



CAI'S COLLEGE OF COMMUNITY ASSOCIATION LAWYERS PRESENTS

Law Seminar

The Ethics of Honoring the Attorney-Client Privilege

January 31, 2009
10:15 – 11:15 AM

Presenter(s):
Michael S. Karpoff, Esq.

The Attorney-Client Privilege and Confidentiality in Community Associations

by

Michael S. Karpoff, Esq.
Partner
Hill Wallack LLP, Attorneys at Law

INTRODUCTION

The attorney-client privilege is said to be the oldest privilege protecting communications recognized by the common law.¹ It is believed to date back to the sixteenth century.² The purpose of the privilege is to encourage the full and frank communication between an attorney and his or her client so that the attorney can be completely informed and thus can properly carry out the professional mission and counsel the client.³ The privilege is deemed to serve the public interest.⁴ Although application of the privilege occasionally shields relevant information and creates obstacles to seeking the truth, the public benefit of preserving confidentiality generally outweighs such concerns.⁵ As the California Supreme Court explained, “[I]f a lawyer could not promise to maintain the confidentiality of his client’s secrets, the only advice he or she could provide would be, ‘Don’t talk to me’ [citation omitted].”⁶

However, the attorney-client privilege is not absolute or unlimited. A variety of situations can result in waiver of the privilege. In certain circumstances, the privilege simply does not apply, because its use would contravene the public interest. Difficulties in the application of the privilege further arise when the client is a corporation or other organization rather than an individual.⁷

¹ *Upjohn Company v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981).

² 8 *Wigmore*, Evidence §2290 (McNaughton rev. 1961), cited in 27 *A.L.R.5th* 76 §2 (1995 & West Supp. 2008).

³ *Upjohn Company*, *supra*, n. 1, 449 U.S. at 389, 101 S.Ct. at 682.

⁴ *Id.*

⁵ *Southern California Gas Company v. Public Utilities Commission*, 50 Cal.3d 31, 37, 784 P.2d 1373, 1376, 265 Cal.Rptr. 801, 804 (1990).

⁶ *Id.* at 37, 784 P.2d at 1375-76, 265 Cal.Rptr. at 804.

⁷ *Upjohn Company*, *supra*, n. 1, 449 U.S. at 389-90, 101 S.Ct. at 682-83.

As a result, although the attorney-client privilege appears on its face to be simple and straight-forward, its applicability or inapplicability in particular situations can confound attorneys and their clients. Attorneys can face ethical quandaries in deciding what information is protected and what is not and in counseling their clients. The issues become more complicated in community associations. Questions arise as to who is covered by the attorney-client privilege and who controls the privilege. Association members frequently expect that attorneys who are paid by their common expense assessments will answer to them and will not limit their legal advice solely to the governing board. In addition, associations operate through agents, including independent contractor property managers, so issues arise as to whether communications with such third parties are protected from disclosure.

Boards – and their attorneys – face other dilemmas pertaining to confidentiality. What association records, if any, may a board refuse to disclose to members and under what conditions? Must minutes of executive session meetings, not open to attendance by members, be disclosed to association members or to third parties? May a governing board declare certain information confidential so that no board member may disclose it? And what can an association do if a director or trustee discloses confidential material? These are some of the questions that association governing boards refer to their attorneys and expect their attorneys to answer.

By exploring the state of the law on these issues, attorneys will be better able to advise their clients, satisfy their ethical obligations and educate their clients and other association professionals about the necessity for and limitations of privileges and confidentiality.

ATTORNEY-CLIENT PRIVILEGE

Definition

To understand the attorney-client privilege, one obviously must know how it is defined. Several definitions have been put forth, although they bear much in common. Two statements of the rule have been commonly quoted by American courts. One is that of Professor Wigmore:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser (8) except the protection be waived.⁸

The second was stated by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*⁹ :

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of

⁸ 8 *Wigmore, supra*, n. 2, §2292, at 554.

⁹ 89 F.Supp. 357, 358 (D. Mass. 1950).

strangers (c) for the purpose of securing primarily either (i) an opinion on the law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Although these definitions refer solely to the client's communication to the attorney, the privilege also includes communications from the attorney to the client to the extent that they contain or would reveal the confidential communications of the client or are based upon or relate to the confidential information provided by the client¹⁰ and therefore generally includes the advice or opinions provided by the attorney.¹¹

The American Law Institute has simplified the basic definition, to state:

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in §86 with respect to:

- (1) a communication
- (2) made between privileged persons
- (3) in confidence
- (4) for the purpose of obtaining or providing legal assistance for the client.¹²

Succeeding sections then define each of these elements. A "communication" is "any expression through which a privileged person ... undertakes to convey information to another privileged person and any document or other record revealing such an expression."¹³ "Privileged persons"

¹⁰ E.g., *In re Ford Motor Company*, 110 F.3d 954, 965 n. 9 (3rd Cir. 1997); *Brinton v. Department of State*, 636 F.2d 600, 603-04 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956); *Soter v. Cowles Publishing Co.*, 131 Wash.App. 882, 903, 130 P.2d 840, 849 (2006); *Olson v. Accessory Controls and Equipment Corp.*, 254 Conn. 145, 157, 757 A.2d 14, 22 (2001); *Harris v. State*, 56 S.W.2d 52, 60 (Tex. App. – Houston 2001); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119-20, 68 Cal.Rptr.2d 844, 850 (2 Dist. 1997); *Gray v. District Court of Eleventh Judicial District*, 884 P.2d 286, 290 (Colo. 1994).

¹¹ But see *Nationwide Mutual Insurance Company v. Fleming*, 924 A.2d 1259, 1269 (Pa. Super.), appeal granted, 594 Pa. 311, 935 A.2d 1270 (2007), where the court ordered disclosure of an attorney's opinion as to the likely outcome of litigation because the opinion did not reveal any confidential facts. The court noted that it had limited its analysis to the attorney-client privilege because the plaintiff had invoked only that privilege, and that decision is now on appeal.

¹² *Restatement (Third) of the Law Governing Lawyers* §68 (2000).

¹³ *Restatement (Third) of the Law Governing Lawyers* §69 (2000).

include the client, a prospective client, the client's lawyer, agents of the client or the lawyer who facilitate communication between them, and agents of the lawyer who facilitate the representation.¹⁴ A communication is in confidence if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one other than a privileged person will learn the contents.¹⁵ Finally, a communication is made for the purpose of obtaining or providing legal assistance if it is made to, or to assist, a person who is a lawyer, or who the client reasonably believes to be a lawyer, and who is consulted for the purpose of obtaining legal assistance.¹⁶ Note that this definition is broader than the two previously cited definitions in that it appears to expressly include communications from the attorney.

Moreover, the attorney-client privilege has been codified by many states, with some definitions appearing broader in scope than others.¹⁷ For example, New Jersey's attorney-client privilege, set forth both as a Court-adopted evidence rule and a Legislature-adopted statute, reads,

(1) General rule. Subject to Rule [530, waiver of privilege] and except as otherwise provided by paragraph 2 of this rule, communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if incompetent or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has

¹⁴ *Restatement (Third) of the Law Governing Lawyers* §70 (2000).

¹⁵ *Restatement (Third) of the Law Governing Lawyers* §71 (2000).

¹⁶ *Restatement (Third) of the Law Governing Lawyers* §72 (2000).

¹⁷ *E.g.*, *Ala. R. Evid.* 502 (2008); *Ark. R. Evid.* 502 (2008); *Cal. Evid. Code* §§951-954 (West 2008); *Fla. Stat. Ann.* §90.502 (West 2008); *Ga. Code Ann.* §§24-9-21(2) & 24-9-24 (West 2008); *Haw. R. Evid.* 503 (2008); *Ky. R. Evid.* 503 (2008); *La. Code Evid. Ann.*, art. 506 (West 2008); *Mich. Comp. Laws Ann.* §767.5a(2) (West 2008); *Miss. R. Evid.* 502 (2008); *Mont. Code Ann.* §26-1-803 (West 2008); *N.H. R. Evid.* 502 (2008); *N.Y. C.P.L.R.* §4503 (McKinney 2008); *Ohio Rev. Code Ann.* §2317.02(A) (West 2008); *Okl. Stat. Ann. tit. 12*, §2502 (West 2008); *Or. Rev. Stat. Ann.* §40.225 (West 2008); *42 Pa. Cons. Stat. Ann.* §5928 (West 2008); *S.D. Codified Laws* §§19-13-2 – 19-13-4 (Rule 502) (West 2008); *Tenn. Code Ann.* §23-3-105 (West 2008); *Texas R. Evid.* 503 (2008); *Utah R. Evid.* 504 (2008); *Wis. Stat. Ann.* §905.03 (West 2008).

been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

(2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes an incompetent whose guardian so consults the lawyer or the lawyer's representative in behalf of the incompetent, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.¹⁸

Thus, counsel must be familiar with the definition adopted by the applicable jurisdiction. However, the common theme of all these definitions is that to qualify for the attorney-client privilege, a communication must be between the client, the potential client, or the client's agent, on the one hand, and the attorney, on the other; it must have been for the purpose of seeking or providing legal assistance; and it must have been intended by the participants to be confidential.

Who is the Client?

A corporation unquestionably can be a client who can assert the attorney-client privilege.¹⁹ So too can other organizations, such as an unincorporated association or a

¹⁸ *N. J. Stat. Ann.* §2A:84A-20 (West 2008); *N.J. R. Evid.* 504 (2008).

