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## Of Caperton, contributions and the courts

By Ann M. Lousin

On June 8, 2009, the U.S. Supreme Court decided that under narrow circumstances, the refusal of a judge to recuse himself in a case in which a party made substantial financial contributions to the judge's election is a violation of the Due Process Clause of the U.S. Constitution.

The holding in *Caperton v. A.T. Massey Coal Co.* has ramifications for Illinois, where the Supreme Court justices, the Appellate Court judges, and most of the circuit court judges are elected by the voters. Judicial campaigns have become incredibly expensive. In 2004, the Supreme Court races in West Virginia, where *Caperton* originated, and Illinois set new records. Contributions on behalf of both candidates for the Supreme Court seat in the 5th District in Illinois totaled over \$9 million.

The litigant in *Caperton* gave \$2.5 million to a section 527 organization called "And For the Sake of the Kids," which in turn assisted the judicial candidate's campaign although the funds were apparently not under his control. The litigant gave only \$1,000 of his personal funds to the candidate's campaign because that is the campaign contribution cap in West Virginia. He also gave a half-million in "in kind" contributions. Thus, of the total of \$3 million he contributed, \$2.5 million was an indirect contribution to an independent section 527 organization.

This is beginning to occur in Illinois. Section 527 organizations were a dominant force in the 2004 Supreme Court race. The frightening thing about this development is that these section 527 organizations, although not part of the candidate's campaign, are becoming such an integral part of judicial races that they may force a judge to recuse himself under the *Caperton* criteria.

The Supreme Court listed four paramount factors in making the determination that due process required recusal in *Caperton*. Even the dissenters to the majority opinion did not question those four factors; their dissent was simply based upon the fear that the opinion is so open-ended that almost any disappointed litigant will now file a petition for certiorari before the U.S. Supreme Court.

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The summary in *Caperton* listed these factors:

- 1) "the contribution's relative size in comparison to the total amount contributed to the campaign";
- 2) "the total amount spent in the election";
- 3) "the apparent effect of the contribution on the outcomes"; and
- 4) "the temporal relationship between the campaign contributions, the justice's election, and the pendency of the case."

At the end of the majority opinion, the five justices pointed out that the ABA Model Code of Judicial Conduct, Canon 2, contains a test for the appearance of impropriety: "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." (Canon 2A) They suggested that the states might adopt a similar standard.

It seems to me that Illinois should respond to *Caperton* by taking three steps.

First, *the Illinois Supreme Court should amend its rule on disqualification of judges, Rule 63, to include the Caperton factors specifically.*

Currently, Rule 63(C)(1) opens with language similar to that of the ABA Model Canon: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where...." A list of specific situations follows, none of which relates to campaign contributions.

One could argue that the *Caperton* situation, which was extreme, fits within the general language in the current Illinois rule. However, absence of a specific guideline regarding contributions means that almost any litigant can raise a *Caperton* challenge in

Illinois. I suggest that the Illinois Supreme Court amend Rule 63 to incorporate the *Caperton* factors specifically.

Second, *Illinois needs a constitutional amendment allowing for a substitution of a Supreme Court justice when one of the seven Supreme Court justices must recuse himself.*

Three years ago, an ISBA-CBA task force on the judiciary co-chaired by James J. Ayres and myself suggested such a recusal policy. Our task force recommended that an appellate court judge from the same judicial district as the Supreme Court justice who recused himself be chosen by lot to sit as a "temporary Supreme Court justice." After *Caperton* there may be more recusals. The General Assembly should draft and propose a recusal amendment to be submitted to the voters at the November 2010 election.

Finally, *Illinois should consider re-structuring the system of financing judicial campaigns.*

The campaign reform bill passed by the General Assembly last month, House Bill 7, establishes a commission to study public financing of judicial campaigns. Experience in other states suggests that public financing, whether by a surcharge upon lawyers' licenses or by an appropriation from general revenue funds, does not work with partisan judicial elections. Illinois would have to establish the non-partisan election of judges, which it can do by statute.

Another issue is whether public campaign financing should extend to judicial primaries. In the Cook County Judicial District, the vast majority of the judicial races are decided in the party primaries. If we continue to have partisan election of judges, what should be the campaign financing regulations regarding primaries?

These are just three suggestions for an Illinois response to *Caperton*. Although the decision can be interpreted very narrowly, it is clear that litigators will begin to use its holding to ask judges to recuse themselves. Just a few years ago, a litigant asked an Illinois Supreme Court justice to recuse himself in a case involving an insurance company that had participated in the justice's campaign. He refused to recuse himself.

Today, the litigant would threaten a *Caperton* appeal to the U.S. Supreme Court. Illinois should try to avoid these appeals by enacting the reforms suggested.