Risks and Remedies for Spousal Interception of Electronic Communications or Wrongfully Accessing Computers and Other Electronic Devices

By Michael P. Sampson

> "The home computer is just sitting here. Copying my husband's files would be a cinch."
>
> "I could forward his text messages to myself and he'll never find out."
>
> "All I have to do is guess the password to her account and voilà! I'm in!"
>
> "This spyware is great…I'll know everything he's doing online."

Tempting. But a spouse must avoid intercepting or otherwise capturing communications between the other spouse and his or her "love interest," business contacts, attorneys or anyone else. One spouse must avoid accessing or copying the other's password protected laptops, hard drives, smart phones or other devices and files on such devices.

Wrongfully intercepting electronic communications or invading and copying a spouse's electronic devices risk both criminal and civil liability. Beyond exposure to such claims, a divorcing spouse who engages in such conduct may find a court will exclude the wrongfully obtained material from evidence.

Ethical Considerations

When a client wrongfully obtains privileged and confidential materials, the client faces multiple risks of claims under various acts and civil claims, such as for invasion of privacy. Some of those statutes and

case materials are collected at the end of this discussion.

When the client gives materials the client improperly obtained to his or her attorney, and the attorney reviews and uses them, the attorney risks disqualification and sanctions for ethical violations for having engaged in improper and inequitable conduct designed to obtain an unfair tactical advantage in the litigation.

Disqualification may also be required if the attorney

- Refuses to return or notify opposing counsel of his obtaining such wrongfully obtained documents.
- Reviews and uses documents protected by the attorney-client, work product, or other recognized privileges.
- Reviews and uses documents that invade protected privacy rights.

The Court should set a prompt hearing, upon motion, so that the Court may set parameters regarding necessary discovery to determine additional facts supporting what should be done regarding the wrongfully obtained materials and possible disqualification of counsel.

A. All Copies of Privileged Documents Must Be Returned

The standard for return of privileged documents that have been inadvertently disclosed is clear: Where there has been an inadvertent disclosure of privileged documents to a party the trial court is required to order the return of the documents, including copies thereof, and to foreclose the use of the documents for any purpose. *Marcus & Marcus, P.A. v. Sinclair*, 731 So.2d 845 (Fla. 3d DCA 1999).

In *Abamar Housing and Development, Inc. v. Lisa Lady Décor, Inc.*, 698 So.2d 276 (Fla. 3d DCA 1997)(*Abamar I*), where one party inadvertently receives privileged documents and refuses to return them to the other party the trial court was required to order the return of all copies of the privileged documents, strike the use of the documents for any purpose, and forbid any further use of, reference to, or reliance on the privileged documents.

It is more egregious when a party wrongfully and unlawfully gains access to privileged and confidential materials and gives them to the attorney to attempt to obtain to obtain a tactical advantage in the case.

B. Disqualification

Disqualification is justified when the attorney has accessed and used privileged and confidential documents that the client has wrongfully provided the attorney, to obtain an unfair informational or tactical advantage. Although disqualification of a party's chosen counsel is an extraordinary remedy, when a party's attorney has had access to privileged and confidential documents the appearance of justice and integrity of the judicial process demand disqualification. *See* *General Accident Insurance Company v. Borg-Warner Acceptance Corp.*, 483 So.2d 505 (Fla. 4th DCA 1986).

The Fifth District Court of Appeal, in an Orange County, Florida paternity action, affirmed the order of the Honorable George A. Sprinkel, IV, disqualifying a Mother's attorney, whom the Court disqualified based upon the attorney's receipt, review, and use of the father's USB flash drive. The flash drive contained electronic files, including confidential attorney client communications, client litigation notes and attorney work product. *Castellano v. Winthrop*, 27 So. 3d 134 (Fla. 5th DCA 2010). After conducting a lengthy evidentiary hearing, Judge Sprinkel found that disqualification of

the Mother's law firm was required because it had obtained an "informational advantage." *Id.* at 136. The trial court further ordered the firm and the Mother to provide, by affidavit, the identity of all persons who had reviewed, received, or been provided with the confidential and privileged information and to indemnify the Father for any damages he might suffer from the improper use thereof. The trial court further enjoined the Mother from using any of the information illegally obtained. The trial court further ordered the Mother and her law firm to return the USB drive and any and all copies that were in their possession or control and to remove from their computers all of the Father's confidential and privileged information and to make their computers available for third party inspection to confirm the deletion of this information, all at the law firm's expense. Lastly, the trial court reserved jurisdiction to determine whether the Father was entitled to an award of attorney's fees.

Rejecting the Mother's argument that her attorneys should not be disqualified and that other remedies were sufficient, the Fifth District held: "Given the nature of the information obtained by the Firm from the USB drive, it cannot be reasonably disputed that an informational and tactical advantage was obtained by the Mother." *Id.* at 137.

The Fifth District advised:

> For the benefit of other attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from further representation. Fla. Bar Prof'l Ethics Comm., Formal Op. 07-1.

Id. at 137 (footnote omitted).

According to the Professional Ethics Of The Florida Bar Opinion 07-1 (September 7, 2007), a lawyer whose client provides them with documents that were *wrongfully* obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that:

> the materials cannot be retained, reviewed, or used without informing the opposing party that the inquiring attorney and client have the documents at issue. *See The Florida Bar v. Hmielewski*, 702 So. 2d 218 (Fla. 1997) . If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation."

Id.

In *Abamar Housing and Development, Inc. v. Lisa Lady Decor, Inc.*, 724 So.2d 572, 573-74 (Fla. 3d DCA 1998)(*Abamar II),* the Third District Court of Appeal held that an *inadvertent* disclosure of privileged documents coupled with a refusal to return said documents requires disqualification to remedy the unfair tactical advantage gained and there is no requirement to demonstrate prejudice.

Regarding the obligations of an attorney who has come into possession of *inadvertently* disclosed privileged documents, *Abamar II* reiterated the admonition in Abamar I at 279, *quoting* The Florida Bar Comm. on Professional Ethics, Op. 93-3 (Feb. 1, 1994)), that "[a]n attorney who receives confidential documents of an adversary as a result of an inadvertent release is ethically obligated to promptly notify the sender of the attorney's receipt of the documents." *Abamar II*, 724 So. 2d at 574 n. 2.

C. Other authorities: Wrongfully Obtaining Electronic Communications and Data

1. Security of Communications Act, Chapter 934, Florida Statutes

What does it mean to "intercept" an electronic communication?

Under the **Security of Communications Act, Chapter 934, Florida Statutes**, to "intercept" a communication means to listen to or otherwise acquire the contents of any wire, electronic, or oral communication, through the use of any electronic, mechanical, or other device.

See also *United States v. Steiger*, 318 F.3d 1039, 1050 (1th Cir. 2003) ("interception" of email under the Federal Wiretap Act, 18 U.S.C. §§ 2510-2522, requires use of automatic routing device).

"Electronic, mechanical, or other device" means any device or apparatus someone can used to intercept a wire, electronic, or oral communication other than:

> (a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof:
>
> 1. Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or
>
> 2. Being used by a provider of wire or electronic communications service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of her or his duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

Interception in the divorce context includes secretly installing and using spyware on the other spouse's computer. The Florida Fifth District Court of Appeal court upheld the trial court's injunction on use of evidence a sleuthing wife gathered from her husband's computer activities. She obtained the evidence through Spector spyware she secretly installed on the home computer. O'Brien v. O'Brien, 899 So. 2d 1133 (Fla. 5th DCA 2005) The wife argued that the electronic communications did not fall within the Security of Communications Act, Chapter 934, Florida Statutes, because she did not "intercept" these communications, but simply retrieved them from storage.

The husband contended that the Spector spyware his wife installed on the computer acquired his electronic communications in real-time as they were in transmission and, therefore, were illegally intercepted communications, in violation of section 934.03(1)(a)(e), Florida Statutes.

The Act makes it illegal and, with some narrow exceptions, punishable as a felony of the third degree, to intercept electronic communications. Section 934.03, Florida Statutes. The court in *O'Brien* upheld the trial court's discretion to exclude the wrongfully obtained communications from evidence. This ruling is consistent with specific provision in the Act that prohibits use of the contents of intercepted communications in evidence. Section 934.06, Florida Statutes.

The Act provides a statutory civil remedy to someone whose wire, oral or electronic communication is "intercepted, disclosed, or used" in violation of the act against "any person or entity who intercepts, discloses, or uses, or procures any other person or entity to intercept, disclose, or use, such communications." Civil remedies include:

(a) Preliminary or equitable or declaratory relief;
(b) Actual damages, but not less than $100 a day for each day of violation or $1,000, whichever is higher;

(c) Punitive damages; and
(d) A reasonable attorney's fee and other litigation costs reasonably incurred.

Section 934.10, Florida Statutes.
A civil claimant must bring an action within 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

The Act extends to conduct beyond "interception, disclosure or use" of wire, oral or electronic communications. Section 934.21, Florida Statutes makes it a crime for someone who (a) intentionally accesses without authorization a "facility" through which an electronic communication service is provided or (b) "intentionally exceeds an authorization to access such facility" and thereby obtain, alter or prevent authorized access to a wire or electronic communication while in electronic storage in such system. The first offense is punishable as a first degree misdemeanor; any subsequent offense is punishable as a third degree felony.

Civil remedies the Act provides for wrongfully accessing or exceeding authorized access appear in section 934.27, Florida Statutes.

Civil remedies include:

(a) Preliminary and equitable or declaratory relief;
(b) Actual damages not less than $1,000; and
(c) A reasonable attorney's fee and other litigation costs reasonably incurred.

Section 934.27, Florida Statutes.

A spouse who accesses or copies the other's secured hard drives, copies the other spouse's password protected files on phones or other electronic devices or accesses the other spouse's accounts by logging in as the owner of the account faces significant other risks.

Violation of other statutes prohibiting the misuse of electronic equipment, including computers, may give rise to other criminal and civil claims.

For example, the Florida Computer Crimes Act, Chapter 815, Florida Statutes, criminalizes accessing or causing to be accessed any computer, computer system, or computer network willfully, knowingly and without authorization in order to defraud or obtain property. The independent civil remedy under section 815.06(4)(a), Florida Statutes, including availability of an award of attorney fees to the prevailing party, seems to be limited to defendants *convicted* under section 815.06. No Florida case has yet extended the civil remedy to those not convicted under section 815.06. Without such a conviction, it is questionable whether an injured spouse would have a ripe claim against the other spouse for wrongfully accessing a computer without authorization to defraud or obtain property. But, if a spouse could convince a state attorney to seek a conviction in an egregious case, such a conviction could support a civil remedy under the statute.

Furthermore, Florida's Civil Remedies for Criminal Practices Act, Chapter 772, Florida Statutes, provides civil remedies against those who engage in a "pattern of criminal activity." Computer related crimes (Chapter 815, Florida Statutes) are included in the definition of "criminal activity."

2. Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2511

Communications may be "intercepted" and "accessed" at different times and in different ways. Shefts v. Petrakis, 758 F. Supp. 2d 620 (Dist Court, CD IL 2012).

Civil action:

§ 2520(a) provides that "any person whose...electronic communication is intercepted...violation of this chapter" has a civil cause of action. The Court finds that communication is ordinarily understood to be a mutual

transaction, such that communications from others intended for a person are included as part of that person's communications. A recipient of a message has as much of a privacy interest in that message as does the sender.

3. **Federal Stored Communications Act, 18 USC § 2701-2712**.

A spouse who accesses or exceeds authorization to access the other spouse's computers, phones, external hard drives or online accounts may run afoul of The Federal Stored Communications Act, 18 USC §2701-2712. The FSCA provides a civil remedy for damages, including attorney fees, preliminary and other equitable or declaratory relief as may be appropriate, and, for willful or intentional violations, punitive damages against the violator.

18 USC §2707 – Civil action

United States Code, 18 U.S.C. §2701, makes it unlawful for someone to intentionally **access or exceed authorization to access** a "facility through which an electronic communication services is provided." The language of the Federal Code is similar to that of section 934.21, Florida Statutes.

Federal courts have held that general authority to access a particular computer's hard drive does not authorize someone to access password protected materials of a joint computer user. *See, Trulock v. Freeh,* 275 F,3d 391 (4th Cir, 2001). However, if stored communications on a joint computer are not properly protected by a password, a spouse cannot be prosecuted for a violation of the statute. *See, State v. Appleby,* 2002 WL 1613716 (Del. Super. 2002).

BUT:

Though we agree with the Fifth and Ninth Circuits' interpretation of the Wiretap Act, we do not rely on this particular reasoning in doing so. *See generally* *Konop*, 302 F.3d at 889 (Reinhardt, J., dissenting in part) (explaining that "[t]he majority's interpretation of the Wiretap Act depends in part on a tortured reading of the Stored Communications Act"). The SCA creates criminal and civil penalties, but no exclusionary remedy, for unauthorized access to a "facility through which an electronic communication service is provided" to "obtain[ ], alter[ ], or prevent[ ] authorized access to a wire or electronic communication *while it is in electronic storage in such system*." 18 U.S.C. § 2701 (emphasis added); *see also* 18 U.S.C. §§ 2707, 2708. "Electronic communication service" is defined as "any service which provides users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). The SCA also generally prohibits an entity providing an electronic communication service to the public from disclosing information absent an applicable exception. *See* 18 U.S.C. § 2702. Thus, the SCA clearly applies, for example, to information stored with a phone company, Internet Service Provider (ISP), or electronic bulletin board system (BBS).

The SCA, however, does not appear to apply to the source's hacking into Steiger's computer to download images and identifying information stored on his hard-drive because there is no evidence to suggest that Steiger's computer maintained any "electronic communication service" as defined in 18 U.S.C. § 2510(15). *Cf.* *Konop*, 302 F.3d at 879-80 (finding SCA applicable to information stored on a BBS); *Steve Jackson Games*, 36 F.3d at 462-64 (applying SCA to information stored on a secure website accessed by third-party users). We note, however that the SCA may apply to the extent the source accessed and retrieved any information stored with Steiger's Internet service provider. In sum, our reading of the Wiretap Act to cover only real-time interception of electronic communications, together with the apparent non-applicability of the SCA to hacking into personal computers to retrieve information stored therein, reveals a legislative hiatus in the current laws purporting to protect privacy in electronic communications. This hiatus creates no remedy.

4. The Computer Fraud and Abuse Act (CFAA), 18 USC § 1030

The Computer Fraud and Abuse Act, 18 USC §1030 (CFAA) protects computers, both public and private, used "in interstate or foreign commerce or communication," which includes any computer connected to the internet. It criminalizes unauthorized access to information without authorization or exceeding authorization.

> If the computer is connected to the Internet at the time she obtains the information, the wife may violate the CFAA based on its plain language prohibiting the access of a computer protected by virtue of its connection to the Internet beyond her authorization. However, because the CFAA does not have an exclusionary rule, the information she obtains may still be admissible.

See also: **"Spying Spouses and their High Tech Tools"**

5. Invasion of Privacy

In some cases, spouses have asserted the other spouse's copying computer files was an actionable invasion of privacy.

In *White v. White*, 781 A.2d 85, 92 (N.J. Super. Ct. Ch. Div. 2001), a husband was living in the sun room of the parties' home. The wife and children came in and out of the room on a regular basis. *White*, 781 A.2d at 92. The New Jersey Superior Court found the husband could not have an expectation of privacy in a computer that was in the sun room, and denied his claim for invasion of privacy based on the wife's examination of his e-mails. *Id.*; *see also* *Miller v. Brooks*, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996) ("[A] person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons.").

