The Law Society of Upper Canada | Barreau du Haut-Canada

Report to Convocation
November 25, 2010

Professional Regulation Committee

Committee Members
Glenn Hainey (Chair)
Carl Fleck (Vice-Chair)
Julian Falconer
Patrick Furlong
Avvy Go
Michelle Haigh
Gavin MacKenzie
Ross Murray
Julian Porter
Judith Potter
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William Simpson
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Purpose of Report: Decision and Information

Prepared by the Policy Secretariat
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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on November 11, 2010. In attendance were Glenn Hainey (Chair), Carl Fleck (Vice-Chair), Julian Falconer, Patrick Furlong, Michelle Haigh, Ross Murray and William Simpson. Tom Heintzman and Susan Richer also attended. Staff attending were Dan Abrahams, Cathy Braid, Naomi Bussin, Sophie Galipeau, Terry Knott, Janice LaForme, Diana Miles, Zeynep Onen, Elliot Spears and Jim Varro.

AMENDMENTS TO RULE 6.03(9) OF THE *RULES OF PROFESSIONAL CONDUCT*

Motion

2. That Convocation approve the proposed amendments to rule 6.03(9) of the *Rules of Professional Conduct*, as set out at Appendix 4.

Introduction and Background

3. During discussions at November 22, 2007 Convocation on amendments to rules 4.03 and 6.03, some benchers raised concerns about lawyers' compliance with rule 6.03(9)(b), which prohibits a lawyer from communicating with certain individuals at an organizational client opposed in interest to the lawyer's client, without the consent of the organization's lawyer.

4. Based on the concerns expressed, the Committee undertook a review of the rule, which included:
   a. considering the appropriateness of the prohibition in paragraph (b) and reviewing material on the initial development of the rule;
   b. preparing a draft of an amended rule, which was published for comment by lawyers and paralegals;
   c. striking a working group to assess the input received;
   d. preparing a revised version of the amended rule and an expanded commentary, for Convocation's consideration in February 2010;
   e. deferring the February 2010 report in favour of obtaining comment on the revised version of the amended rule; and
   f. making further revisions to the commentary to the rule.

5. The Paralegal Standing Committee also reviewed this matter, as the *Paralegal Rules of Conduct* include a very similar rule.

6. Convocation is requested to consider the Committee's proposed revised version of the amended rule and commentary and if it agrees with the Committee's recommendation, adopt the amended rule. The draft of the rule in this report has been reviewed by the Law Society's Rules drafter. The Paralegal Standing Committee in its report to November 25 Convocation is also recommending that Convocation amend the companion rule 4.02(3).

Summary of the Committee's Review

7. Rule 6.03(9) currently reads:

> **Communications with a represented corporation or organization**
>
> 6.03(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a licensee shall not approach
>
> (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. 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 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.

Concerns About the Current Rule

8. Among the concerns expressed about the rule at Convocation on November 22, 2007 were the following:

   a. Rule 6.03(9)(b) creates compliance issues for lawyers representing trade unions (and others). For example,

      1. A lawyer is retained to represent three unions to respond to an application by the employer to remove certain positions from the three bargaining units. The employer is represented by counsel. The persons the employer is seeking to remove are the lawyer's clients' members, whose evidence is needed to prove the lawyer's case. Rule 6.03(9) would say that the lawyer could not contact his or her clients' own members without advising counsel for the employer and getting his or her permission.

      2. A lawyer is retained by two different unions with respect to appeals in which the clients allege that the employer has breached health and safety legislation. The employers are represented by counsel. Rule 6.03(9) would say that the lawyer could not contact employees who have been affected by the employers' actions even though that evidence is necessary to establish the violations.

      3. In every grievance, union-side labour lawyers call evidence from employees without obtaining the approval of counsel for the employer.

      4. A lawyer is retained to represent a professional regulatory body (for nurses) in an inquest in which a doctor murdered a nurse in a recovery room. The hospital is represented by counsel and is opposed in interest to the regulatory body. Rule 6.03(9) would say that counsel could not contact

nurses employed by the hospital without hospital counsel's approval, even though these nurses may be members of the regulatory body.

b. Rule 6.03(9)(b) may be contrary to the purpose of the statutory provisions that are found in labour legislation, health and safety laws and human rights codes that provide no reprisals for testifying in proceedings.

c. Given the language of the commentary, management-side labour lawyers may also be in violation of rule 6.03(9)(b) if they talk to an employee who is a member of a bargaining unit represented by a lawyer.

9. At Convocation's direction, the Committee undertook a review of the rule to determine if the concerns could be addressed.

The Committee's First Proposal

10. The Committee focused primarily on the prohibition in paragraph (b) of the rule. In this circumstance, a lawyer would be approaching a potential witness who is an employee of an opposite party that is a corporation or organization. If the employee's acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability, the lawyer would be prohibited from making the contact.

11. The Committee considered whether the scope of this prohibition was appropriate. One view is that this could be seen as a significant contraction of a lawyer's access to witnesses. Another issue is the difficulty in some circumstances of determining when a person falls within the prohibited category. The Committee learned through research conducted on the approaches in some other Canadian jurisdictions that the prohibition was contrary to existing practice.

12. The Committee also reviewed the background to the development of this rule, which formed part of the new Rules adopted by Convocation in 2000. This material appears at **Appendix 1.** One source of information was an excerpt from Charles W. Wolfram's text, *Modern Legal Ethics*, on the issue, which read, in part:

> …[Anticontact] rules seek to prevent lawyers from gaining for their clients an unfair advantage over other represented persons and to protect the client against intrusions by an opposing lawyer into the confidential client-lawyer relationship. They are not meant to protect others who interests might be impaired by factual information willingly shared by the contacted employee. Contact by a lawyer with a corporate employee will typically do little, if anything, to impair the corporate lawyer's own ability to gather information about legal matters…. So an employee whose position in a matter is only that of a holder of factual information should be freely accessible to either lawyer.
>
> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact 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 anticontact rule should prohibit contact with those officials, but only those, who have the legal power to 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 a representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

13. The Committee felt that the Wolfram excerpt stated the appropriate principles and that this should guide any revisions to the rule.

14. The Committee then prepared a proposed amended rule as follows:

> A lawyer retained to act on a matter involving a corporation or an organization that is represented by a licensee shall not approach a constituent of the corporation or organization
>
> (b) who has the authority to bind the corporation or organization,
>
> (c) 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,
>
> in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

15. The Committee thought that this draft would address the concerns expressed at Convocation, as it would provide a less restrictive standard for such communications without the consent of counsel for the corporation or organization while ensuring that confidential or privileged information is not disclosed by uncounselled individuals.

16. The Committee also determined that additional commentary would assist in providing guidance on the meaning of the amended rule, in particular, with respect to the meaning of the word "bind" and the phrases "regularly consults" and "interests are directly at stake". The proposed amended commentary (redline version) read as follows:

> 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), t~~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 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.

Input from Lawyers and Paralegals

17. With Convocation's approval, the Committee sought input from lawyers and paralegals on the proposed rule amendments. When the rule was initially adopted in 2000, a number of interested parties expressed their views on the scope and content of the rule. As the Committee's proposals are more than superficial changes to the rule, it believed that Convocation would benefit from having external views before Convocation discussed whether to adopt the amendments.

18. The call for input was published in late 2008 in the *Ontario Reports* and on the Law Society's website, and was also included in Law Society informational e-mails to lawyers and paralegals. The Chair also wrote to three legal organizations (the Advocates Society, the OBA and the Ontario Trial Lawyers Association) requesting their comments on the proposal. Input from paralegals came through the Paralegal Society of Ontario and the Licensed Paralegal Association (Ontario). The deadline for responses was February 16, 2009 but some responses continued to arrive towards the end of February and into early March 2009.

19. The Law Society received over 50 written responses from lawyers who represent individual clients, corporations or organizations and municipalities, lawyers working for the federal and provincial governments, in-house counsel and from the legal organizations.

20. The responses represented a wide and somewhat divergent range of views. Several respondents were opposed to the amendments. Some thought that the *current* rule was not restrictive enough and would expand the scope of those within organizations who could not be contacted by a lawyer without consent of the organization's lawyer. The remaining respondents either agreed with the changes or agreed generally with the changes but suggested clarifying amendments or additions. A summary of the responses without attribution appears in **Appendix 2.**

21. At its May and June 2009 meetings, the Committee reviewed the responses and discussed the issues they raised. In June, the Committee determined that a small working group of the Committee should be struck to consider how best to move the matter forward. The working group was formed following the June meeting, and included Linda Rothstein as chair, Chris Bredt, Brian Lawrie and Bonnie Tough.

<u>The Committee's Second Proposal</u>

22. Based on its assessment of the feedback received on the proposed amendments, the working group reviewed options for revisions to the rule and provided the Committee with a revised draft of the amended rule and commentary for consideration.

23. The Committee discussed the draft and reported the matter to February 2010 Convocation. As noted earlier, the Paralegal Standing Committee also reviewed the draft and endorsed the position of the Professional Regulation Committee.

24. The revised amended rule follows paragraph 27. In this version, paragraphs (a) and (c) restated some provisions that appeared in the existing rule that were proposed to be deleted. This change was based on the views of some respondents that the substance of the original language should remain in the rule. In the Committees' view, the four paragraphs that describe who may not be contacted without the consent of counsel provided a reasonable and justifiable limit on those intended to be covered by the prohibition. Other changes incorporated suggestions by respondents that make the rule more comprehensive.

25. The commentary was also significantly expanded to provide clearer guidance on the purpose and scope of the rule. It includes language from the existing rule, new language added in the original proposed amendments and new language added following the call for input. In particular, the commentary makes clear that the purpose of the rule, in the context of informal discovery, is to protect the lawyer/paralegal-client relationship and prevent clients from making ill-advised statements without the advice of their lawyer, but not to protect a corporate or organizational party from the revelation of prejudicial facts.

26. The Committees thank Janet Minor for seeking and offering comments from the government perspective on the commentary on that subject.

27. The following was the proposed revised draft of the amended rule and commentary.

PROPOSED REVISED RULE 6.03(9) AND COMMENTARY

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee in respect of that matter shall not, without that licensee's consent, communicate or facilitate communication with, approach 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 imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the corporation's or organization's lawyer and effectuates the advice of that lawyer with respect to the matter,

unless otherwise authorized or required by law.

Commentary

This subrule sets out the appropriate conduct for lawyers who engage in informal discovery methods, such as information-seeking interviews with individuals in corporations or organizations, that have the potential to streamline discovery and foster the prompt resolution of claims.

The purpose of the subrule is to protect the lawyer-client relationship and prevent clients from making ill-advised statements without the advice of their lawyer, not to protect a corporate party from the revelation of prejudicial facts. The subrule is intended to advance the public policy of promoting efficient discovery and favors the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence.

The subrule applies to corporations and organizations, the latter of which include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. The manner in which the subrule applies in some of these contexts is discussed later in this commentary.Generally, the subrule precludes contact only with actors, not mere witnesses. Further, communications with corporate employees are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. The subrule does not proscribe a lawyer's contact with all or virtually all employees on the ground that *any* employee might conceivably make statements that might be admissible in evidence against the employer. Such an interpretation is inconsistent with the intent of the subrule and would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. This would be overly protective of the organization and too restrictive of an opposing counsel’s ability to contact and interview employees of an adversary organization.

Fairness to the organization does not require the presence of a lawyer every time an employee may make a statement admissible in evidence against his or her employer.

This subrule 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 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 lawyer looks for decisions with respect to the matter.

Thus, the subrule would prohibit contact, without consent, with those employees 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 to be so central and obvious to a determination of corporate liability that the person's conduct may be imputed to the corporation. If it is not reasonably likely that the person may be a central actor for liability purposes, nothing in the subrule precludes informal contact with such an employee.

The individual who regularly consults with the organization's lawyer concerning the matter will not necessarily be a person who also directs the organization's lawyer. In some large 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 an organization's lawyer about a matter to gather factual information does not "regularly consult" with the organization's lawyer. 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.

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 subrule**.**

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.

A lawyer may communicate 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 – The subrule 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 lawyer.

Government –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 the subrule.

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. The subrule, 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.

28. As noted earlier, the Committee's February 2010 report was not considered by Convocation as it was determined that Convocation's review should await a further brief request for input on the revised amended draft. The proposed amended rule and commentary were then sent to 14 individuals or organizations, who included respondents to the first call for input, requesting input.

29. Four responses were received and are summarized in **Appendix 3** without attribution.

The Committee's Final Proposal

30. The Committee considered the comments received in the second round of the call for input and determined that no changes were necessary to the rule itself. However, the Committee decided that the commentary could be improved with some clarifying amendments. These amendments appear in the redlined version of the Committee's final proposal, below.

31. The Committee is recommending that Convocation adopt this draft of the rule and commentary, which appears in final form at **Appendix 4**.

Communications with a represented corporation or organization

6.03(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 imputed 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

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. <u>They apply to litigation as well as to transactional and other non-litigious matters.</u> 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~~ those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with 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 decisions affecting the outcome of the matter, including 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 in a litigation matter 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~~ is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in subrule 6.03 (9) precludes informal contact with such a person.

~~The~~ An individual who regularly consults with the corporation's or organization's legal practitioner concerning ~~the~~ a 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 or other person in the corporation or organization. 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.

If the representation by the legal practitioner described in subrule (9.1) is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

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~~ a termination grievance in which the union alleges that the employer, who is represented, has breached ~~health and safety legislation~~ the collective agreement, is not prohibited from contacting employees who may ~~have been affected by the employer's actions to obtain~~ information ~~necessary to establish the violations~~ on the termination or events leading up to the termination.

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.

APPENDIX 1

THE DEVELOPMENT OF RULE 6.03(9)
(ORIGINALLY ADOPTED IN JUNE 2000)

The first draft of the rule, then numbered 4.03(3), and its commentary was prepared in January 1999 by Gavin MacKenzie, co-chair of the Rules Task Force. It read as follows:

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 …

(3) A lawyer shall not approach or deal with directors, officers, or management personnel of a corporation or other organization that is professionally represented by another lawyer save through or with the consent of that party's lawyer.

Commentary:

This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. A lawyer may communicate with a represented person, or an employee or agent of such a person, concerning matters outside the representation. Also parties to a matter may communicate directly with each other.

The prohibition on communications with a represented person applies only in circumstances in which the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Such an inference may arise where there is substantial reason to believe that the person 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 eyes to the obvious.

