Juicy Enough For Grisham, But Does It Have Any Bite?
Caperton v. A.T. Massey Coal Co. and the Impact for Texas Courts

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"A guy owned a coal company. He got tired of being sued. He elected his guy to the Supreme Court. It switched ... back his way. Now he doesn't worry about getting sued."[1]

That is how John Grisham described the facts underlying one of the Supreme Court's most anticipated decisions in the recent term – *Caperton v. Massey*, on appeal from the Supreme Court of Appeals of West Virginia. The case garnered national attention even before it was announced on the Supreme Court's docket, because Mr. Grisham's own recent best-seller tells an almost identical story. In *The Appeal*, the CEO of a company appealing of a multi-million dollar judgment bankrolls an unsuspecting candidate for the Mississippi Supreme Court. His plan? Get the new judge elected so that the judge will, in time, overturn the verdict against the CEO's company.

We won't spoil the ending of the book. We don't need to, because the facts in *Caperton* are equally intriguing. Hugh Caperton sued A.T. Massey Coal Company alleging fraudulent misrepresentation, concealment and tortious interference with existing contractual relations. In 2002, a jury found in favor of Caperton and awarded $50 million in damages. Due to post-trial motions, the case remained in the trial court until 2005.

Meanwhile, the 2004 West Virginia judicial elections took place. Don Blankenship, Massey's chairman, CEO and president, spent $3 million, more than all other contributors combined, to support Brent Benjamin in his successful bid to unseat incumbent Justice McGraw on West Virginia's highest court.[2]

When the *Caperton* case finally reached the West Virginia Supreme Court – which is composed of only five justices at any given time – Justice Benjamin was among its members. In November 2007, with a vote of 3-2 and with Justice Benjamin in the majority, that court overturned Mr. Caperton's $50 million judgment. Caperton moved for rehearing and sought recusal of three of the five judges on the Court on various grounds.[3] Two of the motions were granted, but the one directed at Justice Benjamin was not. On rehearing, the court voted to reverse Mr. Caperton's trial verdict with Justice Benjamin casting the deciding vote.

The Supreme Court Steps into the Mountain State

In June 2009, the United States Supreme Court ruled that Justice Benjamin's failure to recuse himself was a violation of due process under the Fourteenth Amendment. Acknowledging that the issue of judicial elections had never come before the Court, Justice Kennedy concluded that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level."[4] Justice Kennedy noted that Justice Benjamin's subjective analysis of his bias was inadequate, even if accurate. Instead, Justice Kennedy applied an objective test

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[1] Paul J. Nyden, *Novel linked to state election*, Charleston Gazette, Jan. 30, 2008, *available at* http://www.wvgazette.com/News/200801290715.

[2] Mr. Blankenship gave the statutory maximum $1000 to Mr. Benjamin's campaign, donated $2.5 million to "And For The Sake Of The Kids," an organization supporting Mr. Benjamin's efforts to unseat Justice McGraw, and an additional $500,000 on mailings, newspaper and television ads he produced independently to support Mr. Benjamin.

[3] Caperton sought and received Justice Maynard's recusal because of pictures that surfaced of the Justice and Don Blankenship vacationing in the Riviera. Justice Starcher (who was in the minority) recused himself because he had been a vocal public critic of Mr. Blankenship's financial role in the 2004 judicial elections.

[4] *Caperton*, 556 U.S. _____ (2009).

adapted from *Withrow v. Larkin*: "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[5]

The Supreme Court's decision reflects the public concern regarding campaign financing in judicial elections. Thirty-nine states elect at least some of their judges, rather than following a system of executive appointment. Twenty-three states elect members of their highest court. And Texas and West Virginia are two of only seven states that use partisan elections to elect justices of their highest court. Those elections are costing an increasingly large amount of money. The ABA estimates that in 2008, almost $34 million was contributed to state supreme court campaigns.[6] The Brennan Center for Justice found that campaign spending on contested high court elections in the first eight years of this decade totaled $168 million – over five times the amount spent in the 1980s and nearly double the spending in the 1990s.[7]

The increasingly well-funded elections are not going unnoticed by the public. A USA Today/Gallup poll found that 89% of those surveyed considered the influence of campaign contributions on judges to be a problem.[8] A 2007 poll of business leaders found that 79% believed that campaign contributions had at least some effect on the decisions judges made in the courtroom.[9] There is also some concern over the fairness of deciding recusal motions themselves: a 2009 Justice At Stake poll found that 81% of people believed that the judge in question should not be the one deciding the recusal motion – it should instead be left up to a neutral decision-maker.

