CIVILITY AND ETHICS

by

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This article discusses some civility and ethical issues that we experience in our law practices.

While accepting the Republican presidential nomination on July 16, 1964, Senator Barry Goldwater said: "I would remind you that extremism in the defense of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue."[1]

When it comes to civility and ethics, Senator Goldwater's advice concerning extremism and moderation would usually be counterproductive.

"There is a perception both inside and outside the legal community that civility, candor and professionalism are on the decline in the legal profession and that unethical, win-at-all-costs, scorched-earth tactics are on the rise."[2]

Courtesy and civility are governed to some extent by the attorney's duty of candor and fairness to counsel and the tribunal.[3] The conduct of a Department of Justice attorney in scribbling in the margin of a federal District Court judge's opinion, submitted as an appendix to the Department's appellate brief, the word "wrong" beside several findings of the District judge,

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1 *New York Times*, July 17, 1964, p 1.

2 *Chevron Chemical Co v Deloitte & Touche*,176 Wi2d 935, 501 NW2d 15,19-20 (Wi 1993).

3 MRPC 3.3. See generally 29 USC 1927, MRPC 3.5(c) and 6.5(a), Civil Rule 11, and *In re Lewellen*, 2003 US App LEXIS 932 (6th Cir 2003).

was held to be "indecorous and unprofessional conduct."[4] In addition a Justice Department attorney was reprimanded for misquoting and failing to quote fully two judicial opinions in a motion.[5] On the other hand, a federal District Court's order suspending an attorney from practice in the District for two years for impugning the integrity of the Court was reversed where, according to the Court of Appeals, the attorney's statements that the judge was anti-Semitic and dishonest were statements of opinion, protected by the First Amendment, and the attorney's statement that the judge was drunk on the bench, although a statement of fact, was not shown to be false.[6]

There are ongoing ethical issues concerning an attorney communicating with other individuals. In representing a client, an attorney should not communicate about the subject matter of the representation with a party whom the attorney knows to be represented in the matter by another attorney, unless the attorney has the consent of the other attorney or is authorized to do so.[7] This ethical rule can raise issues when the attorney wants to communicate with present employees of the other side.

There are several guidelines we should heed in this situation. First, the attorney may not interview an incumbent management employee. Second, there cannot be communication with a non-managerial employee regarding matters within the scope of his or her employment. Third,

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4 *Allen v Seidman*, 881 F2d 375 (7th Cir 1989).

5 *Precision Speciality Metals, Inc v United States*, 2003 US App LEXIS 448 (Fed Cir 2003). See generally MRPC 3.3.

6 *Standing Committee v Yagman*,55 F3d 1430 (1995).

7 MRPC 4.2. See generally *Valassis v Samelson*,143 FRD 118 (ED Mi 1992).

there cannot be communication with an employee whose act or commission may be imputed to the other side. Fourth, there cannot be communication with an employee whose statements may be an admission.[8] Some courts have held that this includes mere evidentiary admissions. Other courts have held that the admission must be a binding judicial admission. The latter occurred where it was held that the ethics rules did not prohibit an employee's attorneys from interviewing Harvard College employees and the trial court's sanctions ruling against the employee's attorneys were vacated.[9]

An attorney cannot communicate directly with a represented party even if the adverse party initiates the communication.[10] The attorney cannot "suggest" that the communication be done by the client.[11] An attorney may not instruct a client to tender a settlement offer directly to an opposing party represented by an attorney unless the opposing party's attorney consents.[12] The communicating attorney might be subject to disqualification.[13] However, under some circumstances, the attorney can obtain leave of court to contact groups of incumbent employees with whom contact might otherwise be foreclosed.[14]

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8 Evidence Rule 801(d)(2)(D).

9 *Messing, Rudavsky & Weliky, PC v President and Fellows of Harvard College*, 436 Mass 347, 764 NE2d 825 (2002).

10 *In the Matter of Searer*, 950 F Supp 811 (WD Mi 1996).

