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VIA UPS OVERNIGHT

Edward A. Adams
Editor and Publisher, ABA Journal
321 N. Clark Street 15th floor
Chicago, IL 60610

Re: *Article on Caperton v. A.T. Massey Coal Co.*

Dear Mr. Adams:

I saw on your website the article Caperton's Coal, by John Gibeaut, about the pending Supreme Court case of *Caperton et al.* v. *A.T. Massey Coal et al.* I gather that the article will be published in the forthcoming edition of the ABA Journal. I am counsel of record in the Supreme Court for the Massey parties and write to ask that you correct certain striking errors in the story:

First, the article states that Benjamin "accept[ed] the millions in campaign support from Blankenship" and that Mr. Blankenship "contributed $515,000 in direct support to Benjamin's campaign committee." This is a significant error. Mr. Blankenship contributed only $1,000 to the Benjamin campaign. All the rest of the expenditures were independently made, either through ASK or directly by Blankenship, without any consultation with or control by Justice Benjamin, who cannot accurately be said to have "accepted" any of it.

In fact, Blankenship and Benjamin did not know each other at all, and do not to this day have any personal contact or relationship. Moreover, Benjamin did not solicit these contributions, which were motivated by Blankenship's strong disagreements with rulings by Benjamin's adversary, Warren McGraw.

Second, the article reports that "Massey CEO Blankenship apparently had shown little interest in donating to other political campaigns for statewide offices like governor or the legislature." In fact, as our brief in the Supreme Court (which will shortly be posted at http://www.appellate.net/briefs/CapertonvAT_Massey_No_08-22.pdf., and a copy of which I attach) recounts, Blankenship has a record of making very substantial expenditures on other West Virginia political issues having nothing to do with Massey's business, including legislative races in which he opposed lawmakers who wished to repeal the sales tax exemption for food purchases and a bond referendum that he opposed.

Third, the article states that Benjamin didn't "go public" (which I assume means announce his candidacy) until ASK raised $3.6 million. This is chronologically inaccurate.

Benjamin commenced his candidacy no less than four months before ASK was created, and a sizeable portion of ASK's money was raised and expended right before the election.

Fourth, the author asserts that "Benjamin never acknowledged Caperton's disqualification motions." This statement is baffling. Justice Benjamin issued three written orders denying the motions and wrote a lengthy opinion on the subject.

Fifth, the article neglects to mention that Massey companies have had numerous other cases before the West Virginia Supreme Court of Appeals during Justice Benjamin's tenure on that court, and in every one of them except this, Benjamin voted against Massey. This is hardly the sign of someone harboring a bias in Massey's favor.

Sixth, the article also does not mention that the ABA MODEL CODE OF JUDICIAL CONDUCT has a specific provision (Rule 2.11(A)(4)) relating to recusal based on campaign expenditures. That provision requires disqualification when "a party, a party's lawyer, or the law firm of a party's lawyer has * * * made aggregate contributions to the judge's campaign" that are greater than some particular amount (unspecified in the rule).). Blankenship is not a party or a lawyer for any party; and the expenditures at issue were not contributed to Justice Benjamin's campaign. Thus, under the ABA's own proposed regulation of this specific subject, disqualification would not be required.

As the author correctly points out, there is a longstanding common law principle that judges are presumed to be impartial, as their oath of office requires, and that bias was not a recognized ground for disqualification at the time of adoption of the Constitution or of the Fourteenth Amendment. To the extent practice began to change during the 20th century, the changes were made by legislation, not judicial decisions. Moreover, Caperton's proposed standard, that recusal is constitutionally required whenever the judge might feel a "debt of gratitude" that creates a "probability of actual bias," is an unworkable one that, if it requires recusal here, would also do so in a host of other cases where judges, including Justices of the United States Supreme Court, have not recused themselves. Whatever one may conclude as a matter of policy, the case for constitutionalizing the kind of principle espoused by Caperton is very weak.

Finally, even if Caperton's standard were the correct one, I find it hard to believe that anyone familiar with the facts here could reasonably conclude that there was any real probability of actual bias on Justice Benjamin's part. As he said during his campaign, he welcomed support from those espousing his candidacy, but "if you want something in return, I'm not your candidate." Nothing that has happened gives reason to doubt his sincerity.

Sincerely,

/s/ Andrew L. Frey

Andrew L. Frey