Welcome!

The program will begin shortly.

FLORIDA APPEALS

DQ – And We Don’t Mean Dairy Queen: *Disqualification of Trial Judges*

Disclaimer

This presentation is provided for informational purposes only and should not be relying on as legal advice.

While Florida Appeals has made every effort to ensure the accuracy of the information in this presentation reasonable people may differ as to the analysis and recommendations made.

For brevity, the opinions quoted in this presentation may not include internal quotation marks, internal citations, or pinpoint citations.

Most of the opinions here arise in the civil context, and some of the concepts discussed may differ in criminal cases.

The examples provided here are non-exhaustive. Always conduct independent research.

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Due Process

"[E]very litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge. . . . A judge must not only be impartial, he or she must leave the impression of impartiality upon all those who attend court. . . . The due process guarantee of the fair trial can mean nothing less[.]"

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

Fla. Code Jud. Conduct, Canon 3(B)(5)

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice.

Substantive Right – Chapter 38

- § 38.01 – Judge as a party (mandatory DQ)
- § 38.02 – Consanguinity; party to; relation to counsel; material witness (by motion)
- § 38.05 – Own motion

§ 38.10 – Disqualification for prejudice

Section 38.10

1. An affidavit by a party stating fear that he or she will not receive a fair trial because the trial judge has shown prejudice against the party or favor toward the adverse party;
2. Includes facts and reasons why the party believes the trial judge is bias; and
3. Supported by certification of counsel that affidavit is made in good faith.

THE JUDGE SHALL PROCEED NO FURTHER.

Rule 2.330

1. Applies only to trial judges acting alone.
2. Does not apply to circuit judges sitting on a multi-member appellate panel.
3. Any party may move to disqualify a trial judge.

A motion filed pursuant to section 38.10 rather than rule 2.330 is not invalid. *Livingston v. State*, 441 So. 2d 1083 (Fla. 1983).

Contents

A MOTION TO DISQUALIFY SHALL

1. Be in writing.
2. Allege "specifically" the fact and reasons for disqualification.
3. State the "precise date" the grounds for disqualification were discovered by counsel or the party, whichever is earlier.
4. Be sworn by signing the motion or an attached separate affidavit.
5. Include the date(s) of any previously granted motion to disqualify filed under rule 2.230 and the date the motion was granted.
6. Include a separate certification by counsel that the motion is made in good faith.

* Served on the trial judge.

Grounds

- Relationship to a party or counsel: the judge, his/her spouse or domestic partner, or person within the third degree* of relationship to either, or the spouse or domestic partner of such a person:
  – has more than a *de minimis* economic interest in the subject matter in controversy or is a party to the proceeding, or an officer, director, or trustee of the party;
  – is acting as a lawyer in the proceedings;
  – has more than a *de minimis* interest that could be substantially affected by the proceedings; or
  – is likely to be a material witness or expert in the proceedings.

*Great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

Grounds

- Judge's Knowledge:

- "The judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter."

- "The judge has prior personal knowledge of or bias regarding disputed evidentiary facts concerning the proceeding."

Knowledge imputed: It does not matter if the judge was not involved with the matter while working at the law firm.

The BIG One

(e) Grounds. A motion to disqualify shall set forth all specific and material facts upon which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) the party reasonably fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

Timing is Everything – 2.330(g)

- The motion must be filed "withing a reasonable time not to exceed 20 days after discovery by the party or party's counsel, whichever is earlier."
- A motion may be made during a hearing or trial based on facts discovered at the hearing or trial and may be stated on the record, "provided that the motion is also promptly reduced to a writing."
- "A motion made during a hearing or trial shall be ruled on immediately."

When counsel makes an ore tenus motion, the "trial court should grant a reasonable continuance to allow counsel to file written motion." *Tyler v. State*, 816 So. 2d 755 (Fla. 4th DCA 2002). *Cf. Forrest v. State*, 904 So. 2d 629 (Fla. 4th DCA 2005) (reversal not required where trial court denied oral motion to disqualify, and counsel did not request a continuance to file written motion). An oral motion is legally insufficient. *Id.*

Court's Order

RULING (2.330(l))

- The trial court shall rule on the motion immediately (no later than 30 days after service on the motion).
- If the motion is not denied within 30 days if service, it is deemed granted.

