Judicial Disqualification: What Next for Connecticut?

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By Thomas J. Donlon

In a single week last June, both the Connecticut Supreme Court and the U.S. Supreme Court issued decisions on the standard for judicial disqualification. On June 2, 2009, the Connecticut Supreme Court released its decision in *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*[1] Six days later, the U.S. Supreme Court issued its decision in *Caperton v. Massey Coal Co.*[2] The two opinions address different, yet related, bases for judicial disqualification. *Rosado* deals with the application of the Code of Judicial Conduct, while *Massey* considers the role of the Due Process Clause of the Fourteenth Amendment. Although the decisions do not conflict, the result in *Massey* raises questions whether future Connecticut disqualification motions and appeals may change in both number and complexity and whether that may affect the public's perception of our state judiciary.

Rosado and the Appearance of Bias

The disqualification issue in *Rosado*[3] arose at the intersection of two separate events that received considerable public attention in Connecticut. The lawsuit involved efforts by newspapers to obtain information from sealed court files about settled cases that had alleged sexual abuse by Roman Catholic priests. The motion to disqualify resulted from steps taken to address court secrecy after the political firestorm arising from former Chief Justice Sullivan's withholding of a decision denying application of the Freedom of Information Act to court records.[4]

While presiding over the efforts to unseal files in *Rosado*, Judge Alander of the Waterbury Complex Litigation Docket was appointed to a task force created by

Acting Chief Justice Borden to "make recommendations for the maximum degree of public access to the courts, *consistent with the needs of the courts in discharging their core functions of adjudicating and managing cases*…."[5] Judge Alander served as co-chair of the task force's subcommittee on access to court records. A reporter for the *Hartford Courant*, one of the parties seeking the sealed records in *Rosado*, served on that subcommittee.[6]

Based on Judge Alander's role in the task force, defendants moved to disqualify for the appearance of bias under Canon 3(c)(1) of the Connecticut Code of Judicial Conduct, which states that a "judge should disqualify himself or herself in a proceeding in which *the judge's impartiality might reasonably be questioned*…."[7] Judge Alander denied the motion and proceeded to rule that most of the records should be available to the media.

On appeal, the Connecticut Supreme Court reviewed general principles regarding judicial disqualification. The Court noted: "[d]isqualification is required even when no actual bias has been demonstrated if a judge's impartiality might reasonably be questioned because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority."[8] An objective standard applies to this determination. On appeal, the trial judge's decision is reviewed for abuse of discretion. Such review requires "a *sensitive evaluation* of all the facts and circumstances" since "[j]udges who are asked to recuse themselves are reluctant to impugn their own standards" and "judges sitting in review of others do not like to cast aspersions."[9] Applying this standard, in light of the express authorization in the Code of Judicial Conduct for judges to engage in activities to improve the legal system, the Connecticut Supreme Court held "Judge Alander did not abuse his discretion in denying the defendant's motion to recuse himself."[10]

Massey and the Probability of Bias

Meanwhile in West Virginia, a $50 million jury verdict against Massey Coal Company triggered a chain of circumstances that ultimately led to the U.S. Supreme Court. Before an appeal of the jury's verdict was filed in the West Virginia Supreme Court, Massey's CEO contributed more than $3 million to the campaign of attorney Brent Benjamin for election to that court. After Benjamin won the election defeating an incumbent justice, Massey filed its appeal. Plaintiffs moved to disqualify Benjamin on due process grounds. Benjamin denied the motion, relying on the absence of any evidence of actual bias. Then Benjamin provided the decisive vote in a 3–2 decision overturning the $50 million verdict.[11]

After the West Virginia Supreme Court's decision, plaintiffs sought a rehearing when pictures appeared of another justice in the majority vacationing on the French Riviera with Massey's CEO. That justice, plus a member of the dissent who had made public statements criticizing the role of Massey's CEO in the election, recused themselves. As a result, Benjamin became acting Chief Justice and selected two judges to replace those recused. Benjamin denied further disqualification motions and again joined a 3–2 majority setting aside the jury's verdict.[12]

