LEGAL PUBLICATIONS IN SPANISH

TO THE POINT

PRINT EDITION 71

Federal Court Alters Rules on Judge Assignments

By Benjamin Weiser and Joseph Goldstein
Published: December 23, 2013, N.Y. Times

"Chief Judge, Loretta Preska, announced new rules to make the future assignment of cases more random and transparent, and to offer a means for parties to object to assignments.

"Criminal and Civil cases are normally randomly assigned to federal judges in New York City. But there is a rule that can circumvent the 'random' rule. It is known as the "related-case" rule and sends a case directly to the judge that the prosecutor or a defense attorney designates it as being "related" to a previous case the judge had heard.

"The rule is commonly used to send cases involving similar facts to a single judge in the interest of efficiency and economy, but it has also evoked concerns about 'judge-shopping.'

"The new rules require any party that seeks to mark a case as "related" to another case before a judge to file a statement 'stating clearly and succinctly the basis for the contention.' Any other party may object to a claim of relatedness, in writing, the rules say. Although a judge being asked to accept a "related" case will still make that decision alone, a new three-judge assignment committee, including the chief judge, in the Southern District of New York (aka Manhattan) will review every case where a claim of relatedness has been made.

"If the assignment committee disagrees with the judge's decision to accept a case as related, the matter will be assigned randomly to a new judge, the rules say.

"'We wanted to maximize the randomness of the assignment of cases — we wanted to regularize the process,' Chief Judge Preska said, adding, 'We also wanted to increase transparency.' Judge Preska said that the statements seeking to designate a case as related and any objections would be docketed publicly. She acknowledged that one reason 'randomness is so important is to try to avoid judge-shopping.'

"Judges are supposed to be neutral, but we all know that judges both hold different views on issues and often have a record in ruling on certain issues,' she said. There was a larger benefit to having cases that raise similar issues decided by more than one judge, she said. 'Development of the law is better served by having different judges decide those cases, so that the court of appeals has the benefit of different judges' thinking about the issue,' Judge Preska said.

"Involving the court's assignment committee to review related-case requests will add a degree of oversight. 'There will be greater consistency across the court in what cases are deemed related and which are not,' Judge Preska said. Concerns about the related-case rule had been raised in previous cases in the past. The rules committee, made up of judges, undertook its formal review in May.

Commentary: Readers of this bulletin will recall a past article I posted regarding a narcotics case that was, as far as I was concerned, judge-shopped by prosecutors in the Eastern District of New York. The prosecutors asked a judge to designate a case involving a notorious narcotics organization, to be considered "related" simply because that drug organization had from time to time done things with another drug organization whose case was before that judge even though it did not involve "similar facts" and it certainly did not further "the interest of efficiency or economy." The request was granted and with it the course of these defendants' lives were changed.

Nobody challenged the claim perhaps because the lawyers did not know that the case had been "related, although I can tell you that whenever I get a case that is "coincidentally" in front of a judge who is not friendly to my client's interests, I find out exactly why. There are few coincidences in criminal law.

The new rules announced by Judge Preska will address the problem of "notice." By requiring public notice every lawyer will know if his client's case has been related and be in a position to challenge the designation. Also defendants will get more than one bite at the apple. Defendants will be able to appeal from an adverse ruling. Those who knew about the relatedness in the above-mentioned Eastern District case may well have resisted challenging the designation fearing that they might offend the judge who until now had the last word. Now it is the judge who will have to look over his shoulder. No longer can he act as if he can do what he wishes.

