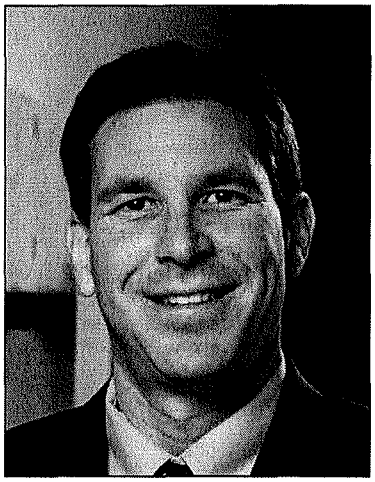
Ethics:

Judges Corral Horses and Ostriches to Combat Bad Lawyering

By Benjamin G. Shatz



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Appeals are generally staid affairs, and appellate justices — jaded by experience — are generally slow to anger. Enter *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, the latest lesson in how to rouse a sleeping giant and incur appellate sanctions — in this instance, $10,000.

What annoyed the court so much? First, respondent's counsel sought an extension of time, claiming that the issues on appeal were "complex" and that more time was needed for research and to finalize the brief. This extension request had three defects: It did not specify the "complex" issues; made only conclusory assertions about counsel's other commitments; and failed to demonstrate any effort to obtain a stipulated extension. Nonetheless, the court granted it.

Yet when respondent's brief was filed, it argued that the appeal was frivolous, contradicting the earlier assertion that the appeal was complex. Moreover, the accusation of frivolity was boilerplate, as was a request for sanctions. But it was worse than boilerplate. Apparently the entire brief was a verbatim cut-and-paste from another one filed in a completely different appeal. The brief thus

belied the assertion that extra time was used for legal research or "finalizing" — proofreading — the brief. This alone might have been enough to incur sanctions, and the court issued an OSC accordingly.

But making matters worse, counsel reacted with a "truculent and dismissive" response, denying wrongdoing and asserting that the OSC must have been erroneously addressed and actually intended to target the appellant. Further, at the hearing, counsel sent a substitute lawyer who was unaware that sanctions were at issue, requiring the court to set another hearing, after which it imposed the $10,000 penalty.

> *"In another recent case, the court imposed sanctions of $8,000 to compensate the state for wasting the Court of Appeal's precious resources in pursuing a frivolous appeal."*

The page-turner of an opinion (by Justice Bedsworth, naturally) laments counsel's serious departures from standard practices, as well as the dishonesty and bullying. Apart from the chutzpah of lying in the extension request, it appears that the court's reaction was prompted by the launching of unwarranted assertions of frivolousness and the pursuit of sanctions through a cut-and-paste brief, combined with rudely second-guessing the court's OSC and failing to show any remorse. The court made clear that these sanctions are meant to warn the Bar as a whole to shape up.

So where's the horse? Well, likening the goal of cleansing incivility from our profession to Don Quixote's quest, the court states, "Rocinante is saddled up" and the court is "prepared to tilt at this windmill for as long as it takes." And it did not take long. A mere two months after Kim, Justice Beds mounted his steed to lance counsel in *Chaaban v. West Seal* (2012) __ Cal.App.4th __, in an unpublished portion of the opinion chiding counsel's "disregard for the rules of appellate practice." Lawyers are now on notice: There's a new sheriff in town.

In another recent case, the court imposed sanctions of $8,000 to compensate the state for wasting the Court of Appeal's precious resources in pursuing a frivolous appeal. (*Shannahan v. Shannahan*, D058220, Nov. 10, 2011 [unpub. opn.].) In addition to the usual reasons an appeal may be found frivolous — pursued to keep the opposing party embroiled in litigation and to hinder efforts to recover money judgments, offering inadequate legal analysis — the court noted that appellant's pursuit of an improper advisory opinion rendered the appeal objectively frivolous.

And now, the ostrich: a "noble" animal, as Judge Posner reminds us — with a large color photo in the Federal Reporter in a consolidated opinion for two otherwise unrelated appeals, *Gonzalez-Servin v. Ford Motor Co.* and *Kerman v. Bayer Corporation* (7th Cir. 2011) 662 F.3d 931. Why the consolidation? Because both cases raised the same ethical advocacy concern: How should counsel address adverse precedent? In both cases,

the appellants had the opportunity to address controlling case law cited by the other side, yet failed to do so. This prompted the court to explain "[w]here there is apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari," but "may not simply ignore it," an approach that is "unacceptable."

By willfully ignoring adverse precedent, counsel in both appeals provoked the remark, "[t]he ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches really bury their heads in the sand when threatened; don't be fooled by the picture below.) The 'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.'" (Quoting prior Seventh Circuit opinions, *Manheim Video, Inc. v. Cook County* (7th Cir. 1989) 884 F.2d 1043, 1047, itself quoting *Hill v. Norfolk & Western Ry.* (7th Cir. 1987) 814 F.2d 1192, 1198.)

Rather than imposing monetary sanctions for poor lawyering, the court emphasized its point by inserting into the opinion two large color photographs: an ostrich burying its head, followed by a similar photo of a suited-man similarly positioned. The decision also specifically named one of the lawyers, pointing out that he was "especially culpable because he filed his opening brief as well as his reply brief after" the adverse opinion had issued, yet failed to mention it — even after opposing counsel heavily relied on it.

Perhaps censure by struthious color photo spread is a kinder way to get the point across without going the extra step of imposing monetary sanctions. Or, given the widespread coverage of the opinion, perhaps not. (For a California version of the ostrich-maneuver resulting in a sanctions OSC, see *Hall v. Foster* (March 3, 2008, B192214) [nonpub. opn.].)

Also of recent note from the Seventh Circuit is *Stanard v. Nygren* (7th Cir. 2011) 658 F.3d 792, where an OSC re suspension and discipline issued for the filing of a complaint riddled with errors making it impossible for the defendants to know what wrongs they were accused of committing. This complaint crossed the line from merely being unnecessarily long to becoming sanctionable as unintelligible. And it suffered from rampant grammatical, syntactical, and typographical errors. This was the plaintiff's third attempt to state claims, and it also failed to attempt to correct deficiencies pointed out by the trial court. On appeal, counsel exacerbated matters by filing late extension motions and a late opening brief that omitted the mandatory jurisdictional statement and was not "reasonably coherent." The court also took umbrage at how the opening brief cited 81 cases, almost all of which were irrelevant.

To close, two more recent tidbits from our own Ninth Circuit. In *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, a sarcastic remark in closing argument — a bit of rhetorical flourish suggesting that an acquittal would encourage future criminal activity — undid a cocaine trafficking conviction, by appealing to the "passions, fears and vulnerabilities" of the jury. And in *Miller v. City of Los Angeles* (9th Cir. 2011) 661 F.3d 1024, an eight word sentence in closing argument prompted a $60,000 sanction that was reversed on appeal by a split panel. The opinions raise very interesting questions about whether counsel actually violated an *in limine* order and whether counsel should — or should not — have apologized.

Yes, litigation can be a circus. But if the animals get out of line, the whip will crack.

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