LEGAL ASPECTS OF CONDOMINUM DEVELOPMENT AND HOMEWONWERS' ASSOCIATIONS

NATIONAL BUSINESS INSTUTUTE SEMINAR

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ETHICAL CONSIDERATIONS IN CONDOMINIUM LAW

"So, I'm the only one who sees a conflict of interest here?"

Introduction

- Conflicts are everywhere
- Transparency is Solution

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Introduction

Board members know they are not to run off with the Reserve funds. And attorneys know they are to guide Boards in the best interests of the association, without fear of angering Board members or worrying about whether they will retain a client. The real trick is identifying other, less clear conflicts, such as sitting on a Board and getting hired as a contractor for the Association.

The key is transparency. Too many times the focus is on the conflict. But conflict does not mean bad; it means warning. If transparency is used, then the conflict can be beneficial to an association.

CLIENT CONFIDENTIALITY

Rule 1.6 –

A copy of Rule 1.6 of the New Hampshire Rules of Professional Conduct is in the Appendix.

Board/Owner Confidentiality

Community associations are just that, a group of people with a shared interest who own property together. For the attorney, confidentiality means not disclosing details of what is happening at one association to another association; not swapping war stories over a scotch. For Board members it means not talking about neighbors in a bad way, noting who is going to be sued, or who is delinquent. The line is not hard to define. The line separates what you want to say from what you would not want people to say about you if the roles were reversed.

The key to any such analysis regarding confidentiality is the common sense one of whether there is a reasonable expectation of privacy in the communication. Much like a drug dealer who is overheard in a public place setting up a sale of heroin and the statements are used against the dealer, you, too, can get in a lot of trouble if you are communicating where there is no reasonable expectation of privacy, such as emailing about association business on a work computer.

It should go without saying, but is important enough to repeat the obvious. No Board member should ever speak (except in glowing terms) about another unit owner. If, for instance the Board member mentions something negative to another Association member or to someone outside the Association (it is debatable which is worse), it opens the problem door. Aside from

the suspect morals where the Unit owner has degenerated from conducting him/herself in a manner consistent with the expectations for which they were elected by their fellow owners, to uttering unkind comments and perhaps gossip, the Board member can be in a lot of trouble. For instance, say the Board member has told a friend and fellow owner that the Association is going to file suit against another owner because the owner is delinquent. If it later turns out the account was not delinquent (for any number of reasons), but the Unit Owner's reputation has been impugned, Boards can be, and have been, sued.

The real danger in this case is the offending Board member's actions may not be covered by the Association's D & O policy. Most such policies exempt from coverage intentional acts. Stating that another way, Courts realize Boards are usually comprised of non-professionals who are either volunteers or who drew the short stick and are sitting on the Board somewhat reluctantly. As long as Board members use reasoned judgment in their actions, they and the Association are safe. But if they intentionally do things they should not, such as spreading word about a particularly delinquent unit owner who is not actually delinquent, they have not used reasoned judgment and open themselves to a suit with no coverage … and a whole lot of angry unit owners who see their fees being raised.

Perhaps more importantly, the individual Board member who spoke inappropriately may be found individually liable, putting his/her condominium, his/her investments, and his/her marriage at risk.

The safest rule is to always be nice, even when our human tendencies urge us to be otherwise.

And if you must act that way, save those actions for when you are not on the Board.

Emails

In this electronic day and age we would be hard-pressed to find the person who has not inadvertently sent an email out to the wrong person. Ouch.

These things happen, and when they do, the best you can do, be you a developer, director, attorney, or soon-to-be-former attorney, is apologize. And quickly. Being humans, error is second nature to us. The trick is to minimize the chances for something like this happening (by, for example, reviewing the intended recipients before hitting Send) and quickly apologizing when it does happen. Once does not a pattern make; a pattern makes for potential lawsuits and a visit from the PCC.

The real problem with emails is access to the emailer's account. Say you are a Board member and are involved in a chain of emails back and forth about how to handle a sticky situation such as whether to sue an owner who has enclosed their deck and converted the limited common area into a new addition to their Unit.

If your spouse has access to your account, for instance on a shared home computer, this can lead to danger of either word getting out about a suit that may never occur, or worse, a co-worker could start spreading rumors if you have been using your work computer for Association business.

Executive Sessions

The common practice is to go into executive session when discussing "sensitive" matters. These can and do include such things as discussions with the association's attorney on litigation

matters or other issues involving legal advice; discussions with the other Board members about fellow unit owners regarding delinquencies; and/or likely violations of the Association's covenants. For instance, if the discussion is over a litigation case, then discussions over what witnessed will be called, what they are expected to say, what evidence will be used, what legal defenses there are, what the weak points of the case are, and discussions of settlement costs, should clearly not be part of either the public session of a BOD meeting or part of the record. The other side is certainly not going to disclose these matters to the Board and the association, nor are they required to do so. And neither is the Association.

Clearly (see above) no one should be humiliated. On the other hand, the owners own the Association and have a right to know how their budget is. There is nothing wrong with identifying the Units that are in delinquency and by how much. Owners have a right to know why they may be in financial peril and the steps the Board is taking to prevent that from happening.

There is, however, no reason to identify the delinquent owners by name or use accusatory language indicating the delinquent owners are causing great problems for the other owners, or similar language that could spur other owners to confront those with delinquent accounts.