The U.S. Supreme Court granted *certiorari* to decide whether the Due Process Clause required Benjamin's disqualification. Justice Kennedy, writing for the majority, held that the Due Process Clause does not require proof of actual bias: "[d]ue process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."[13] The majority applied an objective standard, based upon "reasonable perceptions" to determine if a probability of bias existed.[14] On the "extreme facts" in *Massey*, the majority concluded that due process required reversal of the decision of the West Virginia Supreme Court.[15]

Even the dissent in *Massey* did not try to justify Benjamin's refusal to recuse himself. Instead, Chief Justice Roberts focused on the potential impact of recognizing a separate due process right to disqualification: "[t]his will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be."[16] Justice Scalia, in his separate dissent, argued that due process disqualification "can be raised in all litigated cases in (at least) those 39 states that elect judges."[17]

The majority opinion rejected the dissent's argument that the decision would precipitate "a flood of recusal motions," since the "facts before us are extreme by any measure."[18] The majority also pointed to the adoption by almost every state of the Code of Judicial Conduct provision concerning disqualification when "impartiality might reasonably be questioned."[19] As a state may establish more rigorous standards for disqualification than the Due Process Clause provides, the majority concluded "most disputes over disqualification will be resolved without resort to the Constitution."[20] Whether the majority's, or the dissent's, view of the future is correct will determine whether *Massey* heralds a new era of disqualification in Connecticut.

A Due Process Path Previously Followed

Prior to *Rosado*, the Connecticut Supreme Court had addressed claims that a denial of disqualification violated a party's due process rights. For example, *State v. Eric M* dealt with a request that the trial judge recuse himself from sentencing in a sexual assault case. The defendant's motion specifically relied upon violation of his due process rights under the Fourteenth Amendment. The Connecticut Supreme Court reviewed the issue under the abuse of discretion standard. The opinion referred to the language of Code of Judicial Conduct Canon 3(c)(1) and caselaw interpreting that provision, in holding that no abuse of discretion occurred.[21]

In *Burton v. Mottolese*, the appellant brought a writ of error against the trial judge for disbarring her as a sanction for misconduct. Although the appellant moved in the trial court to disqualify the judge for bias, there is no indication she relied on the Due Process Clause. In her writ of error, however, counsel did argue that her due process rights had been violated. The Connecticut Supreme Court again analyzed the due process claim considering Canon 3(c)(1) and concluded, based "[u]pon our thorough review of the record," that the trial court's action did not reflect either actual bias or the appearance of partiality.[22]

State v. Peeler concerned a capital murder defendant's claim, raised for the first time on appeal, that the trial judge's failure to disqualify himself *sua sponte* violated due process. Once more, the Connecticut

Supreme Court analyzed the claim with reference to the Code of Judicial Conduct to determine that the judge's *in camera* review of allegedly privileged material did not require disqualification.[23]

The most recent Connecticut case to consider whether a failure to disqualify violated due process is *State v. Canales*. In *Canales*, the Connecticut Supreme Court, relying on pre-*Massey* caselaw from the U.S. Supreme Court, found that the appearance of impartiality requirement of the Code of Judicial Conduct did not apply to due process claims. As a result, the Connecticut Supreme Court held that only proof of actual bias could establish a due process claim. "Even if we were to agree that an appearance of bias arose from those circumstances, we would not conclude that the trial court's actions violated due process *without some indication of actual bias*."[24]

The conclusion in *Canales* cannot survive *Massey*, as *Massey* held proof of actual bias is not necessary for due process disqualification.[25] The question going forward is whether the Connecticut Supreme Court will attempt to maintain a distinction between due process disqualification motions and those based upon Connecticut's Code of Judicial Conduct. Or will the Court continue to rely upon the principles of the Code of Judicial Conduct to determine due process claims as it did in *Eric M*, *Burton,* and *Peeler*?

