# Third District Court of Appeal

**State of Florida**

Opinion filed November 6, 2019.
Not final until disposition of timely filed motion for rehearing.

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No. 3D19-1875
Lower Tribunal No. 18-4917

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**JJN FLB, LLC,**
Petitioner,

vs.

**CFLB Partnership, LLC, et al.,**
Respondents.

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No. 3D19-1876
Lower Tribunal No. 18-4923

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**JJN FLB, LLC, et al.,**
Petitioners,

vs.

**CFLB Partnership, LLC,**
Respondent.

No. 3D19-1948
Lower Tribunal No. 18-596

**Bilzin Sumberg Baena Price & Axelrod, LLP,**
Petitioner,

vs.

**The Cantor Group Law P.A., et al.,**
Respondents.

Cases of Original Jurisdiction – Prohibition.

Bilzin Sumberg Baena Price & Axelrod LLP, Mitchell E. Widom, and Raquel M. Fernandez; Kozyak Tropin & Throckmorton LLP, Detra Shaw-Wilder, Javier A. Lopez, and Harley S. Tropin, for petitioners.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Alan H. Fein, and Jenea M. Reed; Zarco Einhorn Salkowski & Brito, P.A., Colby G. Conforti, Robert M. Einhorn, and Robert Zarco, for respondents.

Before LOGUE, MILLER, and LOBREE, JJ.

MILLER, J.

Petitioners, JJN FLB, LLC, 551 FLB 1, LLC, 551 FLB 2, LLC, 551 FLB 3, LLC, 551 FLB 4, LLC, FLB Hotel, LLC, FLB Restaurant, LLC, FLB R-Units, LLC, FLB U-Units, LLC, and Bilzin Sumberg Baena Price & Axelrod, LLP, seek writs of

prohibition to prevent the assigned trial judge from further presiding over their civil disputes against respondents, CFLB Partnership, LLC, CFLB Management, LLC, The Cantor Group Law P.A., Sharon Dresser and The Estate of Steven L. Cantor, Hal J. Webb, Hal J. Webb, P.A., Pruco Life Insurance Company, Neal Slafsky, CPG Capital, LLC, and United Capital Financial Advisers, LLC. All motions are grounded upon judicial findings within a sanctions order rendered in an unrelated case. Given the common underlying legal and factual issues, we have consolidated the three separately-filed petitions, and for the reasons explicated below, we grant relief.

## FACTS AND BACKGROUND

In two of the petitions, petitioners are represented in the lower tribunal by the law firm of Bilzin Sumberg Baena Price & Axelrod, LLP (the "Law Firm").[1] In the remaining petition, the Law Firm is a party to the litigation and the General Counsel to the Law Firm has been disclosed as a witness.

In mid-September of 2019, after convening a multi-day evidentiary hearing, the trial judge issued a detailed, fifty-one-page sanctions order in an unrelated civil case.[2] The tribunal found by clear and convincing evidence that the Law Firm

[1] The parties in these two disputes have waived trial by jury.

[2] In the sanctions order, the court defined "Plaintiff's lawyers" as both the individual attorney of record and the Law Firm. Thus, the overwhelming majority of sanctionable acts were broadly imputed to all members of the Law Firm. Cf. Sands Pointe Ocean Beach Resort Condo. Ass'n v. Aelion, 251 So. 3d 950 (Fla. 3d DCA

"[r]epeatedly made unsubstantiated, false, and defamatory allegations in sealed documents and in open court," violated the Rules of Professional Conduct, misused attorney-client privileged communications, and participated "in a scheme to bring [fabricated criminal] charges."[3] The court imposed sanctions, jointly and severally, against both the individual attorney of record and the Law Firm.

Less than ten days later, petitioners filed the subject disqualification motions. See Fla. R. Jud. Admin. 2.330(e) ("A motion to disqualify shall be filed within a reasonable time not to exceed [ten] days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling."). In their appended, incorporated affidavits, petitioners asserted they harbored a well-founded fear that, based upon the findings articulated within the sanctions order in the unrelated case, they will not receive a fair trial. The lower tribunal denied the motions and the instant petitions ensued.

