The battle over an Appalachian mine exposes a nasty vein in bench politics

CAPERTO

BY JOHN GIBEAUT

THE HARMAN MINE IN SOUTHWESTERN VIRGINIA'S BUCHANAN County was a rickety skeleton when lifelong coal man Hugh M. Caperton purchased it in 1993. But Caperton, a native of Slab Fork in neighboring West Virginia, saw gold in those Appalachian hills.

The mine yielded high-grade metallurgical coal, a hot-burning and especially pure variety that steel mills crave to fuel the blast furnaces used to make coke needed in their production process. By the end of 1993, the mine's yield had increased to 1 million tons a year, quadruple its previous output. Caperton also replaced the contract workers who used to ply the precious bituminous with 150 union miners in one of the nation's poorest states.

Then along came A.T. Massey Coal Co. and its CEO, Don L. Blankenship. Massey, which has headquarters in Richmond, Va., wanted the high-grade coal too. But Caperton at first was unwilling to sell, despite what he described as warnings from Blankenship: "He basically threatened me and said, 'Don't take me to court. We spend a million dollars a month on lawyers, and we'll tie you up for years.' "

Blankenship wasn't lying. Through a series of complex, almost Byzantine transactions, including the acquisition of Harman's prime customer and the land surrounding the competing mine, Massey both landlocked Harman with no road or rail access and left Caperton without a market for his coal even if he could ship it.

Caperton finally cried uncle in early 1998 and agreed to sell. But on the day the deal was to go down, Massey got up and walked away, sending Caperton to court instead of the bank.

"On the day of the closing, at 2 o'clock in the afternoon, they called the whole deal off," Caperton recalls. "They tanked us at the last second. It forced us into bankruptcy."

So after a stop at the federal bankruptcy court to file a Chapter 11 petition, he hauled Massey into West Virginia state court on various allegations of fraud and tortious contract interference. He won a $50 million jury verdict.

Blankenship appealed until the last cow straggled home. Besides his efforts in the courtroom, Blankenship also plunged into judicial politics—West Virginia-style—raising some $3 million in 2004 on behalf of an unknown Charleston lawyer named Brent D. Benjamin, who wanted a seat on the West Virginia Supreme Court of Appeals, the state's highest court. Both sides knew the case undoubtedly would wind up there.

Benjamin defeated a controversial Democratic incumbent in the partisan contest for the 12-year term. Sure enough, the case wound up before a court that included new Justice Benjamin.

Concerned that the seven figures in campaign backing could influence

the case's outcome, Caperton's lawyers asked Benjamin to disqualify himself. He not only refused but also twice cast the third and deciding vote to reverse the judgment against Massey, the last time on April 3 after rehearing.

But Caperton wasn't quite ready to shrivel and die. The U.S. Supreme Court agreed to review his case in mid-November. In arguments scheduled for March 3, the justices will ponder whether Benjamin violated Caperton's 14th Amendment due process right by accepting the millions in campaign support from Blankenship, then deciding the case anyway.

Benjamin declined comment. Calls to Blankenship and his company's lawyers went unreturned.

Critics complain that tossing around such big bucks jeopardizes the system's integrity and independence by suggesting that justice is for sale on some clearance rack parked behind the courthouse. And a sharp rise in contributions to judicial races moved the ABA Standing Committee on Judicial Independence to attempt to clear up the often foggy rules for disqualification. The committee plans to submit its recommendations to the House of Delegates at the association's 2009 annual meeting in Chicago in August.

"Survey after survey reports that 80 percent of the public believes money influences judicial decision-making," says chair William K. Weisenberg, an assistant executive director for the Ohio State Bar Association in Columbus. "What we're dealing with here is a perception that just isn't right."

APPEARANCES MATTER

JUDICIAL DISQUALIFICATION DATES to Roman law, which liberally allowed parties to remove jurists deemed "under suspicion." As the English common-law tradition evolved, however, grounds for recusal tightened considerably, focusing nearly exclusively on whether the judge held a financial stake in the case.