¹⁹ *E.g.*, *In re John Doe Corporation*, 675 F.2d 482, 487 (2nd Cir. 1982); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1978); *National Football League Properties, Inc. v. Superior Court*, 65 Cal.App.4th 100, 107, 75 Cal.Rptr.2d 893, 897 (6 Dist. 1998); *Baisley v. Missisquoi Cemetery Association*, 167 Vt. 473, 482, 708 A.2d 924, 929 (1998); *Southern Bell Telephone and Telegraph Company v. Deason*, 632 So.2d 1377, 1380 (Fla. 1994).

partnership.²⁰ Similarly, a community association's communications with its attorney may be subject to the attorney-client privilege.²¹

A corporation's officers are entitled to assert the attorney-client privilege for the corporation.²² The authority to waive the privilege rests with the corporation's officers and directors.²³ When control of the corporation passes to new people, so too does the authority to assert or waive the privilege.²⁴ Thus, when a bankruptcy trustee takes control of a corporation, the trustee obtains the authority to assert or waive the privilege for the corporation because the trustee takes on the role of management.²⁵ A former director therefore has no power to assert or waive the corporation's privilege,²⁶ and a former officer cannot assert the protection if the corporation has waived it.²⁷ Similarly, former managers of a predecessor corporation have no authority to waive the successor corporation's privilege, even if they raise reliance upon the corporation's attorney's advice as a defense.²⁸ On the other hand, a director may retain his or her

²⁰ *Restatement (Third) of the Law Governing Lawyers* §73 (2000). See also *HLC Properties, Limited v. Superior Court*, 35 Cal.4th 54, 62, 105 P.3d 560, 564-65, 24 Cal.Rptr.3d 199, 204 (2005) (noting that under the California Evidence Code, an unincorporated organization may hold the attorney-client privilege where the organization rather than an individual is the client).

²¹ *Wilstein v. San Tropai Condominium Master Association*, 189 F.R.D. 371, 378 (N.D. Ill. 1999); *Smith v. Laguna Sur Villas Community Association*, 79 Cal.App.4th 639, 642, 94 Cal.Rptr.2d 321, 323 (4 Dist. 2000). See also *Wardleigh v. Second Judicial District*, 111 Nev. 345, 881 P.2d 1180 (1995); *Sunwood Condominium Association v. Buddenhagen*, 1991 W.L. 230067 (Conn. Super. October 29, 1991) (each incorporating the premise that the condominium association could claim an attorney-client privilege).

²² *National Football League Properties, Inc.*, *supra*, n. 19, 65 Cal.App.4th at 111, 75 Cal.Rptr.2d at 900.

²³ *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985).

²⁴ *Id.* at 349, 105 S.Ct. at 1991.

²⁵ *Id.* at 353-54, 105 S.Ct. at 1393-94.

²⁶ *Id.* at 349, 105 S.Ct. at 1991; *Lane v. Sharp*, 251 Wis.2d 68, 99, 640 N.W.2d 788, 802 (2002).

²⁷ *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005), *cert. denied*, 546 U.S. 1131, 126 S.Ct. 1114, 163 L.Ed.2d 928 (2006); *In re Grand Jury Subpoena*, 274 F.3d 563, 574 (1st Cir. 2001).

²⁸ *Venture Law Group v. Superior Court*, 118 Cal.App.4th 96, 12 Cal.Rptr.3d 656 (6 Dist. 2004).

own counsel to obtain personal legal advice regarding the director's corporate duties, and the privilege between the director and personal counsel is subject to the director's control, not the corporation's.²⁹

Courts have held that an attorney may not disclose privileged information without the express waiver of the client and in the absence of any direction, must assert the attorney-client privilege with respect to such communications.³⁰ However, whether a current corporate officer or agent has waived the corporation's privilege in the absence of any express waiver by the board depends on the particular facts. The privilege may be waived implicitly,³¹ so a corporate agent may be deemed to have waived the privilege on behalf of the corporation.

For example, legal counsel for a party generally is considered to have the implicit authority to waive the privilege even in the absence of expressed actual authority granted by the client.³² The United States Court of Appeals for the Seventh Circuit held that although a corporate officer must have the authority to bind the corporation, in-house counsel had the implicit authority to waive the corporation's attorney-client privilege.³³ Similarly, an officer/director/control person of a corporation who disclosed otherwise confidential information at a deposition, in the presence of corporate counsel, had the implicit authority to waive the corporation's privilege.³⁴ The U.S. Court of Appeals for the Second Circuit indicated that a corporate officer's compelled testimony before a grand jury does not automatically waive the corporation's attorney client privilege where the corporation has expressly declined to waive the privilege.³⁵ However, the court remanded the matter to the district court to determine whether

²⁹ *Ex parte Smith*, 942 So.2d 356 (Ala. 2006).

³⁰ *E.g., Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556-57 (2nd Cir. 1967).

³¹ *Weil v. Investment/Indicators Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

³² *Law Office of Douglas T. Harris Esquire v. Philadelphia Waterfront Partners, LP*, 957 A.2d 1223, 1232 (Pa. Super. 2008); *Sitterson v. Evergreen School District No. 114*, 196 P.3d 735, 739 (Wash. App. 2008); *Hanover Insurance Company v. Rapo & Jepsen Insurance Services*, 449 Mass. 609, 617, 870 N.E.2d 1105, 1112 (2007); *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or. 336, 342-43, 838 P.2d 1069, 1073 (1992). But see *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 271 Wis.2d 610, 679 N.W.2d 794 (2004) (holding that attorney could not waive the client's attorney-client privilege if not authorized to do so).

³³ *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671, 674-75 (7th Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1521, 55 L.Ed.2d 530 (1978).

³⁴ *Weil, supra*, n. 31, 647 F.2d at 23-25.

³⁵ *In re Grand Jury Proceedings*, 219 F.3d 175, 186 (2nd Cir. 2000).

the witness' statements were a deliberate attempt to exculpate the corporation rather than himself, in which case, the corporation may have implicitly waived the privilege.³⁶

What Communications Are Protected?

A corporation can only communicate through its agents, though. Because the attorney-client privilege is contrary to the search for truth, it must be construed narrowly.³⁷ Therefore, although the governing board or officers may assert or waive the privilege, not all communications between corporate personnel and the corporation's attorney are privileged. In evaluating which communications are protected, it is necessary to consider the identity of the communicants and the purpose.

With respect to the identity, two tests have been used to establish which corporate personnel are potentially covered by the privilege. The "control group" test requires that the communicant be in a position to control or to substantially participate in the decision about any action taken based upon the lawyer's advice or that he be a member of a group having such authority.³⁸ In *Upjohn Company*, the Supreme Court rejected that approach as too limited and utilized instead the "subject matter" test. That test holds that where a corporate agent communicates with the corporation's attorney concerning matters within the scope of his or her duties and at the direction of his or her superiors in order to enable the corporation to secure legal advice and is aware of the reason for such communication, the communication is protected by the corporation's attorney-client privilege.³⁹ However, the Court refused to adopt a universal rule applicable in all circumstances.⁴⁰

In determining the applicable test in a particular jurisdiction, it is important to review that state's law. Illinois, for example, utilizes the control group test.⁴¹ Texas previously utilized the control group test.⁴² However, in 1998, its evidence rule was amended to incorporate the subject

³⁶ *Id.* at 188.

³⁷ *E.g.*, *Westinghouse Electric Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3rd Cir. 1991); *Adams v. Franklin*, 924 A.2d 993, 998 (D.C. 2007); *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W.Va. 457, 482, 583 S.E.2d 80, 105 (2003); *Pappas v. Holloway*, 114 Wash.2d 198, 203-04, 787 P.2d 30, 34 (1990).

³⁸ *E.g.*, *Philadelphia v. Westinghouse Electric Corporation*, 210 F.Supp. 483, 485 (E.D. Pa.), pet. for mandamus and prohibition denied, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963).

³⁹ *Supra*, n. 1, 449 U.S. at 394-95, 101 S.Ct. at 685.

⁴⁰ *Id.* at 396-97, 101 S.Ct. 686.

⁴¹ *Consolidated Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 118-19; 432 N.E.2d 250, 256, 59 Ill.Dec. 666, 673 (1982).

⁴² *National Tank Company v. Brotherton*, 851 S.W.2d 193, 198 (Texas 1993).

matter test as well.⁴³ Nevada uses the subject matter test.⁴⁴

The control group test clearly limits the application of the privilege to only communications between the attorney and corporate personnel who are members of the control group. Although the control group generally consists of the directors and managing officers of a corporation, the definition arguably includes other agents of the organization who are directly involved in the decision which is the subject of the legal advice. For example, New Jersey's Rule of Professional Conduct which provides that an attorney who represents an organization also represents the organization's litigation control group defines the litigation control group "to include current *agents* and employees responsible for, *or significantly involved in*, the determination of the organization's legal position in the matter."⁴⁵ "Significant involvement" requires involvement other than and greater than merely supplying factual information.⁴⁶ Several courts have suggested that the control group may include persons, and particularly non-employees, who advise the decision-makers rather than make the decisions themselves.⁴⁷

The subject matter test, on the other hand, expands the privilege beyond the control group and relies more on the purpose of the communication. Presumably, such a rule also is not limited to employees but rather applies to communications between any corporate agent and the

⁴³ *Texas R. Evid.* 503(a)(2)(B) (2008), defining a client's representative, whose communications also are protected by the privilege, to include "any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication acting in the scope of employment for the client."

