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Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law-Proposal for Reform

Louis D. D'Agostino*

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Abstract

A fair trial requires the participation of an impartial judge.

KEYWORDS: impartial, judge, bias

Recusal of Judges for Reasons of Bias or Prejudice: A Survey of Florida Law — Proposal for Reform

I. Introduction

A fair trial requires the participation of an impartial judge.[1] In the unfortunate instance when a litigant encounters a prejudicial or biased judge, the litigant must rely upon protective mechanisms which may or may not operate effectively. Recusal is a remedy by which a litigant seeks to disqualify a judge, or the judge disqualifies himself from hearing a case, because of some personal bias or interest in the litigation.[2]

Under current Florida law the challenged judge must determine if the facts alleging prejudice are legally sufficient thereby warranting an order of recusal.[3] Florida law places a heavy burden upon an individual judge by forcing the jurist to determine whether personal prejudices are present and violate a litigant's right to the "cold neutrality" of an impartial judge.[4] The dilemma facing a judge is that to accede to a request for recusal runs contrary to his position of judicial authority calling for total impartiality. The Code of Judicial Conduct states that a judge who possesses personal biases or prejudices in a case should disqualify himself from the proceeding.[5]

This note presents an overview of the procedural mechanisms available in Florida to protect a litigant's right to a fair trial before an impartial judge. This note exposes the inherent inadequacies of those mechanisms and proposes specific reforms of the controlling rules.

II. Mechanisms of Judicial Disqualification

At common law, a litigant facing a prejudicial judge generally had no recourse but to stand trial before that presiding judge.[6] Congress

1. *See* Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972), Tumey v. Ohio, 273 U.S. 510, 523 (1927).
2. BLACK'S LAW DICTIONARY 1148 (5th ed. 1979).
3. *See generally* FLA. R. CRIM. P. 3.230; FLA. STAT. § 38.10 (1986); FLA. R. CIV. P. 1.432.
4. State *ex rel.* Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (1930).
5. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(a) (1986).
6. Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1584 (1986). For a thorough discussion of the historical development of recusal on grounds of bias or prejudice see

and state legislatures, in an attempt to protect a litigant's right to a fair trial, have enacted statutes which allow for the recusal of a judge for reasons of bias or prejudice.[7]

In Florida, there are four sources dealing with the recusal of a judge for reasons of bias or prejudice: (1) Code of Judicial Conduct Canon 3(C);[9] (2) Section 38.10 Florida Statutes;[10] (3) Florida Rule of

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Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Note, *Disqualification of Judges For Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311 (1969).

7. *Aetna*, 106 S. Ct. at 1585.

8. Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

9. CODE OF JUDICIAL CONDUCT Canon 3(C) (1986). Canon 3(C)(1) provides:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his 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.

10. FLA. STAT. § 38.10 (1986). Section 38.10 provides:

Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he 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 trans-

Criminal Procedure 3.230;[11] (4) Florida Rule of Civil Procedure 1.432.[12] Each of these sources proposes in some respect to protect a

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ferred 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 does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he does stand fair and impartial as between the parties and their respective interests, he 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.

11. FLA. R. CRIM. P. 3.230. Rule 3.230 provides:

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state 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.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

12. FLA. R. CIV. P. 1.432. Rule 1.432 provides:

(a) Grounds. Any party may move to disqualify the judge assigned to the action on the grounds provided by statute.

(b) Contents. A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party.

(c) Time. A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification.

(d) Determination. The judge against whom the motion is directed shall determine only the legal sufficiency of the motion. The judge shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the

litigant's right to a fair trial by calling for disqualification of a judge who espouses personal prejudice to a litigant.

The Code of Judicial Conduct, as formulated by the American Bar Association, was adopted by the Supreme Court of Florida on July 25, 1973.[13] The Code of Judicial Conduct outlines various principles of how a judge should conduct his judicial activities.[14] Specifically, Canon 3(C)(1) requires a judge to disqualify himself from cases in which his impartiality may reasonably be questioned.[15] Canon 3(C), therefore, imposes upon a judge an individual responsibility of assuring that his personal prejudices will not affect a litigant's right to a fair trial. Under Canon 3(C), the judge initiates the motion for disqualification and ultimately decides whether recusal is appropriate.[16]

In contrast, court rules of practice and procedure as well as the Florida statutes allow a litigant to initiate a challenge to the partiality of a presiding judge.[17] The technical requirements under each of these sources are basically the same. A litigant must first submit a statement of the facts showing some prejudice as grounds for disqualification.[18] The motion for disqualification must be timely made.[19] Under all three sections the challenged judge must determine whether the motion is legally sufficient and he is not allowed to pass on the truth of the facts alleged.[20] Both Florida Statutessection 38.10 and Florida Rule of Criminal Procedure 3.230 require the movant to submit two affidavits: one alleging his inability to receive a fair trial because of the judge's prejudice; and a second affidavit swearing that the motion for recusal was made in good faith.[21]

It is important to note that under all four sources it is the challenged judge who must decide whether or not disqualification is appro-

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action.

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

13. *In re* The Florida Bar — Code of Judicial Conduct, 281 So. 2d 21 (Fla. 1973).

14. WEST'S FLORIDA RULES OF COURT (1986).

15. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1986).

16. *Id.*

17. *See* FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432; FLA. STAT. § 38.10 (1986).

18. *See* FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432; FLA. STAT. § 38.10 (1986).

19. *See* FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432; FLA. STAT. § 38.10 (1986).

20. *See* FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432; FLA. STAT. § 38.10 (1986). *See also* Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th Dist. Ct. App. 1981).

21. FLA. R. CRIM. P. 3.230; FLA. STAT. § 38.10 (1986).

priate.[22] Therefore, under Florida law a litigant who feels threatened by the prejudices of a trial judge must make his motion for recusal pursuant to one of the three applicable sources. Such a motion is then reviewed by the alleged "biased" judge for his determination of whether or not disqualification should be granted.

