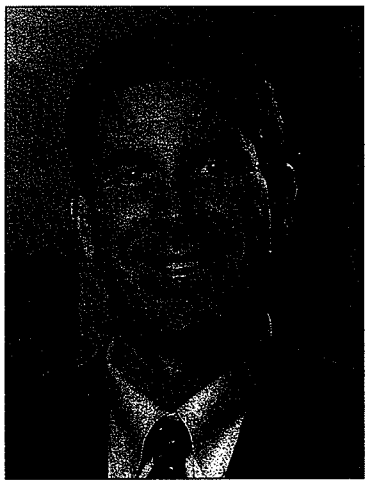
Recent Ethical Disasters:

This Year's Most Memorable Lawyering Lessons

By Benjamin G. Shatz



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What's new in ethical train-wrecks? Perhaps not much "new," but plenty of reminders about what's important.

— Scout's Honor —

Starting with the basics of honesty and integrity, counsel should not mislead the court. This truism is especially crucial when representing an organization priding itself on "truth and "helpfulness," like the Girl Scouts. Thus, in *Girls Scouts Manitou Council v. Girl Scouts of America* (7th Cir. 2011 WL 2119752), Judge Posner came down hard on counsel for misleadingly describing case law. Similarly, the Massachusetts Bar censured a lawyer for "as brazen a piece of misrepresentation as we have ever seen," by not using an

ellipses to indicate omission of key facts and findings. (*In re Vincent N. Cragin*, www.mass.gov/obcbbo/pr11-01.htm.)

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Lawyers persist in misleading courts procedurally, too. *Abner v. Scott Memorial Hospital* (7th Cir. 2011) 634 F.3d 962, presented Judge Posner with a word-count certificate swearing a brief was under 14,000 words, when it was actually over 18,000. Responding to an order to show cause, counsel offered weak and unbelievable excuses claiming inadvertence. The court summarily affirmed, providing a warning that flagrant violation of court rules may justify dismissal.

— Pick Your Battles Wisely —

Responding to OSCs is a taxing test of humility and discretion, which many lawyers fail. In the "know when to stop digging" category, consider *Gallop v. Cheney, Rumsfeld, et al.* (2d Cir.) 642 F.3d 364 (and see 7/7/11 order), where the plaintiff alleged that former government officials knew the September 11 attacks were coming and facilitated them as part of a cover-up to conceal theft of government funds. This "fantastical alternative history" did not amuse the Second Circuit, which dismissed the case as frivolous, and issued an OSC re sanctions. This prompted an inflammatory and malicious "demand" from counsel that the judges recuse themselves, resulting in yet another sanctions OSC.

A Florida lawyer responded to an OSC by accusing the judge of drawing conclusions "from the ether" and making "half-baked findings." (*In re New River Dry Dock, Inc.* (S.D.Fla. 2011) [www.abajournal.com/news/article/lawyers_accuses_judge_of_half-baked_findings_in_scathing_response_to_sancti.) Lawyering attracts combative personalities, but taking on the judge is a losing proposition.

Drafting rehearing petitions can also be a challenge. Back to Judge Posner, who considered a rehearing petition in *Thorogood v. Sears, Roebuck & Co.* (7th Cir. 2010) 627 F.3d 289. There, the losing party leveled "over the top" accusations "in tones of outrage" against the court. Rather than simply deny the petition, the court issued a detailed order chastising the lawyer and suggesting he "moderate his fury."

Devotees of tone-deaf advocacy will recall a similarly egregious example in *In re Koven* (2005) 134 Cal.App.4th 262. There, an insolent, offensive and insulting rehearing

petition accused the court not only of being unfair, biased and result-oriented, but also of ignoring the law, not reading the precedent or briefing, concealing alleged conflicts of interest, and conspiring to "fix" the case.

— Inadequacy —

Sloppiness can also cross an ethical line. In *Fairbanks v. Farmers New World Life Ins. Co.* (2011) 197 Cal.App.4th 544, appellant's appendix omitted several items the rules required. Respondents provided these materials in their own appendix and sought sanctions — ranging from dismissal to fees and costs — for having to prepare it. In an unpublished part of the decision, the court ordered appellant's counsel to compensate respondent. (*See* also *Morisch v. United States* (7th Cir. 2011) __ F.3d __, 2011 WL 3211502 [appeal dismissed because appellant failed to include transcript of relevant evidence].)

In *Consumer Advocacy Group, Inc. v. Sanders Paving, Inc.* (May 31, 2011, A127125) 2011 WL 2135675, the court escorted appellant's counsel to the woodshed for a "woefully deficient" presentation in: failing to include key documents in the record; filing a poorly printed brief that was illegible; citing materials outside the record; asserting facts without citation; and making arguments without citing authority.

— Frivolity —

Lawyers often characterize any opposing position as frivolous, but rhetorical hyperbole aside, what really makes an argument sanctionable as frivolous? Several decisions this year provide guidance. Failing to provide the necessary evidence or record may render a position frivolous — for example, mounting a sufficiency-of-the-evidence challenge without supplying a reporter's transcript of all the evidence. (*E.g., Foust v. San Jose Construction Co.* (Aug. 10, 2011, H036190) 2011 WL 3480956; *Marriage of Bareket* (May 31, 2011, H034249) 2011 WL 2150488 [appellant/wife sanctioned over $30,000 to respondent/husband and $12,500 to the court].)

Lawyers are often chided for raising new issues on appeal, but this may cross the line into frivolousness when lawyers argue for positions that directly contradict arguments made in the trial court. (*Bareket; Marriage of Nguyen* (March 16, 2011, D057199) 2011 WL 901181.) Similarly, pressing a legal position that is flatly contrary to statutes or prior final court orders renders arguments baseless. (*Bareket.*)

The seminal *Marriage of Flaherty* (1982) 31 Cal.3d 637, shows how family law is a fertile breeding ground for frivolous appeals. This year's layering to that precedent includes *Bareket* and *Nguyen.* But 2011's most valuable contribution may *be Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, which emphasizes that although "emotions run high in family law litigation," "cloud[ing]" sound judgment, that does not excuse a frivolous appeal.

In *Greenberg*, a lawyer representing himself appealed an order awarding sanctions to his wife. Substantial evidence supported the order, which was within the trial court's discretion, creating "an impossible platform upon which to predicate legal error," because the appeal "flies in the face of...an adverse factual finding," and "any reasonable attorney would have advised him not to pursue this appeal." The appeal was a plea for the appellate court to substitute its own judgment for the trier of fact's. Even asking for such relief is sanctionable.

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Benjamin G. Shatz Chairs the State Bar's Committee on Appellate Courts and co-chairs the Appellate Practice Group at Manatt, Phelps & Phillips in Los Angeles.