The Path Ahead after Massey

The majority opinion in *Massey* does not provide clear guidance for state courts to determine which path to follow. Justice Scalia believes the law governing due process disqualification after *Massey* "will be indeterminate for years to come, if not forever."[26] Chief Justice Roberts' dissent sets out 40 separate questions, which he contends *Massey* leaves unanswered.[27]

The problem derives from Justice Kennedy's failure to explain how *Massey's* due process standard differs from that of the Code of Judicial Conduct. *Massey* confirms that neither requires evidence of actual bias. The majority states *Massey's* probability of bias test focuses on "objective and *reasonable perceptions*."[28] Yet, as Justice Kennedy points out, the Code of Judicial Conduct "test for appearances of impropriety is whether the conduct would create in *reasonable minds a perception*," that the judge's impartiality is impaired.[29] If both tests deal with perception of impartiality, where lies the boundary?

The majority's constant reiteration of the "extreme" facts may indicate its hope of containing *Massey's* application. However, extreme facts are in the eye of the beholder. As the dissent points out, "all future litigants will assert that their case is really the most extreme so far."[30] Factual distinctions alone are of little use in establishing the boundaries of a constitutional right once one is recognized.

In Connecticut, *Massey's* repudiation of the actual bias requirement in *Canales* leaves the remaining elements of the two types of disqualification motions looking very similar. Both require an objective standard and both look to Code of Judicial Conduct principles. Even if the Connecticut Supreme Court was willing to move away from its earlier decisions' specific reliance on Code principles for due process claims, *Massey* makes many more disqualification motions likely.

Driving this from the advocate's point of view will be the standard of review. The Connecticut Supreme Court has consistently applied the abuse of discretion standard. A *Massey* due process violation, however, is not subject to that standard. By invoking due process as the basis, or at least an alternative to the Code of Judicial Conduct basis, for a disqualification motion, the advocate will be assured of a *de novo* review on appeal. Any differences that may exist between a *Massey* due process claim and one under the Code of Judicial Conduct are too small to stop a good lawyer from phrasing a motion to encompass both.

The opportunities for meaningful review also will reduce the present pressure on trial attorneys not to bring recusal motions for fear of antagonizing the trial judge whose denial of the motion was almost always found not to be an abuse.[31] Although the Connecticut Supreme Court undertakes a "sensitive evaluation" of the trial court's decision,[32] a *de novo* review gives the appellant a better chance of success. *Massey* may well have opened a Pandora's Box, substantially increasing disqualification motions and appeals.

What Will the People Along the Path Think—And Do?

Beyond increased caseload, *Massey's* recognition of a Constitutional right to disqualify has the potential to damage the judiciary in the eyes of the public. Chief Justice Roberts warned that the "end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case."[33] Justice Scalia echoed this concern: What above all is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win . . . The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the Caperton claim.[34]

Connecticut does not have election of judges, but that does not immunize our state judiciary from the political process. At the end of an eight-year term, judges must be recommended for reappointment by the Judicial Selection Commission. Although that is an independent body concerned with merit selection, politics controls thereafter. The governor must renominate the judge for another term.[35] Following the governor's renomination, the judiciary committee of the General Assembly must approve the reappointment, a process which may (and often does) include a public hearing.[36] Finally, the reappointment must be confirmed by a vote of both houses of the General Assembly.[37]

Since 2006, this process, particularly the public hearing before the judiciary committee, has become more contentious. No longer are such hearings *pro forma*, but they can entail probing questions about a judge's actions or alleged unsuitability. As judges have been called on to address emotional issues such as race, gender, and alcohol, decisions on due process motions to disqualify could easily become a subject of such hearings.

The disqualification cases receiving the most public attention so far have been those, like *Massey*, where the judge refused to recuse himself or herself. But disqualifying oneself every time counsel makes a motion is no solution. That would only embolden attorneys seeking to remove judges merely for strategic reasons. Furthermore, the

public may become just as disenchanted with a judge who recuses herself too frequently for the appearance of partiality as a judge who refuses to disqualify himself. Either could become a hot topic at a public hearing, particularly where the motions were framed as "denial" of due process.

The problem of public perception predates *Massey*. However, in the past, the combination of fewer disqualification motions and the abuse of discretion standard significantly reduced their public impact. Should the numbers increase substantially, and the appellate courts have to issue more opinions on a *de novo* review, what previously may have been viewed as a limited individual problem may become seen as a systemic one, requiring public response through the political process. Changes in law and procedure, not always for the best, often result from public outcry.