These rules require a judge to determine whether the motion is legally sufficient. The term "legal sufficiency" is certainly broad on its face but the Florida courts have refined its meaning in several opinions. In *Brewton v. Kelly*,[23] the Second District Court of Appeal held that the term "legal sufficiency" means more than compliance with the technical requirements of section 38.10.[24] The judge must determine, if the facts alleged, "[w]ould prompt a reasonable prudent person to fear that he would not receive a fair trial."[25] In *State ex rel. Brown v. Dewell*,[26] the Supreme Court of Florida emphasized that the test of the sufficiency of the affidavits calling for disqualification must be viewed from the movant's perspective.[27] The court stated:

> The test of the sufficiency of the affidavit is whether or not its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling.[28]

In *Raybon v. Burnette*,[29] the Second District Court of Appeal, in clarifying this test of legal sufficiency, held that the facts alleging prejudice must be taken as true with the judge limited to passing only on the sufficiency of the motion.[30] The rationale for allowing the challenged judge to determine the legal sufficiency of the motion relies on the principle that since a judge is compelled to perform his judicial duties impartially, personal biases would not affect his ability to decide

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22. FLA. R. CRIM. P. 3.230(d); FLA. R. CIV. P. 1.432(d); FLA. STAT. § 38.10 (1986); CODE OF JUDICIAL CONDUCT Canon 3(C) (1986).
23. 166 So. 2d 834 (Fla. 2d Dist. Ct. App. 1964).
24. *Id.* at 836.
25. *Id.*
26. 131 Fla. 566, 568, 179 So. 695, 697-98 (1938).
27. *Id.*
28. *Id.* at 568, 179 So. at 697.
29. 135 So. 2d 228 (Fla. 2d Dist. Ct. App. 1961).
30. *Id.* at 229. *See also* Turner v. State, 100 Fla. 1078, 1081, 130 So. 617, 620 (1930).

whether recusal is warranted.[31] This standard espoused by the Florida courts seems theoretically sound in protecting a litigant's right to a fair trial. However, the difficulty of its application appears obvious in that when a judge accedes to a request for recusal, he is admitting his personal prejudices. Such an admission is totally inconsistent with his professed position of impartiality.

III. Case Law Analysis

It is interesting to note that early Florida case law supported the position of allowing non-challenged members of the court to rule on the legal sufficiency of the request for recusal.[32] However, recent decisional law holds that each individual judge must determine his qualification to sit on a given case.[33] In 1979, the Supreme Court of Florida in *Estate of Carlton v. Rogers*[34] held that each individual challenged judge must determine the legal sufficiency of a request for recusal and whether disqualification is appropriate.[35] Subsequent decisional law in Florida has upheld this position.[36]

Florida law holds that prejudice against a party's attorney may also constitute grounds for recusal.[37] In *Ginsberg v. Holt*,[38] the Supreme Court of Florida held that judges may be disqualified because of some bias or prejudice directed towards a party's attorney.[39] In 1983, the Supreme Court of Florida reaffirmed *Ginsberg* stating: "Prejudice against a party's attorney can be as detrimental to the interests of that party as prejudice against the party himself."[40] In *Hayslip v. Douglas*,[41] the petitioner, Dr. Hayslip, moved for recusal against a judge

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31. CODE OF JUDICIAL CONDUCT Canon (3) (1986). *See also supra* note 9.
32. *See generally* Ball v. Yates, 158 Fla. 521, 29 So. 2d 729, 733, 737 (1947); Ervin v. Collins, 85 So. 2d 833 (Fla. 1956).
33. *See* Aetna Life Ins. Co. v. Thorn, 319 So. 2d 82 (Fla. 3d Dist. Ct. App. 1975).
34. 378 So. 2d 1212 (Fla. 1979).
35. *Id.* at 1216.
36. *See generally* Mobil v. Trask, 463 So. 2d 389 (Fla. 1st Dist. Ct. App. 1985); Livingston v. State, 441 So. 2d 1083 (Fla. 1983); Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th Dist. Ct. App. 1981); Coastal Petroleum Co. v. Mobil Oil Corp., 378 So. 2d 336 (Fla. 1st Dist. Ct. App. 1980).
37. Ginsberg v. Holt, 86 So. 2d 650, 651 (Fla. 1956).
38. *Id.* at 650.
39. *Id.* at 651.
40. Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983).
41. 400 So. 2d 553 (Fla. 4th Dist. Ct. App. 1981).

who stated to Hayslip's attorney at a pretrial conference that the attorney should not be in the case.[42] Dr. Hayslip was not present at the pretrial conference; nevertheless, the Fourth District Court of Appeal held that the movant does not have to have personal knowledge of the facts alleged in the motion in order to successfully challenge a judge's partiality.[43]

The Florida courts and legislature have outlined rules regarding waiver of the right to recusal. Generally, a litigant waives any right to recuse a judge if the request is not filed within a reasonable period of time after discovery of the facts constituting prejudice.[44] Florida Rule of Criminal Procedure 3.230 requires the motion to be filed ten days before the case is called for trial.[45] However, rule 3.230(c) states that if good cause is shown for a late filing, the motion may still be made.[46] Florida Rule of Civil Procedure 1.432 states that the motion of recusal must be made within a reasonable time after discovery of the facts alleging prejudice.[47] Although Florida Statutes section 38.10 does not specify any time restraints for the filing of the motion for recusal,[48] Florida Statutes section 38.02 states that unless the motion is filed within thirty days after learning of the grounds for disqualification, the party waives his right to recusal.[49]

The Florida courts have generally adhered to these time restrictions. The following serves to illustrate the soundness of this adherence. In a scenario where a party knows the facts regarding possible prejudice but does not file a motion for recusal until after an adverse decision has been rendered, waiver of the right to recusal has been strictly enforced.[50] The Florida courts' strict adherence to the waiver of recusal under such circumstances is rationalized on the sound grounds

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42. *Id.* at 555.

43. *Id.* at 556.

44. Schwartz v. Schwartz, 431 So. 2d 716, 717 (Fla. 3d Dist. Ct. App. 1983). *See also* Estate of Carlton v. Rogers, 378 So. 2d 1212, 1218 (Fla. 1979), *recusal denied*, 378 So. 2d 1217 (Fla. 1980); Data Lease Fin. Corp. v. Blackhawk Heating & Plumbing, Inc., 325 So. 2d 475, 479 (Fla. 4th Dist. Ct. App. 1975).

