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DRAFT ABA REPORT REVIEWS RULES AND PROCESSES FOR JUDICIAL RECUSAL, RECOMMENDS IMPROVEMENTS

A preliminary report under review within the ABA surveys the rules and procedures that govern judicial disqualification, identifies problem areas--including the impact of campaign contributions--and proposes possible solutions. The subject of the report is garnering much attention due to the Supreme Court's decision in Caperton v. A.T. Massey Coal Co.,77 U.S.L.W. 4456, (U.S. June 8, 2009).

The report is the product of the Judicial Disqualification Project, which was launched by the ABA Standing Committee on Judicial Independence in 2007. Professor Charles G. Geyh of Indiana University law school is the director of the project and authored the draft report.

The document, which is still a work in progress, recommends that states consider:

• adopting a procedure for peremptory challenge of judges, as 19 states already have done;

• assigning contested disqualification motions to a different judge;

• making the appellate standard of review more rigorous;

• creating procedures for review of decisions concerning disqualification of high court judges; and

• adopting more specific disqualification rules about the impact of campaign contributions and campaign statements that commit or appear to commit judges to rule a certain way.

The report also emphasizes that judges need more information to make sound disqualification decisions. To this end, it urges that: (1) state judiciaries should gather data on disqualification decisions; (2) judges should be encouraged to explain their reasons for disqualification; and (3) state supreme courts should supply greater guidance to judges on when their impartiality might reasonably be questioned.

Harrison suggested that even if most of Blankenship's contributions were independent expenditures, "I think that the Model Code provision, coupled with the decision in Caperton, will (or should) motivate a conscientious judge to recuse if she knows that the campaign contributions were attributable, directly or indirectly, to a single source."

Due Process to the Rescue.

Similarly, Fisher and Geyh indicated in their remarks to BNA that they do not consider the technical characterization of Blankenship's contributions as determinative of the constitutional question. Fisher called the facts in Caperton "outrageous and constitutionally intolerable," while Geyh characterized them as "over the top."

Fisher said Caperton can be viewed as "due process coming to the rescue in extreme situations." According to Geyh, Kennedy's opinion can be read as declaring that a judge's decision not to recuse violates due process "when it's a cold day in hell."

Several of those whom BNA contacted singled out this part of the majority opinion as the heart of the court's due process holding:

We conclude that there is a serious risk of actual bias--based on objective and reasonable perceptions--when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.

The court went on to say: "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

The decision recognizes, Phillips said, that "constitutional implications can arise from large campaign expenditures" in judicial elections--that is, that due process concerns can arise from the election of a judge in a process where a litigant expended inordinately large sums of money.

But the court crafted "a very narrow standard," Phillips emphasized. He predicted that because of the unique facts of the case, most future opinions will end up distinguishing Caperton rather than repeating its result.

The due process holding in Caperton "is the law catching up with the reality of judicial campaigning in today's world," according to George T. Patton Jr., Bose McKinney & Evans in Washington, D.C. Patton was one of three co-authors of the amicus brief submitted by the Conference of Chief Justices.

Responding to a question from BNA, Patton acknowledged that, after Caperton, attorneys seeking a judge's recusal may now cite due process requirements as well as the state's judicial conduct code. But most cases will be resolved under the code, he predicted.

Parade of Horribles?

In his dissenting opinion, joined by Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr., Chief Justice Roberts warned that the majority decision could spawn endless "Caperton motions" based on charges of judicial bias due to campaign contributions. He posed a series of 40 questions that he said courts would now have to determine, such as these:

• "Are independent, non-coordinate expenditures treated the same as direct contributions to a candidate's campaign?"

• "What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received 'disproportionate' support from individuals who feel strongly about either side of that issue?"

• "What if the candidate draws 'disproportionate' support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?"

• "Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?"

