Trial Law TIPS

Roy D. Wasson's
TIP #33

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Motions to Disqualify Judges for Bias or Prejudice

Introduction

My first clue I was in for a tough trial was only a few minutes after I saw two tackle boxes and two fishing rods leaning against the wall of the hallway outside the judge's chambers in the small rural courthouse. This was a criminal case I was going to try for the defense (more than twenty years ago), but I needed a short continuance to depose the state trooper who made the arrest (let's call him "Trooper Brown"). I planned to impeach the trooper through some fairly large inconsistencies in his reported versions of the facts.

Just then the judge came out of his office. Trooper Brown was at his side! The judge announced to those of us waiting in the hall that he was "gonna do a little fishin' instead of workin' this mahwrnin'," then strolled away with Trooper Brown, who was

caddying both fishing poles over his shoulder the box of lures and tackle in his hand. "I spoke to the trooper and you're not going to get anywhere with that. ***Your client is guilty***. Does he want to think about changing his plea?" All I could muster at that moment was the "motorboat defense." I stammered "Buh buh, buh buh buht!" The judge and the State's witness disappeared.

Most cases in which lawyers seek disqualification of their trial judge are not that clear-cut. The judge will seem to rule a disproportionate amount of the time for the other side, who is wearing the same alumni association tie clasp as the judge. Or the judge will chew you out for small transgressions which most judges would never be bothered by. "What does he [or she] have against me?" you wonder. "Can I get the judge recused?" The answer is: rarely. Although I have not seen the course advertised, the judges of this State apparently all regularly attend a Continuing Judicial Education seminar on How to Avoid Disqualification By Irate Attorneys. Maybe this "TIP" will be of some help.

The Pertinent Rule of Judicial Administration

Before trying to disqualify any judge, read and re-read Rule 2.160 of the Florida Rules of Judicial Administration, entitled DISQUALIFICATION OF TRIAL JUDGES. Here are some of the highlights of that rule:

Motion Must Be in Writing and Signed *By Client* Under Oath

If the judge exhibits grounds for disqualification at a hearing, do not rely on the fact that a court reporter was there and you made an *ore tenus* motion to disqualify. You need a written motion signed by both your client and yourself, and sworn to by your client. Rule 2.160(c) provides as follows:

> (c) Motion. A motion to disqualify shall be ***in writing*** and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to ***by the party*** by signing the motion

> ***under oath or by a separate affidavit***. The ***attorney for the party shall also separately certify*** that the motion and the client's statements are made in good faith.

(Emphasis added).

The requirement of a separate certification by counsel makes it clear that the requirement of being sworn to "by the party" means that the motion must be signed by your client, in addition to being certified as being in good faith by you. *See Wal-Mart Stores, Inc. v. Carter*, 768 So. 2d 21 (Fla. 1st DCA 2000)(Petitioner's motion to disqualify the trial judge did not comply with Fla. R. Judicial Admin. 2.160(c) where the motion was only signed by petitioner's counsel and his secretary).

Time Deadline for Motion

You must make your motion within ten days of learning the grounds for seeking disqualification (i.e., within ten days of the fishing trip described above), or during trial if that is where the grounds become apparent. Rule 2.160(e) provides:

> (e) Time. A motion to disqualify shall be made 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 trial must be based on facts discovered during the trial and may be stated on the record and shall also be filed in writing in compliance with subdivision (c). Such trial motions shall be ruled on immediately.

(Emphasis added).

This time deadline is very tough. Most cases do not involve the judge being fishing buddies with your opponent's star witness, which you find out about the week before trial. Usually, the signals from the trial judge comely slowly over a long period of time, until you finally are convinced that the judge has been "out to get you"

all along. How can you get around the ten-day deadline in such cases?

In *Pinnacle Ins. Co. v. Freeman*, 687 So. 2d 989 (Fla. 5th DCA 1997), the trial judge announced at a hearing—more than ten days before the disqualification motion was filed—that he would never enter a summary judgment in favor of the moving party, and refused to hear that party's argument that the defendant's affidavit should be stricken. No motion to disqualify was filed at that time. A later incident ***in another case*** "convinced the attorney that the judge's impartiality remained compromised because of the previous encounter," so the plaintiff filed a motion to disqualify the judge.

