



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 5

TO: MEMBERS OF THE SPECIAL COMMITTEE ON JUDICIAL DISCIPLINE AND
RECUSAL

FROM: Jessica Karls-Ruplinger, Staff Attorney

RE: Disqualification of Judges Under Federal Law and the Due Process Clause

DATE: September 9, 2010

This Memo describes the process for disqualification of judges under federal law and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The discussion of the Due Process Clause in this Memo highlights the decision of the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252 (2009).

Disqualification of Federal Judges

A federal justice, judge, or magistrate judge is required to disqualify himself or herself in proceedings in which the judge's impartiality may reasonably be questioned. [28 U.S.C. s. 455 (a).] The U.S. Supreme Court has stated that the "purpose of [28 U.S.C. s. 455 (a)] is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible [and that] it is critically important ... to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality." [*Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988).]

In addition, the following are specific circumstances under which a federal justice, judge, or magistrate judge is required to disqualify himself or herself:

1. Where the judge has a personal prejudice or bias regarding a party or personal knowledge of evidentiary facts that are disputed in the proceedings.
2. Where, in private practice, the judge served as an attorney in the matter; the judge practiced law with an attorney who served during their association as an attorney in the matter; or the judge or an associated attorney has been a material witness in the matter.

3. Where the judge, in government employment, participated as counsel, adviser, or material witness in the proceedings, or expressed an opinion regarding the merits of the case.
4. The judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child who resides in the judge's household, has a financial interest in a party to the proceeding or in the subject matter in controversy, or any other interest that may be affected substantially by the outcome of the proceedings.
5. The judge, the judge's spouse, an individual within the third degree of relationship to either the judge or the judge's spouse, or the spouse of such an individual is: (a) party to the proceeding, or any trustee, officer, or director of a party; (b) acting as an attorney in the proceeding; (c) known by the judge to have an interest that may be affected substantially by the outcome of the proceeding; or (d) to the judge's knowledge, likely to be a material witness in the proceeding. [28 U.S.C. s. 455 (b).]

Further, a judge must inform himself or herself about his or her fiduciary and personal financial interests, and the judge must make a reasonable effort to inform himself or herself about the personal financial interests of the judge's spouse and minor children who reside in the judge's household. [28 U.S.C. s. 455 (c).]

If the ground for disqualification of a federal judge is based on the specific circumstances outlined in items 1. to 5., above, then a federal judge may not accept a waiver from the parties to the proceeding for the judge's disqualification. However, a federal judge may accept a waiver if the only ground for disqualification is that the judge's impartiality may reasonably be questioned. [28 U.S.C. s. 455 (e).]

Due Process Clause: Caperton v. A.T. Massey Coal Co.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ___, 129 S. Ct. 2252 (2009), the U.S. Supreme Court addressed the application of the Due Process Clause to the issue of judicial recusal. The Due Process Clause of the Fourteenth Amendment provides that no state may deprive a person of life, liberty, or property, without due process. The court has recognized that a requirement of due process is a fair trial and fair tribunal.

In August 2002, a jury verdict of \$50 million in compensatory and punitive damages was entered against A.T. Massey Coal Company for concealment, fraudulent misrepresentation, and tortious interference with contracts. The trial court denied motions challenging the jury verdict and damages.

In 2004, West Virginia held a judicial election in which Justice McGraw, a candidate for reelection, faced an opponent, Brent Benjamin, for the West Virginia Supreme Court of Appeals. Don Blankenship, the President, Chief Executive Officer, and Chairman of Massey, spent approximately \$3 million to get Benjamin elected, through campaign contributions to Benjamin, donations to a political organization, and independent expenditures. The \$3 million spent by Blankenship was three times the amount that was spent by Benjamin and exceeded the amount spent by other supporters of Benjamin. Benjamin won the election.

In December 2006, Massey appealed the \$50 million jury verdict to the West Virginia Supreme Court of Appeals. The court reversed the verdict by a 3-2 vote, with Justice Benjamin in the majority. During the court's consideration and subsequent rehearing of the case, several motions were made to recuse Justice Benjamin, all of which were denied by Justice Benjamin. The U.S. Supreme Court granted certiorari.

In *Caperton*, the question addressed by the U.S. Supreme Court was whether the Due Process Clause was violated when Justice Benjamin denied a recusal motion that was based on Justice Benjamin's receipt of an extraordinary amount of campaign contributions from Blankenship. The court recognized that most matters of judicial recusal do not involve constitutional considerations and that many matters of judicial recusal are governed by statutes and judicial codes.

The court stated that where due process is involved, the Court uses an objective standard that provides "that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case." [*Id.* at 2259, quoting *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441 (1927).] In addition, the court stated that there are "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.'" [*Id.*, quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975).]

In *Tumey*, a village mayor sat as the judge on certain cases. For acting as judge, the mayor was paid a salary supplement that came from the fines assessed for convictions in the cases he tried, and the criminal fines were deposited into the general treasury of the village. The *Tumey* court found that recusal was required because the mayor had a direct pecuniary interest in the cases he tried through the salary supplement. In addition, the mayor had a motive to convict because it helped the village financially. The court stated the following principle in *Tumey*:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. [*Tumey*, 273 U.S. at 532, 47 S. Ct. at 444.]

Subsequent decisions developed this principle. [See *Ward v. Monroeville*, 409 U.S. 57, 93 S. Ct. 80 (1972) (due process requires recusal for a mayor acting as judge with no direct pecuniary interest but with an interest in assessing fines for the town's general treasury); and *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986) (due process requires recusal where a justice was lead plaintiff in an identical case in the state's lower courts).]

In *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623 (1955), the court described an instance where a judge's participation in an earlier proceeding in a case required recusal. The general rule cited by the court was that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." [*Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.] For example, in *Murchison*, the court set aside two contempt convictions where the judge charged, tried, and convicted the individuals of contempt.

In addressing the recusal of Justice Benjamin, the court emphasized the need for an objective test for recusal that does not require proof of actual bias. The court stated that:

We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election. [*Caperton*, 129 S. Ct. at 2263-64.]

Further, the court stated that:

Due process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.’” [*Id.* at 2264 (citations omitted).]

The court found that Blankenship’s \$3 million in spending had a disproportionate and significant impact on the election of Justice Benjamin. Further, the Court noted the importance of the timing of the election and the status of the *Massey* case. The court found that the impact on the election and the timing may tempt a judge “‘not to hold the balance nice, clear and true.’” [*Id.* at 2265 (citations omitted).] Therefore, according to the court, the Due Process Clause required the recusal of Justice Benjamin.

The court remanded the case to the Supreme Court of Appeals of West Virginia, which reversed the jury verdict and remanded the case to the circuit court to dismiss the case against Massey.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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