

CHAPTER 8
DISQUALIFICATION AND
RECUSAL

Chapter 8 - Disqualification

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DISQUALIFICATION AND RECUSAL

8.01 KEY POINTS

Motions for disqualification of a judge may be made by a party or done sua sponte by the judge. The legal grounds for disqualification are set forth in Rules of Judicial Administration, Rule 2.160. Ethical grounds for disqualification are set forth in Canons 3E and F of the Code of Judicial Conduct.

8.011 Voluntary Recusals

- Canon 3E of the Code of Judicial Conduct provides that a judge should recuse himself/herself in a proceeding in which his/her impartiality might reasonably be questioned. The Code specifies four areas of concern:
 - personal bias or prejudice or knowledge of disputed evidentiary facts; and,
 - service as the lawyer or lower court judge concerning the matter in controversy;
 - interest (financial or otherwise) in the outcome of the case; and,
 - relationships with parties or attorneys.
- A judge should refrain from proceeding when his/her impartiality may be seriously questioned.
- A judge's personal friendship, with an attorney or party to a cause, absent special circumstances, is generally insufficient grounds for recusal. See, In Re Estate of Carlton, 378 So.2d 1219 (Fla. 1979) (However, disclosure may be appropriate).

8.012 Disclosure

- If a judge is aware of circumstances that could cause his/her impartiality to be questioned, the judge should disclose them for the record. In some instances, the parties may waive their right to have the judge recuse himself/herself by making a written agreement, outside the judge's presence, to proceed. Florida Code Judicial Conduct, Canon 3F; Section 38.03, Florida Statutes.
- If a judge offers to recuse himself/herself, he/she must follow through, even if the offer is not accepted promptly. Failure to grant a motion for recusal following the judge's offer to recuse is reversible error. Funt v. Nadler, 530 So.2d 1107 (Fla. 3rd DCA 1988); Pistorino v. Ferguson, 386 So.2d 65 (Fla. 3rd DCA 1980).
 - The judge should monitor his/her personal and fiduciary financial interests and those of his/her spouse and minor children living with him/her.

Florida Code Judicial Conduct, Canon 3E (2). The judge's ignorance of a conflict of interest will not save the judge from a potentially embarrassing reversal. See Liljeberg v. Health Services Acquisition Corp. U.S., 108 S. Ct. 2194 (1988).

8.013 Motions for Disqualification of Judge - Fla. R. Jud. Admin. 2.160, Sections 38.02 & 38.10 Florida Statutes (1999)

- Grounds:
 - Fear that the party will not receive a fair trial because of specifically described prejudice or bias of the judge
 - Defendant or his/her attorney or another party or someone who has an interest in the outcome, including attorneys, is related to the judge by consanguinity or affinity within the third degree
 - Judge is a material witness for or against one of the parties
 - Written motion required
 - Written motion must be filed alleging the facts and reasons for the disqualification
 - It must be sworn to by the party signing the motion or by separate affidavit. A certificate of good faith by counsel must accompany the motion
 - Time for motions
 - No more than 10 days after discovery of the facts constituting the grounds for the motion
 - It must be promptly presented to the court for an immediate ruling
 - Must be filed before decisions are rendered unless there is excusable delay. Lawson v. Longo, 547 So.2d 1279 (Fla. 3rd DCA 1989).
 - If the motion is made during the trial it must be based on facts discovered during the trial and may be stated on the record and shall also be filed in writing in accord with the rule. Such motions shall be ruled on immediately
 - May be waived by agreeing to presiding judge after being advised of problem. Lawson v. Longo, 547 So.2d 1279 (Fla. 3rd DCA 1989); Walker

v. State, 552 So.2d 333 (Fla. 4th DCA 1989).

- If judge raises matter and the party then requests disqualification based upon what the judge has revealed, the judge is duty bound to recuse herself/himself. Pool Water Products, Inc. v. Pools by L.S. Rule, 612 So.2d 705 (Fla. 4th DCA 1993).