⁴⁴ *Wardleigh v. Second Judicial District*, *supra*, n. 21, 111 Nev. at 352, 891 P.2d at 1185 (1995).

⁴⁵ *N.J. R.P.C.* 1.13 (2008) [emphasis added].

⁴⁶ *Id.*

⁴⁷ *Upjohn Co.*, *supra*, n. 1, 449 U.S. at 391, 101 S.Ct. at 683 (noting that the "control group" may include "officers *and agents* ... responsible for directing [the company's] actions" [emphasis added]); *Strawser v. Exxon Co., USA, a Division of Exxon Corp.*, 843 P.2d 613, 620-21 (Wyo. 1992) (under the control group test, the "control group" includes "those employees whose advisory roles to top management are such that a decision would not necessarily be made without these persons' advice or opinions"); and *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 626 (S.D.N.Y. 1990), and *Morrison v. Brandeis University*, 125 F.R.D. 14, 15 (D. Mass. 1989), both suggesting that the control group includes agents who are not employees. See also, *e.g.*, *Lama v. Preskill*, 353 Ill.App.3d 300, 306, 818 N.E.2d 443, 449, 288 Ill.Dec. 755, 761 (2004), appeal denied, 213 Ill.2d 560, 829 N.E.2d 788, 293 Ill.Dec. 863 (2005) (noting that a corporation can only communicate with its attorneys through its employees *or agents*); and *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 559, 812 N.E.2d 976, 991 (2004) (stating that a party may communicate with its attorney through an agent, in which case, communications between the agent and the attorney are privileged).

organization's attorney which have been authorized by the corporation. Thus, where the subject matter test applies, the attorney-client privilege may extend to communications between the attorney and non-employee agents of the organization.⁴⁸

The second factor to consider is the purpose of the communication. Not all communications between the corporation's attorney and a corporate representative fall within the scope of legal advice. The involvement of an attorney does not automatically cloak a communication in the protection of the privilege. Communications between an attorney and his or her client concerning business or personal matters, not involving legal advice, are beyond the scope of the attorney-client privilege.⁴⁹ Thus, where a lawyer was retained to make an investigation of facts and render business recommendations, the lawyer's report was not privileged.⁵⁰ A corporate officer who was an attorney and who signed a note as the representative of a limited partnership could not assert the privilege to refuse to answer questions at a deposition.⁵¹ An in-house attorney's transmittal of documents to a collection agency to seek collection of a debt was deemed to be a business function, not a legal function, so the materials could not be kept confidential.⁵²

The issue of who is covered by the attorney-client privilege in the community association context most often arises with respect to the association managers. Are communications

⁴⁸ *E.g., In re Bieter Company*, 16 F.3d 929 (8th Cir. 1994) (applying the attorney-client privilege to communications between a partnership's attorney and the partnership's independent contractor consultant); *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001) (applying privilege to communications between corporation's attorney and corporation's public relations firm); *Alliance Construction Solutions, Inc. v. Department of Corrections*, 54 P.3d 861 (Col. 2002) (applying privilege to communications between government department's attorney and the department's independent construction contractor); *Sieger v. Zak*, 18 Misc.3d 1143(A), 859 N.Y.S.2d 899 (unpublished opinion, Sup. Ct. 2008) (indicating that the attorney-client privilege could apply to communications between the corporation and its business consultant, but imposing the crime-fraud exception). See also *Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002) (referring to the attorney-client privilege as applying in appropriate circumstances to both employees and "contractors"). But see *Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103 (S.D.N.Y. 2005) (declining to hold that communications between the corporation's attorneys and the corporation's financial consultants were privileged because financial advice is generally not privileged and the corporation had failed to prove that the consultant was so integrated into the corporate structure that he was functionally equivalent to an employee).

⁴⁹ *In re Southern Industrial Banking Corporation*, 35 B.R. 643, 647 (Bankr., E.D. Tenn. 1983).

⁵⁰ *Diversified Industries, Inc.*, *supra*, n. 19, 572 F.2d at 603.

⁵¹ *Southern Industrial Banking Corporation*, *supra*, n. 49, 35 B.R. at 649-50.

⁵² *E.I. DuPont de Nemours & Co. v. FormaPack, Inc.*, 351 Md. 396, 422-23, 718 A.2d 1129, 1142 (1998).

between the association's property manager and the association's attorney protected by the attorney-client privilege? Under the control group test, protection may be limited. However, if the manager substantially participates with the governing board and the attorney in making a decision by doing more than merely supplying facts or data, for example, by analyzing the effects of alternative actions and providing a recommendation, it can reasonably be argued that the manager is a member of the control group because he or she had significant involvement in formulation of the decision, as discussed above. In that case, the manager's discussions with the attorney regarding or leading to legal advice about that decision could be protected.

Under the subject matter test, communications between the manager and the attorney, authorized by the association and concerning a privileged issue, are privileged if the parties intended them to be confidential. The justification for protecting such communications is the same as for protecting lawyer-employee communications. A corporation or other organization, which is entitled to assert the attorney-client privilege, can only act through its agents.⁵³ It should not matter whether such agents are employees or independent contractors.

Community associations generally are governed by boards of trustees or directors comprised of unpaid volunteers, elected for set terms. They generally are not available at all times, nor can they be expected to be immediately informed on all issues concerning the association. They therefore rely upon professional management for the operation of the community. As a result, communications with board members are routinely transmitted through the managing agent, and the board implements its policies through the manager.

Because management personnel are responsible for the day-to-day operations of the community and implement the directives of the board, they are important links between the association and its attorney. As the keeper of an association's records and files, management has a significant involvement in formulating the association's legal position in a case, providing both factual information which is necessary for the litigation and advice to the board as to what actions need to be taken to maintain and protect, for example, the association's finances and the physical plant. By necessity, the attorneys must consult with them, obtain information from them, and relay information to them regarding legal issues. Communications between the association's attorneys and management regarding litigation and other association legal matters thus are communications between the attorneys and their client, the association.

As the agent of an association, management personnel have a duty to act loyally for the benefit of the association⁵⁴ and not to use confidential information obtained from the association to the detriment of the association.⁵⁵ The cases discussed above recognize that an agent may be involved in a corporation's decision-making. A privileged communication does not lose its

⁵³ *Lama, supra*, n. 47, 353 Ill.App.3d at 306, 818 N.E.2d at 449, 288 Ill.Dec. at 761; *Macey v. Rollins Environmental Services, Inc.*, 179 N.J. Super. 535, 540, 432 A.2d 960, 963 (App. Div. 1981).

⁵⁴ *Restatement (Third) of Agency* §8.01 (2006).

⁵⁵ *Restatement (Third) of Agency* §8.05 (2006).

status as such because it is shared or relayed by those corporate agents who are responsible for the matter.⁵⁶ Thus, communications between a common interest community's management and the association's attorneys regarding association legal matters should be privileged.

Shareholders'/Members' Rights

Although corporate shareholders or members may have a right to certain disclosures from the corporation, they are not the clients of the corporation's attorney and so do not have an absolute right to pierce the corporation's attorney-client privilege.⁵⁷ Members of a community association similarly do not have an automatic right to disclosure of association confidences.⁵⁸ An argument that the shareholders or members are the ultimate beneficiaries of the corporation's actions is not sufficient to establish a confidential relationship between the corporation's attorney and the shareholders.⁵⁹ The *Smith* court explained the reasoning behind this rule:

It is no secret that crowds cannot keep them. Unlike directors, the residents owed no fiduciary duties to one another and may have been willing to waive or breach the attorney-client privilege for reasons unrelated to the best interests of the association. ... As Villas points out, "[o]ne can only imagine the sleepless nights an attorney and the Board of Directors may incur if privileged information is placed in the hands of hundreds of homeowners who may not all have the same goals in mind."⁶⁰

On the other hand, because the association members are not covered by the association's attorney-client privilege, communications between the homeowners and the association's attorney are not protected. In *Wardleigh*,⁶¹ the court explained that neither the "control group" test nor the "subject matter" test for determining if corporate personnel are within the scope of the corporation's privilege applies to corporate shareholders or, by analogy, members of a homeowners association. Thus, where an association's attorney communicates otherwise confidential information in the presence of homeowners who are not participating in a protected capacity (such as trustees or appropriate agents of the association), the communications are subject to disclosure.

⁵⁶ *Wilstein, supra*, n. 21, 189 F.R.D. at 379.

⁵⁷ *National Football League Properties, Inc., supra*, n. 19, 65 Cal.App.4th at 107, 75 Cal.Rptr.2d at 897.

⁵⁸ *Smith, supra*, n. 21, 79 Cal.App.4th at 644, 94 Cal.Rptr.2d at 323.

⁵⁹ *National Football League Properties, Inc., supra*, n. 19, 65 Cal.App.4th at 111, 75 Cal.Rptr.2d at 900; *Smith, supra*, n. 19, 79 Cal.App.4th at 644, 94 Cal.Rptr.2d at 324. See also *Huie v. DeShazo*, 922 S.W.2d 920 (Texas 1996) (holding that beneficiaries of a trust may not overcome the attorney-client privilege between the trustee and his attorney on the grounds that they are the beneficiaries).