Attorneys should be conscious of the impact on public perception of their choices during litigation. The recognition by *Massey* of a due process claim should not lead to open season on judges. Real cases of even the appearance of bias are rare. When they occur, attorneys must defend the rights of their clients. However, should *Massey* become, as Justice Scalia predicted, merely another routine motion, the public's perception, and the availability of political means to act on that perception, could lead to threats to judicial independence detrimental to all litigants.

Massey will bring change to the treatment of recusal issues in Connecticut. How much and what kind remains to be seen. **CL**

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Notes

1. 292 Conn. 1 (2009)
2. ___ U.S. ___, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)
3. The *Rosado* case had previously been before the Connecticut Supreme Court in 2005. The earlier decision, *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168 (2005), affirmed the intervenors status and remanded the matter to the trial court for further proceedings.
4. *See Clerk of Superior Court v. Freedom of Information Commission*, 278 Conn. 28 (2006).
5. *Rosado*, 292 Conn., at 14 (emphasis in original).
6. *Id*., at 15-16.
7. *Id*., at 13 n. 10 (emphasis added).
8. *Id*., at 20.
9. *Id*., at 21 (emphasis added).
10. *Id*., at 28. *Rosado's* description of the test for disqualification and standard of review follows Connecticut precedents applying the Code of Judicial Conduct. *See, e.g., Abington L.P. v. Heublein*, 246 Conn. 815, 823-4 (1998) (holding the trial judge abused his discretion); *Bonelli v. Bonelli*, 214 Conn. 14, 19-22 (1990) (applying objective standard to determine trial judge did not abuse his discretion).
11. *Massey*, 129 S.Ct., at 2256-2258.
12. *Id*.
13. *Id*., at 2265.
14. *Id*., at 2263.
15. On remand with Chief Justice Benjamin recused, the West Virginia Supreme Court on November 12, 2009 once again overturned the jury verdict by a vote of 4-1.
16. *Id*., at 2267; *see also id*., at 2273.
17. *Id*., at 2274.
18. *Id*., at 2265. Justice Kennedy repeatedly points out that the facts are extreme or "exceptional" or "extraordinary." *Id*., at 2263.
19. *Id*., at 2266; *see also* ABA Model Code of Judicial Conduct (2009), Canon 2, Rule 2.11. Connecticut adopted the language from an earlier version of the Model Code.
20. *Massey*, 129 S. Ct., at 2267.
21. 271 Conn. 641, 643-9 (2004).
22. 267 Conn. 1, 30-34 (2003).
23. 271 Conn. 338, 401-401 (2004). The Court in *Peeler,* citing *Abington*, 246 Conn., at 825, noted that its review was plenary. Since the defendant in *Peeler* never moved to disqualify, the trial judge had no opportunity to exercise his discretion and review for abuse was impossible. In *Abington*, the Court first reviewed the trial judge's ruling for abuse of discretion. Finding abuse, where the judge applied the wrong legal standard, the Court conducted a further plenary review to decide that the appearance of partiality required disqualification. *Id*.
24. 281 Conn. 572, 595 (2007) (emphasis added).
25. *See Massey*, 129 S. Ct., at 2263.
26. *Id*., at 2274.
27. *See Id*., at 2269-2272.
28. *Id*., at 2263 (emphasis added).
29. *Id*., at 2266 (emphasis added).
30. *Id*., at 2272.
31. Of all of the Connecticut Supreme Court cases cited above, only in *Abington* was the denial of a disqualification motion reversed on appeal.
32. *See, e.g., Rosado*, 292 Conn., at 21.
33. *Massey*, 129 S. Ct., at 2267; *see also id*., at 2272 (motions will bring "judges and the judicial system into disrepute").
34. *Id*., at 2274.
35. Conn. Gen. Stat. § 51-44a.
36. Conn. Gen. Stat. § 2-40.
37. Conn. Gen. Stat. § 2-42.