1995

ABA Delegates Amend Model Rule

Susan J. Becker
Cleveland State University, s.becker@csuohio.edu

Original Citation
Susan J. Becker, ABA Delegates Amend Model Rule, 21 Litigation News no. 1 (October-November 1995) at p. 1

American Bar Association
750 North Lake Shore Drive
Chicago, Illinois 60611-4497

LITIGATION NEWS

A PUBLICATION OF THE SECTION OF LITIGATION • AMERICAN BAR ASSOCIATION • OCTOBER/NOVEMBER 1995 VOL. 21, NO. 1

INSIDE

NEW DEVELOPMENTS ON RULE 4.2

Model Rules of Professional Conduct

Ethics Committee Opinion Offers Guidance on Ex Parte Contact Issues

By Wiley E. Mayne, Jr.
Litigation News Associate Editor

In an opinion on the pre-amendment version of Rule 4.2 that is currently tracked in many state ethics codes, the ABA Committee on Ethics and Professional Responsibility has addressed multiple issues regarding the rule's meaning and application. Specifically, the Committee discussed the extent to which opposing counsel may communicate directly with employees of a corporation known to have legal representation, and whether prosecutors may deal directly with represented suspects prior to criminal indictment.

On the latter issue, the Committee broadly states that Model Rule 4.2 applies to criminal as well as civil proceedings and that the ethical rule precludes prosecutors from contacting persons known to be represented by counsel on a matter even before arrest or the institution of formal charges.

The Committee's opinion thus squarely conflicts with internal regulations of the U.S. Justice Department. In general, those

(Please turn to page 5—Ethics Opinion)

ABA Delegates Amend Model Rule

By Susan J. Becker
Litigation News Associate Editor

The ABA House of Delegates has amended Model Rule 4.2 regarding whom attorneys may ethically contact directly during the course of litigation or other legal matters.

Before the amendment, Rule 4.2 prohibited an attorney from communicating with a "party" whom "the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The amendment to Rule 4.2 changes a key word, substituting the word "person" for "party." This change, paired with extensive revisions to the Comment to Rule 4.2, is intended to resolve several long-standing uncertainties regarding the rule.

Most importantly, it is now clear that Rule 4.2 extends beyond named parties to the litigation or proceeding and includes within its scope any person known to be represented by counsel with respect to the subject of the intended communication.

At the same time, an amendment to the accompanying

(Please turn to page 5—Amendment)

Judges—Not Arbitrators—Must Decide Whether an Arbitration Matter is Time-Barred

Decision could impact arbitration under all contracts that incorporate New York law

By Michael Yablonski
Litigation News Associate Editor

Under a recent judicial decision, disputing parties whose contract binds them to arbitration may nonetheless find themselves in court over a potentially dispositive issue: whether the complainant's claim is barred by the statute of limitations.

Traditionally, arbitration awards have been subject to judicial review only on very limited grounds, such as fraud. But in *Smith, Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y. 2d 193, 647 N.E. 2d 1308 (1995), New York's highest court opened the door to judicial intervention in a significant new area by holding that statute of limitations issues must be decided by a court, not an arbitrator.

The implications of the *Luckie* decision are expected to reach far beyond New York borders because it was based on a New York choice-of-law provision that is found in many contracts, according to Ronald M. Sturtz, Roseland, NJ, Chair of the Section of Litigation's By-laws, Resolutions and Blanket Authority Committee, and a former chair of its Arbitration Committee. Although the *Luckie* holding runs counter to recent decisions by courts in California, New Jersey, and elsewhere, Sturtz says, courts across the country will be obliged to follow it where the parties' agreement includes a New York choice-of-law provision.

The *Luckie* case involved separate disputes between two national securities brokers and their customers in Florida and Virginia. The customer agreements included arbitration clauses, followed by a choice-of-law provision stating that the agreement and its enforcement "shall be governed by the laws of the State of New York."

New York arbitration law requires statutory time limitation questions to be decided by the courts, and the parties agreed to refer such questions to the

(Please turn to page 3—Arbitration)

Ethics Opinion

(Continued from page 1)

regulations have allowed broad latitude for ex parte contacts with represented persons before they become parties to a formal proceeding through arrest or indictment.

Mark Flanagan, Jr., a Section of Litigation member who practices criminal law in Washington, D.C., notes that the Justice Department regulations are an outgrowth of government investigations of corporate crime during the 1980s. He says criminal defense lawyers are "especially wary of the Justice Department's position in white collar corporate criminal cases because there is the possibility that the government will have ex parte contact with company employees and other potentially represented witnesses."

The Committee rejects the view that the protections of Model Rule 4.2 are limited to the corporation's "control group."

In addition to issuing its opinion (Formal Opinion 95-396) on this point, the Committee successfully lobbied the ABA House of Delegates for a clarifying amendment to the language of the Model Rule itself. At the ABA's Annual Meeting in August, the House changed the word "party" to "person"—thus eliminating any argument that the rule is intended to apply only after litigation or prosecution had begun. (See related story on page 1 of this issue.)

The Committee's opinion also declares that the ethical prohibition of Model Rule 4.2 provides protection for represented parties in the criminal context over and above that afforded by the Sixth Amendment's right to counsel. The opinion is critical of some court decisions that have limited the scope of Model Rule 4.2 and its predecessors as they relate to prosecutors.

"Applying the Rule to prohibit only post-indictment communications would render the rule of little use in the criminal context," the opinion states.

