

**IN RE DISQUALIFICATION OF BERHALTER.**

**THE STATE OF OHIO v. AHMED.**

[Cite as *In re Disqualification of Berhalter*, 173 Ohio St.3d 1255,  
2023-Ohio-4881.]

*Judges—Affidavits of disqualification—R.C. 2701.03—Affiant is a “party to the proceeding” under R.C. 2701.03(A) on her motion for attorney fees and therefore has standing to seek judge’s disqualification from attorney-fee proceeding—Judge’s merely scheduling hearing on affiant’s attorney-fee motion did not demonstrate bias against affiant or her motion—Affiant failed to establish that judge acted as a lawyer in proceeding relating to affiant’s attorney-fee motion or that judge’s prior involvement in underlying litigation is relevant to appropriateness of requested fees—Disqualification denied.*

(No. 23-AP-165—Decided December 11, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Belmont County Court of Common Pleas,  
General and Domestic Relations Division, Case No. 99 CR 192.

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**KENNEDY, C.J.**

{¶ 1} S. Adele Shank, the former court-appointed counsel for the defendant in the underlying case, has filed an affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge Christopher M. Berhalter of the Belmont County Court of Common Pleas, General and Domestic Relations Division, from presiding over the case. Judge Berhalter filed a response to the affidavit of disqualification.

{¶ 2} As explained below, Shank has not established that the judge should be disqualified from hearing and deciding her motion for attorney fees. Therefore,

the affidavit of disqualification is denied. The attorney-fee proceeding may continue before Judge Berhalter.

### **Trial-Court Proceedings**

{¶ 3} In 2001, a jury found the defendant in the underlying case, Nawaz Ahmed, guilty of four aggravated murders. The trial court sentenced him to death.

{¶ 4} On April 12, 2022, Shank—who had been previously appointed to represent Ahmed in federal habeas corpus proceedings—filed a motion for appointment of counsel in Ahmed’s state capital case. Shank also filed a postconviction petition claiming that Ahmed had a serious mental illness and that he therefore had been ineligible for a death sentence under R.C. 2929.025 and 2953.21. The petition also asserted that Ahmed was not competent to proceed with the litigation on his own and that he lacked the ability to consult with counsel.

{¶ 5} On April 14, Judge Frank Fregiato—the judge then assigned to Ahmed’s capital case—granted Shank’s motion and appointed her to represent Ahmed and to file the petition on his behalf.

{¶ 6} On September 30, Judge Fregiato relieved Shank of representing Ahmed based on Ahmed’s pleadings and testimony that he had not requested to be represented by Shank and that her motions had been filed without his authorization.

{¶ 7} On November 18, Shank submitted a motion for appointed-counsel fees. Judge Fregiato denied the motion, and Shank appealed.

{¶ 8} On September 27, 2023, the Seventh District Court of Appeals reversed, holding that Shank “was legally entitled to receive fees due to her appointment” and that “it was unreasonable to find her fees could be wholly eliminated after the appointment under the circumstances of this case.” *State v. Ahmed*, 2023-Ohio-3464, 225 N.E.3d 385, ¶ 1 (7th Dist.). The appellate court remanded the case “with instructions to grant the fee application to the extent warranted by law.” *Id.* at ¶ 52.

{¶ 9} When the matter was remanded, Judge Berhalter had assumed judicial office in the court of common pleas and the underlying case was assigned to his docket. On September 29, Judge Berhalter issued an entry stating the following: “The Court has been advised of the Seventh Appellate District’s decision in Case 22 BE 71. Therefore, a hearing to determine appropriate attorney fees to be awarded is set for Monday, November 20, 2023, at 11:00 a.m.” On October 31, Shank filed this affidavit of disqualification.

**Affidavit-of-Disqualification Proceedings**

{¶ 10} Shank alleges that Judge Berhalter is biased and that he is also disqualified under the Code of Judicial Conduct, *see* R.C. 2701.03(A) (specifying grounds for disqualification but also providing that an affiant may allege that a judge “otherwise is disqualified to preside”). The judge denies having any bias and that there are any grounds for disqualification.