45. FLA. R. CRIM. P. 3.230(c). *See supra* note 11.

46. *Id.*

47. FLA. R. CIV. P. 1.432. *See supra* note 12.

48. FLA. STAT. § 38.10 (1986). *See supra* note 10.

49. FLA. STAT. § 38.02 (1986).

50. Estate of Carlton v. Rogers, 378 So. 2d 1212, 1218 (Fla. 1979) (petitioner filed motion for recusal eleven months after acquiring knowledge of grounds for disqualification and after an adverse decision was rendered by the Supreme Court of Florida).

of protecting the other litigant who was victorious in the original suit.[51] To allow for recusal under such circumstances would be to give the losing party an additional opportunity to achieve a favorable result while denying a similar opportunity to the other party.[52]

The Florida courts have recognized limited situations where a late filing of a motion for recusal will not constitute a waiver of that right. Courts will look for facts sufficient to establish a sound reason for the late filing. In *Gieseke v. Grossman*,[53] the movant attempted to file a motion for recusal pursuant to Florida Statutes section 38.10.[54] The trial court denied the motion because it was not filed within the recognized time restraint.[55] The Fourth District Court of Appeal allowed the motion to be heard when the petitioner submitted facts showing that the grounds for prejudice did not arise until after a certain date, making it impossible for her to comply with the time requirement.[56] Therefore, a litigant who does not become aware of the facts constituting prejudice until after the expiration of the time for filing the motion should be able to show the requisite "good cause" for the late filing and avoid the harsh sanction of a waiver.

Florida case law includes some governing rules concerning orders issued by such challenged judges. A widely accepted rule is that once a judge has recused himself, any order issued subsequent to the recusation is void.[57] However, Florida law holds that a judge who disqualifies himself does still possess the power to render a final judgment on issues already tried.[58] Further, the disqualified judge may also continue where limited jurisdiction is retained.[59] Florida's position has engendered crit-

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51. *Id.*
52. *Id.*
53. 418 So. 2d 1055 (Fla. 4th Dist. Ct. App. 1982).
54. *Id.* at 1056.
55. *Id.*
56. *Id.* at 1057.
57. Rogers v. State, 341 So. 2d 196 (Fla. 4th Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 953 (Fla. 1977). *See also* Weiss v. Miami Nat'l Bank, 320 So. 2d 466 (Fla. 4th Dist. Ct. App. 1975); Gilmore v. Shell Oil Co., 324 So. 2d 171, 172 (Fla. 2d Dist. Ct. App. 1975).
58. Coastal Petroleum Co. v. Mobil Oil Corp., 378 So. 2d 336, 337 (Fla. 1st Dist. Ct. App.), *cert. denied*, 386 So. 2d 635 (Fla. 1980).
59. *See, e.g.*, State *ex rel.* Cobb v. Bailey, 349 So. 2d 849, 850 (Fla. 1st Dist. Ct. App. 1977). Where parties acquiesce, a judge may disqualify himself from participating in the disposition of a case while reserving power to adjudicate other questions among the parties. Here, the judge disqualified himself from consideration of the case while reserving power to act immediately on questions of temporary alimony and child

icism. For example, opponents often challenged a "biased" judge's entry of a final judgment on issues already tried.[60] The major thrust of their argument is that since the issues were tried before a biased judge, any determination of those issues violated the litigant's right to a fair trial.[61] To be sure, this leaves the litigant in a very uncertain position.

The remedies available to a litigant whose motion for recusal is denied are considered in the following material.

IV. Writ of Prohibition — Adequate Protection?

Florida law has long held that a writ of prohibition is the appropriate mechanism available to a litigant to prevent judicial action when a judge has denied a litigant's motion for recusal.[62] Procedurally, a litigant whose motion for recusal is denied must petition the appropriate appellate court for review of the motion.[63] The litigant must assert that he has no adequate remedy at law and that a delay of appellate review until after final judgment may result in excessive harm.[64] Through this

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support. *Id.* The parties acquiesced to this form of limited jurisdiction and when the judge attempted to exceed his scope of authority, a writ of prohibition was issued on appeal. *Id.*

60. Schwartz v. Schwartz, 431 So. 2d 716 (Fla. 3d Dist. Ct. App. 1983).

61. *Id.*

62. *See generally* State *ex rel.* Bank of America v. Rowe, 96 Fla. 277, 118 So. 5, 6 (1928); R. P. Hewitt & Assoc. v. Hurt, 411 So. 2d 266 (Fla. 1st Dist. Ct. App. 1982); Mobil v. Trask, 463 So. 2d 389 (Fla. 1st Dist. Ct. App. 1985); Lorenzo v. Murphy, 159 Fla. 639, 32 So. 2d 421, 424 (1947) (claiming prohibition to be the proper remedy to restrain a tribunal from acting in excess of its power). It is also recognized that a litigant may wait for a final determination of the proceedings and then appeal, seeking a review of any order regarding judicial disqualification. *See In re* Florida Conference Ass'n of Seventh Day Adventists, 175 So. 715, 718 (1937). However, such a route of appeal is rarely successful. *See* Note, *Disqualification of Federal District Judges — Problems and Proposals*, 7 SETON HALL L. REV. 612, 624-26 (1976). A motion for reconsideration is the generally recognized remedy to change an interlocutory order. However, courts are very reluctant to grant a motion for reconsideration. *See* TRAWICK, FLORIDA PRACTICE AND PROCEDURE § 15-4 (1985). The Florida courts, in recognizing the reluctance of challenged judges to grant a motion for reconsideration, have held the petition for a writ of prohibition as the most effective method of reviewing an order of disqualification. The rationale for allowing the petition for the writ is that this mechanism provides a litigant with an immediate attempt at relief before engaging in the expenditures of trial. *See* Livingston v. State, 441 So. 2d 1083, 1089 (Fla. 1983).

63. FLA. R. CIV. P. 1.630. *See* TRAWICK, *supra* note 62, § 36-1.

64. State *ex rel.* B.F. Goodrich Co. v. Tramell, 140 Fla. 500, 192 So. 175, 176 (1939).

writ of prohibition the unsuccessful litigant seeks to have the appellate court prevent the trial judge from presiding in an action.[65] Writs of prohibition are considered an extraordinary route of appeal because appellate courts traditionally possess discretionary power to accept the petition for review.[66] Therefore, a litigant lacks assurance that his motion will even merit review.

