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News In Brief

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Circuit Aims to Eliminate Inconsistencies in Its Rules

In an effort to streamline the processing of appeals and improve efficiency, the U.S. Court of Appeals for the Second Circuit is conducting a sweeping revision of its local rules. The changes, which cover everything from the scheduling for briefing appeals to the handling of certificates of appealability, are being put before the bar for a comment period that ends on Nov. 16. The court would then consider making revisions based on attorney comments, and the rules would go into effect Jan. 1.

Chief Judge Dennis Jacobs said yesterday that in some places, the rules were internally inconsistent as well as conflicting with Federal Rules of Appellate Procedure. "The scheduling of briefing and argument has over the years become ad hoc and I think that has caused a lot of wasted time and motion," Judge Jacobs said. "People ought to know where they stand and what is due. We need realistic deadlines and those deadlines can now be enforced because they really are realistic and everyone will know what they are."

The new rules will be keyed to the Federal Rules of Appellate Procedure for easy reference. In some cases old rules have been reclassified as internal operating procedures.

"One of the sea changes in how we do business is electronic filing," Judge Jacobs said. "If the rules are clear, litigants can do a lot of things routinely and without a great deal of research or effort. This way, there are many fewer notices we need to send and demands we need to make on the bar."

The proposed rules appear on the circuit's Web site, www.ca2.uscourts.gov. Comments on the proposed rules can be submitted to rulescomments@ca2.uscourts.gov. - *Mark Hamblett*

Punitive Damages Vacated in Cigarette Cancer Case

In 2003, Gladys Frankson, the widow of Harry Frankson, won a negligence action against the Brown & Williamson Tobacco Corp. and several other defendants, marking the first time a New York court held a cigarette manufacturer liable for a smoker's lung cancer. The jury awarded Ms. Frankson $20 million in punitive damages, which Brooklyn Supreme Court Justice Herbert Kramer later reduced to $5 million.

Yesterday, the Appellate Division, Second Department, threw out the punitive damages. Noting that the plaintiff's counsel had observed that thousands of smokers die each year in a "lung cancer epidemic," the Second Department panel concluded that the trial judge had not properly instructed the jury that it could not award damages to punish the defendants for harming other smokers.

It cited the U.S. Supreme Court's 2007 decision *Philip Morris USA v. Williams*, 549 US 346. In that case, the "Court held that 'the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation,'" Justice Randall T. Eng wrote for the unanimous Second Department panel.

"In so holding, the Court expressed concern that allowing punishment for injury to a nonparty would deprive a defendant of an opportunity to show, for example, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."

The panel vacated the punitive damages award and remanded the matter to Brooklyn Supreme Court for a new trial on damages. A $175,000 compensatory damages award against Brown & Williamson was unaffected by the decision. *Frankson v. Brown & Williamson*, 07-06254, will be published on Monday. - *Mark Fass, Vesselin Mitev*

Legislature Appeals Ruling Ordering Raise for Judges

The Legislature on Tuesday filed a notice of an appeal from a second ruling by the Appellate Division, First Department, requiring that the state's 1,300 judges receive a cost-of-living raise. The Court of Appeals announced yesterday that the appeal would be consolidated with oral arguments in two others cases scheduled for 2 p.m. Jan. 12.

The First Department's unanimous unsigned order in *Chief Judge v. Governor*, 1063, affirmed Manhattan Justice Edward H. Lehner's

ruling in a lawsuit brought by the court system, which directed the state to provide judges with a raise retroactive to 1999, the last year in which the judges' salaries were increased.

Justice Lehner's ruling, issued on June 15 of this year (NYLJ, June 16), was the second decision he has made in the pay dispute, following a ruling in *Larabee v. Governor*, 880 NYS2d 256 (June 11, 2008), a case brought by several judges. In both cases, the judge reasoned that the Legislature's linkage of a judicial pay raise to unrelated issues, such as a pay hike for the legislators themselves, violated the separation-of-powers doctrine.

Justice Lehner's ruling in *Larabee* was affirmed by the First Department on June 2 of this year (880 NYS2d 256; NYLJ, June 3) by a unanimous panel of Presiding Justice Luis A. Gonzalez and Justices Peter Tom, Eugene Nardelli, Karla Moskowitz and Dianne T. Renwick. On Sept. 15, those same justices affirmed *Chief Judge* for the "reasons stated in this Court's decision in *Larabee v. Governor*."

