COMMENTARY

ADR SPOTLIGHT

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PREMI PROFESSIONAL RESOLUTION EXPERTS OF MICHIGAN, LLC

Reflections on civility and ethics

This article discusses some civility and ethical issues we experience in our professional 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."[i] 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."[ii]

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."[iii]

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.[iv] "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.'"[v]

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 was held to be "indecorous and unprofessional conduct."[vi]

In addition, a Justice Department attorney was reprimanded for misquoting and failing to quote fully two judicial opinions in a motion.[vii] 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.[viii]

Attorney communication with witnesses

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.[ix]

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, 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.[x] 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.[xi]

An attorney cannot communicate directly with a represented party even if the adverse party initiates the communication.[xii] The attorney cannot "suggest" that the communication be done by the client.[xiii] 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.[xiv] The communicating attorney might be subject to disqualification.[xv] However, under some circumstances, the attorney can obtain leave of court to contact groups of incumbent employees with whom contact might otherwise be foreclosed.[xvi]

The requirements for communicating with former employees are generally more lenient. Usually, an attorney can talk with a former employee if the employee is not personally represented on the matter.[xvii] The proscription against communications with represented parties generally does not extend to former employees of a represented entity.[xviii] 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 to 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.

Attorney tape recording

Secret tape recording by the attorney raises delicate issues. Michigan statutory law provides, in part,

"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."[xix]

In *Tyler v Findling*,[xx] the Michigan Supreme Court enforced mediation confidentiality in a defamation case where one attorney secretly recorded a conversation with another attorney prior to actually meeting with the mediator by striking an affidavit containing statements which were subject to mediation confidentiality. It is generally unethical in many states for an attorney to record any person without that person's consent.[xxi] The mere act of secretly but lawfully recording a conversation might not be inherently deceitful.[xxii] In spite of this, it has been held that the witness interview work product privilege was destroyed because the secret recording by the attorney was done without consent.[xxiii]

Unintentional acquisition of privileged documents

The inadvertent acquisition of privileged documents creates ethical dilemmas. The receipt of plain brown envelopes 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.[xxiv] This includes the inadvertent receipt of attorney-client privileged letters.[xxv]

Attorney review of medical records

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 records from the medical clinic 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.[xxvi]

Conclusion

Ongoing civility and ethical issues require 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. "In 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."xxvii

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[i] *New York Times, July 17, 1964, p 1.*

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

[iii] *O'Connor, Professionalism, 76 Wash ULQ 5, 8 (1998).*

[iv] *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).*

[v] *Bennett v State Farm Mut Auto Ins Co, 731 F3d 584, 585 (6th Cir. 2013) (cleaned up), quoted at Beardon v Ballard Health, 967 F3d 513, 515 (6th Cir 2020).*

[vi] *Allen v Seidman, 881 F2d 375 (7th Cir 1989).*

[vii] *Precision Specialty Metals, Inc v United States, 2003 US App LEXIS 448 (Fed Cir 2003). See generally MRPC 3.3.*

[viii] *Standing Committee v Yagman, 55 F3d 1430 (1995).*

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

[x] *Evidence Rule 801(d)(2)(D).*

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

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

[xiii] *ABA Opn 75 (1932).*

[xiv] *RI 171 (September 17, 1993).*

[xv] *Shoney's v Lewis, 875 SW2d 514 (Ky 1994).*

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

[xvii] *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).*

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

[xix] *MCL 750.539c. Sullivan v Gray, 117 Mich App 476; 324 NW2d 58 (1982). In AFT Michigan v Project Veritas, 397 FSupp3d 981 (ED Mich 2019), the District Court certified an interlocutory appeal to the Sixth Circuit Court of Appeals regarding whether MCL 750.59a and 750.539c prohibit a party to a conversation from recording the conversation absent the consent of all other participants. The Michigan Supreme Court had declined the District Court's request to answer a certified question on the same issue. In re: Certified Question from the United States District Court of Michigan, Southern Division, Docket No. 162121 (May 26, 2021). The Sixth Circuit denied hearing the appeal on August 16, 2019. The Sixth Circuit stated, "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 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."*

[xx] *508 Mich 364 (2021), reversing Tyler v Findling, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2020 (Docket No. 348231, 350126). Tyler is discussed at Lee Hornberger, "Michigan Supreme Court Enforces Mediation Confidentiality," DETROIT LEGAL NEWS (December 30, 2021), p. 1. Mediation is an effective tool for resolving disputes. Confidentiality is an important principle of mediation. Mediation can provide a confidential and informal process that serves the parties' interests. All involved with the mediation process, including the advocates, the parties, and other participants should understand the importance of confidentiality. "In a confidential setting, the parties and their lawyers will convey to the mediator much of what they believe is important about the case." J. Anderson Little, Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes (ABA 2007), p. 20. "Maintaining confidentiality is critical to the integrity of the mediation process. Confidentiality encourages candor, allows a full exploration of the issues, and increases the likelihood of settlement. It also minimizes the inappropriate use of mediation as a discovery technique." Douglas E. Noll, Peacemaking: Practicing at the Intersection of Law and Human Conflict (Cascadia Publishing House 2003). Several resources impact and inform lawyers concerning mediation confidentiality in Michigan. These sources include the State Court Administrative Office (SCAO) Mediator Standards of Conduct (February 1, 2013), the Michigan Court Rules, the rules of the host forum, case law, and the parties' contractual agreement to mediate.*