Appellate review of petitions for writ of prohibition filed upon denial of a motion for disqualification yield apparent inconsistencies. In *Bundy v. Rudd*,[67] the petitioner was a criminal defendant charged with two counts of murder in the first degree, three counts of attempted murder, and two counts of burglary.[68] The petitioner filed a motion for recusal pursuant to Florida Rule of Criminal Procedure 3.230.[69] The trial judge denied the motion for recusal and, within his order of denial, controverted several allegations asserted in the affidavit.[70] The petitioner filed a formal petition for writ of prohibition after denial of his motion for reconsideration.[71] The Supreme Court of Florida accepted the petition for review on the jurisdictional grounds that a death sentence might ultimately be imposed.[72] On review, the Supreme Court of Florida held that a trial judge cannot pass on the truth of the alleged facts.[73] The court further held that when a judge seeks to refute the charges of partiality, he has exceeded his scope of judicial authority.[74] The motion was granted and the case assigned to another judge within the circuit.[75] By this action, the Supreme Court of Florida reaffirmed the principle that once a litigant establishes a basis for recusal, prohibition is both an appropriate and necessary remedy.[76] In criminal cases of this magnitude, the courts are very protective of ensuring total impartiality.

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65. *See, e.g.*, State *ex rel.* Bank of America v. Rowe, 96 Fla. 277, 118 So. 5 (1928).
66. FLA. R. CIV. P. 1.630(d). *See* TRAWICK, *supra* note 62, § 36-1.
67. 366 So. 2d 440 (Fla. 1978).
68. *Id.* at 441.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id. See* Reino v. State, 352 So. 2d 853, 855 (Fla. 1977); FLA. CONST. art. V, § 3(b)(4).
73. *Bundy*, 366 So. 2d at 442.
74. *Id.*
75. *Id.*
76. *Id.*

In *Crosby v. Florida*,[77] the appellant was charged with attempted robbery.[78] At trial, the defendant entered a guilty plea pursuant to a plea bargain agreement that would entitle him to probation rather than imprisonment.[79] After the appellant had testified as a witness for the state, the trial judge said, "I don't want to put a man like that on probation. I am not going to waste any more time with him. . . . I am punishing him for telling a lie. . . . I think he is a liar from the word 'go'."[80] The defendant subsequently sought disqualification of the judge pursuant to Florida Statutes section 38.10.[81] The motion for disqualification was denied.[82] On review, the Supreme Court of Florida held that the trial judge clearly exceeded his scope of judicial authority and should have recused himself from the proceedings.[83] The judgment and sentence were reversed with the case remanded to a different judge.[84] Again, this case illustrates the court's strong concern of ensuring total impartiality.

But consider an applicable appellate review of a recent civil case. In *Mobil v. Trask*,[85] the petitioner was an employer/carrier of a gas station.[86] An employee was injured in a shooting incident that occurred at the gas station.[87] At an administrative hearing for compensation benefits, the deputy commissioner stated to the employer/carrier's attorney, "I don't see how you can't find this accident compensable. If I was sitting at my desk and a man came in here with a gun and shot me, it is an on-the-job accident."[88] At trial, the employer/carrier made a motion for recusal pursuant to Florida Statutes section 38.10, claiming that the deputy had prejudged the case.[89] The motion for recusal was denied and the employer/carrier filed a petition for writ of prohibition.[90] The First District Court of Appeal recognized that the writ of

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77. 97 So. 2d 181 (Fla. 1957).
78. *Id.* at 182.
79. *Id.*
80. *Id.* at 182-83.
81. *Id.* at 183.
82. *Id.*
83. *Id.* at 184.
84. *Id.*
85. 463 So. 2d 389 (Fla. 1st Dist. Ct. App. 1985).
86. *Id.* at 390.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

prohibition is the appropriate mechanism to prevent judicial action when a judge or deputy has wrongfully denied a motion for recusal.[91] However, the court denied the petition, holding that a judge does not have to refrain from forming mental impressions and opinions during the presentation of evidence,[92] and that these remarks did not show that the deputy had prejudged the case.[93] The court distinguished *Bundy* on the grounds that the deputy commissioner did not controvert any of the alleged facts.[94]

These cases present different lines of rationalization. In *Bundy* and *Crosby* the Supreme Court of Florida adhered to a stricter standard of determining the applicability of the writ of prohibition. Certainly the possibility of an imposition of the death penalty and loss of liberty calls for such close scrutiny. However, such close scrutiny is also required where a judge or deputy commissioner indicates that he has already reached a final decision on the merits of a case before *all* evidence has been submitted.[95]

The above analysis illustrates that the appellate courts apply different standards of review when determining the applicability of a writ of prohibition based upon a denial of a motion for recusal. In criminal cases the appellate courts adhere to a strict standard when considering the applicability of the writ. In contrast, appellate review of civil cases

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91. *Id. See also* State *ex rel.* Bank of America v. Rowe, 96 Fla. 277, 118 So. 5 (1928); R.P. Hewitt & Assoc. v. Hurt, 411 So. 2d 266 (Fla. 1st Dist. Ct. App. 1982).

92. *Mobil*, 463 So. 2d at 391. *See* City of Palatka v. Frederick, 128 Fla. 366, 174 So. 826, 828 (1937).

93. *Mobil*, 463 So. 2d at 391.

94. *Id. Compare* Heath v. State, 450 So. 2d 588 (Fla. 3d Dist. Ct. App. 1984). At trial the defendant was ordered to participate in a custodial treatment program for sex offenders. The court agreed to keep an open mind as to sentencing upon completion of the program. *Id.* After the defendant completed the program, an alternate judge presided over his hearing and sentenced the defendant to twenty years. *Id.* On appeal, the Second District Court of Appeal reversed and remanded, holding that the trial judge should have recused herself. *Id.* The court held that her strong views regarding the offense prevented her from honoriong the *plea bargain* agreement. *Id.* Contrasting this case with *Mobil* yields further credence to the inconsistency of review between civil and criminal cases. In *Heath* the judge's strong sentiment against the offense prompted the court to deem recusal was warranted. *Id.* at 590. The facts in *Mobil* show with much more certainty that the deputy commissioner had "prejudged the case." A uniform standard of review on the appellate level seems to be lacking. The appellate court in *Heath* stretched hard to find a plea bargain agreement based on the statement, "[t]he court will rule with an open mind at that time." *Id.* at 589.

95. LeBruno Aluminum Co. v. Lane, 436 So. 2d 1039 (Fla. 1st Dist. Ct. App. 1983).

embraces a more lenient standard of review when considering the applicability of the writ.

