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FILED
SID J. WHITE
JUN 30 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: The Florida Bar, Amendments
to Florida Code of Judicial Conduct, CASE No. 81,685

COMMENTS CONCERNING PROPOSED AMENDMENTS
FLORIDA BAR CODE OF JUDICIAL CONDUCT

COMES NOW, the undersigned ROBERT J. CHRISPEN, a free and natural Continental Citizen of the United States of America, at Common Law, under the provisions of Rules 2.010, 2.030(a)(1), and 2.130(b)(1) and (c)(4), Florida Rules of Judicial Administration, and Article I, Sections 2, 9, and 21; and Article V, Section 3(b) of the Constitution of the State of Florida (1980); and secured and protected under the First, Ninth, and Fourteenth Amendments of the Constitution of the United States of America, and hereby submits the following Comments Concerning Proposed Amendments To Florida Bar Code of Judicial Conduct, and in support thereof, would aver as follows, to wit:

The present proposed amendment of Canon 3(E), Florida Bar Code of Judicial Conduct, provides, in pertinent part, as follows:

E. Disqualification.

(1) A judge should disqualify himself or *herself* in a proceeding in which *the judge's* impartiality might reasonably be questioned, including but not limited in 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; ... * * * ....

1. The undersigned ROBERT J. CHRISPEN, would respectfully submit that the aforesaid Canon 3(E)(1), Florida Bar Code of Judicial Conduct, be revised and renumbered so that Canon 3(E)(1), Florida Bar Code of Judicial Conduct, would read as follows, to wit:

E. Disqualification.

(1) A judge *shall* disqualify himself *or herself* in a proceeding in which *the judge's* impartiality might reasonably be questioned where *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. *If the moving documents are legally insufficient, as a matter of law, to support disqualification under this canon, the judge shall set forth with specificity the substantial facts and points of law which render such moving documents as being legally insufficient to support disqualification under this canon.*

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

(a) *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;

(b) *the judge* knows that ... * * * ....

2. The undersigned ROBERT J. CHRISPEN, would respectfully submit that the aforesaid Canon 3(E)(1), Florida Bar Code of Judicial Conduct, be revised and renumbered so that a presiding judge would not be able to summarily deny duly and timely filed motions for disqualification under the provisions of the new rule of court, Rule 2.160, Florida Rules of Judicial Administration, effective, on the 1st of January, 1993, where at the present time, a judge presented with a motion for disqualification may summarily deny the same as being "legally insufficient" without setting forth the material facts which would, as a matter of law, constitute such motion for disqualification as being "legally insufficient".

ARGUMENT IN SUPPORT OF REVISION OF CANON 3(E)

3. Under Florida law, while the provisions of Section 38.10, Florida Statutes (1991) creates a substantive right to seek the disqualification of a judge, the **procedure** for disqualification of judges (in the trial court) in civil cases was governed by Rule 1.432, Florida Rules of Civil Procedure, and in criminal cases, by Rule 3.230, Florida Rules of Criminal Procedure, (which has been superseded by Rules 2.010 and 2.160, Florida Rules of Judicial Administration, effective January 1, 1993). *Livingston v. State* of *Florida*, 441 So.2d 1086 (Fla. 1983). *MacKenzie v. Super Kids Bargain Stores, Inc.*, 565 So.2d 1332 (Fla. 1990). *Brown v. St. George Island, LTD,* 561 So.2d 253 (Fla. 1990); *Breakstone* v. *MacKenzie*, 561 So.2d 1164 (Fla. 3rd DCA 1989). The provisions of the former Rule 1.432, Florida Rules of Civil Procedure, as well as the former Rule 3.230, Florida Rules of Criminal Procedure, and the

