

Judicial Ethics Update

**Superior Court Judges Summer
Conference**

Asheville, North Carolina

**Paul Ross
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Formal Advisory Opinions

FAO 2009-01

Q May a new judge continue as manager of an inactive PLLC?

A No, a judge should not serve as an officer, director or manager of any business

Clear distinction in the Code between business entities and civic/charitable/cultural entities

Canons 4C, 5B & 5C(2)

FAO 2009-02

Q May a new judge, Former ADA, hear cases prosecuted by the District Attorney's office?

A Yes, provided the judge disqualifies from hearing any matter wherein the judge

- 1) was involved in the investigation or prosecution
- 2) has personal knowledge of disputed evidentiary facts
- 3) believes he/she cannot be impartial

Relationships between attorneys working in the DA's office distinguishable from those between attorneys working together in a private law firm. Division of duties between attorneys prosecuting in district and superior court, multi-county districts, volume of cases prosecuted in district criminal court impact the reasonableness standard by which a judge's impartiality must be considered.

Six Month Rule still recommended

Canons 3C(1)(b) and 3D

(Draft) FAO 2009-03

- Q May a judge use listserv for expert advice?
- A No, if for advice from disinterested expert on the law applicable to proceeding B/4 the judge – OK for general practice/procedure

Problems w/ ex parte, impartiality, disclosure, confidentiality, independence, public records

Canons 1 2A 2B and 3A(4)

(Draft) FAO 2009-04

Q Must a judge DQ if attorney owns title ins business that employs judge's spouse?

A Judge should disclose relationship, if motion to DQ, either grant motion or allow another judge to hear motion

Criminal cases may be addressed by DA waiver

Canons 1 2B 3C(1)(a)

(Draft) FAO 2009-05

Q Must a judge resign before becoming a candidate for election as clerk of superior court?

A No, clerk of superior court is a judicial office

Resign-to-run only applies to non-judicial offices

Canons 7B(5)

(Draft) FAO 2009-06

Q May a judge hold membership in the Black Political Caucus?

A Yes, no evidence the organization practices “illegal discrimination”

Canons 1 2A 2C

Public Reprimands

08-151 Misused official position to assist sister's domestic matter

- Attempted to influence magistrate to issue temporary 50B order
- Requested clerk add case to docket contrary to court policy
- Attempted to keep husband's attorney out of 50B hearing during heated public exchange
- Attempted to influence presiding judge

08-234 Ex parte review of party's web site and Facebook communication with attorney

- Independent online research of party's business
- Quoted poem from web site in order (site info was not in evidence)
- Responded to postings about the pending case on attorney's Facebook page

Caperton

Caperton v. A. T. Massey
Coal Co., Inc., 556 U.S. _____
(2009)

5-4 decision of US Supreme Court reversing West Virginia Supreme Court of Appeals 3-2 ruling which reversed a \$50 million trial court verdict.

Due Process Clause of the US Constitution

Timeline

- August 2002 - \$50 million jury verdict
- November 2004 - WV Sup Ct elections
- March 2005 - final post trial motions
denied
- October 2005 - Pre-appeal motion to DQ
- April 2006 - Motion to DQ denied

- December 2006 - Appeal filed
- November 2007 - WV Sup Ct reversed 3-2
- January 2008 - Petition for rehearing
- January 2008 - Motion to DQ
- March 2008 - Motion to DQ
- March 2008 - Rehearing
- April 2008 - WV Sup Ct reversed 3-2

Blankenship Contributions

- \$1,000 statutory maximum to campaign
- almost \$2.5 million “And For The Sake Of The Kids” (527 political organization that opposed McGraw and supported Benjamin)
- over \$500K on independent expenditures

Benjamin wins by less than 50,000 votes

\$3 Million Support Perspective

- More than all other Benjamin supporters combined
- 3 X more than Benjamin campaign committee
- \$1 million more than both candidate's campaign committees combined

Due Process, Disqualification & Recusal

“the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47

- Financial interest in outcome of the case
- Certain criminal contempt

Objective Standards

“We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.”

Ruling

We find that Blankenship's significant and disproportionate influence-coupled with the temporal relationship between the election and the pending case-““offer a possible temptation to the average . . . judge to . . . lead him

not to hold the balance nice, clear and true.””” *Lavoie*, 475 U. S., at 825 (quoting *Monroeville*, 409 U. S., at 60, in turn quoting *Tumey*, 273 U. S., at 532). On these extreme facts the probability of actual bias rises to an unconstitutional level.

Extreme Facts

“Our decision today addresses an extraordinary situation where the Constitution requires recusal.”

“The facts now before us are extreme by any measure.”

No Coming Flood

- Extreme case
- Didn't happen in the past
- Codes of judicial conduct

Roberts Dissent

- “Probability of bias” cannot be defined in any limited way
- Increased allegations of judicial bias
- 40 questions
- Judges now must be political scientists, economists and psychologists
- Flood of extreme/extraordinary/rare claims

Scalia Dissent

“What above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully

self-perpetuating but incapable of delivering real-world justice. The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the Caperton claim.”