And never forget there may be good reason for the delinquency. Sadly, people lose jobs, get hit with major medical bills, become saddled with a spouse who may have a gambling problem, and worse. Far and away most condominium unit owners do not wake up looking for ways not to pay their condo fees. Quite the opposite. So humiliating or otherwise denigrating a delinquent unit owner can be very, very misplaced.

Attorney-Client Privilege

A parent's first duty is to their children; a spouse's first duty is to their spouse; a Board member's first duty is to the Association; an attorney's first duty is to his client. When you are working on the job as an attorney, the duty is to the Association, not a Board member, not an association member, not a contractor.

Being necessarily pedantic, an attorney-client communication is a confidential communication between the association's legal counsel and the Board and/or the Board's representative. Of course, the communication may be oral or written, paper or electronic.

Two recent cases give guidance. Both are in the Appendix.

- Fouts v. Breezy Point Condominium Association
- Seahaus La Jolla Owners Association ***v.*** The Superior Court of San Diego County

CONFLICTS OF INTEREST

Rule 1.7

A copy of Rule 1.7 of the New Hampshire Rules of Professional Conduct is in the Appendix.

Board Members

First, Board members may be paid for their services as Board members. If it's in the governing regulations, and all know about it (there's that transparency issue again) then there is no problem with Board members receiving payment for their work. Payment can come in many

forms. The most obvious is a cash payment. Another is crediting the Board members' accounts so they either do not have to pay condominium fees or they have a portion waived.

Second, it works best if Board members are never paid for their time. Payment creates more problems than it solves. Payments to Board members open an avenue of criticism which only leads back to the Board members. Unit owners frequently, and sometimes correctly, claim Board members are only on the Board so they can get paid. Charges such as these, no matter how inaccurate put the Board on the defensive where, instead of proactively working to make the association better, they have to act defensively by justifying all of their actions for the wrong reasons. And once paid, no matter how much work a Board member does for the Association, s/he should have done more.

A common complaint of those who wish for payment is that the volunteer job has become a full-time job, or nearly so. It would seem a much better course that when an association is so large or its issues so demanding that the job of a Board member becomes a full-time job that it is time to hire a management company, full or part-time, that is well versed in condominium management.

There is a place for paying people for running an association, but that should be for professionals, much as you hire and pay landscapers, lawn care specialists, snow removers, accountants, etc.

On the other hand, frequently a Board member may be the best person to help the Association with his/her contacts. Say a Board member owns a landscaping company. If the member can do an equal or better job than the current company, the Board may want to hire the

Board member's company as it will have better lines of communication than with a distant company.

Additionally, Board members may want to give a discount for their services because they own property in the Association and consider it fair to do so.

In either of these cases, so long as the Board member abstains from any voting (and perhaps even excuses him/herself from the discussions), then there is no problem with hiring the Board member and/or the Board member's company, relative, friend, etc.

Additionally, it may actually violate a Board's fiduciary duty if the Board does not hire the Board member's company. Each Board is charged with getting the best quality for the lowest price. If a community member is willing to give a discount for equal or better service, and the price is lower than the current cost, then it can be called into question by other members as to why the Board has made such a poor financial decision as to spend more when it could have spent less of the members' money.

Board Ethics Policies

Some associations require a Code of Ethics for Board members to follow. (You can easily find examples on line.)

High ethics also encompasses acting properly, not scolding owners, not taking out your bad day on someone who asks an innocent question, not using your position as a Board member to get special privileges such as parking illegally or having fines waived for late payments on condo fees.

Generally speaking, while not a bad idea, they are not a good idea, either. Aside from the practical problems of enforcement (Who is going to sanction the Board member? The same Board s/he sits with?), if you need a Code of Ethics to teach Board members to treat others with respect, not steal, and work honestly, then you have bigger problems than the written word is going to cure.

Vote them out and get better members.

ORGANIZATION AS CLIENT

Rule 1.13

A copy of Rule 1.13 of the New Hampshire Rules of Professional Conduct is in the Appendix.

Director v. Association

The common example to make the point is the situation where a Director brings his/her own attorney to a Board meeting and repeatedly asks his/her attorney for advice before discussing Association business.

The problem is the Director has mixed his/her individual concerns with those s/he is charged with representing – those of the Association.

Board members need to be constantly vigilant and reminded of the fact their duty is first to the Association.

CONCLUSION

"A career? A life? Isn't that a conflict of interest?"

APPENDIX

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

Ethics Committee Comment

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer’s individual conscience may dictate.

2004 ABA Model Rule Comment
RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former

client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it

will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or

proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are

participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.7. Conflicts of Interest

(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client , a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) Notwithstanding (a) and (b) above, a lawyer from the New Hampshire Public Defender Program may represent an individual for arraignment if that individual is not:

(1) a co-defendant of a defendant also represented by the New Hampshire Public Defender Program; or

(2) a witness in a case in which the New Hampshire Public Defender Program represents a client and it is a case in which the New Hampshire Public Defender Program determines that there is a significant risk that the representation of the witness will materially limit the lawyer’s responsibilities to the existing client.

