

Attorney-Client Privilege: Are communications between an attorney and an Association's management company protected by attorney-client privilege?

There is no case law in Washington that specifically addresses whether or not communications between an attorney and an Association's management company are protected by attorney-client privilege. However, Washington courts have recognized several situations where communications with a third party, similar as an Association's management company, are protected by the attorney-client privilege.^{1 2}

In Washington, communication(s) from the client to the attorney and communication(s) from the attorney to the client are both treated as privileged.³ Communications between an attorney and client are only protected by attorney-client privilege if the communications are confidential.⁴ Generally, if a third party is present during the communication(s), intentionally or unintentionally, those communications lose the privilege.

However, if a third party is an agent of the attorney or the client and that agent is essential or necessary to the giving of legal advice then the privilege is not lost.⁵ The burden of establishing a communication is protected by attorney-client privilege rests with the party claiming it.⁶

Other state and federal courts have applied similar rules regarding the extension of the attorney-client privilege to third parties or agents.^{7 8} Others have applied the "Intermediary Doctrine"⁹ to find that communication between an attorney and a client's agent is privileged.^{10 11 12}

When an attorney represents an Association the client is the Association. However, in most instances an attorney provides counsel and advice directly to the Board. The Board is *not* the client. However, the Board receives attorney communications and gives direction to the attorney and the Association. If an Association employs a management company, then that management company is the Association's agent. Communications between an agent and an attorney are privileged. Employees of the management company who are deemed necessary for the giving of legal advice will not destroy the privilege.

It is advised that an Association's Board and the management company (if one is employed) should exercise caution, and be aware of the risk of sharing information and documents from an attorney with third parties (including unit owners). Documents and invoices from an attorney should be safeguarded. If any documents or information from an attorney are shared with third parties (again, including unit owners) the privilege is lost.¹³

An Association's management company is similar to an interpreter or an accountant in that all are agents who may be necessary for an attorney to give proper and effective legal advice to the client. Though the courts in Washington have not explicitly stated communications between an attorney and an Association's management company are protected by attorney-client privilege, it is likely that Washington courts would consider an Association's management company to be the Association's agent, and necessary for the giving of legal advice to the Association.

Managers and employees whose job function requires them to provide attorneys with facts and information necessary for giving legal advice are third parties who will not destroy the privilege. Employees whose job function does not involve communicating with attorneys or relating legal advice from an attorney to the unit owners (such as a management company's bookkeeper or a management company's receptionist) may destroy the privilege.

And remember that unit owners are also considered third parties who will destroy the privilege.

¹ *State v. Aquino-Cervantes*, 88 Wn. App. 699, 708 (Wash. Ct. App. 1997) (Attorney-client privilege applied to communications in presence of client's interpreter because the interpreter was the client's agent, and necessary for the attorney-client communication.).

² *Bronsink v. Allied Prop. & Cas. Ins.*, 2010 U.S. Dist. LEXIS 29166, *5 (W.D. Wash. Mar. 4, 2010) (An attorney acting as a claims adjuster, and not as legal advisor, could still claim the privilege if that attorney was an agent necessary for the provision of legal advice.).

³ Washington courts interpret RCW 5.60.060(2)³ as providing two-way protection of all communications and advice between attorney and client, including communications from the attorney to the client. (See, *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 903 (Wash. Ct. App. 2006).)

⁴ *Ramsey v. Mading*, 36 Wn.2d 303, 312 (Wash. 1950) (Trial court erred in admitting the testimony of appellants' attorney because the communication between appellants and the attorney were intended to be confidential.).

⁵ *Aquino-Cervante*, 88 Wn. App. at 708.

⁶ *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, (Wash. Ct. App. 2005) (Remanded with the instruction that the trial court must determine whether the party claiming attorney-client privilege applied to certain documents had met the burden of establishing the privilege applied to those documents.).

⁷ *Golden Trade v. Lee Ansarel Co.*, 143 F.R.D. 514, 518 (S.D.N.Y. 1992) (Attorney-client privilege protects communications between a client's agent and the client's attorney if the communication was intended to be confidential, and if the purpose of the communication is to facilitate the rendering of legal services by the attorney.).

⁸ *CoorsTek, Inc. v. Reiber*, 2010 U.S. Dist. LEXIS 42594, 12 (D. Colo. Apr. 5, 2010) (The presence of a third party will not destroy the attorney-client privilege if the third party is the attorney's or client's agent or possesses commonality of interest with the client.).

⁹ See, *Soter* 131 Wn. App. at 903 (Wash. Ct. App. 2006) (A client's communication with his or her lawyer through an agent is privileged when the communication is made in confidence for the purpose of legal

advice. The agent must be effectuating the client's purpose of receiving legal advice.).

¹⁰ *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. N.Y. 1961) (A client's accountant can be necessary for the giving of legal advice.)

¹² *Miller v. Haulmark Transp. Sys.*, 104 F.R.D. 442, 445 (E.D. Pa. 1984) (Attorney-client privilege applied to communications in presence of client's insurance agent.).

¹³ The risk of losing the privilege increases as more third parties are made privy to documents and information from attorneys.