⁶⁰ *Smith, supra*, n. 21, 79 Cal.App.4th at 645, 94 Cal.Rptr.2d at 324.

⁶¹ *Supra*, n. 21, 111 Nev. at 352, 881 P.2d at 1185.

Although members or shareholders have no absolute right to receive confidential information from the corporation, in some jurisdictions, there may be situations which arise which create such a right. Corporations exist to serve their shareholders and members. Some courts therefore have held that where stockholders have sued their corporation alleging that management has acted inimically toward the shareholders, the corporation's claim of the attorney-client privilege to avoid disclosure of information to the plaintiffs requires a showing of good cause.⁶² Where there is evidence of wrongdoing on the part of management, the attorney-client privilege may not prevent disclosure to the shareholders.⁶³ Moreover, where a statute requires disclosure of corporate books and records to shareholders and members, a corporation may not be able to withhold disclosure on the grounds that the documents are privileged if the requesting shareholder can show a proper purpose for seeking the records, such as a good faith fear of mismanagement.⁶⁴ On the other hand, some courts have indicated that the corporation's privilege is absolute even against its members.⁶⁵

A related question is whether the association can claim the attorney-client privilege to prevent disclosure to a former director or trustee of information and materials that were prepared during that director's service. The courts appear split on that issue. The Supreme Court of Montana held that a corporation could not assert the attorney-client privilege against a former director, who had sued the corporation, to shield from disclosure privileged communications which took place during his tenure as director.⁶⁶ The court reasoned that a corporate director is

⁶² *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971); *Beard v. Ames*, 96 A.D.2d 119 (N.Y. App. Div. 1983).

⁶³ *Garner v. Wolfenbarger*, 56 F.R.D. 499 (S.D. Ala. 1972); *Restatement (Third) of the Law Governing Lawyers* §85 (2000).

⁶⁴ *Pershing Square, L.P. v. Ceridian Corporation*, 923 A.2d 810, 817 (Del. Ch. 2007); *Meyer v. Board of Managers of Harbor House Condominium Association*, 221 Ill.App.3d 742, 747-48, 583 N.E.2d 14, 17-18, 164 Ill.Dec. 460, 463-64 (1 Dist. 1991), which was later overruled by amendment to 765 Ill. Comp. Stat. Ann. 605/19 (West 2008) exempting certain types of documents from disclosure.

⁶⁵ *Schein v. Northern Rio Arriba Electric Cooperative, Inc.*, 122 N.M. 800, 805, 932 P.2d 490, 495 (1997) (noting that corporate documents that are subject to the attorney-client privilege may be withheld from shareholders); *Huie, supra*, n. 59, 922 S.W.2d at 924 (Texas 1996), overruling *Burton v. Cravey*, 759 S.W.2d 160 (Texas App.-Houston 1988), which held that a condominium association's books and records held by its attorney must be disclosed to the members; *The Cove on Herring Creek Homeowners' Association v. Riggs*, 2001 W.L. 1720194, at 2 (Del. Ch. 2001) (holding that a homeowners association may assert the attorney-client privilege against the property owners). See also *National Football League Properties, Inc.*, *supra*, n. 19, 65 Cal.App.4th at 107-08; 75 Cal.Rptr.2d at 898; *Smith, supra*, n. 21, 79 Cal.App.4th at 644, 94 Cal.Rptr.2d at 323-24.

⁶⁶ *Inter-Fluve v. Montana Eighteenth Judicial District Court*, 327 Mont. 14, 112 P.3d 258 (2005).

jointly responsible for the proper management of the corporation and therefore must be treated as a joint client with the corporation with respect to legal advice provided while he is a director.⁶⁷ New York's Appellate Division held that a former 50 percent shareholder and director of a corporation was entitled to disclosure of privileged communications that occurred before he surrendered his stock because of the extent of his ownership and managerial involvement.⁶⁸ However, other courts have held that a former director has no right to disclosure of privileged information provided during his term as director simply because he no longer has any management responsibility or duty to maintain confidentiality.⁶⁹

Corporate Documents

Generally, members of a corporation are entitled to inspect and obtain copies of records required to be kept by the corporation, provided they have a proper purpose for doing so. Such records generally include the names and addresses of the members, the books and records of account, and the minutes of membership and board meetings and may include other specified items.⁷⁰ A proper purpose is one reasonably related to the legitimate interests of the member and not harmful to the corporation or its members.⁷¹ A number of planned development and condominium statutes also expressly require retention of specified records and provide for inspection by association members.⁷² Several statutes contain specified exceptions to the

⁶⁷ *Id.* at 23-24, 112 P.3d at 264.

⁶⁸ *Fochetta v. Schlackman*, 257 A.D.2d 546, 685 N.Y.S.2d 22 (1999).

⁶⁹ *Lane*, *supra*, n. 26, 251 Wis.2d at 99-100, 640 N.W.2d at 802; *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 463 (Col. App. 2003).

⁷⁰ See, e.g., *Col. Rev. Stat. Ann.* §§7-136-101 & 7-136-102 (West 2008); *Ga. Code Ann.* §14-3-1602 (West 2008); 805 *Ill. Comp. Stat. Ann.* 105/107.75 (West 2008); *N.J. Stat. Ann.* §15A:5-24 (West 2008); 15 *Pa. Cons. Stat. Ann.* §5508 (West 2008); *S.C. Code Ann.* §§ 33-31-1601 & 33-31-1602 (West 2008); *Texas Property Code Ann.* §82.114 (Vernon 2008); *Utah Code Ann.* §§16-6a-1601 & 16-6a-1602 (West 2008); *Parker v. Clary Lakes Recreation Association, Inc.*, 243 Ga.App. 681, 534 S.E.2d 154 (2000); *Schein*, *supra*, n. 65, 122 N.M. at 803, 932 P.2d at 493.

⁷¹ *Schein*, *supra*, n. 65, 122 N.M. at 803-04, 932 P.2d at 493-94; *Col. Rev. Stat. Ann.* §7-136-102(4)(b) (West 2008); 15 *Pa. Cons. Stat. Ann.* §5508(b) (West 2008); *Utah Code Ann.* §16-6a-1602(4)(b) (West 2008).

⁷² E.g., *Ala. Code* §35-8A-318 (West 2008); *Cal. Civil Code Ann.* §1365.2 (West 2008); *Conn. Gen. Stat. Ann.* §47-81 (West 2008); *Del. Code Ann.* tit. 25, §81-3-118 (West 2008); *Fla. Stat. Ann.* §720.303(3), (4) & (5) (West 2008); *Haw. Rev. Stat. Ann.*, §421J-7 (West 2008); 765 *Ill. Comp. Stat. Ann.* 605/19 (West 2008); *Md. Code Ann.*, Real Prop. §11B-112 (West 2008); *Neb. Rev. Stat.* §76-816 (West 2008); *N.M. Stat. Ann.* §47-7C-18 (West 2008); *Or. Rev. Stat. Ann.* §94.670 (West 2008); *Va. Code Ann.* §§55-79.74:1 & 55-510 (West 2008).

mandate for inspection.⁷³ Therefore, in determining what materials may be withheld from association members, counsel must examine the particular jurisdiction's statutes applicable to the form of the association.

Attorneys also should be familiar with applicable open meetings acts. A number of states have mandated that meetings of association governing boards be open to members, that minutes be kept of such meetings, and that the minutes be made available to the members.⁷⁴ These statutes generally contain exceptions for subjects the disclosure of which would undermine the attorney-client privilege, privacy rights or other needs which the legislatures have deemed take precedence over member rights. Minutes of closed, or executive session, meetings at which such topics have been discussed need not be routinely disclosed. However, courts have held that unless there is a recognized evidentiary privilege, disclosure of executive session records may be required in certain cases.⁷⁵

Notwithstanding that an association may have an obligation to disclose certain records to members, a member's right to obtain records may be limited by reasonable rules necessary to protect the unit owners and the association. As noted above, a number of statutes expressly require that a member requesting documents have a proper purpose for doing so. Associations also probably may limit records disclosures to reasonable periods of time⁷⁶ and may require a member to sign a confidentiality agreement as a condition for obtaining the membership list.⁷⁷ The Delaware Supreme Court held that disclosure of corporate records to shareholders may be

⁷³ *Cal. Civil Code Ann.* §1365.2(d) (West 2008); *Del. Code Ann.* tit. 25, §81-3-118(c) (West 2008); *Fla. Stat. Ann.* §720.303(5)(c) (West 2008); 765 *Ill. Comp. Stat. Ann.* 605/19(g) (West 2008); *Md. Code Ann.*, Real Prop. §11B-112(a)(2) (West 2008); *Or. Rev. Stat. Ann.* §94.670(7)(b) & (8) (West 2008); *Va. Code Ann.* §55-79.74:1C (West 2008).

⁷⁴ *E.g.*, *Ariz. Rev. Stat. Ann.* §33-1248 (West 2008); *Fla. Stat. Ann.* §720.303(2) & (3) (West 2008); *Haw. Rev. Stat. Ann.* §514B-125 (West 2008); 805 *Ill. Comp. Stat. Ann.* 105/108.21 (West 2008); *Kan. Stat. Ann.* §58-3830 (West 2008); *Md. Code Ann.*, Real Prop. §11B-111 (West 2008); *N.J. Stat. Ann.* §46:8B-13a (West 2008); *Va. Code Ann.* §§55-79.75 & 55-510.1 (West 2008).