*Bias*

{¶ 11} In support of the allegation that Judge Berhalter is biased, Shank points to his September 29 entry scheduling a hearing on her attorney-fee motion. Shank avers that she submitted the motion in conformity with the law and that her entitlement to fees has already been established by the court of appeals. But, Shank claims, the hearing scheduled by Judge Berhalter “is not a normal proceeding” and his entry “fail[ed] to identify the nature of the proceeding, the matters to be addressed, or the procedures to be followed and place[d] an unfair and unnecessary burden on counsel.” According to Shank, “[r]equiring a hearing, without explanation, is evidence of bias.”

{¶ 12} Judge Berhalter denies any bias against Shank. The judge argues that an attorney-fee hearing is required and that his entry scheduling the hearing clearly identified the nature of the hearing. The judge maintains that he has authority to review the requested fees for reasonableness and that the court “is not just a rubber stamp to any amounts requested.”

*Otherwise Disqualified under R.C. 2701.03(A)*

{¶ 13} In support of the allegation that Judge Berhalter is disqualified under the Code of Judicial Conduct, Shank points to appellate-court opinions, dockets, and filings showing that in 2006 and 2007, Judge Berhalter—while he was serving as the Belmont County Prosecuting Attorney—prosecuted Ahmed’s capital case. Shank further claims that when the judge was prosecuting Ahmed, the judge opposed efforts to use state funds to determine Ahmed’s competency, which Shank argues could influence the judge’s decision on her attorney-fee motion. Shank asserts that because the judge previously prosecuted the underlying case and took legal positions that affect matters now pending before him, the judge was required to disqualify himself under Jud.Cond.R. 2.11(A)(7). Shank also asserts that the judge failed to disclose that he had served as a lawyer in the underlying case, as advised by Comment 5 under Jud.Cond.R. 2.11.

{¶ 14} In response, Judge Berhalter states that he sees no reason for his disqualification. The judge acknowledges that he served as the Belmont County Prosecuting Attorney from 2005 until 2013. The judge notes, however, that prior to his election as prosecutor, he was not affiliated with the prosecutor’s office and therefore was not involved in Ahmed’s indictment, trial, conviction, or direct appeal.

{¶ 15} Judge Berhalter states that he vaguely recalls various appeals and/or postconviction motions filed by Ahmed during the judge’s tenure as the prosecutor. However, the judge does not recall any personal involvement in those matters. Instead, the judge believes, a specialized division of the Ohio Attorney General’s office drafted and filed the state of Ohio’s responses to Ahmed’s filings.

{¶ 16} Judge Berhalter acknowledges that his name appears on appellate-court documents relating to Ahmed’s case from 2006 and 2007—a fact that he was not aware of before Shank filed the affidavit of disqualification. The judge believes, however, that the appearance of his name on those documents does not

require his disqualification from the only matter pending before him—the appropriateness of Shank’s requested attorney fees. In the judge’s words, “Ahmed is not a party to this matter” and the documents that included the judge’s name in 2006 and 2007 will have no impact on the issue currently before him.

{¶ 17} Judge Berhalter states that if Ahmed were a party to the pending proceeding, the judge would recuse from the case since he now knows that his name appears on appellate-court documentation relating to Ahmed’s case. The judge also notes that because he had no recollection that his name appears on those documents, he could not have disclosed any prior involvement in Ahmed’s case.

#### **Standing to File an Affidavit of Disqualification**

{¶ 18} Because Shank no longer serves as counsel for Ahmed, a preliminary issue is whether Shank is qualified pursuant to R.C. 2701.03(A) to file an affidavit of disqualification against Judge Berhalter.

{¶ 19} Standing to file an affidavit of disqualification is conferred by statute. *See In re Disqualification of Gallagher*, 173 Ohio St.3d 1201, 2023-Ohio-2977, 228 N.E.3d 1, ¶ 26. R.C. 2701.03(A) provides that “[i]f a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party’s counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, *any party to the proceeding or the party’s counsel may file an affidavit of disqualification* with the clerk” of this court. (Emphasis added.)

