Don't Be Afraid, Go Ahead and Ask the Judge

By Lynn Duryee

Frequently Asked Questions of judges appear commonly on court Web sites and on bulletin boards outside courtroom doors. FAQs generally include whether exhibits must be premarked, whether permission is needed to traverse the well, whether duplicate motions are required for chambers and similar mundane queries.

It's long past time, though, that we post the Infrequently Asked Questions (IFAQs), those rarely spoken inquiries we would spring from our swivel chairs to answer.

IFAQ 1: Will the judge find it helpful to receive a copy of the stern letter a lawyer sent to opposing counsel outlining his outrageous disregard of the court's ruling?

A: No. Despite the popularity of "litigation by mean letter," a noticed motion is the time-honored method of alerting a judge that an order should be issued in a case. Some lawyers subscribe to the theory that a "cc: Judge Proudypants" at the bottom of Page 3 adds *je ne sais quoi* to an emphatic letter. That theory fails to consider the judge's ethical prohibition against receiving ex parte communications. It is not improper under the Rules of Professional Conduct for a lawyer to write the court if he or she copies opposing counsel, but it is improper under the Code of Judicial Ethics for a judge to read such a letter. A stand-up lawyer rarely wants to induce an ethical violation for his or her judge.

IFAQ 2: Is a lawyer's chance of changing a judge's mind on a tentative ruling greater or less than his or her chance of winning the California Lottery?

A: Depends on the day. For the most part, a judge should adopt his or her tentative ruling as the court's final order — assuming that the lawyers have made their arguments properly in their papers and further assuming that the court has analyzed them correctly. It sometimes happens that a lawyer's "Aha!" argument emerges after briefs have been submitted, and it also happens that a judge has analyzed an issue incorrectly. As a general rule, though, the assumptions behind a tentative ruling are that the judge has had an opportunity to review and evaluate the arguments before the hearing, and that no new facts or law will be presented during the hearing.

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IFAQ 3: Will a judge hold a lawyer responsible if his or her drug-crazed secretary missed the filing deadline?

A: Yes — and if legal secretaries knew what some lawyers blamed them for in court, they would be long gone by the time the boss returned to the office from a ruinous hearing. Notwithstanding the widespread belief that judges have forgotten what it is like to practice law, most judges grasp how difficult it is to be a lawyer and how easy it is to make a mistake. In most courtrooms, the lawyer who takes full responsibility for his or her mistake has a better shot at getting relief than the one who offloads the error on a secretary, who perhaps should not be practicing law anyway.

IFAQ 4: May defense counsel have permission for Mr. Big Shot in Chicago to be on telephone standby for the settlement conference?

A: No — not if defense counsel wants the case to settle, anyway. There are circumstances under which telephone standby makes sense — and if that is the case, then a lawyer must obtain written permission from the court before the conference. Usually, though, it is essential for all parties with settlement authority to appear in person. Settlement happens when both sides fully participate in, and understand the risks and benefits of, going forward. Moreover, a grueling day during a settlement conference might dampen a party's enthusiasm for spending more time at trial. Bottom line for a settlement-minded judge: It's too easy for Mr. Big Shot to "Just Say No" over the phone.

IFAQ 5: If the pond scum on the other side of a family-law case says something lowdown and rotten about a lawyer or his or her client, should the offended lawyer respond in kind?

A: No. Family-law litigants claim that they would like nothing more than to take the high road, except the scoundrel on the other side — usually their ex — keeps forcing them to air embarrassing secrets about their marriage. Remarkably, litigants assume a judge will accept as true the hair-raising allegations made by their ex. Truly, family-law judges use industrial-strength filters when reviewing declarations. A simple denial, without the "Anything you can do, I can do better" counterattack, will accomplish the task — and will make the denying party look a lot better, too.

IFAQ 6: Can judges object to evidence in the trial?

A: Yes.

IFAQ 7: If a plaintiffs' lawyer runs into his or her judge at a bar function a week after an unsuccessful settlement conference, can the lawyer report to the judge that the case settled the next day?