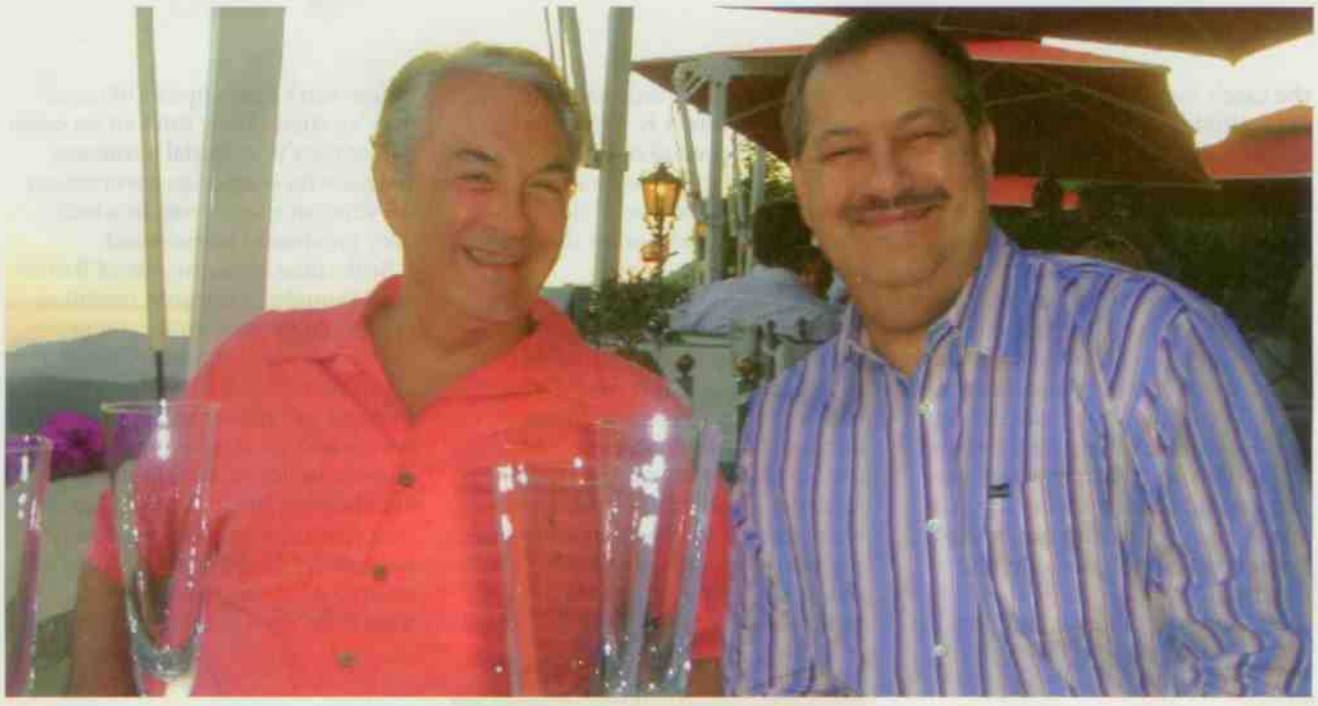
As the American version developed, legislators, courts and model ethics codes had little trouble translating some specific conduct into black-letter grounds for recusal. For example, judges can't hear appeals of cases they've tried. They can't sit on cases where they're material witnesses. Judges who worked as government lawyers can't hear cases in which they previously participated.

Still, there are remnants of British legal thought that create troubling practical and philosophical tensions to this day for U.S. judges facing recusal questions. For one, a duty to sit arose so cases in small jurisdictions won't go wanting for resolution in the absence of an unquestionably evenhanded jurist. The obligation to hear cases can become especially nettlesome for intermediate appeals courts and courts of last resort, where the pool of replacement judges is considerably smaller than at the trial level.

More difficult, however, are accusations of bias, because judges often equate recusal with a failure to impartially administer

N'S COAL

INFOGRAPHIC BY S. LAYTON



Former Justice Elliott Maynard (left) with Massey CEO Don Blankenship on the French Riviera in July 2006

This photo, which came to light in January 2008, raised a few eyebrows in West Virginia, where Blankenship's company had a controversial case before the court. The photo played a part in Maynard's unsuccessful bid for re-election four months later.

justice. Disqualification for bias was not an option in England.