8.014 If Prejudice is Claimed

- **DO NOT HOLD A HEARING.** Ruling on a motion for disqualification "does not require a hearing, oral argument, the presentation of evidence, or a review of prior court proceedings. The legal sufficiency of the motion and affidavits is purely a question of law." Larimer v. State, 16 F.L.W. C147 (Fla. 5th Cir. Ct. 1991)
 - **CAVEAT:** If you do hold a hearing, you must assume the facts alleged are true and limit the argument **SOLELY** to the issue of the legal sufficiency of the motion.
 - Examine the submissions. If motion is legally sufficient the judge shall disqualify himself or herself without considering the truth of the allegations. Brown v. St. George Island, LTD, 561 So.2d 253 (Fla. 1990)
 - If there has been a disqualification under ' 38.02, the second judge is to be treated as if he or she were the first judge for purposes of a disqualification on a claim of prejudice. Brown v. St. George Island, LTD, 561 So.2d 253 (Fla. 1990)
 - Consideration of sufficiency of claim of prejudice
 - The motion is to be viewed from the perspective of the defendant, not the judge. Suarez v. Dugger, 527 So.2d 190 (Fla. 1988)
 - In examining the sufficiency of the motion, the judge must determine both its technical sufficiency and whether the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he would not get a fair and impartial trial". Thunderbird, LTD v. Great American Insurance Company, 566 So.2d 1296, 1304 (Fla. 1st DCA 1990)
 - Facts must be alleged showing a judge's undue bias, prejudice or sympathy. Dragovich v. State, 492 So.2d 350 (Fla. 1986)
 - Not sufficient if it only alleges subjective fears of bias without any allegation of objective facts. Kowalski v. Boyles, 557 So.2d 885 (Fla. 5th DCA 1990)
 - Adverse judicial rulings are not grounds for disqualification. Nassetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990) Jernigan

v. State, 608 So.2d 569 (Fla. 1st DCA 1992) [refusal to accept a plea]

- Statements by judge during or prior to hearings:
 - Statements announcing an adverse judicial ruling or reflecting mental impressions and opinions formed during the course of the pretrial proceedings are not sufficient for disqualification.
 - Statements indicating that the judge feels a party has lied and implying that he will not believe the party's testimony in the future generally reflect a bias against that party requiring removal.
 - The aforementioned principle does not apply merely because the trial judge makes a pretrial ruling which has the effect of rejecting the testimony of the moving party. Brown v. St. George Island, LTD, 561 So.2d 253 (Fla. 1990)
 - Comment by judge off the record when denying a bond reduction that he did not care whether the defendant got out of jail or not was not legally sufficient to show that he was prejudiced against the defendant or for the state. If the bond had been excessive the result might have been different. Nassetta v. Kaplan, 557 So.2d 919 (Fla. 4th DCA 1990)
 - The motion for disqualification was legally sufficient where it alleged that the judge had predetermined a contempt matter against a defendant as evidenced by his refusal to allow him to present evidence and as evidenced by disparaging and insulting comments at the hearing. Sperber v. Sperber, 608 So.2d 145 (Fla. 4th DCA 1992).
 - Claim that judge has formed a fixed opinion of the defendant's guilt is not sufficient even if the judge discusses it with others. Dragovich v. State, 492 So.2d 350 (Fla. 1986).
 - Claim of bias against the type of crime, but not the person is not sufficient. Keenan v. Watson, 525 So.2d 476 (Fla. 5th DCA 1988); Jernigan v. State, 608 So.2d 569 (Fla. 1st DCA 1992) [a prejudice against people judge regarded as child abusers]
- Campaign involvement:
 - A trial judge was required to disqualify herself on motion where the attorneys for one of the parties were members of the judge's "contemporaneously active campaign committee in a contested

election." The question was certified to the Supreme Court. This decision is questionable in light of recent supreme court decisions. Barber v. MacKenzie, 562 So.2d 755 (Fla. 3rd DCA 1990)