In *White*, the wife discovered a written letter from the husband's girlfriend. *Id.* The wife then had computer investigators access the family computer's

hard drive and obtained stored electronic communication between the husband and his girlfriend. *Id.* The husband thought his information was password protected. *Id.* The court determined that because the wife accessed a joint computer and it was not properly protected by a password, her activities were proper and the evidence was admissible. *Id.* The *White* case is further evidence that the distinction between stored communication and intercepted communication is of critical importance.

Ex Parte Communication

Rules of Professional Conduct - Rule 4-3.5(b)

Judicial Ethics Benchguide (January 2012)
Chapter Two - Ex Parte Communications

19th Judicial Circuit (Criminal Division)
Order by Judge Belanger

Judicial Canon 3

Disqualification

Fla. R. Jud. Admin. 2.330

Fla. Stat. Chapter 38

Fla. R. Civ. P. 1.080

Fla. R. App. P. 9.030 (b)(3)
Fla. R. App. P. 9.100 (a)(e)
Fla. R. App. P. 9.600

Florida Bar Judicial Article

Case Law

Johnson v. Johnson, 968 So.2d 61 (Fla. 4th DCA 2007)

Overcash v. Overcash, 91 So.3d 254 (Fla. 5th DCA 2012)

Rath, M.D. and Health Now, Inc. v. Network Marking, L.C., 944 So.2d 485 (Fla. 4th DCA 2006)

Southern Coatings, Inc. v. City of Tamarac, et. al., 943 So.2d 948 (Fla. 4th DCA 2006)

Subdivision (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also rule 4-4.2.

Rule 4-3.5. Impartiality and decorum of the tribunal

(a) **Influencing Decision Maker.** A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.

(b) **Communication with Judge or Official.** In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) in the course of the official proceeding in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer;

(3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer; or

(4) as otherwise authorized by law.

(c) **Disruption of Tribunal.** A lawyer shall not engage in conduct intended to disrupt a tribunal.

(d) **Communication With Jurors.** A lawyer shall not:

(1) before the trial of a case with which the lawyer is connected, communicate or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected;

(2) during the trial of a case with which the lawyer is connected, communicate or cause another to communicate with any member of the jury;

(3) during the trial of a case with which the lawyer is not connected, communicate or cause another to communicate with a juror concerning the case;

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252).

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in Florida's Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Rule 4-3.6. Trial Publicity

(a) **Prejudicial Extrajudicial Statements Prohibited.** A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

(b) **Statements of Third Parties.** A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282).

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in mat-

JUDICIAL ETHICS

BENCHGUIDE:

ANSWERS TO FREQUENTLY ASKED QUESTIONS

JANUARY 2012

A Project of the Florida Court Education Council's Publications Committee

Chapter Two

Ex Parte Communications

Chapter Two

Ex Parte Communications

1. What Are Ex Parte Communications and When and Why Are They Prohibited?

Black's Law Dictionary defines "ex parte" as "[o]n or from one party only, usually without notice to or argument from the adverse party." BLACK'S LAW DICTIONARY 576 (8th ed. 2007). Canon 3B(7) provides as follows:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

> (c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.
>
> (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
>
> (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

In SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 159–160 (Michie/Butterworth 2000), the authors explain the purpose of the rule against ex parte communications:

> Ex parte communications are those that involve fewer than all the parties who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that "every person who is legally interested in a proceeding [is given the] full right to be heard according to law."
>
> Ex parte communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. Ex parte conversations or correspondence can be misleading; the information given to the judge "may be incomplete or inaccurate, the problem can be incorrectly stated." At the very least, participation in ex parte communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, ex parte communication is an invitation to improper influence if not outright corruption. *Id.*

Ex parte communications include not only communications between judges and lawyers but also communications between judges and litigants, witnesses, and law enforcement personnel. Ex parte communications also include communications with another judge for the purpose of trying to influence that judge on behalf of a party appearing before him or her in a case. *See In re Holloway*, 832 So. 2d 716 (Fla. 2002) (judge suspended for, among other infractions, angrily engaging in ex parte communication with another judge regarding scheduling hearing in friend's case and making crude comments about other judge).

- **Opinion 09-17** (judge and magistrate may not communicate on point of law in case referred to magistrate without informing parties).

Ex parte communications are barred when they concern pending or impending litigation. The committee in Opinion 11-16 advised that a judge should not speak to a conference of judges, court administrators, and others, about a trial presided over by the judge, the result of which was being appealed. Thus, general discussion of the law, outside of the explicit or implicit context of the case, would not usually be considered an ex parte communication. Similarly, incidental contact between a judge and a party or attorney, even in the midst of a trial, will not violate the rules so long as the case itself is not discussed.

SHAMAN, *supra* at 150. Some communications by judges are permitted with certain limitations.

- **Opinion 07-19** (judge may review sworn arrest warrants and other probable cause documents and make preliminary probable cause finding prior to defendant's first appearance but may not enter preliminary finding on final probable cause determination form).

- **Opinion 06-12** (judge may meet with state attorney or defendant to discuss factual issues regarding murder case judge prosecuted while he was assistant state attorney).

2. Can Ex Parte Communication Be Remedied?

According to SHAMAN, LUBET & ALFINI, JUDICIAL CONDUCT AND ETHICS 174 (Michie/Butterworth 2000), "[t]he Code of Judicial Conduct does not address the question of remedies, but courts have held that prompt disclosure of ex parte communication to all affected parties may avoid the need for other corrective action." The text further states "Where irremediable prejudice has occurred, of course, disclosure will not be sufficient to avoid disqualification or reversal."

3. What Are Some Examples of Violations of Prohibition Against Ex Parte Communications?

Several judges have been disciplined for engaging in improper ex parte communications. See the following examples:

- ***In re Holloway,*** 832 So. 2d 716 (Fla. 2002) (judge suspended for, among other violations, engaging in angry ex parte communications with another judge and making crude remarks about that judge while trying to influence scheduling change for friend).

- ***In re Perry,*** 586 So. 2d 1054 (Fla. 1991) (judge engaged in improper ex parte communication concerning pending or impending proceedings in violation of former Canon 3A(4) of Code of Judicial Conduct, including instance that required new trial).

- ***In re Clayton,*** 504 So. 2d 394 (Fla. 1987) (on four occasions, judge conducted improper ex parte proceedings with defendants or defense counsel to dispose of criminal cases; in some instances, dispositions took place without defendant's knowledge, including pleas and sentences, and in some cases were not done in open court. Court noted former Canon 3A(4) was written with clear intent of excluding all ex parte communications except when expressly authorized by statute or rule, citing Thode, *Reporter's Notes to Code of Judicial Conduct* (1973)).

- ***In re Damron,*** 487 So. 2d 1 (Fla. 1986) (improper for judge to consider ex parte communications in making specific judicial decision and to grant ex parte request to set aside DUI conviction without notice to state; judge engaged in ex parte communications with parties, attorneys, and citizens concerning matters before his court).

- ***In re Leon,*** 440 So. 2d 1267 (Fla. 1983) (judge disciplined for engaging in improper ex parte conversations with another judge and state attorney regarding cases).

- ***In re Turner,*** 421 So. 2d 1077 (Fla. 1982) (judge had ex parte conference with party's attorney).

- ***In re Boyd,*** 308 So. 2d 13 (Fla. 1975) (justice publicly reprimanded for improperly receiving ex parte memorandum from attorney representing parties in case before court).

- ***In re Dekle,*** 308 So. 2d 5 (Fla. 1975) (justice publicly reprimanded for using ex parte memorandum from attorney for one party in case before him in preparing judicial opinion).

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR OKEECHOBEE, FLORIDA

CRIMINAL DIVISION

ORDER REGARDING EX PARTE COMMUNICATIONS, TELEPHONE CALLS AND, PLEADINGS, MOTIONS & NOTICES FROM FRIENDS, FAMILY OR RELATIVES OF DEFENDANTS

This order addresses the problem of telephone calls to the Court's Judicial Assistant from friends, family members and relatives of Defendants who have criminal charges pending with the court. In these calls, relatives request (and sometimes demand) that the Judicial Assistant cause something to be done in a case, or to communicate information to the judge *ex parte*. (An *ex parte* communication is a communication from one side only, without notice to the other side. The Code of Judicial Conduct does ***not*** permit a judge to read or consider *ex parte* communications.)

This also addresses the submission of *ex parte* pleadings, motions and correspondence from non-parties in criminal cases. [1]

There are **only two (2) parties** to a criminal case. The first is the State of Florida. The State is the plaintiff who files criminal charges against the defendant. The second party is the Defendant, who is almost always represented by the Public Defender or a private attorney.

The Office of the State Attorney may file motions and pleadings on behalf of the plaintiff, the State of Florida. The Office of the Public Defender or the defendant's privately hired attorney may file motions and pleadings on behalf of the Defendant. **No other person can file pleadings or motions in the case, or ask that action be taken in a case *via* telephone.**

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[1] This order applies to *ex parte/pro se* letters, motions and pleadings mailed or delivered to the judge. *See*, JEAC Opinion 99-19 (August 25, 1999).

Friends, family members, spouses, girlfriends and relatives of the defendant are ***not*** parties to the litigation. They lack standing to file any legal pleadings or motions in the case.

Even defendants, who are parties in the case, are limited from filing *pro se* motions in their own cases. *See, e.g., Salser v. State*, 582 So.2d 12 (Fla. 5th DCA 1991) (court properly refused to consider *pro se* motion to discharge under speedy trial rule since *pro se* motions are invalid where the defendant is represented by an attorney). Again, a defendant's spouse, girlfriend, mother, relative or acquaintance ***cannot*** file motions in the case.

Again, **friends or family members have no standing to file legal motions.** They have no standing to intervene in a criminal case. Indeed, the filing of **legal motions or pleadings** by lay persons who are not parties to the suit may constitute the **unauthorized practice of law**, which is a Third Degree Felony, prohibited by Florida Statute § 454.23.

It is also recommended that **letters**, such as character references or sentencing recommendation letters, be sent, not to the court, but to the Defendant's attorney. The defendant's attorney will then decide whether the letter should be provided to the court, with a copy to the State.

Again, an ***ex parte*** communication is a communication from one side only, without notice to the other side. The Code of Judicial Conduct does ***not*** permit a judge to read or consider ***ex parte*** communications. The Judge may only consider matters presented in open court with all parties present, or correspondence which clearly reflects that a copy was provided to the other side. ***A person may not simply call the Judge's Office and ask that something be done on a case.*** If something needs to be done in the case, the ***attorneys should be contacted***, to file appropriate motions, which would then be set for hearing in open court with all parties present.

IF YOU ARE A RELATIVE AND YOU CALL THE JUDGE'S JUDICIAL ASSISTANT, SHE WILL PROVIDE YOU ONLY WITH (1) THE DEFENDANT'S NEXT COURT DATE AND (2) THE NAME OF DEFENDANT'S ATTORNEY, IF ANY. IF YOU ARGUE WITH THE JUDICIAL ASSISTANT OR CONTINUE TO INSIST THAT SHE CAUSE SOMETHING TO BE DONE IN THE CASE, SHE WILL ASK FOR YOUR MAILING ADDRESS AND SEND YOU A COPY OF THIS ORDER.

DONE AND ORDERED in Okeechobee County, Florida on this 5th day of January 2010.

ROBERT E. BELANGER
CIRCUIT JUDGE

copies furnished to:

Clerk of the Circuit Court

State Attorney's Office

Public Defender's Office

age a party from requiring the judge to testify as a character witness.

Canon 2C. Florida Canon 2C is derived from a recommendation by the American Bar Association and from the United States Senate Committee Resolution, 101st Congress, Second Session, as adopted by the United States Senate Judiciary Committee on August 2, 1990.

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

This Canon is not intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(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, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by

words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, with respect to parties or classes of parties, cases, controversies or issues likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(11) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) 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, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge;

(f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(i) parties or classes of parties in the proceeding;

(ii) an issue in the proceeding; or

(iii) the controversy in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Amended Jan. 23, 2003 (838 So.2d 521); Jan. 5, 2006 (918 So.2d 949).

Commentary

Canon 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Canon 3B(8). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

Canon 3B(9) and 3B(10). Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4–3.6 of the Rules Regulating The Florida Bar.

Canon 3B(10). Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Canon 3C(4). Appointees of a judge include assigned counsel, officials such as referees, commissioners, special magistrates, receivers, mediators, arbitrators, and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4). See also Fla.Stat. § 112.3135 (1991).

Canon 3D. Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office or has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required under this Canon to inform the appropriate authority. While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

Canon 3E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that the fact does not automatically require disqualification of the judge. Such disqualification should be on a case-by-case basis.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Canon 3E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Canon 3E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 3E(1)(e). It is not uncommon for a judge's spouse or a person within the third degree of relationship to a judge to also serve as a judge in either the trial or appellate courts. However, where a judge exercises appellate authority over another judge, and that other judge is either a spouse or a relationship within the third degree, then this Code requires disqualification of the judge that is exercising appellate authority. This Code, under these circumstances, precludes the appellate judge from participating in the review of the spouse's or relation's case.

Canon 3F. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Canon 4. A Judge is Encouraged to Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A. A judge shall conduct all of the judge's quasi-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) undermine the judge's independence, integrity, or impartiality;

(3) demean the judicial office;

(4) interfere with the proper performance of judicial duties;

(5) lead to frequent disqualification of the judge; or

(6) appear to a reasonable person to be coercive.

B. A judge is encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government, subject to the requirements of this Code.

C. A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

D. A judge is encouraged to serve as a member, officer, director, trustee or non-legal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice, subject to the following limitations and the other requirements of this Code.

(1) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(a) will be engaged in proceedings that would ordinarily come before the judge, or

(b) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(2) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(a) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally or directly participate in the solicitation of funds, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(b) may appear or speak at, receive an award or other recognition at, be featured on the program of, and permit the judge's title to be used in conjunction with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice and the funds raised will be used for a law related purpose(s);

(c) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(d) shall not personally or directly participate in membership solicitation if the solicitation might reasonably be perceived as coercive;

(e) shall not make use of court premises, staff, stationery, equipment, or other resources for fund-raising purposes, except for incidental use for activities that concern the law, the legal system, or the administration of justice, subject to the requirements of this Code.

Amended May 22, 2008 (983 So.2d 550).

Commentary

Canon 4A. A judge is encouraged to participate in activities designed to improve the law, the legal system, and the administration of justice. In doing so, however, it must be understood that expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge and may undermine the independence and integrity of the judiciary. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Canon 2C and accompanying Commentary.

Canon 4B. This canon was clarified in order to encourage judges to engage in activities to improve

ering and acting upon waiver and extension requests on an individual basis.

(e) **Reporting Requirements and Sanctions.** The Florida Court Education Council shall establish a procedure for reporting annually to the chief justice on compliance with this rule. Each judge shall submit to the Court Education Division of the Office of the State Courts Administrator an annual report showing the judge's attendance at approved courses. Failure to comply with the requirements of this rule will be reported to the chief justice of the Florida supreme court for such administrative action as deemed necessary. The chief justice may consider a judge's or justice's failure to comply as neglect of duty and report the matter to the Judicial Qualifications Commission.