In the United States, attempts to identify such situations through statutes and court rules have been less than successful.

Rule 2.11 of the ABA Model Code of Judicial Conduct requires disqualification "in any proceedings in which the judge's impartiality might reasonably be questioned." The ABA and the majority of court jurisdictions stress both actual impropriety and the appearance of impropriety.

While most states and the federal courts have emulated catch-all provisions like the ABA's, only two states have adopted a 1999 addition that demands recusal when a state judge receives a certain amount in campaign contributions from a party or lawyer.

West Virginia is not one of those. It is one of 39 states that picks its judges through some form of election. And while fundraising and consequent conflicts of interest can occur in any scheme—head-to-head partisan elections, nonpartisan races and retention ballots—most of the allegations of conflict seem to arise in partisan elections.

Not surprisingly, lawyers and business interests combine for anywhere from half to two-thirds of money donated to judicial candidates in a given year.

The big money breakout came in 2000, when candidates for state supreme court seats raised $45.6 million, 60 percent more than the $28.2 million raised just two years before, according to the Brennan Center for Justice at New York University School of Law.

That figure dipped to $29 million in 2002, then bounced back to $42 million in 2004. In 2008, state supreme court campaigns were projected to collect nearly $34 million, about the same as in 2006.

Although few judicial races involve fundraising with the intensity found in West Virginia, most judges have to guard against conflicts in their workaday worlds. Even federal judges, with lifetime appointments, must pay attention to what people and what documents pass through their courts. Personal, family, business and professional relationships also can sow seeds for a recusal motion alleging bias.

Still, many judges grope in the dark. No one even knows how often judges are actually asked to withdraw.

U.S. District Judge Charles N. Clevert Jr. of Milwaukee says pro se petitions almost always demand disqualification. Clevert says he relies on the reasonableness of the complaint.

"The first thing that goes through my mind is whether there is anything in the [recusal] motion relating to a prior decision or something in this case," says Clevert.

Even with regular litigators whom he knows, the more facts alleged, the more likely the recusal motion will succeed on grounds of bias in Clevert's court.

"If there are some facts in the rea-

sonableness complaint that aren't way out in left field, then that certainly could trigger a situation that could give rise to a recusal," Clevert says.

In Missouri, state supreme court Judge Michael A. Wolff compares motions for disqualification to juror selection in high-profile cases, where prospective panelists are asked whether they can set aside outside knowledge and decide the case as it's presented in court.

"When the guy says yes, we usually go ahead and let him be seated," Wolff says. Judges especially need to apply that standard to the lawyers who appear before them, he says.

"Judges have special connections with lawyers," Wolff explains. "That's who our friends are. That's who we went to law school with. 'Can I set it aside?' If a judge says, 'Yes, I can,' then he probably can go ahead and sit. But you know what? It can look bad.

"If you can't explain it in a simple sentence, then you probably have something bad," he says. This is where the similarity to jury selection ends.

"Nobody cares who the juror is," Wolff says. "At the end of the case he goes home. He's anonymous. But the judge has a higher calling to set an example."

WEIGHING THE RECUSAL

IN 2003 THE ABA OFFERED UP ANOTHER, even stricter addition to the Model Code—since adopted in 11 states—requiring recusal when judges make statements outside court that appear to predispose them to rule a particular way in certain kinds of cases. In 2002, the Supreme Court held in *Republican Party of Minnesota v. White* that such restrictions violate the First Amendment speech rights of judicial candidates.

Indiana University law professor Charles Geyh, author of a report supporting the ABA recommendations, says the states have yet to demonstrate a full understanding of the *White* case.

"When it does come, it will be harder to disqualify judges because it puts them at odds with the electorate when you can't do what you promised," says Geyh.

The dearth of case law or other documentation also makes it tough to determine exactly why judges reject disqualification attempts. Geyh's report offers some suggestions.

Judges, he says, may refuse motions because they truly believe they can act fairly. Others may decline if they detect an attempt to gain a more sympathetic venue.