In granting prohibition and overturning the trial court's ruling that the motion to disqualify him was untimely, the court of appeal held as follows:

> The judge denied the motion on the basis that it was untimely and failed to state facts that would justify recusal. We disagree on both points. This motion for disqualification is not based on the judge's avowed refusal to even consider granting summary judgment or even on the court's alleged intemperate remarks in chambers [at the first hearing]. It is based on a fear of continuing animosity allegedly held by the judge as ***evidenced at a more recent, unrelated hearing***. We find the motion timely filed. And although the judge's alleged statements in chambers are not themselves the basis for the motion to disqualify, ***they are relevant in considering the allegation of a fear of continuing animosity***. The court's alleged threat that a lawyer that challenges his authority will "pay a price" when ***taken together*** with the allegations concerning the second, independent hearing are sufficient to require disqualification.

Id. at 990 (emphasis added). The lesson is clear. Don't base your motion on events of long ago, but use them to bolster the recent events set forth in your motion.

Grounds for Disqualification in General

Unless the judge is the Defendant's first cousin or is listed as a witness by one of the parties in the case, the only real grounds for seeking disqualification are bias or prejudice. That portion of the rule reads as follows:

> **(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.

(Emphasis added).

Thus, a motion which merely alleges that the judge is "biased" or "prejudiced" is not sufficient, because that motion does not "specifically describe" that bias or prejudice. You need to study the rule and the cases and track the language of Rule 2.160(d) exactly in order to succeed before the judge or the appellate court. Spell it out in excruciating detail!

"Legal Sufficiency" of Motions to Disqualify

Introduction

Nine times out of ten (if not 999 times out of a thousand), the judge you have moved to disqualify himself or herself will pronounce your motion "legally insufficient" and deny it without a hearing or any fanfare. The pertinent provision reads as follows:

> (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.

(Emphasis added).

The trial lawyer's usual reaction upon receiving such an order is to regret having filed the motion in the first place. Now you fear even worse treatment from the judge you have accused of bias or prejudice. To maximize the chances of prevailing before the trial judge or appellate court in such cases, try to phrase the specific descriptions of bias or prejudice in the language of the cases that are similar to yours.

Objective Standard of Facial Sufficiency

The judge may not assess the truth of the allegations in your motion. *See Nathanson v. Nathanson*, 693 So. 2d 1061 (Fla. 4th DCA. 1997)(Judge must rule on the legal sufficiency of a motion to disqualify without passing on its truth or falsity, and without permitting a third party to offer testimony or explanations of the judge's conduct). If the judge takes issue with the content of the motion, that alone is grounds for disqualification. *Leveritt & Assocs., P.A. v. Williamson*, 698 So. 2d 1316 (Fla. 2d DCA 1997)(where the trial court improperly reviewed and attempted to rebut the factual allegations contained in petitioner's motion to disqualify, this established sufficient grounds for the trial's court disqualification). *Kielbania v. Jasberg*, 744 So. 2d 1027 (Fla. 4th DCA 1997)(Judge, who interjected comments that verged on argument with counsel during a hearing on petitioner estate representative's motion to disqualify the judge, did not follow the directives of Fla. R. Jud. Admin. 2.160(f), which only permitted the judge to determine the legal sufficiency of petitioner's motion and

to have refrained from comments about the facts upon which the motion was based).

If the motion you file is facially sufficient in alleging grounds for disqualification, the judge cannot deny your motion on the ground that your client is a tough, ex-Marine who would not be bullied by such a threat of disparate treatment in court. "The test for determining the legal sufficiency of a motion for disqualification is whether the facts alleged (which must be taken as true) would prompt ***a reasonably prudent person*** to fear that he or she could not get a fair and impartial trial." *Department of Agriculture and Consumer Services v. Broward County,* 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002) (emphasis added).

Whether the judge agrees that he or she might be unfair under the circumstances is not the question. For example, a judge cannot tell a racist joke and then deny a minority member's motion to disqualify on the ground that "some of my best friends are [of that minority race]." The issue whether the judge's actions could be ***taken by a reasonable litigant*** to constitute a threat to the judge's impartiality. "It is not a question of how the judge actually feels but rather what feeling resides in the affiant's mind and the basis for such a feeling." *Department of Agriculture and Consumer Services, supra.*