On the other side of this issue are the concerns Chief Justice Roberts expressed about the workability of the Supreme Court's "new" due process right. In his dissent, he expresses concern that "opening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts."[10] Chief Justice Roberts concluded that the unworkable "objective" standard, along with the foreseeable increase in allegations of judicial bias created many more questions than it answered – he managed to come up with forty in his opinion.[11] Justice Scalia, in a separate opinion, agreed that the opinion did more to undermine confidence in the judiciary than to bolster it, and described his fear of the new "*Caperton* claim" that had been "add[ed] to the vast arsenal of lawyerly gambits."[12]

Indeed, there were "gloom and doom" scenarios on both sides of this issue. Those advocating for Mr. Caperton raised concerns about the appearance of impropriety in the judicial system undermining public confidence. Various *amici* tied the outcome of the case to economic growth, corporate ethical dilemmas, and stagnation of state election reform efforts. Those arguing for affirmation of the West Virginia court's decision invoked specters of an unworkable rule that would unduly burden the courts and lead to increased motions for recusal, over-recusal

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[5] *Caperton*, 556 U.S. _____ (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (internal citations omitted).
[6] John Gibeaut, *Caperton's Coal*, ABA JOURNAL, Feb. 2009, *available at* http://www.abajournal.com/magazine/capertons_coal/.
[7] Joan Biskupic, *Supreme Court case with the feel of a best seller*, USA TODAY, Feb. 16, 2009, *available at* http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.
[8] *Id.*
[9] Justice at Stake – Campaign Spending and the Courts, http://www.justiceatstake.org/node/110.
[10] *Caperton*, 556 U.S. _____ (2009) (Roberts, C.J., dissenting).
[11] *Caperton*, 556 U.S. _____ (2009) (Roberts, C.J., dissenting).
[12] *Caperton*, 556 U.S. _____ (2009) (Scalia, J., dissenting).

by judges, and even mischief on the part of litigants. The opposition also feared that the Court's decision would actually lower the esteem of the judiciary in the public eye and harm judicial impartiality in practice.

Wait, What Just Happened?

With all this hype, it's hard to picture this case as being anything but a watershed case in American jurisprudence. But when one considers the extreme facts of the case and its limited holding, it is unlikely to have a significant effect. A review of current Texas law shows that safeguards are already in place to prevent judicial bias and prejudice from interfering with the administration of justice in Texas courts.

The Texas Constitution contains language governing the base standards for disqualification of judges, providing that "No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case."[13] The Constitution, however, does not define what qualifies as sufficiently "interested" to require removal of the judge from the proceedings.

To fill this void, the Texas Rules of Civil Procedure include guidelines both for the basis of recusal and the proper procedures in seeking that relief. Pursuant to Rule 18b(2)(a), a judge "shall recuse himself in any proceeding" where "his impartiality might reasonably be questioned." (The Texas Rules of Appellate Procedure adopt these same grounds for recusal from the Civil Procedure rules through Rule 16.2.) This rule's language is "imperative and mandatory, not permissive or discretionary; the standard is objective, not subjective."[14] The Rule tracks quite closely the test Justice Kennedy articulates in finding that Justice Benjamin should have disqualified himself. The Supreme Court asks whether there is a "serious risk of actual bias—based on objective and reasonable perceptions."[15]

Interestingly enough, the Code of Judicial Conduct of West Virginia also contains similar language. There, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[16] West Virginia case law similarly follows the standards articulated by the Justice Kennedy in *Caperton*. The Supreme Court of Appeals held that, "Due process requires that the appearance of justice be satisfied," and adopted a standard requiring recusal when "the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused."[17]

It would appear, then, that the problem in the *Caperton* case came not from the lack of proper standards, but instead from the application of those standards in that case. If so, the *Caperton* case will do little more than prevent backsliding from already-established principles in many states, including Texas. Since, as Justice Roberts points out, the Court does little to define the contours of the due process rule, the courts and legislatures of each state will be left to establish the boundaries of the right and the situations requiring reversal.

Some Lone Star Guidance

Some changes to the case law contours of recusal law might be required. Prior to *Caperton,* Texas had soundly rejected the principle that campaign contributions to a judicial

[13] Tex. Const. art. V, § 11.
[14] *Rogers v. Bradley*, 909 S.W.2d 872, 873 (Tex. 1995).
[15] *Caperton*, 556 U.S. _____ (2009).
[16] West Virginia Code of Judicial Conduct Canon 3, subsection E(1).
[17] *State ex rel. Brown v. Dietrick*, 444 S.E.2d 47, 51 (W.Va. 1994) (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

campaign "creates bias necessitating recusal, or even an appearance of impropriety."[18] The rationale for this was spelled out by the San Antonio Court of Appeals in *Rocha v. Ahmad*: "If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts."[19] Of course, the contributions at issue in *Caperton* were made by a litigant and not by an attorney, but the principles are equally applicable – campaign contributions are not inherently disqualifying. "Campaign contributions cannot serve as independent grounds for recusal."[20] While a standard requiring recusal for any donation to a campaign would prove unworkable (and is uncalled for in *Caperton*, as Justice Kennedy repeatedly pointed out the extremity of the facts presented), the courts will need to soften their stance regarding significant campaign contributions and view large campaign contributors with a more critical eye.