It is "preposterous" to postulate a flood of litigation based on the ruling in Caperton, said professor Roy A. Schotland of Georgetown University Law Center in Washington, D.C. That's the "oldest stunt in the books" when resisting something new, he told BNA. Schotland, like Patton, was a co-author of the amicus brief for the Conference of Chief Justices. He is known for having told a reporter two decades ago that judicial elections were becoming "nastier, noisier, and costlier."

Schotland conceded, however, that Roberts posed some questions worth pondering, and that "there may be some tough cases," such as how far back to reach when a recusal motion comes up.

Fisher also described some of the questions as "very good," but he said that the timing and magnitude of the contributions at issue in Caperton take it out of the ordinary. There was no need for the court to draw a bright line, he said, because the facts were so far over any line.

Although saying he endorses the result reached by the majority, Hodes told BNA he agrees with the dissent that the decision presents fertile ground for manipulation. People will try to take advantage of it, he said, "but in the vast majority of cases," amid a huge waste of time and legal charges, "very few will succeed at the due process level."

Geyh described the concerns raised by Roberts as "alarmist." Yes, he said, some litigants will raise due process claims and appeal on that ground if recusal is denied. But given the extreme facts of the Caperton case, he added, it's "remote" to think the problems will go as far as the dissent suggests.

Patton commented that although it's difficult to predict how many of the questions Roberts posed will turn into problems, Caperton will have no application in a "garden-variety" case involving an ordinary campaign contribution. "I don't see a Pandora's box," he said.

Harrison expressed the view that "the Caperton decision will provide a basis for more motions to disqualify than in the past," but that "since it is likely to prompt more voluntary recusals by judges, it is hard to predict whether voluntary recusal or motions to disqualify will predominate as a result of Caperton ."

Rotunda is not as sanguine about Caperton's legacy. The case "will lead to a flood of recusal motions," he said, due to the vagueness of the court's standard. "The problem is that the test is so vague that any lower court judge can do what he wants," Rotunda stated. The majority did not even hint at an answer to the dissenters' 40 questions, he added.

Role of States.

Caperton is attracting attention partly because of federalism concerns, Hodes stated. "It federalizes the issue" of judicial recusal, which "ought to be regulated by each state individually," he said.

On the other hand, he continued, the majority made clear that states can have more stringent disqualification rules than due process requires. For example, the majority opinion states: "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution."

Phillips emphasized this aspect of the opinion as well. The court set due process as a floor and "recognized explicitly the role of states in crafting higher standards that would promote the integrity of the judiciary," he observed.

Patton said he feels likewise. Caperton acknowledges that judicial conduct codes are the primary source for judicial disqualification and that a state's standards can be higher than due process requirements, he noted. The court empowered the states, through their judicial conduct rules, to decide most of these cases, he said, so that "due process is a backstop for the codes of conduct."

Changes Coming on State Level?

Harrison noted that more than three dozen states are in the process of revising their judicial conduct codes in light of the ABA's 2007 model code, and that several jurisdictions have adopted new codes within the past 18 months.

"In view of the decision in Caperton," he said, "I would not be surprised if state Supreme Courts look more favorably on the adoption of financial disqualification provisions." He pointed to Arizona's new judicial conduct code, based largely on the revised ABA standards, which includes a provision on campaign contributions.

Rule 2.11(A)(4) of the new Arizona code, which takes effect Sept. 1, mandates disqualification when "[t]he judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous four years made aggregate contributions to the judge's campaign in an amount that is greater than the amounts permitted pursuant to A.R.S. Section 16-905."

More broadly, Schotland commented that "in meeting the challenges raised by the holding [in Caperton], state courts have a huge role to play through their

state codes."

Because Caperton explicitly said that states may apply disqualification standards stricter than what the Due Process Clause mandates, Hodes anticipates the decision will clearly strengthen the hands of those, including some within the ABA, who seek to enact tougher standards on judicial disqualification.

What 'Process' Is Due?

But the standards governing judicial recusal are not the real problem, Geyh said; instead, it is the procedures that need to be improved. He singled out two particular changes that could make a difference.