present Rule 2.160, Florida Rules of Judicial Administration, as adjective law, constitutes the legal mechanism for which the substantive right for the disqualification of a trial judge for prejudice under Section 38.10, Florida Statutes (1991), is made operatively effective where "substantive law creates, defines, and regulates rights, while procedural law is the machinery by which substantive law is made effective." *State* of *Florida v. J.R. Jr.*, 367 So.2d 702, 703 (Fla. 2nd DCA 1979). See, *State* of *Florida v. Garcia*, 229 So.2d 236, 238 (Fla. 1969); *In re: Florida* ***Rules*** of *Criminal Procedure*, 272 So.2d 65 (Fla. 1972). Additionally, it is settled, as a matter of law, that the prejudice of the judge against the party-applicant or in favor of the adverse party, includes prejudice against counsel (of record) for the applicant, or in favor of counsel (of record) for the adverse party. *Livingston v. State*, supra at 1087; *Breakstone*, supra; *State* of *Florida, ex rel. Jensen v. Cannon*, 163 So.2d 535 (Fla. 3rd DCA 19-64); *Ginsburg v. Holt*, 86 So.2d 650, 651 (Fla. 1956); *State* of *Florida, ex rel. Fuente* v. *Himes*, 160 Fla. 757, 36 So.2d 433 (19-48); *State* of *Florida, ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613 (1939).

4. Under Florida law, the requirements as set forth in section 38.10, Florida Statutes (1991), and the present Rule 2.160, Florida Rules of Judicial Administration, (the former Florida Rule of Criminal Procedure 3.230, and the former Rule 1.432, Florida Rules of Civil Procedure), "were established to ensure public confidence in the integrity of the judicial system as well as to

prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and ....", *Livingston v. State*, impartiality of the proceeding. infra. As stated by the Florida Supreme Court:

> "Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. ... It is a matter of no concern what judge presides in a particular cause, but is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy. The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised."

Livingston v. State of *Florida*, 441 So.2d 1083, 1085-1086 (Fla. 1983); *Dickenson v. Parks*, 104 Fla. 577, 582-584, 140 So. 459, 462 (1932)

5. The former Rule 1.432, Florida Rules of Civil Procedure, subdivisions (a) and (b) provided: "A party may move to disqualify the judge assigned to the action on the grounds provided by statute." "A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party." Under Florida law, a verified motion for disqualification must contain an actual factual foundation for the alleged fear of prejudice. *Fisher* v. *Knuck*, 497 So.2d 240, 242 (Fla. 1986);

Wilson v. Renfroe, 91 So. 2d 857 (Fla. 1956); Wyman v. Reasbeck, 436 So.2d 1112 (Fla. 4th DCA 1983).

6. The former Rule 1.432, Florida Rules of Civil Procedure, subdivision (c), provided: "A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification." "Rule 1.432 requires that a motion to disqualify be made within a reasonable time after discovering the facts upon which the motion is based. * * One of the purposes of the timeliness requirement is to avoid the adverse effect on the other party to the proceeding and the problems of a retrial with its resulting costs and delay. A motion is considered un-timely when delayed until after the moving party has suffered an adverse ruling unless good cause is shown." Fisher v. *Knuck,* 497 So.2d 240, 243 (Fla. 1986).

7. The former Rule 1.432, Florida Rules of Civil Procedure, subdivision (d), provided: "If the motion is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the action." (Emphasis added.) The principal issue presented on a motion for disqualification is that of legal sufficiency, *Livingston* v. State of Florida, 441 So.2d 1083, 1086 (Fla. 1983), which is governed by a reasonable person standard. Breakstone v. *MacKenzie,* 561 So.2d 1164 (Fla. 3rd DCA 1989). "When a party seeks to disqualify a judge under section 38.10, the judge cannot pass on the truth of the statements of fact set forth in the affidavit. State v. Dewell, 131 Fla. 566, 179 So. 695 (1938). The facts and reasons for the belief of prejudice must be taken as

true, and the judge may only pass on the legal sufficiency of the motion and supporting affidavits to invoke the statute. Ravbon v. Burnette, 135 So.2d 228 (Fla. 2d DCA 1961)." Brown v. *St. George Island, LTD,* 561 So.2d 253 (Fla. 1990). An affidavit or motion for disqualification of a judge for prejudice filed under Section 38.10, Florida Statutes (1991) or Rule 1.432, Florida Rules of Civil Procedure, respectively, must recite facts and circumstances that would lead any normal human being in the position of the applicant or movant to "fear" that he would not receive a fair trial at the hands of the trial judge. *Dickenson* v. *Parks,* 104 Fla. 577, 582, 140 So. 459, 462 (1932); *Breakstone* v. *MacKenzie,* 561 So.2d 1164 (Fla. 3rd DCA 1989). In the case of *Lee* v. *Lee,* 563 So.2d 754 (Fla. 3rd DCA 1990), the appellant therein was not entitled to the disqualification of the trial court judge where the appellant's (unsworn) motion for recusal was not supported by an affidavit under section 38.10, Florida Statutes, as amended. The District Court of Appeal for the Fourth District of the State of Florida, on petition for writ of prohibition which sought the review of a denial of a motion for disqualification filed pursuant to Rule 1.432, Florida Rules of Civil Procedure, stated:

> "The term 'legal sufficiency' encompasses more than mere technical compliance with the rule and statute; the court must also determine if the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. Brewton v. Kelly, [166 So.2d 834 (Fla. 2nd DCA 1964)]. As indicated by the court in State ex rel. Brown v. Dewell, 131 Fla. 566, 179 So. 695, 697-98 (1938):
>
> > The test of the sufficiency of the affidavit is whether or not its contents 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's a question of what feeling resides in the affiant's mind, and the basis of such feeling.... [The trial judge] cannot pass on the truth of the allegations of fact. If they are not frivolous or fanciful, they are sufficient to support a motion to disqualify on the ground of prejudice."

Gieseke v. Grossman, 418 So.2d 1055, 1057 (Fla. 4th DCA 1982); and ***Hayslip*** V. *Douglas,* 400 So.2d 553, 556 (Fla. 4th DCA 1981). Barber ***V. MacKenzie,*** 562 So.2d 755 (Fla. 3rd DCA 1990), review denied, ***MacKenzie*** V. ***Barber,*** 562 So.2d 755 (Fla. 1991). Although the trial or merits panel judge may strongly disagree with the factual matters set forth in the affidavit, the trial or merits panel judge must accept the affidavit as true and consider solely the issue of legal sufficiency. For such reason an order of disqualification should not be interpreted as a determination of the actual existence of prejudice, for in any such proceeding the matter asserted in the affidavits is assumed to be true, although not proven. The disqualification procedure is designed to assure the appearance and reality of impartial adjudication while avoiding the undesirable situation which could be presented by inquiry into the existence of an actual prejudice on the part of the trial or merits panel judge. ***Breakstone*** V. ***MacKenzie,*** 561 So.2d 1164 (Fla. 3rd DCA 1989). "The facts alleged in the motion need only show that 'the party making it has a well grounded fear that he will not receive a fair trial at the hands of the trial judge.' Dewell, 131 Fla. at 573, 179 So. at 697. 'If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there.' Parks, 141 Fla. at 518, 194 So. at 614. Further, 'it is a question of what feeling resides in the

affiant's mind and the basis for such feeling.' Dewell, 131 Fla. at 573, 179 So. at 697-98." *Livingston* v. *State of Florida*, 441 So.2d 1083, 1087 (Fla. 1983). Therefore, as a matter of law, the trial judge against whom a motion for recusal (or disqualification) is directed thereto, is permitted only to determine the legal sufficiency thereof, *Sikes, infra*, wherein, the trial judge ascertains whether or not the contents of the motion shows that the party making it has a well grounded fear that he will not receive a fair trial at the hands of the trial judge, *Sikes, infra* at 1224; *State of Florida, ex rel. Brown v. Dewell*, 133 Fla. 566, 17 So.2d 695, 697 (1938), and where the provisions of Rule 1.432, Florida Rules of Civil Procedure, are to read in pari materia with Section 38.10, Florida Statutes (1989), on the authority of *Sikes, infra; Gieseke* v. *Grossman*, 418 So.2d 1055 (Fla. 4th DCA 1982); *R.P. Hewlitt & Associates v. Hunt*, 411 So.2d 266 (Fla. 1st DCA 1982); *Hayslip v. Douglas*, 400 So.2d 553 (Fla. 4th DCA 1981). Henceforth, as a matter of law, once the movant meets the statutory requirement of demonstrating a well-founded fear that he is unable to receive a due process-mandated fair trial based upon the obvious prejudice of the trial judge, the moving documents are deemed to be legally sufficient. *Sikes v. Seaboard Coast Line Railroad Company*, 429 So.2d 1216, 1223 - 1225 (Fla. 1st DCA 1983), *pet. for review denied, Seaboard Coast Line Railroad Company v. Sikes*, 440 So.2d 353 (Fla. 1983); *State of Florida, ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613 (1939); *Pistorino v. Ferguson*, 386 So.2d 65, 66 - 67 (Fla. 3rd DCA 1980).