In some cases, clever court operators could try to force recusals of unsympathetic judges by seeding their campaign funds with donations. And granting a recusal motion could seem an endorsement of accusations.

Most often, however, lawyers are reluctant to ask for recusal for fear of failure.

"I always say if you're going to shoot the tiger, you'd better kill the tiger," Wolff says. "If you don't kill the tiger, then you're going to have one angry tiger."

While disqualification proceedings usually go unnoticed in the shadows, many potential conflicts, such as modest campaign giving, simply don't rise to the level of disqualification.

Caperton's lawyers could face questioning from the Supreme Court justices on what amounts may affect due process and thus open a disqualification inquiry. Though *White* addressed verbal comments by candidates, the justices also have long held that campaign donations are a form of First Amendment expression. But cases like the $3 million lunker from West Virginia are hard to hide.

"The magnitude and timing of the campaign contributions here gave Justice Benjamin, in appearance if not in fact, a personal interest in the outcome of this case," the ABA argued in an amicus brief supporting Caperton's cert petition. "If the facts of this case do not implicate due process concerns, then few judicial contribution cases ever will."

Caperton's lawyers call the case one of a kind. Though Massey CEO Blankenship apparently had shown little interest in donating to other political campaigns for statewide offices like governor or the legislature, he didn't mess around in channeling millions of dollars and other means of support to elect Benjamin.

In motions asking Benjamin to recuse himself, Caperton's lawyers recited Blankenship's fundraising and spending in head-throbbing detail. One version regurgitates a 26-page chunk of factual recitations and argument along with 84 appendices and exhibits.

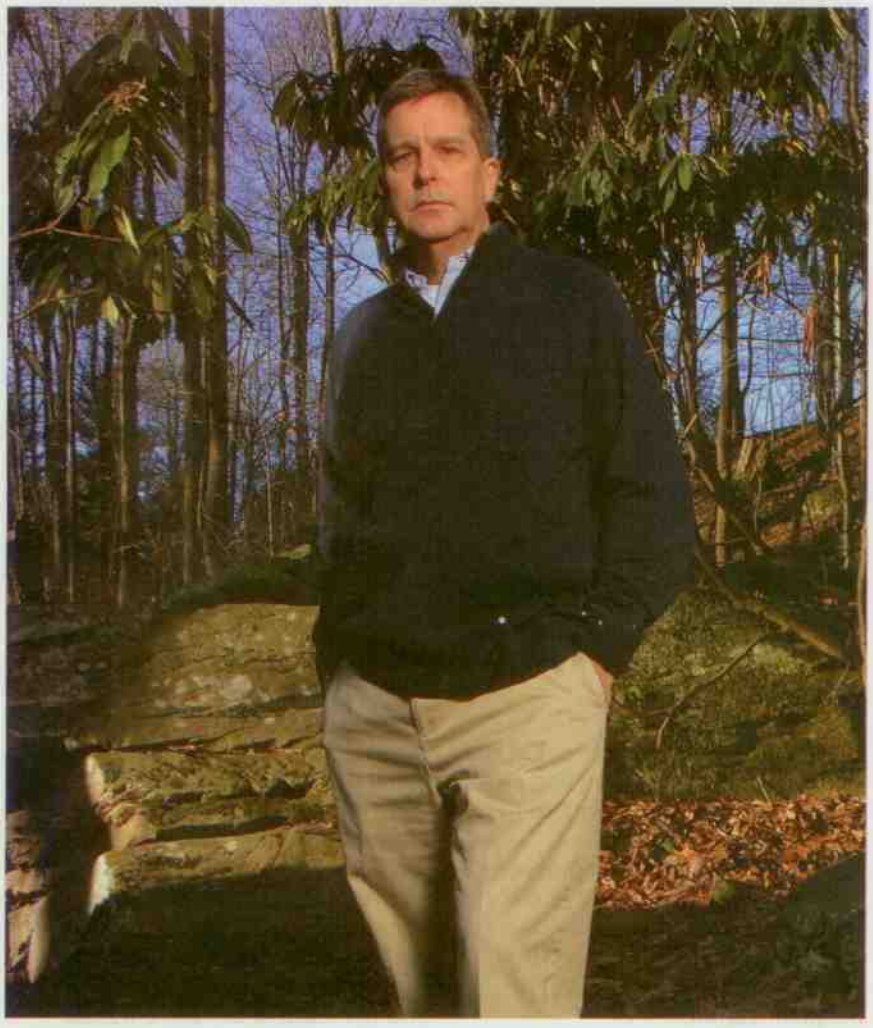
"It's been surreal—what happened in that litigation," says Caperton lawyer David B. Fawcett of Pittsburgh. "We've never seen anything like what occurred."