Comment

Paragraph (c) of Rule 1.7 is designed to address a difficulty that has arisen in connection with the anticipated implementation in the near future of Circuit Court – District Division Criminal Rules 2.20 through 2.23 (and equivalent rules that are to be promulgated for the Superior Court). These rules were developed in the wake of the New Hampshire Supreme Court’s order in *Nygn & a. v. Manchester District Court*, No. 2011-0464 (decided March 16, 2012), and are designed to insure, to the maximum extent possible, that an attorney will actually be present to represent a defendant at arraignment.

The New Hampshire Public Defender (NHPD) is obliged, by statute, to represent all indigent criminal defendants charged with offenses punishable by incarceration. *See* N.H. RSA 604-B:2, :6 (2001). The only exception to this obligation is when NHPD has a conflict

of interest that prevents it from providing conflict-free representation. In order to effectuate RSA 604-B, NHPD has in place an extensive internal conflict of interest policy to guide its attorneys and staff when determining whether NHPD is able to provide conflict-free representation. The conflict policy was written using the New Hampshire Rules of Professional Conduct and its annotations as guidance. NHPD's conflict policy requires NHPD office staff to run the names of the defendant and all witnesses through a statewide database. If the defendant is a co-defendant in an open case or an alleged victim or witness, a trained conflict resolution attorney, guided by the Rules of Professional Conduct, determines whether NHPD can represent the new defendant, or whether it must decline representation.

In *State v. Veale*, 154 N.H. 730, 734-35 (2007), the New Hampshire Supreme Court decided that NHPD is one firm for purposes of conflict determinations. Therefore, when NHPD is making conflict-of-interest determinations it operates under the assumption that all nine of the trial offices and the Appellate Defender constitute one law firm. This becomes a concern when NHPD has an attorney in one office representing a defendant, a witness name appears in that defendant's case, a conflict check is run, and the same name appears as a client in another office. In practice, there will rarely if ever be communication between the two attorneys about the individual; in fact the attorneys will most likely never even know about each other, but because of Rule 1.7 and the *Veale* case, NHPD would take precautionary measures and reject one of the cases. Historically, this approach has caused a substantial number of withdrawals, backlog for the courts, and delay for the clients. However, given the current state of the rules and the law, NHPD is unable to avoid withdrawal.

Paragraph (c) of the rule was adopted because the conflict of interest regime set forth in Rule 1.7(a) and (b) would significantly inhibit the ability of NHPD to participate in implementing the new arraignment rules which will be set forth in Circuit Court – District Division Rules 2.20 through 2.23. In order to effectuate the goal of having an attorney actually present to represent at arraignment all indigent defendants charged with felony or class A misdemeanor offenses, the number of instances in which NHPD will be called upon to provide such representation will increase substantially. Yet without the availability of NHPD attorneys to serve as counsel at arraignment, implementation of the new rules would not be possible due to the practical difficulties and prohibitive costs entailed in providing contract or appointed counsel in every circumstance where, under the prior version of Rule 1.7, NHPD could have been deemed to have a conflict preventing its attorneys from acting as counsel at arraignment.

New paragraph (c) of Rule 1.7 is designed to create an exception to the strict requirements of paragraphs (a) and (b) of the rule that will apply only to NHPD attorneys representing defendants at arraignment. Not only is this exception justified for the practical reasons stated above, but it also is justified by the need for the NHPD to respond quickly to court appointments for arraignment purposes and by the limited scope of the representation provided by NHPD to clients represented at arraignments only. It must be noted that the exception does not permit an NHPD attorney to represent co-defendants at arraignment. In addition, even where the client to be represented at arraignment by one NHPD attorney is a

witness or an alleged victim in a case where another NHPD attorney represents the defendant, the representation will not be allowed if NHPD determines, in accordance with its internal conflicts policy, that there is a significant risk the representation at arraignment will materially limit the other NHPD attorney's responsibilities to that attorney's client.

Ethics Committee Comment

The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is exists a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. *See Fiandaca v. Cunningham*, 827 F.2d. 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used under the old rules the "harsh reality test" which states:

> "(i)f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this "harsh reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation . . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

As discussed in Comment 17 to the ABA Model Rules, the determination of whether two clients are directly aligned against one another so as to give rise to a non-waivable conflict will require case-by-case analysis in the context of the particular circumstances. Other factors – including the availability of insurance, hold harmless agreements or indemnification agreements – may also be relevant in determining whether the interests of the clients are in reality "directly adverse" so as to preclude waiver of, or consent to, the conflict. However, even when third party payers or other financial protections eliminate the clients' financial exposure in litigation, there are claims (for example, assertions of comparative fault among professionals) in which the client, not the insurer, may have a strong personal interest in a vigorous defense of their work despite the fact that insurance will cover any judgment. This makes such concurrent representation impossible. In making these determinations, the harsh reality test discussed above should be foremost in the attorney's mind.

2004 ABA Model Rule Comment
RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer

must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the

basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members,

such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything

bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected

by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.13. Organization as Client

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions

of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Ethics Committee Comment

In New Hampshire, a lawyer who represents an unincorporated association also represents each individual member of the association as to matters of association business. *Franklin v Callum*, 148 NH 199 (2002). This rule is an exception to the prevailing "entity theory" of representation reflected in Rule 1.13. *See also* Restatement of the Law Governing Lawyers § 96 (ALI 2000); *McCabe v Arcidy,* 138 N.H. 20, 26 (1993).