A uniform standard of review also is lacking in appellate review of civil cases based upon a denial of a motion for recusal. In *Le Bruno Aluminum Co. v. Lane*,[96] an employee was injured and sought workers' compensation benefits.[97] At an administrative hearing, the deputy commissioner stated that he had already decided to award benefits to the claimant before the employer presented any evidence.[98] Specifically, when counsel for the employer asked to put on witnesses, the deputy commissioner answered, "You can put them on if you want to take up the court's time."[99] The First District Court of Appeal held that such remarks violated the employer's right to a fair and impartial hearing.[100] It is difficult to distinguish *LeBruno* from *Mobil*. In *Mobil* the court stated that the remarks did not indicate that a final decision had been made, as in *LeBruno*. Such results further evidence the inconsistent treatment given to appellate review of cases dealing with judicial disqualification. The impartiality of trial judges is so fundamental to the judicial system that petitions for writ of prohibition should all be examined with the utmost circumspection.

The writ of prohibition, therefore, presents to the litigant a very uncertain vehicle for protecting his right to a fair trial before an impartial judge. The discretionary nature of this route of appeal,[101] as well as the sometimes inconsistent standards of review by Florida's higher courts, leaves the concerned litigant in a precarious situation.

V. Judicial Disqualification — Strict Technical Compliance?

What happens where prejudice of a trial judge is present but a litigant files his motion for recusal pursuant to an inappropriate procedural source? What results if a litigant properly files his motion for recusal under the applicable rule or statute, but fails in some respect to comply with all of the technicalities? The Florida courts have recently addressed these questions. The following progression of cases illustrates the Florida courts' resolution of these conflicts.

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. FLA. R. CIV. P. 1.630. *See* TRAWICK, *supra* note 62, § 36-1.

In *Pistorino v. Ferguson*[102] the trial judge stated to the petitioner's attorney, "Dick, your client [petitioner] is not playing with a full deck. Personally, I think she is crazy and I will recuse myself anytime you want me to."[103] The petitioner moved for disqualification pursuant to section 38.10 (1979).[104] The trial judge denied the motion for recusal on the grounds that section 38.10 was not complied with because the motion: was filed late; was not supported by corroborating affidavits; and was not accompanied by a certificate of good faith.[105] On review, the Third District Court of Appeal faced an important issue: Must the petitioner comply with all technicalities of the disqualification statute before relief will be granted through a writ of prohibition?[106] The court held that where such "patent prejudice"[107] is present, relief by writ of prohibition will be granted even in the absence of strict technical compliance.[108]

In *Jackson v. Korda*,[109] the petitioner was a criminal defendant who filed a motion to disqualify the trial judge pursuant to Florida Statutes section 38.10.[110] The trial judge denied the motion, holding that the petitioner failed to comply with the statutory requirement of submitting two affidavits from unrelated parties.[111] Petitioner then filed a petition for writ of mandamus[112] regarding the denial of his motion for recusal.[113] The Fourth District Court of Appeal held that prohibition was the appropriate avenue of appeal but nevertheless treated the petition for mandamus as one for prohibition.[114] The predominant issue facing the appellate court was whether a technically insufficient motion for recusal filed pursuant to Florida Statutes section 38.10 governs the

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102. 386 So. 2d 65 (Fla. 3d Dist. Ct. App. 1980).

103. *Id.* at 66.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id. See* State v. McFarlane, 318 So. 2d 449, 450 (Fla. 2d Dist. Ct. App. 1975); State v. Cannon, 166 So. 2d 625, 626-27 (Fla. 3d Dist. Ct. App. 1964).

108. *Pistorino*, 386 So. 2d at 67.

109. 402 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1981).

110. *Id.* at 1363.

111. *Id.*

112. *Id.* The court treated the petition for mandamus as one for prohibition in that both are considered an extraordinary route of appeal. Mandamus generally compels a lower court to do an affirmative act. *See* TRAWICK, *supra* note 62, § 36-4.

113. *Jackson*, 402 So. 2d at 1363.

114. *Id.*

procedure for disqualification of a judge in criminal cases.[115] The court held that procedures for the recusal of judges in criminal cases are governed by Florida Rule of Criminal Procedure 3.230, not Florida Statutes section 38.10.[116] Under this holding, petitioner's motion for writ of prohibition was granted because his original motion for recusal did in fact comply with Rule 3.230.[117]

In *Livingston v. State*,[118] the defendant was convicted of first-degree murder, and on appeal sought review of his denial of a motion for recusal which he made at the trial court level.[119] At trial, the defendant filed a motion of recusal pursuant to section 38.10.[120] The trial judge denied the motion as legally insufficient, specifically on the grounds that the motion was filed pursuant to section 38.10 and not under the applicable Florida Rule of Criminal Procedure 3.230.[121] On review, the Supreme Court of Florida held that section 38.10 does give litigants a substantive right to seek disqualification of a trial judge.[122] However, the court further held that the actual process of disqualification is procedural and, therefore, Florida Rule of Criminal Procedure 3.230 controls the disqualification process.[123] In remanding the case for a new trial, the court emphasized that "technical requirements" of the affidavits need not be strictly applied.[124] The test, as emphasized by the court, is whether the movant has a reasonable fear that he will not receive a fair trial in a particular case.[125]

This progression of recent cases suggests that the Florida courts look more to substance than technical compliance when reviewing petitions for writ of prohibition based upon a denial of a motion for disqualification. Recognizing the judiciary's emphasis on substance rather than technical compliance, the Supreme Court of Florida in 1984 held that the statutory requirement of submitting supporting affidavits as expressed in Florida Statutes section 38.10 was constitutionally inva-

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115. *Id.*
116. *Id. See* State *ex rel.* Aguiar v. Chappell, 344 So. 2d 925, 926 n.1 (Fla. 3d Dist. Ct. App. 1977).
117. *Jackson*, 402 So. 2d at 1363.
118. 441 So. 2d 1083 (Fla. 1983).
119. *Id.* at 1084.
120. *Id.*
121. *Id.* at 1085.
122. *Id.* at 1087.
123. *Id.*
124. *Id.*
125. *Id.*

lid.[126] Such an emphasis upon the substance of affidavits rather than technical compliance is certainly a fundamental requisite of protecting a litigant's right to an impartial judge.

