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March 19, 2014

VIA ELECTRONIC MAIL

Mr. Doug Carson
Daily & Woods, PLLC
58 South 6th Street
Fort Smith, AR 72902

RE: Communications with City Directors

Dear Mr. Carson:

I am in receipt of the copy of your "letter of March 14" that you emailed on March 18.

Last things first, if you had extended me the same courtesy that I've shown you at every turn and had emailed the letter to me, rather than sending it by U.S. Mail, Pony Express, or whatever other form of non-instant communication that you chose to use, we would likely not be having this conversation now. But, as we're both well aware, your intent with everything related to me or my clients is to perform your tasks as slowly as possible. So, to that end, your use of U.S. Mail,[1] instead of email, makes perfect sense.

Turning to the letter itself, I am first struck by the context: given your own ongoing, pervasive failure to produce discovery, the irony of your writing to chastise me – incorrectly, for reasons discussed below – about Rules of Professional Conduct is mind-boggling. As long as we're throwing around Rules, however, I would call your attention to this:

A lawyer shall not:

[1] I only assume that you sent it via U.S. Mail. I have not, as of this writing, actually received the letter in any form other than email.

> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> [...]
>
> (d) in pretrial procedure, make a frivolous discovery request **or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party**[.]

Ark. R. Prof'l Conduct 3.4 (emphasis added). The official Comments to Rule 3.4 continue:

> [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
>
> [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed.

Id., at Cmts. 1 & 2.

As I explained in depth in the Motion to Compel that I filed on Monday, your statements about complying with discovery requests are belied by your ongoing failure to actually follow through and produce the relevant materials. Yet, rather than address these issues, you chose to write a letter about communications with elected City officials that is based on an incorrect application of your own selective quoting of the Rules of Professional Conduct.

Turning, then, to the substance of your letter, it appears that you are ignoring the difference between a typical suit between two private parties and a suit against the City. In the latter situation, the Plaintiffs do not give up their rights with respect to contacting government officials about matters outside of the scope of litigation, nor do they abandon their right under the Whistle Blower Act to contact "appropriate authority" regarding waste of funds or violations of laws. In fact, because this is a suit against the City, it is interesting that you quoted Comment 7 to Rule 4.2 and, somehow, skipped right over Comments 2, 4, and 5.

The language of Rule 4.2 and of Comment 2 directly contradict your apparent assertion that I am not allowed to contact the Board of Directors regarding issues outside the scope of a pending lawsuit. Comment 2 states:

> [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

By definition, where no legal action has been filed regarding an issue, there is no "matter" about which you represent the City within the meaning of Rule 4.2. Surely you are not suggesting that your firm represents the City regarding every issue that could potentially lead to litigation in the future, as that would be a gross misstatement of your role and your authority within the City's government.

Daily & Woods are merely hired attorneys serving in the capacity of city attorney, and your role is limited by law to the duties specified in Fort Smith Municipal Code § 2-113. It is City Administrator who represents the interests of the City on a day-to-day basis, including the handling of possibly contentious issues, regardless of whether those issues could evolve into litigation. *See, e.g.*, Ark. Code Ann. § 14-48-117. Because the City Administrator serves at the pleasure of the Board of Directors, *see* Ark. Code Ann. § 14-48-116(d), where a possible issue involves the City Administrator, addressing that issue to one or more members of the Board is obviously proper.

So, if I wish to contact the Board regarding, for example, Ray Gosack's blatantly false public statements about one or more of my clients, in an attempt to *avoid* litigation by offering a possible resolution to the issue, that is not something on which the City is represented by Daily & Woods unless and until a complaint is actually filed. Accordingly, I will continue to contact the Board regarding matters outside the scope of any existing litigation to the extent I deem appropriate.

Additionally, Comment 4 to Rule 4.2 states (emphasis mine):

> [4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. **For example, the existence of a controversy between a government agency and a private party, or between two organizations, does**

> **not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.**

That comment could not be more clear. Simply because you represent the City in *Bales, et al.*, does not mean that I cannot communicate with City Directors regarding a separate matter. In the most recent instance, that separate matter was clarification of my own identity to correct misrepresentations made by others.