⁷⁵ *E.g.*, *Wilstein, supra*, n. 21, 189 F.R.D. at 377-78 (holding that information discussed at executive session meetings is not *per se* privileged and must be disclosed where there is a substantial need for the evidence); *Southern California Housing Rights Center v. Los Feliz Towers Homeowners Association*, 2005 W.L. 3954720, at 4 (U.S. Dist. Ct., C.D. Cal. 2005) (holding that only portions of executive session minutes which discuss confidential information disclosed to or received from the attorney are protected from disclosure, and other parts are subject to discovery).

⁷⁶ *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association*, 383 N.J. Super. 22, 61, 890 A.2d 947, 971-72 (App. Div. 2006), partially rev'd. on other grounds, 192 N.J. 344, 929 A.2d 1060 (2007).

⁷⁷ *Id.* at 59, 890 A.2d at 970.

conditioned upon signing a confidentiality agreement when necessary to safeguard the rights of the corporation.⁷⁸

Whether particular documents may be subject to the attorney-client privilege depends upon their contents and their distribution. To be protected from disclosure, documents must contain privileged information and be shared only by those within the scope of the privilege.

For example, bills and invoices submitted by attorneys to their clients are generally not privileged because the fact that an attorney has been retained and the amount of his or her fees are not privileged.⁷⁹ One court has stated that the instructions given by a corporate client to its attorney and the nature and scope of the attorney's authority are not privileged.⁸⁰

However, courts also have recognized that attorney bills may contain privileged information. Itemized bills which indicate the detailed work of the attorney and disclose such information as the people with whom the attorney spoke, the subjects the attorney researched, and the papers the attorney reviewed may reveal strategies, confidential communications, the motive of the client, or the specific nature of the services provided and therefore may be protected.⁸¹ In such circumstances, the attorney may redact privileged information before disclosing the bills.⁸² The court may be required to conduct an *in camera* review to assure that confidential information is not disclosed.⁸³

⁷⁸ *Stroud v. Grace*, 606 A.2d 75, 89 (Del. 1992).

⁷⁹ E.g., *Hanover Insurance Company*, *supra*, n. 32, 449 Mass. at 619, 870 N.E.2d at 1114; *Hunterdon County Policemen's Benevolent Association Local 188 v. Township of Franklin*, 286 N.J. Super. 389, 394, 669 A.2d 299, 302 (App. Div. 1996); *Maxima Corporation v. 6933 Arlington Development Limited Partnership*, 100 Md.App. 441, 456-57, 641 A.2d 977, 984 (1994); *City of New Haven v. Freedom of Information Commission*, 4 Conn.App. 216, 220, 493 A.2d 283, 285 (1985); *Brandman v. Cross & Brown Company of Florida*, 125 Misc.2d 185, 187-88, 479 N.Y.S.2d 435, 437-38 (Sup. Ct. 1984).

⁸⁰ *Schein*, *supra*, n. 65, 122 N.M. at 805, 932 P.2d at 495.

⁸¹ E.g., *Slusaw v. Hoffman*, 861 A.2d 269, 273 (Pa. Super. 2004); *Maxima Corporation*, *supra*, n. 79, 100 Md.App. at 457, 641 A.2d at 984; *Hewes v. Langston*, 853 So.2d 1237, 1248-49 (Miss. 2003).

⁸² E.g., *Maughan v. Google Technology, Inc.*, 143 Cal.App.4th 1242, 1256, 49 Cal.Rptr.3d 861, 872 (2 Dist. 2007); *Farber v. Bay View Terrace Homeowners Association*, 141 Cal.App.4th 1007, 1014, 46 Cal.Rptr.3d 425, 430 (4 Dist. 2006); *Soiefer v. Soiefer*, 17 A.D.3d 268, 269, 794 N.Y.S.2d 20, 21 (2005); *Slusaw*, *supra*, n. 81, 861 A.2d at 273; *Teich v. Teich*, 245 A.D.2d 41, 665 N.Y.S.2d 859 (1997).

⁸³ *Hunterdon County Policemen's Benevolent Association Local 188*, *supra*, n. 79, 286 N.J. Super. at 394-95, 669 A.2d at 302; *Maxima Corporation*, *supra*, n. 79, 100 Md.App. at 457, 641 A.2d at 984.

Waiver of the Privilege

Otherwise privileged communications may lose their confidentiality due to waiver or because of statutory exceptions. Exceptions include communications in furtherance of a crime or fraud, communications by claimants through a deceased client, communications pertaining to a claim of a breach of duty by the lawyer or by the client, documents attested by the attorney, and communications with any clients jointly represented by the attorney in a common matter. The New Jersey rule provides an example of such exceptions. Section 2, defining the exceptions, states,

Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.⁸⁴

Thus, communications in a legal relationship which the client is using to commit a crime or fraud are not privileged; communications pertaining to a joint representation with the attorney who is representing the joint clients are not privileged as to any of the joint clients; and communications which are relevant to a claim between an attorney and his or her client of a breach of duty also are not privileged.

Of course, where a client waives the privilege, by intentionally disclosing or authorizing the lawyer to disclose the confidential information, the communication no longer is privileged. Waiver also can occur by putting privileged communications in issue. A party who raises a claim or defense which will require reliance upon a privileged communication implicitly waives the privilege as to all related communications.⁸⁵ Thus, where a party has made the statute of limitations an issue and the evidence to prove the issue will come from privileged documents or communications with counsel, that party is deemed to have waived the attorney-client privilege as to all related documents.⁸⁶ When a party raises the defense of reliance upon counsel, the privilege as to all communications with counsel is waived so that the party opposing the defense

⁸⁴ *N. J. Stat. Ann.* 2A:84A-20(b) (West 2008); *N.J. R. Evid.* 504(2) (2008).

⁸⁵ *Export-Import Bank of the United States*, *supra*, n. 48, 232 F.R.D. at 114; *Wardleigh*, *supra*, n. 21, 111 Nev. at 355, 891 P.2d at 1186; *Southern California Gas Company v. Public Utilities Commission*, 50 Cal.3d 31, 40, 784 P.2d 1373, 1378, 265 Cal.Rptr. 801, 806 (1990).

⁸⁶ *Lama*, *supra*, n. 47, 353 Ill.App.3d at 306, 818 N.E.2d at 449, 288 Ill.Dec. at 761; *Wardleigh*, *supra*, n. 21, 111 Nev. at 357, 891 P.2d at 1187.

can adequately test it.⁸⁷ In a California case, the court found that by putting his attorney's state of mind in issue, the plaintiff had waived the attorney-client privilege.⁸⁸ Similarly, a party who claims that his attorney did not give him necessary information has waived the privilege regarding his communications with his attorney.⁸⁹ Where a plaintiff intends to call his attorney as a witness, he also waives the attorney-client privilege.⁹⁰ However, if the claim or defense is fruitless, the opposing party may not be entitled to pierce the attorney-client privilege in reliance upon such claim or defense.⁹¹

Actual waiver occurs when a privileged communication is disclosed to a third party who is not encompassed by the privilege.⁹² For example, voluntary disclosure of a condominium association's confidential minutes and attorney's opinion constituted a waiver of the attorney-client privilege.⁹³ The majority hold that disclosure of privileged information to a government agency is deemed a waiver of the privilege even where the government agency agrees to maintain confidentiality.⁹⁴ The minority view is that a corporation may selectively waive the privilege by disclosing confidential information to a government agency subject to a confidentiality agreement and thereby preserve the privilege as to others.⁹⁵

The issue of waiver generally is much clearer when an individual holds the privilege because that individual's conduct and speech directly show his or her intent. As applied to an organization, the issue of waiver can be complex because the waiver must be properly

⁸⁷ *Glenmede Trust Company v. Thompson*, 56 F.3d 476, 486-87 (3rd Cir. 1995); *Edmund J. Flynn Company v. LaVay*, 431 A.2d 543, 551 (D.C. 1981).

⁸⁸ *Merritt v. Superior Court*, 9 Cal.App.3d 721, 730, 88 Cal.Rptr. 337 (1970).

⁸⁹ *1050 Tenants Corp. v. Lapidus*, 12 Misc.3d 1118, 817 N.Y.S.2d 491 (Civ. Ct. 2006).

⁹⁰ *Dewey Merritt v. Superior Court of Los Angeles County*, 9 Cal.App.3d 721, 730, 88 Cal.Rptr. 337 (1970); *Aysseh v. Lawn*, 186 N.J. Super. 218, 452 A.2d 213 (Ch. Div. 1982).

⁹¹ *Export-Import Bank of the United States*, *supra*, n. 48, 232 F.R.D. at 114.

⁹² *In re Sealed Case*, 676 F.2d 793, 809, 219 U.S.App.D.C. 195, 211 (D.C. Cir. 1982).

⁹³ *Chinnici v. Central Dupage Hospital Association*, 136 F.R.D. 464, 465 (N.D. Ill.), order clarified, 1991 W.L. 127606 (U.S. Dist. Ct., N.D. Ill. 1991).

⁹⁴ E.g., *Permian Corporation v. United States*, 665 F.2d 1214, 214 U.S.App.D.C. 396 (D.C. Cir. 1981); *Westinghouse Electric Corporation*, *supra*, n. 37, 951 F.2d 1414; *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997); *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), *pet. for cert. dismissed*, 539 U.S. 977, 124 S.Ct. 27, 156 L.Ed.2d 690 (2003); *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006).