In addition to *Chief Judge* and *Larabee*, the Court of Appeals has agreed to review a ruling from the Third Department rejecting a pay-raise lawsuit brought by three other judges, *Maron v. Silver,* 58 AD3d 102 (2008). The Court of Appeals has scheduled argument in those cases for Jan. 12 (NYLJ, Sept. 25). - *Daniel Wise*

Gotti Had Access to Files of His Lawyer, Witness Says

A key witness in the trial of John "Junior" Gotti testified yesterday that Mr. Gotti's former lawyer let the allegedly-retired mobster examine the files of other clients. Government cooperator John Alite, a former top lieutenant of Mr. Gotti's, said that during the 1990s attorney Richard Rehbock of Jericho, N.Y., allowed Mr. Gotti to look at files of the competition—members of the Lucchese crime family who had also retained Mr. Rehbock. The goal, Mr. Alite said in Judge Kevin P. Castel's courtroom during the second week of Mr. Gotti's murder and racketeering trial, was that Mr. Gotti wanted to find out who might be informing against him.

"Gotti would go into the files. Richie Rehbock would let him look at 'em all," Mr. Alite told the jury. "He was looking to see who was a rat, who wasn't a rat."

Mr. Alite said he was also ordered to retain Mr. Rehbock by his boss. "They want to know what's going on with your life so you don't become an informant," he said.

Reached yesterday for comment, Mr. Rehbock said, "It never happened. I categorically state that I have never and would never share somebody's file with someone else. John Gotti was probably in my office twice in 20 years. It was not his practice to come to my office. I would add that I never discussed John Alite's cases with John Gotti." - *Mark Hamblett, Associated Press*

Executor's Investments 'Prudent,' Court Concludes

An attorney should not have to make good on stock portfolio losses incurred by an estate for which he served as executor during the period of volatility in the stock market just before and after the Sept. 11, 2001, terrorist attacks, a western New York surrogate has decided. Monroe County Surrogate Edmund A. Calvaruso held that the husband of decedent Eleanor Kopec failed to meet the burden of showing that attorney Michael Duffy's oversight over Ms. Kopec's estate and investments violated the Prudent Investor Act under §11-2.3 of the state Estates, Powers & Trusts Law. Ms. Kopec's husband, Gilbert Stone contended that Mr. Duffy failed to immediately convert all or most of Ms. Kopec's stock holdings into cash to protect the investments from what ultimately proved to be a 40 percent slide in value between August 2001, when Mr. Duffy became executor of the Kopec estate, and October 2002, when its stock was transferred to Mr. Stone.

Mr. Duffy, in turn, argued that he had a plan for Ms. Kopec's assets that carried out her wishes that Mr. Stone's long-term financial needs be protected. Mr. Stone was 38 years Ms. Kopec's junior when she died. Mr. Duffy also contended that he had an obligation to maintain a diversified investment portfolio.

Surrogate Calvaruso ruled that fiduciaries are not to be held responsible for repaying investment losses unless those losses were due to negligence. To agree with Mr. Stone that Mr. Duffy's alleged negligence was based on his failure to convert his late wife's portfolio to cash would run counter to the goal of maintaining a diversified portfolio, the surrogate held. "While the conversion to cash might be good practice in many estates, the court does not interpret the Prudent Investor Act to impart such a potentially unyielding requirement on all estates," the surrogate wrote.

Surrogate Calvaruso also ordered Mr. Duffy, of Duffy & Tiernan in Rochester, to be paid $8,000 in attorney's fees. *Matter of the Final Accounting of Michael Duffy*, 2001DT01229/A appears on page 45. - *Joel Stashenko*

'First Monday' Event Set

Two of the metropolitan area's top litigators will square off on the obligation of defense attorneys to immigrant clients at the Office of the Appellate Defender's annual "First Monday" mock U.S. Supreme Court argument. Henry G. Miller, a senior partner of Clark, Gagliardi & Miller in White Plains, and Mark F. Pomerantz, a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison, will debate whether a lawyer who provides "manifestly" incorrect advice about immigration consequences of a guilty plea should be judged to have provided ineffective assistance of counsel. The two lawyers also will receive the Gould Award for Outstanding Oral Advocacy.

Former Appellate Division, First Department Justice Betty Weinberg Ellerin, now a senior counsel at Alston & Bird, will be the chief justice of the nine "judge" bench. The moot court will start at 7:30 p.m. Monday in the Tishman Auditorium at New York University School of Law, 40 Washington Square North. For information, call 212-402-4100.