2004 ABA Model Rule Comment
RULE 1.13 ORGANIZATION AS CLIENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RONALD FOUTS, PLAINTIFF-APPELLANT,
v.
BREEZY POINT CONDOMINIUM ASSOCIATION, DEFENDANT-RESPONDENT.

Appeal No. 2013AP1585.

Court of Appeals of Wisconsin, District IV.

Filed June 17, 2014.

Before Hoover, P.J., Mangerson and Stark, JJ.

MANGERSON, J.

Ronald Fouts appeals an order dismissing his complaint against the Breezy Point Condominium Association and awarding the Association statutory attorney fees. He asserts that, as a director of the Association, he is entitled to review confidential communications between the Association and its attorney regardless of a claim of attorney-client privilege. We conclude the circuit court, in a well-reasoned decision, properly dismissed his complaint and awarded statutory attorney fees. Accordingly, we affirm.

BACKGROUND

The following facts are undisputed. At all relevant times, Fouts was a member, unit owner, and director of the Association. He sued the Association and/or its members on three occasions prior to 2009. The last occurred in 2008 when Fouts was granted a declaratory judgment authorizing him to examine Association records consisting of invoices for legal services. Fouts' appellate brief asserts the Association has wrongfully paid for the personal legal expenses of other directors and member-owners.

In September 2010, Fouts requested the Association grant him full access to its past and present records, including all attorney-client files, without redaction or claim of privilege. The Association then passed a resolution granting permission for any director to review the records of the Association contained in the office of the Association's attorney. Several days later, the Association president clarified directors were only permitted to access records the Association had paid for, the records permitted to be examined were limited to "closed cases," and no copies were to be made.

In late 2010, the Association's attorney reviewed Association files to remove confidential communications, and he provided the redacted files to Fouts. Nothing deemed by the attorney to contain privileged attorney-client communications was made available for review. Counsel took the position that the Association, through its resolution or otherwise, had not specifically informed him it was waiving the attorney-client privilege. Fouts' subsequent requests for the privileged material went unanswered.

Fouts filed the present action on August 20, 2012. He sought a declaratory judgment giving him full access to the Association's records, including "attorney client files of the [A]ssociation without redaction or claim of privilege[.]" Fouts also sought punitive damages as a sanction. The Association answered, labeling Fouts "a serial litigator," asserting it had provided all documents Fouts had a right to inspect, and claiming any withheld documents were protected by attorney-client privilege.

Fouts filed a summary judgment motion, again requesting full access to Association records. Fouts argued he had an absolute right to inspect the records as a director of the

Association, and he asserted the Association's attorney had an ethical duty to deliver all client files. The Association responded that Fouts' rights and duties as a director did not trump attorney-client privilege, and any waiver of the privilege had to come from the Association as the sole client, not an individual director.

The court denied Fouts' summary judgment motion in a written decision on March 19, 2013. It identified the relevant legal issues as whether the attorney-client privilege "grant[s] the Association the authority to withhold confidential lawyer-client communications from a current director of the Association[,]" and, if so, whether Fouts could waive that privilege on behalf of the Association. The court, relying on *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788, concluded the Association, acting through the board of directors, has exclusive authority to decide whether individual directors should have access to information covered by the privilege, and as such could withhold confidential communications from a current director. The court noted the record did not contain any indication that the board had waived the privilege, nor did it indicate whether the board of directors had yet made a decision on whether Fouts was entitled to any or all privileged documents.

After the court's decision, the parties stipulated to certain facts in lieu of an evidentiary hearing. The stipulation provides, "On or about February 8, 2012 the plaintiff demanded that the [A]ssociation provide the requested records regardless of the claim of [attorney-client] privilege. The [A]ssociation did not waive the privilege and did not provide the records."

The court approved the stipulation and concluded there were no further facts in dispute. The court stated the "only factual issues remaining [after its March 19 decision] was whether or not the Association waived the lawyer-client privilege, and then still did not provide the requested records." The court determined the stipulation resolved that question, granted summary judgment in favor of the Association, and dismissed Fouts' complaint. It also awarded statutory costs and statutory attorney fees. Fouts appeals.

DISCUSSION

We review a grant of summary judgment de novo. *See Waters by Murphy v. U. S. Fid. & Guar. Co.,* 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). Summary judgment motions are governed by a well-established methodology. *See Ixonia State Bank v. Schuelke,* 171 Wis. 2d 89, 94, 491 N.W.2d 722 (Ct. App. 1992). In short, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2).[1] On appeal, we apply the standards set forth in the statute just as the trial court was to have applied them. *Ixonia State Bank,* 171 Wis. 2d at 94.

As a procedural aside, Fouts argues the court incorrectly granted the Association summary judgment without having a motion before it. However, the "purpose of summary judgment is to avoid trial when there are no issues to be tried." *Id.* Accordingly, "[i]f it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor." WIS. STAT. § 802.08(6). Consequently, we reject Fouts' procedural argument.