Former Rule 2.150 added Dec. 31, 1987, effective Jan. 1, 1988 (518 So.2d 258). Amended Oct. 8, 1992, effective Jan. 1, 1993 (609 So.2d 465); Nov. 3, 2005, effective Nov. 3, 2007 (915 So.2d 145). Renumbered from Rule 2.150 Sept. 21, 2006 (939 So.2d 966). Amended effective Dec. 9, 2010 (51 So.3d 1151).

Rule 2.330. Disqualification of Trial Judges

(a) **Application.** This rule applies only to county and circuit judges in all matters in all divisions of court.

(b) **Parties.** Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.

(c) **Motion.** A motion to disqualify shall:

(1) be in writing;

(2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification;

(3) be sworn to by the party by signing the motion under oath or by a separate affidavit; and

(4) include the dates of all previously granted motions to disqualify filed under this rule in the case and the dates of the orders granting those motions.

The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith. In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080.

(d) **Grounds.** A motion to disqualify shall show:

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

(2) that the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.

(e) **Time.** A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification made during a hearing or trial must be based on facts discovered during the hearing or trial and may be stated on the record, provided that it is also promptly reduced to writing in compliance with subdivision (c) and promptly filed. A motion made during hearing or trial shall be ruled on immediately.

(f) **Determination — Initial Motion.** The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

(g) **Determination — Successive Motions.** If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not 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.

(h) **Prior Rulings.** Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

(i) **Judge's Initiative.** Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.

(j) **Time for Determination.** The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

Former Rule 2.160 added Oct. 8, 1992, effective Jan. 1, 1993 (609 So.2d 465). Amended July 10, 2003, effective Jan. 1, 2004 (851 So.2d 698); Oct. 7, 2004, effective Jan. 1, 2005 (885 So.2d 870). Renumbered from Rule 2.160 Sept. 21, 2006 (939 So.2d 966). Amended July 10, 2008, effective Jan. 1, 2009 (986 So.2d 560).

Title V
JUDICIAL BRANCH

Chapter 38
JUDGES: GENERAL PROVISIONS

View Entire Chapter

CHAPTER 38
JUDGES: GENERAL PROVISIONS

38.01 Disqualification when judge party; effect of attempted judicial acts.—Every judge of this state who appears of record as a party to any cause before him or her shall be disqualified to act therein, and shall forthwith enter an order declaring himself or herself to be disqualified in said cause. Any and all attempted judicial acts by any judge so disqualified in a cause, whether done inadvertently or otherwise, shall be utterly null and void and of no effect. No judge shall be disqualified from sitting in the trial of any suit in which any county or municipal corporation is a party by reason that such judge is a resident or taxpayer within such county or municipal corporation.

History.—s. 2, ch. 16053, 1933; CGL 1936 Supp. 4155(1); s. 1, ch. 59-43; s. 205, ch. 95-147.

38.02 Suggestion of disqualification; grounds; proceedings on suggestion and effect.—In any cause in any of the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such

suggestions shall be filed in the cause within 30 days after the party filing the suggestion, or the party's attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion appear from the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his or her disqualification, and declaring himself or herself to be disqualified in said cause. If the truth of any such suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds that the suggestion is true, he or she shall forthwith enter an order reciting the ground of his or her disqualification and declaring himself or herself disqualified in the cause; if the judge finds that the suggestion is false, he or she shall forthwith enter the order so reciting and declaring himself or herself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

History.—s. 3, ch. 16053, 1933; CGL 1936 Supp. 4155(2); s. 1, ch. 26890, 1951; s. 6, ch. 63-559; s. 206, ch. 95-147.

38.03 Waiver of grounds of disqualification by parties.—The parties to any cause, or their attorneys of record, may, by written stipulation filed in the cause, waive any of the grounds of disqualification named in s. 38.02 and such waiver shall be valid and binding as to orders previously entered as well as to future acts of the judge therein; provided, however, that nothing herein shall prevent a judge from disqualifying himself or herself of his or her own motion under s. 38.05.

History.—s. 4, ch. 16053, 1933; CGL 1936 Supp. 4155(3); s. 207, ch. 95-147.

38.04 Sworn statement by judge holding himself or herself qualified.—Whenever any judge shall enter an order under s. 38.02 declaring qualification to act in said cause, he or she shall contemporaneously therewith file therein a sworn statement that to the best of his or her knowledge and belief the ground or grounds of the disqualification named in the suggestion do not exist.

History.—s. 5, ch. 16053, 1933; CGL 1936 Supp. 4155(4); s. 208, ch. 95-147.

38.05 Disqualification of judge on own motion.—Any judge may of his or her own motion disqualify himself or herself where, to the judge's own knowledge, any of the grounds for a suggestion of disqualification, as named in s. 38.02, exist. The failure of a judge to so disqualify himself or herself under this section shall not be assignable as error or subject to review.

History.—s. 6, ch. 16053, 1933; CGL 1936 Supp. 4155(5); s. 6, ch. 63-559; s. 209, ch. 95-147.

38.06 Effect of acts where judge fails to disqualify himself or herself.—In any cause where the grounds for a suggestion of disqualification, as set forth in s. 38.02, appear of record in the cause, but no suggestion of disqualification is filed therein, the orders, judgments, and decrees entered therein by the judge shall be valid. Where, on a suggestion of disqualification the judge enters an order declaring himself or herself qualified, the orders, judgments, and decrees entered therein by the said judge shall not be void and shall not be subject to collateral attack.

History.—s. 7, ch. 16053, 1933; CGL 1936 Supp. 4155(6); s. 210, ch. 95-147.

38.07 Effect of orders entered prior to disqualification; petition for reconsideration.—When orders have been entered in any cause by a judge prior to the entry of any order of disqualification under s. 38.02 or s. 38.05, any party to the cause may, within 30 days after the filing in the cause of the

order of the chief judge of the circuit or the Chief Justice of the Supreme Court, as provided for in s. 38.09, petition the judge so designated for a reconsideration of the orders entered by the disqualified judge prior to the date of the entry of the order of disqualification. Such a petition shall set forth with particularity the matters of law or fact to be relied upon as grounds for the modification or vacation of the orders. Such a petition shall be granted as a matter of right. Upon the granting of the petition, notice of the time and place of the hearing thereon, together with a copy of the petition, shall be mailed by the attorney, or attorneys, of record for the petitioners to the other attorney or attorneys of record, or to the party or parties if they have no attorneys of record. This notice shall be mailed at least 8 days prior to the date fixed by the judge for the hearing. The judge before whom the cause is then pending may, after the hearing, affirm, approve, confirm, reenter, modify, or vacate the orders.

History.—s. 8, ch. 16053, 1933; CGL 1936 Supp. 4155(7); s. 10, ch. 63-572; s. 30, ch. 81-259; s. 1, ch. 83-260.

38.08 Effect of orders where petition for reconsideration not filed.—If no petition for reconsideration is filed, as provided for in s. 38.07, all orders entered by the disqualified judge prior to the entry of the order of disqualification shall be as binding and valid as if said orders had been duly entered by a qualified judge authorized to act in the cause. The fact that an order was entered by a judge who is subsequently disqualified under s. 38.02 or s. 38.05, shall not be assignable as error subject to review by the appropriate appellate court unless a petition for reconsideration as provided for in s. 38.07, was filed by the party urging the matter as error, and the judge before whom the cause was then pending refused to vacate or modify said order.

History.—s. 9, ch. 16053, 1933; CGL 1936 Supp. 4155(8); s. 6, ch. 63-559.

38.09 Designation of judge to hear cause when order of disqualification entered.—Every judge of this state shall advise the chief judge of the circuit upon the entry of an order of disqualification. An order of assignment shall then be entered as provided by the Florida Rules of Judicial Administration. In the event any judge is disqualified as herein provided, upon application for any temporary writ of injunction or habeas corpus, the judge shall immediately enter an order of disqualification, whereupon the cause may be presented to any other judge of a court of the same jurisdiction as the court in which that cause is pending; and it shall be the duty of any such judge to hear and determine such matters until a substitute judge is so designated.

History.—s. 10, ch. 16053, 1933; CGL 1936 Supp. 4155(9)81s. 11, ch. 63-572; s. 20, ch. 73-333; s. 2, ch. 83-260; s. 211, ch. 95-147.

38.10 Disqualification of judge for prejudice; application; affidavits; etc.—Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that

he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

History.—s. 4, ch. 7852, 1919; RGS 2674; s. 1, ch. 9276, 1923; CGL 4341; s. 3, ch. 83-260; s. 212, ch. 95-147.

38.12 Resignation, death, or removal of judges; disposition of pending matters and papers.—Upon the resignation, death, or impeachment of any judge, all matters pending before that judge shall be heard and determined by the judge's successor, and parties making any motion before such judge shall suffer no detriment by reason of his or her resignation, death, or impeachment. All judges, upon resignation or impeachment, shall file all papers pending before them with the clerk of the court in which the cause is pending; and the executor or administrator of any judge who dies pending any matter before him or her shall file all papers found among the papers of his or her intestate or testator with the said clerk.

History.—ss. 1, 2, ch. 3007, 1877; RS 971, 972; GS 1341, 1342; RGS 2529, 2530; CGL 4156, 4157; s. 4, ch. 73-334; s. 1331, ch. 95-147.

38.13 Judge ad litem; when may be selected in the circuit or county court.—When, from any cause, the judge of a circuit or county court is disqualified from presiding in any civil case, the parties may agree upon an attorney at law, which agreement shall be entered upon the record of said cause, who shall be judge ad litem and shall preside over the trial of, and make orders in, said case as if he or she were the judge of the court. Nothing in this section shall prevent the parties from transferring the cause to another circuit or county court, as the case may be.

History.—s. 1, ch. 3713, 1887; RS 974; GS 1344; RGS 2533; CGL 4160; s. 7, ch. 22858, 1945; s. 4, ch. 73-334; s. 213, ch. 95-147.

38.22 Power to punish contempts.—Every court may punish contempts against it whether such contempts be direct, indirect, or constructive, and in any such proceeding the court shall proceed to hear and determine all questions of law and fact.

History.—s. 1, Nov. 23, 1828; RS 975; GS 1345; RGS 2534; CGL 4161; s. 1, ch. 23004, 1945; s. 4, ch. 73-334.

38.23 Contempts defined.—A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt.

History.—s. 2, Nov. 23, 1828; RS 976; GS 1346; RGS 2535; CGL 4162.

Florida Rules of Civil Procedure

RULE 1.080 SERVICE OF PLEADINGS AND PAPERS

1. **(a) Service; When Required.** Unless the court otherwise orders, every pleading subsequent to the initial pleading and every other paper filed in the action, except applications for witness subpoena, shall be served on each party. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them shall be served in the manner provided for service of summons.

(b) Service; How Made. When service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court. Service on the attorney or party shall be made by delivering a copy or mailing it to the attorney or the party at the last known address or, if no address is known, by leaving it with the clerk of the court. Service by mail shall be complete upon mailing. Delivery of a copy within this rule shall be complete upon: (1) handing it to the attorney or to the party, (2) leaving it at the attorney's or party's office with a clerk or other person in charge thereof, (3) if there is no one in charge, leaving it in a conspicuous place therein, (4) if the office is closed or the person to be served has no office, leaving it at the person's usual place of abode with some person of his or her family above 15 years of age and informing such person of the contents, or (5) transmitting it by facsimile to the attorney's or party's office with a cover sheet containing the sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted. When service is made by facsimile, a copy shall also be served by any other method permitted by this rule. Facsimile service occurs when transmission is complete. Service by delivery after 5:00 p.m. shall be deemed to have been made on the next day that is not a Saturday, Sunday, or legal holiday.

(c) Service; Numerous Defendants. In actions when the parties are unusually numerous, the court may regulate the service contemplated by these rules on motion or on its initiative in such manner as may be found to be just and reasonable.

(d) Filing. All original papers shall be filed with the court either before service or immediately thereafter. If the original of any bond or other paper is not placed in the court file, a certified copy shall be so placed by the clerk.

(e) Filing Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note the filing date before him or her on the papers and transmit them to the clerk. The date of filing is that shown on the face of the paper by the judge's notation or the clerk's time stamp, whichever is earlier.

(f) Certificate of service. When any attorney shall certify in substance:

"I certify that a copy hereof has been furnished to (here insert name or names) by (delivery) (mail) (fax) on .....(date).....

_____

Attorney"

the certificate shall be taken as prima facie proof of such service in compliance with these rules.

(g) Service by Clerk. If a party who is not represented by an attorney files a paper that does not show service of a copy on other parties, the clerk shall serve a copy of it on other parties as provided in subdivision (b).

(h) Service of Orders.

(1) A copy of all orders or judgments shall be transmitted by the court or under its direction to all parties at the time of entry of the order of judgment. No service need be made on parties against whom a default has been entered except orders setting an action for trial as prescribed in rule 1.440(c) and final judgments that shall be prepared and served as provided in subdivision (h)(2). The court may require that orders or judgments be prepared by a party, may require the party to furnish the court with stamped, addressed envelopes for service of the order or judgment, and may require that proposed orders and judgments be furnished to all parties before entry by the court of the order or judgment.

(2) When a final judgment is entered against a party in default, the court shall mail a conformed copy of it to the party. The party in whose favor the judgment is entered shall furnish the court with a copy of the judgment, unless it is prepared by the court, and the address of the party to be served. If the address is unknown, the copy need not be furnished.

(3) This subdivision is directory and a failure to comply with it does not affect the order or judgment or its finality or any proceedings arising in the action.

or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.[8]

(b) Jurisdiction of District Courts of Appeal.

(1) *Appeal Jurisdiction.* District courts of appeal shall review, by appeal

(A) final orders of trial courts,[1] [2] not directly reviewable by the supreme court or a circuit court, including county court final orders declaring invalid a state statute or provision of the state constitution;

(B) non-final orders of circuit courts as prescribed by rule 9.130;[9]

(C) administrative action if provided by general law.[2]

(2) *Certiorari Jurisdiction.*[8] The certiorari jurisdiction of district courts of appeal may be sought to review

(A) non-final orders of lower tribunals other than as prescribed by rule 9.130;

(B) final orders of circuit courts acting in their review capacity.

(3) *Original Jurisdiction.*[8] District courts of appeal may issue writs of mandamus, prohibition, quo warranto, and common law certiorari, and all writs necessary to the complete exercise of the courts' jurisdiction; or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof, or before any circuit judge within the territorial jurisdiction of the court.

(4) *Discretionary Review.*[10] District courts of appeal, in their discretion, may review by appeal

(A) final orders of the county court, otherwise appealable to the circuit court under these rules, that the county court has certified to be of great public importance;

(B) non-final orders, otherwise appealable to the circuit court under rule 9.140(c), that the county court has certified to be of great public importance.

(c) Jurisdiction of Circuit Courts.

(1) *Appeal Jurisdiction.* The circuit courts shall review, by appeal

(A) final orders of lower tribunals as provided by general law;[1] [2]

(B) non-final orders of lower tribunals as provided by general law;

(C) administrative action if provided by general law.

(2) *Certiorari Jurisdiction.*[8] The certiorari jurisdiction of circuit courts may be sought to review non-final orders of lower tribunals other than as prescribed by rule 9.130.

(3) *Original Jurisdiction.*[8] Circuit courts may issue writs of mandamus, prohibition, quo warranto, common law certiorari, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction.

