By Raivo Uukkivi

Counsel to Counsel

Beware of approaching council

It may come as a surprise to some lawyers and municipal staff that it is not appropriate for a lawyer to contact a municipal councillor, or staff vested with decision-making authority, where that lawyer represents an opposing party, or even a party in common interest. This prohibition applies if the municipality is represented by a legal practitioner.[1]

The commentary to the Law Society of Upper Canada's Rules of Professional Conduct (RPC) was amended in November 2010 to make clear that such contact without the consent of the municipality's legal practitioner is improper. There are a plethora of adversarial situations to which this could apply: court proceedings, Ontario Municipal Board hearings, licensing hearings, and other quasi-judicial processes or matters where legal practitioners are involved. This also includes standard municipal work such as real estate transactions or other corporate work. It is important for both legal practitioners and municipal officials to be aware of the existence and scope of this prohibition, since the negative consequences flowing from a misstep could cause prejudice to the parties or result in unnecessary costs.

Consent of Solicitor Required

It is common for developers' legal practitioners to have dealings with the local councillor in development applications in an effort to get a positive result for a legal practitioner's client. The practice is expected in the policy-making process. In this situation, legal practitioners and municipal officials should turn their minds to Rule 6.09 of the Rules of Professional Conduct[2] for guidance before continuing to engage in ongoing discussions.

The rule in question is Subrule 6.03 (9), the full text of which appears at page 80 of the RPC. The rule itself is clear and easily understood in the private law context. It can be summarized briefly: do not contact officers, directors or employees of a corporate entity involved in the decision-making process without consent of the corporate entity's legal practitioner. Given the fact that the municipality is responsible to the public, it is important to take note of this rule since it places restrictions on how and when municipal officials can be contacted. The context to Subrule 6.03 (9) is provided in the commentary appearing on page 84 of the RPC. In particular, the commentary provides that:

> **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.

It is clear from the RPC and associated commentary that opposing legal practitioners may not, for example, contact individual members of council of a municipality on a litigious matter in which the municipality is adverse in interest without consent of the municipality's legal practitioner. This would almost certainly apply to contact with members of municipal staff as well. Municipal staff should be aware of these restrictions as their actions and reactions to attempted contact can have unintended consequences. This can easily be avoided by simply seeking advice before responding.

1 This may include a lawyer or paralegal licensed to practice law in Ontario or a member of the bar in another Canadian jurisdiction or otherwise authorized to practise law as a barrister and solicitor in another jurisdiction, RPC Rule 1.02 "legal practitioner."

2 Available at: <www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147484089>.

RAIVO UUKKIVI practises municipal and land-use planning law. He acknowledges the valuable guidance of George Rust-D'Eye of WeirFoulds LLP and Paul Cassan of Wishart Law Firm LLP during the preparation of this article.

Examples of Prohibited Conduct

Before looking at the exceptions, it is useful to consider some examples of conduct that appears to be prohibited by Subrule 6.03 (9). Contacting witnesses is one such example. In a contested planning application, there are often planning staff or councillors who express opinions that may be favourable to the developer or an applicant for planning approval, despite general opposition to a proposal. Contacting these municipal staff members and councillors becomes problematic once the municipality engages legal representation. In some ways, this may create unfairness, since persons with favourable information or views can essentially be shielded from contact, in essence creating property in a potentially broad range of witnesses, given the large number of individuals typically involved in the municipal decision-making process.

Another example could arise in the context of licensing proceedings. Take for instance the City of Toronto Municipal Code, which gives the local area councillor notice of licensing hearings in his or her ward. If the councillor gets involved, it is usually, if not exclusively, for reasons that are politically motivated. The RPC appears to prohibit a licensee's lawyer from contacting the local councillor, assuming the municipality retains a legal practitioner to conduct the hearing. If it happens that you want to discuss your concerns with the local councillor, you would be prohibited from doing so without first seeking the permission of the municipality's legal practitioner.

The importance of this rule was recently highlighted in the unreported decision of Justice Koke in *Aubrey et al v. Prince (Township)* 2011 ONSC 5944. The facts are extreme, but they serve to highlight how the RPC can cause problems for an unsuspecting legal practitioner. In the middle of the trial, two lawyers acting for several of the named plaintiffs (defendants by counterclaim) contacted the reeve of the township in an effort to obtain information that the township had refused to produce during the discovery process. The lawyers for the township discovered the fact of the conversation at a council meeting that same night. Given the prejudice to the township at trial, the township brought a motion the following morning to exclude any evidence that touched upon the issue, based on the clear violation of the RPC. The attempt to admit the evidence was, in essence, an effort to get evidence through the backdoor in light of the trial judge's previous order that refused a request for further discovery made at the commencement of trial.

Justice Koke found that the lawyers for the plaintiffs had acted improperly and in violation of their obligations under the RPC when they contacted the reeve. A summons to a witness that had been served on the town's clerk/administrator was struck out because Justice Koke determined that the only reason it was issued was to obtain information that had been previously refused during discoveries. The parties were invited to make further written submissions on what impact the opposing counsel's conduct would have on the evidence at trial. No decision was made on these further submissions as the trial settled the next day.

This case highlights the impact this kind of a decision can have on adversarial proceedings and the negative impacts to a client's case where a legal practitioner runs afoul of the RPC.

Exceptions to the Rule

As noted, there are exceptions highlighted by the commentary. They are stated in the RPC as follows:

> Subrule [6.03 (9)] 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 the 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.

While the commentary in a. and b. is clear, and perhaps obvious, the third exception can be a trap. It is in some ways irreconcilable with the commentary that prohibits contact with councillors involved in controversial planning applications. Lobbying often continues throughout a development process and throughout a hearing. The exception in c. appears to permit lobbying at any stage; but, the commentary on contact during litigious proceedings appears equally absolute. While rules of statutory interpretation may allow reliance on the exception in preference to the general rule, I would suggest that it remains prudent not to take that risk. Rather, a legal practitioner should seek permission from the municipality's legal practitioner before contacting staff. It avoids the unnecessary risks and potential embarrassment such as that faced by the lawyers for the plaintiffs (defendants by counterclaim) in the *Aubrey* litigation. It is equally important for staff and councillors to be on the lookout and to ensure that they seek legal advice before agreeing to an interview with a legal practitioner to ensure there are no negative consequences to the municipality.

The Rules of Professional Conduct are intended to protect against inadvertent disclosure of sensitive information of which a staff member or a councillor may not appreciate the significance given the small role he or she may play in litigation or any portion of a transaction. It is especially important in light of the fact that no individual member of council has the right to waive the municipality's solicitor-client privilege. When in doubt, the prudent course of action is always to ask for consent from the municipality's legal practitioner. MW