{¶ 20} Under this plain and unambiguous language, only a “party to the proceeding or the party’s counsel” may file an affidavit of disqualification. “Former chief justices have ‘strictly enforced’ this statutory language and have consistently found that ‘individuals who do not qualify as a “party” or “party’s counsel” do not have standing to file an affidavit of disqualification.’ ” *Gallagher* at ¶ 26, quoting *In re Disqualification of Grendell*, 137 Ohio St.3d 1220, 2013-

Ohio-5243, 999 N.E.2d 681, ¶ 2, citing *In re Disqualification of Cleary*, 74 Ohio St.3d 1225, 657 N.E.2d 1337 (1990), and *In re Disqualification of Haas*, 74 Ohio St.3d 1217, 657 N.E.2d 1331 (1990). For purposes of R.C. 2701.03(A), a “party’s counsel” includes counsel of record in the underlying case from which the judge’s disqualification is sought *or* an attorney retained by a party in the underlying case to file an affidavit of disqualification in this court. *See id.* at ¶ 29-34.

{¶ 21} In general, a “party” is defined as “[o]ne by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment.” *Black’s Law Dictionary* 1350-1351 (11th Ed.2019). Although Shank is neither the plaintiff nor the defendant in the underlying capital case, Shank is directly interested in the only matter pending in the trial court—i.e., her motion for attorney fees. And as evidenced by Shank’s prior appeal, she will have the right to appeal an adverse judgment on her motion. Indeed, in the prior appeal, the court of appeals noted that Shank was the “sole appellant” in the matter and that the appeal did not raise any of Ahmed’s rights. *Ahmed*, 2023-Ohio-3464, 225 N.E.3d 385, at ¶ 32.

{¶ 22} Under these unique circumstances, Shank is considered a “party to the proceeding” on her motion for attorney fees and therefore has standing to seek Judge Berhalter’s disqualification from the attorney-fee proceeding. This conclusion is consistent with prior interpretations of R.C. 2701.03. For example, an alleged contemnor had standing to seek a judge’s disqualification from a contempt proceeding held in the underlying medical-malpractice cases, even though the alleged contemnor was not a plaintiff, defendant, or counsel in those cases. *In re Disqualification of Schweikert*, 158 Ohio St.3d 1201, 2019-Ohio-5451, 139 N.E.3d 936, ¶ 4. Because the alleged contemnor was the subject of the contempt motion, he had authority to file an affidavit of disqualification seeking to remove the judge from hearing and deciding the contempt motion. *Id.*

{¶ 23} Similarly, a newspaper had standing under R.C. 2701.03 to seek a juvenile-court judge’s disqualification from hearing and deciding motions to close certain delinquency proceedings from the public. *In re Disqualification of Hunter*, 137 Ohio St.3d 1201, 2013-Ohio-4467, 997 N.E.2d 541, ¶ 7. The newspaper was “considered the equivalent to a party in the closure proceedings” due to the media’s role in closure-of-court proceedings and because the newspaper had filed objections to the closure motions. *Id.* Therefore, the newspaper had authority to file an affidavit of disqualification “under these limited circumstances.” *Id.*

{¶ 24} Under *Schweikert* and *Hunter*, Shank has standing to seek Judge Berhalter’s disqualification from hearing and deciding her attorney-fee motion.

#### **Disqualification of a Common-Pleas-Court Judge**

{¶ 25} R.C. 2701.03(A) provides that if a judge of a court of common pleas “allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party’s counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court,” then that party or counsel may file an affidavit of disqualification with the clerk of this court. Granting or denying the affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification set forth in the affidavit exist. R.C. 2701.03(E).

{¶ 26} The burden falls on the affiant to submit “specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations.” R.C. 2701.03(B)(1). Therefore, “[a]n affidavit must describe with specificity and particularity those facts alleged to support the claim.” *In re Disqualification of Mitrovich*, 101 Ohio St.3d 1214, 2003-Ohio-7358, 803 N.E.2d 816, ¶ 4.

{¶ 27} As set forth above, Shank alleges two bases for the disqualification of Judge Berhalter—the judge is biased and the judge is disqualified under the Code of Judicial Conduct.

{¶ 28} “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, 132 N.E.2d 191 (1956), paragraph four of the syllabus. “ ‘Bias or prejudice on the part of a judge will not be presumed. In fact, the law presumes that a judge is unbiased and unprejudiced in the matters over which he presides, and bias and prejudice must be strong enough to overcome the presumption of his integrity.’ ” *Id.* at ¶ 16, quoting 48A Corpus Juris Secundum, Judges, Section 108, at 731 (1981). A determination of whether a judge is biased or prejudiced is based on the judge’s words and/or actions and whether those words and/or actions convey that the judge is predisposed to an outcome of a case.