A: No — see the discussion of ex parte communications in IFAQ 1. This is an understandable mistake because the lawyer likely spent time alone with the judge discussing the case during the settlement conference and does not think the prohibition against ex parte communications is back in place after the conference. It is: The judge cannot talk about the case, even to hear welcome news of settlement, unless all parties are present. When the judge shoots up his or her eyebrows and thrusts his or her hands over his or her ears, the lawyer is not to take it personally, even if everyone at the bar function is staring at the lawyer.

IFAQ 8: Are civil trial lawyers allowed to try cases without filing motions in limine?

A: Yes. Whereas lawyers used to file a handful of motions to exclude witnesses, evidence of insurance and settlement negotiations, they now file indexed binders of pleadings seeking to exclude everything from "testimony different from what plaintiff said at deposition" to "evidence that hurts my case." For further guidance, see *Kelly v. New West Federal Savings,* 49 Cal.App.4th 659 (1996), one of the few cases civil judges can cite by heart. An in limine motion that educates a judge about a tricky evidentiary concept is useful; an in limine motion that requires a judge to hear several days of testimony to understand its context is not.

IFAQ 9: Is "Wrap it up" the only thing on a judge's mind during an expert examination?

A: Yes. Trial judges soon discover that jurors' most common complaint is boredom. The most common cause of jurors' boredom is sheer repetition, again and again. Judges notice when jurors begin to resemble coma patients. A trial judge who tells a lawyer to pick up the pace is doing the lawyer a favor.

IFAQ 10: Did you rule against me because you don't like me?

A: No — pinkie-swear. There must be a profound psychological dynamic that causes lawyers to believe that an adverse ruling equates to a rejection of their personhood. It does not. Unlikely as it might seem, judges base their decisions on the facts and the law — not their feelings about the lawyers, and not a lawyer's suit, haircut or Rotary pin.

In the interest of fair play, check out our posting on the bulletin board next to the cafeteria: "The FAQs Lawyers Long to Hear." Here, at last, lawyers will have an opportunity to answer judges' rarely uttered inquiries, such as:

What makes you think the judge hasn't read your papers?

Why would a lawyer want to try his or her case anyway?

Why do you need more than 10 minutes for voir dire?

And the nagging question that refuses to go away: What makes you think the judge doesn't like you?

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U.S. Obscenity Prosecutions Smack of Persecutions

By Clay Calvert and Robert D. Richards

At a time when most of the country is occupied by matters like the foiled terrorist plot against John F. Kennedy International Airport, the ever-increasing deaths of American soldiers in Iraq, the realities of global warming and the rising price of gasoline, the U.S. Department of Justice has chosen to spend time, effort and taxpayer money prosecuting an Altadena man named Paul F. Little.

On May 31, the Justice Department unveiled a 10-count obscenity indictment against Little, who goes by the name of Max Hardcore.

This is not a prosecution targeting child pornography; there are no allegations whatsoever that Little used minors in the production of his movies.

Similarly, it is not a prosecution aimed at sexually explicit material sent to children or, for that matter, distributed to unsuspecting or unwitting adults.

Rather, the focus of *United States v. Little* is material that was made by adults, with adult actors and aimed at adult consumers. The content was purchased, in this case, by U.S. postal inspectors conducting a sting operation on Little.

As Little's Santa Monica-based attorney Jeffrey Douglas told the Los Angeles Times in a June 1 article, "Everyone in America understands that if you don't want to watch, you don't have to. Why can't the prosecutors understand that?"

In its official press release announcing the indictment, the Justice Department said it "is seeking forfeiture of the obscene films charged in the indictment, all gross profits from the distribution of the films, and all property used to facilitate the charged obscenity crimes, including Little's residence in Altadena."

Rather than prosecuting Little in relatively liberal Southern California — where the adult movie industry flourishes in San Fernando Valley municipalities like Chatsworth and Woodland Hills — the Justice Department went venue shopping and ended up more than 2,500 miles away in Tampa, Fla.