Further, we concur with the circuit court's assessment of the substantive legal issue in this appeal. In general, a client—which, under WIS. STAT. § 905.03(1)(a), includes a private association—may refuse to disclose confidential communications between the client and its attorney. WIS. STAT. § 905.03(2). Wisconsin subscribes to the "entity rule," which provides that when a lawyer represents an organization, the organization is the client, not

the organization's constituents. *See Jesse by* *Reinecke v. Danforth*, 169 Wis. 2d 229, 239, 485 N.W.2d 63 (1992). The entity rule applies to privileged communications under SCR 20:1.6. *Reinecke*, 169 Wis. 2d at 241. The corporate entity, not the individual constituents, holds the privilege. *Id.* The purpose of the entity rule is to enhance the organizational lawyer's ability to represent the best interests of the organization without automatically having the additional and potentially conflicting burden of representing the organization's constituents. *Id.* at 240.

The issue in this case is whether an association invoking attorney-client privilege may withhold privileged communications from a current board member. The parties agree there is no case directly on point. However, in *Lane*, 251 Wis. 2d 68, the supreme court considered an analogous situation in which a former corporate director sought privileged documents generated during his term.

In that case, Lane, a member of Sharp's board of directors, was terminated and questioned an appraisal of the value of his interest in the business. *Id.,* ¶10. During discovery, Lane subpoenaed documents from Sharp's attorney and his firm, including bills and communications between the attorney and Sharp's constituents. *Id.,* ¶15. Sharp and the principal owners responded with a motion for a protective order and to quash the subpoena, arguing the documents were protected by the lawyer-client privilege. *Id.,* ¶16. The circuit court agreed with Lane and ordered the production of the requested documents.

On appeal, our supreme court reversed. The court first rejected the notion that Lane's status as a former director allowed him to access otherwise privileged communications. *Id.,* ¶33. Citing the entity rule, the court concluded "the lawyer-client privilege belongs to Sharp [the client], and only Sharp can waive the lawyer-client privilege." *Id.* Accordingly, the court held that a former director cannot act on behalf of the client corporation and waive the privilege. *Id.* The court further held that even though the documents were created during Lane's tenure as a director, he was not entitled to them. *Id.,* ¶34. The power to waive the privilege rests with the corporation's management, and as a "dissident director," Lane had no authority to pierce or frustrate the attorney-client privilege when that action conflicts with the will of management. *Id.* (citing *Milroy v. Hanson*, 875 F.Supp. 646 (D. Neb. 1995)).

Fouts acknowledges *Lane* cuts against his position, but notes the supreme court explicitly limited its holding to the facts presented and declined to "address, or speculate, on the outcome of any similar situations involving a current member of a board of directors." *Id.,* ¶35. However, we conclude *Milroy,* on which the *Lane* court heavily relied, is directly applicable to the question before us.

In *Milroy*, 875 F.Supp. at 647, a director of a closely held Nebraska corporation brought suit against the corporation and the majority shareholders, who were also directors. Milroy, the plaintiff, alleged the majority shareholders violated their fiduciary duties, wasted corporate assets, and operated an unlawful enterprise. *Id.* The corporation resisted the production of some documents during discovery, raising attorney-client privilege. *Id.* Milroy argued the privilege could not be asserted against him because he was a director of the corporation, and because he had initiated a derivative suit that would presumably benefit the corporation. *Id.* at 648.

The district court rejected both of Milroy's arguments. It first held that Milroy's status as a director did not allow him to circumvent the privilege because a majority of the board had, at least implicitly, determined to assert the privilege on behalf of the corporation. *Id.* "[I]t follows that an individual director is bound by the majority decision and cannot unilaterally waive or otherwise frustrate the corporation's attorney-client privilege if such an action conflicts with the majority decision of the board of directors." *Id.* The court further reasoned that a dissident director is not management and has no authority to frustrate the client corporation's invocation of attorney-client privilege. *Id.* at 649-50. Finally, the court

concluded Milroy's suit was brought in his personal capacity and was intended primarily to benefit Milroy, to the detriment of the corporation and remaining stockholders. *Id.* at 652. Accordingly, the court saw no reason to order the production of privileged documents. *Id.*

Here, following *Lane* and *Milroy,* the Association is the client and has the exclusive authority to withhold privileged information from current individual directors. Fouts and the Association have stipulated that the Association has exercised the attorney-client privilege and refused to waive it. The privilege is absolute, unless one or more of the exceptions set out in WIS. STAT. § 905.03(4) applies, or it is waived by operation of WIS. STAT. § 905.11. *Borgwardt v. Redlin*, 196 Wis. 2d 342, 353, 538 N.W.2d 581 (Ct. App. 1995).

Fouts argues for the first time in his reply brief that the exception for joint clients thwarts the privilege. Under WIS. STAT. § 905.03(4)(e), the privilege does not extend to communications "relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." Fouts reasons that "because the action is between the Association and one of its current directors, both of which are clients of the Association attorney, attorney-client privilege cannot extend to any communications made between any of the Association directors and the Association attorney."

We reject Fouts' argument regarding WIS. STAT. § 905.03(4)(e). First, arguments raised for the first time in a reply brief will not be considered. *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256. Second, Fouts' argument is contrary to the entity rule, under which there is no joint representation because the Association is the only client. *See Reinecke,* 169 Wis. 2d at 239.

Fouts counters that our reliance on *Lane* is misplaced for three reasons. First, he argues he brought suit for the Association's benefit and stands to gain nothing personally from the litigation. Second, he appears to concede the Association could withhold privileged information from a dissident director, but argues a factual dispute exists about whether he can be considered a dissident. Third, he contends he is not adverse to the Association as a matter of law.