First, judges need more guidance for making recusal decisions, he said, such as opinions from judicial organizations and continuing education courses that explain the factors to consider when pondering the need for disqualification due to campaign contributions. "There are lots of ways to sensitize judges to the standard," he said.

Second, Geyh suggested the need for a procedure ensuring that the recusal decision is not left solely up to the challenged judge, a point also made by Schotland and Hodes. " 'I want you to grade your own paper' is an odd way of doing business," Geyh remarked. Hodes said Caperton can be read as indicating that Benjamin could not make a proper evaluation of the need for his recusal--so the court did it for him.

Geyh also noted that a jurisdiction may allow a litigant one "peremptory strike" of the trial judge assigned to a case.

There are many other ways to improve the process of judicial disqualification, Geyh added, such as adopting a de novo standard of review rather than the usual abuse-of-discretion standard when recusal decisions are reviewed.

These points are set out more fully in the draft Report of the Judicial Disqualification Project, which Geyh authored. He said that the steps the report outlines will be translated into recommendations for the ABA's policy-making House of Delegates to consider, possibly as early as the delegates' midyear meeting in February 2010.

A different decision in Caperton, Schotland said, would have made it extremely difficult for the states to tighten up their approaches to judicial recusal. But now "it's tilted the other way," he said.

Link to Judicial Speech Cases.

Most of the lawyers who gave BNA their thoughts on Caperton brought up Republican Party of Minnesota v. White,536 U.S. 765 (2002), which held that a judicial conduct rule barring judicial candidates from stating their views on disputed legal or political issues violates the First Amendment.

White left people wondering, Phillips said, whether there is any difference between judicial elections and other elections. In Caperton, he said, the

Supreme Court has recognized that the judiciary--even an elected judiciary--is different from other branches of government.

"This is an answer to White," Phillips stated. Those who were worried about the inevitable degradation of the judiciary--a "race to the bottom"--can take some comfort from Caperton, he said.

According to Schotland, Caperton recognizes that "there are fundamental distinctions between judicial elections and other elections." No other elected officials are disqualified due to huge campaign support, he asserted. Caperton means that "we have turned the corner from the White case," he said.

To Hodes, Caperton is most interesting for what it might portend on post-White issues, such as the constitutionality of a rule requiring disqualification when a judicial candidate's statement "appears to commit" the judge to rule a certain way. Rule 2.11(A)(5) of the ABA model code contains that language.

Hodes noted that in Kennedy's concurrence in White, he suggested that although a judge could not be punished for core political speech, states could mandate disqualification for statements during campaigns in some circumstances. Now Kennedy has authored the majority opinion in Caperton finding disqualification mandated as a matter of due process by campaign spending, Hodes pointed out.

It would be deplorable, Hodes said, if judges could be disqualified for statements during a campaign that "appear to commit" the judge to rule a certain way. That would lead to unending manipulation of the judicial disqualification rules and completely undo White, he stated.

'Fanciful Thinking.'

In his comments to BNA, Bopp, who represented the winning party in White, interpreted Caperton as having no relevance at all to the issue of regulating judicial candidates' speech. That's "fanciful thinking" on the part of those inherently hostile to electing judges, he said.

White clearly held, he said, that a candidate's prejudgment on an issue doesn't raise impartiality concerns. Nothing in Caperton addresses this, he said.

The draft Report of the Judicial Independence Project, which has not yet been officially considered or adopted by the ABA, is available for viewing at http://www.abanet.org/judind/pdf/JDP_DRAFT_FOR_DISCUSSION_PURPOSES.pdf .

Two appendices to the draft report, which describe and compare laws and rules on the subject around the nation, are at http://www.abanet.org/judind/ .

Arizona's new judicial conduct code is posted at http://www.supreme.state.az.us/ethics/Supreme_Court_Order_Adopting_New_Code.pdf .

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