PHILIPPINE IN-COUNTRY TRAIN-THE-TRAINERS PROGRAM
STRENGTHENING CAPACITY FOR ENVIRONMENTAL LAW – TOWARDS A SUSTAINABLE FUTURE
ADB in partnership with UNIVERSITY OF CEBU SCHOOL OF LAW
14-16 August 2019

Legal Writing: August 1, 2019

Participants are invited to send to Professor John A. Boyd (trainthetrainersasia@gmail.com) an email including a draft legal memorandum prior to our meeting in Cebu. Professor Boyd will provide comments during face-to-face meetings during our three day meeting. To assist you in preparing your draft legal memorandum, consider the following suggestions on teaching legal writing, which Professor Boyd will briefly review during our meeting:

What are four key issues to be raised in teaching legal writing as illustrated in four books dealing with these issues?

I. "**In a series of three or more terms with a single conjunction, use a comma after each term except the last**." William Strunk Jr. and E.B. White, *The Elements of Style* (Fourth Edition) (2000), Rule 2, p. 2.

II. "**14. Always start with a statement of the main issue before fully stating the facts**. Cicero advised that you must not spring at once into the fact-specific part of your presentation, since 'it forms no part of the question, and men are at first desirous to learn the very point that is to come under their judgment.'" Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading* Judges, p. 25.

III. Follow the format of a legal memorandum as indicated in Bryan A. Garner's The *Redbook: A Manual of Legal Style* (Third Edition) (2013) pp. 403-408:

A. "MEMORANDUM, To: Mr. Harold H. Jillofson, From: Katherine G. Pilchen, Date: April 2, 2002, Re: Rillerton Group Insurance Litigation, File No. 02-5949-234; Insurer's possible communications with Rillerton's former employees."

B. Summary of Issues and Answers

1. "Ex parte Communication of Issues and Answers
Our client Rillerton Inc. has sued its former insurance carrier for bad-faith denial of coverage. [one sentence omitted] Are ex parte communications permitted under Maryland law?

Short Answer: Maryland law probably allows ex parte communications between a litigant and a former employee of its corporate adversary, unless the former employee is represented by counsel. [two sentences omitted]"

2. "Rules governing ex parte communications. If such are allowed, what rules govern the communications?" [one paragraph omitted]

C. Discussion

1. "Permissibility of ex parte communications"[12 paragraphs omitted]

D. Conclusion

"Unless a former Rillerton employee is represented by a lawyer, a court will probably allow ex parte communications with the employee by the insurer's attorney. [one sentence omitted] Perhaps we should talk with RIllerton's general counsel about interviewing whichever former employee the company is most concerned about. [two sentences omitted]

MEMORANDUM

To: Harold H. Jillofson

From: Katherine G. Pilchen

Date: April 2, 2002

Re: Rillerton Group Insurance Litigation, File No. 02-5949-234;
Insurer's possible communications with Rillerton's former employees.

Summary of Issues and Answers

1. **Ex parte communication with former employees.** Our client Rillerton Inc. has sued its former insurance carrier for bad-faith denial of coverage. Rillerton is concerned that the insurer might attempt to contact Rillerton's former employees in their pretrial investigation. Are ex parte communications between a litigant and the former employees of its adversary permitted under Maryland law?

   Short Answer: Maryland law probably allows ex parte communication between a litigant and a former employee of its corporate adversary, unless the former employee is represented by counsel in the litigation. The out-of-state and federal courts that have considered the question allow ex parte contact. And the Committee on Ethics of the Maryland State Bar Association has concluded that such communications are generally permissible.

2. **Rules governing ex parte communications.** If such communications are allowed, what rules govern the communications?

   Short Answer: Professional Conduct Rules 4.3 and 4.4 protect Rillerton's unrepresented former employees. An opponent's attorney must make certain disclosures to the person contacted, including the client's identity and the attorney's role in the litigation. Also, the lawyer cannot induce a breach of the attorney–client privilege by asking about what a former employee said to corporate counsel. But the attorney may ask about the facts underlying the communication.

