



# MONEY & POLITICS REPORT

Reproduced with permission from Money & Politics Report, September 21, 2009, 9/21/2009. Copyright © 2009 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

## Judicial Elections

### Action Seen on State Rules After Caperton But Impact of High Court Ruling Still Unclear

**N**EW YORK—A U.S. Supreme Court ruling in June, which said the Constitution's due-process clause required recusal of a West Virginia state justice in a case involving a major campaign supporter, has already prompted at least 10 states to look at strengthening their rules on recusal of judges, supporters of such efforts said at a conference here Sept. 17.

The states are looking at the issue in order to deal with increasing questions about whether justice may be "for sale" to campaign contributors, suggested panelists at a conference at Baruch College sponsored by the nonprofit Center for Political Accountability and the Zicklin Center for Business Ethics Research.

The Supreme Court's recent 5-4 decision in *Caperton v. A.T. Massey Coal Co.*, (U.S., No. 08-22, 6/8/09) involved \$3 million in independent spending by a coal company owner to aid the election of a favored candidate to the West Virginia Supreme Court. The ruling was hailed by political reformers, but legal experts have said the potential impact of the case on financing judicial races or other campaigns is not yet clear.

Three law professors who are experts on the issue, Roy Schotland of Georgetown University, Penny White of the University of Tennessee, and James Sample of Hofstra University indicated they were encouraged by the new attention to recusal rules as a way to deal with persistent questions about the role of money in state judicial elections. But, the professors acknowledged that tough questions have to be faced to establish a workable system.

Such issues include:

- what dollar level of campaign funding might prompt recusal and

- whether a defined time limit or changes in circumstances might eventually end the requirement for a judge to be recused in a particular case.

**Pitfalls Predicted by Roberts.** Another panelist was Jeffrey Berger of the law firm Mayer Brown, which represented the respondent, Massey Coal Co., in the West Virginia case decided by the Supreme Court. Berger noted that the dissenting opinion in the *Caperton* case by Chief Justice John Roberts highlighted the tough questions that would have to be addressed in deciding when state judges should be recused from cases involving campaign supporters.

Roberts' dissent also predicted a flood of new appeals that would cite the *Caperton* decision to accuse state judges of possible bias. This prediction, Berger said, has already begun to come true, with scores of new cases citing the *Caperton* decision in the three months since it was handed down (114 DER C-1, 6/17/09).

Schotland responded by suggesting most of these new appeals are frivolous and will be easily dismissed by the courts.

Despite their optimism about the effects of the *Caperton* decision, those backing constraints on spending in judicial races also acknowledged that the case is not necessarily aligned with other Supreme Court cases involving campaign financing and campaign conduct.

Cases citing First Amendment rights for unfettered campaign speech and spending have been gaining ground in recent years and could pose a challenge to those who argue that money distorts the judicial process and the public image of the courts. This concern was highlighted by White, the University of Tennessee professor who is a former justice of the Tennessee Supreme Court.

**Tough Decisions for Companies.** The major case now pending before the high court is *Citizens United v. Federal Election Commission*, which involves a constitutional challenge to a ban on direct campaign spending

in congressional and presidential elections by corporations and unions.

A potential decision by the Supreme Court to loosen the restrictions on corporate spending in federal elections could require companies to face more tough decisions about campaign involvement at the federal level, in addition to the choices they already face at the state level, according to attorney Karl Sandstrom of the law firm Perkins Coie.

Sandstrom, a former Democratic member of the Federal Election Commission, worked on briefs for the Supreme Court on behalf of the Center for Political Accountability and the Zicklin Center in both the *Caperton* and *Citizens United* cases. He spoke on a second panel at the Sept. 17 conference, along with business leaders Landon Rowland and Charles Grezlak and Heritage Foundation fellow Robert Alt.

The brief filed by Sandstrom in the *Citizens United* case warned about the potential impact on federal campaigns if billions of dollars in corporate earnings could be targeted to those campaigns. The comments he and others made in the panel discussion focused on the issues that are faced by companies themselves as they decide whether to fund campaigns.

Sandstrom suggested companies should set up a process to consider the political impact and other consequences of their campaign spending decisions

and to guard against these decisions being controlled by the personal preference of company managers or lobbyists.

Another panelist, Grezlak, head of government affairs for Merck & Co., outlined how his company had addressed the issue by deciding to make public information about all of its political spending and to refrain from providing money in virtually all state judicial races. He said Merck decided not to fund judicial campaigns because of the ethical issues raised for the company itself through involvement in this activity.

BY KENNETH P. DOYLE