11 ABA Opn 75 (1932).

12 RI 171 (September 17, 1993).

13 *Shoney's v Lewis*, 875 SW2d 514 (Ky 1994).

14 *Morrison v Brandeis*,125 FRD 14 (D Ma 1989).

The requirements for communicating with former employees are generally more lenient. Usually an attorney can talk with former employees if the employee is not personally represented on the matter.[15] The proscription against communications with represented parties generally does not extend to former employees of a represented entity.[16] Nevertheless, there are several *Miranda* type warnings which should be given by the interviewer attorney to the former employee. These warnings include clearly telling the former employee that the employee is not required yo talk with the attorney, the former employee is not to divulge any attorney-client privilege information, and the communication cannot occur if the former employee is represented by his or own counsel or the entity's counsel on the subject matter of the communication. In addition, the communicating attorney cannot give legal advice to the individual.

Secret tape recording by the attorney raises delicate issues. It is generally unethical in many states for an attorney to tape record any person without that person's consent.[17] The mere act of secretly but lawfully recording a conversation might not be inherently deceitful.[18] In spite of this, it has been held that the witness interview work product privilege was destroyed because the secret tape recording by the attorney was done without consent.[19]

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[15] RI-120 (March 6, 1992), RI-44 (1990), and R-2 (1989). See generally *Kitchen v Aristech Chemical*, 769 F Supp 254 (SD Oh 1991); and *Upjohn Co v Aetna Casualty and Surety Co*, 768 F Supp 1186 (WD Mi 1991).

[16] *US v Beiersdorf-Jobst, Inc*, 980 F Supp 257 (ND Oh 1997).

[17] ABA Formal Opinion No 337 (1974). But see Mich Ethics Opinion RI-309 (1998)(determine on a case by case basis).

[18] ABA Formal Ethics Op 01-422 (2001)

[19] *Wilson v Lamb*, 125 FRD 142 (ED Ky 1989).

The inadvertent acquisition of privileged documents creates ethical dilemmas. The receipt of brown envelope and "dickie bird" deliveries falls into this category. An attorney who, without solicitation, receives materials which are obviously privileged and/or confidential has a professional obligation to notify the adverse party's attorney that the receiving attorney has such materials and either follow the instructions of the adverse party's attorney concerning the disposition of the materials or refrain from using the materials until a resolution of their proper disposition is obtained from the court.[20] This includes the inadvertent receipt of attorney-client privileged letters.[21]

Issues can arise concerning the timing of the review of an individual's medical records by the opposing party. For example, in one case, a defendant University's attorney was sanctioned for unilaterally reviewing the plaintiff's student medical clinic medical records while there were pending objections to the discovery and before the return date in the subpoena duces tecum issued by the attorney for those records.[22]

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[20] ABA Formal Opinion 92-368 (1992) and ABA Formal Opinion 94-382 (1994). *Cf* District of Columbia Ethics Opinion 356 (May 16, 1995), and Maryland Bar Assn. Op 89-53 (1989), Ohio Op 93-11, Virginia Op 1076 (1988), and Michigan Op C1-970 (1983). Inadvertent disclosure in Michigan. Mich Ethics Op RI-179 (1993). See generally Proctor, "Counsel's Corner: Inadvertent Disclosure," 75 *Mich Bar J* 418 (1996).

[21] *Trans Equip Sales Corp v BMY Wheeled Vehicles*, 930 F Supp 1187 (ND Oh 1996); and *Resolution Trust Corp v First of Am Bank*, 868 F Supp 217 (WD Mi 1994).

[22] *Mann v University of Cincinnati*,824 F Supp 1190 (SD Oh 1993); and 152 FRD 119 (SD Oh 1993), aff'd memo op,114 F3d 1188 (6th Cir 1997). *Cf Domako v Rowe*, 438 Mich 347 (1991).

In conclusion, ongoing civility and ethical issues force the conscientious attorney to practice both moderation and civility in the pursuit of justice. These issues repeatedly raise concerns in many areas, including interaction with the court and other counsel, brief writing, contacting witnesses, and document retention and review.