22--Who Holds the Attorney-Client Privilege—the Board or Individual Board Members?

Washington law protects confidential communications between clients and attorneys from disclosure. The privilege extends to agents of the clients, and therefore protects communications not only between Boards and their attorneys, but also between employees and professionals hired by an Association. Only the client can waive the privilege because the privilege "belongs" to the client.[1] The Association, the Board or its members, is the client of the Association's attorney. Accordingly, it is the Board as a whole (not individual members, employees, or agents) that holds the attorney-client privilege, and the power to waive the privilege.[2]

Any communication disclosed without the client's consent will remain privileged, meaning that opposing parties will not be permitted to use them or the information they contain.[3] A Board Member who discloses confidential information to the Board's attorney cannot waive the privilege even with respect to his or her own communications. The communications were made in the Board Member's capacity as an agent of the Board, to further the interest of the Board, not in his or her individual capacity.

WUCIOA has specifically listed attorney-client communications as a class of information which may be withheld from Owners.[4]

Board Members May Be Personally Liable for the Unauthorized Disclosure of Privileged Information

Board Members of both Condo Associations and HOAs owe a duty of care to both Associations and individual Owners. To discharge their duty, Board Members must act in good faith, and must exercise reasonable and ordinary care.[5] In some cases, the

disclosure of information protected by attorney-client privilege will constitute a breach of the duty of care. A Board Member fails to act in good faith if he discloses information vindictively or to further his own interests (i.e. self-dealing Board Members). Board Members who disclose privileged information in the belief that they are permitted to do so, or because they believe the Board is doing the wrong thing and they decide to "blow the whistle," may still be breaching their duty of care. If an "ordinarily prudent person" in similar circumstances would not disclose the information, or if their belief that they are acting in the best interests of the Association are not objectively reasonable, the disclosure will qualify as a breach. As such, the Member(s) who disclosed the information may be subject to personal liability for any harm the Association suffers as a result of the breach.

Individual Board Members Must Not Disclose Documents Prepared by or for the Association's Attorney(s)

Attorney-client privilege protects documents prepared by attorneys, as well as documents prepared for attorneys by their agents and employees.[6] The privilege extends not only to documents containing communications that, if oral, would be privileged, but also to documents providing the client with legal advice, laying out different options, etc. For example, opinions on collections and other legal opinions provide Associations with legal advice and therefore are privileged. Documents prepared by professionals hired by the attorney that discuss different repair options available to an Association would also be privileged.[7] Individual Board Members may not disclose these documents to anyone who is not authorized by the full Board to have access to them. Just as Board Members may be personally liable for harm to the Association resulting from the unauthorized disclosure of privileged communications with an attorney, they may also be personally liable for harm resulting from the unauthorized disclosure of documents prepared by or for an attorney.

[1] RCW 5.60.060(2)(a) provides that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." Disclosures made without the client's consent do not waive privilege.

[2] *See, e.g., State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 833 (1964) ("…the attorney-client privilege is not absolute, for it can be waived by the client."); *State v. Pam*, 31 Wn.App. 692 (1982), *rev'd on other grounds*; *State v. Marshall*, 83 Wn.App. 741 (1996).

[3] *Soter v. Cowles Publ'g Co*., 131 Wn. App. 882, 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.).

[4] RCW 64.90.495(3)(e). ("Records retained by an association may be withheld from inspection and copying to the extent that they concern…Legal advice or communications that are otherwise protected by the attorney-client privilege or the attorney work product doctrine, including communications with the managing agent or other agent of the association…"

[5] Board members appointed by declarants may be required to exercise the care of a fiduciary of the unit owners.

[6] *Pappas v. Holloway*, 114 Wn.2d 198, 203 (1990). ("The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents which contain a privileged communication.")

[7] Documents prepared by professionals hired directly by an association, without any involvement of the association's attorney(s), would not be protected by attorney-client privilege, but may still be exempt from disclosure under other laws.