Pre-Judging Believability or Distrust of Party, Witness, or Attorney

Where a trial court questions the believability of a party or attorney, and the motion for disqualification specifically describes the circumstances of that pre-judging of believability as the ground for recusal, the motion will be held to be legally sufficient. A comment by the trial judge which indicates "that he feels a party has lied in a case generally indicates a bias against the party." *Brown v. St. George Island, Ltd,* 561 So. 2d 253, 257 (Fla. 1990). *Accord, Peterson v. Asklipious*, 833 So. 2d 262 (Fla. 4th DCA 2002)(disqualifying trial judge in a contempt action where the trial court's comments indicated that the judge was not going to believe any statements by the petitioner concerning his ability to pay court ordered attorney's fees); *Deauville Realty Co. v. Towbin,* 120 So. 2d 198 (Fla. 3d DCA 1960).

The fact that a judge's expression of distrust or disbelief is made against Plaintiffs' counsel, rather than the Plaintiffs themselves, is not significant to the question whether the motion for disqualification was legally sufficient. "Bias or prejudice against a litigant's attorney is grounds for disqualification where the prejudice is of such a degree that it adversely affects the client." *Town Centre of Islamorada, Inc. v. Overby,* 592 So. 2d 774, 775 (Fla. 3d DCA 1992). *Accord, e.g., Hayslip v. Douglas,* 400 So. 2d 553, 556-57 (Fla. 4th DCA 1981)("a judge is disqualified where his prejudice against the attorney is of such a degree that it adversely affects the client, in which instance the trial judge should disqualify and recuse himself").

Have you had a case where the judge rolls his eyes when you call your star expert, as if to say, "Not him again"? Just as a trial court's expression of bias or prejudice directed toward a litigant or the litigant's attorney will support and compel disqualification, the judge's bias or prejudice directed toward a party's ***witness*** also is grounds for disqualification. *See Fogun v. Fogun*, 706 So. 2d 382 (Fla. 4th DCA 1998); *Fogelman v. State*, 648 So. 2d 214, 219-20 (Fla. 4th DCA 1994)(court's comments relating to credibility of movant's witness was one ground to support disqualification).

You may need to delicately conduct a sort of mini *voir dire* of the judge in such a case to ask if the judge has some axe to grind against the expert. Be careful, though, or the judge might turn his or her scorn away from the expert and onto you. If so, the next subsection is what you need.

Verbal Altercations Between Judge and Counsel

Some judges sometimes get so annoyed with trial lawyers that they threaten them or demean them to the point of demonstrating prejudice. *See, e.g., Olszewska v. Ferro,* 590 So. 2d 11 (Fla. 3d DCA 1991), in which the court granted the petitioner's writ of prohibition and reversed the order denying disqualification, holding that "[t]he verbal altercations that occurred between Olszewska's attorney and the court require the judge to disqualify himself."

That case involved the same (now former) judge who once threatened this author with contempt of court for taking ***less*** time in

closing argument than we had predicted, excoriating me for "messing up the court's scheduling for the rest of the week." (True story, I swear!) By that time in the trial, I did not seek disqualification, although in light of the verdict I should have.

Another such example of grounds for disqualification is the trial court's statement that he would "deal with" an attorney for having "gone over his head" in *Lamendola v. Grossman*, 439 So. 2d 960 (Fla. 3d DCA 1983). In that case, the Third District held that the trial court should have granted petitioners' motion to disqualify based upon such a threat of retribution "which was both derogatory of the attorney and tended to undermine the presentation of a clients' case; and other alleged incidents of antagonism directed at the attorney, [which] all make well founded the petitioners' stated fear that they would not receive a fair and impartial trial at the judge's hands." *Id.* at 961.

If you are a lawyer from one of the larger, southern counties (especially one which has a hyphenated name), you need to be aware of *Marshall v. Bookstein,* 789 So. 2d 455 (Fla. 4th DCA 2001). In that decision, prohibition was granted to disqualify a trial judge who "expressed bias against petitioners' counsel, angrily denouncing their 'tactics' and deriding them as substandard 'Miami Lawyers,' who 'may get away with it in Miami but not up here.'" *Id.* at 456.

