# Reflections on civility and ethics

**BY** LEE HORNBERGER

While accepting the 1964 Republican presidential nomination, Sen. 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, Sen. Goldwater's advice concerning extremism and moderation would usually be counterproductive. As noted in a 1993 Wisconsin Court of Appeals opinion in *Chevron Chemical Co v. Deloitte & Touche*, "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]

U.S. Supreme Court Justice Sandra Day O'Connor advised that "[m]ore civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."[3]

## FAIRNESS AND CANDOR TO THE TRIBUNAL

Courtesy and civility are governed to some extent by the attorney's duty of candor and fairness to counsel and the tribunal.[4] The conduct of a U.S. Department of Justice attorney scribbling the word "wrong" in the margin next to several findings in a federal district court judge's opinion and submitting it as an appendix to the department's appellate brief was held to be "indecorous and unprofessional conduct."[5] In addition, a Justice Department attorney was reprimanded for misquoting and failing to quote fully two judicial opinions in a motion.[6] On the other hand, a federal district court order suspending an attorney from practice for two years for impugning the integrity of the court was reversed; according to an

appeals court, the attorney's claims 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.[7]

## ATTORNEY COMMUNICATIONS WITH WITNESSES

There are ongoing ethical issues concerning attorney communication with other individuals. When representing a client, an attorney should not discuss 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.[8] This ethical rule can raise issues when an attorney wants to communicate with the 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, 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.[9]

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 in a case that held that ethics rules did not prohibit an employee's attorneys from interviewing Harvard employees and the trial court's sanctions against the employee's attorneys were vacated.[10]

An attorney cannot communicate directly with a represented party even if the adverse party initiates the communication.[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, an attorney can obtain leave of court to contact groups of incumbent employees with whom contact might otherwise be foreclosed.[14]

The requirements for communicating with former employees are generally more lenient. Typically, an attorney can talk with a former employee if that employee is not personally represented in 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 they are not required to talk with the attorney, the former employee is not to divulge any information subject to attorney-client privilege, and the communication cannot occur if the former employee is represented by his or her 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.

## ATTORNEY RECORDING

Secret recording by an attorney may raise delicate issues. MCL 750.539c, in part, provides:

> Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs, or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.[17]

It is generally unethical in many states for an attorney to record any person without that person's consent.[18] The mere act of secretly but lawfully recording a conversation might not be inherently deceitful.[19] In spite of this, it has been held that the witness interview work-product privilege was destroyed because a secret recording by the attorney was done without consent.[20]

The inadvertent acquisition of privileged documents also creates ethical dilemmas. Receipt of brown envelope and dickie-bird deliveries fall 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, after which the receiving attorney can follow the instructions of the adverse party's attorney concerning disposition of the materials or refrain from using them until a resolution of their proper disposition is obtained from the court.[21]

This includes inadvertent receipt of attorney-client privileged letters.[22]

In *AFT Michigan v. Project Veritas*,[23] the district court certified an interlocutory appeal to the U.S. Sixth Circuit Court of Appeals regarding whether MCL 750.59a and 750.539c prohibit a party to a conversation from recording it absent the consent of all other participants. The Michigan Supreme Court had declined the district court request to answer a certified question on the same issue in *In re Certified Question from the United States District Court of Michigan, Southern Division*.[24] The Sixth Circuit denied hearing the appeal on August 16, 2019, stating, "The district court certified for an interlocutory appeal under § 1292(b) whether Michigan's eavesdropping statute prohibits a participant from recording, without the consent of all parties thereto, a private conversation. The Michigan Supreme Court has not addressed this question, which may be controlling as to some of the claims asserted below. The defendants have not demonstrated … that an immediate appeal will advance the termination of the litigation because the litigation is likely to proceed in substantially the same manner regardless of its outcome."[25]

In *Tyler v. Findling*,[26] the Supreme Court enforced mediation confidentiality in a defamation case where one attorney secretly recorded a conversation with another attorney.[27]

## ATTORNEY REVIEW OF MEDICAL RECORDS

Issues can arise concerning the timing of 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 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.[28]

## CONCLUSION

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. As the Michigan Supreme Court has stated, "[i]n fulfilling our professional responsibilities, we as attorneys, officers of the court, and custodians of our legal system, must remain ever-mindful of our obligations of civility in pursuit of justice, the rule of law, and the fair and peaceable resolution of disputes and controversies."[29]

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## ENDNOTES

1. Goldwater Institute, *Barry Goldwater Quotes That Inspire Us* <https://www.goldwaterinstitute.org/barry-goldwater-quotes-that-inspire-us/> [https://perma.cc/8QRS-47PN] (accessed January 19, 2023).
2. *Chevron Chemical Co v Deloitte & Touche*, 176 Wis 2d 935, 944-45; 501 NW2d 15 (App, 1993).
3. O'Connor, *Professionalism*, 76 Wash U L Q 5, 8 (1998).