First, we observe that Fouts' suit seeks punitive damages against the Association.[2] "Punitive damages are not intended to compensate the plaintiff, but rather are awarded to punish the wrongdoer, and to deter [it] and others from similar conduct." *Kimble v. Land Concepts, Inc.*, 2014 WI 21, ¶43, 353 Wis. 2d 377, 845 N.W.2d 395 (quotation omitted). Fouts can hardly argue, then, that the suit is primarily for the Association's benefit, rather than his own. *See Milroy,* 875 F.Supp at 651 (refusing to allow stockholder to pierce attorney-client privilege when stockholder asserts claims primarily to benefit himself, particularly when such claims will undoubtedly harm all other stockholders if successful). This is especially true because Fouts' complaint does not allege any misconduct other than the Association's refusal to disclose privileged information.

Second, given our recitation of Wisconsin law, the circuit court was not required to determine whether Fouts can be classified as a dissident director, and therefore no factual issue was presented. The operative principle here is that the privilege belongs to the Association, and Fouts, as an individual director, has no authority to waive it. To the extent Fouts could have argued an exception other than the joint client exception applies, he has missed his opportunity.[3] *See State v. Pettit,* 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not address undeveloped and inadequately briefed arguments).

Fouts notes that, as a director, he is responsible for ensuring the Association is properly managed. The Association concedes that, as a current director, Fouts has a fiduciary responsibility to perform oversight of the Association. Fouts essentially claims his fiduciary duties as a director trump an assertion of attorney-client privilege.

To the extent a public policy analysis is necessary to the issue at hand, we believe the circuit court articulated the appropriate balancing of interests:

Although the right of a stockholder (or director) to inspect the books of a corporation is positive, full, and complete[, *see* *State ex rel. Harvey v. Plankinton Arcade Co.*, 182 Wis. 23, 25, 195 N.W. 904 (1923)], no [c]ourt in Wisconsin has ruled on whether or not a current director of an unincorporated association has unfettered access to lawyer-client communications. The Court believes that privileged lawyer-client communications are far different from financial records that are freely accessible to mere stockholders. Whereas to properly evaluate the workings of a corporation by stockholders or directors, financial information is always critical, legal advice given to the organization, may or may not be critical for a director to know to fulfill his responsibilities. In fact, if the advice involves an adversarial relationship with one director, its release to that director may be deleterious to the organization.

Accordingly, we conclude Fouts' fiduciary duties do not automatically entitle him to privileged documents.

Fouts next argues the circuit court erred because it did not tell him how to gain access to privileged documents. Fouts believes it was the court's responsibility to "clarify the uncertainty" by requiring a privilege log or employing a third-party mediator to challenge and review the files in question. However, as the plaintiff, Fouts was in the driver's seat of the litigation. He requested a blanket order authorizing access to all Association documents without redaction or privilege. If there were documents he believed were wrongfully withheld, it was incumbent upon him to identify them so the court could ultimately determine if they should be produced. Without such a discovery demand, the Association could not respond or provide a privilege log. There was nothing from which the court could determine whether the privilege was properly asserted, and the circuit court was not required to develop a litigation strategy on Fouts' behalf.

Fouts also asserts the public policy and statutory directives codified in WIS. STAT. ch. 703 abrogate the attorney-client privilege under the circumstances of this case. Specifically, he contends he had fiduciary duties to fulfill under that chapter. He also argues the Association president's modification of the Association's resolution was not "approved by an affirmative vote or written consent of at least 75% of the board[,]" in violation of the small condominiums statute, WIS. STAT. § 703.365(3)(d).

We reject Fouts' arguments based on WIS. STAT. ch. 703 for several reasons. First, there is no dispute Fouts has a fiduciary duty to act in the best interests of the Association. Second, the parties stipulated the attorney-client privilege has been asserted and has not been waived. Accordingly, the relevance of the 75% rule embodied in WIS. STAT. § 703.365(3)(d) is unclear. Finally, assuming the statute does have some relevance, Fouts has not shown § 703.365 is applicable. The Association asserts that, at the time the Breezy Point Condominium was declared, it did not qualify as a "small condominium" because it contained more than the maximum number of units allowable at that time. Fouts has not responded to this argument, and therefore concedes the statute does not apply. *See* *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not specifically refuted are deemed conceded).

Notably, Fouts appears to backtrack in his reply brief. He clarifies he "does not maintain that the Association could never have lawfully excluded him from certain association records, only that the required formal decision-making process was not followed." However, he then concedes the facts surrounding the "decision-making process" he challenges "were not put in the record and would therefore be inappropriate to further explore in this appeal." The appellant has the responsibility of ensuring the record on appeal is sufficient to support his or her assertions of error. *Fiumefreddo v. McLean*, 174

Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). When the appellate record is incomplete, we must assume the missing material supports the trial court's ruling. *Id.* at 27. Accordingly, the conceded inadequacy of the appellate record is fatal to Fouts' assertion that an improper protocol was used.

Fouts' final argument is that the circuit court erred in awarding attorney fees. He contends attorney fees are not recoverable in an action for declaratory judgment. Under the Uniform Declaratory Judgments Act, a court may make "such award of costs as may seem equitable and just." WIS. STAT. § 806.04(10). "Costs," for purposes of § 806.04(10), do not include actual attorney fees. *See* *Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis. 2d 722, 746-47, 351 N.W.2d 156 (1984).