Nonetheless, the Committee recognizes that there exists a body of case law which permits ex parte communications "where the contacts are made with represented persons which have been neither arrested nor formally charged, and the contacts are made by undercover agents or informants and not by the government lawyers themselves." The Committee opines that contacts of this sort must, in light of the existing case law, be deemed permissible under the "authorized by law" exception to Model Rule 4.2.

On the civil side, with regard to ex parte communications by opposing counsel with employees of a corporation, the Committee rejects the view that the protections of Model Rule 4.2 are limited to the corporation's "control group." The Committee opines that the prohibition on ex parte communication extends beyond the control group to all employees who have managerial responsibility, those whose acts or omissions may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question.

The opinion also clarifies or underscores other provisions of Model Rule 4.2 by opining that:

- The communicating lawyer is not barred from communicating with a represented person, absent actual knowledge of the representation. That knowledge may, however, be inferred from the circumstances.
- The communicating lawyer is not barred from communicating with a represented person about topics that are not the subject of the representation.
- The bar of Model Rule 4.2 is equally applicable whether it is the lawyer or the represented person who initiates the contact.
- Communications with a formerly represented party are permissible, but the lawyer must have reasonable assurance that the representation has in fact terminated— including, in a litigated matter, that the court has authorized counsel to withdraw.

Of course, ABA Ethics Committee opinions have no binding effect, although they may be persuasive in jurisdictions that have used the Model Rules as a model for their own codes of professional conduct. Gene Pratter, Co-Chair of the Section's Committee on Ethics and Professionalism, stresses that "it is up to the various states to determine the scope of Model Rule 4.2."

Volunteer Lawyers Sought for Eastern Europe

The American Bar Association's Central and East European Initiative (CEELI) is seeking experienced attorneys to serve as volunteer legal advisors in Central and Eastern Europe and the republics of the former Soviet Union.

CEELI has a continuing need for attorneys in a number of practice areas, including international law, constitutional law, criminal law, media law, civil and administrative law, non-profit law, and commercial law. Current openings include criminal law liaisons, small and medium enterprise legal specialists, and advisors for international war crime tribunals.

Time commitments normally range from three months to one year. CEELI provides volunteers with financing for travel, housing, per diem, and associated business expenses.

CEELI is a public service project of the ABA designed to support the development and reform of indigenous legal institutions in Central and Eastern Europe. For additional information, contact Deborah Nolind, ABA/CEELI, Liaison and Legal Specialist Program, 740 15th Street, NW, Washington, DC 20005-1009. Phone: (202) 662-1967. Fax: (202)662-1957.

Corporate and Environmental Compliance

A Special Satellite Seminar

PROTECTING YOUR COMPANY: Organizing and Managing Effective Corporate and Environmental Compliance Programs is the topic of a program that will air on November 16, 1995, from noon to 4 PM EST. The Corporate Counsel Committee of the Section of Litigation is sponsoring this satellite seminar, which will broadcast live from a studio in Washington, DC, to more than 70 cities.

The seminar will highlight the distinguishing features of an effective corporate compliance program; the latest developments in voluntary disclosure programs and environmental audit privileges; and an expert faculty who will address the best way to respond to a government investigation.

Registration fee is $160. To register, order the videotaped program, or receive information via fax, (312)988-5522. For credit card orders (800)285-2221.

Amendments

(Continued from page 1)

Comment clarifies that the rule applies to government attorneys conducting investigations prior to the initiation of criminal or civil proceedings. This runs counter to the U.S. Attorney General's current internal guidelines for Justice Department lawyers.

Further, the amended Comment now states that while the "knowledge" of representation by the inquiring lawyer is generally limited to actual knowledge, "actual knowledge may be inferred by the circumstances." The Comment was also amended to adopt certain judicially recognized definitions of the "authorized by law" exception of Rule 4.2.

"I think the House took a good step toward indicating the value of representation by a lawyer in amending rule 4.2 to require that any person represented by a lawyer as to a particular subject shall not be contacted by other counsel or state or federal investigators and prosecutors," says House Delegate Benjamin R. Civiletti, Baltimore, a former Chair of the Litigation Section.

Although the ABA's Model Rules have no binding force of their own, they are frequently incorporated into the ethics rules that govern lawyers in individual states. The amendment to Model Rule 4.2 was among more than 30 substantive resolutions approved by the ABA House of Delegates during the ABA Annual Meeting in Chicago.

Civiletti also views two other resolutions as especially important to litigators. One, urging civil and courteous conduct by lawyers and judges, "will be helpful in restoring the dignity of the profession and furthering the administration of justice," Civiletti says. Another aspirational resolution, which calls for increased pro bono activity by lawyers, "recognizes the expanded need for such services as a critical priority."

Among other substantive resolutions, the ABA House of Delegates:

- Removed from Model Rule 3.8 the requirement that prosecutors obtain judicial approval before subpoenaing lawyers to appear at a grand jury or other proceeding to present evidence about former or current clients;
- Opposed attempts to reduce funding for federal, state, and local legal services to the poor and to restrict the purposes for which such funding can be used;
- Endorsed the ABA's continued promotion of affirmative action-type programs, defined as "legal remedies and voluntary action that take into account as a factor race, national origin, or gender to eliminate or prevent discrimination"; and
- Denounced any manifestation of bias by lawyers against clients, other parties and adverse counsel on the basis of race, national origin, age, disability, gender, sexual-orientation, or socioeconomic status.