⁹⁵ *Diversified Industries, Inc.*, *supra*, n. 19, 572 F.2d at 611.

authorized. Thus, where an adverse party obtained a confidential letter between an attorney and an association's governing board from an undisclosed source and the governing board had not authorized such disclosure, there was no waiver.⁹⁶ The president of a corporation cannot waive the corporation's attorney-client privilege unless authorized to do so.⁹⁷ A dissident director cannot waive the corporation's attorney-client privilege over the objection of management.⁹⁸ On the other hand, when a corporation has waived the privilege, a corporate employee who has no attorney-client relationship with the corporation's attorney may not assert the privilege.⁹⁹

Electronic Communication

The prolific use of electronic communications also raises questions of waiver. Some commentators have questioned whether voice mail messages, facsimile transmissions, cell phone and cordless telephone calls, and e-mails between an attorney and his or her client are privileged. Cell phone and cordless telephone calls can be intercepted. E-mails also can be intercepted and are even less secure than phone calls because they are transmitted through various computer servers and their ease of use makes them more susceptible to accidental misdirection. Voice mail messages may be heard by unauthorized persons, and faxes can wind up in the hands of unauthorized parties since they are printed out on machines where third parties can view them. Recommendations therefore have been made that because of the possibility of interception and misdirection, these modes of communication be encrypted to maintain confidentiality.¹⁰⁰ Of course, wireless telephone calls, voice mail and faxes are safer than e-mails because they are

⁹⁶ *The Cove on Herring Creek Homeowners' Association, Inc.*, *supra*, n. 65, 2001 W.L. 1720194, at 3.

⁹⁷ *Stewart Equipment Co. v. Gallo*, 32 N.J. Super. 15, 17, 107 A.2d 527, 528 (Law Div. 1954).

⁹⁸ *Milroy v. Hansen*, 902 F.Supp. 1029, 1031 (D. Neb. 1991).

⁹⁹ *Grand Jury Subpoena: Under Seal*, *supra*, n. 27, 415 F.3d 333.

¹⁰⁰ *E.g.*, Paul H. Aloe, 1997-98 *Survey of New York Law, Civil Procedure*, 40 *Syracuse L. Rev.* 247, 262-64 (1999); Harry M. Gruber, Note, *E-mail: The Attorney-Client Privilege Applied*, 66 *Geo. Wash. L. Rev.* 624 (March 1998); Amy M. Fulmer Stevenson, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 *Cap. U. L. Rev.* 347 (1997); William P. Matthews, Comment, *Encoded Confidences: Electronic Mail, the Internet, and the Attorney-Client Privilege*, 45 *U. Kan. L. Rev.* 273 (November 1996); Patricia M. Worthy, *The Impact of New and Emerging Telecommunications Technologies: A Call to the Rescue of the Attorney-Client Privilege*, 39 *How. L. J.* 437 (Winter 1996). See also *United States v. Mathis*, 96 F.3d 1577, 1583-84 (11th Cir. 1996), *cert. denied*, 520 U.S. 1213, 117 S.Ct. 1699, 137 L.Ed.2d 825 (1997), refusing to suppress from evidence intercepted cordless and cellular telephone conversations on the grounds that federal statutory law at that time recognized no reasonable expectation of privacy to these conversations.

transmitted directly to the recipients' machines. In addition, it has been noted that similar doubts about security even applied to landline telephone conversations at one time.¹⁰¹

In light of the advances in technology and particularly security and the adoption and amendment of the Electronic Communications Privacy Act of 1986 (ECPA)¹⁰² to prohibit the interception of all kinds of wireless messages, recent pronouncements seem to have accepted that the risk of interception of these types of communications is not sufficient to constitute a waiver, provided that the parties take reasonable precautions to prevent dissemination to unauthorized persons.¹⁰³ The standard now appears to be whether the parties had a reasonable expectation that their communication would remain private. For example, where a client sends and receives e-mails via his employment e-mail address and is aware of the employer's policy of having the right to access employee's e-mails, there is no expectation of privacy, and such e-mails are not privileged.¹⁰⁴ On the other hand, where an employer's policy did not expressly advise that it would monitor private e-mail accounts or that e-mails were retained on hard drives, the employee's transmission of e-mails via his private account and his attempt to delete the e-mails from the hard drive demonstrated a reasonable expectation of privacy. Therefore, his e-mails

¹⁰¹ Matthews, *supra*, n. 100, at 273.

¹⁰² 28 U.S.C. §2510, *et seq.* (West 2008).

¹⁰³ Mitchel L. Winick, Brian Burris, Y. Danae Bush, *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 Tex. Tech L. Rev. 1125 (2000); Dennis P. Duffy, *Professionalism and Ethics Obligations*, 37th Annual Institute on Employment Law 353 (PLI 2008); ABA Committee on Ethics and Professional Responsibility, Formal Op. 99-413 (1999). See also Yvette Joy Liebesman, *The Potential Effects of United States v. Councilman on the Confidentiality of Attorney-Client E-mail Communications*, 18 Geo. J. Legal Ethics 893 (Summer 2005), noting the view that e-mails retain the attorney-client privilege but questioning the viability of protection in light of the First Circuit's decision in *United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004), that interception of e-mails was not a violation of the ECPA. That decision was subsequently reversed *en banc*, and the court held that there was a violation of the Act. *United States v. Councilman*, 418 F.3d 67 (1st Cir. 2005).

¹⁰⁴ *Scott v. Beth Israel Medical Center, Inc.*, 17 Misc.3d 934, 847 N.Y.S.2d 436 (Sup. Ct. 2007); *Banks v. Mario Industries of Virginia, Inc.*, 274 Va. 438, 453-54, 650 S.E.2d 687, 695 (2007); *Kaufman v. SunGard Investment Systems*, 2006 W.L. 1307882, at 4 (U.S. Dist. Ct., D.N.J. 2006).

retained protection.¹⁰⁵ The fact that privileged communications are sent by facsimile or by e-mail does not *per se* eliminate the attorney-client privilege.¹⁰⁶

However, attorneys must be sensitive to the potential differing opinions regarding the application of the attorney-client privilege to electronic communications. Clients should be informed of the risks and allowed to decide whether they wish to utilize such means of communication. If electronic communications are used, caution must be exercised to avoid accidental misdirection of messages, such as proofreading and rechecking addresses before hitting the “send” button. Of course, attorneys may also encrypt their communications with clients to reduce the chance of inadvertent disclosure if they believe that such effort and expense are warranted.

Work Product Doctrine

Although sometimes overlapping with and frequently discussed in conjunction with the attorney-client privilege, the work product doctrine is distinct. The work product doctrine protects from disclosure information and materials obtained or prepared in anticipation of litigation or for trial.¹⁰⁷ The rationale for the doctrine is that a party is not entitled to prepare his case through the investigative work of his adversary where the same information is essentially available through other sources.¹⁰⁸ The doctrine continues to protect the subject materials even after the litigation has concluded.¹⁰⁹

While the “work product” in question often is that of an attorney, it need not be. The United States Supreme Court has discussed the importance of the work product doctrine in enabling an attorney to prepare his or her client’s case.¹¹⁰ However, materials prepared by or for a party or the party’s representative other than an attorney also can be protected,¹¹¹ and the

¹⁰⁵ *National Economic Research Associates, Inc. v. Evans*, 21 Mass. L. Rptr. 337, 2006 W.L. 2440008 (Super. 2006). See also *Sims v. Lakeside School*, 2007 W.L. 2745367, at 1-2 (U.S. Dist. Ct., W.D. Wash. 2007) (where e-mails sent on employer’s service from employer’s laptop were not privileged but web-based e-mails retained privilege).

¹⁰⁶ *E.g. State ex rel. United States Fidelity and Guaranty Company v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

¹⁰⁷ *Diversified Industries, supra*, n. 19, 572 F.2d at 603; *Southern Bell Telephone and Telegraph Co., supra*, n. 19, 632 So.2d at 1383.

¹⁰⁸ *Southern Bell Telephone and Telegraph Co., supra*, n. 19, 632 So.2d at 1384.

¹⁰⁹ *Pappas, supra*, n. 37, 114 Wash.2d at 209-10, 787 P.2d at 37.

¹¹⁰ *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947); *United States v. Nobles*, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975).

¹¹¹ *Diversified Industries, supra*, n. 19, 572 F.2d at 603; *Southern Bell Telephone and Telegraph Co., supra*, n. 19, 632 So.2d at 1384.

materials need not have been created at the request of an attorney.¹¹² For the doctrine to apply, though, litigation must be pending or reasonably anticipated.¹¹³ A remote prospect of litigation is insufficient to give rise to work product immunity.¹¹⁴ A document is considered to have been prepared in anticipation of litigation if it can be fairly said to have been prepared or obtained *because* of the prospect of litigation.¹¹⁵ Documents prepared in the ordinary course of business or that would have been created even in the absence of litigation are not “work product.”¹¹⁶

In the organizational context, the application of the work product doctrine differs significantly from the attorney-client privilege. As noted above, the work product doctrine is not limited to communications involving an attorney, as the attorney-client privilege is. Moreover, the issue for work product immunity is not whether the employee or agent is within the scope of the privilege. Rather, the issue is whether the communication by the employee or agent is in furtherance of investigation or preparation in anticipation of or for litigation.¹¹⁷

Notwithstanding the purpose of the doctrine, the adverse party may abrogate it and obtain the protected materials if it can demonstrate that it has a substantial need for them but is unable to obtain the substantial equivalent without undue hardship.¹¹⁸ However, unlike waiver of the attorney-client privilege, the work product doctrine is not waived by the proponent merely because the information is disclosed to a third party. Rather, the protection is waived only if the material is disclosed in a manner that is inconsistent with keeping it from an adversary.¹¹⁹ For example, an attorney’s disclosure of materials prepared for litigation to the client’s investigator does not waive the work product protection, but disclosure to the adverse party does.¹²⁰

¹¹² *Copper Market Antitrust Litigation*, *supra*, n. 48, 200 F.R.D. at 220.

