KEOUGH MOODY

September, 2022
Newsletter

Keough & Moody Webinar

"Everything said can and WILL be used against you in a court of law."

October 12, 2022 at 12:00 p.m. - 1:30 p.m.
**Pending approval for continuing education*

Join Gabby Comstock and Dawn Moody on Wednesday, October 12, 2022, from 12:00 p.m. to 1:30 p.m., for a discussion about all that is said by a member of the board of directors and its managing agent can and will be used against the association. During this webinar, we will discuss how to avoid inadvertently saying something that can be misconstrued. As many of you know, Dawn and Gabby believe the best way to learn is through mistakes. Therefore, during this webinar, they will provide examples of statements made only to come back and haunt the association. Not only will tips be given to avoid falling into a trap, but also Dawn and Gabby will explain what should be done if you discover you have fallen into a trap.

Join us for what we believe will be very beneficial to all board members and managers. As always, come learn and have your questions answered. Registration is required.

Register in advance for this webinar below.

Register Now

THINK TWICE BEFORE YOU FORWARD THE ATTORNEY'S E-MAIL

In this day and age, we primarily communicate via e-mail. We, as attorneys, are often sending our opinions and legal advice as an attachment to an e-mail or in the body of an e-mail. We often learn (after the fact) that our e-mail was forwarded to third parties. Why is that such a big deal?

What is the Attorney-Client Privilege?

The attorney-client privilege was first recognized in the 16th century. Initially, courts held that

the privilege belonged to the attorney. However, by the middle of the 19th century, it was recognized that the privilege belonged to the client, not the attorney. The purpose of the privilege is to encourage clients to speak with their attorney honestly and with full freedom, and without risk of disclosure by the attorney. This privilege applies not only to individuals but also to corporate clients. To apply, the communication typically must remain between the attorney and the "control group" of the corporation. Community associations can only act through their board of directors or agent. Hence, the control group for a community association typically are the members of the board and, if applicable, the managing agent. (There can be exceptions to this rule.)

In addition, to apply, the communication must be confidential. The communication shall contain information that is not known to third parties and is only between the client and the attorney. For example, the attorney-client privilege would apply to an e-mail from a managing agent to the association's attorney acknowledging an issue with notice of a special assessment and seeking guidance if the association simply ignored the error. Similarly, the attorney's response to this e-mail, which is directed only to the members of the board of directors and its managing agent, and which provides the attorney's legal opinion and explains the attorney's recommendation, is considered confidential and protected by the attorney-client privilege.

What happens when a confidential communication is given to a third party?

Privilege can be destroyed if given to a third party. For example, while investigating a leak within a unit and the association's liability, the association, through its president, asked the attorney if the association could be liable for damage to a unit that was caused by the common elements. The president stated in the e-mail that the board knew the roof was leaking. In response to the e-mail, the attorney provided legal advice and different scenarios on how the association could be liable, depending on what was discovered in the investigation. The attorney also explained how the association would counter any allegation by the owner if the owner asserted liability against the association. In an effort to minimize the association's liability, the managing agent forwarded the attorney's e-mail to the contractor who will be investigating the matter. Since the contractor is not part of the association's control group, and the e-mail contained confidential information, such as the attorney's advice as to how to handle the matter, attorney-client privilege was likely destroyed once the e-mail was forwarded to the contractor. Hence, all that was discussed between the board and the attorney on that topic may no longer be protected by the privilege.

What if the attorney's statements in an opinion are helpful for a third party to do his job or specifically answer the questions of the unit owner?

We can certainly appreciate why our opinion can be of benefit to a third party. Unfortunately, though, once the privilege is broken, it cannot be restored. However, there are ways that the attorney's information can be provided to a third party without destroying attorney-client privilege. For example, the manager can provide a brief summary of what the attorney stated. Another option is for the association to ask the attorney to draft something that can be given to a third party. The attorney can then draft something that does not contain confidential information, that is not intended for his client, and which is not then subject to the attorney-client privilege but which is still helpful to the third party.

We know we did not do anything wrong, so why shouldn't we just give the

attorney's opinion to the owners since we know this will put the controversial issue to rest?

Rarely will an attorney advise a client to waive the attorney-client privilege. However, there are times when it is in the association's best interest to waive the privilege. The decision to waive the privilege is one for the client—the board of directors—to make. Most attorneys would agree that it should not be waived without careful consideration and a full understanding of the pros and cons.

What should I do if I am not sure if I can forward the attorney's e-mail?

One should always assume that if he/she wants to send the e-mail to someone other than the member of the board of directors or management, sending the e-mail will destroy the privilege. When in doubt, ask the attorney—how do I get this information to a third party?

Are there problems with sending the e-mail to members of the board of directors?

Yes, there still can be problems. After all, the president of the board may not be the only member of his/her household that has access to the e-mail. The spouse may inadvertently open an e-mail that was sent by the managing agent. Similarly, when board members have association-related e-mails sent to their work e-mail address, third parties have access to the employer's server or perhaps even the actual e-mails. It is strongly recommended that members of the board set up e-mail addresses that are used exclusively by the member of the board.

It is always best that members of the board and the managing agent understand how communication with the attorney is to be treated. It is recommended that, after the annual meeting, all members of the board be reminded how to treat confidential information received in their capacity as members of the board. At that time, a discussion should also be had as to who will communicate directly with the attorney and how communication with the attorney will be transmitted to the members of the board. It should also be discussed how members of the board should handle information related to legal advice. Remember, it is always best to have these direct communications with one another than to wait for a problem to arise.

If you have any questions about this newsletter or anything related to your association, please do not hesitate to contact us.

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