UPPING THE ANTE

AS HIS OPTIONS BEGAN TO WANE FOR getting the $50 million judgment reduced or tossed out, Blankenship moved quickly. In August 2004 he formed a section 527 organization—so named for the part of the Internal Revenue Code that allows such groups to collect money to support or oppose candidates.

Blankenship's 527, called And for the Sake of the Kids, was designed not to work for Republican challenger and political novice Benjamin, but to use televised attack ads to work for the defeat of Warren McGraw, the Democratic incumbent. McGraw was under intense public heat for joining an unsigned opinion that placed a convicted child molester on probation. Blankenship also maintained that "anti-business rulings" by McGraw poisoned the Mountain State's economic climate.

Of the $3.6 million the group raised, $2.4 million came from Blankenship, with 25 other contributors uniting to shell out the remaining $1.1 million. The organization ranked fifth nationally among other 527s in the amount raised in a state election. Blankenship also contributed $515,000 in direct support



Hugh Caperton: "I've spent every nickel I've ever had trying to right this wrong."

to Benjamin's campaign committee, while other donors chipped in the remaining $330,000 of the $845,000 the committee raised.

Then Benjamin went public.

"Nobody, including the people we practice law with, knew who Brent Benjamin was," says Caperton lawyer Bruce E. Stanley of Pittsburgh. "Then the billboards started popping up."

They asked a good question: "Who is Brent Benjamin?" Stanley realized a political machine had started its engine. Benjamin drove it right over McGraw in the November 2004 election, garnering 53 percent of the vote.

By November 2007, the Caperton case arrived at the state high court and was promptly ushered out on a 3-2 vote that reversed the $50 million award and included Benjamin in the majority. Benjamin supplied the decisive third vote on rehearing in April 2008 to again pitch the judgment.

Benjamin never acknowledged Caperton's disqualification motions. Caperton's lawyers never got to argue them orally or received an explanation for the decision.

RIVIERA SNAPSHOT

MEANWHILE, BLANKENSHIP'S RELATIONS with other members of the high court began receiving notice in early 2008 when photos surfaced of Blankenship vacationing on the French Riviera with Justice Elliott "Spike" Maynard. Though he insisted he paid his own way and did nothing wrong, Maynard withdrew from the coal case in January 2008. His term as a justice ended last year with his defeat in the May primary. He did not respond to requests for comment.

Meanwhile, Justice Larry V. Starcher, an especially vociferous and public critic of Massey and its practices, had a run-in with Blankenship, who not only wanted him off the Caperton matter but also has asked the U.S. Supreme Court to use his harsh attacks to disqualify Starcher from another Massey case, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*

Starcher, who retired in January, dissented in the first Caperton decision but withdrew before the rehearing. He declined comment, but in his written recusal he hinted that Blankenship had disrupted the state supreme court's business.

"The simple fact of the matter is that the pernicious effects of Mr. Blankenship's bestowal of his personal wealth, political tactics and 'friendship' have created a cancer in the affairs of this court," Starcher wrote.

Benjamin did not write an opinion when the court again held for Massey on April 3. Caperton asked the U.S. Supreme Court for cert on July 2. Three weeks later, Benjamin added a concurrence to the state court's April ruling.

Caperton had not accused Benjamin of acting improperly or actually being prejudiced by the campaign contributions. But from Benjamin's perspective, actual bias is all that counts in West Virginia.

"The fundamental question raised by the appellees and the dissenting opinion herein is whether, in a free society, we should value 'apparent or political justice' more than 'actual justice,' " Benjamin wrote in the concurrence, filed July 28.