The Justice Department does this, of course, because under the U.S. Supreme Court's ruling in *Miller v. California*, 413 U.S. 15 (1973), obscenity is measured by "contemporary community standards," which has been held to refer to any community where the material is purchased, downloaded or simply transferred through. The high court in *Miller* specifically rejected a national community standard, leading to an anomalous outcome wherein sexual speech that may be protected by the First Amendment in one state might be restricted in another state.

The obscenity prosecution of Little should not come as a surprise. In May 2005, the Criminal Division of the Justice Department established an Obscenity Prosecution Task Force exclusively dedicated to the investigation and prosecution of obscenity cases.

The creation of this task force was more than just a symbolic gesture toward cracking down on sexually explicit content. In fact, at least two of the eight U.S. attorneys fired by Attorney General Alberto Gonzales were terminated in part because of their reluctance to bring obscenity prosecutions.

In particular, the Los Angeles Times reported on March 14 that now-fired U.S. Attorneys Paul Charlton and Daniel G. Bogden were specifically mentioned in a memorandum sent to D. Kyle Sampson, Gonzales' former chief of staff, by Brent Ward, head of the Justice Department's obscenity task force, for being "unwilling to take good cases we have presented to them." A March 20 article by the Times confirmed that Justice Department officials "were upset with Daniel G. Bogden in Las Vegas for not bringing enough obscenity prosecutions."

The prosecution of Little is not the only ongoing federal obscenity prosecution against a Southern California-based adult movie company brought in a far-flung venue. The case of *United States v. Extreme Associates Inc.*, which has worked its way up to the Supreme Court once, is now pending in federal district court in Pittsburgh, Pa.

Almost exactly one year before the unveiling of the indictment against Paul Little, the Justice Department announced that it was targeting Chatsworth-headquartered JM Productions for distributing allegedly obscene movies in Phoenix. That case, *United States v. Five Star Video*, is also pending.

But perhaps the most outrageous example of the Justice Department's fixation on prosecuting sexually explicit speech is the case of *United States v. Fletcher*, which, like the *Extreme Associates* case, is pending in Pittsburgh.

The defendant is a 54-year-old grandmother named Karen Fletcher who posted a series of text-only short stories on a password-protected, members-only Web site that was subscribed to by a grand total of only 29 people.

That's right. The stories, which described in detail the sexual abuse of minors at the hands of adults, contain no photographs, no drawings and no images whatsoever. It is a prosecution focused solely on the written word, harkening back to last century's prosecutions of books like

Henry Miller's "Tropic of Cancer" and James Joyce's "Ulysses."

Why did Karen Fletcher write her stories? Did she harbor some evil motive? Far from it.

One of Fletcher's pro bono attorneys, Lawrence Walters of Florida, explained that "the stories were written largely out of the instructions by her therapist to put her stories down on paper in order to make them more real, to be able to deal with them, and to be able to think back to them. A lot of this stuff deals with things that happened to her."

We may be entering an era like the early 1960s, when the late comedian Lenny Bruce was prosecuted in California, Illinois and New York for allegedly obscene stand-up routines that, much like Fletcher's speech, contained no images other than the one's in a listener's own mind.

If the federal government is willing to target the written words of Fletcher, then it comes as little surprise that it is going after Little.

According to the Justice Department's press release announcing the Little indictment, his content involves, among other things, "anal penetration" and "urination." Graphic material, yes, but it's made by consenting adults for an audience of consenting adults and no one is forced to watch it.

During an interview with Little last July in the office at his hillside Altadena residence — the same one the government now seeks to take — he told the authors of this commentary that "the real obscenity is not what is going on out in the San Fernando Valley, it is what's going on in Iraq, Afghanistan and Israel — that's the real obscenity."

Unfortunately for Little, Gonzales' Justice Department does not share that belief.

But during that same interview, Little almost seemed resigned to the inevitability of being prosecuted.

"I don't enjoy writing out checks for $20,000 and $25,000 a pop for lawyers, but it's part of the business. It's part of the budget. … If you're going to play it and you're going to be out at the pointy end of the charge, you're going to take some hits."

How the latest government hit will turn out remains to be seen, but it is unlikely that either Little or his attorney will go down without a fight for freedom of expression, however graphic it may be.

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