Keeping Up Appearances

How much do we really care about the public's confidence in an impartial judiciary? That is the essence of the question facing the California Supreme Court in *People v. Freeman*, which was argued earlier this month. If the questions asked at oral argument are any indication, the court may be poised to rule that the *appearance* of judicial bias is not enough to overturn a judgment, and that the aggrieved party must provide some evidence that the judge was *actually* biased.

In *Freeman*, the trial judge initially recused himself from a criminal defendant's pre-trial bail hearing case because the judge had heard rumors that the defendant was stalking one of the judge's close friends. In light of the rumors, the judge determined he was disqualified from presiding over the bail hearing. He recused himself and another judge conducted the bail hearing.

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A few years later, when the case was ready for trial, it was reassigned to the disqualified judge. He noted that the stalking rumors had never been substantiated, and he therefore determined that he was no longer disqualified. He re-entered the case and presided over the trial, notwithstanding the defendant's objections. The defendant appealed, arguing that the participation of the disqualified judge amounted to a denial of due process.

The Court of Appeal (4th District, Division One) agreed. Its opinion emphasized that public confidence in the impartiality of the judiciary is critically important to the integrity of the judicial process. The court concluded that the trial judge in *Freeman* committed a "constitutional structural error" when he presided over the case despite an appearance of impartiality that justified his disqualification. The California Supreme Court granted review.

While *Freeman* was pending before the California Supreme Court, the United States Supreme Court addressed a similar issue in *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 129 S.Ct. 2252. In *Caperton*, Justice Brent Benjamin of the West Virginia Supreme Court refused to recuse himself from a case involving the Massey Coal Co., even though Massey's chairman had donated over $3 million to Justice Benjamin's judicial election campaign. The West Virginia Supreme Court, including Justice Benjamin, voted to reverse a $50 million judgment against Massey.

The United States Supreme Court granted certiorari to decide whether Justice Benjamin's participation in the case created an appearance of partiality that violated the plaintiffs' due process right to a trial before an unbiased tribunal. Justice Anthony M. Kennedy, writing for the majority, rejected the notion that proof of actual bias is required before an appellate court can reverse a judgment based on an appearance of judicial bias. He explained that requiring proof of actual bias would necessitate an inquiry into a judge's subjective motives for reaching a particular decision, which would often be impossible for a reviewing court to ascertain. Justice Kennedy wrote that, given the difficulties associated with proving actual bias, due process requires a new trial whenever the appearance of bias is so strong that it demonstrates a "probability" of actual bias. Applying that standard, the majority opinion reversed the West Virginia Supreme Court's decision and remanded the case for a rehearing before an unbiased panel (i.e., a panel not including Justice Benjamin).

Oral argument in the *Freeman* case was held after the *Caperton* decision was issued. The justices of the California Supreme Court expressed skepticism that the facts in *Freeman* could satisfy the *Caperton* standard of showing a probability of actual bias. Their questions further suggested that the Court may adopt some form of "harmless error" standard for cases involving on the appearance of judicial bias, which would be a new development in California law. Until now, California courts have consistently held that a new trial is required whenever an appellate court determines that a trial judge was disqualified by an appearance of partiality.

For example, Division Two of the 1st Appellate District has stated unequivocally that, in cases where the facts would cause a reasonable person to doubt whether the judge was impartial, "appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided.... but should reverse the judgment and remand the matter to a different judge for a new trial on all issues." (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 247.)

Whether the decision in *Freeman* will undermine or even expressly disapprove decisions like *Catchpole*, however, is complicated by the fact that the defendant in *Freeman* waived her rights to challenge the judgment under California's statutes governing judicial disqualification. Instead, her challenge is based solely on *constitutional* protections. As a result, the sole question before the California Supreme Court is whether the appearance of judicial bias violates the due process guarantees of the federal and state constitutions, separate and apart from the provisions of the disqualification statutes.

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It will be interesting to see if the California Supreme Court's decision in *Freeman* creates two different standards for determining whether the participation of a disqualified judge requires reversal of a judgment. It is possible the court will make a sweeping pronouncement that governs both the statutory and the constitutional standards. More likely, the court will issue a limited holding that addresses only the constitutional standard, leaving existing law intact for the statutory challenges. Such a ruling would make it even more important for parties to preserve their objections under the disqualification statutes. A party who preserves its statutory objections to the participation of a disqualified judge would have an automatic right to a new trial under the *Catchpole* standard, but a party who waives its statutory objections and is forced to rely on an after-the-fact constitutional challenge would not be entitled to a new trial unless it could demonstrate actual bias, or at least a probability of actual bias.

Under the Legal Lens: Climate Change Policy

Beth Dorris, a partner with Best Best & Krieger, was one of seven experts from across the country selected by Aspatore Books, a Thomson Reuters business, to write a chapter in *The Impact of International Climate Change Policies*. Below is an edited excerpt from her chapter, *Climate Change Policy Trends from a Lawyer's Perspective*.

BOOK EXCERPT

Climate change policies are shifting in three significant ways. First, there is a growing awareness that climate change measures, if adopted without considering other environmental impacts of those measures, may end up doing more harm than good. This new awareness comes at least in part from the recent effort by the European Union to shift to ethanol, or "biofuel." The shift was accompanied by a drop in the world food supply, a drop that opponents attributed to farmers growing and selling crops for fuel instead of food.

To avoid such controversies going forward, international forums are now attempting to examine the overall environmental and health impacts of proposed greenhouse gas emission reduction measures. In other words, international climate change policy is no longer just about climate change. This new perspective has even affected the language of policymakers, who now hold "sustainability," and not just "climate change," conferences. By referencing "sustainability," policymakers help convey the idea that they are not only examining ways to mitigate climate change impacts, but the way climate change mitigations and associated actions affect the environment as a whole.