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 having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization in represented in the matter by his or her counsel, the consent of that counsel to a communication will be sufficient for purposes of this rule.
>
> 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 2.03 (avoidance of conflicts of interest), and particularly subrules 2.03 (5) through (9). A lawyer must not represent that he or she acts for an employee of a client unless the requirements of rule 2.03 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

In his explanatory information on the draft, Mr. MacKenzie indicated to the Task Force that the first three paragraphs of commentary were based on the ABA Model Rules, and that the last paragraph was new, reflecting discussions at the Task Force meetings. He referenced an excerpt from Charles Wolfram's text, *Modern Legal Ethics,* on the issue, which read, in part:

> …[Anticontact] rules seek to prevent lawyers from gaining for their clients an unfair advantage over other represented persons and to protect the client against intrusions by an opposing lawyer into the confidential client-lawyer relationship. They are not meant to protect others who interests might be impaired by factual information willingly shared by the contacted employee. Contact by a lawyer with a corporate employee will typically do little, if anything, to impair the corporate lawyer's own ability to gather information about legal matters…. So an employee whose position in a matter is only that of a holder of factual information should be freely accessible to either lawyer.
>
> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact 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

> anticontact rule should prohibit contact with those officials, but only those, who have the legal power to 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 a representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

This draft rule remained in the form appearing above (except for revised references to rule 2.04 in the commentary) in the Task Force's report to April 1999 Convocation, which introduced the new Rules. In that report, the new rule was explained in the following way:

> …a new rule was added, appearing at rule 4.03(3), dealing with the circumstances in which it is permissible for counsel to interview witnesses who are employees of a corporate party that is represented by a lawyer. In the Task Force's view, this fills a gap in the rule and provides valuable guidance on the issue. The rule provides that a person acting for a corporation cannot claim to professionally represent an employee as a witness unless he or she is in fact acting for that employee, and commentary is added to the effect that this is designed to prevent corporate counsel from sheltering factual information from another party;

In commenting on the draft rule at Convocation, Mr. MacKenzie said:

> …it should permissible, for, say, an individual plaintiff suing a corporate defendant to interview lower level employees who have knowledge about the matters in issue without going through the corporate defendant's lawyer, and that's a distinction, as I say, which is observed in the case law generally and also in Rules of Professional Conduct with other jurisdictions.

In response to a request for comments on the proposed Rules before they were adopted, the Task Force received input from lawyers and law firms on this rule, including comments relevant to the subject of employees and agents, as follows:

a. The rule does not specifically deal with employees and agents, even though the commentary references employees and agents. The right of a party to have its employees shielded from direct interrogation by counsel for an opposing party remains an important part of the adversary system, and there is no danger in continuing with the present

arrangement.[1] At present, opposing counsel may still, through counsel, direct relevant questions to employees of an opposing party in the discovery process;

b. To date, these obligations have been defined by the common law test which requires the consent of counsel only where the witness is likely involved in the decision-making process of the party (as opposed to merely carrying out the direction of others). The common law test should be incorporated in the rule, and that the rule should go no further;

c. The prohibition is all too frequently ignored. As an example, a lawyer may attempt to interview a nurse who was involved in health care matters in issue, was employed by the subject health care institution whose conduct was in issue, and whose conduct may be imputed to the institution for purposes of civil liability. The rule should apply to this type of situation and an amendment should be made that would add "other employees of a corporation or other organization or any other person whose act or omission in connection with the matter is in issue or may be imputed to the organization for purposes of civil or criminal liability" who are represented by counsel.

These comments informed the next draft of the rule. In particular, revisions made to the rule included a division between directors and officers in paragraph (a), and employees and agents in paragraph (b).

In advance of Convocation's consideration of the rules in the spring of 2000, further comments were received from a number of individuals and organizations, including then bencher Earl Cherniak. He commented on rule 4.03(3) as follows:

> …I am not certain that it should be impermissible to interview an employee of a corporation or organization as long as those employees are not in a fiduciary relationship with the corporation, such as a director or officer would be. For instance, why shouldn't a lawyer be entitled to interview a whistle-blower, or an employee who is a witness, not a participant and is willing to talk to the lawyer?

[1] The reference is to former Rule 10 commentary 14 which read: "The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. An opposite party who is professionally represented should not be approached or dealt with save through or with the consent of that party's lawyer."

The draft that was eventually adopted at Convocation in June 2000 read as follows:

> (3) Where a corporation or other organization has retained a lawyer on a matter, another lawyer seeking information about that matter shall not, without the consent of the lawyer representing the corporation or organization, approach or deal with
>
> > (a) directors, officers, or persons likely involved in the decision-making process concerning that matter; or
> >
> > (b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter are in issue or whose acts or omissions may expose the corporation or organization to civil or criminal liability.

The commentary to the rule was not changed substantially.

Reconsideration of the Rule After June 2000

Following adoption of the new Rules in June 2000, effective November 2000, comments were received from the profession on its experience with the new Rules. One of these rules was rule 4.03(3). The following is an excerpt from the Professional Regulation Committee's report to May 2001 Convocation with suggested amendments to the rule based on comments received.

> Rule 4.03(3) - Advocacy - Interviewing Witnesses
>
> 27. New rules and commentary were added in the 2000 Rule revisions to deal with the circumstances in which a lawyer may interview employees of a corporate party that is represented by a lawyer.
>
> 28 Lawyers who prosecute provincial offences and who appear before tribunals such as the Ontario Securities Commission raised a concern that a literal interpretation of the rule may prevent them from adopting certain investigative measures specifically authorized by their governing statutes, and may also prevent them from interviewing and preparing for trial certain witnesses who are employees of corporate defendants. An unrelated concern that was raised was that the new rule may prevent a plaintiff's counsel from speaking with a

"whistleblower" who approaches the plaintiff's counsel to disclose corporate wrongdoing.

29. The Committee concluded that the most effective way of addressing these legitimate concerns would be to revise the rule as follows:

a. By adding language making it clear that communications with employees of corporate parties that would otherwise be proscribed are permissible if they are otherwise authorized or required by law;

b. By deleting the prohibition against communications with corporate employees whose acts or omissions are "in issue", while maintaining the prohibition against communicating with employees whose acts or omissions may expose the corporation to civil or criminal liability; and

c. By deleting the prohibition against "dealing with" employees whose acts or omissions may expose the corporation to liability, while maintaining the prohibition against "approaching" such employees.

30. The Committee proposes the following new subrule 4.03(3):

> (3) A lawyer retained to act on a matter involving a corporation or organization that is represented by another lawyer shall not approach
>
> (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,
>
> unless the lawyer representing the corporation or organization consents or unless otherwise authorized or required by law.

These changes were adopted by Convocation.

Through these developments, the rule evolved into the form appearing above. The rule was renumbered as rule 6.03(9) in November 2007 following amendments to the rule addressing communication with a represented individual (then rule 4.03(3) and now rule 6.03(7))

APPENDIX 2

RESULTS OF CALL FOR INPUT ON RULE 6.03(9)

(Without Attribution)

The following is the version of the amendments that was submitted for comment:

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,

(d) 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),~~ ~~t~~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 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.

General Comments From Respondents

Support for the amendments

1. The amendments to the current rule are appropriate for the following reasons:
    a. There has been a continual erosion of lawyer's behavior relative to the wording of the rule; it should be wider in application than "micro" so that technical interpretations cannot be made to frustrate its purpose;
    b. The rule was not intended to shield corporations from liability and the current original wording does just that;
    c. Precluding access to those who are not involved in instructing corporate counsel and who are not involved in decision-making can deprive a party adverse in interest to the organization of evidence that is critical to the prosecution of claims against the organization; this is exacerbated by the ambiguity of current clause (b), which requires considerable judgment.

d. The rule in the context of provisions in the Ontario *Securities Act* can impose "insuperable" obstacles to the plaintiff;[2]

e. Not all directors, officers or persons likely involved in decision-making have the ability to bind the corporation or regularly consult with counsel – as such, there is no need to provide blanket protection of these people, as they may be holders of factual information;

f. Current paragraph (b) is subject to overly broad interpretation to the degree that no corporate employee who could expose the corporation to liability could be approached;

g. The proposed rule provides more reasonable restrictions;

h. The amendments add clarity to the rule and commentary. The writer, as a federal government lawyer, has encountered situations where counsel have inappropriately contacted officials within the client department; it will help to have a clear and detailed rule to reference in discussions with outside counsel;

i. The rule is much improved;

j. The original rule gave an unfair advantage to corporate defendants, and prevented counsel from speaking with employees whose interests were not necessarily consistent with the corporation's, and whose input could often be said to be more objective than interested parties;

k. There will be situations where it is beneficial to employees, and to the cause of justice, to have the veil drawn back somewhat, as the changes propose, such that facts and information are more readily available to the parties; more openness and availability of information will enhance access to and the administration of justice.

2. One respondent "wholeheartedly" supports the amendments for the reasons stated in the report.

[2] Reference is to s. 138.8 of the Act by which a plaintiff must obtain leave of the court before commencing an action for misrepresentations in the secondary market, and must show that the claim has a reasonable possibility of success. This means obtaining evidence that is often non-public and only in the possession of current employees of the corporation.

Suggested revisions to improve the rule (from those who support the amendments)

3. The rule could be reorganized to have clearer meaning, as follows:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not **directly or indirectly communicate or facilitate communication with** ~~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 **is related to the subject matter of the communication**,
>
> ~~(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,~~

4. As the rule applies to both litigation and transactions, some clarification from a transactional perspective is need to deal with situations where consent is explicitly or implicitly given at the outset for direct communication between counsel and another licensee, and subsists unless clearly revoked.

5. The rule should be rewritten in plain language.

6. The proposed amended rule should be revised as follows:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not, without the other licensee's consent 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,

in respect of that matter ~~unless the other licensee consents~~ or unless otherwise authorized or required by law.

7. The phrase "unless otherwise authorized or required by law" is so far adrift from the related noun (is it the licensee or the retained organization counsel?) that the writer recommends adding both a repeated noun and verb from to the phrase for clarification.

<u>The scope of the rule should be broadened (i.e. more restrictive)</u>

8. The rule should be broadened to make it clear that all employees, whether senior management or others, may not be consulted by a third party lawyer without the consent of the in-house legal department or outside counsel. The information the employee has belongs to the company and should only be disclosed through an appropriate representative in a discovery process or as otherwise permissible to protect the integrity of confidential information. If there were two individual parties to a lawsuit, contact would be impermissible – why should it be different for a corporation, which acts through many people?

9. Would it not be simpler to state that a lawyer is prohibited from communicating with any person within the organization or its concerning a matter in question without first obtaining the consent of the lawyer acting for them or unless otherwise authorized or required by law?

10. The rule uses "a licensee shall not approach" while the commentary uses "This rule prohibits communication…" which are different standards. For example, under the first standard, the lawyer may communicate with employees as long as they initiate the communication, but under the second standard, no communication is permitted subject to consent, apart from "who approaches who." In the writer's view, no communication should be permitted, subject to the conditions and exceptions noted, to avoid contentious and disputable fact-finding associated with "who approached who."

The scope of the rule should be narrowed (i.e. less restrictive)

11. The amendments are too stringent. The rule should allow the other lawyer to deal with an organization if the shares are publicly-traded or if it is or appears to be sophisticated in legal matters, and the organization allows him or her to be involved in the dealing.

The unique government context[3]

12. For the purposes of this rule, the structure of government branches, divisions and ministries is unique and does not parallel the corporate world in form or function. That said, the writer supports the creation (with some comments about the amended rule that are included in this summary).

13. It would be inappropriate for licensees to approach people in government when the parties are actually or potentially adverse in interest. Legal work including litigation, advisory services, sensitive negotiations and contract management may all require protection of the rule.

14. Public servants are required to take an oath or affirmation of office under the *Public Service of Ontario Act, 2006*. If the employee divulges any information to a licensee, the employee may fact sanctions by the employer. There is also public interest immunity protection for a significant number of Crown documents, since access to such documents is provided to public servants at varying levels.

15. Might it be preferable to have a separate rule or commentary that addresses the unique issues in government?

16. From the government perspective, the rule should not operate to constrain lawyers who wish to contact government officials for a discussion of policy matters on behalf of a client. This is a valuable mechanism to address issues that may move up to the political level, and allows those who wish to speak to an issue to do so freely.

[3] More comments from the government perspective appear later in this summary with respect to specific parts of the rule and commentary.

17. Is the Society proposing with Rule 6.03(9) to attempt to deny the availability of Access to Information Requests (ATIP) to litigants who have named the Federal Crown as a defendant? The proposed Rule purports to do just that. The rules of paramountcy would appear to dictate that the current proposed formulation of this Rule that disallows contact with 'government departments and agencies' is in direct conflict with, *inter alia*, the *Access to Information Act* and is thus clearly *ultra vires* the power of the LSUC. Quite apart from the obvious conflict with federal statutes, it is not for the Society to attempt to lead the courts in this matter. An amendment with respect to the Crown in general that allows contact 'in the ordinary course of business' and specifically excludes ATIP requests from the ambit of the Rule might be more appropriate.

<u>The municipal context</u>

18. The revisions to not adequately address situations that municipalities encounter that should fall within the scope of the rule.

19. In the municipal context, lawyers can appear as a delegation before council on a client's behalf and can make representations to a public meeting held pursuant to the *Planning Act.* Lawyers can also utilize the *Municipal Freedom of Information and Protection of Privacy Act* to obtain factual information.

20. Legal counsel retained by persons having dealings or negotiations or disputes with municipalities must not be restrained from communicating with the elected representatives of their clients i.e. councillors; the same can be said of municipal staff. Such communication is vital to effective representation by legal counsel of the public bodies' constituencies, in particular when there are so many diverse opportunities for this type of communication, including lobbying and social encounters.

<u>Disagreement with the proposals</u>

21. One respondent disagrees with the proposed amendments, and believes that the current rule should continue to apply.

22. There is no mischief that justifies amendment of the rule.

23. A federal government lawyer writes that the amendments increase the scope of government officials who may be approached. As such the amendments are neither desirable nor necessary, and are vague and unworkable:

a. Individuals in the prohibited categories may not be readily identifiable to someone outside government;

b. Narrowing the restriction by the amendments would undermine the respect that the profession routinely expects between counsel, as it does not respect the right of an employee to seek the advice of his or her employer's counsel and invites an unseemly chase to get to the witness first;

c. The amendments will not further public respect for the law or lawyers, as witnesses could feel pressured to make statements not made if they had received legal advice – their careers or employment could be negatively affected;

d. Formal and informal mechanisms exist to facilitate access to witnesses (e.g. Rule 53.07, Rule 39.03, exchange of will-say statements at case conferences, interviewing witnesses upon request to the counsel).