The following section considers whether these rules of law are in harmony with the general rules regarding recusal laid down by the United States Supreme Court in *Aetna Life Insurance Co. v. Lavoie*.[127]

VI. The United States Supreme Court on Recusal

In *Aetna Life Insurance Co. v. Lavoie*,[128] the United States Supreme Court considered the constitutional limitations of state imposed rules of recusation. A brief analysis of the case follows with an in depth look at the issues presented before the Court and the constitutional principles enunciated by the Court.

A. *The Facts*

The case originated in Alabama and was based on an insurance company's failure to pay an appropriately filed claim by one of its insured.[129] The insured, upon discharge from the Mobile Infirmary Hospital, filed a claim with Aetna Insurance for $3,058.25.[130] The local office of Aetna Insurance refused to pay the entire amount and the insured in turn filed suit against Aetna for both the payment of the remainder of the claim and punitive damages for the insurance company's bad faith refusal to pay a valid claim.[131] The trial court dismissed the action with respect to the first party bad faith claim for failure to state a claim upon which relief can be granted.[132] On appeal, the Alabama Supreme Court remanded the case for trial, holding that recovery on a bad faith claim is possible.[133] On remand, the trial court awarded the insured party (Lavoie) the unpaid portion of her original claim while also issuing a summary judgment with respect to the bad

126. *In re* Amendments to Rules of Civil Procedure, 458 So. 2d 245, 247 (Fla. 1984).
127. 106 S. Ct. 1580 (1986).
128. *Id.*
129. *Id.* at 1582.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

faith claim.[134] On a second appeal, the Alabama Supreme Court reversed and remanded, holding that first party bad faith claims were now recognized in Alabama.[135] On a second remand, the issue of the first party bad faith claim was submitted to the jury who returned an award of $3.5 million in punitive damages for Lavoie.[136] Again, on appeal, a divided 5:4 Alabama Supreme Court affirmed the jury award in a per curiam opinion authored by Justice Embry.[137] Upon filing a motion for rehearing, it became known that Justice Embry had personally filed two concurrent actions against other insurance carriers also claiming bad faith failure to pay claims and seeking punitive damages.[138] It is clear from the record that, at the time of the Alabama Supreme Court's affirmance, the law in Alabama was unsettled with respect to first party bad faith claims.[139] Prior to the decision affirmed by the Alabama Supreme Court, the cause of action was traditionally not recognized.[140]

Counsel for Aetna, upon learning of Justice Embry's involvement in the other cases, sought recusal of Justice Embry as well as the other justices.[141]

The motions for recusal as well as the rehearing were denied by the Alabama Supreme Court.[142] On appeal, the United States Supreme Court dealt with the due process challenges claimed by Aetna.[143] Specifically, Aetna asserted that its right to a fair trial was violated by the participation of the Alabama Supreme Court justices in the case.[144]

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1583.
138. *Id.* Justice Embry filed one action against Maryland Casualty Company for allegedly failing to pay for the loss of a mink coat. *Id.* The second action was filed by Justice Embry as a class action on behalf of himself and all state employees insured by Blue Cross-Blue Shield against the insurance company for failure to withhold payment on valid claims. *Id.* Subsequent to the decision rendered by the Alabama Supreme Court, Justice Embry settled his suit with Maryland Casualty for $30,000. *Id.* at 1584. The action against Blue Cross-Blue Shield was settled upon agreement of the parties to minimize problems in the future. *Id.*
139. *Id.* at 1586.
140. *Id.*
141. *Id.* at 1583.
142. *Id.*
143. *Id.* at 1584.
144. *Id.*

B. *The Issues*

1) Did Justice Embry's personal feelings of frustration and hostility directed towards insurance companies require a conclusion that the due process clause was violated by his participation in the case?[145]

The Supreme Court held that only in extreme cases would disqualification be constitutionally required.[146] The Court further held that the personal feelings of Justice Embry directed towards insurance companies were an insufficient basis for warranting recusal.[147] The Court emphasized that many claimants are surely frustrated at insurance companies regarding the payment of claims and certainly judges should not be restrained from formulating these same opinions.[148]

2) Where a judge holds a direct stake in the outcome of a case, does such an interest violate the constitutional provisions of the due process clause?[149]

The Supreme Court held that where such a direct interest is present, it may violate constitutional provisions.[150] In citing an earlier Supreme Court case, the Court stressed that under the due process clause no judge "can be a judge in his own case or be permitted to try cases where he has an interest in the outcome."[151] The Court also emphasized an earlier decision rendered in *Tumey v. Ohio*.[152] There the Court held that subjecting a litigant to a judge who has a "direct, personal, substantial, pecuniary" interest in the litigation is violative of the fourteenth amendment.[153] The Supreme Court stated that a general formulation for the test mandating recusal is a situation which would offer a possible temptation to the average judge to lead him not to hold the balance, "nice, clear, true."[154]

From these guidelines the Supreme Court held that since Justice Embry cast the deciding vote in an area of law that was unsettled in

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145. *Id.*
146. *Id.* at 1585.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
152. *Aetna*, 106 S. Ct. at 1585.
153. *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1920)).
154. *Aetna*, 106 S. Ct. at 1585, 1587 (quoting Ward v. Village of Monroeville, 409 U.S., at 60 (1972)).

Alabama, he was concurrently creating new law.[155] The favorable judgment offered by Justice Embry in the per curiam opinion had the immediate effect of enhancing both the legal status and settlement value of his own case.[156] On resolution of this issue, the United States Supreme Court therefore concluded that: 1) When Justice Embry cast his deciding opinion, he acted as a judge in his own case; 2) Justice Embry's interest was direct, personal, substantial, and pecuniary; and 3) Justice Embry's participation violated the appellant's due process right to a fair trial before an impartial judge.[157]

3) Whether the decision of the Alabama Supreme Court must be vacated because of the participation of one member, Justice Embry, who had an interest in the outcome of the case?[158]

The Court held that since Justice Embry's vote was decisive, and he was the author of the court's opinion, the decision must be vacated and the case remanded.[159]

4) Did the participation of the other Alabama Supreme Court justices, who had marginal interests in the class action brought by Justice Embry, constitute a violation of the due process clause?[160]

The Court held that such a broad proposition was insufficient as to establishing any constitutional violation.[161] To hold otherwise would subject every state judge to disqualification for holding any marginal legal interests.[162]

The majority concluded that due process demarks only the outer boundaries of judicial disqualification.[163] The Court further held that Congress and states are free to impose more rigorous standards for judicial disqualification than those mandated within this case.[164]

Inquiry now turns to whether Florida law comports with *Aetna*. The following analysis will show that Florida law, in theory, is consistent with the Supreme Court's ruling. However, the analysis will further show that the actual mechanism of judicial disqualification recognized in Florida is in danger of leading to future constitutional

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155. *Aetna*, 106 S. Ct. at 1586.
156. *Id.*
157. *Id.* at 1586-87.
158. *Id.* at 1588.
159. *Id.* at 1588, 1589.
160. *Id.* at 1587.
161. *Id.*
162. *Id.*
163. *Id.* at 1589.
164. *Id.*

violations.

