her] by the imposition of ongoing non-billable hours which result with each unnecessary delay.”¹

{¶ 3} Judge Mackey submitted a response to the affidavit and denies any bias or hostility against Ms. Wasserman. He notes that any delays in Ms. Wasserman’s cases are not deliberate. The judge further says that he is not aware of any attempts to communicate with him on an ex parte basis about the underlying case.

{¶ 4} In disqualification requests, “[t]he 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, 132 N.E.2d 191 (1956), paragraph four of the syllabus. “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. In addition, a “presumption of impartiality” is accorded all judges in affidavit-of-disqualification proceedings. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7.

1. Ms. Wasserman also repeats some of the allegations against Judge Mackey that she raised—and were rejected—in her prior affidavit-of-disqualification matter. Those issues will not be addressed again here.

{¶ 5} Ms. Wasserman has not established that Judge Mackey has hostile feelings toward her or that the judge has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Ms. Wasserman set forth a compelling argument for disqualifying Judge Mackey to avoid an appearance of partiality. In general, a judge’s alleged failure to provide timely rulings on a motion is not a concern that can be addressed through an affidavit of disqualification. *In re Disqualification of Eyster*, 105 Ohio St.3d 1246, 2004-Ohio-7350, 826 N.E.2d 304, ¶ 4. “An alleged ex parte communication constitutes grounds for disqualification when there is ‘proof that the communication * * * addressed substantive matters in the pending case.’ ” (Ellipsis sic.) *In re Disqualification of Forsthoefel*, 135 Ohio St.3d 1316, 2013-Ohio-2292, 989 N.E.2d 62, ¶ 7, quoting *In re Disqualification of Calabrese*, 100 Ohio St.3d 1224, 2002-Ohio-7475, 798 N.E.2d 10, ¶ 2. “The allegations must be substantiated and consist of something more than hearsay or speculation.” *Id.* Ms. Wasserman has failed to substantiate her allegation that Judge Mackey received prejudicial ex parte information about her or the underlying matter. Judge Mackey denies having received any such communications, and Ms. Wasserman provides only speculation to support her claim.

{¶ 6} Finally, many of Ms. Wasserman’s allegations are vague, although she has submitted a voluminous number of documents with her affidavit. Under R.C. 2701.03(B)(1), an affidavit of disqualification must include “[t]he specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations.” It is not the chief justice’s role to sift through documents to find support for an affiant’s allegations or to speculate about what conduct the affiant considers hostile.

{¶ 7} The affidavit of disqualification is denied. The case may proceed before Judge Mackey.