- It is not legally sufficient for disqualification that the lawyer for one of the litigants made a legal campaign contribution to the trial judge or his spouse. MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332 (Fla. 1990)
- Claim of bias because the judge was continuously having *ex parte* contact with the receiver in a mortgage foreclosure was insufficient. Thunderbird, LTD v. Great American Insurance Company, 566 So.2d 1296 (Fla. 1st DCA 1990)
- Erroneous entry of a prior *ex parte* order was insufficient for disqualification. Harris v. P.S. Mortgage and Investment Corporation, 558 So.2d 430 (Fla. 3rd DCA 1990)
- Bias against the attorney - A motion for disqualification was sufficient where it alleged that the judge was biased against the attorney for the movant because he had represented an individual who had sued the judge while the judge was in private practice. James v. Theobald, 557 So.2d 591 (Fla. 3rd DCA 1990)
- The fact that there has been a great deal of pretrial publicity, none of which is attributable to the judge, is not grounds for disqualification. Provenzano v. State, 616 So.2d 428 (Fla. 1993)

8.015 Motion Claiming Prejudice Against Subsequent Judge

- If this is the party's second motion for disqualification due to alleged judicial prejudice, and if the predecessor judge granted the party's first motion, a successor judge "shall not be disqualified...unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion." Rule 2.160(g), Fla. R. Jud. Admin.; *See also*, Section 38.10, Florida Statutes (1999); Brown v. St. George Island, Ltd., 562 So.2d 684 (Fla. 1990)
- Where trial judge comments on truth of the allegations, the judge exceeds the proper scope of his/her inquiry and on that basis alone has established grounds for disqualification by creating an intolerable adversary atmosphere between himself/herself and [defendant]. Haggerty v. State, 531 So.2d 364 (Fl 1st DCA 1988); *See also*, Taylor v. State, 557 So.2d 138 (Fla. 1st DCA 1990); Townsend v. State, 564 So.2d 594 (Fla. 2d DCA 1990); Gulfstream Park Racing Association v. Gale, 540 So.2d 196 (Fla. 3rd DCA 1989); Hill v. Speiser, 536 So.2d 1190 (Fla. 4th DCA 1989)

- Statements by the judge expressing his recollection as to what he had done at the prior hearing were not an attempt to refute the charges of partiality, but rather they were merely a statement of the record. Kowalski v. Boyles, 557 So.2d 885 (Fla. 5th DCA 1990)

8.016 If Appealed, Do Not File a Response

"Although we do not hold that any response filed by a judge in a prohibition-disqualification proceeding is per se disqualifying, it is decidedly dangerous for the judge to do so. The judge should remain silent and let the adversarial party supply the response." Fabber v. Wessel, 604 So.2d 533, 534 (Fla. 4th DCA 1992).

8.02 AUTHORITIES

8.03 TIPS/NOTES

8.04 CHECKLISTS/FORMS

8.041 Disqualification Checklist

____ STOP, say nothing, take recess and take motion to chambers.

- Motion must be:

- ____ 1. in writing
- ____ 2. by a party
- ____ 3. allege specific facts and reason
- ____ 4. sworn to by party
- ____ 5. accompanied by attorney's certificate of good faith
- ____ 6. timely.

- When in doubt, GET OUT.
- DO NOT send case to another judge or reassign or transfer case. Administrative judge and/or clerk will handle it.

8.42 Recusal Form

THIS CAUSE came to be heard on the motion to recuse the undersigned Judge filed by the _____ and upon consideration it is:

ORDERED AND ADJUDGED that the motion is hereby:

G Granted - Request is hereby made to the Administrative Judge to reassign said cause to another division of this Court in accordance with established procedure.

G Denied

ORDERED in _____ County, Florida, this _____ day of _____, 200____.