However, the court did not order actual attorney fees; it awarded statutory attorney fees. Statutory attorney fees, when awarded to the defendant, are computed based on the demands of the complaint. *See* WIS. STAT. §§ 814.03,.04. The awarding of judgment costs under § 814.03 is mandatory, not discretionary. *Taylor v. St. Croix Chippewa Indians of Wis.*, 229 Wis. 2d 688, 696, 599 N.W.2d 924 (Ct. App. 1999). Accordingly, the court did not erroneously exercise its discretion by awarding statutory attorney fees. In any event, Fouts does not reply to the Association's response argument, and therefore concedes the award was proper. *See* *Charolais Breeding Ranches*, 90 Wis. 2d at 109.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We observe that Fouts' complaint incorrectly frames his request for punitive damages as a separate cause of action. *See* *Hansen v. Texas Roadhouse, Inc.*, 2013 WI App 2, ¶21, 345 Wis. 2d 669, 827 N.W.2d 99 (WI App 2012), *review dismissed,* 2013 WI 22, 346 Wis. 2d 286, 827 N.W.2d 376 ("Punitive damages are a remedy, not a cause of action.").

[3] If indeed individual directors misappropriated Association funds for their own benefit, as Fouts suggests in his brief, the exception to the attorney-client privilege for documents prepared in furtherance of a crime or fraud might arguably apply, which would require an in camera review by the circuit court. *See* WIS. STAT. § 905.03(4)(a); *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶¶50-51, 55, 251 Wis. 2d 68, 640 N.W.2d 788. However, Fouts' complaint alleges only that he was wrongfully denied access to Association documents; he did not allege any substantive misconduct by other directors.

SEAHAUS LA JOLLA OWNERS ASSOCIATION v. SUPERIOR COURT OF SAN DIEGO COUNTY *NO. D058237.*

SEAHAUS LA JOLLA OWNERS ASSOCIATION, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; WEYERHAEUSER COMPANY et al., Real Parties in Interest.

Court of Appeals of California, Fourth District, Division One.

Filed November 9, 2010.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IRION, J.

FACTUAL AND PROCEDURAL BACKGROUND

Seahaus La Jolla Owners Association (Association) sued developers, contractors and others for various alleged construction defects at the Seahaus La Jolla condominium project. Association asserted causes of action for strict products liability, negligence and violations of the residential construction standards enumerated in Civil Code section 896 against defendants Weyerhaeuser Company and Weyerhaeuser NR Company (collectively, Weyerhaeuser).

In the litigation, Association sought production of testing data related to Weyerhaeuser's engineered lumber product, Parallam PSL, which was utilized at the project. Weyerhaueser responded that it would consider producing the testing data, but since the data was "proprietary, confidential, trade secret information," it would be produced only under the terms of a proposed stipulated confidentiality agreement. Weyerhaeuser's proposed agreement empowered the producing party to unilaterally designate information as confidential and provided that any party could move the court to challenge the confidentiality designation. Confidential information could be used only for purposes of litigation and could be disclosed only to party experts who agreed to be bound by the confidentiality agreement. The agreement contained an indemnification provision protecting the disclosing party from losses resulting from any breach of the agreement and provided that "[c]ounsel who seek to file with the Court Clerk Confidential Information . . . will ask the Court to direct that this Confidential Information be filed under seal . . . ."[1]

Association refused to stipulate to the terms of Weyerhaeuser's proposed agreement and moved to compel production of the testing data.

In opposing the motion, Weyerhaeuser took the position that it was willing to produce the testing data but argued that the data constituted a trade secret and should be produced only subject to a protective order. To support its claim of trade secret, Weyerhaeuser submitted an employee declaration describing the testing data as follows:

"The documents withheld generally consist of (1) Parallam PSC quality reports, i.e., summaries of quality assurance data generated while Parallam is being manufactured . . . and (2) a 1992 MacMillan Bloedel Limited research report and related memoranda and Trus Joist MacMillan[2] interoffice memoranda regarding the moisture content strength effects on Parallam PSL made of different wood species and (3) a [1995] Trus Joist MacMillan compilation of existing research on the effect of moisture on the mechanical properties of Microllam LVL, Parallam PSL and TimberStrand LSL."

Weyerhaeuser explained that the above-described data was maintained in such a manner as to preserve its confidentiality and provided the following statement, presumably to substantiate the purported economic value of the testing data: "Weyerhaeuser NR Company benefits from issuance of the code approvals demonstrating that its products are Code compliant. Weyerhaeuser NR Company also benefits from maintaining its internal reports and the raw data contained in the reports as confidential information, because the information is likely to be misused by competitors." Given its claim of trade secret,

Weyerhaeuser requested the superior court to "direct[] [the Association] to execute the agreement offered" by Weyerhaeuser.

The superior court found that the testing data was relevant and discoverable. It also found that Weyerhaeuser met its burden to show that the testing data constituted a trade secret and that Civil Code section 3426.5 compelled it to preserve its secrecy by reasonable means. The court further found that good cause existed for the imposition of a protective order and "ordered [the Association] to execute the Confidentiality Agreement proposed by [Weyerhaeuser]."

Association timely filed this petition, contending that the superior court committed at least two errors, first, in determining that Weyerhaeuser had met its burden to prove that the testing data constituted a trade secret, and second, in ordering the Association to execute the stipulated confidentiality agreement.