## STANDARD OF REVIEW

"[A] writ of prohibition is the proper procedure for appellate review to test the validity of a motion to disqualify." Pilkington v. Pilkington, 182 So. 3d 776, 778

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2018) (refusing to impute the alleged fear of prejudice held by a single associate to all members of the law firm). The court further made individualized findings that the General Counsel engaged in misconduct.

[3] We express no opinion regarding the ultimate propriety of the findings set forth in the sanctions order. For purposes of reviewing the denial of disqualification, "[t]he facts and reasons for the belief of prejudice [set forth in the motion] must be taken as true." Brown v. St. George Island, Ltd., 561 So. 2d 253, 255 (Fla. 1990).

(Fla. 5th DCA 2015) (citation omitted). We review "a trial judge's determination on a motion to disqualify . . . de novo." Parker v. State, 3 So. 3d 974, 982 (Fla. 2009). "The standard for viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge." Wall v. State, 238 So. 3d 127, 143 (Fla. 2018) (citation omitted).

**LEGAL ANALYSIS**

"It has long been said in the courts of this state that 'every litigant is entitled to nothing less than the cold neutrality of an impartial judge.'" Great Am. Ins. Co. of N.Y. v. 2000 Island Blvd. Condo. Ass'n, Inc., 153 So. 3d 384, 385 (Fla. 3d DCA 2014) (quoting State ex rel. Davis v. Parks, 141 Fla. 516, 519, 194 So. 613, 615 (1939)). "Due process requires that a judge possess neither actual nor [perceived] bias." Eric P. Christofferson, Comment, Authority of the Trial Judge, 89 Geo. L.J. 1559, 1559 (2001).[4] "The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983).

[4] "[T]he Due Process Clause has been implemented by objective standards that **do not require proof of actual bias**." Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 883, 129 S. Ct. 2252, 2263, 173 L. Ed. 2d 1208 (2009) (emphasis added).

Although "[t]he facts must be viewed from the perspective of the petitioner[s]," Michaud-Berger v. Hurley, 607 So. 2d 441, 446 (Fla. 4th DCA 1992), it is equally "well-settled that adverse rulings are insufficient to show bias." Clark v. Clark, 159 So. 3d 1015, 1017 (Fla. 1st DCA 2015) (citations omitted). This is because judicial rulings "cannot possibly show reliance upon an extrajudicial source, [thus], . . . [a]lmost invariably, they are proper grounds for appeal, not recusal." Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994). Similarly, the "mere reporting of perceived . . . unprofessionalism" is insufficient to sustain disqualification. 5-H Corp. v. Padovano, 708 So. 2d 244, 248 (Fla. 1997).

Nonetheless, "[u]nder Florida law, a judge's statement that he [or she] feels a party has lied in a case before him [or her], generally indicates bias against the party." DeMetro v. Barad, 576 So. 2d 1353, 1354 (Fla. 3d DCA 1991) (citing Brown v. St. George Island, Ltd., 561 So. 2d 253, 257 (Fla.1990)). In reconciling these outwardly juxtaposed principles, our court has held:

> [T]he formation of a prejudice during and as a result of a party's testimony in a trial need not affect the case in which it was arrived at in that manner, although it may operate to disqualify that judge from hearing any later or second trial of that case if one is had, or from participating in any subsequent trial in which that party is involved.

Deauville Realty Co. v. Tobin, 120 So. 2d 198, 202 (Fla. 3d DCA 1960), cert. denied, 127 So. 2d 678 (Fla. 1961); see also St. George Island, Ltd. v. Rudd, 547 So. 2d 958,

960 (Fla. 1st DCA 1989) (granting prohibition where the trial court made a remark at a hearing in another case "if [witness] were here, I wouldn't believe him anyway").