24. The report appears to indicate that the change is labour, not civil litigation, related. Clarification of that issue could be pursued rather than a significant revamping of the rule.

25. The rule appears to be designed to remedy a potential problem in one or two areas of practice (trade unions and whistleblowers) at the cost of creating significant problems in others, including insurance defence litigation. The exiting rule could be preserved but altered to create exceptions in the trade union or whistleblower or similar situations (for example, allowing an employee to speak with opposing counsel if the employee voluntarily approaches opposing counsel).

26. The amendments open a host of practical problems in this area of practice. Approaching an employee, who may not have the benefit of legal counsel, may result in the unwitting provision of information directly affecting the legal position and strategy of the organization. It is not a situation of preventing factual disclosure (through the

examination for discovery process) but a misuse or misinterpretation of information. The current rule protects the employee and the organization – the amendments would erase that. The proposed amendments may undermine one of the purposes of the rule – to foster the prevention of major capitulations of legal position on the part of a momentarily uncounselled but represented party.

27. One respondent expresses concern that the amendments would permit opposing counsel to communicate with personnel of organizations about their involvement in the very subject matter of the litigation, whereas the current rule would not. The broad access would give opposing counsel an unfair advantage, allowing communication with those within an organization who are most intimately involved in the issues being litigated, and would tend to undermine the general purpose of the rule. This will leave lawyers with two classes of represented persons: individuals to whom other lawyers are denied access and organizations where lawyers are permitted access.

28. The rule will adversely affect a lawyer's ability to properly defend a client and will infringe on solicitor-client privilege.

29. A clear and straightforward rule is proposed to be replaced with one that is inordinately complicated, obscure and dependent upon a commentary which muddies rather than clarifies. This respondent suggests the Society "stick with what you have."

30. One respondent is "very opposed" to the proposed changes (and another law firm wrote to support this view entirely). The respondent uses as an example a motor vehicle accident on a snowy, icy highway that results in serious injury (where he represents the municipality) and where the people approached are the municipality's roads superintendent/plowmen:

    a. Not contacting "directors or officers" (authority to bind) is irrelevant in this example (e.g. the mayor and councillors);
    b. It would be rare for there to be an employee whose own interests are directly at stake in such a situation;

c. The plaintiff's lawyer, under the amended rule, would be permitted to contact the roads supervisor/plowmen, as they do not fall within a prohibited category (they do not supervise or direct counsel, or regularly consult with counsel);

d. The fact that these people would usually be the witness for the municipality on examination for discovery does not enter the analysis under the rule and serves to show how wrong the amendments are. The municipality's lawyer could attend at the examination and find out that the witness has already been interviewed and "statementized" by plaintiff's counsel.

e. In the interview, there is no protection against privileged material being disclosed and no protection against defence assessments, tactics and strategies being disclosed.

f. Why is it deemed necessary to allow plaintiff's counsel an opportunity to interview the primary personification of the defendant corporation in the absence of counsel of record for the defendant corporation?

31. The proposed rule will give an unfair and substantial advantage to the client of the adverse lawyer where liability is an issue.

Other comments

32. Should the same rule apply to non-profit/charitable organizations and public/for profit organizations?

33. Contact with former employees should be permitted pursuant to the principle that there is no property in a witness. The rule should make clear whether such contact is permitted (based on the amended rule, it appears contact with them would not be prohibited). This respondent made reference to the case of *Anderson v. City of Niagara Falls* which deals with the rule in question. In *Anderson*, the plaintiff was rendered a quadriplegic as a result of a motor vehicle accident on an icy highway. The action against the City included allegations of negligence in failing to adequately salt and sand roads where the collision occurred. The City failed to fulfill undertakings on discovery to provide the names and contact information for certain employees and one former employee for

subpoena purposes, arguing that do so would breach rule 4.03(3) (now 6.03(9)). The plaintiff sought leave to appeal the motions judge's decision to decline to compel fulfillment of the undertaking, and was successful, for the reason, *inter alia*, that there was no evidence that the purpose of seeking the information in question was to interview employees. Further, the judge said in a footnote that

> I do not think that the wording of subrule 4.03(3) of the *Rules of Professional Conduct* or of the Commentary to rule 4.03 supports a finding that it applies to former employees of a corporation, as is implicit in the decision of the motions judge. Therefore, I would regard this finding as an additional error.

34. There is a "grey area" around communications between plaintiff's counsel and the no fault accident benefits adjuster, i.e. the plaintiff's own insurer for Statutory Accident Benefits (SABS), *after* the plaintiff has failed a FSCO Mediation and elected to add the no fault accident benefit insurer in lieu of electing to pursue a FSCO arbitration application. Suppose that there is a tacit agreement between the adjuster, who is usually the insurer's corporate representative at discovery and the instructing client of the insurer corporation, the insurance defence counsel, the plaintiff and the plaintiff's counsel that matters in the action will only be discussed by counsel whereas matters at issue, i.e. accident benefits and treatment plans being applied for and/or denied but not yet mediated or litigated can be discussed directly by the plaintiff (the insured) or the plaintiff's counsel and the no fault insurance adjuster on an ongoing basis without the need to include the defence counsel or seek his or her consent or approval. (To do otherwise would require that the adjuster not be the corporate rep at discovery, or that a different corporate rep of the no fault insurer, who will have no knowledge of the day to day handling of the claim, would have to produced for discovery.) This practice may offend the letter and, possibly, the spirit of the amended rule. It remains an open question whether an exception exists in the *Insurance Act's* regulation regarding this corporate representative/claims adjuster and plaintiff's counsel direct post-litigation communication.

Specific Issues Raised by Respondents

Meaning of "constituent"

35. Confusion was expressed about the word "constituent". Some respondents said that it should be replaced with "individual".

36. Some questioned who a constituent of a partnership or government department would be. For example, one respondent (with government) said that the individuals falling within "constituent" may be significantly different between a private corporation and a municipality. In the latter, it would include elected officials, department heads, consultants, full time staff, and even summer students, depending on the circumstances.

37. Others said that the rule or commentary should include a definition of "constituent". One suggested definition was "directors, officers, employees, agents or others who act on behalf of the corporation or organization."

38. Using "who has authority to bind" assumes that the roles and responsibilities of such individuals are discrete. In government, there could be different officials at different levels in different departments providing advice and recommendations. An outside lawyer may only determine whether someone is caught by the rule after unintentionally violating it.

Paragraph (a) of the proposed rule

39. This paragraph should be revised to read "who has authority, either individually or as part of a group, to bind…". In the municipal context, no one individual member has the authority to bind. As worded, the paragraph may allow an applicant's lawyer to contact individual members of Council on a controversial planning matter that is before the Ontario Municipal Board without the consent of the municipal solicitor.

40. In government, because of its complexity and despite its hierarchy, it is difficult to conclude who a licensee is authorized to approach on a particular matter, who is involved in the decision-making process or who has authority to "bind." The legal, policy and finance branches may all have individuals who are directly related to a decision.

"Binding" is somewhat of a misnomer in government – it is expected that 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, and not merely the individual who can "bind" the government.

41. In the context of a law firm's representation of individual school principals in some level of disagreement or dispute with their employer Boards, while each Board has a unique organization structure, and some have counsel that a lawyer may know will be assigned to and are eventually retained for a matter, absent notice of the lawyer's involvement, the question is at what point does the entity become a represented organizational client on a matter? A lawyer may not assume that because the Board has in-house counsel, that counsel will be necessarily involved in a matter. A lawyer might deal directly with non-lawyers to resolve issues or settle matters. A modification to (a) is suggested:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee <u>in respect of that same matter</u> shall not, <u>upon being advised of such representation,</u> approach a constituent… (and remove "in respect of that matter" from the last part of the rule).

42. The commentary relating to this paragraph (and paragraph (b)) uses the words "persons likely involved in the decision-making", where as the rule uses "persons who have authority" or "who supervise or direct." The suggestion is that "likely" be deleted from the commentary or the "likely" concept reintroduced into the rule (it was in the original rule). The latter suggestion is preferable as that would prohibit contact with anyone with apparent authority.

43. Three points:

a. Does the licensee need to know that organization is represented *in the matter* or is the fact that he or she is aware that the organization is represented by a licensee *in other matters* sufficient?

b. Should not that representation be inferred where the organization has in-house counsel, even though not expressly stated to be represented in the matter?

c. If representation is only inferred in circumstances where a licensee has had previous dealings with the organization where in-house counsel was involved, should the representation be inferred again, particularly where the matter is similar?

The rule/commentary should be clarified to indicate whether the licensee needs to have knowledge of representation in relation to a matter and the circumstances where such representation might reasonably be inferred in the absence of express communication to the licensee.

44. A new paragraph (d) should be added to maintain the intent of the present rule by including those persons involved in decision-making:

> "who, by nature of his or her position, may provide advice or recommendations to those in the corporation or organization charged with the responsibility of making a decision in respect of the matter."

<u>Paragraph (b) of the current rule ("acts or omissions" exposing the organization to liability)</u>

45. Original paragraph (b) should not be deleted. A person not having "authority to bind" (the new concept) may still possess information or opinion which should be afforded the protection of "right to counsel" oversight. In such cases, it is the information and not the authority to bind that exposes the entity to liability. The following paragraph should be added to the amended rule as (d):

> (d) who is an employee, agent or contractor of the corporation or organization whose own, or knowledge of any other constituents', acts, omissions or duties in connection with the matter may expose the corporation or organization to civil or criminal liability

46. This paragraph (deleted paragraph (b)) should remain. The individuals described deserve the benefit of representation to ensure they are aware of their rights and the implications of information they provide, even if they cannot bind the corporation. Employees won't become inaccessible if this paragraph remains, as they can still be questioned during the discovery process.

47. An insurance defence lawyer, with support from the firm's public entity insurer clients, strongly opposes the elimination of this paragraph. In a municipality, for example, individual employees may not know the full picture or how their communications may impact on litigation. Statements that are obtained "off the cuff" without reference to underlying business records can be both unfair to the employee and to the entity in defence of the action. Allowing direct contact with municipal employees without the involvement of counsel constitutes an invasion of the employees' privacy rights (by demanding disclosure of direct contact information) and a potentially highly prejudicial act to a defendant. Disclosure can properly be made through the discovery process – there is no evidence that this process is unfair or has worked an injustice in the preparation of a plaintiff's case against corporate defendants. The rule changes will sanction unfair behavior.

48. The original rule protects the corporation from a procedural standpoint (decision-makers) and substantive standpoint (those exposing the corporation to liability) whereas the amendment only protects it from a procedural standpoint (binding the corporation and the role of consulting with corporate counsel). However, both interests ought to be protected through the advice of corporate counsel. All employees, agents, etc. in a position to influence the outcome of a proceeding either from procedural or substantive perspectives ought to benefit from the advice of corporate counsel before communicating with an opposing lawyer.

Paragraph (b) of the proposed rule

49. The phrase "regularly consults with" should be removed as it does not reduce or eliminate and may in fact only increase the potential for compliance issues. If it remains, the words "with respect to the matter" should be added to the relevant commentary.

50. Some rationale is needed for this paragraph. The original paragraph is not limited to those who supervise, direct or regularly consult with the organization's lawyer. How often must an employee consult to meet the regularly "consult test" and how is a lawyer supposed to know?

51. As a practical matter, the writer is not sure how counsel would know without asking opposing counsel which employees are caught by this paragraph – the thought is that opposing counsel would take a very broad view.

52. While for government there is agreement generally that a licensee should not approach those who supervise, etc. the organization's counsel, due to the nature of government, it may be problematic for a licensee to approach an employee who does not appear to be directly related to the matter (an example is a contract negotiation, where employees from one ministry would be directly involved but those from other ministries may also have sensitive information that may require protection under the rule).

53. Licensees must be aware that in government, even if there is no named lawyer on the file, the legal branch at the ministry is considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. Further, instructions provided to a ministry's lawyer may come from a variety of sources, meaning that it is not necessarily one person who is supervising, etc. a government lawyer.

Paragraph (c) of the proposed rule

54. The Ministry of the Attorney General is in agreement with this limitation.

55. The word "directly" is highly interpretive and subjective.

56. It is not clear who is caught by this paragraph. The commentary suggests that unfairness is the test. But would it apply to any employee who is a witness in a proceeding? Most organizations would consider it unfair for opposing counsel to interview an employee who is a witness, and whose evidence could harm the organization's case, without the knowledge or consent of corporate counsel.

57. The intent of the "so closely tied" language in the commentary is not sufficiently captured by new paragraph (c). The paragraph should be worded as follows:

…whose own interests or course of conduct are directly at stake…

This may help preserve the distinction between an employee who is a witness and one who is a participant.

58. What does it mean for an employee or agent's own interest to be "directly at stake?" This is not clear and may lead to compliance issues.

59. This paragraph is so wide reaching that it could apply to anyone, including a shareholder not even involved in decision-making. More clarity is needed.

60. With respect to "those who own interests are directly at stake", this suggests that the approval for contact must come from both corporate counsel and the individual's counsel - in effect, double approval. However, the commentary is confusing on this point, as one part says

> 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.

and another part says

> 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.

and eliminates the approval of corporate counsel. As individual and corporate identities may operate seamlessly, it is proper that the opposing lawyer obtain the consent of both counsel for the individual and the corporation prior to approaching the employee.

61. The following amendment would help to clarify the categories of individuals with whom contact is prohibited:

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

This will make it clear that counsel are not in position to close their eyes to the obvious when attempting to communicate with the organization.

62. With respect to paragraph (c) of the rule, cross-reference should be made to the rule dealing with unrepresented persons (2.04(14)).[4]

Proposed new commentary

63. The commentary corresponding to paragraph (b) of the rule is ambiguous. Does the proposal capture only those who supervise, direct etc. the counsel on the specific matter or everyone in the organization who does so, including for other non-related matters? Clarification is required.

64. The amendments must clearly state that they do not derogate from protection of solicitor-client privilege, and that all constituents who supervise, direct etc. counsel, whether or not for the specific matter, are "off limits" for an approach by the licensee without consent.