Amended March 27, 1980, effective April 1, 1980 (381 So.2d 1370); Nov. 26, 1980, effective Jan. 1, 1981 (391 So.2d 203); Sept. 13, 1984, effective Oct. 1, 1984 (463 So.2d 1114); Feb. 14, 1985, effective March 1, 1985 (463 So.2d 1124); July 14, 1988, effective Jan. 1, 1989 (529 So.2d 687); Dec. 30, 1988, effective Jan. 1, 1989 (536 So.2d 240); Oct. 22, 1992, effective Jan. 1, 1993 (609 So.2d 516); Oct. 12, 2000, effective Jan. 1, 2001 (780 So.2d 834); Feb. 3, 2005 (894 So.2d 202).

1 9.140: Appeal Proceedings in Criminal Cases.

2 9.110: Appeal Proceedings: Final Orders.

3 9.110(i): Validation of Bonds.

4 9.110: Appeal Proceedings: Final Orders; 9.100: Original Proceedings.

5 9.120: Discretionary Review of District Court Decisions.

6 9.125: Discretionary Review of Trial Court Orders and Judgments Certified by the District Court.

7 9.150: Certified Questions from Federal Courts.

8 9.100: Original Proceedings.

9 9.130: Appeal Proceedings: Non-Final Orders.

10 9.160: Discretionary Review of County Court Decisions.

Committee Notes

1977 Amendment. This rule replaces former rules 2.1(a)(5) and 2.2(a)(4). It sets forth the jurisdiction of the supreme court, district courts of appeal, and that portion of the jurisdiction of the circuit courts to which these rules apply. It paraphrases sections 3(b), 4(b), and, in relevant part, 5(b) of article V of the Florida Constitution. The items stating the certiorari jurisdiction of the supreme court and district courts of appeal refer to the constitutional jurisdiction popularly known as the "constitutional certiorari" jurisdiction of the supreme court and "common law certiorari" jurisdiction of the district courts of appeal. This rule is not intended to affect the substantive law governing the jurisdiction of any court and should not be considered as authority for the resolution of disputes concerning any court's jurisdiction. Its purpose is to provide a tool of reference to the practitioner so that ready reference may be made to the specific procedural rule or rules governing a particular proceeding. Footnote references have been made to the rule or rules governing proceedings invoking the listed areas of jurisdiction.

This rule does not set forth the basis for the issuance of advisory opinions by the supreme court to the governor because the power to advise rests with the justices under article IV, section 1(c), Florida Constitution, and not the supreme court as a body. The procedure governing requests from the governor for advice are set forth in rule 9.500.

The advisory committee considered and rejected as unwise a proposal to permit the chief judge of each judicial circuit to modify the applicability of these rules to that particular circuit. These rules may be modified in a particular case, of course, by an agreed joint motion of the parties granted by the court so long as the change does not affect jurisdiction.

1980 Amendment. Subdivision (a) of this rule has been extensively revised to reflect the constitu-

supreme court under rule 9.030(a)(2)(B) or otherwise certified under rule 9.030(a)(2)(A)(v) or (a)(2)(A)(vi).

1992 Amendment. Subdivision (h) was amended to provide that the failure to attach conformed copies of the order or orders designated in a notice of appeal as is now required by rules 9.110(d), 9.130(c), and 9.160(c) would not be a jurisdictional defect, but could be the basis of appropriate sanction by the court if the conformed copies were not included with the notice of appeal.

2000 Amendment. In the event non-final or interlocutory review of a reviewable, non-final order is sought, new subdivision 9.040(b)(2) specifies which court should review such order, after rendition of an order transferring venue to another lower tribunal outside the appellate district of the transferor lower tribunal. It is intended to change and clarify the rules announced in *Vasilinda v. Lozano*, 631 So.2d 1082 (Fla. 1994), and *Cottingham v. State*, 672 So.2d 28 (Fla. 1996). The subdivision makes the time a venue order is rendered the critical factor in determining which court should review such non-final orders, rather than the time fees are paid, or the time the file is received by the transferee lower tribunal, and it applies equally to civil as well as criminal cases. If review is sought of the order transferring venue, as well as other reviewable non-final orders rendered before the change of venue order is rendered, or ones rendered simultaneously with it, review should be by the court that reviews such orders from the transferring lower tribunal. If review is sought of reviewable, non-final orders rendered after the time the venue order is rendered, review should be by the court that reviews such orders from the transferee lower tribunal. The only exceptions are for review of orders staying or vacating the transfer of venue order, or an order dismissing the cause for failure to pay fees, which should be reviewed by the court that reviews orders from the transferring lower tribunal. This paragraph is not intended to apply to review of reviewable non-final orders, for which non-final or interlocutory review is not timely sought or perfected.

Rule 9.050. Maintaining Privacy of Personal Data

(a) Application. Unless otherwise required by another rule of court or permitted by leave of court, all briefs, petitions, replies, appendices, motions, notices, stipulations, and responses and any attachment thereto filed with the court shall comply with the requirements of Florida Rule of Judicial Administration 2.425.

(b) Limitation. This rule does not require redaction of personal data from the record.

(c) Motions Not Restricted. This rule does not restrict a party's right to move to file documents under seal.

Added Nov. 3, 2011, effective, *nunc pro tunc*, Oct. 1, 2011 (78 So.3d 1045).

Rule 9.100. Original Proceedings

(a) Applicability. This rule applies to those proceedings that invoke the jurisdiction of the courts described in rules 9.030(a)(3), (b)(2), (b)(3), (c)(2), and (c)(3) for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction; and for review of non-final administrative action.

(b) Commencement; Parties. The original jurisdiction of the court shall be invoked by filing a petition, accompanied by any filing fees prescribed by law, with the clerk of the court deemed to have jurisdiction. If the original jurisdiction of the court is invoked to enforce a private right, the proceeding shall not be brought on the relation of the state. If the petition seeks review of an order entered by a lower tribunal, all parties to the proceeding in the lower tribunal who are not named as petitioners shall be named as respondents.

(c) Exceptions; Petitions for Certiorari; Review of Non-Final Agency Action. The following shall be filed within 30 days of rendition of the order to be reviewed:

(1) A petition for certiorari.

(2) A petition to review quasi-judicial action of agencies, boards, and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari.

(3) A petition to review non-final agency action under the Administrative Procedure Act.

(4) A petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings.

Lower court judges shall not be named as respondents to petitions for certiorari; individual members of the agencies, boards, and commissions of local government shall not be named as respondents to petitions for review of final quasi-judicial action; and hearing officers shall not be named as respondents to petitions for review of non-final agency action. A copy of the petition shall be furnished to the person (or chairperson of a collegial administrative agency) issuing the order.

(d) Exception; Orders Excluding or Granting Access to Press or Public.

(1) A petition to review an order excluding the press or public from, or granting the press or public access to, any proceeding, any part of a proceeding, or any records of the judicial branch, shall be filed in the court as soon as practicable following rendition of the order to be reviewed, if written, or announcement of the order to be reviewed, if oral, but no later than 30 days after rendition of the order. A copy of the petition shall be furnished to the person (or chairperson of the collegial administrative agency) issuing the

order, the parties to the proceeding, and any affected non-parties, as defined in Florida Rule of Judicial Administration 2.420.

(2) The court shall immediately consider the petition to determine whether a stay of proceedings in the lower tribunal or the order under review is appropriate and, on its own motion or that of any party, the court may order a stay on such conditions as may be appropriate. Any motion to stay an order granting access to a proceeding, any part of a proceeding, or any records of the judicial branch made under this subdivision must include a signed certification by the movant that the motion is made in good faith and is supported by a sound factual and legal basis. Pending the court's ruling on the motion to stay, the clerk of the court and the lower tribunal shall treat as confidential those proceedings or those records of the judicial branch that are the subject of the motion to stay.

(3) Review of orders under this subdivision shall be expedited.

(e) Exception; Petitions for Writs of Mandamus and Prohibition Directed to a Judge or Lower Tribunal. When a petition for a writ of mandamus or prohibition seeks a writ directed to a judge or lower tribunal, the following procedures apply:

(1) *Caption.* The name of the judge or lower tribunal shall be omitted from the caption. The caption shall bear the name of the petitioner and other parties to the proceeding in the lower tribunal who are not petitioners shall be named in the caption as respondents.

(2) *Parties.* The judge or the lower tribunal is a formal party to the petition for mandamus or prohibition and must be named as such in the body of the petition (but not in the caption). The petition must be served on all parties, including any judge or lower tribunal who is a formal party to the petition.

(3) *Response.* The responsibility to respond to an order to show cause is that of the litigant opposing the relief requested in the petition. Unless otherwise specifically ordered, the judge or lower tribunal has no obligation to file a response. The judge or lower tribunal retains the discretion to file a separate response should the judge or lower tribunal choose to do so. The absence of a separate response by the judge or lower tribunal shall not be deemed to admit the allegations of the petition.

(f) Review Proceedings in Circuit Court.

(1) *Applicability.* The following additional requirements apply to those proceedings that invoke the jurisdiction of the circuit court described in rules 9.030(c)(2) and (c)(3) to the extent that the petition involves review of judicial or quasi-judicial action.

(2) *Caption.* The caption shall contain a statement that the petition is filed pursuant to this subdivision.

(3) *Duties of the Circuit Court Clerk.* When a petition prescribed by this subdivision is filed, the circuit court clerk shall forthwith transmit the petition to the administrative judge of the appellate division, or other appellate judge or judges as prescribed by administrative order, for a determination as to whether an order to show cause should be issued.

(4) *Default.* The clerk of the circuit court shall not enter a default in a proceeding where a petition has been filed pursuant to this subdivision .

(g) Petition. The caption shall contain the name of the court and the name and designation of all parties on each side. The petition shall not exceed 50 pages in length and shall contain

(1) the basis for invoking the jurisdiction of the court;

(2) the facts on which the petitioner relies;

(3) the nature of the relief sought; and

(4) argument in support of the petition and appropriate citations of authority.

If the petition seeks an order directed to a lower tribunal, the petition shall be accompanied by an appendix as prescribed by rule 9.220, and the petition shall contain references to the appropriate pages of the supporting appendix.

(h) Order to Show Cause. If the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted. In prohibition proceedings such orders shall stay further proceedings in the lower tribunal.

(i) Record. A record shall not be transmitted to the court unless ordered.

(j) Response. Within the time set by the court, the respondent may serve a response, which shall not exceed 50 pages in length and which shall include argument in support of the response, appropriate citations of authority, and references to the appropriate pages of the supporting appendices.

(k) Reply. Within 20 days thereafter or such other time set by the court, the petitioner may serve a reply, which shall not exceed 15 pages in length, and supplemental appendix.

(*l*) General Requirements; Fonts. The lettering in all petitions, responses, and replies filed under this rule shall be black and in distinct type, double-spaced, with margins no less than 1 inch. Lettering in script or type made in imitation of handwriting shall not be permitted. Footnotes and quotations may be single spaced and shall be in the same size type, with the same spacing between characters, as the text. Computer-generated petitions, responses, and replies shall be submitted in either Times New Roman 14-point

Committee Notes

1980 Amendment. This rule has been replaced in its entirety by new Rule 9.150.

Historical Notes

Publisher's Note

Florida Supreme Court Opinion No. SC11-399, provides the following implementation schedule:

"First, the new electronic filing requirements the Court adopts will become effective in the civil, probate, small claims, and family law divisions of the trial courts, as well as for appeals to the circuit courts in these categories of cases, on April 1, 2013, at 12:01 a.m., except as may be otherwise provided by administrative order. Electronic filing will be mandatory in these divisions pursuant to rule 2.525 on that date. However, until the new rules take effect in these divisions, any clerk who is already accepting documents filed by electronic transmission under the current rules should continue to do so; attorneys in these counties are encouraged to file documents electronically under the current rules.

"Next, the new electronic filing requirements the Court adopts will become effective in the criminal, traffic, and juvenile divisions of the trial courts, as well as for appeals to the circuit court in these categories of cases, on October 1, 2013, at 12:01 a.m., except as may be otherwise provided by administrative order. Electronic filing will be mandatory in these divisions under rule 2.525 on that date. As stated above, until the new rules take effect in these divisions, any clerk who is already accepting electronically filed documents under the current rules should continue to do so; attorneys are again encouraged to utilize existing electronic filing procedures under the current rules.

"In this Court and in the district courts of appeal, the new electronic filing procedures adopted in this case will become effective October 1, 2012, at 12:01 a.m., except as may be otherwise provided by administrative order. However, clerks will not be required to electronically transmit the record on appeal until January 1, 2013, at 12:01 a.m. Until January 1, we encourage clerks, whenever possible, to electronically transmit the record under the new rules and requirements."

Rule 9.600. Jurisdiction of Lower Tribunal Pending Review

(a) **Concurrent Jurisdiction.** Only the court may grant an extension of time for any act required by these rules. Before the record is transmitted, the lower tribunal shall have concurrent jurisdiction with the court to render orders on any other procedural matter relating to the cause, subject to the control of the court.

(b) **Further Proceedings.** If the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.

(c) **Family Law Matters.** In family law matters:

(1) The lower tribunal shall retain jurisdiction to enter and enforce orders awarding separate maintenance, child support, alimony, attorneys' fees and costs for services rendered in the lower tribunal, temporary attorneys' fees and costs reasonably necessary to prosecute or defend an appeal, or other awards necessary to protect the welfare and rights of any party pending appeal.

(2) The receipt, payment, or transfer of funds or property under an order in a family law matter shall not prejudice the rights of appeal of any party. The lower tribunal shall have the jurisdiction to impose, modify, or dissolve conditions upon the receipt or payment of such awards in order to protect the interests of the parties during the appeal.

(3) Review of orders entered pursuant to this subdivision shall be by motion filed in the court within 30 days of rendition.

(d) **Criminal Cases.** The lower tribunal shall retain jurisdiction to consider motions pursuant to Florida Rules of Criminal Procedure 3.800(b)(2) and in conjunction with post-trial release pursuant to rule 9.140(h).

Amended July 3, 1980, effective Jan. 1, 1981 (387 So.2d 920); June 8, 1987, effective July 1, 1987 (509 So.2d 276); Oct. 22, 1992, effective Jan. 1, 1993 (609 So.2d 516); June 15, 1995 (657 So.2d 897); Nov. 22, 1996, effective Jan. 1, 1997 (685 So.2d 773); Nov. 12, 1999 (760 So.2d 67); Jan. 13, 2000 (761 So.2d 1015); Nov. 13, 2008, effective Jan. 1, 2009 (2 So.3d 89).

Committee Notes

1977 Amendment. This rule governs the jurisdiction of the lower tribunal during the pendency of review proceedings, except for interlocutory appeals. If an interlocutory appeal is taken, the lower tribunal's jurisdiction is governed by rule 9.130(f).

Subdivision (b) replaces former rule 3.8(a). It allows for continuation of various aspects of the proceeding in the lower tribunal, as may be allowed by the court, without a formal remand of the cause. This rule is intended to prevent unnecessary delays in the resolution of disputes.

Subdivision (c) is derived from former rule 3.8(b). It provides for jurisdiction in the lower tribunal to enter and enforce orders awarding separate maintenance, child support, alimony, temporary suit money, and attorneys' fees. Such orders may be reviewed by motion.

1980 Amendment. Subdivision (a) was amended to clarify the appellate court's paramount control over the lower tribunal in the exercise of its concurrent jurisdiction over procedural matters. This amendment would allow the appellate court to limit the number of extensions of time granted by a lower tribunal, for example.

1994 Amendment. Subdivision (c) was amended to conform to and implement section 61.16(1), Florida Statutes (1994 Supp.), authorizing the lower tribunal to award temporary appellate attorneys' fees, suit money, and costs.

