always Appealing: Disqualification of Appellate Court Judges

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By Catherine W. Smith

What might or should cause the recusal or disqualification of an appellate court judge has been in the news again recently because of the political activities of Ginni Thomas, U.S. Supreme Court Justice Clarence Thomas's wife. Last month's Bar Bulletin (March 2022) contains an interesting article, "Keeping Up With the Thomases," on the topic, from our esteemed editor, Christopher Young. But this is not a new issue, of course. Over a decade ago, I chaired a task force of the American Academy of Appellate Lawyers that addressed disqualification of appellate judges, when the issue was being brought to the forefront of the public's attention by the facts and decision in Caperton v. A.T. Massey Coal Co., Inc.1

In Caperton, the U.S. Supreme Court recognized that there are circumstances in which the appearance of bias of an appellate decisionmaker will violate due process. It said disqualification is required when there is "a serious, objective risk of actual bias"; the majority of the Court found such a risk in the size of the campaign contributions made by the owner of Massey Coal to the election of a justice of the West Virginia Supreme Court who voted to overturn a $50 million verdict against the company.

But, as Chief Justice Roberts's dissent noted, the majority decision in Caperton provided little "guidance to judges and litigants about when recusal will be constitutionally required." Roberts's dissent identifies 40 questions that courts may have to resolve in future disqualification cases. Yet there is very little case law to guide the practitioner, or the courts, in deciding future challenges.

The Academy task force was an effort to begin establishing the principles that should govern the disqualification of appellate judges. The Academy is a non-profit, national professional association of lawyers invited to become members based on their experience in appellate practice and related post-trial activity in state and federal courts, dedicated to the improvement of appellate practice, the administration of justice, and the ethics of the profession.

Academy members from throughout the country served on the task force, which was initially appointed to survey and study the state of judicial selection and disqualification in the states. After reviewing relevant statutory and regulatory provisions, case law, and available literature, the committee quickly decided to focus its efforts on trying to establish principles that should govern the disqualification of state appellate court judges.

The Academy chose to focus on state appellate courts because of its members' experience and knowledge of those courts and the difficult issues raised by disqualification in the various state court systems, where appellate judges generally are neither appointed by an executive officer and confirmed by a legislative body nor hold their positions for life. Washington's Code of Judicial Conduct and similar provisions in other states provide substantive guidance, but there are very few rules or statutes governing disqualification at the appellate level. And in most states, as in Washington, there are statutory provisions for disqualification of trial court judges,2 and cases interpreting those provisions, but very little direction concerning recusal or disqualification of appellate court judges.

In proposing that clearly articulated procedures should govern disqualification of appellate decision-makers, the Academy explained that procedural standards for appellate court judicial disqualification were particularly important because appellate courts make law, interpret constitutions, and lead the judiciary in their jurisdictions. Appellate courts play a key constitutional role, arising from "[d]ifferences in the institutional competence of trial judges and appellate judges."3 Bias or perceived bias of a decisionmaker in the appellate courts affects not only the immediate case before the court, but also other cases and other legal transactions that depend upon precedents created by appellate decisions. The appearance of bias, let alone actual bias, causes the public to lose respect for and confidence in the judicial system. "Not only is a biased decisionmaker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness."4

Indeed, if the bias of an appellate decisionmaker affects their reasoning about an appeal, then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of stare decisis. Appellate opinions "collectively form the body of the common law" and "govern what a trial judge does, even if no appeal is ever taken in a particular case. . . ."5 Decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. The text of the opinion deciding a case may have as much effect on future litigants and on others who depend on the state of the law as it does for the immediate parties to a case.

Not every action by an appellate court creates precedent or resolves a constitutional dispute, of course. Correcting trial court error is another important role played by appellate courts. For more than two centuries, the American people have made provision for appellate courts in their state constitutions, to elevate fairness and equal application of justice over the risks of local bias and the fallibility of trial judges acting alone. Overwhelmingly, state constitutions and statutes provide a right of review. Today, first resort is usually to an intermediate court that emphasizes the error-correcting function. When trial court decisions are reviewed, they should be reviewed carefully to ensure that they are free of improper influence, and that the review itself is free from taint.

Appellate oversight of trial courts brings consistency to the legal system as a whole. That oversight must be exercised without bias. For that reason, why an appellate court decides a case a certain way can be as important as what the court decides. When an improper factor taints appellate decision making, it also distorts the process of explaining judicial reasoning — i.e., writing opinions — that is at the heart of an appellate court's mission.

With all those considerations in mind, the task force recommended, and the Academy adopted, a paper recommending that every State have in place clearly articulated procedures for appellate judicial disqualification that incorporate eight protections for the public and the litigants:

1. The right to review on the merits by judges whose impartiality cannot reasonably be questioned.

2. The right to be timely informed of who will decide an appeal.

3. The right to seek disqualification of any member of the merits panel pursuant to clearly articulated procedures.

4. The right to know who will decide a disqualification request.

5. The right to decision on any disqualification request before an appeal is submitted on the merits.

6. The right to be informed of grounds for disqualification of any member of the merits panel.

7. Review of the disqualification decision pursuant to clearly articulated procedures.

8. Replacement of a disqualified judge to maintain a quorum or prevent a tie.

We are lucky in Washington that the sort of conduct that led to the decision in Caperton has not been an issue. Still, in my view the principles articulated in the Academy's paper remain valuable. Yet little progress has been made in any jurisdiction to ensure that they are procedurally safeguarded. The discussion is worth continuing. Over the next few months, then, I hope occasionally to return to discussion of these principles in "Always Appealing," more fully explaining the bases for these proposals found in judicial conduct codes and due process principles.

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1 556 U.S. 868 (2009).

2 See, e.g., RCW § 4.12.040.

3 Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001).

4 Withrow v. Larkin, 421 U.S. 35, 47 (1975) (quoting In re Murchison, 349 U.S. 133, 136 (1955).

5 Daniel J. Meador, Maurice Rosenberg and Paul D. Carrington, Appellate Courts: Structures, Functions, Processes, and Personnel xxxi-xxxii (Michie 1994).

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