In *Rogers v. Bradley*, two justices of the Texas Supreme Court considered the question of whether a video produced by a political action committee to garner support for some Texas Supreme Court members in a general election created a situation that merited recusal of the involved justices, coming to opposite conclusions. Justice Gammage recused himself, articulating a rule that comports with the *Caperton* court's requirements, and requires that "(1) where a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates, and (2) where that effort is made through a medium which is intended to be widely circulated, and (3) where that effort ties the success of the person's or entity's chosen candidate or candidates to the probable result in a pending or impending case, a judge should recuse from participation in that case under Rule 18b(2)(a)."[21]

Justice Enoch, however, refused to recuse himself. Noting that judges have a duty to sit and decide matters before them in the absence of a basis for disqualification or recusal, he argued that there is "as much obligation for a judge not to recuse where there is no occasion for him to do so as there is for him to do so when there is."[22] While he too applies a reasonable person standard, he looks to the activities and conduct of the judge, not of the third party litigant. He concluded that "a judge would not recuse himself or herself merely because others had engaged in normal, even vigorous, campaign activities."[23] Invoking the First Amendment's regard for political speech, Justice Enoch concludes that "[c]itizens' political speech would be unacceptably regulated if they had to fear that their efforts in support of a political candidate, even for judicial office, would remove that candidate from his or her official duties if elected."[24]

Justice Gammage's more cautious approach to recusal is more consistent with the majority opinion in *Caperton*. Contrary to Justice Enoch's approach, *Caperton* shifts the focus from the judge's activities to that of third persons, allowing others' campaign activities, solicited or not, to impact a judge's ability to sit in a particular case. Justice Gammage's test might well be used by the Texas courts as a jumping-off point for the development of a clearer test, and can be a guide for lawyers attempting to predict where the high courts will draw lines in the future.

Tips for the Practicing Lawyer: A Recusal Primer

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[18] *Aguilar v. Anderson*, 855 S.W.2d 799, 802 (Tex. App.—El Paso 1993, writ denied); *J-IV Investments v. David Lynn Machine, Inc.*, 784 S.W.2d 106, 107 (Tex. App.—Dallas 1990, no writ); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.—San Antonio 1983, no writ).
[19] *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App.—San Antonio 1983, no writ).
[20] *Degarmo v. State*, 922 S.W.2d 256 (Tex. App.—Houston [14th Dist.] 1996, pet for discretionary review ref'd).
[21] *Rogers v. Bradley*, 909 S.W.2d 872, 874 (Tex. 1995).
[22] *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., concurring).
[23] *Rogers v. Bradley*, 909 S.W.2d 872, 882 (Tex. 1995) (Enoch, J., concurring).
[24] *Rogers v. Bradley*, 909 S.W.2d 872, 882 (Tex. 1995) (Enoch, J., concurring).

While we acknowledge that this case *should* not bring about a material change in the manner in which lawyers appearing before any court conduct themselves and consider possible recusals, we cannot deny that some fallout from *Caperton* is bound to occur. Further, given a lawyer's duty to always act zealously to protect his client's interests, lawyers should consider – in light of *Caperton* – whether they should seek recusal or disqualification.

As a practical matter, the procedures governing recusal or disqualification of trial court judges are found in Rule 18a of the Texas Rules of Civil Procedure. A motion to recuse must be filed at least 10 days before the date of a trial or hearing, be verified, and state the grounds for recusal or disqualification "with particularity." That motion is either granted by the judge or sent to the presiding judge of the district for hearing. Following a hearing, the presiding judge will either grant or deny the motion. If it is granted, the motion is not reviewable. If it is denied, it will be reviewed only upon final judgment, and under an "abuse of discretion" standard.

Rule 16.3 of the Texas Rules of Appellate Procedure governs motions to recuse for appellate judges. There, a motion must be filed "promptly after the party has reason to believe that the justice or judge should not participate in deciding the case." As with trial court judges, the judge may either grant the motion or certify it to a third party – here, the entire appellate court sitting *en banc* – for review. Denial is reviewable, but a granted motion is not.

Motions for recusal are not without their pitfalls. Rule 18a(h) provides for sanctions if a judge determines that the motion was brought "solely for the purpose of delay and without sufficient cause." Beyond formal sanctions, however, there is always the potential fallout from a failed motion. A Missouri state supreme court justice, Michael A. Wolff, described this colorfully: "I always say if you're going to shoot the tiger, you'd better kill the tiger. If you don't kill the tiger, then you're going to have one angry tiger."[25] While this fear should not dissuade meritorious *Caperton* claims, attorneys should understand that such motions, like most aspects of litigation, carry calculated risks, and an attorney or client should not naively assume that success under this new regime is guaranteed.

An attorney should be cognizant of the political activity of not only his opponent, but his client as well. Most campaign finance information is publicly available, obviating the need for formal requests for this information in many instances. Because the *Caperton* standard turns on the appearance of impropriety rather than actual bias, newly available claims will probably come from public information. Counsel should of course still consider the possibility of actual bias that may disqualify judges from presiding over particular cases.

As is true with so many Supreme Court precedents, we may not really understand *Caperton*'s impact until the next case interpreting it is announced by the Court. In the meantime, attorneys may rest assured that the standards enunciated in *Caperton* do not deviate significantly from those already observed in the Texas courts. Texas case law already exists to help navigate the uncharted waters until further guidance is provided either in Texas or by the federal courts. Fascinating facts, to be sure, but we foresee that *Caperton* will not turn the Texas justice system on its head.

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[25] ABA Article Caperton's coal.