

## **Advisory Opinion No 2015-3**

### **Synopsis**

Assuming a nonprofit board of directors is properly elected, an attorney employed by the nonprofit can properly take his instructions from a majority decision of that board, notwithstanding minority opposition within the board.

### **Facts**

Attorney represents an incorporated, nonprofit homeowners' association formed in 1988 to "establish, construct, improve, maintain, supervise and otherwise care for and manage the streets, driveways, sidewalks, culverts, landscaping, and other areas of the [planned residential development] for the benefit of its members and others entitled to use the same." The association is subject to a Declaration of Covenants, Conditions and Restrictions and Bylaws. The Declaration was created by a Vermont corporation acting as the Declarant.

The Declaration provides for three classes of members in the association: the Class A members are the owners of the duplex, condominium or townhouse units in the development; the Class B members are owners of single family homes on individual lots in the development; and the Class C member is the Declarant. There are currently approximately 50 Class A members and 56 Class B members in the association.

The Declaration controls voting rights and details various covenants, rights and restrictions affecting the development. Pursuant to the declaration, the Class A and Class B members each get one vote for each developed unit owned. The Class C member gets three votes for each unit it owns whether or not the unit has been developed.

The Declaration has provisions for amendment which are currently in dispute. Certain Class A and Class B members are taking actions to amend the Declarations to equalize the voting rights of the Class A, Class B and Class C members. The Class C member opposes the proposed amendment and disputes, on legal grounds, the procedure being followed by the Class A and Class B members to accomplish the amendment. A declaratory judgment action will likely be required to resolve the dispute.

The association is governed by a Board of Directors and is subject to bylaws which provide that the Class A and B groups of members shall each have one director, and the Class C member shall have three directors. Under these provisions, the Board of Directors is effectively controlled by the Class C member. The bylaws can only be amended by "an affirmative vote of two-thirds (2/3) of each Class of members in the Association."

### **Questions Presented**

May a nonprofit corporation's attorney follow a divided, but majority, decision of a properly elected board of directors and commence a declaratory judgment action to determine the propriety of efforts by minority members to amend the association's bylaws?

### **Relevant Provision of the Vermont Rules of Professional Conduct**

#### **Rule 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d) [neither of which are applicable here], a lawyer shall abide by a client's decision concerning the objectives of representation.... A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation....

#### **Rule 1.13 ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

### **Analysis**

Assuming a board of directors of a nonprofit corporation is properly elected,<sup>1</sup> the attorney for the nonprofit is obliged to follow the direction of that board. The attorney represents the nonprofit "acting through its duly authorized constituents." V.R.P.C. 1.13(a). All corporate power of the nonprofit is exercised by and under the authority of the board and the affairs of the nonprofit are managed under the board's direction. 11B V.S.A. § 8.01(b). Assuming a quorum of the board is present when the vote is taken, the affirmative vote of a majority of directors present is the act of the board. 11B V.S.A. §8.24(b).<sup>2</sup> Subject to rules not applicable here<sup>3</sup>, the attorney "shall abide by a client's decisions concerning the objectives of representation ...." V.R.P.C. 1.2(a).

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<sup>1</sup> This is a substantive law question we are not authorized to address, involving what law (e.g. Vermont Nonprofit Corporation Act, Vermont Corporation Act, Vermont Common Interest Ownership Act, Vermont Condominium Ownership Act, or other statutory, contract or common law) governed the proper procedure for election of this nonprofit's board of directors and whether, in the specific circumstances surrounding the differing interests of these three classes of members, that procedure was followed.

<sup>2</sup> If another provision of 11B V.S.A., or the articles of incorporation or bylaws require a greater number than a majority, the greater number will prevail. There is no such other provision in 11B V.S.A. and the facts on which this opinion is based do not indicate such a provision in the applicable articles or bylaws.

<sup>3</sup> Under V.R.P.C. 1.2(c) an attorney may limit the scope of the representation if the limitation is reasonable and consented to by the client. Under V.R.P.C. 1.2(d) an attorney is forbidden from counseling or assisting a client in criminal or fraudulent conduct.

## **Conclusion**

Assuming a nonprofit board of directors is properly elected, an attorney employed by the nonprofit can properly take his instructions from a majority decision of that board, notwithstanding minority opposition within the board.

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