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Whatever Happened to the Search for Truth

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Ethics and Professionalism in the Digital Age

A Symposium of the Mercer Law Review

November 6, 2008

Dinner Speech

Whatever Happened to the Search for Truth?

PROFESSOR LONGAN: It is my great honor to introduce our speaker tonight, Professor Monroe Freedman of the Hofstra University School of Law. I doubt there is anyone in the room tonight who is not familiar with Professor Freedman and his work. All I intend to do by way of introduction is mention one of his many honors and then read for you a few comments about his work from others in the field.

In 1998 Professor Freedman received the Michael Franck Award, the ABA's highest award for professionalism. The ABA Center for Professional Responsibility created the Michael Franck Award for Professional Responsibility to acknowledge "individuals whose contributions in the area of lawyers' professional responsibility set an example of insight into the demands of legal professionalism, dedication to the highest level of

ethical conduct, and a vision of constant improvement of lawyer regulation in the public interest.”¹ Professor Freedman received the award in recognition of “a lifetime of original and influential scholarship in the field of lawyers’ ethics.”²

To give you some perspective on his influence, here are a few comments from his peers:

· Professor Ronald Rotunda: “If we had to pick the one person who first created modern legal ethics as a serious academic specialty, it would be Monroe Freedman.”

· Larry Fox: Professor Freedman is “the conscience of our profession.”

· William Simon: “Suppose you had to pick the two most influential events in the recent emergence of ethics as a subject of serious reflection by the bar. Most likely, you would name the Watergate affair of 1974 and the appearance a few years earlier of an article by Monroe Freedman Of the two events, Watergate is the most famous, but . . . the least important.”

· And finally, from Alan Dershowitz: “I regard [Monroe Freedman] as the Holmes and Brandeis of Legal Ethics.”³

Please join me in welcoming to Macon and to Mercer, Professor Monroe Freedman.

PROFESSOR FREEDMAN: Thank you very much, Professor Longan, for the generous introduction.

In a recent case, *Gutman v. Klein*,⁴ the court ordered the defendant to turn over his laptop so that it could be copied by the plaintiff’s lawyer and an expert. When the lawyer and the expert arrived at the appointed time, there was a two-hour delay. When they finally got the laptop, they found that it was hot to the touch and was missing a screw from the hard-drive plate, which made them suspicious.

As a result, the court ordered its own expert to examine the laptop. The court’s expert found that numerous files had been deleted and were unrecoverable, and also that there were numerous modifications in documents that were on the laptop. Accordingly, the judge entered a default judgment against that defendant for spoliation of evidence and ordered that attorney’s fees be given by the defendant to the plaintiff for the time involved. One of the things that the judge said was, “It is

1. <http://www.abanet.org/cpr/awards/home.html>.

2. http://www.abanet.org/cpr/awards/mfrank_winner_bios.html#freedman.

3. All of these quotes are from http://law.hostra.edu/pdf/Directory/Faculty/FullTimeFaculty/ftfac_mfreedman_vitae.pdf.

4. No. 03CV1570(BMC) (RML), 2008 WL 4682208 (E.D.N.Y. Oct. 15, 2008).

impossible to know what [plaintiffs] would have found if [defendants] and [their] counsel had complied with their discovery obligations.⁷⁶

Well, assume a similar situation, but that the spoliation is not discovered because of a court-ordered production but instead because the defendant sent discovery materials to the plaintiff in which metadata revealed exactly the same thing, or that a misdirected fax revealed the same kind of thing. There are a number of court opinions and ethics opinions in this area, and a large number of them apply an exclusionary rule to the metadata or to the misdirected fax. The decision of a large number of these opinions is that the receiving lawyer cannot read the fax or the metadata, must advise the sender that it was received, must return it, and may not use it.

As a practical matter, however, the case of the metadata or of the misdirected fax is indistinguishable from *Gutman v. Klein*, where court-ordered discovery revealed that the defendant had concealed information through spoliation. Nevertheless, the majority of ethics opinions and court decisions would exclude the evidence of spoliation discovered through examination of metadata or through the errant fax. And the reasoning of those opinions is striking. There is discussion of attorney-client confidentiality. There is discussion of dishonesty—that is, on the part of the receiving lawyer who uses the information. There is discussion of prejudice to the administration of justice. There is discussion of professionalism, sometimes expressed as what goes around comes around—professionalism there being a euphemism for putting the interest of yourself and your fellow lawyer ahead of your client's interests. That is, if you use what another lawyer has sent you through carelessness, then another lawyer some day is going to do the same thing to you. It's therefore not in your interest to use evidence of spoliation or the smoking gun document that indicates some other kind of fraud on the other side.