Importantly, Comment 4 then continues:

> Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

An attempt to avoid future litigation over a misstatement by Mr. Gosack is obviously an independent justification for contacting both Mr. Gosack and the Board. As for legal authorization, I am legally authorized by my clients by the Rules of Professional Conduct to zealously represent my clients' interests, which includes addressing Mr. Gosack's statements and attempting to resolve the issue amicably.

Going back further, all of my communications with Mr. Gosack (save for one, discussed below) have been in the context of drawing his attention, as City Administrator, to potential means of avoiding litigation against the City or to serve him with a request under the Arkansas Freedom of Information Act. My contacts with the Board have similarly been attempts to avoid litigation or to provide information that I am otherwise allowed to provide to a public official. The Rules do not prohibit such communications, and, again, I will continue to make any such future communications as I believe are in the best interests of my clients.

Speaking of legal authorization to communicate with represented parties under Rule 4.2, Comment 5 states:

> [5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

As public employees, my clients have a legal right to communicate in good faith, through the proper channels, the existence of waste of public funds or manpower or a violation or suspected violation of a law, rule, or regulation adopted under the law of this state or a political

subdivision of the state. *See* Ark. Code Ann. § 21-1-603(a). Because they have this right, I, as their attorney, have that right under Rule 4.2, Comment 5.

When I contacted Mr. Gosack regarding Mr. Richard Jones' lack of authority to punish my clients – a communication made prior to filing suit against Ms. McCabe – it was in the context of communicating a waste of funds and manpower, as well as suspected violations of city and state rules. When, having received no response from Mr. Gosack, I then informed the Board of Directors about the matter, this was again within my clients' rights and, by extension, within my rights under Rule 4.2. Should another event arise in the future that would come within the umbrella of the foregoing analysis, I will again communicate the same to Mr. Gosack and/or the Board if I feel it is in the best interests of my clients.

Finally, you referenced Rule 4.3 in the context of an email that I sent to Mr. Catsavis. Yet you omitted Comment 1 to Rule 4.3:

> [1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.

By your own admission, I acknowledged in my email to Mr. Catsavis that I am, generally speaking, the attorney for Don Paul Bales, Rick Entmeier, and Wendall Sampson. While I was emailing Mr. Catsavis as a concerned citizen, at no time did I suggest that I was "disinterested in loyalties" or that I was "a disinterested authority on the law." Because I was talking to Mr. Catsavis in that email about the best interests of the City, the remaining language of Comment 1 is inapposite.

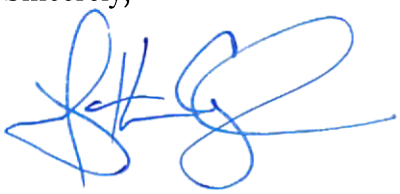
More to the point, Rule 4.3 is not applicable at all; Comment 8 to Rule 4.2 makes clear that knowledge of Mr. Catsavis' representation by counsel, at least to the extent my communication dealt with anything related to the pending litigation, would be assumed from the surrounding facts. However, my communication with Mr. Catsavis was made with "independent justification," as permitted under Comment 4 to Rule 4.2. That communication was made just prior to Mr. Gosack's performance review by the Board of Directors and was justified, as

explained in the email, as an effort on my part to keep Mr. Catsavis informed and to expose questionable decision making by Mr. Gosack in events that led to the filing of the pending suits.

The only email I see with which you could take issue would be the January 15, 2014 email to Mr. Gosack regarding spoliation. I have already discussed that email with Mr. Wade and have agreed to direct any future communication of that sort, **about ongoing litigation**, to him or to Daily & Woods in general. I have complied with that agreement.

To recap, I have not communicated with Mr. Gosack and the Board in any manner that violates the Rules of Professional Conduct, and I will continue to not violate the Rules going forward. In the event that a future communication with Mr. Gosack or the Board appears questionable, I am more than willing to send it to them through you. At the same time, the Rules do not require that **every** communication with a City official needs to go through you or your office, and I will not pretend otherwise.

Sincerely,



Matthew D. Campbell

cc: Don Paul Bales
Rick Entmeier
Wendall Sampson