

STATE OF MICHIGAN

Attorney Discipline Board

Grievance Administrator,  
State of Michigan  
Attorney Grievance Commission,

Petitioner,

v

John F. Ogurek, P 18430,

Respondent.

Case No. 90-155-GA

Decided: October 28, 1992

MEMORANDUM OPINION

A formal complaint charging that respondent, John F. Ogurek, had committed acts of professional misconduct warranting discipline was first filed in this matter on October 4, 1990 and was assigned to Tri-County Hearing Panel 151 of the Attorney Discipline Board. The proceedings before that panel resulted in a request from the panel that the matter be reassigned and the case was assigned to Tri-County Hearing Panel #78 (Harvey I. Wax, Raymond J. Sterling, and Ann S. Lorigas-Randall) on December 20, 1991. On June 25, 1992, the Board notified all parties that hearing panelist Sterling was replaced by Ms. Oltarz-Schwartz. The motion to disqualify Ms. Oltarz-Schwartz was filed October 6, 1992.

The Grievance Administrator's motion recites that: 1) Panel member Oltarz-Schwartz is married to Michael Alan Schwartz; 2) Michael Schwartz was employed by the Michigan Attorney Grievance Commission as the Grievance Administrator from October 1979 through September 1988; 3) Mr. Schwartz has represented respondents in disciplinary proceedings and currently represents respondents in matters before other hearing panels; 4) The affidavit of Michael Schwartz has been submitted on behalf of a respondent in an unrelated proceeding before another hearing panel regarding policies which may have been effect prior to 1988 during his tenure as Grievance Administrator. Counter affidavits have been filed in that action on behalf of the current Administrator; 5) A Motion to Strike Michael Schwartz' Affidavit in the unrelated case was signed by associate counsel, Joan Vestrand, who is also the Grievance Commission attorney assigned to prosecute the Ogurek case; and, 6) Newspaper accounts of the dispute between Mr. Schwartz and the Grievance Administrator's office in the unrelated case include comments attributed to Mr. Schwartz which are characterized in the motion as "personal attacks" on the character and competency of the current Grievance Administrator.

It is the petitioner's position that the \*public, highly adversial position Mr. Schwartz has taken against petitioner and the Attorney Grievance Commission" create a likelihood of bias or an appearance of bias on the part of hearing panel member Sara Oltarz-Schwartz sufficient to require her disqualification.

Panel member Oltarz-Schwartz has declined to disqualify herself from this case. Therefore, this motion is decided by the Board's chairperson under the guidelines of MCR 2.003, as provided by MCR 9.115(F)(2)(a).

Under sub-rule MCR 2.003(B), a judge is disqualified when he or she cannot impartially hear a case, including the situations and relationships covered under sub-rules (B)(1-7). The Administrator's brief specifically calls attention to sub-rules (B)(1,2 & 7). Sub-rule (B)(1) directs disqualification when a judge is assigned to a proceeding in which he or she is interested as a party. It is not alleged that Ms. Oltarz-Schwartz is interested as a party in the Matter of Grievance Administrator v John F. Ogurek. Nor it is alleged that her husband, Michael Schwartz, has any interest as a party or as an attorney for a party in this case.

Sub-rule (B)(7) directs disqualification when a judge "is disqualified by law for any other reason". The motion does not allege that Ms. Oltarz-Schwartz is disqualified as a matter of law.

Although not cited in the motion, sub-rules (B)(3-6) have been reviewed and have been found to be clearly inapplicable. There is no claim that panel member Oltarz-Schwartz has any financial, professional, family or corporate relationship with any party or attorney in the Matter of Grievance Administrator v John F. Ogurek.

It has not been alleged or shown that this panel member harbors any ill will toward the Grievance Administrator or the Attorney Grievance Commission or that she has engaged in any conduct or made any statement which would remotely suggest any bias or prejudice for or against the Grievance Administrator or his counsel.

It appears that the sole basis for this motion is the panel member's marital status as the wife of an attorney who has publicly expressed an unfavorable opinion toward one of the parties appearing before the panel. The petitioner's position is summarized in the concluding paragraph of the brief:

"Mrs. Schwartz is the wife of Michael Alan Schwartz. Mr. Schwartz' opinion of petitioner has, of late, been made abundantly clear by Mr. Schwartz' very public and demeaning attacks on petitioner. Under these circumstances, it would be grossly unfair to petitioner and the interests of the public to permit Mrs. Schwartz to remain on this panel. There is a great likelihood and/or appearance that Mrs. Schwartz cannot be a fair and impartial jurist."

This motion has therefore been considered under MCR 2.003(B)(2) with regard to the likelihood that panelist Oltarz-Schwartz is biased or prejudiced against the Grievance Administrator, or will appear to be biased, because of the publicly stated opinions of her husband.

The Grievance Administrator properly asserts that it is not necessary to show actual bias on the part of the decision maker where experience teaches that the mere probability of bias is too high, Crompton v Department of State, 395 Mich 347, 351 (1975). In a 1991 opinion, the Attorney Discipline Board recognized that disqualification may be appropriate even where no actual bias or prejudice has been shown. Matter of Joseph W. Moch, ADB 131-88, (6/25/91). However, where there is no allegation of actual bias or prejudice and disqualification is sought solely on the basis that bias or the appearance of bias is "likely" or "probable", the moving party must demonstrate more than a mere suspicion or more than a mere possibility of bias. As stated in another matter, the appropriate test for an appearance of bias is the test which has been adopted under the federal rules governing the disqualification of judges, that is, whether an objective disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt that justice would be done in the case. Pepsico v McMillan, 764 F2d 458, 460 (1985).

Based upon the facts alleged in this motion, it has not been established that an objective, disinterested observer would entertain significant doubts that Ms. Oltarz-Schwartz will discharge her obligations as a panelist with fairness and impartiality.

For purposes of deciding this motion, the petitioner's characterizations of the public statements attributed to Michael Schwartz are accepted and it is assumed for purposes of this motion that those statements would be grounds for disqualification had they been uttered by Sara Oltarz-Schwartz

The sole issue presented in this motion is whether or not it should be presumed that this panel member shares the alleged biases or prejudices of her spouse. Such a presumption is not supported by modern case law, experience or common sense.

MCR 2.003(B)(2) requires disqualification of a judge when the judge cannot impartially hear a case, including a proceeding in which the judge "is personally biased or prejudiced for or against a party or attorney." (emphasis added) Neither this rule or the authorities cited with this motion suggest that a decision maker should be disqualified automatically because a spouse or other member of his or her family may be biased or prejudiced against a party in the proceeding. It is the understanding of this writer that judges at all levels of Michigan's court system, including the state's highest appellate tribunals, have spouses who are attorneys. I can find no precedent for the suggestion that a trial judge, Court of Appeals judge or Supreme Court justice would be disqualified from a matter because of the public statements of his or her spouse in an unrelated case.