However, there is almost no discussion whatsoever about the recipient's fiduciary obligation to his or her own client. Nor is there discussion about the lawyer's obligation of loyalty to the client, despite the fact that the model rules say that loyalty is an essential element in the lawyer's relationship to the client. Moreover, very few of these dozens of ethics opinions and judicial opinions talk about the importance of truth in the system of administration of justice. That is why the title to my talk is, "What Ever Happened to the Search for Truth?" One exception, however, is an article by David Hricik in 2006 in which part

5. *Id.* at *12 (alterations in original) (quoting *Metro. Opera Ass'n v. Local 100, Hotel Employee's & Rest. Employees Int'l Union*, 212 F.R.D. 178, 230 (S.D.N.Y. 2003)).

of the title is: "I Can Tell When You're Telling Lies."⁶ But what follows from that? Too often what follows from that is: "But I can't tell anybody about it." Does that make sense?

As a preliminary to talking about the search for truth and the importance of the search for truth in what we are going to be talking about at the Symposium is that none of these opinions or decisions makes any reference to the fact that the lawyer is the client's agent. Yet a truism that is universally recognized is that the lawyer is the client's agent. To understand my point, take an actual case, where a defense lawyer in a personal injury case checked his voice mail one morning and found on it a message from the plaintiff himself, who thought he was calling his own lawyer but had mistakenly called the defense lawyer. What the plaintiff said was, "Is it okay if I shoot some baskets with the guys? I thought I should ask you because you got so angry with me when I went bowling."

Now, does anybody have any question about whether that admission by the plaintiff can be used? Why is it different, then, if the same kind of information comes in a misdirected e-mail or in metadata that has been mined, or in a misdirected fax from the lawyer for the plaintiff saying, for example, "I understand you went bowling. If you ever do anything like that again, you're going to have to find another lawyer. I have told you that they are going to be watching and we can't afford to have them catch you." Why should that not be useable just as much as when it comes from the client, from the principal, himself?

Take a United States Supreme Court decision in a death penalty case. The case was *Coleman v. Thompson*.⁷ The defendant's court-appointed lawyer filed the Virginia notice of appeal seventy-two hours late because the lawyer miscalculated the time. The Virginia courts acknowledged that the notice of appeal was purely ministerial, that the late filing was no doubt inadvertent, and that the defendant had not understandably and knowingly waived his right to appeal. Nevertheless, the Virginia Supreme Court refused to allow the defendant to raise eleven alleged constitutional errors before ordering that he be put to death.

Because of that decision, the United States Supreme Court held that Coleman could not raise his constitutional issues. Why? Because under the Restatement of Agency, section 242—which deals with the master being subject to liability for harm caused by the negligent conduct of the servant within the scope of employment—the defendant was bound by his lawyer's error, by his lawyer's negligence. So Coleman, the

6. David Hricik, *I Can Tell When You're Telling Lies: Ethics and Embedded Confidential Information*, 30 J. LEGAL PROF. 79 (2006).

7. 501 U.S. 722 (1991).

defendant, sitting in prison, was the master, and his court-appointed lawyer was his servant. Accordingly, when his court-appointed lawyer was negligent, Coleman was responsible as the master. Thus, the Supreme Court found that the lawyer's status as agent justified putting the client to death without consideration of his constitutional rights.

In view of that, should not the lawyer's agency support truth in the system over exclusion of truthful evidence? I have read no less than sixty United States Supreme Court decisions in which the Court has emphasized the importance of the search for truth in trials. Justice Scalia said that the purchase price of the exclusion of reliable and probative evidence is derogatory to the search for truth, and that the victim of the exclusion of such reliable and trustworthy evidence is likely to be some individual who is prevented from proving a valid claim or who is prevented from establishing a valid defense.⁸ And this, he said, is offensive to "those who love justice" because courts that exclude the truth "become themselves the instruments of wrong."⁹

Similarly, Justice White wrote, "After all, a . . . trial is not a game or a sport. [T]he very nature of a trial [i]s a search for truth."¹⁰ I take the importance of truth in the system seriously, although I know that there are things that trump truth. However, I do not understand why we should overlook or exclude reliable, trustworthy, probative evidence because it has been obtained through mining of metadata or through a misdirected e-mail.