1996 Amendment. New rule 9.600(d) recognizes the jurisdiction of the trial courts, while an appeal is pending, to rule on motions for post-trial release, as authorized by rule 9.140(g), and to decide motions pursuant to Florida Rule of Criminal Procedure 3.800(a), as authorized by case law such as *Barber v. State*, 590 So. 2d 527 (Fla. 2d DCA 1991).

Rule 9.700. Mediation Rules

(a) **Applicability.** Rules 9.700—9.740 apply to all appellate courts, including circuit courts exercising jurisdiction under rule 9.030(c), district courts of appeal, and the Supreme Court of Florida.

Don't Let the Blindfold Slip: A Guide to Judicial Disqualification

by Marcia K. Lippincott

A $3 million dollar campaign contribution to a West Virginia Supreme Court judicial candidate should have prevented the elected candidate from presiding over a case involving this contributor. Yet, it took years before the U.S. Supreme Court reversed a $50 million judgment in favor of that contributor in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). The Brennan Center for Justice of the New York University School of Law recently reported that most states, including Florida, have not heeded *Caperton*'s call to strengthen judicial recusal rules.[1]

Judicial neutrality is critical to our legal system. Florida judges have the obligation to voluntarily recuse themselves for a variety of reasons, including bias or prejudice regarding a party or an economic interest in the matter.[2] Canon 3E of the Florida Judicial Conduct Code applies to all judges, but there is no statutory right or mandatory procedure for disqualifying an appellate court judge.[3] Instead, determination of the disqualification motion is "personal and discretionary" with the individual appellate judge.[4] A disqualification decision made by a Florida Supreme Court justice is unreviewable; the motion is directed to the challenged judge, and the judge's decision is final.[5] Such a practice has been criticized as eroding public confidence in the judicial system.[6]

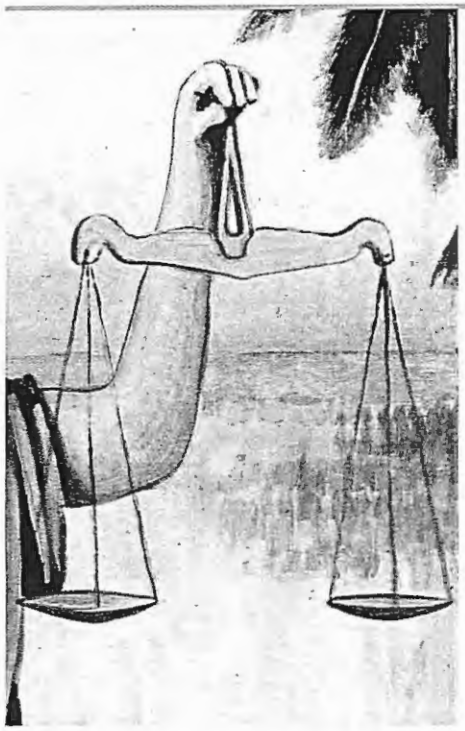
There is some confusion about the standard for disqualification of circuit judges when they are acting in an appellate capacity. One appellate court has ruled the trial court disqualification rules apply to a single circuit judge performing in an appellate capacity.[7] Another district has held that the appellate disqualification standard applies to trial court judges sitting in three-judge appellate panels.[8] Fla. R. Jud. Admin. 2.330(a) expressly states the trial disqualification rules apply to county and circuit court judges "in all matters in all divisions."

Judicial disqualification standards for trial and appellate judges are quite distinct. Although Florida's rules may need strengthening, litigants have a statutory right to request disqualification of trial court judges when prejudice is reasonably feared.[9] The effectiveness of this process hinges upon the key role attorneys play in maintaining the blindfold of judicial neutrality. This article focuses on a litigant's right to disqualify[10] a trial court judge, and it will assist Florida attorneys in improving their use of this tool.

Judicial Disqualification Based Upon Relationships

Certain relationships, including an association with the litigation subject matter, can require judicial removal. A judge may not continue if there is a possibility the lawsuit will financially benefit the judge or a close relative.[11] Disqualification must also be ordered when a judge or family member is personally involved in a similar legal difficulty.[12]

An attorney's current or recent representation of the judge, the judge's spouse, or even the judge's significant other, requires disqualification.[13] It is also necessary when a judge's spouse has an ongoing business relationship with a litigant's expert.[14] Prior representation of a litigant when a judge was a prac-



Florida judges have been cautioned not to "friend" attorneys on the judge's Facebook page because this recognition "conveys or permits others to convey the impression that they are in a special position to influence the judge."

ticing attorney does not require replacement if there is no recent confidential relationship, and the extent of prior contact was not meaningful.[15]

Legal campaign contributions are inadequate to compel judicial disqualification, even though the combined contributions of law firm members totaled almost $5,000.[16] Active participation in a judge's election campaign requires disqualification,[17] but that is not the case when the attorney did not play an instrumental role in the political campaign or when the campaign was several years ago.[18]

Adverse relationships between a judge and an attorney can lead to judicial disqualification. An acrimonious political campaign between a judge and a litigant's attorney necessitates disqualification.[19] Conversely, a trial judge's appointment as a referee in an attorney's pending disciplinary action is insufficient to dictate disqualification without a showing of personal bias.[20]

Friendship without "special circumstances" between a judge and a litigant, attorney, or witness does not require disqualification.[21] A new rule requiring judicial substitution when friendship goes beyond "politeness" and constitutes "loyalty" has been nationally advanced.[22] Indeed, Florida judges have been cautioned not to "friend" attorneys on the judge's Facebook page because this recognition "conveys or permits others to convey the impression that they are in a special position to influence the judge."[23]

Once a judge discloses a relationship and offers recusal, a disqualification motion must he granted.[24] A judicial connection that compels disqualification in one case applies to all such cases.[25] Significantly, an attorney cannot join litigation and succeed in obtaining judicial removal based upon a known conflict.[26]

Judicial Disqualification Based Upon Actions

Adverse rulings are an insufficient basis for disqualification.[27] Judicial actions cross the line when a judge becomes an active participant in the adversarial process, *i.e.*, giving "tips" to either side.[28] Similarly, seeking information outside the courtroom is an investigative action requiring disqualification.[29] While judicial questions to clarify testimony are permitted, extensive questioning or questions providing the essential elements of a party's case requires removal.[30]

Preventing a litigant from introducing testimony or engaging in cross-examination constitutes a due process violation and provides a basis for disqualification.[31] Ex parte communication is permissible for purely administrative matters.[32] When one-sided judicial contact exceeds that purpose, disqualification is required.[33]

Although a judge may form mental impressions during a proceeding, prejudgment of an issue is not permitted.[34] This principle does not prevent judicial performance of preliminary research or note preparation before a hearing.[35] Disqualification is required when judicial comments are made about matters not yet before the court, or prior to an evidentiary presentation.[36] Consequently, a well-founded fear of bias was found to exist because a judge commented at a contempt hearing before any testimony was offered, "[S]o he's going to tell me one more time he has no money when I haven't believed him anytime before."[37]

A judge's targeted personal remarks may create a well-grounded fear of bias mandating disqualification. Although a judge is permitted to make civil remarks expressing frustration with attorneys,[38] comments exceed the bounds when the judge calls an attorney a "liar" or a "substandard Miami lawyer."[39]

Remarks demonstrating a subject matter predisposition can also lead to disqualification. In a marital dissolution case, the judge's use of the term "alimony drone" indicated a negative view of alimony, and warranted disqualification.[40] General remarks — like "tough on crime" — will not necessitate removal, but a judicial suggestion that the death penalty was inappropriate due to the defendant's advanced age required disqualification.[41]

Judicial Disqualification Procedural Requirements

F.S. §38.10 provides litigants with the substantive right to seek disqualification of trial judges, and

After a disqualification motion is filed, the trial court judge must immediately rule on this matter before taking any other action, *i.e.*, no later than 30 days. This time limit is absolute if activated by proper service, and even a one-day agreed delay is unacceptable.

Fla. R. Jud. Admin. 2.330 governs the procedure.[42] A disqualification motion must be "legally sufficient."[43] This prerequisite is not examined based on evidence; rather, it is the litigant's perspective that is important.[44] The motion must establish an "objectively reasonable" fear of prejudice because subjective fear is inadequate.[45]

A motion for judicial disqualification must be in writing.[46] If the motion is orally made, the judge must interrupt the proceedings to provide a reasonable time for preparation of a written motion.[47] The motion must be sworn or supported by a party's sworn affidavit.[48] In addition, the motion must contain 1) information regarding any prior disqualifications; 2) a certificate from counsel confirming the motion and client's statements are made in good faith; and 3) a certificate showing service of the motion upon the trial judge.[49] If the motion is based upon judicial conduct or remarks, it is imperative the motion set forth the context of the conduct or remarks.[50]

Rumors and gossip are a flawed basis for disqualification, as is an affidavit based only upon information and belief.[51] In contrast, a disqualification movant is not required to have personal knowledge of the judge's relationships or conduct; rather, an affidavit is sufficient if it is at least partially based on the affiant's personal knowledge.[52]

A judicial disqualification motion must be filed within 10 days of the time the basis for removal is discovered.[53] Timeliness is a matter of fact, but it is the litigant's allegations of these facts that control.[54] If the disqualification basis occurs during trial, an immediate objection must be made, as a delay until after judgment is usually untimely.[55]

Cumulative events, provided they occur within a short time span, may be used together to show judicial bias.[56] Even when an earlier event cannot be used as a timely basis for disqualification, that event may still be relevant.[57] Failure to timely file a disqualification motion provides a basis for denial.[58] Interestingly, if the trial court fails to address the timeliness issue, the issue has not been preserved and will not be considered on appeal.[59]

Although a hearing may be conducted on a disqualification motion, the introduction of evidence is not permitted and holding a hearing has been labeled "unwise."[60] To minimize heightened adversarial tension, judges are limited to making only "a bare determination of legal sufficiency."[61] Indeed, a separate basis for disqualification is created if the judge investigates or challenges the factual allegations of a disqualification motion.[62] Even when a motion was untimely and uncertified, and the basis probably inadequate, disqualification was compelled solely because the judge commented on the truthfulness of the alleged facts.[63] Importantly, once disqualification has occurred in a case, the rules change, and the trial judge may then challenge allegations of bias.[64]

After a disqualification motion is filed, the trial court judge must immediately rule on this matter before taking any other action, *i.e.*, no later than 30 days.[65] Proper service of the disqualification motion on the trial judge is critical to the operation of this rule. If the motion is sent to an incorrect address, or if the motion does not contain a certificate of judicial service, the 30-day service deadline is not triggered.[66] This time limit is absolute if activated by proper service, and even a one-day agreed delay is unacceptable.[67] The disqualification motion is deemed granted if the judge fails to timely rule, and the movant is entitled to judicial reassignment.[68]

After the Disqualification Ruling

Once a judge makes a recusal offer or enters a disqualification order, reconsideration is not an option, even if the judge acted mistakenly.[69] In addition, partial disqualification is not permissible; it must be complete.[70] Once an order is entered, the disqualified judge can take no action except for the ministerial act of reducing an oral order to writing.[71] Indeed, a disqualified judge is not permitted to determine whether a judgment prepared by counsel complies with judicial instructions because this act is one of discretion.[72]

A litigant who succeeds in disqualification has a right to ask the successor judge for reconsideration of previously entered orders. This is a significant right that must be timely exercised. The reconsideration motion must be filed within 20 days of the disqualification order.[73] The successor judge is not required to hold a hearing on the issue of whether to reconsider, but once the decision to reconsider is affirmatively made, a hearing must be held

with notice and an opportunity to be heard given to all parties.[74]

Prohibition is used to prevent the improper use of judicial power, and it is the appropriate appellate remedy for the interlocutory denial of a judicial disqualification motion.[75] A petition for this writ should be filed with the appellate court within 30 days of the disqualification denial,[76] and it must be served upon the trial court judge.[77] If the appellate court determines the petition demonstrates a preliminary basis for relief, an order to show cause will be issued, staying further trial court proceedings and providing the opposing party the opportunity to respond.[78] Notably, a trial judge's pro se response to a prohibition petition required disqualification because the judge commented on the facts alleged in a disqualification motion.[79]

Conclusion

Disqualification is a vital safeguard to the preservation of judicial neutrality. The procedure is exacting, and the short deadline leaves little time for education when a problem arises. In addition, reluctance to challenge judicial authority may exist. Maintaining judicial impartiality is a critical task for both the judiciary and attorneys. If the blindfold begins to slip, a well-informed Florida trial attorney is the only safeguard that remains.❑

[1] Brennan Center for Justice at the New York University School of Law Press Release reported by Editorial, *Can Justice Be Bought*, N.Y. TIMES, June 16, 2011, at A34. Only "nine states — Arizona, California, Iowa, Michigan, Missouri, New York, Oklahoma, Utah and Washington State — have made recusal mandatory when contributions by a party or attorney exceed a certain threshold amount."

[2] FLA. CODE JUD. CONDUCT CANNON 3E. Disqualification. "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) 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, or the judge has been a material witness concerning it; (c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding; (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding; (e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge; (f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to: (i) parties or classes of parties in the proceeding; (ii) an issue in

the proceeding; or (iii) the controversy in the proceeding. (2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household."

[3] *In re Estate of Carlton*, 378 So. 2d 1212, 1216, 1218 (Fla. 1979).

[4] *Id.*

[5] *Id.*

[6] Adam Skaggs & Andrew Silver, *Promoting Fair and Impartial Courts through Recusal Reform*, 3-7 Brennan Center for Justice (Rev. Aug. 2011); Editorial, *A Study in Judicial Dysfunction*, N.Y. TIMES, Aug. 20, 2011, at A18.

[7] *Smith v. Santa Rosa Island Authority*, 729 So. 2d 944, 946 (Fla. 1st D.C.A. 1998).

[8] *Clarendon Nat'l Ins. Co. v. Shogreen*, 990 So. 2d 1231, 1233-1234 (Fla. 3d D.C.A. 2008). *Smith* was distinguished because it considered a *single* circuit judge acting in an appellate capacity, and any bias of a single judge would have more impact on the decision than one judge of a three-judge panel.

[9] FLA. STAT. §38.10 (2011); FLA. R. JUD. ADMIN. 2.330(d); *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983).

[10] The terms "recusal" and "disqualification" are often confused. In Florida, recusal is a voluntary action taken by the judge, whereas a litigant initiates disqualification. *Sume v. State*, 773 So. 2d 600, 602 (Fla. 1st D.C.A. 2000).

[11] *Corie v. City of Riviera Beach*, 954 So. 2d 68 (Fla. 4th D.C.A. 2007).

[12] *See, e.g., Bethesda Memorial Hosp., Inc. v. Cassone*, 807 So. 2d 142 (Fla. 4th D.C.A. 2002) (debt collection matter); *Aberdeen Property Owners Ass'n, Inc. v. Bristol Lakes Homeowners Ass'n, Inc.*, 8 So. 3d 469 (Fla. 4th D.C.A. 2009) (homeowner's association dispute).

[13] *E.g., City of Fort Lauderdale v. Palazzo Las Olas Group, LLC*, 882 So. 2d 1102 (Fla. 4th D.C.A. 2004) (representation of judge); *J&J Towing, Inc. v. Stokes*, 789 So. 2d 1196 (Fla. 4th D.C.A. 2001) (representation of judge's spouse); *Baez v. Koelemij*, 960 So. 2d 918 (Fla. 4th D.C.A. 2007) (representation of judge's "significant other").