¹¹³ *Lane*, *supra*, n. 26, 251 Wis.2d at 117, 640 N.W.2d at 811.

¹¹⁴ *Diversified Industries*, *supra*, n. 19, 572 F.2d at 604.

¹¹⁵ *Copper Market Antitrust Litigation*, *supra*, n. 48, 200 F.R.D. at 220.

¹¹⁶ *Id.* at 221.

¹¹⁷ *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2nd Cir. 1979).

¹¹⁸ *John Doe Corp.*, *supra*, n. 19, 675 F.2d at 492; *Wardleigh*, *supra*, n. 21, 111 Nev. at 357, 891 P.2d at 1188; *State Farm Fire and Casualty Company v. Von Hohenberg*, 595 So.2d 303, 304 (Fla. App., 3 Dist. 1992); *Pappas*, *supra*, n. 37, 114 Wash.2d at 210, 891 P.2d at 37-38.

¹¹⁹ *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 687 (1st Cir. 1997); *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 328 (N.D. Cal. 1985).

¹²⁰ *Hartford Fire Insurance Co.*, *supra*, n. 119, 109 F.R.D. at 328.

Because association attorneys, managers and board members often are involved in investigating issues which may result in litigation or actually prepare materials for use in litigation, they should be familiar with the boundaries of the work product doctrine. Sharing information among association officers and agents in order to plan and prepare for anticipated litigation is appropriate. Disclosure of materials to potential adversaries, on the other hand, may constitute a waiver and enable adversaries to benefit from the efforts of the association's personnel where they otherwise would not have been able to do so. It may be to an association's advantage to provide such information to an adverse party, for example, to attempt to convince the party not to sue. However, such disclosure should be made only if the association recognizes the potential disadvantage as well.

DIRECTORS' OBLIGATIONS

Asserting the attorney-client privilege, though, does not alone protect the association from disclosure of confidential information. Those who are privy to the information must protect it so that the organization is not deemed to have waived the privilege or, even if not deemed waived, the organization will not be prejudiced by unauthorized disclosure. In particular, directors have a duty not to disseminate confidential information.

Directors/Trustees Have Fiduciary Duty

Directors and trustees of community associations have a fiduciary duty of loyalty to their respective associations and must devote themselves to promote the common interests of their association.¹²¹ Several state statutes emphasize the obligation of directors of a non-profit corporation to act in good faith in the best interests of the corporation. New Jersey, for example, requires that trustees of a corporation "discharge their duties in good faith and with that degree of diligence, care and skill which ordinary, prudent persons would exercise under similar circumstances in like positions."¹²² A Pennsylvania statute states that a director of a non-profit corporation stands in a fiduciary relation to the corporation and must perform his duties "in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care ... as a person of ordinary prudence would use under similar circumstances."¹²³ Thus,

¹²¹ *E.g.*, *Willens v. 2720 Wisconsin Avenue Co-operative Ass'n., Inc.*, 844 A.2d 1126, 1136 (D.C. 2004); *Schweickart v. Powers*, 245 Ill.App.3d 281, 290, 613 N.E.2d 403, 410, 184 Ill.Dec. 376, 383 (2 Dist. 1993); *Mulligan v. Panther Valley Property Owners Association*, 337 N.J. Super. 293, 309, 766 A.2d 1186, 1194 (App. Div. 2001); *Board of Managers of Fairways at North Hills Condominium v. Fairway at North Hills*, 193 A.D.2d 322, 324-25, 603 N.Y.S.2d 867, 869 (1993). See also, in general, *Hollinger International, Inc. v. Black*, 844 A.2d 1022, 1061-62 (Del. Ch.), interlocutory appeal denied, 856 A.2d 1066 (Del. 2004); *Valle v. North Jersey Automobile Club*, 141 N.J. Super. 568, 573, 359 A.2d 504, 506 (App. Div. 1976), *aff'd.*, 74 N.J. 109, 376 A.2d 1192 (1977); *Anchel v. Shea*, 762 A.2d 346, 357 (Pa. Super. 2000).

¹²² *N.J. Stat. Ann.* §15A:6-14 (West 2008).

¹²³ 15 *Pa. Cons. Stat. Ann.* §5712(a) (West 2008). See, *e.g.*, also *Ga. Code Ann.* §14-2-830 (West 2008); *La. Rev. Stat. Ann.* §12:226 (West 2008); *Okl. Stat. Ann. tit. 18*, §867 (West 2008).

the trustees of the association must act in good faith in the best interests of the association. However, a trustee's obligation to act in the best interests of the association does not empower the trustee to act contrary to the will of the board.

Some Matters Should Be Confidential

Several common interest ownership statutes authorize associations to keep certain information confidential. The New Jersey Condominium Act is an example. Section 13a states that

(1) any matter the disclosure of which would constitute an unwarranted invasion of individual privacy; (2) any pending or anticipated litigation or contract negotiations; (3) any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer; or (4) any matter involving the employment, promotion, discipline or dismissal of a specific officer or employee of the association¹²⁴

may be discussed in closed session and thus kept confidential.¹²⁵ Florida exempts from required open meetings discussions between board or committee members and the association's attorney regarding proposed or pending litigation.¹²⁶ In addition, documents and information which otherwise may be accessible may be protected based upon legitimate considerations of privacy, privilege and confidentiality.¹²⁷ Other materials also may be deemed confidential because they constitute private communications of the board members relating to their deliberations on corporate matters which the board members reasonably expect to remain private, and disclosure could chill the free exchange among board members.¹²⁸

These are matters which the board has determined should not be made public because such disclosure may be detrimental to the interests of the association. Disclosure of information contrary to the determination of the board may harm the association and may therefore constitute

¹²⁴ *N.J. Stat. Ann.* §46:8B-13a (West 2008).

¹²⁵ See also, e.g., *Ariz. Rev. Stat. Ann.* §33-1248A (West 2008); 805 *Ill. Comp. Stat. Ann.* §105/108.21 (West 2008); *Md. Code Ann.*, Real Prop. §11B-111(4) (West 2008); *Va. Code Ann.* §55-79.75C (West 2008).

¹²⁶ *Fla. Stat. Ann.* §§718.112(2)(c) & 720.303(2)(a) (West 2008).

¹²⁷ *Lewis v. Pennsylvania Bar Association*, 549 Pa. 471, 478-79, 701 A.2d 551, 555 (1997).

¹²⁸ See, e.g., *Disney v. The Walt Disney Company*, 2005 W.L. 1538336, at 3 (Del. Ch. 2005), cited with approval in *Pershing Square, L.P.*, *supra*, n. 64, 923 A.2d at 823.

a breach of fiduciary duty.¹²⁹ In fact, trustees do not have an unlimited right of disclosure of association records. Rather, trustees' rights may be limited by the rights of association members and the needs of the association itself.¹³⁰

The business judgment rule protects from liability board members who act in good faith, without fraud, self-dealing, or unconscionability, provided their actions are authorized by law.¹³¹ A trustee who decides to disclose confidential information contrary to the determination of the majority of the board generally cannot claim the protection of the business judgment rule because such trustee's action is not authorized by law. Generally, an association's by-laws states that acts of the board are decided by a majority of the trustees at a meeting at which a quorum is present. A single trustee or a minority of the board has no authority to act on behalf of the association and cannot lawfully take action contrary to the decision of the majority. Where a trustee does act contrary to the majority will, he or she cannot claim the protection of the business judgment rule and thus acts at his or her own risk.

The Pennsylvania Supreme Court in *Lyman*¹³² held that for condominiums created after July 2, 1980, the governing boards' decisions are to be judged by the standard established by the Uniform Condominium Act, specifically, 68 Pa. Cons. Stat. Ann. §3303(a), requiring good faith and reasonableness, rather than by the business judgment rule. The adoption of the Pennsylvania Uniformed Planned Community Act in 1996 subjected all planned residential communities in the commonwealth to this fiduciary standard.¹³³ Several non-profit corporation acts also impose this standard on governing boards.¹³⁴ The standard can be expressed as follows:

¹²⁹ *National Football League Properties, Inc.*, *supra*, 65 Cal.App.4th at 109-10, 75 Cal.Rptr.2d at 899.

¹³⁰ See, e.g., *Disney*, *supra*, n. 128, 2005 W.L. 1538336; *Chantiles v. Lake Forest II Master Homeowners Association*, 37 Cal. App.4th 914, 45 Cal. Rptr.2d 1 (4th Dist. 1995) (holding that an association trustee's right to inspect ballots may be limited to protect the members' rights to privacy). See also *Thornton ex rel. Laneco Construction Systems, Inc. v. Lanehart*, 723 So.2d 1113 (La. App. 1 Cir. 1998), *cert. denied*, 740 So.2d 116 (La. 1999), and *Havlicek v. Coast-to-Coast Analytical Services, Inc.*, 39 Cal.App.4th 1844, 1856, 46 Cal.Rptr.2d 696, 701 (4 Dist. 1995) (both indicating that where a corporate director is likely to commit a tort against the corporation using the corporation's records, his right to inspect such records may be limited).

