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February 23, 2009

James Varro
Secretary, Professional Regulation Committee
Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, Ontario M5H 2N6

Dear Mr. Varro:

On behalf of the Ontario Bar Association (OBA) I am pleased to provide you with our submission on the Proposed Amendments to Rule 6.03(9) – Communications with represented organizational clients.

The OBA represents more than 18,000 lawyers in each practice area and region across Ontario making us well positioned to offer advice on this important issue.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,

Jamie Trimble
President
Ontario Bar Association

David Sterns
Civil Litigation Section
Ontario Bar Association



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Proposed amendments to Rule 6.03(9) – Communications with represented organizational clients

Submitted on *February 23, 2009*

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Submitted to:

James Varro

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Introduction

We are pleased to provide our comments on behalf of the Ontario Bar Association in response to the Notice to Lawyers – Consultation on proposed amendments to Rule 6.03(9) dated December 8, 2008. The proposed amendments being considered are as follows:

Amended Rule and Commentary

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not approach a constituent of the corporation or organization

(a) who has the authority to bind the corporation or organization,

(b) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or

(c) whose own interests are directly at stake in the representation,

~~(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or~~

~~(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,~~

in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

Commentary

This subrule applies to corporations and “other organizations.” “Other organizations” include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. ~~In the case of a corporation or other organization (including, for example, an association or government department),~~ This rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person’s authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or whose duties include answering the type of inquiries posed. These individuals include those to whom the organization’s lawyer looks for decisions with respect to the matter.

The individual who regularly consults with the organization’s lawyer concerning the matter need not be a constituent who also directs the organization’s lawyer. In some large organizations, some management constituents may direct or control counsel for some matters but not others. The mere fact that a constituent holds a management position does not trigger the protections of the rule. A constituent who is simply interviewed or questioned by an organization’s lawyer about a matter does not “regularly consult” with the organization’s lawyer.

The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee

General Comments:

The most significant change introduced by this proposed amendment is the expansion of potential witnesses that will be available for approach by a licensee without requiring the consent of the corporation. In general, we are in agreement with the proposed amendments which reflect the concerns laid down by Charles W. Wolfram in his leading text:¹

Application of the anti-contact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anti-contact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation’s lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anti-contact rule should prohibit contact with those officials, but only those, who have the legal power to

¹ Charles W. Wolfram, *Modern Legal Ethics* 613 (West. Pub. Co., 1986)

bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in the representation. And generally the anti-contact rules should apply if an employee or other non-official person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter. (Emphasis added)

The proposed amendment also adheres to the established principle that a corporate employee who is only a holder of factual information should be freely accessible to either lawyer.²

Proposed Changes

The potential people caught by subparagraph a) of the old rule could have included people who were off limits simply because of their title within the corporation. Not all officers, directors or other persons likely involved in the decision-making process have the ability to bind the corporation or regularly supervise, direct or regularly consult with the corporation's lawyer. As such, there is no need to provide blanket protection of the corporation to all of these people as they may only be holders of factual information.

Similarly, subparagraph b) of the old rule places restraints on a lawyer's ability to approach corporate employees. Read literally, it could have led to an overly broad interpretation whereby no corporate employee who could expose the corporation to vicarious liability, regardless of where they stood in the corporate hierarchy, could be approached.

The concern with the old rule was that it restricted a lawyer's ability to engage in the fact-finding process. The effect of this would be that the fact-gathering process would become more expensive and the corporation would be protected where there is no need to offer them this protection.³ However, as recognized in the American case of *Neisig v. Team I*,⁴ it "is not the purpose of [the anti-contact rule] to protect a corporate party from the revelation of prejudicial facts." As such, the new rule provides more reasonable restrictions on when a licensee should not approach a constituent of a corporation.

² *Supra*, note 1.

³ Rotunda, Ronald D. *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*. (ABA Thomson-West, St. Paul, Minn. 2008)

⁴ *Neisig v. Team I*, 76 N.Y.2d 363 (1990)

Required Clarifications

While we agree with the changes made to Rule 6.03(9), further comments are required in the Commentary to clarify the extent of the scope of the rule.

While the purpose of subparagraph b) of the new rule is correct in principle, the corresponding commentary is ambiguous as to the scope of the rule. Primarily, it is unclear whether this rule is meant to catch only those who supervise, direct, or regularly consult with the corporation's or organization's lawyer with respect to the specific matter in issue, or everyone in the corporation who supervises, directs or regularly consults with the corporation's or organization's lawyer generally, including for other non-related matters.

While the commentary has recognized this potential problem by inserting the second sentence of the second paragraph, we believe that clarification is needed regarding which of the two classes of people described above is caught by this rule.

In our opinion, the proposed amendments to the Rule and Commentary must state clearly that they do not derogate from protecting the sanctity of solicitor-client privilege, in any way. Therefore, all constituents who supervise, direct, or regularly consult with the corporation's or organization's lawyer, regardless of whether they do so for the specific matter in issue, should be off limits for approach by a licensee unless consent is given. This is because such people, while not possessing any confidential information with respect to the matter in issue, may possess important information with respect to the lawyer's strategy, approach or general philosophy and, as such, it would be unfair to interview such person without the corporation or organization's counsel present or without the consent of the corporation's lawyer.

Furthermore, with respect to the last sentence of paragraph two of the commentary, uncertainty may arise over whether someone is "simply interviewed or questioned" or, whether that employee has been imparted with confidential information. As such, a qualifier such as interviewed or questioned *to gather factual information* may be beneficial as it only allows an employee who has been previously interviewed to gather factual information by the corporation to be available to the opposing lawyer without having to obtain the consent of the corporation. This is consistent with the principle that only holders of factual information should be freely accessible by both sides.

Finally, with respect to the commentary relating to subparagraph c) of the new rule, cross-reference should be made to the rule dealing with unrepresented persons, more specifically Rule 2.04(14). The constituent whose own interests are directly at stake in the representation may have interests which are adverse to the corporation or organization and so the consent of the corporation to interview this person should not be the only prerequisite to approach this person; the other rules governing dealing with unrepresented persons should equally apply.