Suffice it to say that the application to designate Eastern District of New York's case as "related" was before a judge that, as Judge Preska diplomatically put it, 'hold[s] certain views on issues and ha[s] a record in ruling on certain issues,' that would favor the prosecutors. I can tell you this, at the risk of personalizing the argument but strengthening it as well that if Judge Weinstein had the first case, there was not a chance in a million that the prosecutors would have sought to have the second case "related." Those of you who practice law in the Eastern District of New York, prosecutor or defense lawyer, know exactly what I mean. Those of you who do not, just know that Judge Weinstein is a very liberal and iconoclastic judge who admittedly and very proudly 'hold[s] certain views on issues and ha[s] a record in ruling on certain issues'

that do not exactly favor the prosecution. There usually is a "Judge Weinstein" in every district—if you are lucky.

This is not a criticism of the judge who accepted the case as related. The judge may well have rejected the prosecutor's claim if someone had challenged the designation. And it certainly is not a criticism of the entire Eastern District of New York's United States Attorney's Office who rarely judge-shops, but the consequences can be so devastating—it can literally change a person's life—that all defendants should be on the look out for it.

The new rules were issued out of the Southern District of New York rule but the Eastern District of New York cannot be far behind in implementing similar rules. The judges there have long sought to tackle this intractable issue, and several chief judges of the Eastern District of New York have issued directives precisely to discourage judge shopping with limited success.

– David Zapp

Defendants May Be Able To Use Frozen Assets To Retain Lawyers

NYTimes By Adam Liptak
Published: October 16, 2013

"WASHINGTON — Kerri and Brian Kaley, a New York couple, were unable to hire a lawyer to defend themselves against serious criminal charges because the government had frozen their assets. That seemed to trouble several justices at a Supreme Court argument on Wednesday.

"The Kaleys were accused of participating in a scheme to obtain and sell prescription medical devices. They said they were likely to win at trial because no one had been harmed by their conduct, a point two justices seemed to find plausible. The relief the Kaleys actually sought was substantially narrower. They did not challenge the general framework established by a pair of 1989 Supreme Court decisions, which ruled that freezing assets before a criminal trial was permissible, even if it frustrated the defendant's ability to hire a lawyer, so long as there was probable cause that a crime had been committed and the assets were linked to the offenses described in the indictment. All the Kaleys were seeking was a hearing at which they could try to show that they were entitled to use their money to defend themselves because the charges against them were flawed.

"Justice Antonin Scalia said he was uncomfortable with the modest step of allowing a hearing but might be open to a bolder one. "To save your client, I would prefer a rule that says you cannot, even with a grand jury indictment, prevent the defendant from using funds that are in his possession to hire counsel," he said. "Don't need a hearing."

"Later in the argument, he proposed another solution. "I don't like casting into doubt the judgment of the grand jury," he said, "but why couldn't we say that when you're taking away funds that are needed for hiring a lawyer for your defense, you need something more than probable cause?" he asked. "Couldn't we make that up?"

"Some justices tried to assess the practical consequences of allowing the requested hearings. Justice Elena Kagan said that defendants had never prevailed in any of 25 such hearings conducted in a part of the country that allowed them. "So what are we going through all this rigamarole for," she asked, "for the prospect of, you know, coming out the same way in the end?" Chief Justice John G. Roberts Jr., who emerged as the Kaleys' primary defender, said those statistics were only part of the picture. "Who knows how many hundreds of times the government would have sought to seize the assets but didn't because they knew they would have to justify it at a hearing?" he asked.

"[The prosecutor] said that grand jury findings of probable cause often serve as a basis for jailing a defendant until trial. It followed, he said, that such findings may also serve as the basis for freezing tainted money. Chief Justice Roberts rejected the comparison. "It's not that property is more valuable than liberty or anything like that," he said. "It's that the property can be used to hire a lawyer who can keep him out of jail for the next 30 years. So the parallels don't strike me as useful."

"[The prosecutor] said that requiring hearings could allow defendants to have an early look at the government's evidence, put prosecution witnesses at risk and frustrate efforts to pay restitution to crime victims. Chief Justice Roberts jumped on the last point. A hearing, he said, could also establish whether there had been any victims, a question in dispute in the case.

Kaley v. United States, No. 12-464."

Stay tuned!

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