[14] *E.g., Aurigemma v. State*, 964 So. 2d 224 (Fla. 4th D.C.A. 2007).

[15] *E.g., Milani v. Palm Beach County*, 973 So. 2d 1222, 1227 (Fla. 4th D.C.A. 2008).

[16] *E.I. DuPont de Nemours & Co. v. Aquamar S.A.*, 24 So. 3d 585 (Fla. 4th D.C.A. 2009).

[17] *Neiman-Marcus Group, Inc. v. Robinson*, 829 So. 2d 967 (Fla. 4th D.C.A. 2002) (campaign treasurer); *Dell v. Dell*, 829 So. 2d 969 (Fla. 4th D.C.A. 2002) (one of six members of a reelection committee).

[18] *Braynen v. State*, 895 So. 2d 1169 (Fla. 4th D.C.A. 2005) (one member of a 34-member steering committee); *Garcia v. American Income Life Ins. Co.*, 664 So. 2d 301, 302 (Fla. 3d D.C.A. 1995) (attorney's spouse was judge's campaign manager four years previously).

[19] *Tower Group, Inc. v. Doral Enterprises Joint Ventures*, 760 So. 2d 256 (Fla. 3d D.C.A. 2000).

[20] *State ex rel. Metsch v. Traeger*, 834 So. 2d 877 (Fla. 3d D.C.A. 2003).

[21] *In re Estate of Carlton*, 378 So. 2d 1212, 1219-20 (Fla. 1979).

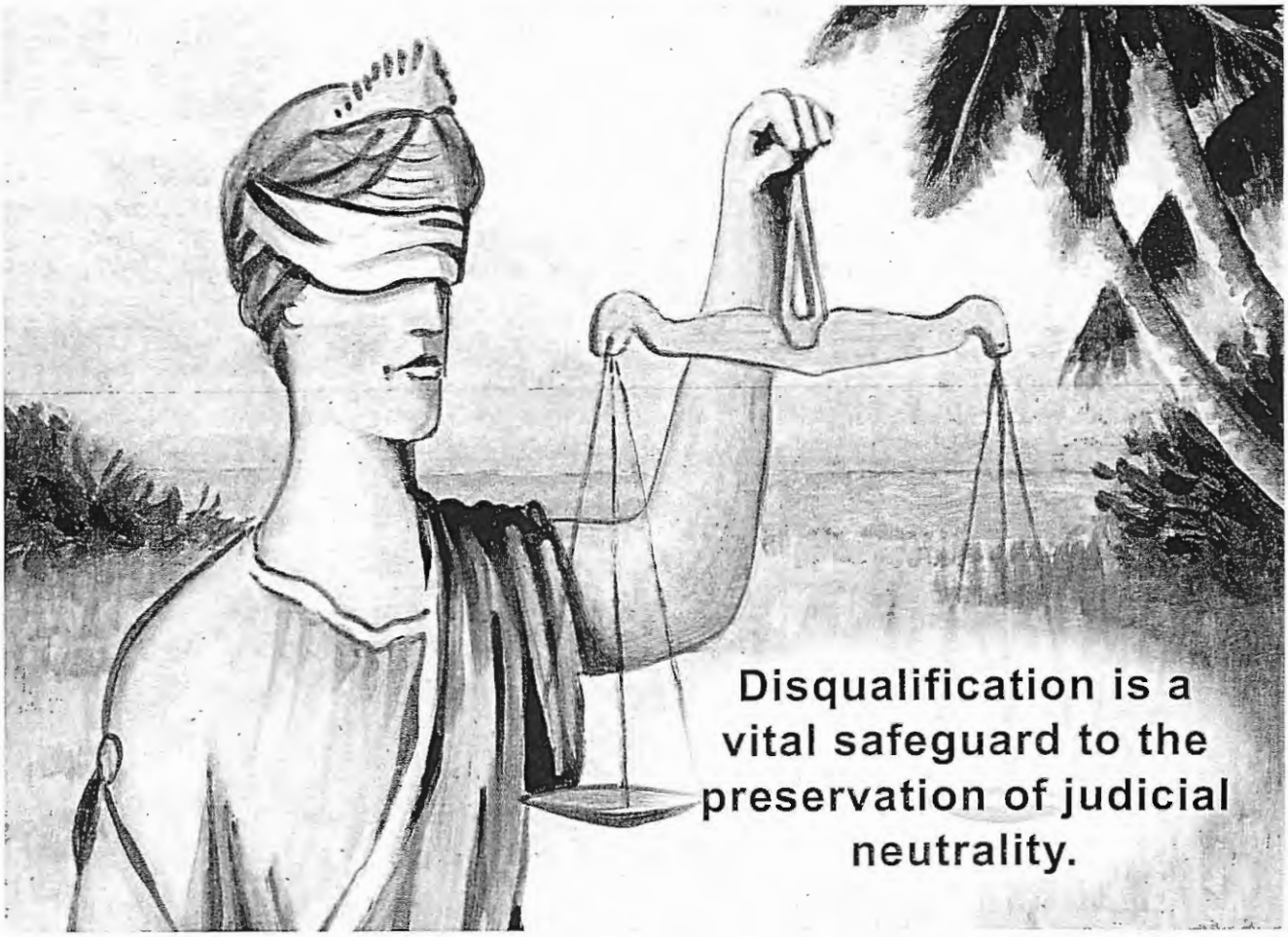
[22] Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 PEPP. L. REV. 575 (2006).

[23] Fla. JEAC Op. 09-20 (2009); Fla. JEAC Op.10-06, 2010 WL 7809062, Fla. Jud. Eth. Adv. Comm. (2010).

[24] *Stevens v. Americana Healthcare Corp.*, 919 So. 2d 713 (Fla. 2d D.C.A. 2006).

[25] *E.g., Walls v. State*, 910 So. 2d 432 (Fla. 4th D.C.A. 2005) (adversarial relationship); *Mulligan v. Mulligan*, 877 So. 2d 791 (Fla. 4th D.C.A. 2004) (friendship).

[26] *E.g., Sume v. State*, 773 So. 2d 600



(Fla. 1st D.C.A. 2000).

[27] *E.g., Howard v. State,* 950 So. 2d 1260, 1262 (Fla. 5th D.C.A. 2007); *Letterese v. Brody,* 985 So. 2d 597, 599 (Fla. 4th D.C.A. 2008).

[28] *E.g., Chastine v. Broome,* 629 So. 2d 293 (Fla. 4th D.C.A. 1993).

[29] *E.g., Albert v. Rogers,* 57 So. 3d 233, 236 (Fla. 4th D.C.A. 2011).

[30] *E.g., Stockstill v. Stockstill,* 770 So. 2d 191 (Fla. 5th D.C.A. 2000) (extensive questioning) (the author's firm represented the appellant in this case); *R.O. v. State,* 46 So. 3d 124 (Fla. 3d D.C.A. 2010) (essential elements).

[31] *E.g., Swida v. Raventos,* 872 So. 2d 413 (Fla. 4th D.C.A. 2004) (denied opportunity of presenting defense); *Zuchel v. State,* 824 So. 2d 1044, 1046 (Fla. 4th D.C.A. 2002) (denied opportunity of cross-examination).

[32] *E.g., Jimenez v. State,* 997 So. 2d 1056, 1072-73 (Fla. 2008); *Nudel v. Flagstar Bank, FSB,* 52 So. 3d 692 (Fla. 4th D.C.A. 2010).

[33] *E.g., Frengel v Frengel,* 880 So. 2d 763 (Fla. 2d D.C.A. 2004) (email communication between the judge and the parties' children).

[34] *E.g., Leslie v. Leslie,* 840 So. 2d 1097 (Fla. 4th D.C.A. 2003).

[35] *Bush v. Schiavo,* 861 So. 2d 506, 509 (Fla. 2d D.C.A. 2003).

[36] *E.g., Kates v. Seidenman,* 881 So. 2d 56 (Fla. 4th D.C.A. 2004) (issues not before court at temporary relief hearing); *Williams v. Balch,* 897 So. 2d 498 (Fla. 4th D.C.A. 2005) (predisposition before considering evidence).

[37] *Peterson v. Asklipious,* 833 So. 2d 262 (Fla. 4th D.C.A. 2002).

[38] *See, e.g., Letterese v. Brody,* 985 So. 2d 597 (Fla. 4th D.C.A. 2008).

[39] *Siegel v. State,* 861 So. 2d 90 (Fla. 4th D.C.A. 2003) (characterized attorneys as liars); *Marshall v. Bookstein,* 789 So. 2d 455 (Fla. 4th D.C.A. 2001) (referenced attorneys as "substandard Miami lawyers").

[40] *Valdes-Fauli v. Valdes-Fauli,* 903 So. 2d 214 (Fla. 3d D.C.A. 2005);

[41] *Arbelaez v. State,* 775 So. 2d 909, 916 (Fla. 2005); *State v. Ballard,* 956 So. 2d 470 (Fla. 2d D.C.A. 2007).

[42] *Wickham v State,* 998 So. 2d 593, 596 (Fla. 2008). These rules also apply to special masters. FLA. R. CIV. P. 1.490(d); *Pasteur Medical Center, Inc. v. Wellcare of Florida, Inc.,* 943 So. 2d 144, 146-47 (Fla. 3d D.C.A. 2006).

[43] FLA. R. JUD. ADMIN. 2.330(f).

[44] *E.g., Livingston v. State,* 441 So. 2d 1083, 1087 (Fla. 1983).

[45] *E.g., Rodgers v. State,* 948 So. 2d 655, 672-73 (Fla. 2006).

[46] FLA. R. JUD. ADMIN. 2.330(c)(1); *Migliore v. Migliore,* 792 So. 2d 1276 (Fla. 4th D.C.A. 2001).

[47] *Rodgers v. State,* 630 So. 2d 513, 516 (Fla. 1993).

[48] FLA. R. JUD. ADMIN. 2.330(c)(3); *e.g., Wal-Mart Stores, Inc. v. Carter,* 768 So. 2d 21 (Fla. 1st D.C.A. 2000); *Skarka v. Lennar Homes, Inc.,* 29 So. 3d 1170 (Fla. 1st D.C.A. 2010).

[49] FLA. R. JUD. ADMIN. 2.330(c)(4).

[50] *See, e.g., Ursi v. Ursi,* 21 So. 3d 45 (Fla. 3d D.C.A. 2009); *Marshall v. Bookstein,* 789 So. 2d 455 (Fla. 4th D.C.A. 2001). The better practice is to provide a transcript.

[51] *Barwick v. State,* 660 So. 2d 685, 693 (Fla. 1995), *receded from on other grounds by Topps v. State,* 865 So. 2d 1253 (Fla. 2004) (rumors or gossip); *Hahn v. Frederick,* 66 So. 2d 823, 825 (Fla. 1953) (information and belief).

[52] *E.g., Hayslip v. Douglas,* 400 So. 2d 553, 556 (Fla. 4th D.C.A. 1981); *Gieseke v. Grossman,* 418 So. 2d 1055, 1057 (Fla. 4th D.C.A. 1982).

[53] FLA. R. JUD. ADMIN. 2.330(e); *Doorbal v. State,* 983 So. 2d 464, 475-76 (Fla. 2008); *Holter v. Dohnansky,* 917 So. 2d 242, 243 (Fla. 5th D.C.A. 2005) (the mail rule applies, so a motion filed on the 11th day following a weekend is timely).

[54] *See, e.g., Brown ex rel. Preshong-Brown v. Graham,* 931 So. 2d 961, 963-64 (Fla. 4th D.C.A. 2006).

[55] *E.g., Fischer v. Knuck,* 497 So. 2d 240, 243 (Fla. 1986); *Detournay v. City of Coral Gables,* 65 So. 3d 1103 (Fla. 3d D.C.A. 2011).

[56] *E.g., Chillingworth v. State,* 846 So. 2d 674, 676 (Fla. 4th D.C.A. 2003); *cf. Inphynet Contracting Services, Inc. v. Soria,* 37 So. 3d 299, 300 (Fla. 4th D.C.A. 2010) (cumulative events over a long time period is insufficient).

[57] *R.V. v. State,* 44 So. 3d 180, 183 (Fla. 4th D.C.A. 2010).

[58] *E.g., Rodriquez v. State,* 919 So. 2d 1252, 1274 (Fla. 2006); *T/F Systems, Inc. v. Malt,* 814 So. 2d 511, 513 (Fla. 4th D.C.A. 2002).

[59] *Roberts v. State,* 840 So. 2d 962, 969 (Fla. 2002).

[60] *Letterese v. Brody,* 985 So. 2d 597, 598-99 (Fla. 4th D.C.A. 2008) (argument permitted); *Shuler v. Green Mountain Ventures, Inc.,* 791 So. 2d 1213, 1216 fn.1 (Fla. 5th D.C.A. 2001) (hearing unwise).

[61] FLA. R. JUD. ADMIN. 2.330(f); *Bundy v. Rudd,* 366 So. 2d 440, 442 (Fla. 1978).

[62] FLA. R. JUD. ADMIN. 2.330(f); *see, e.g., D.H. ex rel. J.R. v. Dept. of Children and Families,* 12 So. 3d 266, 271 (Fla. 1st D.C.A. 2009); *Edwards v. State,* 976 So. 2d 1177 (Fla. 4th D.C.A. 2008).

[63] *E.g., Dominquez v. State,* 944 So. 2d 1052 (Fla. 4th D.C.A. 2006).

[64] FLA. R. JUD. ADMIN. 2.330(g).

[65] FLA. R. JUD. ADMIN. 2.330(j); *e.g., Valdes-Fauli v. Valdes-Fauli,* 903 So. 2d 214, 217-18 (Fla. 3d D.C.A. 2005) (rule on disqualification before taking any other action); *Hatfield v. State,* 46 So. 3d 654 (Fla. 2d D.C.A. 2010) (mail rule applies to extend this deadline).

[66] *E.g., Tobkin v. State,* 889 So. 2d 120 (Fla. 4th D.C.A. 2004) (incorrect address); *Marquez v. State,* 11 So. 3d 975 (Fla. 3d D.C.A. 2009) (no judicial certificate of service).

[67] *Schisler v. State,* 958 So. 2d 503 (Fla. 3d D.C.A. 2007).

[68] FLA. R. JUD. ADMIN. 2.330(j); *see, e.g., Lightsey v. State,* 53 So. 3d 1093 (Fla. 1st D.C.A. 2011). *Rowe v. Duetche Bank Nat. Trust Co.,* 49 So. 3d 1285 (Fla. 1st D.C.A. 2010) (mandamus denied as premature where a written demand for reassignment was not made).

[69] *E.g., Stevens v. Americana Healthcare Corp. of Naples,* 919 So. 2d 713, 715-16 (Fla. 2d D.C.A. 2006) (if recusal offered judge must grant disqualification motion); *Jenkins v. Motorola, Inc.,* 911 So. 2d 196 (Fla. 3d D.C.A. 2005) (mistaken entry of disqualification order cannot be corrected).

[70] *See, e.g., Southern Coatings, Inc. v. City of Tamarac,* 840 So. 2d 1109 (Fla. 4th D.C.A. 2003); *Thibideau v. Estate of Blane,* 851 So. 2d 911 (Fla. 4th D.C.A. 2003).

[71] *See, e.g., Fernwoods Condominum Ass'n #2, Inc. v. Alonso,* 26 So. 3d 27 (Fla. 3d D.C.A. 2009).

