OPINION # 2011-5

Synopsis: An attorney representing parties being sued by a non-profit condominium association that is governed by a board of directors elected by the membership may communicate directly with non-board members of the association regarding facts relevant to the litigation without notifying the board's attorney and without first obtaining the board's attorney's consent.

Facts: A Vermont non-profit condominium association governed by a board of directors elected by the membership has brought suit against multiple defendants, including the developers of the condominium, for a series of alleged construction defects. The suit is being pursued by the Board of Directors on behalf of the Association. The Board of Directors is authorized to act on behalf of the Association. This is true even if individual members disagree. The Board has retained counsel to represent it in the litigation. Counsel for the association has confirmed that counsel does not represent the individual owners, but the association counsel asserts that by representing the association he is *de facto* representing the owners as members of the association because the association is acting in what the association board of directors believes to be in the interests of the member owners. As such, the association's attorney takes the position that his representation extends to the member owners for purposes of the application of the anti-contact provisions of V.R.P.C. 4.2. Requesting attorney asks whether requesting attorney is required to seek the consent of the association counsel before contacting non-board members of the association to discuss issues relevant to the lawsuit.

Question: Is the attorney for the defendants permitted to communicate with non-board members of the association without first obtaining the consent of the association's attorney without violating Rule 4.2 of the Vermont Rules of Professional Conduct.

Analysis: Rule 4.2 states as follows:

Communication with Person Represented by Counsel

> In representing a client, a lawyer shall not communicate about the subject of the representation with a *person* the lawyer knows to be *represented by another lawyer in the matter*, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. (emphasis added).

The issue raised by the opinion request is whether the non-board members of the association are persons represented by the association's lawyer within the meaning of Rule 4.2. If so, then Rule 4.2 prohibits the defendant's attorney from communicating with such persons without the association lawyer's consent. If not, then Rule 4.2 does not prohibit direct communication between the defendant's attorney and the non-board association members.

When an organization is represented by counsel, Rule 4.2 prohibits the attorney for an adverse party from communicating directly with a constituent of the organization, if (1) the constituent supervises, directs or regularly consults with the organization's lawyer concerning the matter in litigation, or (2) the constituent has the authority to obligate the organization with respect to the matter in litigation, or (3) the constituent's act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Rule 4.2, Comment 7.

The association acts through its board of directors. The board of directors gives guidance to the association's lawyer and makes decisions about the litigation. Non-board members are in a totally different category. Non-board members interests may align fully with the association's interests, but non-board members do not satisfy any of the three categories set forth above as guides to when a constituent is deemed to be within the scope of the prohibition of the Rule.

A test for the applicability of the anti-contact rule used in some cases is known as the "managing-speaking" test. That test prohibits communications with any person who is a manager who is authorized to speak for the corporation. *Palmer v. Pioneer & Associates,* 257

F.3rd 999 (9th Cir. 2001) (employees holding managerial positions which give them authority to speak for and bind a corporation may not be contacted by the opposing party's attorney). Applying that test here, the non-board members would not be deemed to be covered by the anti-contact provisions of Rule 4.2 because such members do not meet the managing-speaking test.

Additional guidance with respect to the scope of Rule 4.2 is obtained by reference to the attorney corporate client privilege set forth in 12 V.S.A. §1613. That statute is entitled "Lawyer-Corporate Client Privilege." The statute applies only to for-profit business corporations, but a review of its provisions is instructive because the protective purposes of the statutory evidentiary privilege is similar to, though not identical to, the protective purpose of the Rule.

The statute states that communications between an attorney and a corporate employee are privileged if (1) the employee is a member of the control group of the corporation, acting in the employee's official capacity, or (2) if the communications with a corporate employee are necessary to effectuate legal representation of the corporation. This two-prong standard incorporates but expands upon the "control group" standard for determining the scope of the attorney client privilege in the corporate setting.

The statute defines the control group as including (1) the officers and directors of a corporation and (2) persons within the corporation with authority to control or "substantially participate" in a decision regarding action to be taken on the advice of a lawyer, and persons who have the authority to obtain legal advice for the corporation or to act on advice rendered. Thus, under the statutory definition, officers and directors of a corporation are, by definition, part of the control group and thus within the scope of the privilege, and others who have authority to act on the advice of corporate counsel are also included.

In response to the statutory enactment, the Supreme Court amended V.R.E. 502 regarding

the scope of the lawyer client privilege. The court added a definition for a "representative of the client." VRE 502(a)(2). The phraseology adopted by the court differs from the phraseology of the statute, but the Reporter's Notes make clear that the scope of the evidentiary privilege under the Rule is intended to be seen as the same as the scope of the statutory privilege. V.R.E. 502(a)(2) defines a "representative of a client" as (1) a person having authority to obtain legal services or act on legal advice on behalf of the client, and (2) a person who, while acting within the scope of employment, makes or receives confidential communications necessary to effectuate legal representation for the client. In the case of a corporation, the officers and directors and those having authority to control or substantially participate in decisions responsive to the advice of a lawyer are also deemed to be representatives of the client.