In the name of truth, the Supreme Court has even condoned government officers lying to defense lawyers. For example, in *Moran v. Burbine*,¹¹ the authorities told the defense lawyer who wanted to see her client that she did not have to see him that evening because her client would not be interrogated that night. The defendant did not know that his lawyer was trying to see him, and he was not told. Within an hour, the authorities began a series of interrogations that went through the night—directly contradicting what they had told the defendant's lawyer. They did get a Miranda waiver but they got it from somebody who did not know that his lawyer wanted to see him, and who did not know that there had been a promise that he would not be interrogated. The Supreme Court was very upset about this, decrying the objectionable ethics of "deliberate[ly] misleading . . . an officer of the court."¹²

8. *Jaffee v. Redmond*, 518 U.S. 1, 18-19 (1996) (Scalia, J., dissenting).

9. *Id.* at 19.

10. *Matthews v. United States*, 485 U.S. 58, 71 (1988) (White, J., dissenting) (alterations in original) (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)).

11. 475 U.S. 412 (1986).

12. *Id.* at 424.

Nevertheless, the Court allowed the confession, in the name of the search for truth.

Similarly, in *Nix v. Williams*,¹³ the police promised the lawyer that they would not interrogate the client when they were transporting him to another city, and on that assurance the lawyer let them transport the prisoner without his being present. What then resulted, of course, was interrogation during the trip. Again, the Supreme Court allowed the fruit of that illicit interrogation, emphasizing the “enormous societal cost of excluding truth . . . in the administration of justice.”¹⁴ The Court explained that there is no support for excluding reliable, truthful, probative evidence, even when it is the result of lying to the officer of the Court. To exclude the evidence, the Court said, would be a “formalistic, pointless, and punitive approach,”¹⁵ and the Court again stressed the “integrity of the trial process.”¹⁶

Now, in the face of the balance that has been repeatedly struck by the Supreme Court in favor of the integrity of the trial process; that is—the search for truth despite illicit conduct, misleading conduct, even deliberate lying to obtain evidence—doesn't it seem incongruous to exclude the use of truthful, probative, reliable evidence because it was obtained through a misdirected e-mail or fax or through the mining of metadata? Yet there are numerous holdings and articles saying that to read a misdirected fax or e-mail or to mine metadata is dishonest, and that the evidence obtained must be excluded from the search for truth.

Finally, one finds a recurring theme in the articles, in the opinions, and in the ethics decisions that to allow evidence obtained from a misdirected fax seems at odds with a profession that puts such a high value on confidentiality and the attorney-client privilege. Now, think about that for just a moment. To allow the evidence that is sent by the lawyer on one side to the lawyer on the other side is at odds with the high value of confidentiality and the attorney-client privilege. That is a non sequitur. The attorney-client privilege, the work product doctrine, and attorney-client confidentiality, those are between the sending lawyer and his own client. There is no attorney-client privilege or attorney-client confidentiality going from the *recipient* lawyer and her *adversary's* client. The receiving lawyer does have, with regard to her own client, an obligation of loyalty, but she does not have a duty of confidentiality to her adversary's client.

13. 467 U.S. 431 (1984).

14. *Id.* at 445.

15. *Id.*

16. *Id.* at 447.

Of course, it is all right if lawyers want to have agreements between them that metadata will not be mined or that misdirected e-mails will not be used. However, it is constantly overlooked that this is not the lawyer's unilateral decision to make—this is a decision that must be made by the client. This is part of a lawyer's obligation to communicate to the client anything that is material to the representation. And it is up to the client, not the lawyer, to make that decision. Indeed, the lawyers would have conflicts of interest in making the decision themselves.

If the client agrees, that's fine, but what if the client says, "Look, I'm being completely open in this case. But I know my adversary. He's a crook. That's what this is all about. So, if you send something by mistake to the other side, I don't care, because I have no secrets. But we might receive evidence of his fraud. So no, I don't agree with that." The client's decision should be controlling.