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[4] **Unrepresented Persons**

2.04 (14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(a) urge the unrepresented person to obtain independent legal representation,

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

(c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Commentary
If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

65. The last sentence of paragraph two of the commentary should be qualified to include "interviewed or questioned to gather factual information".

66. The commentary needs to be tightened up. The writer suggests that the rule should permit contacted with those who are knowledgeable but have no responsibility over the litigation. As worded, it could be taken to exclude anyone with knowledge, and would, for example, immunize a government bureau from facing evidence of wrongdoing by those frontline workers who actually know about it firsthand. The commentary should be expanded to include the following (after the word "posed"):

> But with respect to the latter group, those only excluded because their duties include answering litigation related inquiries of the type posed, this rule does not preclude an inquiry 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 individuals with whom communication is prohibited include those to whom the organization's lawyer looks for decisions with respect to the matter.

67. The commentary would be improved by adding bracketed definitions for the two types of licensees mentioned ("institutional licensee" and "retained licensee") and the "organizational constituents."

68. For consistency sake, use the word "prohibit" in the sentence "The subrule also <u>prohibits</u> ~~disallows~~ contact…"

69. The sentence "The individual who regularly consults…" might be clearer if "need not be" were replace with "will not necessarily be."

70. The paragraph beginning with the sentence noted above is somewhat unclear – using "regularly consults" with "in respect of the matter." The commentary might be clarified to make clear that while someone in management may consult regularly with the entity's lawyers, if they don't consult in respect of this matter they are not off-limits.

71. The part of the paragraph discussing "who regularly consults…" is confusing, as it does not appear to match the language of the rule. It seems to draw a distinction between

"regularly consults' and "directs" which is not included in paragraph (b) of the rule. The writer assumes that the rule is triggered in either case where the individual is a constituent of the organization.

72. The sentence in the commentary "These individuals would have the authority to commit…" does not appear to read correctly. It could be amended to say

> "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 <u>because his or her duties</u> include answering the type of inquiries posed."

73. The addition of the paragraph about members of the organization "so closely tied" would be cold comfort to public entities. This is open to interpretation. For example, would it include a municipal employee at an accident cleanup who has relevant information which might impact on the municipality's liability but who was not directly involved in the events?

74. The meaning of "so closely tied" is not clear. When will a lawyer know that this is the case? And what does it mean to be "unfair?" This should be made clearer or removed.

APPENDIX 3

RESPONDENTS' COMMENTS
(Post-February 2010 Call for Input)

Respondent 1

1. This respondent consulted with lawyers at his firm at the time who indicated that they are content with the proposal, and support the amendments to the rule and commentary as indicated in the draft.

Respondent 2

2. This respondent offered the following comments:
    a. Paragraph 6.03(9)(d) is redundant as all decision-makers – even those with only apparent authority – are caught by paragraph (b);
    b. Subrule (9.1) may create a problem. If an officer at the organization is personally represented by counsel and consents to a communication with a lawyer, but the organization's own counsel does not consent, whose decision governs? The officer would likely only have counsel if the officer had a personal interest in the matter. It would seem appropriate that the officer's lawyer's consent would only go to matters relating to the officer's interests, but with respect to purely organizational issues, only the organization's own counsel could give effective consent for that communication. This should be clarified;
    c. While the commentary refers to discovery and evidentiary issues affecting litigators, the rule also applies to transactional lawyers, although its impact on transactions is unclear (e.g. it would be unusual for a seller's lawyer to call the purchaser corporation – including a call to speak with those in the corporation who have no decision-making or managerial authority - about the transaction without the corporation's lawyer's consent). Should the rule be confined to potential witnesses for discover/litigation and not apply to transactions?
    d. The word "actors" in the commentary is not a term of art and might be defined, or replaced with "those who act for or can bind the corporation."

Respondent 3

3. This respondent agreed with the proposed amendments subject to the following comments:

   a. For clarity, the introductory line should be amended to read: "A lawyer retained to act on a matter involving another party that is a corporation …";

   b. The commentary subtitled "Unions" should use a more generic example relevant to labour and employment law than that relating to an *Occupational Health and Safety Act* issue, as follows:

> For example, a lawyer retained by a union with respect to a termination grievance ~~an appeal~~ in which the union alleges that the employer, who is represented, has breached the collective agreement ~~health and safety legislation~~, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination. ~~have been affected by the employer's actions to obtain information necessary to establish the violations.~~

   c. With respect to paragraph 6.03(9)(c), if it is correct that a lawyer retained by the 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, this may conflict with the 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";

   d. In a termination grievance, the lawyer retained by a union may work closely with the employee, although that lawyer does not, in the strict sense, represent the employee. Is the rule intended to protect the employee from contact, communication or facilitated communication by the lawyer for the corporation? If so, this may interfere with the corporation's workplace investigations. This should be clarified in the rule or commentary so that the rule can be properly applied.

Respondent 4

4. A corporation's or organization's lawyer should be present whenever a person currently or formerly within the corporation or organization may make a statement admissible in evidence against it. As such, the commentary that reads

> 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.

should be amended to read

> Fairness requires the presence of a corporation's or organization's lawyer or legal practitioner whenever a person currently or formerly within the corporation or organization may make a statement admissible in evidence against it.

5. In the alternative, this paragraph should read:

> Fairness requires the presence of a corporation's or organization's lawyer or legal practitioner whenever a person currently within the corporation or organization may make a statement admissible in evidence against it.

6. If the Law Society is not of the view that after litigation has begun at a minimum the corporation's or organization's counsel must be present when a person who is currently with the corporation or organization is interviewed and may make a statement admissible in evidence against it, the lawyer making the contact should make full disclosure, including:

   a. That he or she represents a party adverse in interest;
   b. The nature of the legal proceeding and the relief sought;
   c. That the corporation or organization is represented;
   d. The name, address and phone number of the corporation's or organization's counsel; and
   e. That the person may decline to respond.

7. As such, at bare minimum, the commentary should be amended to read:

~~As a practical matter,~~ To avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer, or any other person acting on the lawyer's instructions, must, before interviewing a person currently or formerly within a corporation or organization, advise them:

a. That they are free to decline from engaging in all communication with the lawyer or person acting on the lawyer's instructions;
b. That they represent a party adverse in interest to the corporation or organization,
c. The nature of the legal proceeding and the relief sought; that the corporation or organization is or may be presented by a lawyer or legal practitioners, and
d. Provide the name, address and phone number of the corporation or organization's lawyer of record or legal practitioner, if known.

~~.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).~~

8. A similar amendment should be made to rule 4.03. The concern is that as the commentary under rule 4.03 was deleted some years ago, there is no guidance for lawyers who are seeking to interview a person, before litigation is commenced, who is currently or formerly within a corporation or organization. Rule 4.03 deals with a time before litigation.[5]

9. The following amendments should be to the definitions and commentary:
   a. A new subrule (9.3) to read "corporation" includes a municipal corporation;

[5]Current rule 4.03 (which has no commentary) is reproduced below. The rule was amended in 2007 to move subsections that deal with communication with represented parties to rule 6.03. The rule on communicating with a represented individual became rule 6.03(7) and the commentary that was relevant to that subsection in rule 4.03 was also moved to rule 6.03(7). There was no commentary even before the 2007 amendments that dealt only with the subject matter of current rule 4.03. The relevant part of the 2007 report to Convocation on these amendments is at **Appendix 2**.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 Subject to the rules on communication with a represented party set out in subrules 6.03(7),(8) and (9), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.
[Amended – November 2007]

b. An amended subrule (9.2) to read “In subrule (9), “organization” includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship, school board, tribunal and a government department, agency, or regulatory body;

c. Add to the commentary “persons within a corporation or organization includes current officers, directors, employees and appointed or elected officials such as councillors, aldermen, trustees, ombudsmen and mayors”.

APPENDIX 4

PROPOSED AMENDED RULE 6.03(9) OF THE *RULES OF PROFESSIONAL CONDUCT* AND COMMENTARY

Communications with a represented corporation or organization

6.03(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 imputed 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

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. They apply to litigation as well as to transactional and other non-litigious matters. 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 those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with 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 decisions affecting the outcome of the matter, including 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 in a litigation matter 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 is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in subrule 6.03 (9) precludes informal contact with such a person.

An individual who regularly consults with the corporation's or organization's legal practitioner concerning a 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 or other person in the corporation or organization. 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.

If the representation by the legal practitioner described in subrule (9.1) is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

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 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.

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.

Pages 61 - 176 In Camera

FOR INFORMATION

PROFESSIONAL REGULATION DIVISION QUARTERLY REPORT

68. The Professional Regulation Division's Quarterly Report (third quarter 2010), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period July to September 2010.

The Law Society of Upper Canada | Barreau du Haut-Canada

The Professional Regulation Division

Quarterly Report

July – September 2010

The Quarterly Report

The Quarterly Report provides a summary of the Professional Regulation Division's activities and achievements during the past quarter, July 1 – September 30, 2010. The purpose of the Quarterly Report is to provide information on the production and work of the Division during the quarter, to explain the factors that may have influenced the Division's performance, and to provide a description of exceptional or unusual projects or events in the period.

The Professional Regulation Division

Professional Regulation is responsible for the resolution, investigation and prosecution of complaints against licensees of the Law Society of Upper Canada, within the jurisdiction provided under the *Law Society Act*. In addition the Professional Regulation provides trusteeship services for the practices of licensees who are incapacitated by legal or health reasons. Professional Regulation also includes the Compensation Fund which compensates clients for losses suffered as a result of the wrongful acts of licensees.

See the Appendices for a case flow chart describing the complaints process.

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SECTION 1

REPORT HIGHLIGHTS

Highlights of Quarterly Performance

The Division

In the third quarter of 2010, Professional Regulation received fewer complaints than in the same period in 2009. While this is a departure from the trend, we do not yet have sufficient information to analyze the cause of the reduction. The Division's inventory of cases remained stable during this period.

Intake

During Q3 2010 the department closed 22% more complaints than in Q3 2009 (461 in Q3 2010 compared with 378 in Q3 2009). The department's inventory decreased by 21% from its inventory at the end of Q2 2010.

Complaints Resolution

The department's intake of new cases continued to increase, a trend since the fourth quarter of 2009. An analysis of the case types does not provide any specific indicator for this increase which mirrors the caseload of the department overall.

The department's objective during this quarter was to reduce case aging. It met its target of 170 days for the median age by the end of the quarter. As a result of this project, there was a lag in case closures, with fewer cases closed than received. The inventory of the department increased by 4% as a result, however it remains within an acceptable range given the available resources.

Investigations

The department met its aging target during this quarter, with a median case age of 240 days. It closed fewer cases than were received, however it is expected to meet its case production targets for the end of 2010.

Discipline

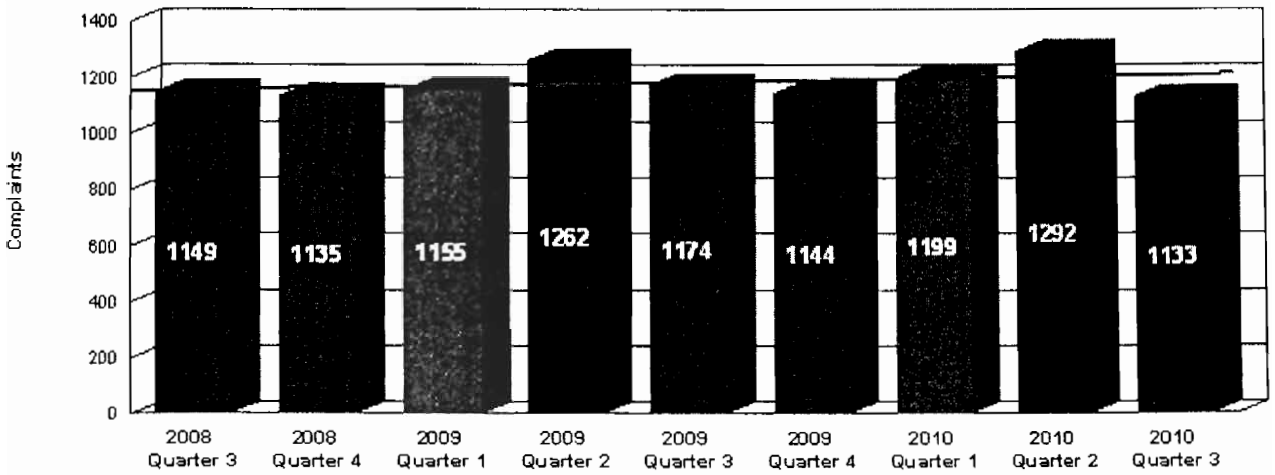
Discipline received slightly more new cases in this quarter than in the same quarter in 2009 (67 in 2009 and 72 in 2010). It continues to carry a high inventory, attributable to Investigations closure of increasing numbers of mortgage fraud cases, and the remaining paralegal grandparent good character cases.

SECTION 2

DIVISIONAL PERFORMANCE DURING THE QUARTER

PERFORMANCE IN THE PROFESSIONAL REGULATION DIVISION

Graph 2A: Complaints[1] Received in the Division



In the third quarter of 2010, there was a decrease in new complaints received, attributable to a reduction in complaints against lawyers, paralegals and persons subject to complaints alleging the unauthorized practice of law or provision of legal services (UAP).