"Actual justice is based on actualities," he asserted. "Through its written decisions, a court gives that transparency of decision-making

PHOTOGRAPH BY STEVE BRIGHTWELL

"THE PERNICIOUS EFFECTS OF MR. BLANKENSHIP'S BESTOWAL OF HIS ... 'FRIENDSHIP' HAVE CREATED A CANCER IN THE AFFAIRS OF THIS COURT." —JUSTICE LARRY STARCHER

needed from government entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court's legal analysis, but rather by the political acceptability of the case's end result as measured by dominant partisan groups such as politicians and the media, or by the litigants themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias."

THE FEAR FACTOR

FAWCETT SAYS IT'S TOO EASY TO SIMply blame the decision on a political atmosphere unique to West Virginia. He suggests that Massey's economic power also loomed large in the background. Massey is the nation's fourth-largest coal company and the state's major employer.

"There are certain people who will say that's just the way it is down there, including Don Blankenship," Fawcett says. "But people were afraid. He's the largest employer in the state. Who's going to call him out on that? Even the lawyers were quiet. They all were afraid."

In the short run, Fawcett, Stanley and their client are headed to Washington, D.C., where former Solicitor General Theodore B. Olson will argue their position to the justices. Long term, both lawyers are in agreement when asked how to solve the campaign contribution conundrum once and for all: "The easiest and simplest way to do it is through public financing."

Taxpayer funding may be the most viable option. Last spring, in *Duke v. Leake*, the Richmond, Va.-based 4th U.S. Circuit Court of Appeals affirmed North Carolina's state financing scheme, the nation's first for judicial elections. The Supreme Court declined to review its decision.

To be sure, disqualification issues involving bias still can arise in publicly financed systems. Nevertheless, state campaign funding appears to relieve pressure on judges and dampen the giving spirits of the usual suspects in recusal proceedings.

In an amicus brief filed with the 4th Circuit, former North Carolina judges maintained that the 2002 law works and has attracted participation by a majority of candidates. Perhaps more telling, contributions from business interests in 2004 judicial races were only a third of those in 2002. Contributions from lawyers dropped by 75 percent.

"As a result, the public is less likely to feel that wealthy parties with access to wealthy attorneys who have contributed to judicial campaigns are treated more favorably than those without such access," the former judges maintained.

Meanwhile, the ABA judicial independence panel postponed its proposals until summer in order to accommodate a decision in the Caperton case and to respond to comments on a draft report and recommendations circulated in October. As things stood in the fall, the committee planned to present a list of principles on which to base specific policies and procedures to govern disqualification.

"What we need to do is create clarity," says chair Weisenberg. "We run into a lot of gray here. We want to clear up the gray as much as possible to assist the judiciary."

Highlights of the draft recommendations include:

- Disclosure by a judge, at the start of a case, of "all information known by that judicial officer that might reasonably be construed as bearing on that judicial officer's impartiality."
- Recusal decisions made by a judge other than the subject of a disqualification motion. In Illinois, for instance, disqualification motions are automatically reassigned. Judges can testify on their own behalf, but they are not required to do so.
- A more rigorous standard of appellate review, particularly in states where judges review their own recusal. While great deference is given to the decisions of a trial judge in most cases, the ABA argues that standard should change when the judge is, in effect, reviewing himself.
- Written response to a contested disqualification motion. By explaining a recusal decision, a judge reassures the parties and the public, and creates a record of his reasoning for use in any appeals.
- Peremptory challenges, which allow a lawyer to remove a judge without cause, much the same as in jury selection. Such challenges—already permitted in Arizona—would allow reassignment within 10 days and cannot be for delay.

At 53, Caperton says the case has taken its toll not only on his bank account, but also on his health.

"It's miserable," he says. "It's like living in purgatory. It's cost me everything I've got. I've spent every nickel I've ever had trying to right this wrong."

At the end of a two-hour interview, Caperton pauses to consider his daughter, born just a few months before the case was filed. The 11-year-old must figure her dad is a lawyer, Caperton says, because he regularly hangs out with them so much in court. "That's all she's ever known." ■

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