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Second, with the economic downturn, there is an intensified effort to realize immediate cash benefits from climate change programs wherever possible. One manifestation of this trend is increased focus on adaptation funding - that is, funding to help remedy or defray the damages that particular localities or countries claim have been caused, or will soon occur, by climate change. Similarly, Kenya, the Inuit people, and others are attempting to recover cash damages through litigation.

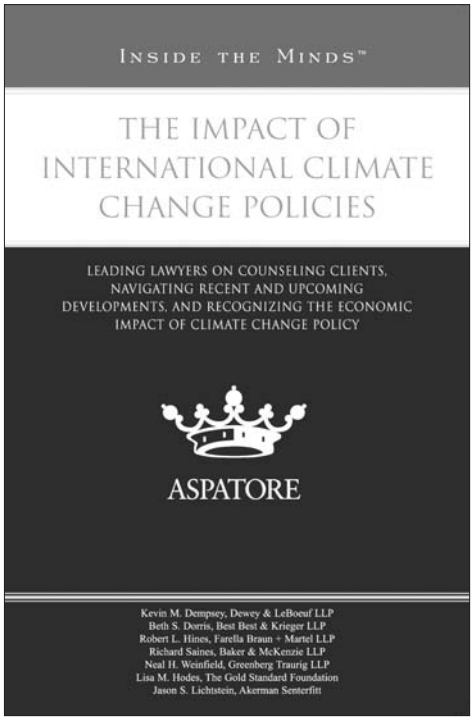
At the same time, industrialized nations are looking harder for ways to save money while reducing greenhouse gas emissions. There now is greater emphasis than ever on finding greenhouse gas emissions reduction measures that eventually pay for themselves, or at least come close to doing so. See, e.g., *Climate Change, Health Care, and the Budget*, *THE ECONOMIST*, July 2, 2009 (describing a public opinion poll indicating majority support for climate change measures under, but not over, $80 per household). Energy conservation and "smart grid" programs may offer net economic returns. Increasing reliance on climate change mitigations that virtually pay for themselves sounds like a "win-win" approach, but cost-saving measures can only go so far in addressing climate change effectively. In addition, once cost-saving benefits are exhausted, or found to produce disappointing monetary results, there may no longer be enough impetus to continue what otherwise is an important greenhouse gas reduction program.

The third major trend is that global warming is going local. Even before the U.S. EPA and Congress turned their attention to climate change, individual states, counties, and cities began adopting their own greenhouse gas reduction programs. Under AB 32, adopted in 2006, the state of California plans to reduce greenhouse gas emissions to 1990 levels by the year 2020, and to lower levels by the year 2050. Several other states have signed onto a Western States Initiative to align themselves with California's climate change program. And eight states in the Northeast adopted a cap-and-trade program, similar though not identical to that used by the European Union and others under the Kyoto Protocol. Meanwhile, over 940 individual cities across the United States also have voluntarily undertaken measures to comply in principle with the Kyoto Protocol. See list of participating mayors, available at http://www.usmayors.org/climateprotection/list.asp (last visited July 27, 2008). California municipalities are major players in this trend; dozens have already adopted climate action plans or sustainability plans. See generally state of California Governor's Office of Planning and Research, *Cities and Counties Addressing Climate Change*, http://www.opr.ca.gov/ceqa/pdfs/City_and_County_Plans_Addressing_Climate_Change.pdf (last visited July 8, 2009).

As localities each adopt their own plans, the looming question becomes how to fit them all together. Low or zero growth in one small city may help reduce greenhouse gas emissions in a particular city, but may indirectly increase emissions elsewhere if there is insufficient housing near work centers or transportation hubs. California is now attempting to address this issue. Under SB 375, regional transportation plans must take into account transportation-related climate change impacts when allocating regional housing needs assessments, and must be consistent with "sustainable community strategies" to reduce greenhouse gas emissions. SB 375 is fraught with problems of its own, however. For example, it focuses housing allocations and transportation planning on climate change considerations, without considering other environmental impacts associated with the loss of open space, increased density and strain on aging inner-city infrastructure. SB 375 provides little effective means to produce agreement among cities in a region, who often have widely disparate views on global warming, growth and housing allocations.

The going-local trend can be seen not only in the actions of individual states and municipalities, but in the stimulus funding being provided for "green" infrastructure projects at the local level. For example, the U.S. Department of Energy issued block grants in April 2009 that provided hundreds of millions of dollars to municipalities across the United States for renewable energy projects. See DOE CFDA No. 81.128 Energy Efficiency and Conservation Block Grant Program issued April 24, 2009.

Stimulus spending on local renewable energy projects, while helpful, may not be enough and may even, in some instances, be misdirected. Strong feed-in tariffs, used with success in European Union nations to promote solar energy, are not yet being duplicated on the same scale in the United States, and are being bogged down further by requirements to enter a purchase agreement with a public utility. Moreover, large-scale wind, solar, and geothermal projects face major siting issues. This is because, similar to the European Union's initial ethanol projects, new federally funded solar, wind, and geothermal projects may create potential adverse environmental impacts of their own. Solar plants may invade miles of what had been pristine desert area, wind projects face opposition related in part to concerns about protecting avian and other endangered wildlife, and certain thermal projects require more water than may be available.



An edited excerpt from *The Impact of International Climate Change Policies* (Thomson Reuters/Aspatore Books, 2009). Reprinted by permission of the publisher.