Detailed Analysis of Complaints Received in the Division

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	988	954	956	1038	912
Complaints against Paralegals**	122	108	156	168	162
UAP Complaints***	64	82	87	86	59
TOTAL	1174	1144	1199	1292	1133

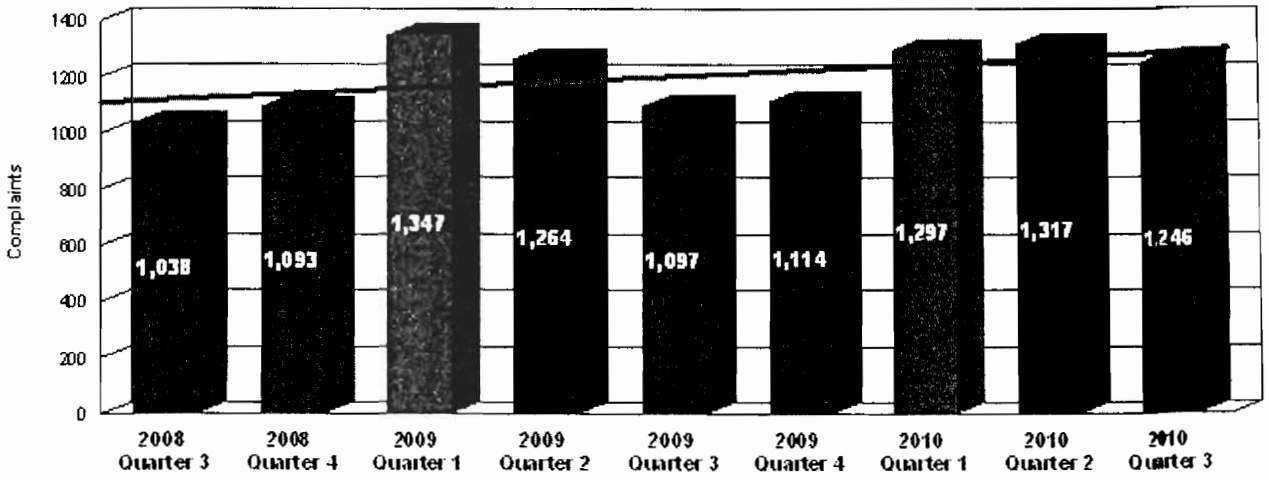
* includes Lawyers and Lawyer Applicants (i.e. Students)

** includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

[1] Includes all complaints received in PRD from Complaints Services

Graph 2B: Complaints Closed[2] in the Division



The number of cases closed in the division in Q3 2010 increase 14% from Q3 2009. Although there was a slight decrease (5%) from Q2 2010, this is attributable to reduced staffing during the summer months.

Detailed Analysis of Complaints Closed in the Division

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	912	905	1068	1096	1037
Complaints against Paralegals**	117	138	125	146	144
UAP Complaints***	68	71	104	75	65
TOTAL	1097	1114	1297	1317	1246

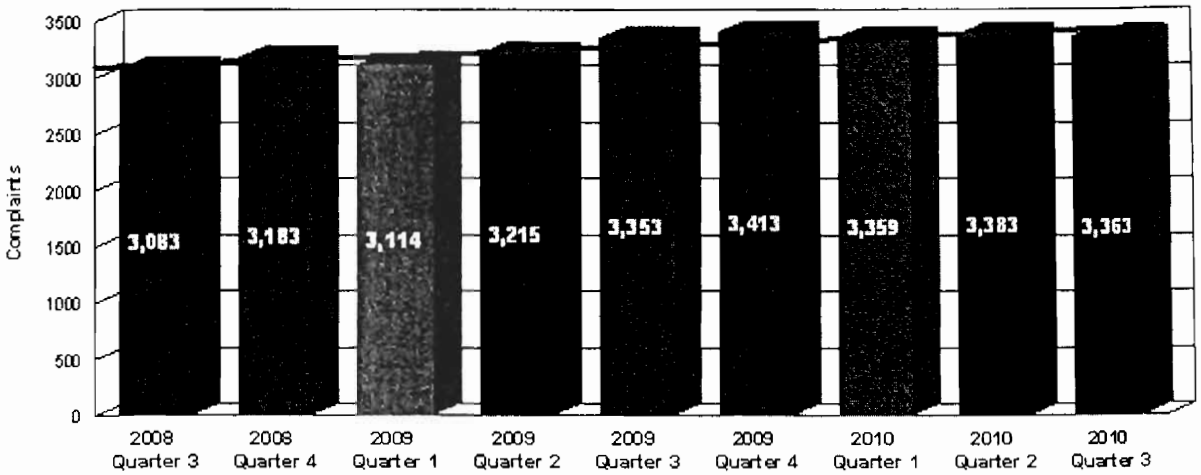
* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

[2] This graph includes all complaints closed in Intake, Complaints Resolution, Investigations and Discipline.

Graph 2C: Total Inventory[3]



The value in each bar represents the inventory at the end of the period

At the end of Q3 2010, the Division's inventory decreased slightly from the inventory at the end of Q2 2010. The breakdown of the inventory in the chart below demonstrates that the inventory of complaints against paralegals and UAP cases increased during the third quarter. The inventory of complaints against lawyers continues to decrease from Q4 2009.

Detailed Analysis of Division Inventory

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	2883	2951	2877	2851	2799
Complaints against Paralegals**	343	322	352	383	410
UAP Complaints***	127	140	130	149	154
TOTAL	3353	3413	3359	3383	3363

* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

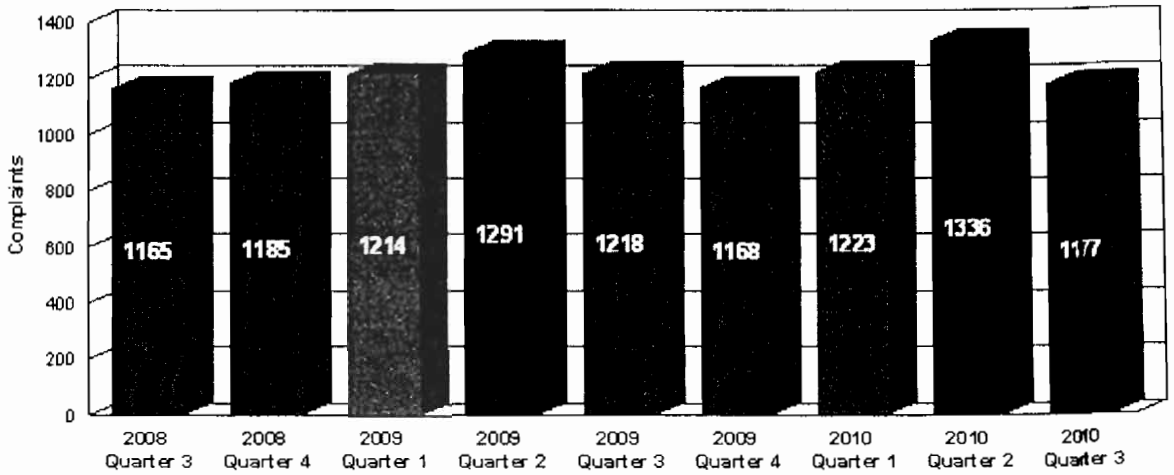
[3] This graph does not include active complaints in the Monitoring & Enforcement Department.

SECTION 3

DEPARTMENTAL PERFORMANCE DURING THE QUARTER

3.1 – Intake

Graph 3.1A: Intake - Input[4]

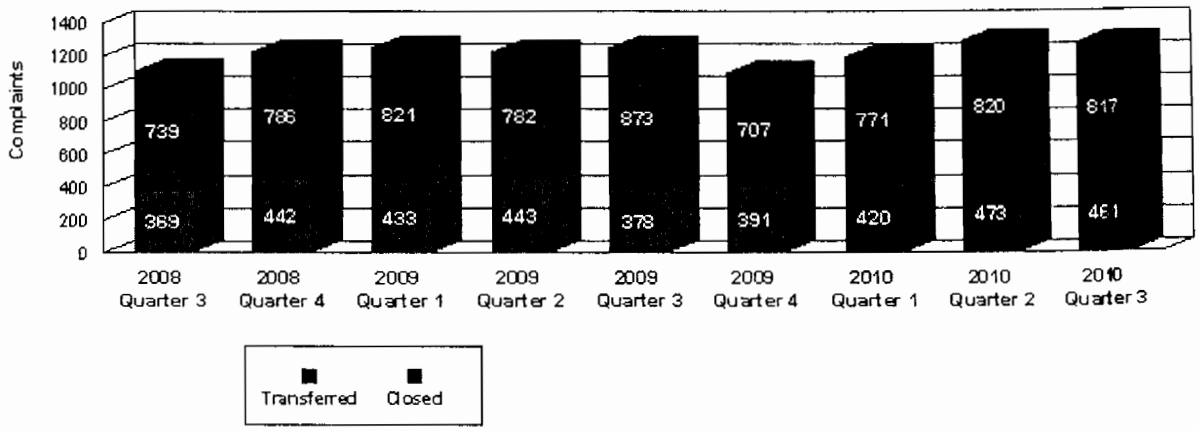


The Intake department processes all new regulatory complaints. In Q2 2010, in addition to the 1133 new cases, Intake re-opened 44 complaints which met the threshold for reopening a closed matter.

[4] includes new complaints received and re-opened complaints

3.1 – Intake

Graph 3.1B: Intake - Complaints Closed and Transferred Out



In Q3 2010, the Intake department closed 22% more cases than in Q3 2009 (461 vs 391) but transferred 6% fewer cases than in Q3 2009.

Detailed Analysis of Complaints Closed and Transferred From Intake

		Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	Closed	321	328	342	374	373
	Transferred	726	594	606	652	649
Complaints against Paralegals **	Closed	31	27	33	68	53
	Transferred	94	82	103	109	123
UAP Complaints***	Closed	26	36	45	31	35
	Transferred	53	31	62	59	45
TOTAL	Closed	378	391	420	473	461
	Transferred	873	707	771	820	817

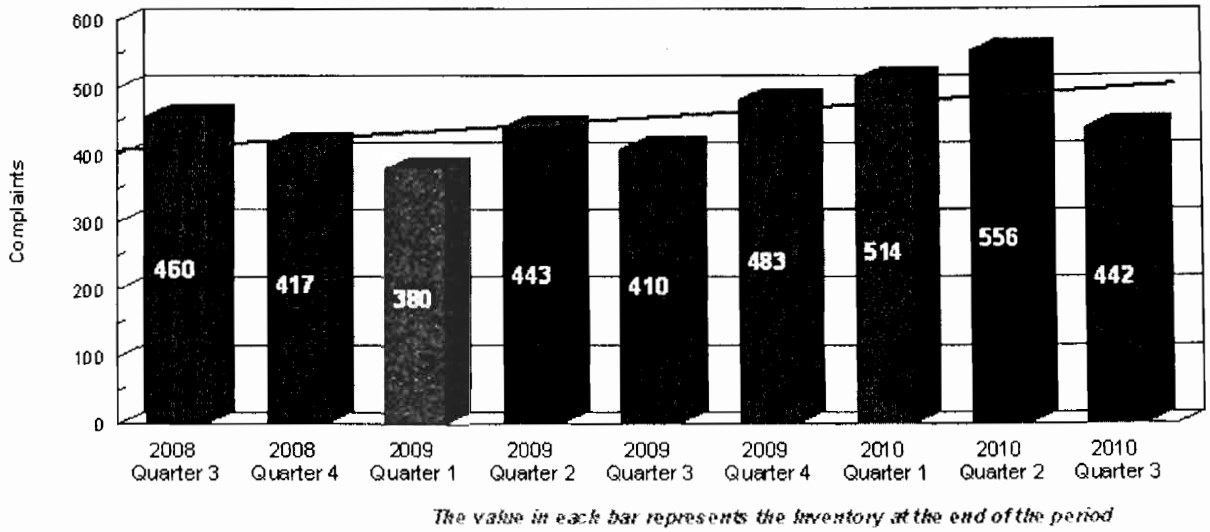
* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

3.1 – Intake

Graph 3.1C: Intake - Department Inventory



The value in each bar represents the inventory at the end of the period

In Q3 2010, Intake's inventory decreased by 20% from the previous quarter. As noted in the chart below, this decrease is reflected in complaints against lawyers, paralegals and UAP complaints.

Detailed Analysis of Intake Inventory

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	348	404	429	476	378
Complaints against Paralegals**	37	33	53	46	39
UAP Complaints***	25	46	32	34	25
TOTAL	410	483	514	556	442

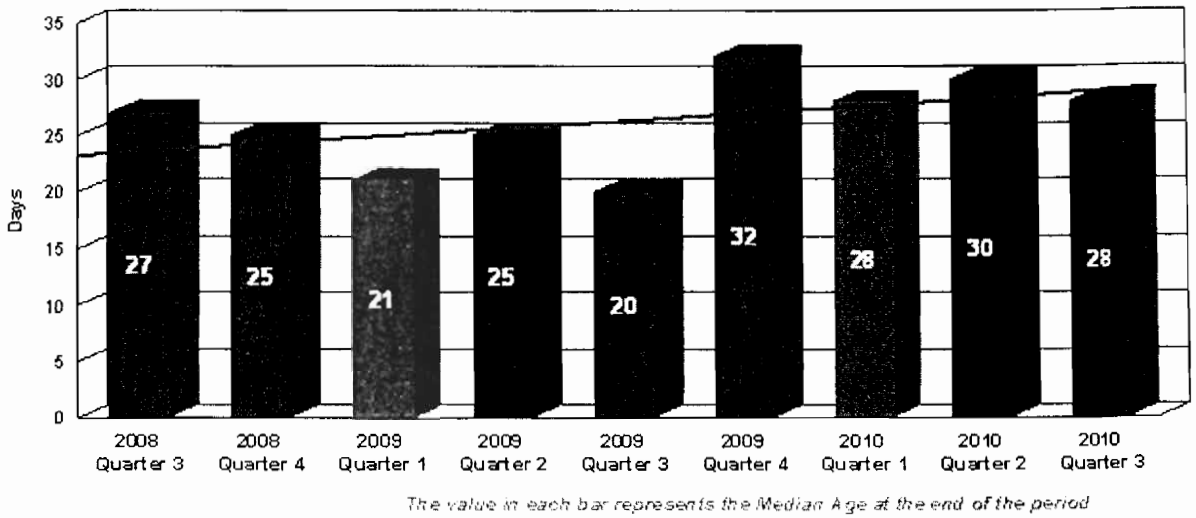
* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

3.1 – Intake

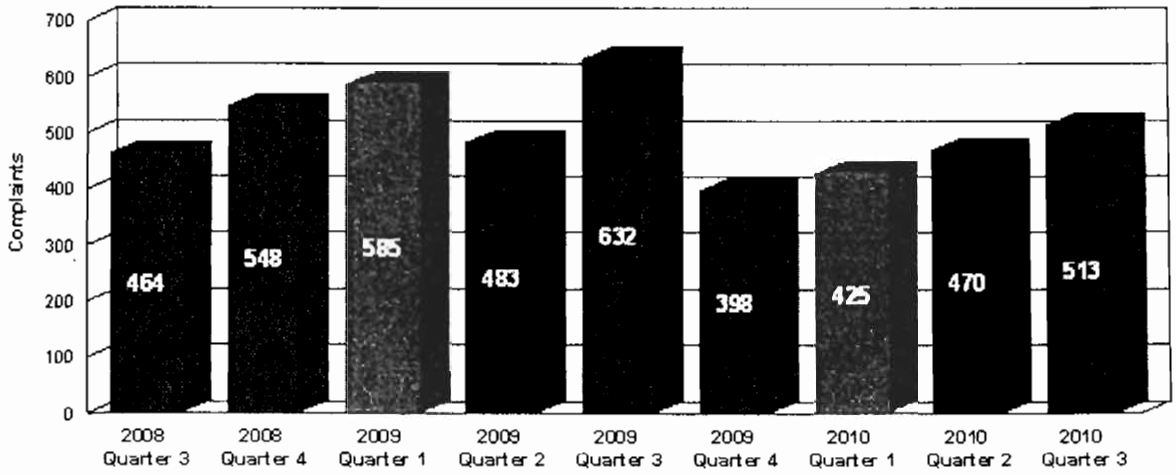
Graph 3.1D: Intake - Median Age of Complaints



The value in each bar represents the Median Age at the end of the period

3.2 – Complaints Resolution

Graph 3.2A: Complaints Resolution – Input[5]



The number of new cases received in the Complaints Resolution Department has decreased significantly from the high of 632 cases received in Q3 2009. This decrease was due largely to a decision to investigate all unauthorized practice cases in Investigations. Since Q4 2009, the number of new cases received in the department has increased steadily, from 398 in Q4 2009 to 513 in Q3 2010 (an increase of 29%).