Sufficient Grounds

- The judge shows personal bias or prejudice.

Martinez v. Cramer, 111 So. 3d 206 (Fla. 4th DCA 2013).

- Referring to a party in the pejorative.

Valdes-Fauli v. Valdes-Fauli, 903 So. 2d 214 (Fla. 3d DCA 2005) (calling the wife an "alimony drown" was alone sufficient to place the wife in fear of not receiving a fair and impartial trial).

- Comments on the credibility of a party.

S.S. v. Dep't of Child. & Families, 298 So. 3d 1184 (Fla. 3d DCA 2020).

Sufficient Grounds

- Comments that denigrate or show distain for a party.

Publix Super Mkts. v. Olivares, 292 So. 3d 803 (Fla. 4th DCA 2020 (judge in wrongful death case where Publix tractor-trailer driver was using cell phone with hands-free device "made multiple comments showing his predisposition that cell phone use while driving, even if legal, is dangerous and should not be allowed").

- Comments suggesting how a party should proceed, illustrating a departure from the role of neutral arbiter.

Wright v. Wright, 260 So. 3d 496 (Fla. 5th DCA 2018) (encouraging or dissuading party regarding potential motions).

Insufficient Grounds

- Unflattering remarks or comments about legal argument or evidence.

Pilkington v. Pilkington, 182 So. 3d 776, 779 (Fla. 5th DCA 2015) ("Comments from the bench—even unflattering remarks—which reflect observations or mental impressions are not legally sufficient to require disqualification.").

Letterese v. Brody, 985 So. 2d 597 (Fla. 4th DCA 2008) (judge commented about counsel's argument that "a proctologist couldn't have been more thorough").

Oates v. State, 619 So. 2d 23 (Fla. 4th DCA 1993) (court telling defendant he was "being an obstinate jerk" coupled with defendant's behavior that led to the comment).

Insufficient Grounds

- Disqualification based on comments by a trial judge is required only if the comments indicate prejudice or bias.

Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996).

Rule 2.330(f): Basis for disqualification cannot be created by appearance of substitute or additional counsel.

Adverse Rulings?

NO

"This Court has repeatedly held that an adverse ruling does not provide a legally sufficient basis for disqualification." *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001).

Adverse ruling, without more, are not legally sufficient grounds for disqualification. *Correll v. State*, 698 So. 2d 522, 524–25 (Fla. 1997).

Initial Motion – 2.330(h)

DETERMINATION

- The judge may only determine legal sufficiency on the motion.
- The judge "shall not pass on the truth of the facts alleged."
- "If any motion is legally insufficient, an order denying the motion shall be immedicably entered."
- "If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action."

Legal Sufficiency

To be legally sufficient, the motion must

- Meet the literal requirements of the rule, and
- "Contain an actual factual foundation for the alleged fear or prejudice."

Teller v. Teller, 571 So. 2d 539 (Fla. 4th DCA 1990).

Legal Sufficiency

"A motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *R.M.C. v. D.C.*, 77 So. 3d 234 (Fla. 1st DCA 2012).

"It is not a question of what the judge feels, but the feeling in the mind of the party seeking to disqualify and the basis for that feeling. It must, however, be objectively reasonable." *Martinez v. Cramer*, 111 So. 3d 206 (Fla. 4th DCA 2013) (citations omitted).

A mere subjective fear of bias is not legally sufficient. *Kline v. JRD Mgmt. Corp.*, 165 So. 3d 812 (Fla. 1st DCA 2015).

When Ruling

The trial court must accept the facts alleged as true. *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978).

"When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification." *Id.*

“Status of the Record”

General Rule: a trial court should not take issue with the motion.

Exception: When denying a motion, the trial court may “explain the status of the record.” *Barwick v. State*, 660 So. 2d 694 (Fla. 1995),* (judge made statements about the contents of the motion and referred to the transcript of a prior hearing).

