

Wednesday, September 10, 2008

Revisiting a denied objection.

Photo from website of U.S. District Court (W.D. Mi.). Judges are generalists, at least where I practice law. They are expected to grasp and rule on a vast body of law. The law is too vast for even the most conscientious insomniac judge to be a walking encyclopaedia on the law. As a mentor told me not long out of law school: In your written advocacy, write as if you are talking to the judge with your hand casually sticking in your pocket. He also said that you need to shove your point down the judge's throat, because s/he does not have the time to try to divine any hidden meanings in your writing. (Perhaps that is a bit of hyperbole to say to get straight to the point with the judge, and to give the judge the relevant condensed law so that the judge is not left on a hunting trip.) What to do when a judge denies a motion so as to have a ruling that flies in the face of established law. If you start arguing about the judge's ruling, the judge may say "I have ruled. It is time to move along. Raise the issue in the appellate court, if you wish." On the other hand, the judge might listen further if you help the judge save face and eliminate concern about interference with "moving it along", and say something along the lines of: "Judge, thank you for considering our motion. I hope you might consider page 246 of the Aardvark decision, which mandates the opposite of what your honor has just ruled." Now, the judge has been offered an invitation to revisit the issue without losing face, or to say "Thank you, counsel, for your tenacity. I stand by my ruling. I look forward to seeing you on our next court date." A problem a judge faces when a lawyer hands up a court opinion to read, on the spot in court, is that so many appellate opinions are lengthy, and take time to sift through the decision to figure out what the writers are really saying. If you are in a jurisdiction that does not require all legal authorities to be presented to the court before the court date, you can help out the judge by handing him or her case opinions that have relevant pages highlighted and tabbed. You might even wish to hand up two or three cases with a short written summary of the benefit of those cases to your cases. The key is to make it no less pleasant for the judge to leaf through the often turgid prose of appellate opinions and statutes, than to say "denied" without reading the provided authorities. One very talented criminal defense lawyer has a penchant -- at least at CLE presentations -- to project relevant portions of cases on the screen and to read aloud some of the most apt, and sometimes, humorous passages with a laser pointer to follow along, including this passage from the Ninth Circuit's 1985 ruling on Larry Flynt's contempt of court ruling, quoting Flynt's exchange with a federal trial judge (I think this may have been as part of a presentation of how to deal with out of control clients, or perhaps about how Flynt got his lengthy contempt sentence cut short by the appellate court): "FLYNT: I move that you call the U.S. marshal to the stand that was present when I took the drugs, when I was flung on the floor by an inmate, and when I was kicked when I was smacked. I want the U.S. marshal called, I also want the guard called that tipped me off that this asshole was sending me to Springfield. THE MARSHALL: Open up the door. / THE COURT: No, that is all right. He's got the responsibility. That is going to cost you 30 days, Mr. Flynt. THE DEFENDANT: Hey, you know what punishment -- is. Well, you don't give a f*ck. / THE COURT: Mr. Flynt, you just keep that up. THE DEFENDANT: F*ck you. Give me life without parole you foul mother-f*cker. / THE COURT: That is another 30. THE DEFENDANT: I want you -- give me more. You chicken- shit son-of-a-bitch. / THE COURT: That is another 30 days. THE DEFENDANT: Give me more. [So much for an ordinary day in an august courthouse.] United States v. Flynt, 756 F.2d 1352 (9th Cir. 1985). Back to my mentor who certainly had a point about talking to judges as if your hand is informally sticking in your pocket. Doing so puts one more in the mood of sitting around with friends, in a relaxed setting. That helps remove the bullsh*t quotient. Judges and most other people have no tolerance for bullsh*t. A case in point about convincing a judge to overrule an objection on the spot came at a recent administrative hearing to determine whether my client would lose his driving privileges for several weeks for having allegedly driven in contravention of the drinking and driving laws. If an adverse ruling is announced at such hearings, the alleged wrongdoing driver might face worse devastation from the driving suspension than the possibility of sitting in jail a short period for a drinking and driving conviction. Inside, I am incredulous that the administrative law judge refuses to dismiss the case when the matter cries out for dismissal. Outwardly, I try my best to use non-confrontational words and tone of voice to share my concerns about the adverse ruling rather than to push against the judge. All of the sudden, there is silence. The judge is more studiously reading my appellate case decision that is directly on point with the need for dismissal. Then more silence and reflection comes, and the ALJ finally says that although he does not agree with all of my characterization of the applicable case, in this instance he finds no valid grounds in the record to justify the cop's request for a breathalyzer test from my client. Once we emerge from the hearing room, I congratulate my client, and say "Let's get the hell out of here. No need to give the ALJ a chance to change his mind." So we vamoose like bats out of hell. Jon Katz

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:00