

## Judge Shopping

*By David Zapp*

“Judge shopping” is the means by which prosecutors and sometimes defense attorneys go about getting their cases in front of a judge of their choice. Prosecutors do this by alleging that a certain case is “related” to a previous case and that “judicial economy” is best served by bringing the new case in front of that particular judge. Of course if the so-called related case is not really related or related in the most tenuous way or does not advance the cause of judicial economy, then it is just judge-shopping pure and simple, a reprehensible practice that greatly affects the fate of a defendant for obvious reasons. Judge shopping can be challenged by going before the selected judge and asking that the case be returned to the clerk’s office for random selection.

Random selection is how judges are generally selected in all federal districts and provided for in the district’s local rules. In the Eastern District of New York, for example, the local rule says that “all cases

shall be **randomly** assigned by the clerk or his designee **in public view** in one of the clerk’s offices in such a manner that each active judge shall receive as nearly as possible the same number of cases, except as provided in paragraph (h). Where a party or his counsel requests prior to selection that he or she be present at the selection, the clerk shall make reasonable efforts to comply with the request. 50.2(b) Nowadays this random selection is usually achieved by a specially designed computer program.

But you can see how the language is couched in terms of making sure that judge shopping is avoided even providing the defendant (where possible) and his lawyer the opportunity to see for themselves that nothing fishy is going on with the selection process. That said, judge shopping in fact rarely occurs but it does happen, and like the saying goes, “if you see something, say something.”

How can you determine whether a case has been related? Have your attorney go to the clerk’s office and ask the clerk. If he won’t tell you, ask the prosecutor. When a high profile case is brought before a harsh judge,

the lawyer should always inquire and challenge the designation if appropriate.

The judge will not punish a lawyer for making the challenge so long he makes it respectfully and in good faith. No lawyer was ever punished for good lawyering, and besides, it is the behavior of the prosecutor and not of the judge that is being challenged. For good measure, a copy of the motion should be sent to the chief judge. To the extent that it may have a certain sway with the selected judge, there is nothing wrong with a district court judge knowing that his or her chief is aware of the challenge.

To give you a good example of the way the relatedness rule should be implemented, years ago there was a prosecution of a large-scale narcotics organization presided over by one of the more conservative judges in the Eastern District of New York. Time passed and a co-defendant fugitive in the case was arrested. The case was retrieved from the closed files and returned to the judge who had handled the case originally. But she refused to take it reasoning that there was no basis for the case to be returned to her. She said she did not know anything more about the case than any other judge would by reading a presentence report. While she had all the defendants originally before her, they all had pled guilty

and so she was not privy to any particular information that any other judge would come to know. And, as important, referring the case to her **would not advance the cause of judicial economy**. The case was returned to the clerk's office for random selection of the judge and the defendant's life was forever changed. He received a sentence at least fifty percent lower than if the case had remained with the original judge. And note, this individual was a defendant in the same indictment! But that is how a judge should decide whether to accept a related case: does relating the case to a particular judge advance judicial economy?

Another case with a different outcome concerned a courier defendant who was in front of a liberal judge. She was tried and convicted which means that the judge knew a lot more about the case than if he had read about it in a pre-sentence report. He had had an opportunity to hear the witnesses, gauge their credibility and learn all details that would not have come to light in any pre sentence report. A year or more later the continuing investigation led to the arrest of several of the other defendants connected to the courier. But rather than add the defendants to the original indictment the prosecutor indicted these defendants in a separate indictment which he is allowed to do and rather than relate the case to the liberal judge, as he

easily could have done, the case was "wheeled" out to a harsh judge and unfortunately the defendants' lives were forever changed.

The tactics of defending the defendants were affected as well. Instead of simply pleading guilty in front of the liberal judge the defendants had only two choices: go to trial or cooperate. Pleading guilty without a cooperation agreement would have been suicide. To be fair the prosecutor may have thought that the interest of judicial economy was not involved and he may have been right. But the fact remains that the person who had complete control of that selection process in that case was the prosecutor. The moral of the story: do not take judge shopping lightly.

## A Giant Setback for Human Rights

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The Supreme Court's conservatives dealt a major blow Wednesday to the ability of American federal courts to hold violators of international human rights accountable. The court declared that a 1789 law called the Alien Tort Statute does not allow

foreigners to sue in American courts to seek redress "for violations of the law of nations occurring outside the United States."

In the case at issue, *Kiobel v. Royal Dutch Petroleum*, Nigerian citizens alleged that, from 1992 to 1995, multinational oil companies working in Nigeria aided the military dictatorship that tortured and killed protesters who fought the environmental damage caused by the oil operations. These companies did business in the United States. But Chief Justice John Roberts Jr., writing for the majority, said that even where claims of atrocities "touch and concern the territory of the United States, they must do so with sufficient force" to overcome a presumption that the statute does not apply to actions outside this country.

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