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Discussion

1. Permissibility of ex parte communications

This question is undecided in Maryland. But a Maryland court would most likely follow the court decisions and bar-association opinions and comments that uniformly permit ex parte communications between an opposing party's attorney and the former employees of a corporate adversary.

A. Ethical Limitations Under Rule 4.2

In Maryland, Rule of Professional Conduct 4.2 (Rule 4.2) now controls an attorney's ability to contact parties and affiliated persons, such as employees, who are represented by lawyers. Historically, Maryland's bar association has advised us that under Rule 4.2 and its predecessor,[1] an attorney's ex parte contact with a corporate party's former employee is permissible as long as the former employee is not represented by counsel.[2]

Maryland's Rule 4.2, which has never been judicially interpreted, is patterned on Rule 4.2 of the ABA Model Rules of Professional Conduct (the Model Rule). The Model Rule is designed to govern an attorney's right to contact an opposing party. Its plain language does not prohibit ex parte contact with a corporate party's former employees, managerial or otherwise.[3] The comment explains that the rule applies to anyone known to be represented regarding the litigation, not just to those named as parties.[4] Paragraph 4 of the comment explains the limits of an attorney's ex parte communications with a corporate party's current agents and employees. In a formal opinion, the ABA refused to extend the Model Rule's interpretation to cover former employees because such a liberal interpretation would unduly restrain discovery.[5] Maryland courts regard the ABA's opinions on its Model Rules as highly persuasive authority.[6]

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[1] Md. Code Prof. Resp. DR 7-104(A)(1) (1985). *See* Md. R. Prof. Conduct 4.2 cmt. (2001) (comparing rule and code).

[2] Md. State Bar Ass'n Op. 86-13 (1986); Md. State Bar Ass'n Comm. on Ethics Op. 90-29 (1990).

[3] ABA Comm. on Ethics & Prof. Resp. Formal Op. 91-359, at 3 (1991).

[4] ABA Comm. on Ethics & Prof. Resp. Formal Op. 95-396, at 9 (1995).

[5] ABA Formal Op. 91-359, at 3, 5; *see also* ABA Model R. Prof. Conduct 4.2 cmt. (1985).

[6] *Brown & Sturm v. Frederick Road L.P.*, 137 Md. App. 150, 180 (2001).

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or agents may have information that is protected as a privileged attorney–client communication or as work product. A lawyer may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege.[21]

C. Attorney–Client Privilege

Attorney–client privilege is recognized as a rule of evidence in Maryland.[22] This privilege restricts ex parte communications to some extent, especially when coupled with Rule 4.4. The attorney–client rule is not an absolute protection since it protects only communications with an attorney, not the facts underlying those confidential communications. So an opponent's counsel may still ask about those facts.[23]

Conclusion

Unless a former Rillerton employee is represented by a lawyer, a court will probably allow ex parte communications with the employee by the insurer's attorney. The contact is limited only by the ethical rules that protect unrepresented people and the privilege protecting confidential communications.

Perhaps we should talk with Rillerton's general counsel about interviewing whichever former employees the company is most concerned about. Either in-house counsel or we could do this. But the practical problems here relate as much to maintaining good relations with former employees as they do to what the Maryland court might end up doing.

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[21] Md. R. Prof. Conduct 4.4 cmt. (2001).

[22] *Blair v. Maryland*, 747 A.2d 702, 720 (Md. 2000) (attorney–client privilege).

[23] *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

IV. Follow the advice of Bryan A. Garner, *Legal Writing in Plain English: A Text with Excercises* (Second Edition) (2013), p. 36:

9. "**Prefer the active voice over the passive."**

"The active voice typically has four advantages over the passive

- It usually requires fewer words.
- It better reflects a chronologically ordered sequence [17 words omitted]
- It makes the reading easier because its syntax meets the English speaker's default expectation that the subject of a sentence will perform the action of the verb.
- It makes the writing more vigorous and lively (*John wrote the company* as opposed to (*The Company was written to by John*)."