The major thrust behind the Supreme Court's decision clarifying the due process limitations regarding recusal is that a judge may not preside over a case in which he holds a "direct stake"[165] in the outcome.[166] A judge cannot act as a judge in his own case and should recuse himself if he possesses a "direct, personal, substantial, pecuniary interest" in the outcome of the case.[167]

Florida law appears to comport with these constitutional limitations as evidenced in the mechanisms dealing with recusal. Specifically, Canon 3(C)(1)(c) holds that a judge should disqualify himself if he possesses a financial interest in the subject matter or any interest that may be affected by the outcome of the proceeding.[168] The Code of Judicial Conduct is in harmony with the Supreme Court's mandate that a judge should not hold a "direct, personal, substantial, pecuniary interest" in the subject matter and outcome of the case.[169] Florida Rule of Criminal Procedure 3.230, Florida Rule of Civil Procedure 1.432, and Florida Statute section 38.10 allow the litigant on his own initiative to challenge a judge's partiality.[170] In all cases, the alleged facts are taken as true with the challenged judge limited to passing only on the legal sufficency of the motion.[171] Florida's guidelines and standards regarding judicial disqualification appear to be in harmony with the Supreme Court's holding.

However, a closer examination of the actual process of implementing these guidelines and standards is necessary.

A further inquiry of *Aetna* reveals that judicial disqualification in Alabama requires the challenged judge to determine whether recusal is appropriate.[172] Justice Embry refused to disqualify himself despite the language governing his judicial activities.[173] Specifically, in Alabama judicial disqualification is required where a judge possesses an interest

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165. *Id.* at 1585.

166. *Id.*

167. *Id.*

168. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(c) (1986). *See also supra* note 9.

169. *Aetna*, 106 S. Ct. at 1585.

170. FLA. STAT. § 38.10 (1986); FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432. *See supra* Section II.

171. CODE OF JUDICIAL CONDUCT (1986); FLA. STAT. § 38.10 (1986); FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432. *See supra* sections II and III.

172. Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060, 1089 (Ala. 1984).

173. *Id.*

in the litigation that could be substantially affected by the outcome of the proceeding.[174] Certainly such language is in harmony with the Supreme Court's holding that a judge must disqualify himself if he holds a "direct, personal, substantial, pecuniary interest" in the outcome of the case.[175] Despite the conforming language found in Alabama law regarding recusal, constitutional violations occurred.[176]

By analogy, Florida law requires the challenged judge to determine whether recusal is warranted.[177] The guidelines enunciated in the code and the test of legal sufficiency are applied by the *challenged* judge.[178]

The crux of the problem in *Aetna* centers around allowing the challenged judge to determine if recusal is called for in a particular case. Rather than deal with this problem, the Supreme Court outlined more formalistic rules upon which such challenged judges will have to deal with in the future. The rules in Alabama regarding judicial disqualification certainly comport with the principles mandated by the United States Supreme Court. The constitutional problem arose on the application of these rules by the challenged judge. Since Florida law is in harmony with Alabama law in allowing the challenged judge himself to determine the legal sufficiency of a motion for recusal, it is indeed possible that the controlling rules in Florida may lead to due process questions in the future. Since the constitutional problems regarding recusal lie in the application of the rules, rather than the rules themselves, the question now turns to the possibility of an alternative to the currently recognized procedure of allowing the challenged judge to decide a motion for recusal.

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174. ALABAMA CANONS OF JUDICIAL ETHICS Canon 3(C)(1)(d)(ii) (1986). Canon 3(C)(1) provides:

> (1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, included but not limited to instances where:
> (d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person: . . .
> (ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

175. Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580, 1585 (1986).

176. *Id.* at 1586-87.

177. CODE OF JUDICIAL CONDUCT (1986); FLA. STAT. § 38.10 (1986); FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432.

178. CODE OF JUDICIAL CONDUCT (1986); FLA. STAT. § 38.10 (1986); FLA. R. CRIM. P. 3.230; FLA. R. CIV. P. 1.432.

VII. Alternatives — The Peremptory Challenge

Justice Frankfurter stated that, "[J]ustice must satisfy the appearance of justice."[179] Current Florida law allowing a challenged judge to determine the legal sufficiency of a motion for recusal falls short of reaching this goal. The preceding section showed that the current status of Florida law regarding recusal is in danger of leading to future constitutional problems. Many states have implemented alternative procedures dealing with the recusal of judges. The purpose of this section is to propose an alternative to the current practice of allowing the challenged judge to determine the sufficiency of a recusal motion.

A. *The Peremptory Challenge*

The most often suggested alternative is the peremptory challenge.[180] Such an alternative is currently used in several states.[181] Under this system, either party may disqualify a trial judge by filing a peremptory challenge.[182] The filing of this affidavit requires the trial judge to disqualify himself in the same fashion as a peremptory challenge disqualifies a juror.[183] The litigant does not have to assert any specific facts constituting prejudice.[184] The submitted affidavit must state that the litigant possesses a belief that a fair trial is not possible before the presiding judge.[185] The filing of this affidavit is regulated by strict time requirements[186] with each party limited to the use of one peremptory challenge.[187] If the time restriction is met the trial judge

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179. Offutt v. United States, 348 U.S. 11, 14 (1954).

180. *See, e.g.*, Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROB. 43, 65-67 (1970).

181. *See, e.g.*, ALASKA STAT. § 22.20.022 (1982); CAL. CIV. PROC. CODE § 170.6 (West Supp. 1986); ILL. ANN. STAT ch. 38,] 114]-5 (Smith-Hurd Supp. 1986); N.D. CENT. CODE § 29-15-21 (Supp. 1985); OR. REV. STAT. §§ 14.250 to .270 (1985); WASH. REV. CODE ANN. §§ 4.12.040 -.050 (1986).