Here, in the midst of protracted litigation, petitioners received the sanctions order, penned by the judge slated to serve as the arbiter in their current disputes. The order was rendered after the Law Firm became embroiled in the suits below, as a party to one dispute, and as counsel of record in the remaining two cases.[5] The court signed the order in close temporal proximity to hearings in the underlying cases. The decision deduced that the Law Firm engaged in treacherous conduct, including lying and fabricating allegations of a criminal conspiracy. Further, the tribunal was expansive in the scope of its findings of deceit, equally condemning the actions of the Law Firm and the individual attorney of record.[6]

Consequently, the court's "denouncement of the petitioners' [counsel's] character and believability in the prior proceeding was a strong implication that [it] would not believe them in future proceedings, and that [it] had already formed a hostile opinion . . ."[7] DeMetro, 576 So. 2d at 1355; see also Cummings v. Montalvo,

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[5] "Ordinarily a party may not bring an attorney into a case after it has been assigned to a judge, and then move to disqualify the judge on grounds that the judge has a bias against the attorney." Town Ctr. of Islamorada, Inc. v. Overby, 592 So. 2d 774, 776 (Fla. 3d DCA 1992)

[6] The order expressly implicated the General Counsel.

[7] We are cognizant that "[s]uch a 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

135 So. 3d 389 (Fla. 5th DCA 2014) ("The motion, which sought disqualification based upon the judge's statements indicating that she had strongly and definitively prejudged Petitioner's credibility in an unfavorable fashion, should have been granted."); Holmes v. Goldstein, 650 So. 2d 87, 88 (Fla. 4th DCA 1995) ("Petitioner is entitled to have a trial judge preside over matters involving petitioner's credibility in the present case who has not evaluated petitioner's credibility and character in a negative fashion.").

Under prevailing jurisprudence, that the findings implicate petitioners' counsel in two of the petitions before us, rather than petitioners individually, is a distinction without a discernible difference. See Lowman v. Racetrac Petroleum, Inc., 220 So. 3d 1282, 1284 (Fla. 1st DCA 2017) ("[A]s an indication of a bias which may create a party's fear of not receiving an impartial hearing, there is no appreciable difference," between statements regarding the credibility of petitioners or his or her counsel.); Kline v. JRD Mgmt. Corp. & CCMSI, 165 So. 3d 812, 815 (Fla. 1st DCA 2015) (requiring disqualification where the tribunal "found that [p]etitioner's attorney acted dishonestly, had committed a crime (if not multiple crimes), and that he was not worthy of belief"); see also Fla. Code Jud. Conduct, Canon 3E(1)(a) ("A

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justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) (emphasis added) (citation omitted).

judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party or a party's lawyer."). As was so eloquently posited by our sister court in Hayslip v. Douglas, 400 So. 2d 553, 557 (Fla. 4th DCA 1981):

> "It is not always possible with exact particularity in a matter of this kind to set forth facts as to the process of the human mind." Brewton v. Kelly, 166 So. 2d 834, 836 (Fla. 2d DCA 1964). Nonetheless, we feel certain that under the facts as alleged in [petitioners'] motion[s], [their] fear was reasonable and not frivolous nor fanciful. Though a client and his counsel are separate entities, they share a common bond forged by the attorney-client relationship and tempered in the rigors of litigation. Most clients find the courtroom to be an unfamiliar and, in some instances, uncomfortable atmosphere and so it is not unusual that they entrust themselves into their counsel's care and view their interests as one. Thus, it is understandable that a client would become concerned and fearful upon learning that the trial judge has an antipathy toward [its] lawyer and has expressed the opinion that the client's counsel "should not be in this case."

See also Michaud–Berger, 607 So. 2d at 446 (granting prohibition where trial judge, in an unrelated case, found petitioner's counsel engaged in "sophistry," masking "greed, overreaching[,] and attempted extortion").

Accordingly, the attested facts sufficiently support the proposition that petitioners' hold a well-grounded fear that they will not receive "a fair trial at the hands of the judge." State v. Cam Voong Leng, 987 So. 2d 236, 237 (Fla. 4th DCA 2008) (citation omitted); see also Parks, 141 Fla. at 518, 194 So. at 614 ("Such a fear rests in the mind of the litigant and 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.").

Thus, we grant the petitions for writ of prohibition. As we are confident the trial judge will abide by this decision, we withhold formal issuance of the writs.

Prohibitions granted.