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

[xxii] *ABA Formal Ethics Op 01-422 (2001).*

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

[xxiv] *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).*

[xxv] *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).*

[xxvi] *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).*

[xxvii] *Professionalism Principles for Lawyers and Judges, Mich. Administrative Order No. 2020-23.*

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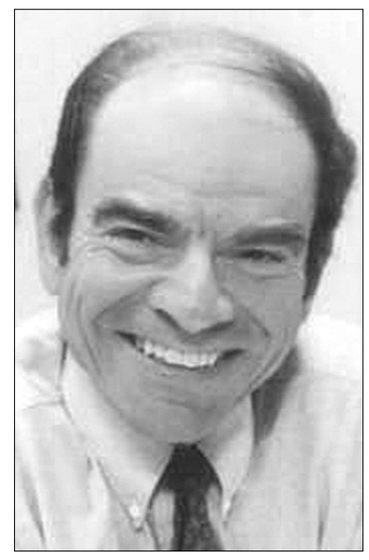
Musk's actions prompt a media seismic reaction

BY BERL FALBAUM



Berl Falbaum

What am I missing?

I am referring to the brouhaha over Elon Musk banning some journalists from Twitter, among them reporters from CNN, The New York Times, and The Washington Post.

I'll come right to the conclusion: So what? The journalists may not like that but he has every right to do so. He is not guilty of any wrongdoing, any illegal activity, any libel or any unconstitutional action.

Twitter is a private company which Musk heads. As such, he is free to choose what he will publish on his outlet or what he decides to "ban."

The media daily make tens of thousands of decisions on what they approve to publish and or want will be "banned." In the media world it is called "editing." In my decades in journalism, I have lost count on the number of my articles and letters to editors which never saw the light of day. They were "banned."

Now, that upset me because subscribers would never have the privilege of reading my pearls of wisdom, but I recognized the media's inherit right to protect the world from my ramblings.

The Musk controversy is not, to emphasize, a freedom of press issue. The First Amendment prohibits governmental actions not those by private (media) entities or individuals.

Here is a summary of reactions to Musk's edicts:

—The United Nations said it was "very disturbed."

—The European Union threatened sanctions.

—The Committee to Protect Journalists was "deeply disturbed."

—CNN called the action "unjustified and impulsive."

—Fourth Watch chimed in with, "This is outrageous."

—New York Rep. Alexandria Ocasio-Cortez asked Musk to "lay off pro-fascism." That one took my breath away. Ironically, government demanding publication by a private media institution would be pro-fascist.

Talk about overreaction. If Musk has been arbitrary, he has the right to be arbitrary. If his policy is "vengeful," he has the right to be that as well. He was also accused of being hypocritical because when he acquired Twitter, he promised Twitter would be the ultimate outlet for a free flow of ideas.

Well, he also has a right to be hypocritical and the right to be erratic, dictatorial, hateful, inconsiderate, inconsistent, impulsive, selfish, mean-spirited, closed-minded, partisan, etc. I think you get the picture.

There was also the charge of "censorship" which, of course, does not apply at all in this case. Censorship, by definition, emanates from governmental authorities banning or prohibiting "speech."

Just about all complained about not receiving a reason for the ban. I'll answer on Musk's behalf: As a private entrepreneur, he is not obligated to explain himself. There is no such constitutional requirement. Need I add, CNN, the Times, The Washington Post nor the rest of the media ever offer explanations for their actions.

Musk, of course, is not the first media "dictator" who has held court in the country. American journalism has a long history of so-called media barons who ruled over their news publishing empires with iron and "banning" fists. Think Hearst, Luce, Pulitzer, McCormick and, more recently, Murdoch and Bloomberg.

Some of the Musk-like publishers not only banned material they found offensive, but also "slanted" stories to reflect their political views.

I was particularly fascinated by the reaction from the New York Times. It called Musk's banning dictum "questionable."

I have no idea what that means. That aside, this is the same paper which forced its editorial page director, James Bennett, to resign after the paper published an Op-Ed by Arkansas U.S. Senator Tom Cotton which recommended that then President Trump send in troops to quell rioting that followed the murder of George Floyd in Minneapolis.

The resignation came after the paper's liberal staffers revolted over the publication of Cotton's piece. Bottom-line: They believed the piece should have been banned and they turned a deaf ear to Bennett's defense in which he stated:

"Times Opinion owes it to our readers to show them counter-arguments, particularly those made by people in a position to set policy."

In addition to condemning Musk's action as "questionable," the paper added the ban was "unfortunate."

So, it's unfortunate. I consistently come across "unfortunate" decisions made by the media in what they publish. I am confident they make countless "unfortunate" decisions on what they do not print or air.

I am considering sending this piece for publication to The Times and others who protested Musk's decision. I don't want to be pessimistic, but I think I will experience "questionable" and "unfortunate" decisions.?

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COMMENTARY PAGE

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