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Trials&TRIBULATIONS

Bright line rule on judge recusal about to be visible

On Feb. 15, Chief Judge Jonathan Lippman announced new rules regarding the assignment of judges in New York to cases in which the judge has been the recipient of a contribution of $2,500 or more to his or her campaign committee within the previous two years. In essence, the proposed rules provide that no case shall be assigned to a judge other than in an emergency if the assignment would be to a case in which the attorney or the party in the case has contributed $2,500 or more individually, or $3,500 collectively by multiple plaintiffs or defendants or an attorney's law firm.

By MICHAEL R. WOLFORD
Daily Record Columnist

According to Chief Judge Lippman, these rules have been under consideration for some time but have been given greater impetus since the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 U.S. 2252 (2009). In that case, decided by a 5-4 vote, the majority held that Justice Benjamin, who was the recipient of a $3 million contribution from Massey Coal CEO Don Blankenship, should have recused himself from the case that reviewed the jury award of $50 million against Massey Coal Co.

Massey appealed to the West Virginia Supreme Court and Justice Benjamin was the deciding vote in a 3-2 decision, which reversed the damage award and exonerated Blankenship's Massey Coal Co.

The proposed changes to Part 151 of the Rules of the Chief Administrator of the Courts were published, and the comment period runs from Feb. 18 through April 29. If you are interested in submitting a comment to these proposed rules, you are encouraged to send them, in writing, to John McConnell, Counsel, Office of Court Administration, 25 Beaver St., New York, N.Y. 10004, or via email to rulecomments@nycourts.gov.

Chief Judge Lippman, who has promoted the adoption of these new rules, stated in an interview published in The New York Times on Feb. 13: "Nothing could be more important for the judiciary than to have the public see that we are neutral arbiters of disputes, if we don't have that, we don't have anything."

It is interesting to consider the impact the proposed rules would have within the Seventh Judicial District. In reviewing the Judicial Campaign Committee Financial Disclosure Statements for the past two years (available at www.elections.state.ny.us), it is worth noting that if these rules had been in effect, the attorneys in a number of major law firms in the area would have been precluded from practicing before certain judges since the firm's campaign contributions exceeded the $3,500 limit.

It is also interesting to speculate as to whether some law firms or attorneys might choose to adopt the "poison pill" method by contributing over the limit to a particular judge in order to avoid having that judge assigned to their cases. Similarly, in a small county where there are two or less county court judges such as Livingston, Wayne, Yates and Steuben counties, the proposed rules could have a significant impact on the assignment of cases if contributions exceed the $2,500 threshold.

Other grounds for recusal under state law

At present, the only provision that serves as a basis to file a motion to recuse a judge is contained at §14 of the Judiciary Law. This provision essentially provides that a judge will not preside in any case in which he has been the attorney, or in which he is a party, or related to a party within the sixth degree.

It also provides that a judge shall be deemed disqualified from being involved in a case because of the ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys in writing or in open court, waive any claim as to the disqualification of the judge. There is no present provision dealing with contributions to a judge's campaign committee.

Despite the absence of a campaign contribution provision as a basis to disqualify a judge, such a claim was still made in a case pending in New York County in which it was alleged that the case should not be transferred to Livingston County since the justice scheduled to preside was the recipient of a campaign contribution

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from the attorneys representing one of the parties.

The trial court rejected the argument and the Appellate Division, First Department affirmed in *Anderson v. Belke*, 80 A.D.3d 453 (First Dept. 2011) explaining: "Not every campaign contribution by a litigant or an attorney creates a probability of bias that requires a judge's recusal and this is no exceptional case. See *Caperton v. A.T. Massey Coal Co.*, 129 U.S. 2252 (2009)."

If the new rules become effective, there will not be a probability of bias but, rather, a presumed bias if there is a contribution of $2,500 or more.

With the passage of these new rules, we will now have a bright line rule that, in essence, will disqualify a judge from sitting on any case in which the party or his or her attorney has contributed more than $2,500 or the law firm in which the attorney is employed or is a partner, has contributed $3,500 or more. No discretion will be exercised.

Federal standard for recusal

Federal judges need not worry about campaign contributions since they are all appointed, but the basis for a recusal motion in federal court is contained at 28 U.S.C. §455, entitled "Disqualification of justice, judge, or magistrate judge." As it suggests, this section governs the basis for a recusal directed to a U.S. Supreme Court justice down to a magistrate. The section covers a number of potential grounds, including a case in which the judge has a personal bias, or has been involved in the proceeding either in private practice or in government employment, or where he or she would have a financial interest in the controversy.

As with recusal motions elsewhere, the judge has to decide whether or not the basis for recusal is well-founded. Recently, Justice Elena Kagan chose to recuse herself from 25 of the 51 cases the court accepted this term because of potential conflicts due to her prior position as solicitor general. The difficulty with a Supreme Court justice stepping aside is the absence of any substitute judge and, as a result, the potential of a 4-4 decision is more likely to occur.

In light of that potential deadlock, there is a proposal in Congress to empower the Supreme Court to appoint a retired justice to fill in if a justice recuses himself or herself from a case.

One of the more noteworthy cases of recusal in federal courts is the case involving Justice Antonin Scalia, who was asked to disqualify himself in a motion filed by the Sierra Club in connection with the case involving Vice President Dick Cheney's refusal to disclose the proceedings before a National Energy Policy Development Group meeting.

Before the case came before the Supreme Court, Justice Scalia and his son accompanied Cheney on an Air Force flight to Louisiana for a duck hunting vacation. Although there was a flood of editorials from newspapers throughout the country, and cartoons as well, clamoring for the justice to step aside, he refused and issued in 2004 a 21-page opinion in which he explained why the motion to recuse him from the case lacked merit.

In essence, he declared that he would rule impartially and he belittled the claim that a simple trip on a government plane with his friend the vice president would cause him to be partial. As he said: "If it is reasonable to think that a Supreme Court justice can be bought so cheap, the nation is in deeper trouble than I had imagined," *Cheney v. United States District Court for the District of Columbia, et al.*, 541 U.S. 913, 929 (2004).

In his opinion, Justice Scalia pointed to historical examples of close relationships with justices and high ranking administration officials, and none of them caused the justices to step aside when cases involving those same government officials, in their official capacity, came before them. A few months after issuing his opinion, Justice Scalia joined with the majority and rejected the requests for access to the Energy Group's documents.

Although four justices on the Supreme Court do not believe that a $3 million contribution was grounds to disqualify a justice on the West Virginia Supreme Court, New York courts are on the verge of adopting the most restrictive rules in the country for disqualifying a judge from hearing a case based upon a campaign contribution of $2,500 or more.

It has been previously expected that judges should be unaware of the identity of contributors and the amount of their contributions to campaign committees, however it will now become mandatory that they be conversant with such information, and as Chief Judge Lippman stated in the New York Law Journal article of Feb. 15: "[T]he view that judges either are prohibited from learning about who their campaign contributors are, or manage to avoid finding out, even when attending their own fundraisers, is, 'Not really compatible with the society we live in today.'"

Hopefully, these new rules will have a positive impact on the public's view of the judiciary as well as the administration of justice in this state.

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