The court noted in the *Marshall* decision that the petitioners' motion to disqualify sufficiently established the trial court's bias or prejudice wherein it "stated that the judge's hostile treatment of petitioners' attorney and open display of contempt for him and Miami lawyers in general caused counsel and their clients to have a well-grounded fear that they would not receive a fair hearing from the judge." *Id.*

Indication of Pre-Judging Issue in the Case

Most if not all of the appellate courts of Florida have held that a judge's indication that he or she has prejudged an important issue before the court will constitute a legally sufficient ground to support disqualification. One example is the comment of the trial judge in the case of *Roy v. Roy*, 687 So. 2d 956 (Fla. 5th DCA 1997). That was an appeal from an order adjudging the appellant in

contempt of court which was reversed because the trial court had erred in denying the appellant's motion for disqualification. That motion "was legally sufficient to place appellant in fear that the trial judge ***had already determined to hold him in contempt*** despite any mitigating evidence he might present, and the motion should have been granted." *Id*. at 956 (emphasis added).

In *Barnett v. Barnett*, 727 So. 2d (Fla. 2d DCA. 1999), the court of appeal held that the judge's comment to counsel that her client should attempt to negotiate for more visitation rather than rely on the trial court's decision could reasonably be interpreted to mean that the judge had prejudged the custody issue and judge should have granted her request for recusal. Other cases on this point include *Begens v. Olschewsky*, 743 So.2d 133 (Fla. 4th DCA 1999) and *Amato v. Winn Dixie*, 810 So.2d 979 (Fla. 1st DCA 2002).

The standard is tough here. A judge can get away with expressing some skepticism in your client's position without being subject to disqualification. But if the judge basically tells you that you are wasting your time in making your presentation, you may have a shot at disqualification for prejudging the issues.

Close Cases Should Result in Disqualification

At least one appellate court has indicated that close cases should be resolved in favor of disqualification and has issued writs of prohibition based upon a lesser showing of bias or prejudice than sometimes is thought to be required. "The basic tenet for disqualification is, 'justice must satisfy the appearance of justice.' . . . This tenet must be followed even if the record is lacking of any actual bias or prejudice on the judge's part, and 'even though this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Kielbania v. Jasberg*, 744 So. 2d 1027, 1028 (Fla. 4th DCA 1997). The appearance of improper prejudice requires that motions to disqualify be granted.

Appellate Review of Denial of Motion By Prohibition or Certiorari

Most district courts of appeal have recognized that their jurisdiction to issue writs of prohibition is necessarily and appropriately exercised when a trial court judge denies a legally sufficient motion for disqualification. *E.g.*, *Caleffe v. Vitale*, 488 So. 2d 627 (Fla. 4th DCA 1986); *Gieseke v. Grossman*, 418 So. 2d 1055 (Fla. 4th DCA 1982); *Hayslip v. Douglas*, 400 So. 2d 553 (Fla. 4th DCA 1981); *Owens-Corning Fiberglas Corp. v. Parsons*, 644 So. 2d 340 (Fla. 1st DCA 1994); *Mobil v. Trask*, 463 So. 2d 389, 390 (Fla. 1st DCA 1985)("A petition for writ of prohibition is an appropriate vehicle to prevent judicial action when a judge or deputy commissioner has improperly denied a motion to disqualify"). Other courts grant certiorari review in such cases. *E.g., Tower Group, Inc. v. Doral Enters. Joint Ventures*, 760 So. 2d 256 (Fla. 3d DCA. 2000).

Unlike most non-final rulings which are susceptible to immediate appellate review, you are not safe in waiting until the end of the case and appealing the denial of your motion to disqualify if the verdict is against you. Some courts have taken a "use it or lose it" approach to this right of immediate appeal.

Rulings on such petitions are often swift and decisive, with some petitions being granted by telephone calls from the clerk of court to the chambers of the disqualified judge. My quickest loss of such a petition resulted in a faxed order stating "prohibition denied" which was waiting for me at my office when I returned from filing the petition. Be sure to mention in the petition when the trial or a big hearing is set to start in the near future. However, don't count on that continuance from filing a petition, as you need to be ready to try the case if the petition is denied.

Conclusion

May your motion for disqualification be facially sufficient to establish Plaintiffs' good faith fear of unfairness based upon specifically-described bias or prejudice against Plaintiffs' attorneys, prejudgment of the issues, and disbelief in the credibility of counsel, the Plaintiff and your witnesses. May the trial judge you accuse of such stuff not embark on a lifetime vendetta to get

even with you. May you somehow win your trial, even though everyone (except me) is against you. Best yet, may you never see two fishing poles—one belonging to your opponent's star witness—leaning on the wall outside the judge's office.

Keep Tryin!

Roy