8. Under Florida law, a court is required to give a construction of Rule 2.160, Florida Rules of Judicial Administration, in the same manner as statutory legislative enactments. Procedural court rules must be construed in the same manner as legislative enactments, on the authority of *Bryan* v. *State* of *Florida,* 94 Fla. 909, 114 So. 773 (1927); *Syndicate Properties, Inc. v. Hotel Floridian Company,* 94 Fla. 899, 114 So. 441 (1927); and *Hoodless* v. *Jernigan,* 51 Fla. 221, 41 So. 194 (1906). The Second District Court of Appeal in the case of *In re: Estate* of *Cleary,* 135 So.2d 428 (Fla 2nd DCA 1961), stated: "It is axiomatic that when are several rules pertaining to the same subject they are to be construed together and in relation to each other." 135 So.2d at 430. Specifically, with respect to Rule 2.160(f), Florida Rules of Judicial Administration, all principals of statutory construction and common sense interpret the word "shall" as is normally used in a statute or rule of court, as to connote a mandatory (non-discretionary) requirement (rather than a future tense). *In the Interest of S.R. v. State* of *Florida,* 346 So.2d 1018 (Fla. 1977); *Holloway* v. *State of Florida,* 342 So.2d 966 (Fla. 1977); *City* of *Orlando v. County of Orange,* 276 So.2d 41, 43 (Fla. 1973). The Supreme Court of the State of Florida stated:

> " * * * .... It is an axiom of statutory construction that an interpretation of a statute of which leads to an unreasonable or ridiculous conclusion or a result obviously not designed by the legislature will not be adopted. *City* of *St. Petersburg* v. *Siebold,* 48 So.2d 291 (Fla. 1950); *Allied Fidelity Insurance Company* v. *State,* 415 So.2d 109 (Fla. 3d DCA 1982); *Palm Springs General Hospital, Inc. v. State Farm Mutual Automobile Insurance Co.*, 218 So.2d 793 (Fla. 3d DCA 1969)."

Drury v. State of *Florida,* 461 So.2d 104,105 (Fla. 1984).

WHEREFORE, based upon the foregoing facts and legal authority cited herein, the undersigned, Robert J. Chrispen, would hereby respectfully submit that this Court should implement the aforesaid subject matter "*revision* of *Canon 3(E), Florida Bar Code* ***of*** *Judicial Conduct*", where since a litigant has the substantive right of nothing less than a high standard of the cold neutrality of an impartial judge founded upon the due process mandated guarantee of a fair trial, *Pistorino v. Ferguson,* 386 So.2d 65, 66 - 67 (Fla. 3rd DCA 1980); *Marlin v. Williams,* 385 So.2d 1030, 1031 (Fla. 3rd DCA 1980), each of which is secured and protected by Article I, Sections 2, 9, 13, and 21, Florida Constitution (1980) and the First, Ninth, Thirteenth and Fourteenth Amendments of the Constitution of the United States of America; and where in the case of *Brown* v. *St. George Island, Ltd.,* 562 So.2d 684 (Fla. 1990) (which approved the decision below in *St. George Island, Ltd.* v. *Rudd,* 553 So.2d 772 (Fla. 3rd DCA 1989)), the Supreme Court of the State of Florida stated: "In other words, each side has the right to seek the disqualification of one judge under the standard enumerated in the first portion of section 38.10."

Respectfully submitted,

Robert J. Chrispen

Robert J. Chrispen, In Propria Persona

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing COMMENTS CONCERNING PROPOSED AMENDMENTS FLORIDA BAR CODE OF JUDICIAL CONDUCT has been furnished by regular U.S. Mail, this 28th day of June, 1993, and that all parties required to be served have been served, to wit:

JOHN F. HARKNESS, Jr., Attorney of Record for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399.

Respectfully submitted,

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