Rubbernecking on the Ethics Highway

By Benjamin G. Shatz

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California is justly famous for its highways. But human operation of vehicles makes accidents on the road inevitable. Equally inevitable is rubbernecking: gawking at carnage resulting from highway mishaps. Many drivers simply cannot resist slowing down to catch a glimpse of an unfortunate incident.

The byways of litigation are no different; with so much traffic and so much raw human nature on display, calamity ensues. However, while freeway rubbernecking often poses a nuisance that slows traffic and might cause other accidents, rubbernecking on the road of litigation ethics may have beneficial and edifying consequences. Let's sneak a peek at some current events, shall we?

Accident 1: The Price of Non-Admission

Lawyers no doubt have memories, often vivid ones, of the bar exam — the primary hurdle to admission to practice in state court. Memories about admission to various federal courts are far less defined; for most lawyers federal court admission is done by mail, or perhaps at a cattle-call affair leaving no lasting impression.

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Our last ethics column (by Charles Gomez) explored what sort of misconduct may get a lawyer booted from admission to federal court. Those stories all involved lawyers who had been properly admitted to practice in federal court and then got into hot water. But trouble also may come in the form of litigating in a federal court in which a lawyer never was admitted.

Sound improbable? Well, it's not. In fact, before the information age made checking admission status a matter of mouse-clicking a nanosecond database search, it was not uncommon for federal courts to simply assume that all lawyers filing papers and appearing had taken care of preliminary details like admission. Resources did not allow for exhaustive scrutiny and the honor system sufficed.

But, these days, the federal courts are more apt to check-up and catch unadmitted lawyers. In fact, with the advent of e-filing in nearly all federal courts (the U.S. Supreme Court being a notable exception, but I have no doubt that the clerks there actually do check admission status on every filing), gaining an access code for filing any papers requires proper admission. Yet a firm may have one lawyer admitted, use that lawyer's e-filing password for submitted documents, and then send a different lawyer to appear in court. Yes, really.

Indeed, that apparently happened recently, when a well known California lawyer from a well known law firm argued a motion in a high-profile case in the United States District Court for the Northern District of California when her colleagues primarily handling the matter were occupied with other matters. The presiding magistrate judge, however, noticed that the lawyer had not filed a formal appearance, and then checked the court's database and discovered that there was no record of her ever having been admitted to the Northern District. The lawyer apparently thought she had been admitted decades ago, and explained that her appearance was the result of inadvertence and oversight. This incident was widely reported by the press, which pounces on such tidbits.

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sive presentation when, instead of focusing on the legal issues at bar, the court is distracted by the procedural question of whether the lawyer addressing it has been admitted to practice there at all. The lesson here is so clear, it should go without saying: Before appearing in any given federal court, ensure compliance with all admission formalities.

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If memory about admission is too hazy for precise recall, then call the clerk to confirm admission status before appearing. Don't jeopardize credibility and sabotage a representation by overlooking something as simple as valid admission. Also keep in mind that admission in at least a few federal courts (e.g., the Second and Fifth Circuits) expires and must be renewed periodically — by paying a renewal fee, of course! Get admitted and stay admitted. The price of non-admission — embarrassment, stricken papers, possibly even sanctions — is simply too high to pay.

Accident 2: No Conflict Waiver, No Fees

Speaking of bar exam memories, remember bar review course provider BAR/BRI? Well, BAR/BRI settled an antitrust class action against it (the class consisting of all BAR/BRI purchasers between August 1997 and July 2006) for $49 million dollars. The plaintiffs' firm then sought millions in attorneys fees, but the district court judge denied nearly all fees on the basis that the firm violated an ethics rule.

Specifically, the firm had an incentive fee arrangement with five class representatives, under which their payment depended on how much money the firm could recover, but capped any recovery over $10 million. This meant that these class members had no incentive to seek a larger award, whereas the other class members naturally had an incentive to obtain the highest possible recovery.

The Ninth Circuit Court of Appeals affirmed the denial of fees, emphasizing that representing clients with conflicting interests without informed consent is an "egregious ethical violation that may be a proper basis for complete denial of fees." (*Rodriguez v. Disner* (9th Cir. Aug. 10, 2012) __ F.3d __.)

Accident 3: You Can't Hide Your Prying Eyes

Federal court admission gaffes resemble most roadway accidents: caused by insufficient attention to detail. But some accident causes — like texting while driving — are more a function of human compulsion to misbehave. Case in point: the overwhelming urge to see what other people are doing on their computers or mobile devices.

Most readers of this publication would define POS as "proof of service," but some may recognize an alternative meaning: Parent Over Shoulder (as in a teenager's message to the effect, "I can't text or talk freely now because mom just entered the room"). Recently two Texas litigators, a DA and a defense attorney, found themselves in a TRONesque situation: a digital world of trouble.

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Apparently a courtroom clerk caught the lawyers reading a text message on the judge's cell phone. The judge, not amused, recused herself from the case and ordered the lawyers to complete ethics training. The lawyers explained that they had picked up the judge's phone by mistake, noting that phones these days look identical. When the DA's office appealed the sanctions order, the judge vacated it. Perhaps this was much ado about nothing. But an easy and important lesson is to be careful in court, and don't touch the judge's belongings.

— Other Crashes —

In the grab-bag department, note that the Illinois Bar is seeking to disbar a lawyer convicted of smuggling Cuban cigars into the U.S. (*In re Richard Steven Connors* (Aug. 9, 2012) Ill. Atty Reg. & Disciplinary Commn. No. 04-CH-122; see *United States v. Connors* (7th Cir. 2006) 441 F.3d 527.)

Also, a New York attorney drew $5,000 sanctions for repeatedly arguing that "someone" at the court was "corrupt" and essentially working for the opposing party. Taking offense at these attacks, the court explained that nonjudicial staff members of the court assist in administering justice and are indispensable participants in the court process, such that "Disrespecting them or accusing them of corruption...impugns the administration of the justice and disrespects the integrity and impartiality of the Court." (*Curtis & Associates, P.C. v. Callaghan*, No. 11831/10, NYLJ 1202565654161.) As noted in this column before, attacking the court rarely works out well; attacking court staff fares no better.

That covers enough ground for now. Keep your eyes on the road, drive safely, and litigate safely too.

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