If Rule 4.2 were deemed to be co-extensive with the evidentiary privilege, the non-board members would still not be within the Rule because they do not satisfy the evidentiary privilege definition of a representative client.

Court decisions have noted a distinction between the scope of the attorney client privilege and the scope of the anti-contact provisions of Rule 4.2. Courts have observed that the attorney client privilege is broader in scope than the anti-contact rule. Persons who are "clients" within the scope of the attorney client privilege in a corporate setting may not be "represented parties" for purposes of the anti- contact rule. *Wright v. Group Health Hospital,* 691 P2d 564 (Wash. 1984). (a corporate employee who is an "employee" under the attorney client privilege is not necessarily a "party" for purposes of the disciplinary rule).

The relationship here between an association member and the association is admittedly distinguishable from the relationship between an employee and a corporation; but that difference does not change the analysis. The same test applies to both types of relationships for purposes of

determining scope of representation and for deciding whether a person is a represented person within the meaning of Rule 4.2.

There is no indication in the language of Rule 4.2 or in the many cases interpreting it, that the scope of coverage should be different for members of an association than for employees of a corporation. A California court has squarely rejected the assertion that members of a homeowners association are deemed to be clients of the association's counsel for purposes of applying the protections of the attorney client privilege. *Smith v Laguna Sur Villas Cmty Ass'n*, 79 Cal. App. 4th 639 (2000) (homeowners of represented association held not to be clients of the association's attorney and, thus, not entitled to attorney client information developed in litigation). It is clear from the facts presented by requesting attorney that non-board members of the association have no direct role in the conduct of the litigation and have no authority to speak for or act on behalf of the association with respect to the matter in litigation.

Rule 4.2 is intended to strike a balance that preserves the integrity of the lawyer client relationship for matters in litigation by ensuring that persons represented by counsel may not be contacted directly by opposing counsel; but the Rule is not intended to create a blanket prohibition against contact by opposing counsel that would extend beyond persons actually represented by counsel. In the case of an organization, such represented persons include representatives of the organization who meet the tests described above in this analysis. Non-board members do not meet those tests.

A competing interest to the restriction imposed by Rule 4.2 is the goal that each party have access to information relevant to the matter in dispute and that each party be able to independently investigate facts important to preparation of the case. Attempts to use Rule 4.2 as a blanket shield to block opposing counsel from gaining access to persons associated with an

organization are generally rejected as over broad. *Terra International, Inc. v. Mississippi Chemical Corp.,* 913 F. Supp. 1306 (W.D. Ia. 1996) (claim that all employees were represented by corporate counsel by virtue of their employment rejected as over broad); *Carter Herman v. City of Philadelphia*, 897 F. Supp. 899 (E.D. Penn. 1995) (court rejects assertion that every employee of defendant city is deemed within the scope of representation by virtue of employment). The court in *Carter Herman* observed that if the broad scope of representation claimed by the city were accepted,

> An organization could thwart the purpose of Rule 4.2 simply by unilaterally pronouncing its representation of all its employees.

The court in *Terra* observed that

> an employer cannot unilaterally create or impose representation of an employee by corporate counsel. Such a "automatic representation" rule would serve no universal purpose, but would instead impede the course of investigation leading to or following the filing of a lawsuit.

Requesting attorney has provided additional information about the role and status of non-board members. Non-board members of the association do not supervise or direct the association's lawyer, nor do they regularly consult with the association's lawyer regarding the litigation. Non-board members of the association have no authority to obligate the association, direct the lawsuit, enter into settlements, respond to discovery, or act in any way on behalf of the association with respect to the litigation.

Under these facts, Rule 4.2 does not bar defendant's counsel from contacting non-board members of the association and discussing with non-board members issues relative to the matters in litigation directly and without the consent of the association's counsel.

We would note two further observations. First, we would remind requesting counsel of the provisions of Rule 4.3 entitled, "Dealing with Unrepresented Person." That Rule imposes

obligations on an attorney who is dealing with an unrepresented person to ensure that the person understands the lawyer's role in the matter and cautions that an attorney must give no legal advice to an unrepresented person other than the advice to secure legal counsel. Given that non-board members have ownership interests in the association and may be affected directly by the litigation, requesting attorney must take all necessary precautions to ensure that a non-board member understands the attorney's position in the pending litigation.

Second, requesting attorney could seek clarification from the court as was done in *Baisley v. Missisquoi Cemetery Assn*., 167 Vt. 473 (1998), but a majority of the committee does not believe that such a request is necessary under the facts presented here.

Conclusion: Requesting attorney may contact non-board members of a condominium association without the knowledge or consent of the association's lawyer.