Although I have strong views in favor of confidentiality, I agree with those courts which have held that if confidentiality is not protected like the crown jewels, it is lost. This was applied, for example, in a case where an investigator for one side went at night to the dumpster behind the building of the adverse lawyer, went through the trash in the dumpster, and found some attorney-client privileged material that was extremely important. The court allowed the evidence to be used, saying it had been abandoned, saying that it had not been treated like the crown jewels.

That means, at least in crown-jewels jurisdictions, that the attorney-client privilege can be waived. And that means, in turn, that a lawyer with a fiduciary obligation, with an obligation of loyalty, with an obligation of zealous representation, has no choice but to use that information unless the client agrees that it should not be used. Again, it is the client's decision, not the lawyer's decision.

I believe that the recipient lawyer should read the document, that the recipient lawyer should withhold the fact that she has it until it is tactically desirable to use it in a deposition or in cross-examination at trial, and that the recipient lawyer should not tell the other lawyer, "You'd better prepare your client, because otherwise I've got some information that he's going to be very embarrassed about."

I get calls from lawyers who want to know what to do with a misdirected fax or e-mail. When that happens, that lawyer is my client. The lawyer who calls me to ask for advice is my client. My view of how the issue ought to be resolved is not my client, and that lawyer's client is not my client. In two cases, a box of documents was sent to a lawyer by a disgruntled employee on the other side. What I suggested was that the lawyer use me as a screen. I went through the documents to

determine whether there was anything that was useful to the case and found that there was nothing. So we resealed the box and sent it back. In each case, that resolved the issue.

On the other hand, if I had found anything useful in the box, or if the lawyer had read something useful in an e-mail, then my recommendation would be that the lawyer forward the document to the court accompanied by a memorandum of law explaining why the information is important to the search for truth and why the lawyer should be permitted to use it. That way, regardless of how the court decides, at least the court knows about the information and the lawyer has carried out her obligations to her client in a reasonably safe way.

However, I also add that if the lawyer wants to be absolutely secure, she should call up the lawyer on the other side and tell him that you have it, ask him what he wants you to do with it, and then you do that. That is the safest thing to do. I do not think you have to go that far. I think it is safe enough to send it to the court with a memo, but that's my lawyer-client's decision.

PROFESSOR LONGAN: We will take just a minute if anybody has any questions for Professor Freedman; we can certainly entertain those.

AUDIENCE QUESTION: Professor Freedman, I think the ABA agrees with your reading based on its opinion on metadata, but you are a professor who teaches in New York. So, if you counsel a New York Bar member, where the New York Bar has come out the other way in suggesting that metadata is inadvertently disclosed, would you give the same advice to somebody who is a member of the New York Bar?

PROFESSOR FREEDMAN: Yes, but I do tell that person that there is such a decision and that that creates an element of risk. Of course, what the New York State Bar Committee says is not binding on the disciplinary committee, and it is certainly not binding on the court. So I still think it is safe enough to send the document to the court. In fact, it's something that I have done in an analogous context. I told the court, "Your Honor, I'm a moral stakeholder. I have obligations to my client and to the search for truth. At the same time, I might have an obligation not to use this. Therefore, I am asking you. I will do whatever you tell me to do. Here is the document. This is why it is important to my case. And this is why the New York State Bar Association is wrong. But whatever you decide, Your Honor, that is what I am going to do."

That is not ideal because, of course, the other side gets a copy of the memo, gets a copy of the attachments and so you give them the

opportunity to coach their client. That bothers me. But again, that is a reasonably safe course.

AUDIENCE QUESTION: Just out of curiosity, are you a member of the New York Bar?

PROFESSOR FREEDMAN: Yes. I was sworn into the New York Bar in 1978. There was a room full of people—it was about this size—a room full of young lawyers. And the first thing they had us do was commit perjury. The presiding judge said, “I want each of you to raise your hand and swear that you have read the New York Code of Professional Responsibility and understand it.” I was probably the only one who had read the whole thing, but I could not honestly say that I understood it. But I lied along with everybody else, because I was not going to fail to become a member of the Bar at the last minute like that.