JUDGE

Chapter 8 -- Recusal and Disqualification

Criterion for Recusal

Article I, section 16 of the Florida Constitution guarantee the right to a jury trial. That right includes an entitlement to an impartial jury and it provide the accused with a safeguard against a compliant, biased, or eccentric judge.

Dougherty v. S., 813 So. 2d 217 (2d DCA 2002), 27 F.L.W. D756 (4/3/2002)

The standard for determining whether to grant a motion to disqualify is whether the fact alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. whether motion is legally sufficient is a question of law, and the denial of that motion is reviewed de novo.

When the technical requirements of a motion to disqualify are not met, the court does not err in denying the motion even if the allegations are otherwise legally sufficient.

Barnhill v. S., 834 So. 2d 836 (Fla. 2002), 27 F.L.W. S850 (10/10/2002)

Under rule 2.160(g) and section 38.10, a successor judge cannot be recused unless the judge acknowledges that he in fact cannot be impartial. Where the court considered the motion and rules that his is impartial, and there is no abuse of discretion, the ruling is affirmed.

Quince v. S., 732 So. 2d 1059 (Fla. 1999), 24 F.L.W. S173 (4/8/99)

Judicial Conduct

Where the judge participates in ex parte contacts with the prosecutor during the pendency of defendant's 3.850 motion regarding preparing and changing orders, the judge's impartiality is properly questioned and the judge should be recused.

Smith v. S., 708 So. 2d 253 (Fla. 1998), 23 F.L.W. S49 (1/22/98)

When a judge has contact with jurors during lunch, the judge should not refuse to answer questions but should respond with minimal, courteous answers.

Mendoza v. S., 700 So. 2d 670 (Fla. 1997), 22 F.L.W. S655 (10/16/97)

A judge should not conduct an independent investigation into matters pertaining to the victim of a homicide and other matters pertaining to defendant's sentencing. Such behavior does not promote public confidence in the integrity and impartiality of the judiciary.

Vining v. S., 827 So. 2d 201 (Fla. 2002), 27 F.L.W. S654 (7/3/2002)

Defendant was charged with violating probation by having contact with children under 18. At the hearing the state presented evidence going to that point, and also heard evidence that defendant was at work at another location at the charged time. The court sua sponte continued the hearing to allow the defense to get authenticated evidence of his time card. At the next hearing, the court told the state that it wanted to hear from the children themselves, and at a third hearing the court found defendant guilty. Held: The court did not depart from its position as a neutral magistrate. The court did not know what the evidence it sought was going to show, and gave the defense every opportunity to help discover the truth.

Kirkpatrick v. S., 769 So. 2d 515 (1st DCA 2000), 25 F.L.W. D2531 (10/23/2000)

(See **Grant v. S., 764 So. 2d 804 (2d DCA 2000), 25 F.L.W. D1782 (7/26/2000)** for criticism of the trial judge for interrupting cross and questioning witnesses himself.)

While a VOP hearing can be conducted informally and the judge may question witnesses, the judge may not take the role of the prosecutor. Where the judge departs from his role as a neutral magistrate, defendant's VOP conviction is reversed.

Cagle v. S., 821 So. 2d 443 (2d DCA 2002), 27 F.L.W. D1631 (7/19/2002)

Where the judge assumes the role of the prosecutor in a VOP hearing by doing all of the questioning of the witnesses, the judge departs from his role as an impartial magistrate and probation revocation is reversed.

Edwards v. S., 807 So. 2d 762 (2d DCA 2002), 27 F.L.W. D417 (2/15/2002)

The fact that a judge has ruled against a party is not a basis to recuse, nor does the judge's questioning a party about his position on an issue raise a doubt regarding the judge's impartiality.

Thompson v. S., 759 So. 2d 650 (Fla. 2000), 25 F.L.W. S346 (4/13/2000)

When the judge determines that defense counsel engaged in conduct that required that it be reported to the Bar, the judge's act of making that report does not require that the judge subsequently recuse himself from acting further in the case.

