23--Are Communications Between an Attorney and an Association's Manager Privileged?

The attorney-client privilege may extend to managers if the manager is communicating as an agent of the community and the communication is necessary for the lawyer to provide the community with legal advice. Attorney-client privilege protects communications from clients to attorneys, as well as communications from attorneys to clients, provided that the communications occur "in the course of [the attorney's] professional employment."[1] The privilege also extends to agents of both clients and attorneys when the agents are necessary to the communication. Association managers should qualify as such agents. Privilege applies only to confidential communications, meaning that the presence of a third party who is not an agent of the client or attorney will destroy any privilege that otherwise would have existed.[2] The burden of establishing a communication is protected by attorney-client privilege rests with the party claiming it.[3]

Whether privilege exists is a highly fact-specific inquiry, and thus it is difficult to predict how a court will rule based on prior decisions. Nevertheless, cases from Washington and other states offer some guidance on when a court may find that communications between an Association's management company and attorney(s) are privileged.

One federal case, *Greenlake Condominium Association v. Allstate Insurance Co.*, offers some insight into the factors courts will consider when assessing whether communications between management companies and an Association's attorney(s) are privileged.[4] In *Greenlake*, the defendant insurance company

sought to compel disclosure of emails between the Association's property manager and its attorneys. The court denied defendant's request, finding that the property manager was "a necessary and customary participant in the consultative process between Plaintiff and Plaintiff's attorney."[5] The Association, "like many condominium boards, ha[d] no employees and [was] governed by a volunteer board of directors" who "relied on [the property manager] to handle day-to-day operation of the property and to act as a repository of information concerning ongoing issues affecting the property."[6] In other words, the property manager was acting as an agent of the Association and, as such, her communications with the attorneys were entitled to the same privilege extended to communications directly between the Board Members and attorneys.

Washington courts have extended attorney-client privilege to communications between attorneys, and interpreters and claims adjusters, respectively, under what is sometimes referred to as the "Intermediary Doctrine," which protects communications between attorneys and the agents of their clients provided that the agent is "effectuating the client's purpose of receiving legal advice." [7] Our firm would argue that these third parties are similar to an Association's management company in that they are "necessary parties" to the provision of legal advice and services and are therefore protected by the attorney-client privilege. Other state and federal courts have applied similar rules regarding the extension of the attorney-client privilege to third parties or agents.[8]

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.

Associations should also keep in mind that Unit Owners are considered third parties whose presence will destroy the privilege.

WUCIOA recognizes the need to protect communications that include the manager from Owners. RCW 64.90.495(3)(e) specifically allows Associations to withhold from Owners any communication between the managing agent and the attorney.

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.[9]

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[1] Washington courts interpret RCW 5.60.060(2) 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).)

[2] *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.).

[3] *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.).

[4] 14-CV-01860-BJR, 2015 WL 11921419, at *1 (W.D. Wash. Oct. 30, 2015).

[5] *Id.*

[6] *Id.*

[7] *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.); *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.); *Bronsink v. Allied Prop. & Cas. Ins*., 2010 U.S. Dist. 09-751 MJP 2010 WL 786016, at *1 (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.).

[8] *See*, *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.); *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.); *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.); *CoorsTek, Inc. v. Reiber*, CIVA08CV01133KMTCBS, 2010 WL 1332845, at *1 (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] The risk of losing the privilege increases as more third parties are made privy to documents and information from attorneys.