AUDIENCE QUESTION: Do you think there is any difference between the litigation and nonlitigation context? Imagine that in a transaction there is a document the lawyer receives that contains metadata. The idea of searching for the truth is a little different in that context when you see the analysis being made.

PROFESSOR FREEDMAN: Good point. First, I think that a lawyer is always in an adversarial position in our constitutionalized adversary system. Regardless of whether you are drafting a contract, writing a will, negotiating, or whatever it may be, you are dealing with an adversary and with potential litigation over that contract, over that will, over the advice you give. So the idea that you are only an adversary if you are in litigation, I think it is wrong.

Beyond that, you still have the agency issue, and you still have your fiduciary obligations to your client. You still have no attorney-client privilege or confidentiality with the party on the other side. And here is an interesting variation on that theme. I have seen this happen. David Hricik mentions it in one of his articles in this area. The metadata or the misdirected fax was sent on purpose. The e-mail says we will not settle for a penny more than \$100,000. My client is absolutely firm on that. And the metadata shows that it originally said \$150,000. That case was shortly thereafter settled for \$150,000. But I happen to know it was sent on purpose. So that can happen, too.

With regard to lawyers succumbing to the conflict of interest of what goes around comes around, I remember when I was in law school there was a case where an ophthalmologist wanted to dilate a boy's eyes but the drops he put in were not dilation drops, they were acid, and he

blinded him. Back then the lawyer who represented the boy had to go to Europe to find a doctor who would testify that that was not reasonably skilled and competent practice. He could not find a doctor in the United States who would testify. Doctors testifying against doctors is a relatively recent thing. And I remember raising that case with a doctor friend of mine. His response was, "What goes around comes around. You don't mess in your own yard. If I do that, then somebody might do it to me." In addition, the price of doing it back then was that the doctor who testified would lose his hospital privileges. Is that really professionalism under any rational definition? But that is what we are talking about. We are talking about professionalism meaning taking care of each other ahead of your fiduciary responsibility to your client, your loyalty to your client. We are talking about protecting each other from potential malpractice.

There is something else that I would not object to, but I have never had a lawyer pick up on this. That is, put into your retainer agreement and make sure your client understands that you might get information that could win your case for the client but that if using it would be embarrassing or risk malpractice on the part of the lawyer on the other side, you would not use it. That is the kind of lawyer I am. I think the client is entitled to know in advance if there's going to be a limit on your fiduciary obligation and on your loyalty.

AUDIENCE QUESTION: The *Coleman* decision—the death penalty case you talked about—has such a strong view of agency, and given that I think your position on what you're talking about tonight is unassailable, but I happen to think that *Coleman* is wrongly decided, that *Coleman* should not have been fatally bound by his lawyer's negligence.

PROFESSOR FREEDMAN: As you might suspect, I agree with you very strongly. It is one of Justice O'Connor's more outrageous opinions. Contrary to the mythology that has developed, I think that she is a cruel and unprincipled person. Of course, that is a whole other issue.

AUDIENCE QUESTION: If you are the receiving lawyer of the metadata or the misdirected communication, and you are terribly unimpressed with the ethical responsibility to return it to the other side, do you not violate your obligation to your client by communicating with the court rather than just using it?

PROFESSOR FREEDMAN: Oh, yes, that's what I said. That is not what I favor, but my view of the proper outcome is not my client in that

case. My client is the lawyer who has called me, and my job is to keep that lawyer out of trouble.

AUDIENCE QUESTION: That is, when the receiving lawyer retains you for advice?

PROFESSOR FREEDMAN: Yes, although I do not take retainers anymore. All I do now is death penalty and Guantanamo cases.

AUDIENCE QUESTION: If you are the lawyer receiving the data and you did not retain Monroe Freedman for advice, would you feel like you simply had to use it rather than send it to the court for a decision?

PROFESSOR FREEDMAN: Yes, but if I were in a jurisdiction where that was risky, at the very least I would talk to my client about it and see if I could get the client to agree with sending it to the court. That might well have advantages for the client, because if I should go ahead in the way I think proper, and the judge then got angry about it, as the judge could, the repercussions could not only be against me but against my client. So there is a very good chance that the client would agree to sending it to the court.

PROFESSOR LONGAN: We'll have a lot of time tomorrow to pursue these and other issues. I would like to thank you again.