Detailed Analysis of New and Re-opened Complaints in Complaints Resolution

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	556	363	389	430	458
Complaints against Paralegals**	47	29	35	40	53
UAP Complaints***	29	6	1	0	2
TOTAL	632	398	425	470	513

* Includes Lawyers and Lawyer Applicants (i.e. Students)

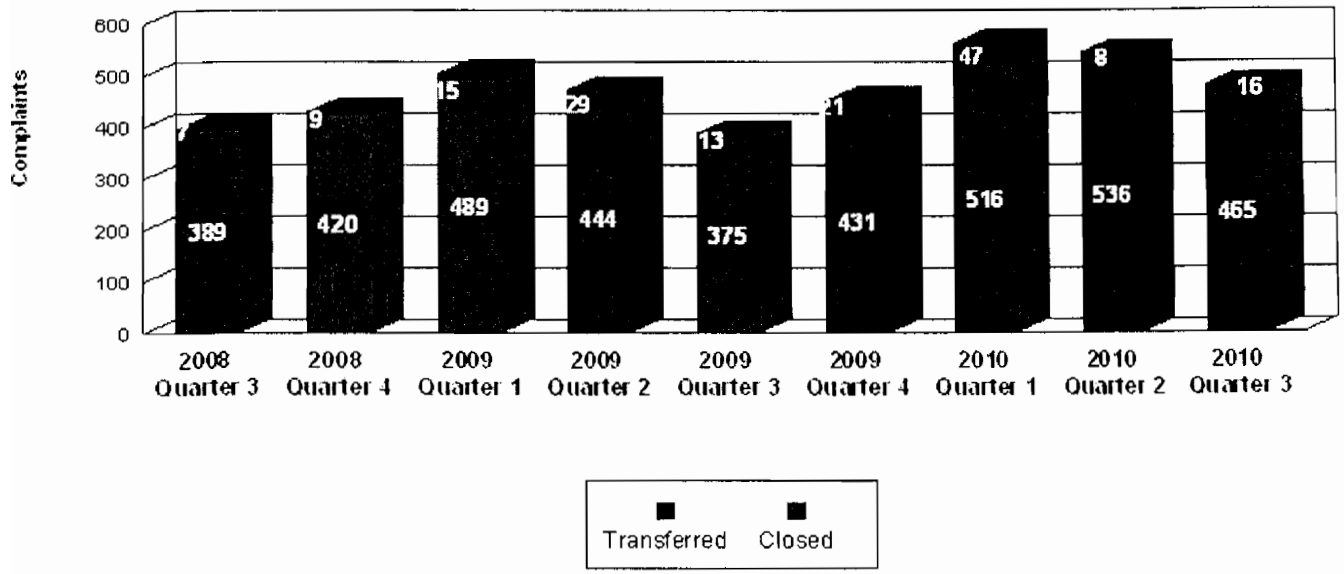
** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

[5] Includes new complaints received into the department as well as complaints re-opened during the Quarter.

3.2 – Complaints Resolution

Graph 3.2B: Complaints Resolution - Complaints Closed and Transferred Out



While the department closed fewer cases in Q3 2010 than in Q2 2010 (a 13% decrease), Complaints Resolution closed 24% more cases in this quarter than in Q3 2009. The chart below depicts the breakdown of this caseload by lawyers and paralegals.

Detailed Analysis of Complaints Closed and Transferred From Complaints Resolution

		Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	Closed	349	392	478	501	421
	Transferred	12	14	29	6	11
Complaints against Paralegals **	Closed	16	25	30	29	42
	Transferred	0	7	10	2	5
UAP Complaints***	Closed	10	14	8	6	2
	Transferred	1	0	8	0	0
TOTAL	Closed	375	431	516	536	465
	Transferred	13	21	47	8	16

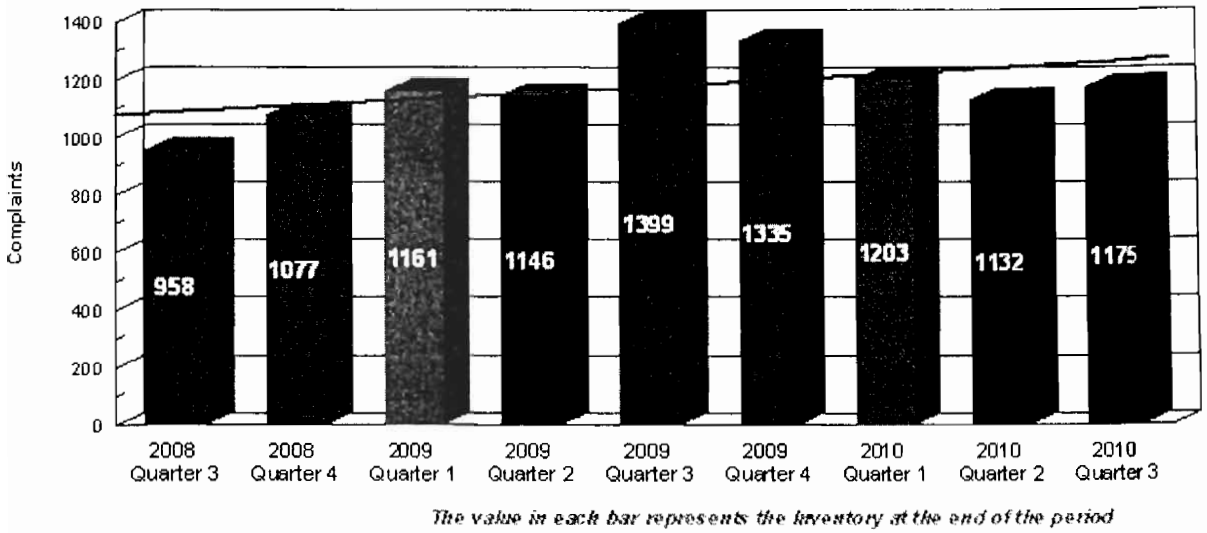
* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

3.2 – Complaints Resolution

Graph 3.2C: Complaints Resolution – Department Inventory



Due to the decreased number of case completions in Q3 2010, Complaints Resolution's inventory increased by 4% in Q3 2010 from the inventory at the end of the last quarter. However, the department's inventory has still decreased by 16% from Q3 2009.

Detailed Analysis of Complaint Resolution's Inventory

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	1266	1216	1104	1029	1068
Complaints against Paralegals**	92	88	83	93	99
UAP Complaints***	41	31	16	10	8
TOTAL	1399	1335	1203	1132	1175

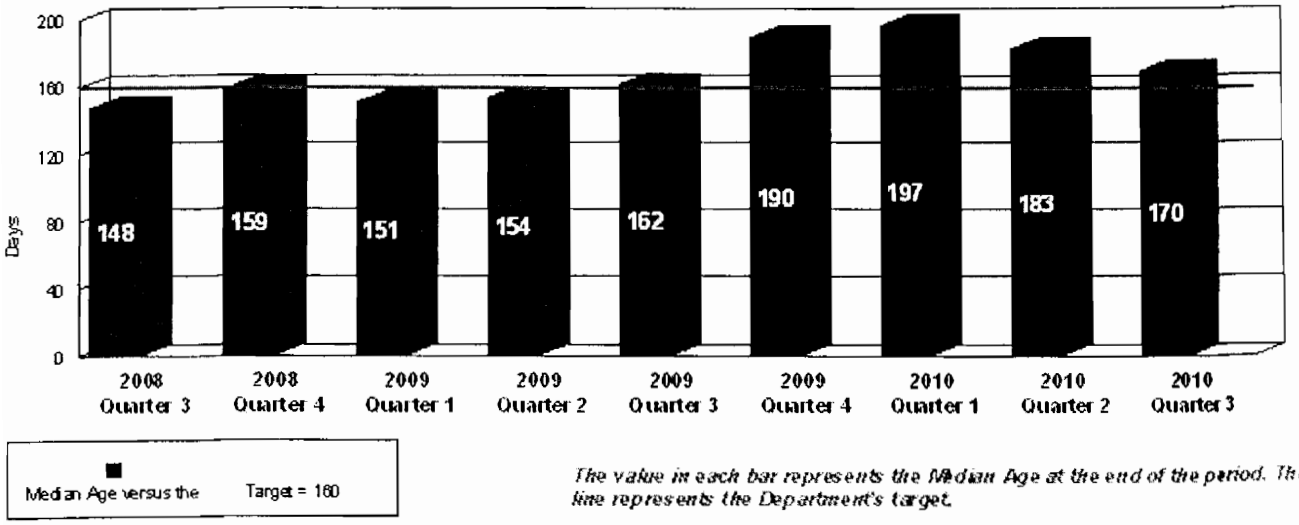
* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

3.2 – Complaints Resolution

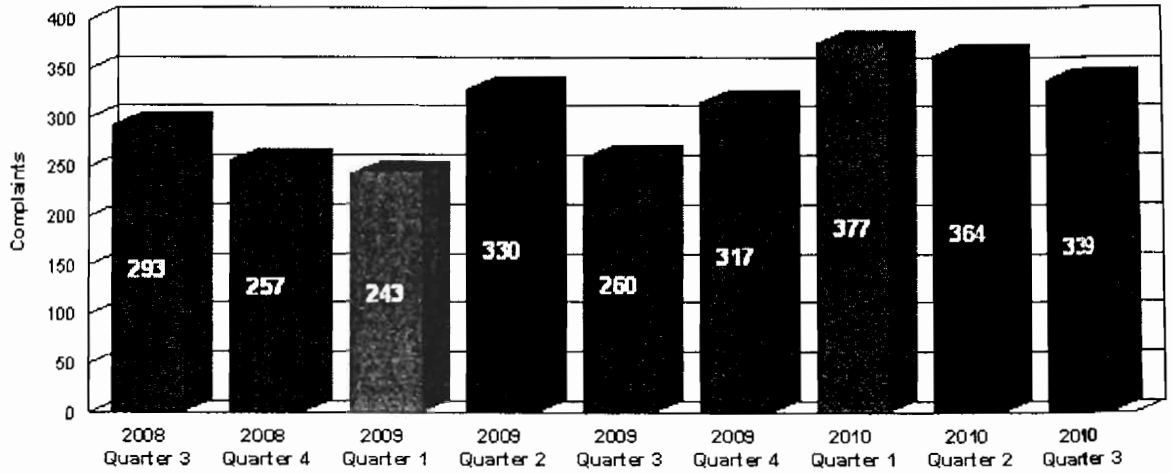
Graph 3.2D: Complaints Resolution - Median Age of Complaints



The value in each bar represents the Median Age at the end of the period. The line represents the Department's target.

3.3 – Investigations

Graph 3.3A: Investigations – Input[6]



The department continues to receive more cases than during the same quarter in the preceding year, due largely to the increase in complaints received against paralegals and UAP complaints.

Detailed Analysis of New and Re-opened Complaints Received in Investigations

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	188	238	234	230	219
Complaints against Paralegals**	48	54	72	74	75
UAP Complaints***	24	25	71	60	45
TOTAL	260	317	377	364	339

* Includes Lawyers and Lawyer Applicants (i.e. Students)

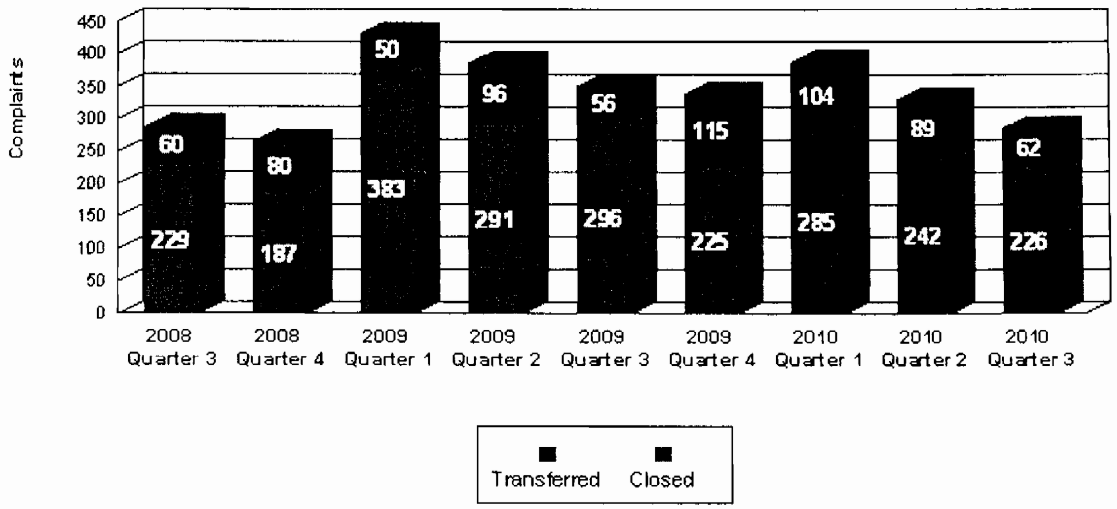
** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

[6] Includes new complaints received in Investigations and re-opened complaints

3.3 – Investigations

Graph 3.3B: Investigations - Complaints Closed and Transferred Out



The number of cases closed/transferred out of the department decreased by 13% over last quarter, due to vacations during the summer months.

