



April 29, 2010

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

Dear Mr. Varro:

The Ontario Bar Association ("OBA") welcomes the opportunity to comment on the Law Society's Professional Regulation Committee's recent Rule 6.03(9) (the "Rule") and Commentary proposal dated March 11, 2010. This Submission has been approved by the OBA Board of Directors and was prepared by our Labour and Employment Law Section with input from the Civil Litigation Section.

The Ontario Bar Association is the largest voluntary association of lawyers in Ontario representing more than 17,000 lawyers, judges and law students. We have a robust practice section infrastructure that helps up develop expert commentary on matters such as the one discussed in this submission. Combined the Labour and Employment Law Section and Civil Litigation Section of the OBA have approximately 2500 members.

We hope you will find this submission helpful and informative as you move forward on this matter.

Amended Rule and Commentary

It is proposed that Rule 6.03(9) be amended to the following text:

- (9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner in respect of that matter shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person
- (a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,
 - (b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,
 - (c) whose act or omission may be binding on or implied to the corporation or organization for the purposes of its liability, or

- (d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.
- (9.1) if a person described in subrule (9)(a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person
- (9.2) in subrule (9), "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

Commentary specific to the OBA states:

Unions – Subrule 6.03(9) is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to an appeal in which the union alleges that the employer, who is represented, has breached health and safety legislation, is not prohibited from contacting employees who have been affected by the employer's actions to obtain information necessary to establish the violations.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

The Commentary, in its entirety is attached as Appendix "A."

General Comments

Distilling the proposed Rule, a lawyer may not contact, communicate or facilitate communication with the following people:

- a. A person authorized to act on behalf of the corporation;
- b. A person authorized to give direction/advise or make decisions regarding the particular matter; or
- c. A person who's actions may hold the corporation vicariously liable.

Exemptions to the proposed Rule exist if a lawyer representing the above noted individuals gives consent or if the contact, communication or facilitated communication is required by law.

The proposed Commentary makes it clear that the purpose of the proposed Rule is intended to protect the lawyer-client relationship and promote efficient discovery and favour the revelation of truth. The proposed Rule is not intended to protect a corporation from the revelation of prejudicial facts.

With specific regard to the labour law context, the proposed Commentary clarifies that the lawyer representing the union and the lawyer representing the corporation may both, individually, contact, communicate or facilitate communication with employees who are bargaining unit members in order to obtain information, subject to the exceptions.

The OBA is in general agreement with the proposed Rules and Commentary subject to the comments set out below.

Suggested Changes/Clarifications

1. Amendments to the first paragraph of Rule 6.03(9)

To provide for even greater clarity, it is recommended that the first paragraph of Rule 6.03(9) be amended as follows:

6.03(9) A lawyer retained to act on a matter involving another party that is a corporation or organization that is represented by a legal practitioner...

2. Amendments to the Commentary regarding Unions

The proposed Commentary regarding unions uses the example of an *Occupational Health and Safety Act* violation to explain when a lawyer may contact bargaining unit employees. It is recommended that the proposed Commentary be amended to include a more generic example. For example:

... a lawyer retained by a union with respect to a termination grievance in which the union alleges that the employer, who is represented, has breached the collective agreement, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination.

It is believed that by using an example that is more relevant to labour and employment law lawyers, it will provide for greater assistance in the appropriate interpretation of the Rules.

3. Clarification regarding the proposed Rule 6.03(9)(c)

The proposed Rule 6.03(9)(c) states that a lawyer may not contact a person whose act or omission may be binding on or implied to the corporation for the purposes of its liability. Is it correct that a lawyer retained by a union may not contact a bargaining unit employee involved in

a workplace accident because his or her information on how the accident occurred may result in charges against a corporation?

If so, it seems that this example may conflict with the proposed Commentary which indicates that a lawyer retained by a union may contact “employees who have been affected by the employer’s actions to obtain information necessary to establish the violations.”

4. Clarification required regarding contacting specific bargaining unit employees

As noted above, the proposed Commentary essentially allows for the lawyers retained by the union and by the corporation to both contact bargaining unit employees with few exceptions. However, in the case of a termination grievance, for example, the lawyer retained by a union may work closely with the employee whose employment was terminated. The lawyer retained by a union does not, in the strict sense, represent the employee. While the employee may hire his or her own lawyer, it is not common. Is it the intent of the proposed Rule to protect the employee, who is not technically represented by a lawyer, from contact, communication or facilitated communication by the lawyer retained by the corporation? If so, this may interfere with a corporation’s workplace investigations.

It is recommended that this be clarified in the proposed Rule, itself, or the proposed Commentary so that the proposed Rule may be properly applied.

We thank you for providing us with the opportunity to be part of this process. If you require additional information or clarification, please do not hesitate to contact us.

Yours very truly,

Carole J. Brown
President
Ontario Bar Association

Laura Lyn Trachuk
Chair
OBA Labour and Employment Law Section

Commentary

The purpose of subrules 6.03 (9), (9.1) and (9.2) is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in subrule (9), even if the corporation or organization is represented by a legal practitioner. These subrules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

Generally, subrule 6.03 (9) precludes contact only with actors, not mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel's ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

Subrule 6.03 (9) 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 are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions, or because his or her duties include answering the type of inquiries posed. These individuals include those to whom the organization's legal practitioner looks for decisions with respect to the matter.

Thus, subject to the exceptions set out in it, subrule 6.03 (9) would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

A lawyer is not prohibited from communicating with a person unless the person's act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person's conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person may be a central actor for liability purposes, nothing in subrule 6.03 (9) precludes informal contact with such a person.

The individual who regularly consults with the corporation's or organization's legal practitioner concerning the matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, this rule does not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing his or her eyes to the obvious.

Subrule 6.03 (9) does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).

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 of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Unions – Subrule 6.03 (9) is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union’s interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to an appeal in which the union alleges that the employer, who is represented, has breached health and safety legislation, is not prohibited from contacting employees who have been affected by the employer’s actions to obtain information necessary to establish the violations.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

Governments –The concept of the individual who may “bind the organization” may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under subrule 6.03 (9).

In addition, the legal branch at the particular ministry is usually considered to always be “retained”. There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

In general, the subrule is not intended to:

- a. constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;
- b. affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act*, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or
- c. affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Subrule 6.03 (9), for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

The subrule is not intended to:

- a. prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the *Planning Act*;
- b. affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or
- c. restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.