[72] *E.g., Berry v. Berry,* 765 So. 2d 855, 857-58 (Fla. 5th D.C.A. 2000); *Plaza v. Plaza,* 21 So. 3d 181 (Fla. 3d D.C.A. 2009).

[73] FLA. R. JUD. ADMIN. 2.330(h); *Weiss v. Berkett,* 907 So. 2d 1181 (Fla. 3d D.C.A. 2005).

[74] *Rath v. Network Marketing, L.C.,* 944 So. 2d 485 (Fla. 4th D.C.A. 2006) (no hearing required on decision of whether to reconsider); *Southern Coatings, Inc. v. City of Tamarac,* 943 So. 2d 948, 952 (Fla. 4th D.C.A. 2006) (if successor judge decides to reconsider, hearing required on merits).

[75] *E.g., Sutton v. State,* 975 So. 2d 1073, 1076-77 (Fla. 2008).

[76] There is no mandatory time requirement for the filing of a prohibition petition. However, such a petition should be timely filed. PADAVANO, FLORIDA APPELLATE PRACTICE, §29.9 at 746 (2010 ed).

[77] FLA. R. APP. P. 9.100(e)(2).

[78] FLA. R. APP. P. 9.100(h); *Plavnicky v. Deluicia,* 954 So. 2d 1178 (Fla. 4th D.C.A. 2007).

[79] *Rollins v. Baker,* 683 So. 2d 1138, 1140 (Fla. 5th D.C.A. 1996) (a judge's "best course of action" is to request a response from the attorney general).

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968 So.2d 61, 32 Fla. L. Weekly D2594

(Cite as: 968 So.2d 61)

H

District Court of Appeal of Florida,

Fourth District.
Lester JOHNSON, Petitioner,
v.
STATE of Florida, Respondent.
No. 4D07-2975.

Oct. 31, 2007.
Rehearing Denied Dec. 6, 2007.

Background: Defendant filed writ of prohibition seeking to disqualify Robert R. Makemson, J., from continuing to preside over civil and criminal cases pending in Nineteenth Judicial Circuit Court, Okeechobee County.

Holding: The District Court of Appeal treated petition as one for writ of mandamus and held that defendant was entitled to have clerk reassign pending criminal cases to other judge after judge failed to rule on motion to disqualify within 30 days.

Writ dismissed in part as moot and granted in part.

West Headnotes

Judges 227 ⚿ 51(4)

227 Judges

227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of Objections. Most Cited Cases

After trial court judge failed to rule on defendant's motion to disqualify within 30 days, defendant was entitled to have clerk reassign pending criminal cases to other judge. West's F.S.A. R.Jud.Admin.Rule 2.330(j).

*62 Lester Johnson, Okeechobee, pro se.

Bill McCollum, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for respondent.

PER CURIAM.

Lester Johnson filed a petition for writ of prohibition, seeking to disqualify Circuit Court Judge Robert Makemson from continuing to preside over five lower tribunal cases: three criminal cases in which he is the defendant-L.T. case nos. 06-127, 06-462, and 06-488-and two civil cases in which he petitioned for writs of mandamus-L.T. case nos. 06-287 and 06-227. We find the petition is moot with respect to the two civil cases, and grant the petition as to the three criminal cases.[FN1]

FN1. In L.T. case no. 06-287, the trial court entered a final order on December 8, 2006, dismissing Johnson's complaint seeking a writ of mandamus, and an order denying his motion for rehearing on January 11, 2007. Johnson appealed the dismissal and this court affirmed per curiam on July 25, 2007. (Case no. 4D07-577) Thus, at the time he filed the motion for disqualification, this case no longer was pending. With respect to L.T. case no. 06-227, on September 10, 2007, Johnson supplied this court with a copy of Judge Makemson's order dated August 28, 2007, reassigning the case to another judge. Thus, his efforts to disqualify Judge Makemson in this case too are now moot.

On June 8, 2007, Johnson served on Judge Makemson a motion for disqualification of judge, referencing all five L.T. case numbers. The motion concerned Judge Makemson's actions in a hearing held on May 29, 2007. As there was no ruling on the motion for disqualification within the thirty-day period provided by Florida Rule of Judicial Administration 2.330(j), on July 11, 2007, Johnson served his motion for an order directing the clerk to reassign the cases.

Instead, in two of the lower tribunal criminal cases, Judge Makemson issued orders dated July 12, 2007, scheduling hearings for August 24. Johnson filed the

instant pro se petition for writ of prohibition with this court on July 27, 2007.

Rule 2.330(j) of the Florida Rules of Judicial Administration provides:

> The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

The petition for writ of prohibition filed may be considered premature as the trial judge has not yet ruled on the motion for disqualification. *See generally* Kelly v. Scussel, 167 So.2d 870 (Fla.1964) (holding that, when trial court set hearing on suggestion of disqualification, district court erred in entering order of prohibition, prohibiting judge from proceeding further in the case other than to enter his order disqualifying himself, as it deprived trial judge of right to ascertain whether to disqualify himself); *City of Hollywood v. Diamond On The Beach, Inc.*, 855 So.2d 87 (Fla. 4th DCA 2003) (where trial court denied motions for disqualification as procedurally insufficient without considering legal sufficiency, granting petition only to the extent of returning consolidated cases to the trial court to make determination of legal sufficiency in the first instance); *Novartis Pharms. Corp. v. Carnoto*, 840 So.2d 410 (Fla. 4th DCA 2003) (where trial court *63 dismissed as untimely a motion to disqualify which this court determined was timely, returning case to trial court to determine issue of legal sufficiency).

However, rule 2.330(j) entitled Johnson to a ruling within thirty days and, failing that, to an order directing the clerk to reassign the case.[FN2] *Compare* Schisler v. State, 958 So.2d 503 (Fla. 3d DCA 2007) (granting a mandamus petition to direct the trial judge to quash his order denying a motion to disqualify the judge, where the judge did not rule within thirty days after service of the motion, even though the ruling was only one day late and petitioner's counsel acquiesced in setting a hearing on the motion outside the thirty-day time frame); *Harrison v. Johnson*, 934 So.2d 563 (Fla. 1st DCA 2006) (stating that, to the extent a movant seeks to compel a ruling by the circuit court on his motion to reassign, mandamus is the proper remedy).

> FN2. There are exceptions. *See Tobkin v. State*, 889 So.2d 120 (Fla. 4th DCA 2004) (holding that trial judge's failure to rule on recusal motion within thirty days after it was filed did not require judge's automatic recusal, where court clerk's office mistakenly failed to forward motion to judge, the movant had mailed judge's copy of motion to wrong courthouse, and judge ruled on motion within six days after becoming aware of motion, and one day after receiving it); *Chrispen v. State*, No. 4D06-5009, 954 So.2d 1155 (Fla. 4th DCA Jan. 29, 2007) (denying prohibition petition, by unpublished order, stating "[b]ecause the petitioner did not serve a copy of the motion for disqualification on the trial judge, the court's order of denial was not untimely under Florida Rule of Judicial Administration 2.330(j)"). However, the state's response did not indicate that the motion was not properly served on the judge or that for some reason he did not receive it.

The state argues in its response that Johnson's motion for disqualification was a nullity because Judge Makemson is a successor judge in Johnson's cases, and, as such, he cannot be disqualified unless he rules that he is not impartial in the case. *See* Fla. R. Jud. Admin. 2.330(g). However, rule 2.330(j) does not contain an exception for successor judges.

Accordingly, we treat the petition for writ of prohibition as a petition for writ of mandamus to compel the court to direct the clerk to reassign the cases, and grant it as it relates to the pending criminal cases. We dismiss the petition as it relates to the civil matters, which are now moot.

Dismissed as Moot in Part and Granted in Part.

POLEN, HAZOURI, and MAY, JJ., concur.

Fla.App. 4 Dist.,2007.

91 So.3d 254, 37 Fla. L. Weekly D1559

(Cite as: 91 So.3d 254)

C

District Court of Appeal of Florida,

Fifth District.
William Todd OVERCASH, Petitioner,
v.
Lori Ann OVERCASH, n/k/a Lori Ann Foultz,
Respondent.
No. 5D11–3689.

June 29, 2012.

Background: Divorced father filed motion to disqualify trial judge from presiding over dispute with former wife over their shared parenting responsibilities. The Circuit Court, Marion County, William T. Swigert, J., denied the motion. Father filed petition for writ of prohibition.

Holding: The District Court of Appeal, Griffin, J., held that trial judge's failure to rule on motion to disqualify within 30 days after it was filed resulted in motion being deemed granted.

Petition granted.

West Headnotes

[1] **Judges 227 ⚿ 51(4)**

227 Judges

227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of objections. Most Cited Cases

Trial judge's failure to rule on divorced father's motion to disqualify within 30 days after it was filed resulted in motion being deemed granted, even though certificate of service did not show that judge was served with the motion, as required by rule governing motions to disqualify; certificate of service was not conclusive or exclusive evidence of service, and affidavit of father's process server stated that motion was hand-delivered to security officer at courthouse, in compliance with heightened security measures, on same date the motion was filed. West's F.S.A. RCP Rule 1.080(f); West's F.S.A. R.Jud.Admin.Rule 2.330(c, j).

[2] **Judges 227 ⚿ 51(4)**

227 Judges

227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) k. Determination of objections. Most Cited Cases

Divorced father's failure to file affidavit of process server stating that motion to disqualify had been served on trial judge until after judge denied the motion was irrelevant to the determination of when the 30-day period within which judge was required to rule on the motion was triggered; issue was service of the motion, rather than proof of service. West's F.S.A. RCP Rule 1.080(f); West's F.S.A. R.Jud.Admin.Rule 2.330(c, j).

***254** Beth Gordon of The Gordon Law Firm, Williston, for Petitioner.

Mark D. Shelnutt and Cheri A. Russell of Mark D. Shelnutt, P.A., Ocala, for Respondent.

GRIFFIN, J.

Petitioner, William Todd Overcash ["Petitioner"], seeks a writ of prohibition from this Court to disqualify Senior Circuit Court Judge William T. Swigert from presiding over Marion County Case No. 2002–4655–DR–FJ, which involves a dispute with Petitioner's former wife, Lori Ann Overcash, now known as Lori Ann Foultz ***255** ["Respondent"] over the parties' shared parenting responsibilities of their daughter. Specifically, Petitioner argues that his motion should be deemed granted because the judge failed to issue its ruling

within the thirty-day time limit pursuant to Florida Rule of Judicial Administration 2.330(j). We agree that because the trial court's order was untimely, the petition should be granted.

Petitioner timely filed a motion to disqualify the trial judge on August 19, 2011. The motion claimed judicial bias based upon several comments and actions the trial judge made during a hearing held on August 9, 2011. The trial judge denied Petitioner's motion to disqualify on October 3, 2011, more than forty-five days after it had been filed.

[1] Florida Rule of Judicial Administration 2.330(j) provides that once a motion to disqualify has been filed, the judge shall make its ruling immediately, but no later than thirty days.[FN1] *Tableau Fine Art Group, Inc. v. Jacoboni*, 853 So.2d 299, 302–03 (Fla.2003). As rule 2.330(j) indicates, it must be read in conjunction with subsection (c) of the same rule, which provides that: "In addition to filing with the clerk, the movant shall immediately serve a copy of the motion on the subject judge as set forth in Florida Rule of Civil Procedure 1.080." Fla. R. Jud. Admin. 2.330(c). Respondent argues that because the certificate of service on Petitioner's motion to disqualify does not show that the judge was served, the thirty-day window for the judge to rule was not triggered. We disagree. A certificate of service serves as prima facie evidence that service of pleadings is in compliance with the rules, but such evidence is neither conclusive nor exclusive. *See e.g.* Fla. R. Civ. P. 1.080(f).

> FN1. Florida Rule of Judicial Administration 2.330(j) provides:
>
> > The judge shall rule on a motion to disqualify immediately, but no later than 30 days after the service of the motion as set forth in subdivision (c). If not ruled on within 30 days of service, the motion shall be deemed granted and the moving party may seek an order from the court directing the clerk to reassign the case.

According to the filed affidavit of the Petitioner's process server, on August 19, the same day the motion was filed, Judge Swigert's copy of the motion to disqualify was hand delivered to the security officer on the fourth floor of the Marion County courthouse. Due to heightened security measures at the courthouse, documents being delivered to the judges were to be left with the security officer.

[2] Respondent also objects that Petitioner did not file the affidavit of delivery by the process server until after the judge had ruled on the motion to disqualify, but that fact is of no significance. Service is the issue, not proof of service. *See Tobkin v. State*, 889 So.2d 120, 122 (Fla. 4th DCA 2004) (reference to Florida Rule of Civil Procedure 1.080 in Rule 2.330(c) "requires service in a manner designed to notify the judge of the existence of the motion"); *cf. Marquez v. State*, 11 So.3d 975, 976 (Fla. 3d DCA 2009) (denying writ of prohibition where the motion's certificate of service did not reflect service of the motion to the trial judge and there was no other proof of compliance with Florida Rule of Civil Procedure 1.080). Here, although the certificate of service does not show service upon the judge, there appears to be no genuine dispute that the judge was promptly served. No evidence suggests he was not served and, in addition to the affidavit, there is corroborating evidence.

The record indicates that the judge was aware of Petitioner's motion soon after its filing because the disqualification motion was met with a motion to strike and reply, ***256** all of which were acknowledged in the judge's order denying Respondent's motion to strike on September 22, 2011. *See Rosado v. State*, 76 So.3d 1140 (Fla. 4th DCA 2012) (even if the trial judge had not received a copy of a motion to disqualify on the same date it had been filed, record evidence indicating that the judge had been aware of the motion during its pendency required that the motion to disqualify be deemed granted pursuant to rule 2.330(j)).

Thus, under rule 2.330(j), Petitioner's motion to disqualify Judge Swigert was deemed to have been granted because it was not ruled on within 30 days. Petitioner's writ for prohibition is granted.

PETITION GRANTED.

PALMER and TORPY, JJ., concur.

944 So.2d 485, 31 Fla. L. Weekly D3064

(Cite as: 944 So.2d 485)

H

District Court of Appeal of Florida,

Fourth District.
Matthias RATH, M.D. and Health Now, Inc.,
Petitioners,
v.
NETWORK MARKETING, L.C. f/k/a Rexall Showcase International, Inc., and Rexall Sundown, Inc.,
Respondents.
No. 4D06-3315.

Dec. 6, 2006.
Rehearing Denied Jan. 12, 2007.

Background: Health products company brought action against scientist and corporation. After recusal of original trial judge, scientist and corporation filed motion for reconsideration of 12 of original judge's rulings as to pleading and discovery. The Fifteenth Judicial Circuit Court, Palm Beach County, Diana Lewis, J., denied motion without a hearing. Scientist and corporation filed petition for writ of mandamus or for writ of certiorari.

Holdings: The District Court of Appeal, Warner, J., held that:

(1) scientist and corporation were not entitled as matter of right to a hearing on the motion for reconsideration, and
(2) scientist and corporation failed to show that they were irreparably damaged by successor judge's denial of the motion without a hearing.

Petition denied.

West Headnotes

[1] **Judges 227 ⇐56**

227 Judges

227IV Disqualification to Act
227k56 k. Effect on Acts and Proceedings of Judge. Most Cited Cases

The purpose of reconsideration by a successor judge of the original judge's orders after recusal 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. West's F.S.A. R.Jud.Admin.Rule 2.330(h).