{¶ 29} Disqualification pursuant to the Code of Judicial Conduct is not one of the grounds for disqualification specified in R.C. 2701.03(A). However, a judge “otherwise is disqualified” under R.C. 2701.03(A) when one of the express bases for disqualification—interest, relation to a party, bias, or prejudice—do not apply but other grounds for disqualification exist. *See In re Disqualification of Schooley*, 173 Ohio St.3d 1241, 2023-Ohio-4332, 229 N.E.3d 1224, ¶ 19. For example, R.C. 2701.03 speaks in terms of *actual* bias and prejudice: “Nevertheless, even in cases in which no evidence of actual bias or prejudice is apparent, a judge’s disqualification may be appropriate to avoid an appearance of impropriety or when the public’s confidence in the integrity of the judicial system is at issue.” *In re*

*Disqualification of Crawford*, 152 Ohio St.3d 1256, 2017-Ohio-9428, 98 N.E.3d 277, ¶ 6.

{¶ 30} In addition, an ex parte communication between a judge and a party may be a ground for disqualification when the communication either was initiated by the judge or addressed substantive matters in the pending case. *In re Disqualification of Calabrese*, 100 Ohio St.3d 1224, 2002-Ohio-7475, 798 N.E.2d 10, ¶ 2. Jud.Cond.R. 2.11 sets forth additional circumstances when a judge should be disqualified, including the economic interests of the judge’s family members and the judge’s likeliness to be a material witness concerning the matter in controversy.

{¶ 31} These examples are not exhaustive, but they illustrate that a judge may be “otherwise \* \* \* disqualified” when the grounds for disqualification specified in R.C. 2701.03(A) are not applicable.

#### **Analysis**

{¶ 32} As explained below, Shank has not established that Judge Berhalter’s disqualification is warranted.

#### *Bias*

{¶ 33} The Seventh District held that it was unreasonable for the trial court to deny Shank all requested attorney fees. *Ahmed*, 2023-Ohio-3464, 225 N.E.3d 385, at ¶ 1. However, the court of appeals did *not* find that Shank was entitled to fees in the exact amount that she had requested in her motion. Rather, the court remanded the case “with instructions to grant the fee application to the extent warranted by law.” *Id.* at ¶ 52. The court of appeals noted that Shank’s attorney-fee motion was not in the record and that the “trial court in the first instance is to verify the contents of the application and issue a judgment on the appropriate amount of fees.” *Id.* at ¶ 52, fn. 4.

{¶ 34} Judge Berhalter maintains that in response to the appellate court’s mandate, he scheduled a hearing on Shank’s attorney-fee motion. The judge’s entry

stated that the hearing’s purpose is to “determine appropriate attorney fees to be awarded.” As a general rule, “a judge’s discretionary actions—such as \* \* \* whether to afford a hearing \* \* \* do not ordinarily warrant judicial disqualification.” Flamm, *Judicial Disqualification*, Section 15.1, at 412 (2d Ed.2007).

{¶ 35} Judge Berhalter’s mere scheduling of a hearing on Shank’s attorney-fee motion is not evidence that the judge has hostility or ill will toward Shank or that the judge has formed a fixed anticipatory judgment on the appropriateness of the fees requested in the motion. Therefore, this allegation lacks merit.

*Otherwise Disqualified under R.C. 2701.03(A)*

{¶ 36} As stated above, Shank also cites the Code of Judicial Conduct—namely, Jud.Cond.R. 2.11(A)(7) and Comment 5 to Jud.Cond.R. 2.11—in support of her affidavit of disqualification.

{¶ 37} As an initial matter, it is important to note that it is beyond the scope of a chief justice’s authority in an affidavit-of-disqualification proceeding to determine whether a judge has *violated* the Code of Judicial Conduct. *See In re Disqualification of Allen*, 172 Ohio St.3d 1217, 2023-Ohio-3238, 223 N.E.3d 1284, ¶ 36. Allegations of judicial misconduct are subject to the disciplinary system in accordance with Gov.Bar R. V(2)(A). Gov.Bar R. V provides no authority for the chief justice to independently determine whether a member of the judiciary has violated the Code of Judicial Conduct. “Judicial-misconduct complaints are heard by the Board of Professional Conduct and are ultimately decided by all justices of this court.” *Allen* at ¶ 36.