We obtained a response from Weyerhaeuser and subsequently issued *Palma* notice. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.)

DISCUSSION

We do not here decide whether Weyerhaeuser's testing data constitutes a trade secret.[3] Under the circumstances of the present case, where the superior court found the testing data to be relevant and ordered its production, and where Weyerhaeuser did not object to production subject to a suitable protective order, any arguable error in the court's trade secret determination does not threaten the petitioner with harm for which there is no adequate remedy at law. Accordingly, writ relief is not warranted. (See Code Civ. Proc.,[4] § 1086 [writ relief warranted where "there is not a plain, speedy, and adequate remedy, in the ordinary course of law"]; *Schmier v. Supreme Court of California* (2000) 78 Cal.App.4th 703, 707-708 ["writ of mandate is granted `"only where necessary to protect a substantial right and only when it is shown that some substantial damage will be *suffered by the petitioner* if said writ is denied"'"].)

What concerns this court is that the superior court, having determined that Weyerhaeuser's testing data was confidential and warranted protection, failed to formulate an appropriate protective order in compliance with the law. The court found that Civil Code section 3426.5 compelled it to preserve the secrecy of the testing data by reasonable means. This was error. Civil Code section 3426.5 applies only "[i]n an action under this title." The current case is not an action under "this title" because it is not an action for misappropriation of trade secrets under the Uniform Trade Secrets Act. Consequently, even if Weyerhaeuser's testing data constitutes a trade secret, an issue which we need not and do not decide, Civil Code section 3426.5 does not compel the court to preserve its secrecy by reasonable means.

This is not to say that the superior court lacked authority to issue an order protecting the testing data. Section 2031.060, subdivision (b)(5) expressly authorizes the superior court to issue a protective order to limit the disclosure of "*trade secret or other confidential research, development, or commercial information,*" upon a showing of good cause. (Italics added.)

Section 2031.060, subdivision (b)(5) provides:

"The court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order *may include, but is not limited to, one or more of the following directions*: [¶] . . . [¶] (5) That a *trade secret or other confidential research, development, or commercial information* not be disclosed, or be disclosed only to specified persons or only in a specified way." (See also §§ 2025.420 [governing protective order in depositions], 2030.090 [interrogatories], 2033.080 [requests for admission].)

Having determined that Weyerhaeuser had shown that good cause existed for issuance of an order to protect the confidentiality of its testing data, it was incumbent on the superior court to exercise *its* discretion to formulate an appropriate protective order. (§ 2031.060, subd. (b)(5) ["This protective order *may include, but is not limited to, one or more of the following directions*: [¶] . . . [¶] (5) That a *trade secret or other confidential research, development, or commercial information* not be disclosed, or be disclosed only to specified persons or only in a specified way."], italics added.) Rather than formulating such an order, the superior court instead ordered the Association to execute a proposed stipulated confidentiality

agreement, the terms of which were dictated by Weyerhaeuser. We hold that this was an abuse of the superior court's discretion.

As evident from the Legislature's use of the word "may" (§ 2031.060, subd. (b)), the court's authority to issue a protective order is discretionary. (*Raymond Handling Concepts Corp. v. Superior Court* (*Zuelzke*) (1995) 39 Cal.App.4th 584, 588.) When the superior court is vested with discretionary authority, the failure to exercise discretion can itself be an abuse of discretion. (See, e.g., *Richard, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1180 [Where trial court's authority is discretionary, court was obligated to exercise its discretion.]; *Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 339 ["It is the judge's responsibility to consider and weigh all the evidence and argument and make a reasoned choice."]; *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176 ["A failure to exercise discretion is an abuse of discretion."].) In directing the Association to execute Weyerhaeuser's proposed stipulated confidentiality agreement, the superior court failed to exercise its discretion to formulate an appropriate protective order, and in doing so, abused its discretion.[5]

Because the relevant facts are not in dispute and Association's entitlement to relief is clear, we conclude that a peremptory writ in the first instance is proper. (§ 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223, disapproved on another ground in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate the portions of its July 29 and September 15, 2010 orders directing Association to execute Weyerhaeuser's proposed stipulated confidentiality agreement and to conduct further proceedings consistent with the views expressed herein. The stay issued by this court on September 29, 2010, is VACATED. Petitioner shall recover its costs. (Cal. Rules of Court, rule 8.493(a)(1)(A).) This opinion is made final as to this court seven days after this decision is filed. (Cal. Rules of Court, rule 8.490(b)(3).)

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

FOOTNOTES

1. Rather than attempting to stipulate to the filing of records under seal, this proposed language properly contemplated that the parties would "ask the Court" to order that the records be sealed. Before ordering that a record be filed under seal, the court must "expressly find[] facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d); see (1999) .)
2. MacMillan Bloedel and Trus Joist were companies that Weyerhaeuser subsequently acquired.

3. Under the Uniform Trade Secrets Act, "`trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: [¶] (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civ. Code, § 3426.1, subd. (d).)

4. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

5. Inherent in the superior court's decision to impose a protective order is a balancing of the Association's interest in discovery of information relevant to its claims against Weyerhaeuser's interest in maintaining the confidentiality of proprietary business information. The superior court should carefully tailor any discovery order to protect these competing interests.