¹³¹ *Lyman v. Boonin*, 535 Pa. 397, 404, 635 A.2d 1029, 1032 (1993); *Papalexou v. Tower West Condominium Association*, 167 N.J. Super. 516, 527, 401 A.2d 280, 285-86 (Ch. Div. 1979).

¹³² *Supra*, n. 131, 535 Pa. 397, 635 A.2d 1029.

¹³³ 68 Pa. Cons. Stat. Ann. §5102(b.1) (West 2008).

¹³⁴ E.g., *Ind. Code Ann.* §23-17-16-8 (West 2008); *La. Rev. Stat. Ann.* §12:226 (West 2008); *Ohio Rev. Code Ann.* §1702.30 (West 2008); *S.C. Code Ann.* §33-31-830 (West 2008).

In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties ... in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances. ... The executive board and its members shall have no liability for exercising these powers provided they are exercised in good faith, in the best interest of the association and with care in the manner set forth in this section.¹³⁵

A trustee who acts unilaterally, contrary to the direction of the board, may not be able to rely on the protection afforded by this standard.

Even where a trustee claims he or she needs to disclose information to protect the association from improper conduct of other trustees, the trustee may not unilaterally breach confidentiality. The *Disney* court commented on this issue. The court noted that although disclosure might serve the corporation's interests, it also could chill board deliberations. It therefore ruled in favor of the presumption that board members, in making business decisions, act in good faith in the best interests of the corporation and upheld confidentiality. Furthermore, the court pointed out that the minority director, in his capacity as a shareholder, had other avenues to bring directors to account for mismanagement, specifically, elections and a derivative lawsuit against the corporation.¹³⁶ The same principles apply to the relationship among non-profit corporations, trustees, and corporation members.

A trustee thus has a fiduciary duty to the association to maintain the confidentiality of materials determined by the board as a whole to be confidential. A single trustee has no right to unilaterally reject that determination.

Sanctions Available for Breach of Duty

Therefore, a trustee who discloses information which the board, as a group, has decided must be kept confidential may be found to have breached his or her fiduciary duty to the association and may be held personally liable for any damage caused to the association as a result of that breach. Moreover, if the board believes that a particular trustee may endanger the welfare of the association, it may seek judicial intervention to obtain injunctive relief, to prevent future breaches of duty. Most association by-laws also allow removal of trustees by the association members, so the board also may ask the members of the association to vote to remove that person from the board.

In addition, most association by-laws require the association to indemnify trustees and officers against losses and costs incurred in connection with any action arising out of the exercise of their duties, except if they are liable for gross negligence or willful misconduct. A trustee

¹³⁵ 68 Pa. Cons. Stat. Ann. §5303(a) (West 2008).

¹³⁶ *Supra*, n. 128, 2005 W.L. 1538336, at 4-5.

who willfully disobeys a board determination is likely to be found to have committed willful misconduct or gross negligence and thereby to have surrendered the right to indemnification. Thus, such a trustee also may be held personally liable to any association member or other third party who is damaged as a result of the breach of fiduciary duty.

The board also may have a right to publicly censure a trustee for such conduct. In *Committee for a Better Twin Rivers*,¹³⁷ the trial judge held that the board of trustees of the homeowners association could not properly issue a letter of censure to a board member who had disclosed certain allegedly confidential information because the information disclosed was not categorized anywhere as being confidential and the board had no clear standards for such censure. (The court relied upon a section of the state condominium act, *N.J. Stat. Ann.* §46:8B-13a, although Twin Rivers is not a condominium association.) The appellate court affirmed that decision. Therefore, where a trustee in New Jersey discloses information which the condominium act states may be kept confidential or where a trustee acts in violation of clear standards established by the board, it appears that the board may decide to publicly censure the trustee for breaching his or her duty to the association. Such action seems permissible particularly since the board may disclose the breach to the association members and ask them to vote for removal of the trustee from the board.

Finally, if the board has a reasonable basis to conclude that a trustee will breach his or her duty of confidentiality with respect to a particular matter or otherwise has a conflict of interest which may injure the association, the board may, by majority vote, exclude that trustee from the discussion of that matter. A director whose interest is adverse to that of the corporation cannot participate in corporate decisions regarding such interest.¹³⁸ As one court long ago noted, "A director of a corporation 'cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of his beneficiary.'"¹³⁹ The Texas Court of Appeals more recently noted, "It has been well established that the directors of a corporation stand in a fiduciary relationship to the corporation and its shareholders, and they are without authority to act in a matter in which a director's interest is adverse to that of the corporation."¹⁴⁰

¹³⁷ *Supra*, n. 76, 383 N.J. Super. 22, 890 A.2d 947.

¹³⁸ *Hill Dredging Corp. v. Risley*, 18 N.J. 501, 534, 114 A.2d 697, 714 (1955).

¹³⁹ *North Confidence Mining & Development Co. v. Fitch*, 58 Cal.App. 329, 332, 208 P. 328, 329 (3 Dist. 1922).

¹⁴⁰ *Pinnacle Data Services, Inc. v. Gillen*, 104 S.W.3d 188, 198 (Tex. Ct. App. – Texarkana 2003).

It is widely accepted that a director who has a conflict with the corporation is barred from making a quorum or voting on the matter.¹⁴¹ Moreover, a director of a corporation is not entitled to corporate records where disclosure to the director would cause harm to the corporation.¹⁴²

Based upon such decisions, when disclosure of confidential matter to a trustee who has a conflict of interest with the association would cause harm to the association, the board may exclude that trustee from participating in the matter. Such action is not limited to where a trustee is directly adverse to the association; it also applies to situations where the trustee acts as an agent for someone else. For example, where a trustee has shared confidential information with a friend in the past and that friend is now involved in litigation with the association, if the board concludes that the trustee is likely to disclose information regarding the litigation to the friend, it may exclude that trustee from confidential discussions about the litigation.

Summary

A trustee who breaches confidentiality established by the board may breach his or her fiduciary duty to the association and therefore may be liable to the association and others for any damages which result. By acting without board authority, such a trustee bears the risk of his or her conduct, cannot claim the protection of the business judgment rule, and loses the right to be indemnified by the association. The board may take appropriate action to remediate or prevent such a breach, such as suing for damages, suing for injunctive relief, requesting that the association members remove the trustee from office, issuing a public censure of the trustee, and/or, in an extreme case, excluding the trustee from meetings at which confidential matters are discussed.

CONCLUSION

As can be seen from the discussion above, the application of the attorney-client privilege and other rules of confidentiality to organizations, and specifically to common interest ownership associations, can be complex. Persons who are authorized to assert or waive the privilege need to be identified. Whether the privilege protects communications or whether there are grounds to maintain confidentiality from members or third parties often is fact dependent. In certain circumstances, members are entitled to disclosure but may be required to submit to limits to protect the association and its members. Boards may wish to keep certain information

¹⁴¹ E.g., *In re Webster Loose Leaf Filing Co.*, 240 F. 779, 784-85 (D.N.J. 1916); *Weiss Medical Complex, Ltd. V. Kim*, 87 Ill. App.3d 111, 115, 408 N.E.2d 959, 963, 42 Ill.Dec. 250, 254 (1 Dist. 1980); *Jackson Redevelopment Authority v. King, Inc.*, 364 So.2d 1104, 1111 (Miss. 1978); *Gieselmann v. Stegeman*, 443 S.W.2d 127, 136 (Mo. 1969); *International Stevedoring Co. v. Frank Waterhouse & Co.*, 129 Wash. 451, 454, 225 P. 420, 421 (1924).

¹⁴² *Thornton, supra*, n. 130, 723 So.2d 1113; *Havlicek, supra*, n. 130, 39 Cal.App.4th at 1856, 46 Cal.Rptr.2d at 702; *State ex rel. Farber v. Seiberling Rubber Co.*, 53 Del. 295, 298, 168 A.2d 310, 312 (Super. Ct. 1961); *State ex rel. Paschall v. Scott*, 41 Wash.2d 71, 80, 247 P.2d 543, 549 (1952); *Melup v. Rubber Corporation of America*, 181 Misc. 826, 828, 43 N.Y.S.2d 444, 445-46 (Sup. Ct. 1943).

confidential, to protect the interests of their associations, but competing interests may mandate disclosure.

The attorney-client privilege can be waived by agents if the association does not take sufficient steps to preserve it or does not clearly assert it. Confidential communications and documents can be disseminated inadvertently because people are not aware of permitted protections, intentionally by dissident trustees, or as a result of misunderstood instructions. Associations should take precautions to minimize the risks.

Association trustees and managers need to be educated about the protections of the attorney-client privilege, the requirements for it to apply, and its limitations. They need to understand when it is permissible to keep association business confidential. They rely on their attorneys to properly advise them. To fulfill their professional and ethical responsibilities, attorneys must know the law in the applicable jurisdiction and be sensitive to the competing arguments and policies. It is hoped that this article will assist counsel in rendering appropriate legal advice to their clients.