4. Generally, MRPC 3.3, MPRC 3.5(c), MRPC 6.5(a), and 29 USC 1927. See also *In re Lewellen*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit issued January 17, 2003 (Case No 00-2028) and *Bearden v Ballard Health*, 967 F 3d 513, 515 (CA 6, 2020) (citing in part from *Bennett v State Farm Mut Auto Ins Co*, 731 F3d 584, 585 (CA 6, 2013), "There are good reasons not to disparage your opponent, especially in court filings. 'The reasons include civility; the near-certainty that overstatement will only push the reader away ... and that, even where the record supports an extreme modifier, the better practice is usually to lay out the facts and let the court reach its own conclusions.'").
5. *Allen v Seidman*, 881 F2d 375, 381 (CA 7, 1989).
6. *Precision Specialty Metals, Inc v United States*, 315 F 3d 1346, 1357 (Fed Cir, 2003) and MRPC 3.3.
7. *Standing Comm v Yagman*, 55 F3d 1430 (CA 9, 1995).
8. MRPC 4.2 and *Valassis v Samelson*, 143 FRD 118, 123 (ED Mich, 1992).
9. FRE 801(d)(2)(D).
10. *Messing, Rudavsky & Weliky, PC v President and Fellows of Harvard College*, 436 Mass 347, 764 NE2d 825 (2002).
11. *In the Matter of Searer*, 950 F Supp 811, 814 (WD Mich, 1996).
12. Ethics Opinion RI-171 (September 17, 1993).
13. *Shoney's v Lewis*, 875 SW2d 514 (Ky, 1994).
14. *Morrison v Brandeis Univ*, 125 FRD 14 (D Mass, 1989).
15. Ethics Opinions RI-120 (1992), RI-44 (1990), and R-2 (1989). See generally, *Kitchen v Aristech Chemical*, 769 F Supp 254 (SD Ohio, 1991) and *Upjohn Co v Aetna Casualty and Surety Co*, 768 F Supp 1186 (WD Mich, 1991).
16. *Smith v Kalamazoo Ophthalmology,* 322 F Supp 2d 883 (WD Mich, 2004), *US v Beiersdorf-Jobst*, 980 F Supp 257 (ND Ohio, 1997), and Ethics Opinion RI-360 (2013).
17. *Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982).
18. ABA Formal Opinion 337 (1974) but see Ethics Opinion RI-309 (1998) (determined on a case-by-case basis).
19. ABA Formal Opinion 01-422 (2001).
20. *Wilson v Lamb*, 125 FRD 142 (ED Ky, 1989).
21. ABA Formal Opinion 92-368 (1992) and ABA Formal Opinion 94-382 (1994). But see District of Columbia Ethics Opinion 356 (1995), Maryland Bar Ass'n Opinion 89-53 (1989), Ohio Opinion 93-11, Virginia Opinion 1076 (1988), and Ethics Opinion C1-970 (1983). Regarding inadvertent disclosure in Michigan, see generally Ethics Opinion RI-179 (1993) and Proctor, *Counsel's Corner: Inadvertent Disclosure,* 75 Mich Bar J 418 (1996).
22. *Trans Equip Sales Corp v BMY Wheeled Vehicles*, 930 F Supp 1187 (ND Ohio, 1996) and *Resolution Trust Corp v First of Am Bank*, 868 F Supp 217 (WD Mich, 1994).
23. *AFT Michigan v Project Veritas*, 397 F Supp 3d 981 (ED Mich, 2019).
24. *In re Certified Question from the United States District Court of Michigan, Southern Division*, 954 NW2d 212 (2021).
25. *In re Project Veritas*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued August 16, 2019 (Case No 19-0109).
26. *Tyler v Findling*, 508 Mich 364; 972 NW2d 833 (2021).
27. Hornberger, *Michigan Supreme Court enforces mediation confidentiality*, Oakland County Legal News (December 8, 2021) <https://www.leehornberger.com/files/Findling,%20OCLN%20(Dec2021).pdf> [https://perma.cc/N39L-YK5V] (accessed January 19, 2023).
28. *Mann v Univ of Cincinnati*, 824 F Supp 1190 (SD Ohio, 1993) and *Mann v Univ of Cincinnati,* 152 FRD 119 (SD Ohio, 1993), but see *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991).
29. Administrative Order No 2020-23 (December 16, 2020, amended December 14, 2022).