{¶ 38} However, as stated above, Jud.Cond.R. 2.11 sets forth circumstances when a judge should be disqualified, including when a judge previously “served as a lawyer in the matter in controversy.” Jud.Cond.R. 2.11(A)(7)(a). Jud.Cond.R. 2.11(A)(7)(b) provides that a judge shall disqualify himself or herself if the “judge served in governmental employment, and in such capacity participated personally

and substantially as a lawyer \* \* \* concerning the particular matter.” Jud.Cond.R. 2.11(A)(7)(a) and (b) “distinguish between lawyers and government lawyers,” and subsection (b) applies when the allegations involve a judge’s prior employment as a prosecutor. *In re Disqualification of Hedric*, 127 Ohio St.3d 1227, 2009-Ohio-7208, 937 N.E.2d 1016, ¶ 6.

{¶ 39} Under Jud.Cond.R. 2.11(A)(7)(b), “a judge cannot preside over a case in which the judge previously served as the prosecutor.” *In re Disqualification of Selvaggio*, 153 Ohio St.3d 1201, 2017-Ohio-9436, 100 N.E.3d 413, ¶ 4. However, “[a] judge generally need not disqualify himself from presiding over a criminal matter that, although pending at the time he served as a prosecuting attorney, was one in which he had no direct involvement.” *In re Disqualification of Rastatter*, 117 Ohio St.3d 1231, 2005-Ohio-7147, 884 N.E.2d 1085, ¶ 3.

{¶ 40} Here, Judge Berhalter was not involved in Ahmed’s indictment, trial, conviction, or direct appeal. After taking office as the county prosecuting attorney in January 2005, the judge’s name appeared on appellate-court opinions, dockets, and filings involving Ahmed. However, the judge maintains that he was not involved in those matters and that the Ohio Attorney General’s office drafted, filed, and litigated the pleadings.

{¶ 41} Regardless of the judge’s level of involvement in the 2006 and 2007 litigation following Ahmed’s convictions, the “particular matter” currently pending before Judge Berhalter is the proceeding on Shank’s attorney-fee motion. As explained above, Shank has standing to seek the judge’s disqualification *only* from the proceeding relating to the motion. There is no evidence that Judge Berhalter has acted as a lawyer in the proceeding relating to the motion, and Shank has failed to establish that the judge’s prior involvement in the 2006 and 2007 Ahmed litigation is somehow relevant to the appropriateness of her requested fees. The court of appeals has already determined that Shank is entitled to attorney fees; the

only issue before Judge Berhalter is the appropriateness of the amount of requested fees.

{¶ 42} Shank also cites Comment 5 under Jud.Cond.R. 2.11 as supporting the judge’s disqualification. That comment states that 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.” The comment instructs judges when they *should* disclose a perceived conflict. The comment does not require the disqualification of a judge who fails to disclose a conflict.

{¶ 43} Moreover, Judge Berhalter maintains that he could not have notified Shank of his prior participation in the Ahmed appellate-court litigation, because the judge had no recollection that his name was listed in the 2006 and 2007 appellate-court documents. “In the face of the judge’s explanation, \* \* \* [the judge] cannot be faulted for failing to disclose the existence of something that he no longer remembered.” *In re Disqualification of Serrott*, 134 Ohio St.3d 1245, 2012-Ohio-6340, 984 N.E.2d 14, ¶ 11. Moreover, “[a] failure to disclose is not likely to create an appearance of partiality where, as here, [the perceived conflict of interest] does not require disqualification.” *In re Disqualification of Jennings*, 143 Ohio St.3d 1225, 2014-Ohio-5866, 35 N.E.3d 531, ¶ 6, citing *In re Jacobs*, 802 N.W.2d 748, 754 (Minn.2011).

{¶ 44} Shank has not established that the Code of Judicial Conduct provides a basis for Judge Berhalter’s disqualification from the proceeding on Shank’s attorney-fee motion. Therefore, this allegation also lacks merit.

### **Conclusion**

{¶ 45} The affidavit of disqualification is denied. The proceeding on Shank’s attorney-fee motion may continue before Judge Berhalter.