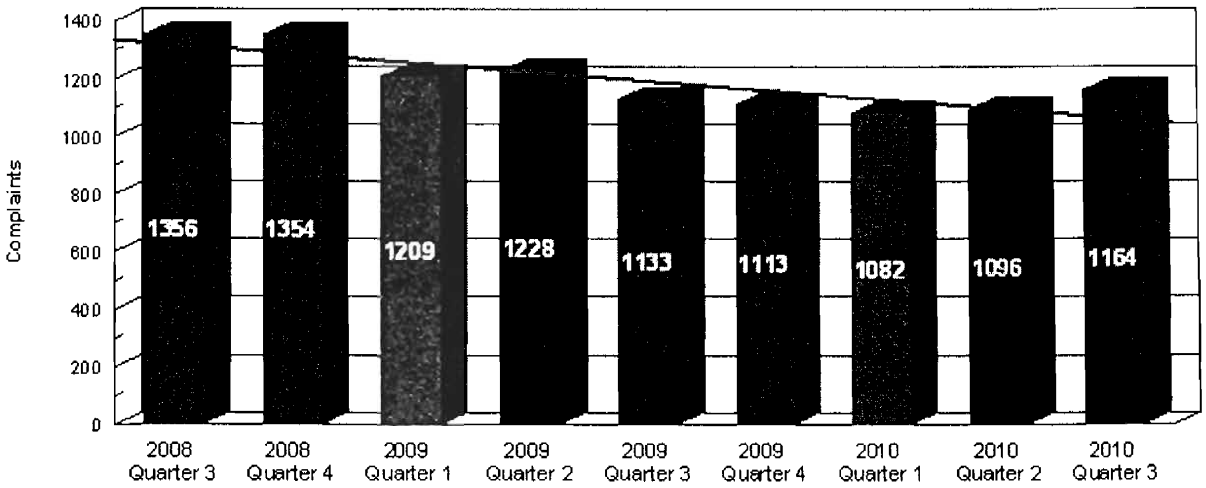
Detailed Analysis of Complaints Closed and Transferred Out of Investigations

		Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	Closed	201	145	199	180	177
	Transferred	38	75	79	56	55
Complaints against Paralegals **	Closed	65	59	36	25	21
	Transferred	18	40	13	18	6
UAP Complaints***	Closed	30	21	50	37	28
	Transferred	0	0	12	15	1
TOTAL	Closed	296	225	285	242	226
	Transferred	56	115	104	89	62

* Includes Lawyers and Lawyer Applicants (i.e. Students)
** Includes Paralegal Licensees and Paralegal Applicants
*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

3.3 – Investigations

Graph 3.3C: Investigations – Department Inventory



The value in each bar represents the inventory at the end of the period

Investigations' inventory increased by 6% over the department's inventory at the end of the previous quarter. As noted in the chart below the inventory in relation to all three groups has increased.

Detailed Analysis of Investigations Inventory

	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Complaints against Lawyers*	952	965	904	878	885
Complaints against Paralegals**	130	87	110	141	187
UAP Complaints***	60	61	68	77	92
TOTAL	1142	1113	1082	1096	1164

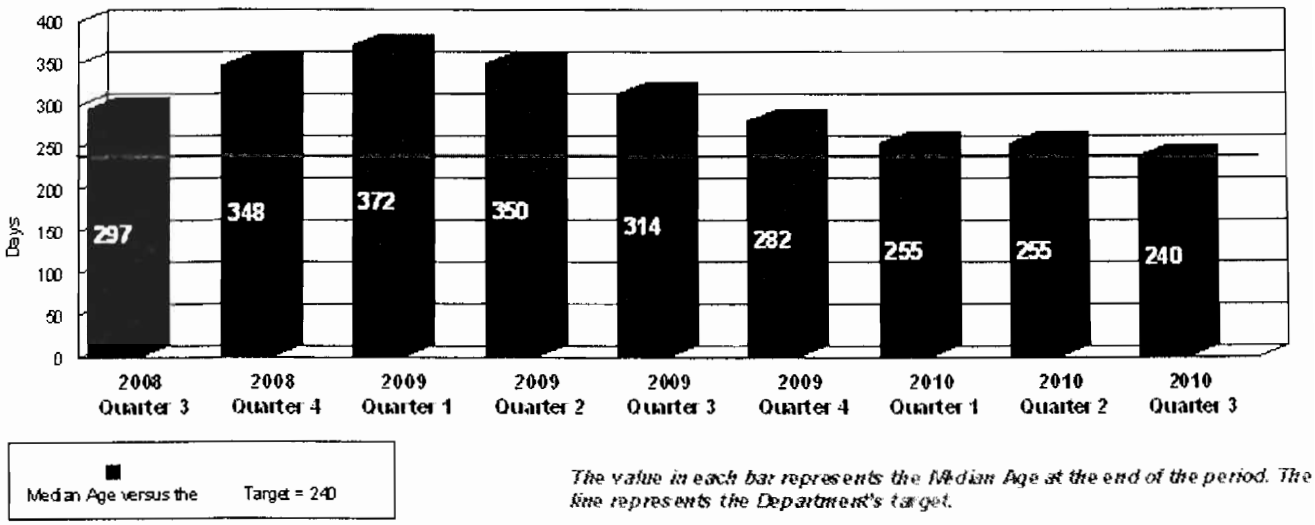
* Includes Lawyers and Lawyer Applicants (i.e. Students)

** Includes Paralegal Licensees and Paralegal Applicants

*** Note that the UAP complaints received against Paralegal Licensees, Paralegal Applicants and Lawyer Applicants will be included in the figures for Lawyers and Paralegals. For a complete analysis of UAP complaints, see section 3.4.

3.3 – Investigations

Graph 3.3D: Investigations - Median Age of All Complaints



The value in each bar represents the Median Age at the end of the period. The line represents the Department's target.

3.4 – Unauthorized Practice (UAP)

Chart 3.4A: Unauthorized Practice Complaints in Intake

Quarter	New	Closed/Transferred			Active at end of Quarter
		Closed	Transfer to CR	Transfer to Inv	
Q1 2008	86	16	16	51	48
Q2 2008	102	17	24	51	57
Q3 2008	70	41	4	34	44
Q4 2008	79	48	6	32	23
Totals - 2008	337	122	50	168	
Q1 2009	115	53	19	23	49
Q2 2009	118	48	24	69	30
Q3 2009	99	26	41	47	30
Q4 2009	113	38	2	53	49
Totals - 2009	445	165	86	192	
Q1 2010	94	42	0	76	36
Q2 2010	89	32	0	69	32
Q3 2010	67	32	1	50	29
Totals: Q1–Q3 (+ practise outside scope)	250* (296)	106	1	195	

* In response to the number of UAP complaints being received in the division, a new allegation of "Practising Outside the Scope of Practice" was added to the division's case management system in Q1 2010. This allows for improved identification of the nature of these complaints. In the first three quarters of 2010, complaints were received in 46 cases which were identified as "Practising Outside the Scope of Practice". Prior to Q1 2010, these would have been included in the UAP figures. As noted, including these 46 cases with the UAP cases increases the new complaints received to 296 for the first three quarters of 2010.

As noted in the chart above, in Q3 2010, the number of new unauthorized practice cases received in Professional Regulation continued to decrease (decrease of 25% from Q2 2010).

As noted in the chart on the next page, during Q3 2010, Complaints Resolution and Investigations closed a total of 32 cases, leaving an inventory of 116 unauthorized practice investigations at the end of the quarter.

In Q3 2010, PAC provided authorization to seek an order pursuant to s. 26.3 of the *Law Society Act* in one (1) matter. Currently, there are 3 open unauthorized practice prosecutions (including 1 appeal) and 6 open UAP matters in which permanent injunctions are being sought.

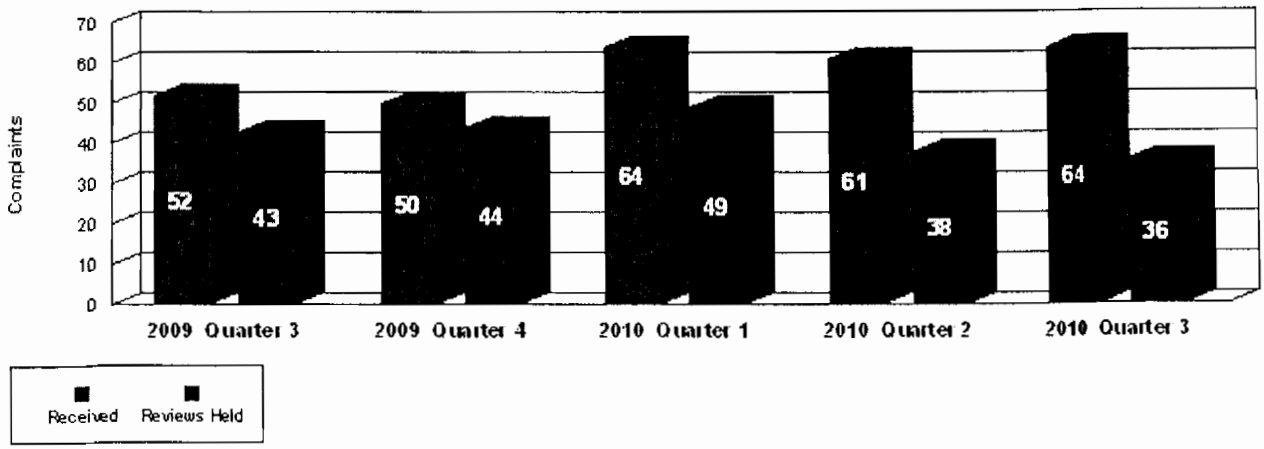
Chart 3.4B: Unauthorized Practice investigations (in Complaints Resolution and Investigations)

	New		Closed[7]		Inventory	
	CR	Inv	CR	Inv	CR	Inv
Q1 2008	17	51	23	10	27	81
Q2 2008	25	54	11	30	41	105
Q3 2008	4	34	24	49	21	90
Q4 2008	6	32	6	37	21	85
Totals: 2008	52	171	64	126		
Q1 2009	5	18	4	26	22	77
Q2 2009	24	69	6	20	41	120
Q3 2009	41	47	16	50	64	104
Q4 2009	7	53	22	42	69	99
Totals: 2009	77	187	48	138		
Q1 2010	0	76	12	73	17	79
Q2 2010	0	70	6	54	10	90
Q3 2010	1	50	2	31	8	108
Totals: Q1-Q3	1	196	20	158	116	

[7] "Closed" refers to completed investigations and therefore consists of both those investigations that were closed by the Law Society and those that were referred for prosecution/injunctive relief.

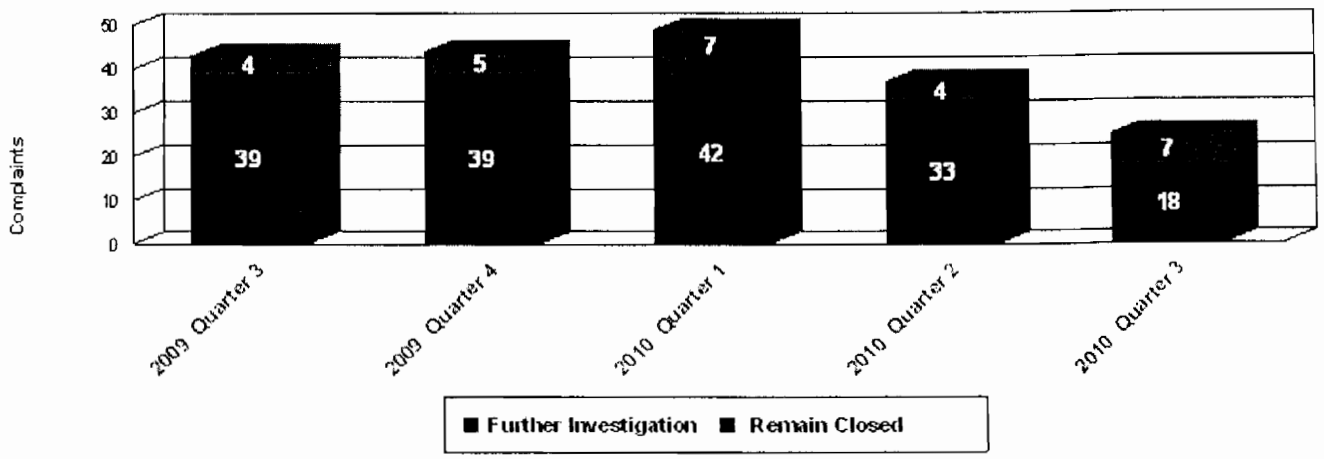
3.5 – Complaints Resolution Commissioner

Graph 3.5A – Reviews Requested and Review Meetings Held (by Quarter)



The number of requests for reviews by the Complaints Resolution Commissioner in Q3 2010 remained fairly stable from the previous two quarters.

Graph 3.5B – Results of Reviews Completed[8] in each Quarter

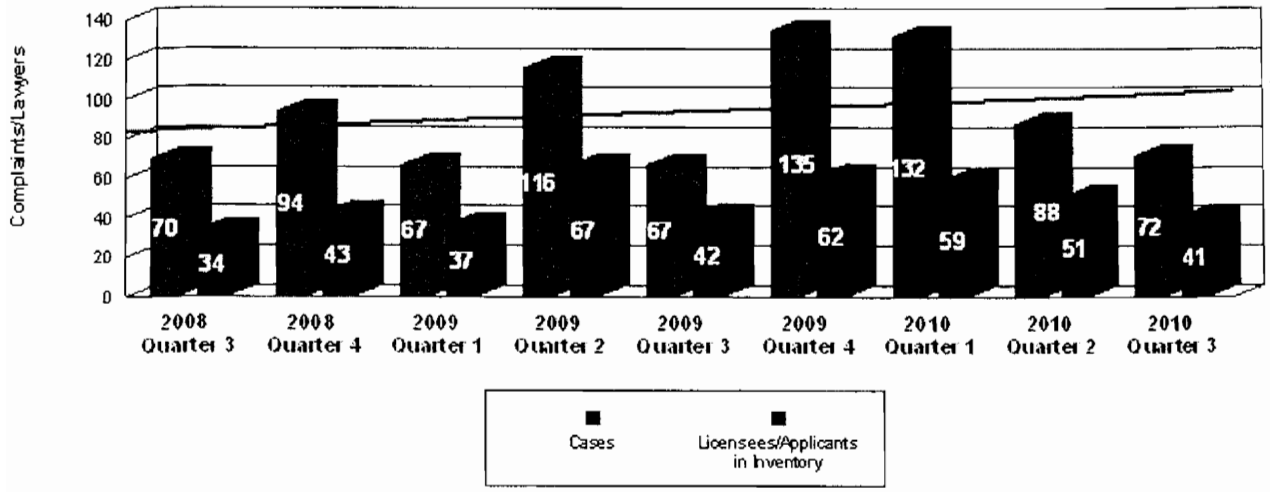


As at September 30, 2010, there were 11 cases in which the review meeting had been held in Quarter 3 but the decision had not been released. In addition, the decision in 1 case which was reviewed in Quarter 2 continues to remain outstanding. These cases were not included, therefore, as they had not been "completed".