Birotte v. S., 795 So. 2d 112 (4th DCA 2001), 26 F.L.W. D1881 (8/1/2001)

The judge errs in interrupting cross to clarify the witness' testimony. Where the judge believed the witness was confused and that the jury was given the wrong impression, the judge should wait until the end of the witness' testimony to intervene. The court should

weigh the danger of creating the wrong impression with the jury regarding his impartiality with the danger of the witness' lack of clarity.

Hyland v. S., 826 So. 2d 1037 (3d DCA 2002), 27 F.L.W. D1840 (8/14/2002)

A judge should be recused when he assumes an adversarial position when ruling on a motion to disqualify. Any comment regarding the merit of the allegations will result in disqualification, regardless of whether the motion is legally sufficient.

SanMartin v. S., 820 So. 2d 403 (3d DCA 2002), 27 F.L.W. D1374 (6/12/2002)

The court's actions during trial of repeatedly interrupting defense counsel, without objection from the state, and commenting that defense counsel's actions were improper, is error. However, the failure of defense counsel to object to the interruptions and comments results in a failure to preserve the errors, and conviction is affirmed.

(See this case for discussion of when the judge's improper comments before the jury constitute fundamental error.)

•Mathew v. S., 837 So. 2d 1167 (4th DCA 2003), 28 F.L.W. D559 (2/26/2003)

Where the court on its own initiative suggests to the prosecutor that he inquire into the defendant's immigration status, the judge departs from his role as impartial magistrate, and the error is reversible.

Evans v. S., 831 So. 2d 808 (4th DCA 2002), 27 F.L.W. D2625 (12/11/2002)

The judge's stated policy that he will impose probation following a prison sentence is sufficient to get the judge disqualified as showing a refusal to consider sentences individually.

(See this case for extensive discussion of cases regarding disqualification when the judge has an expressed "policy" regarding sentencing in specific categories of cases.)

Martin v. S., 804 So. 2d 360 (4th DCA 2001), 26 F.L.W. D2218 (9/12/2001)

The judge's act of leaving the courtroom while testimony is being read back to the jury is fundamental error. While defendant can waive the judge's presence, when no valid waiver is made, the error gets reversal.

•Bryant v.S., 656 So. 2d 426 (Fla. 1995), 20 F.L.W. S164 (4/13/95)

Judicial Comment

It is error for the judge to comment on the evidence before the jury in such a way that indicates his opinion of the weight, character, or credibility of the evidence. Where the court

overrules an objection to the prosecutor's closing in such a way that it indicates the judge believed the argument, a new trial is required.

Simmons v. S., 803 So. 2d 787 (1st DCA 2001), 26 F.L.W. D2838 (11/30/2001)

Denying a 3.850 motion by finding that the claim is nothing more than "abject whining" does not result in recusal, but the court is cautioned to refrain from comments that might cause a litigant to fear that the judge's neutrality has been compromised.

Ragsdale v. S., 720 So. 2d 203 (Fla. 1998), 23 F.L.W. S544 (10/15/98)

Judge's sua sponte comment that an LEO qualified as an expert witness constitutes an improper comment on the credibility of a witness.

Whitaker v. S., 742 So. 2d 530 (1st DCA 1999), 24 F.L.W. D2405 (10/20/99)

A judge's extra-record attempts to defend against allegations in a motion to recuse will result in recusal just as though the judge on the record had defended himself.

(See this case for discussion of the difficulties arising from the rule that prohibits a judge from seeking to rebut allegations in a motion to recuse.)

Brinson v. S., 789 So. 2d 1125 (2d DCA 2001), 26 F.L.W. D1589 (6/27/2001)

(See **Cornelius v. S., 760 So. 2d 292 (2d DCA 2000), 25 F.L.W. D1452 (6/14/2000)**, Blue, J., concurring, for admonition to the court that the judge must refrain from facial expressions or body language that indicates that the court prefers one side to another.)

The judge's statement denying that he had prejudged the matter followed by his denial of a motion to recuse does not violate the rule against refuting the charges in a motion to disqualify.