Consult *Manuel v. Est. of Manuel*, 367 So. 3d 520 (Fla. 4th DCA 2023), for a discussion about this exception.

Question certified: “To what extent may a judge issue a written denial of a motion for disqualification that stays within the confines of [rule 2.330(h)] and the ‘status of the record’ exception enunciated in Barwick[.]”

* Receded from in part on other grounds by *Topps v. State*, 865 So. 2d 1253 (Fla. 2004).

While Motion Pending

A court must first rule on the motion before deciding any other motions or proceeding further with the case. *Berry v. Berry*, 765 So. 2d 855 (Fla. 5th DCA 2000).

Except: "The trial court . . . maintains the authority to perform the ministerial duty of preparing a written order to reflect oral pronouncements made before the motion to disqualify." *Godin v. Owens*, 275 So. 3d 700 (Fla. 5th DCA 2019).

The rational for the ministerial duty exception is that the trial judge is not exercising discretion by memorializing prior pronouncements. *Berry v. Berry*, 765 So. 2d 855 (Fla. 5th DCA 2000).

When Ruling

A motion which is untimely or lacks certification by counsel is legally insufficient, but if the trial judge comments on the truthfulness of the facts asserted in the motion, that alone "create[es] a new basis for disqualification." *Dominguez v. State*, 944 So. 2d 1052 (Fla. 4th DCA 2006).

"[T]he erroneous denial of a legally sufficient motion for disqualification based on alleged bias or prejudice is not reversible error per se," but instead is subject to harmless error analysis. *Davis v. State*, 347 So. 3d 315 (Fla. 2022).

Reconsideration?

Rule 2.330(j) – Prior Rulings:

Party may ask successor judge to reconsider disqualified judge's factual and legal ruling provided the motion for reconsideration is filed within 30 days of the order of disqualification.

"The purpose of reconsideration is to remove the taint of prejudice where rulings might be perceived as so tainted. It should not be used merely to obtain 'a second bite at the apple' with respect to prior judicial rulings." *Rath v. Network Mktg., L.C.*, 944 So. 2d 485 (Fla. 4th DCA 2006).

Successive Motions

DETERMINATION

- Successive Motions (2.330(i)):

"If a judge has been previously disqualified on motion for alleged prejudice or partiality . . . a successor judge cannot be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion."

Kokal v. State, 901 So. 2d 766 (Fla. 2005) ("because . . . motion was a successive disqualification motion, the court could rule on the merits of the motion").

No Judge Shopping

An original trial judge may not pass on the truthfulness of the motion alleged in a successive motion. *J&J Industries, Inc., v. Carpet Showcase of Tampa Bay, Inc.*, 723 So. 2d 281 (Fla. 2d DCA 1998).

Successor Judge

Legally Sufficient vs. Partiality in Fact

"A party may not seek a second disqualification of a successor judge except in such instance where the party demonstrates actual bias or prejudice." *Carnevale v. Rogenia Trading, Inc.*, 365 So. 3d 426 (Fla. 3d DCA 2023).

Appellate Review

"A petition for writ of prohibition is the manner in which a party may seek review of a trial court's denial of a motion to disqualify a trial judge." *Joshua v. State*, 254 So. 3d 419 (Fla. 4th DCA 2018).

Standard of review

- Initial motion = *de novo*: *Id.*; *Murphy v. Collins*, 307 So. 3d 102 (Fla. 3d DCA 2020).
- Successive motions = abuse of discretion: *Delgado v. Miller*, 358 So. 3d 801 (Fla. 3d DCA 2023).

Appellate Review

- A trial judge's decision to deny a successive motion should only be disturbed if the "record clearly refutes the successor judge's decision to deny the motion." *Pinfield v. State*, 710 So. 2d 201 (Fla. 5th DCA 1998).

- "Prohibition does not lie unless the record clearly refutes the successor judge's decision to deny the motion." *Delgado*.

Questions?

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THANK YOU!

THAT'S A WRAP!

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