182. *See, e.g.*, CAL. CIV. PROC. CODE § 170.6 (West Supp. 1986).

183. Frank, *supra* note 180, at 65-66.

184. *See, e.g.*, CAL. CIV. PROC. CODE § 170.6(2) (West Supp. 1986).

185. *Id.*

186. *See, e.g., id.* The peremptory challenge must be filed five days before trial if the judge is known ten days before trial; all other circumstances require the motion to be filed upon assignment of the case for trial.

187. *See, e.g.*, CAL. CIV. PROC. CODE § 170.6(3) (West Supp. 1986). *But see* OR. REV. STAT. § 14.160 (1985) (allows two challenges per party).

must disqualify himself.[188]

Under this system, the judge does not have to determine the "legal sufficiency" of a motion for recusal. Instead, the judge must determine only if the time restriction has been met. The judge is therefore not placed in the dilemma of deciding whether his personal prejudices are violating the litigant's right to a fair trial.

If a party fails to timely file a peremptory challenge, or faces possible prejudice in an action after assignment of his case to a second judge, the only method in seeking disqualification is through a challenge for cause.[189] Under such a scenario, the challenge for cause is reviewed by a *second* judge who must determine the alleged bias with respect to the first judge.[190]

Many objections are raised to the use of such a system. Opponents often argue that the use of the peremptory challenge encourages judge-shopping.[191] The argument is that litigants will use the peremptory challenge as a means of seeking a judge more favorable to their interests.[192] Opponents also argue that the peremptory challenge could be monopolistically used by attorneys against a specific targeted judge.[193] Another objection is that the peremptory challenge would simply lead to further delay in the trial proceedings.[194]

These arguments support Florida's strong adherence to the current recusal practices. However, each of these arguments are easily countered.

A litigant's use of a peremptory challenge would not promote judge shopping, for the litigant under this system possesses no choice as

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188. *See, e.g.*, CAL. CIV. PROC. CODE § 170.6(3). (West Supp. 1986), (the challenged judge is relegated to passing on the timeliness of the motion; he does not determine the "legal sufficiency" of motion as mandated by Florida law).

189. *See, e.g.*, CAL. CIV. PROC. CODE § 170.3 (West Supp. 1986).

190. *See, e.g., id.* Under this system, when a challenge for cause is alleged, the movant must submit facts alleging prejudice. The challenged judge must within ten days file an answer stating any additional facts. Another judge then determines the sufficiency of the allegations, ordering disqualification if prejudice is shown.

191. *See, e.g.*, Davis v. Board of School Comm'rs, 517 F.2d 1044, 1050 (5th Cir. 1975), where the court stated, "Lawyers once in a controversy with a judge, would have a license under which the judge would serve at their will."

192. *See generally* Note, *Meeting the Challenge: Re-thinking Judicial Disqualifications*, 69 CALIF. L. REV. 1445, 1471 (1981).

193. Leland, *Benching the Bench*, 6 CALIF. LAW. 16, 16-17 (1986).

194. Note, *Meeting the Challenge: Re-thinking Judicial Disqualifications, supra* note 192, at 1472.

to the newly assigned judge.[195] The litigant, therefore, cannot exclusively control the actual selection process of determining which judge is to hear his case.[196] The argument that specific judges may be targeted by conspiring attorneys and left with little or no judicial work seems to lack merit. The tremendous backlog of cases present today suggests that a disqualified judge would have an abundance of cases waiting to be tried.[197] Further, the argument that the peremptory challenge would cause further delay in the litigation overlooks the fact that the use of the peremptory challenge is subjected to a strict time limitation.[198]

This article has shown the problems inherent in allowing the challenged judge himself to review a motion for recusal. As discussed previously, the peremptory challenge system calls for an alternate judge to review a "challenge for cause."[199] Opponents attack this position as being theoretically sound but difficult in application.[200] They argue that fellow jurists would be extremely reluctant to pass judgment on one of their colleagues.[201]

Certainly such an objection is valid. However, the use of such a system would avoid the inherent problems and possible constitutional violations evidenced in *Aetna*. The earlier analysis of *Aetna* showed that the constitutional problems arose when the challenged judge ruled on the motion for disqualification. The proposed adoption of the peremptory challenge system in Florida would reduce the possibility of constitutional violations by allowing a non-challenged member of the court to rule on the motion for disqualification. Most importantly, the adoption of this system would serve to strengthen a litigant's confidence that his right to a fair trial before an impartial judge is adequately protected and ensured. Further, this system would more adequately satisfy Justice Frankfurter's statement, "[J]ustice must satisfy the appearance of justice."[202]

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195. *See, e.g.*, CAL. CIV. PRO. CODE § 170.6 (West Supp. 1986).

196. *See* Note, *Disqualification of Federal District Judges — Problems and Proposals*, 7 SETON HALL L. REV. 612, 634 (1976).

197. *Id.*

198. *See, e.g.*, CAL. CIV. PRO. CODE § 170.6(2) (West Supp. 1986). *See also* Note, *Disqualification of Federal District Judges — Problems and Proposals*, *supra* note 196, at 634.

199. *See, e.g.*, CAL. CIV. PRO. CODE § 170.3 (West Supp. 1986).

200. *See* Note, *Disqualification of Federal District Judges — Problems and Proposals*, *supra* note 196, at 637 n.129.

201. *Id.*

202. Offutt v. United States, 348 U.S. 11, 14 (1954).

VIII. Conclusion

In surveying Florida law on recusal, this article has exposed the inadequacies of the prevailing rules. The current procedure of allowing the challenged judge to determine the "legal sufficiency" of a motion for recusal often leads to inconsistent results. Such a standard may lead to possible constitutional violations as evidenced in *Aetna*.[203] The writ of prohibition is an uncertain vehicle for protecting a litigant's right to a fair trial as evidenced in the different standards of review applied by the Florida appellate courts. The adoption of the peremptory challenge system in Florida would lessen the possibility of future constitutional violations. Review of a challenge for cause by an alternate judge would strengthen a litigant's belief that his right to a fair trial is adequately protected. Further, the adoption of this system in Florida would more adequately protect a litigant's right to a fair trial before an impartial judge.[204]

Louis D. D'Agostino

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203. *Aetna*, 106 S. Ct. at 1580.

204. *See* Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927).