Niebla v. S., 832 So. 2d 887 (3d DCA 2002), 28 F.L.W. D7 (2/18/2002)

Disqualification Motion and Hearing

When grounds for judicial bias are known but are not raised at the time, the grounds are waived and cannot be raised in a post-conviction relief motion.

Schwab v. S., 814 So. 2d 402 (Fla. 2002), 27 F.L.W. S275 (3/28/2002)

A motion for disqualification must be made within 10 days after the grounds for disqualification are discovered. Where the judge presided over defendant's first trial, which was reversed, and the same judge reappointed for the second trial and defendant did not seek to have the judge removed until after more than ten days after the appointment had passed, the motion is not timely.

Willacy v. S., 696 So. 2d 693 (Fla. 1997), 22 F.L.W. S219 (4/24/97)

Where court holds a hearing on motion to disqualify, and allows witnesses to be called, it is clear that the court is passing on the merits of the motion instead of determining solely whether the motion is legally sufficient as required under rule 2.160(d), and death sentence is reversed.

•Cave v. S., 660 So. 2d 705 (Fla. 1995), 20 F.L.W. S484 (9/21/95)

When a judge voluntarily removes himself from a case, he “recuses” himself. When a party seeks the judge’s removal, he seek the judge’s disqualification, not recusal.

An order denying a motion to disqualify is reviewable on a de novo standard.

Where an attorney who has a personal conflict with a judge takes a case after the case has been assigned to that judge, the judge is not required to recuse himself and is not subject to disqualification.

Sume v. S., 773 So. 2d 600 (1st DCA 2000), 25 F.L.W. D2802 (12/6/2000)

(See **Cascone v. Foster, 774 So. 2d 773 (1st DCA 2000), 25 F.L.W. D2803 (12/6/2000)** for discussion of an attorney’s right to obtain a blanket order disqualifying a judge from hearing his cases.)

Under rule 2.160, when the judge is presented with a motion to disqualify, the judge is limited to assessing the motion’s procedural and legal sufficiency and is not to pass on the truth or falsity of the allegations.

Legal sufficiency requires a factual foundation for the litigant’s fear, and the facts must be sufficient to cause a reasonably prudent person to fear not receiving a fair trial.

A threat to humiliate defense counsel in front of the jury coming in a sidebar conference where the judge’s voice was loud enough to be heard in the back of the courtroom, is legally sufficient to require disqualification.

Gates v. S., 784 So. 2d 1235 (2d DCA 2001), 26 F.L.W. D1098 (4/27/2001)

Denial of a continuance to allow time to prepare a written motion to recuse is an abuse of discretion. An oral motion is insufficient.

Tyler v. S., 816 So. 2d 755 (4th DCA 2002), 27 F.L.W. D1091 (5/8/2002)

When a judge enters an order recusing himself, any further orders entered by the judge in the case are void.

Meawether v. S., 732 So. 2d 499 (1st DCA 1999), 24 F.L.W. D1261 (5/27/99)

(See **Franco v. S.**, 777 So. 2d 1138 (4th DCA 2001), 26 F.L.W. D343 (1/31/2001) for discussion of the sufficiency of a motion to disqualify filed after trial and before sentencing based on the judge's dislike for defense attorney expressed during trial.)

Successor Judge

A successor judge can rule on a motion for rehearing when the original judge is unable to act due to death, disability, or other event.

A successor judge is without authority to reverse the original judge on a legal ruling made by the original judge. When the motion for rehearing is based on a reargument of points or facts originally made, the successor judge cannot reverse.

Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997), 22 F.L.W. S36 (1/9/97)

When a sentence is reversed and remanded for resentencing, a successor judge under rule 3.700(c) must become acquainted with what transpired at trial and other facts related to the case. Merely reviewing the prior sentencing order is not sufficient.

Watson v. S., 820 So. 2d 1057 (4th DCA 2002), 27 F.L.W. D1592 (7/10/2002)