[2] **Mandamus 250 ⇐32**

250 Mandamus

250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k32 k. Proceedings in Civil Actions in General. Most Cited Cases
Mandamus 250 ⇐39

250 Mandamus

250II Subjects and Purposes of Relief
250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers
250k39 k. Pleading. Most Cited Cases

Scientist and corporation, who sought reconsideration by successor judge of original judge's pleading and discovery rulings in action brought against them by health products company, were not entitled as matter of right to a hearing on the motion and, thus, were not entitled to writ of mandamus compelling successor judge to reconsider the rulings of the original judge; judicial administration rule governing original judge's recusal did not require reconsideration of such judge's rulings. West's F.S.A. R.Jud.Admin.Rule 2.330(h).

[3] **Certiorari 73 ⇐5(1)**

73 Certiorari

73I Nature and Grounds
73k5 Existence of Remedy by Appeal or Writ of Error

73k5(1) k. In General. Most Cited Cases

Scientist and corporation, who sought reconsideration by successor judge of original judge's pleading and discovery rulings in action brought against them by health products company, failed to show that they were irreparably damaged by successor judge's denial of the motion for reconsideration without a hearing and, thus, were not entitled to certiorari review of successor judge's decision; any erroneous rulings by original judge would be reviewable on appeal from a final judgment. West's F.S.A. R.Jud.Admin.Rule 2.330(h).

***486** Bard D. Rockenbach of Burlington & Rockenbach, P.A., West Palm Beach and Small & Small, P.A., Palm Beach, for petitioners.

No response required for respondents.

WARNER, J.

The petitioners seek a writ of mandamus to compel the trial court to grant their motion for reconsideration filed after the assigned judge granted a motion to recuse in accordance with Florida Rule of Judicial Administration 2.160.[FN1] Without holding a hearing to reconsider those individual rulings, the successor judge denied the petitioners' motion for reconsideration of twelve motions ruled on by the recused judge during the year prior to his recusal. In the alternative, the petitioners seek certiorari review of the successor judge's order denying the motion for reconsideration. We hold that the petitioners are not entitled to either mandamus or certiorari relief.

FN1. Effective September 21, 2006, rule 2.160 was renumbered as rule 2.330. *See In re Amendments to the Florida Rules of Judicial Administration,* 939 So.2d 966 (Fla.2006).

The petitioners claim that they are entitled to reconsideration of prior rulings by the recused judge as a matter of right, citing to section 38.07, Florida Statutes. However, that statute applies only to orders for disqualification under sections 38.02 or 38.05, dealing with disqualification due to consanguinity, not for bias or prejudice.

***487** Instead, pursuant to Florida Rule of Judicial Administration 2.330(h) a successor judge *may* reconsider and vacate or amend prior factual or legal rulings of a recused judge if a motion for reconsideration is made within twenty days of the order of disqualification. Here, petitioners claim that they are entitled to a de novo hearing on each of the motions on which they have requested reconsideration. We disagree that an individualized hearing on each such motion is mandatory.

Where a motion for reconsideration is made, we think it is reasonable for the litigant to detail the reasons for the necessity of reconsideration and point the successor judge to all parts of the record necessary to determine whether to vacate the prior ruling. Then, after review of the motion and the record, the court can determine on the record whether reconsideration of a motion should occur, and as to those motions, the court may wish to set a hearing and conduct further proceedings.

[1] The orders in this case constituted various rulings on discovery issues and pleading issues. They do not impose liability on petitioners, nor does the motion for reconsideration indicate how the grounds alleged for recusal impacted the recused judge's rulings on these motions. It would seem to us that the successor judge must consider whether the rulings work an injustice on the party as well as the effect of reconsideration of a multitude of rulings on the administration of justice. 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.

[2][3] As the petitioners were not entitled as a matter of right to a hearing on each motion, mandamus relief is not appropriate. Further, as to certiorari relief, petitioners have not shown how they are irreparably damaged because the successor judge failed to set the motion to reconsider for a hearing. If any of the rulings made by the recused judge are in error, then relief may be available on appeal from any final judgment.

Petition denied.

SHAHOOD and TAYLOR, JJ., concur.

943 So.2d 948, 31 Fla. L. Weekly D3048

(Cite as: 943 So.2d 948)

H

District Court of Appeal of Florida,

Fourth District.
SOUTHERN COATINGS, INC., Appellant,
v.
The CITY OF TAMARAC, Mayor Joe Schreiber, Vice-Mayor Marc Sultanof, Commissioners Gertrude Mishkin, Edward Portner and Karen Roberts, Appellees.
No. 4D05-4479.

Dec. 6, 2006.

Background: Corporation brought action against city and city officials to obtain public documents. After original trial judge determined that the imposition of sanctions against corporation's counsel was warranted, he recused himself as to all aspects of the case except the sanctions issue. Corporation filed petition for writ of prohibition, and the District Court of Appeal, 840 So.2d 1109, granted the petition and ruled that original judge could not continue to preside over the sanctions issue. Subsequently, the successor judge awarded summary judgment to city and officials. Corporation appealed, and the District Court of Appeal, 916 So.2d 19, affirmed in part, reversed in part, and remanded. After remand, the Seventeenth Judicial Circuit Court, Broward County, J. Leonard Fleet, J., awarded attorney fees against corporation's counsel. Corporation appealed.

Holdings: The District Court of Appeal, Warner, J., held that:

(1) successor judge was not required by mandate in prohibition proceeding to reconsider the issue of entitlement to sanctions, but
(2) successor judge was required to provide counsel with notice and an opportunity to be heard prior to reconsidering the issue by choice.

Reversed.

West Headnotes

[1] **Judges 227 ⇐ 32**

227 Judges

227III Rights, Powers, Duties, and Liabilities
227k32 k. Powers of Successor as to Proceedings Before Former Judge. Most Cited Cases

Successor trial judge in corporation's action to obtain public records from city and city officials, who was appointed after original judge decided to impose sanctions against corporation's counsel but before amount of such sanctions was determined, was not required by District Court of Appeal's appellate mandate in prohibition proceeding to reconsider the issue of entitlement to sanctions, even though such mandate barred original judge from continuing to preside over sanctions issue and ordered that "the motion in question" be decided by successor judge; mandate referred to determination of the amount of sanctions, and did not quash order determining entitlement to sanctions.

[2] **Judges 227 ⇐ 32**

227 Judges

227III Rights, Powers, Duties, and Liabilities
227k32 k. Powers of Successor as to Proceedings Before Former Judge. Most Cited Cases

Successor judge in corporation's action to obtain public documents from city and city officials, who elected to reconsider the issue of the imposition of sanctions against corporation's counsel which had previously been decided by original judge, was required to provide counsel with notice and an opportunity to be heard prior to reconsidering the issue, even though successor judge was not required to reconsider the issue at all.

[3] **Constitutional Law 92 ⇐ 4426**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4426 k. Penalties, Fines, and Sanctions in General. Most Cited Cases
(Formerly 92k303)

The inherent authority of the trial court to assess attorney's fees against an attorney carries with it an obligation to provide due process; accordingly, such a sanction is appropriate only after notice and an opportunity to be heard. U.S.C.A. Const.Amend. 14.

*949 Rosemary Hanna Hayes and Tina L. Caraballo of Hayes & Caraballo, PL, Orlando, for appellant.

Jeffrey L. Hochman and Tamara M. Scrudders of Johnson, Anselmo, Murdoch, Burke, Piper & McDuff, P.A., Fort Lauderdale, for appellee.

WARNER, J.

An attorney challenges the imposition of an order awarding attorney's fees based upon the inherent power of the court to sanction attorneys for egregious conduct. She contends that she was entitled to a hearing on the matter involving the sanction before the successor judge, based upon this court's issuance of a writ of *950 prohibition to prevent the original judge on the case from proceeding to determine the sanctions. While we disagree with her on the necessity of a hearing, in this case the successor judge offered to rehear the matter but did not provide reasonable notice and opportunity to be heard. We therefore reverse and remand for a properly noticed hearing on the sanctions.

The protracted litigation in this case has already resulted in two published opinions from this court: *Southern Coatings, Inc. v. City of Tamarac*, 840 So.2d 1109 (Fla. 4th DCA 2003) ("*Southern I*") and *Southern Coatings, Inc. v. City of Tamarac*, 916 So.2d 19 (Fla. 4th DCA 2005) ("*Southern II*"). Essentially, the dispute involves attempts by Southern to obtain public records from the City of Tamarac. Two prior suits were filed against the City and its commissioners, but both were dismissed before the filing of the suit underlying this appeal.

The litigation conduct drawing sanctions from the court involved the attempts by Southern's attorney, Rosemary Hayes, to take the depositions of the defendants, the city commissioners of Tamarac. Shortly after this third lawsuit was filed, the commissioners were subpoenaed for deposition. Defense counsel moved for a protective order against the taking of the depositions. When the commissioners did not appear at the deposition, Southern's counsel had each of the commissioners personally served with a document entitled "Motion and Notice of Hearing-Indirect Civil Contempt." This was done during a City Commission meeting. That notice informed the defendants that they would be subject to arrest if they failed to appear at a deposition. The defendants were instructed to call Southern's attorney directly to set a time for the deposition. The depositions were taken a few days later. Judge Moe subsequently entered an order quashing the subpoenas, but this was done only after the commissioners had been personally served and their depositions had been taken.

Defense counsel filed a motion to disqualify Ms. Hayes from representation or for sanctions because of "motion and notice of hearing for indirect civil contempt." Defense counsel termed her conduct egregious both because of the direct contact with represented defendants, contrary to Bar rules, and for the intimidating nature of the notice, which threatened the defendants with arrest. Judge Moe heard the motion in September 2002, and Ms. Hayes explained that she used a form she obtained in a Continuing Legal Education class approved by the Florida Bar. She also believed that she had to serve the defendants directly to obtain the relief she sought. The judge did not find her explanation sufficient. He found the service of the motion with its coercive language was in bad faith. Based upon his findings, he determined to sanction the attorney by requiring her to pay attorney's fees incurred by the defendants. However, the judge did not disqualify Ms. Hayes from representing her client. The judge entered a written order granting the defendants' motion for sanctions and also set a hearing on the amount of the sanctions.[FN1]

FN1. Contrary to representations of Southern's counsel in this appeal, Judge Moe's decision to impose sanctions had nothing to do with any violation of Judge Moe's order quashing the subpoenas. The conduct drawing the sanctions

> occurred prior to that order. Accordingly, the issue of the assistant county attorney's involvement in preparing a proposed order quashing the subpoenas without notice to Southern does not appear relevant to the issue of whether Ms. Hayes engaged in litigation conduct warranting sanctions.

After the order of sanctions was entered, Southern moved to disqualify Judge Moe. He entered an order recusing himself ***951** as to all matters except the determination of the amount of sanctions. Southern brought a petition for writ of prohibition to this court to prevent Judge Moe from *continuing to preside* on the matter of sanctions. This court agreed it was improper for him to retain jurisdiction on any issue in the case, once he recused himself. *Southern I*, 840 So.2d at 1110-11. We granted the writ and ordered that "the motion in question" should be heard by the successor judge, Judge Fleet.

Southern filed a timely motion for the successor judge to reconsider Judge Moe's rulings on the motion for sanctions. It does not appear that there was any actual ruling on this motion until summary judgment was granted on the underlying claims in favor of the defendants. In the order granting summary judgment, the court did not specifically refer to the sanction finding of Judge Moe, but stated that there was justification to award sanctions under section 57.105, Florida Statutes. It retained jurisdiction to determine the nature and amount of sanctions upon proper motion.

After that order, the defendants moved for entry of an order imposing attorney's fees as a result of the litigation conduct. In their motion, the defendants argued that the summary judgment had effectively been an affirmation of Judge Moe's findings with respect to their entitlement to attorney's fees. The defendants also attached affidavits of their attorney's fees. Southern responded and argued, in part, that no hearing had been held or evidence taken on the issue of entitlement to sanctions.

At the hearing, the court first noted that it had made an independent review of the record and "affirmed" Judge Moe's finding with respect to sanctions. The defendants relied on Judge Moe's findings on entitlement. After much discussion and argument from Ms. Hayes that she had never had an opportunity for a hearing on the issue, Judge Fleet changed his mind and determined that instead of relying solely on Judge Moe's findings, he would hear evidence on the issue of entitlement-that is, he would reconsider the issue of the conduct giving rise to the sanctions. At that point, Ms. Hayes noted that she was unprepared to address Judge Moe's findings because it was not set for a hearing. Only the defense motion had been set, and that requested a determination of the amount of attorney's fees. Believing that the motion raised both issues, the court continued with the hearing and took testimony regarding the amount of attorney's fees. The order on the motion determined the amount of attorney's fees and reaffirmed the findings of Judge Moe as contained in the transcript of the sanctions hearing.[FN2] Southern appeals this order.

> FN2. It is clear that this order imposing sanctions was based upon Ms. Hayes' conduct in having the commissioners personally served during a City Commission meeting. This sanctions order was not based upon a finding of res judicata that was rejected in *Southern II*, in which this court partially reversed the final summary judgment entered by Judge Fleet.

[1] Southern first contends that Judge Fleet's order is contrary to our appellate mandate in *Southern I* which required that the "motion" proceed before the successor judge. However, we were considering an order in which Judge Moe had recused himself but reserved jurisdiction to determine the amount of the sanctions. We granted the writ on the ground that a judge could not continue to retain jurisdiction in any case in which the judge has recused himself. We did not quash the prior order determining entitlement to sanctions. Thus, Judge Fleet did not depart from our appellate mandate.

***952** Instead, the proper procedure for reconsideration of an order entered by a recused judge is set forth in rule 2.330(h), Florida Rules of Judicial Administration, which provides:

> Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor

judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

Here, Southern did file a motion for reconsideration. Thus, the rule would have permitted the successor judge to reconsider the issue of entitlement to sanctions, but the appellate mandate did not, *in and of itself,* require Judge Fleet to reconsider the issue.

Some three years after the original order of Judge Moe, defense counsel moved to assess attorney's fees as the sanction. Both before and during the hearing, Ms. Hayes objected that the court was required to reconsider Judge Moe's ruling and hear evidence on the issue. While Judge Fleet at first determined that he would not reconsider Judge Moe's rulings, he then reversed himself and determined that he would hear evidence on the entire matter. Unfortunately, his complete reversal of position and requirement that Ms. Hayes present her defense to sanctions at that hearing came without notice. The motion to be heard did not ask the court to determine entitlement but informed the court of Judge Moe's rulings and surmised that Judge Fleet had adopted Judge Moe's rulings by the language used in the summary judgment.

[2][3] The inherent authority of the trial court to assess attorney's fees against an attorney carries with it an obligation to provide due process. *See Moakley v. Smallwood,* 826 So.2d 221, 226-27 (Fla.2002). Accordingly, such a sanction is appropriate only after notice and an opportunity to be heard. *Id.* at 227. While Judge Fleet had no obligation to reconsider Judge Moe's finding of entitlement to sanctions, once he agreed to reconsider the issue, he was required to provide notice and an opportunity to be heard. Because Ms. Hayes did not receive notice that the issue of entitlement would be addressed at the hearing as to the amount of sanctions, she had no meaningful opportunity to prepare and present evidence on the issue of entitlement.

We therefore reverse the order of the trial court without prejudice to the court reconsidering the issue of entitlement to sanctions after Ms. Hayes has been afforded proper notice and an opportunity to be heard.

Reversed.

STEVENSON, C.J., and TAYLOR, J., concur.

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