[8] "Completed" means that the review hearing has been held and the decision by the Commissioner has been released.

3.6 – Discipline

Graph 3.6A: Discipline - Input[9]



"Input" refers to complaints that were transferred into Discipline from various other departments during the specific quarter for preparation for the Proceedings Authorization Committee. As noted in the chart below, the majority of cases involve lawyers. The paralegal cases received in Discipline in Q3 2010 include 2 paralegal licensee conduct matters (involving 5 cases). The remaining paralegal cases are related to 3 paralegal applicant good character matters which were already in the department (involving 4 cases).

Detailed Analysis of New Cases Received in Discipline

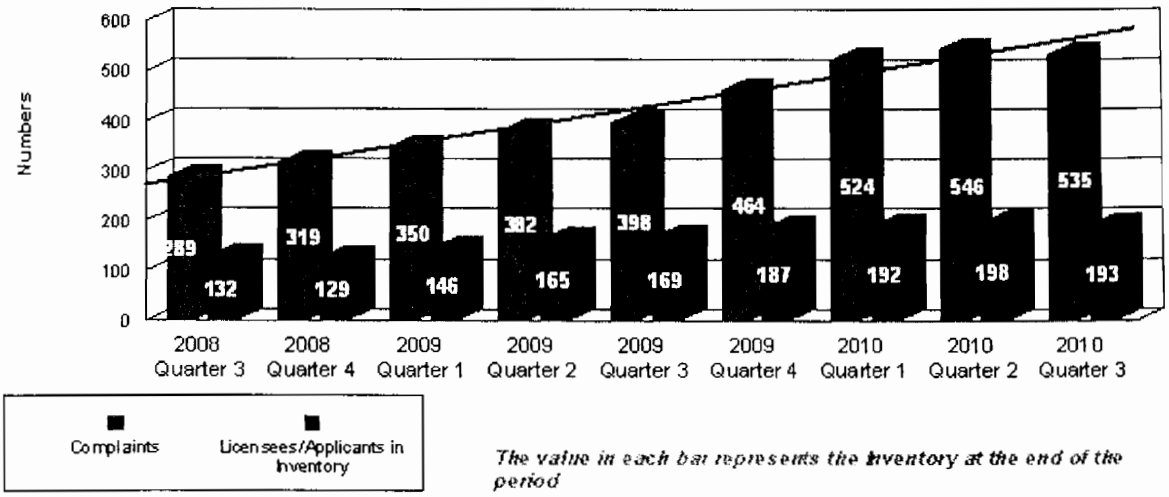
		Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Lawyers*	Cases	49	85	112	67	63
	Lawyers*	32	44	47	41	36
Paralegals**	Cases	18	49	20	21	9
	Paralegals**	10	18	12	10	5
TOTAL	Cases	67	134	132	88	72
	Lawyers/ Paralegals	42	62	59	51	41

* Includes Lawyers and Lawyer Applicants (i.e. Students)
** Includes Paralegal Licensees and Paralegal Applicants

[9] Includes new complaints/cases received in Discipline and the lawyers/applicants to which the new complaints relate.

3.6 – Discipline

Graph 3.6B: Discipline – Department Inventory[10]



In Q3 2010, the number of paralegal cases in Discipline's inventory, consisting predominantly of grandparent/transitional paralegal applicant good character cases, continued to decrease from the beginning of year as the good character hearings are being completed.

Detailed Analysis of Discipline's Inventory

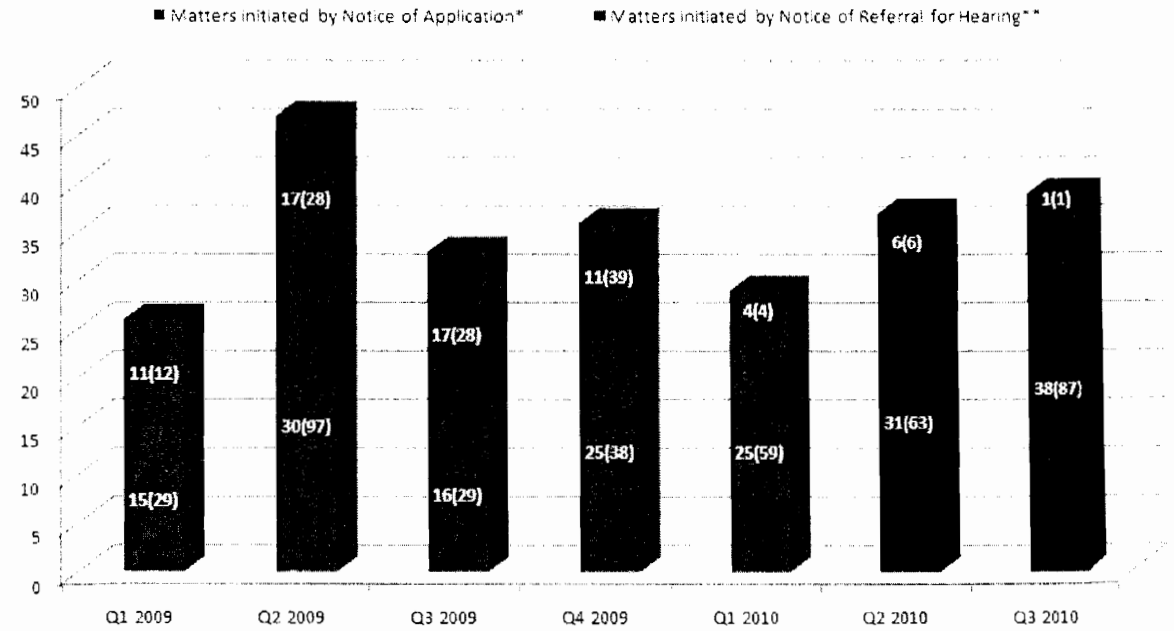
		Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Lawyers*	Cases	314	350	418	443	450
	Lawyers*	124	134	149	160	161
Paralegals**	Cases	84	114	106	103	85
	Paralegals**	45	53	43	38	32
TOTAL	Cases	398	464	524	546	535
	Lawyers/ Paralegals	169	187	192	198	193

* Includes Lawyers and Lawyer Applicants (i.e. Students)
** Includes Paralegal Licensees and Paralegal Applicants

[10] Consists primarily of complaints and lawyers/applicants that are in scheduling and are with the Hearing Panel or on appeal.

3.6 – Discipline

Graph 3.6C: Discipline - Notices Issued



* Matters which are initiated by Notice of Application include conduct, capacity, non-compliance and competency matters. Also included in this category are interlocutory suspension/restriction motions.

** Matters which are initiated by Notice of Referral for Hearing (formerly Notice of Hearing) include licensing (including readmission matters), reinstatement and restoration matters.

The above graph shows the number of notices issued by the Discipline department in the past 7 quarters. The numbers in each bar indicate the number of notices issued and, in brackets, the number of cases relating to those notices. One notice may relate to more than one case. For example, in Q3 2010, 38 Notices of Application were issued (relating to 87 cases) and 1 Notice of Referral for Hearing was issued (relating to 1 case).

With respect to the 38 Notices of Application[11]/Notices of Motion for Interim Suspension Order which were issued in Q3 2010:

27 were issued less than 1 month after PAC authorization;
10 were issued between 1 and 3 months after PAC authorization; and
1 was issued over 3 months after PAC authorization.

With respect to the 1 matter for which a Notice of Referral for Hearing was issued in Q3 2010, it was issued less than 1 month after PAC authorization.

[11] Notices of Application are issued with respect to conduct, competency, capacity and non-compliance matters and require authorization by the Proceedings Authorization Committee (PAC).

3.6 – Discipline

Graph 3.6D: Discipline – Completed Matters (Hearings)

		Q12009	Q2 2009	Q3 2009	Q4 2009	Q1 2010	Q2 2010	Q3 2010
Conduct Hearings	Lawyers	17	18	8	26	20	16	10
	Paralegal Licensees	-	1	-	1	-	2	-
Interlocutory Suspension Hearings/Orders	Lawyers	2	1	1	2	2	4	2
	Paralegal Licensees	-	-	-	-	-	-	-
Capacity Hearings	Lawyers	1	1	-	1	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Competency Hearings	Lawyers	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Non-Compliance Hearings	Lawyers	1	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Reinstatement Hearings	Lawyers	1	2	-	-	1	1	-
	Paralegal Licensees	-	-	-	-	-	-	-
Restoration	Lawyers	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Licensing Hearings (including Readmission)	Lawyer Applicants	1	1	2	-	3	2	1
	Paralegal Applicants	1	5	3	11	12	8	10
TOTAL NUMBER OF HEARINGS	Lawyers*	23	23	11	29	26	23	13
	Paralegals*	1	6	3	12	12	10	10
	TOTAL	**24**	**29**	**14**	**41**	**38**	**33**	**23**
		108				**94**		

Graph 3.6E - Discipline – Appeals

The following chart sets out the number of appeals filed with the Appeal Panel, the Divisional Court or the Court of Appeal in the calendar years 2008 and 2009 and in the first three quarters of 2010:

Quarter/Year	Appeal Panel	Divisional Court	Court of Appeal
2008	14	8	
2009	19	1	3 motions for leave; 2 appeals
2010 – Quarter 1 2010 – Quarter 2 2010 – Quarter 3 **Totals for 2010**	8 7 3 **18**	**2 appeals; 2 judicial reviews**	**4 motions for leave**

As of September 30, 2010, there were 21 appeals pending before the Appeal Panel, 3 matters pending in Divisional Court and 3 motions for leave to appeal pending in the Court of Appeal for Ontario.

In 2010, 14 appeals before the Appeal Panel have been completed:

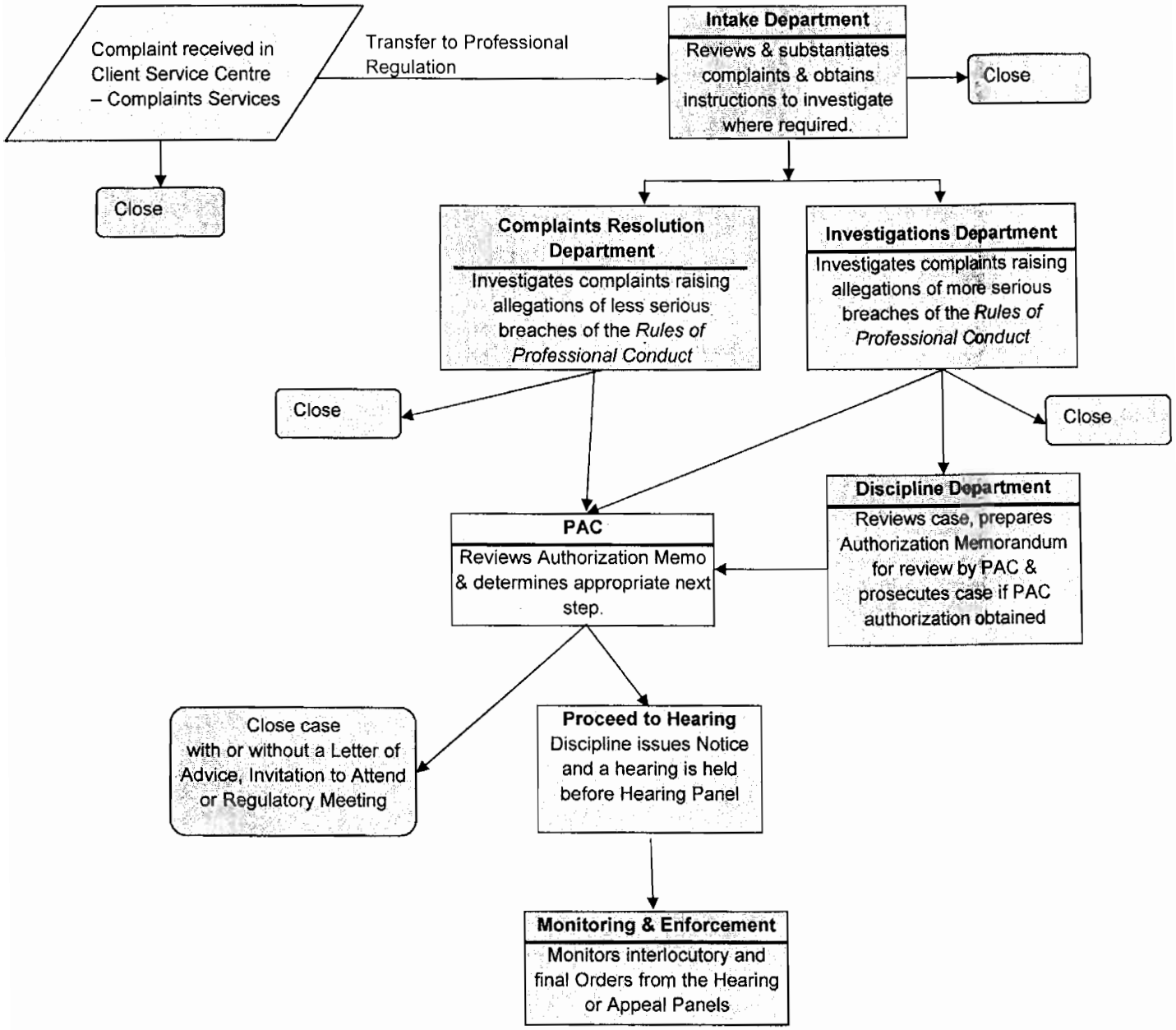
- 4 appeals were abandoned or deemed abandoned;
- 6 appeals were dismissed;
- 4 appeals were allowed. In 3 of these appeals, new hearings were ordered.

In addition, there are 5 appeals in which the Appeal Panel has reserved on judgment.

SECTION 4

APPENDICES

The Professional Regulation Complaint Process



PROFESSIONAL REGULATION ORGANIZATIONAL CHART