by lisa a. magill, ESQ.

Not a Peep

TWO BOARD MEMBERS and their spouses are eating lunch at the local diner. They discuss the association attorney's advice regarding a resident's request for a wheelchair ramp, a disability-related accommodation that falls under the federal Fair Housing Act.

They bring up personal information about the resident's disability and disagree with the attorney's recommendation to allow the ramp. The spouses chime in. The waiter, the son of another homeowner, hears some of the conversation. Against legal advice, the board denies the ramp request. Word of the diner discussion gets back to the resident, who sues the association.

Since the case was discussed in public, it's no longer confidential. That means the resident can ask a court to provide all the association's documents on the issue—including the attorney's advice to allow the ramp, which will, of course, bolster the discrimination claim.

Since some state laws allow penalties for intentional discrimination, the resident may try to hold the board members individually liable. In addition, because they discussed the resident's health issues publicly, they may have exposed themselves and the association to further liability.

If the board members hadn't discussed the case in public, the discussion would have been protected by the attorney-client privilege and not open to court scrutiny.

LOOSE LIPS

During World War II, military officers gave soldiers instructions on what not to say when writing home to loved ones. Should community association board members be given similar instructions?

There are simple, but vital, reasons to keep certain communications confidential. People are not inclined to share information with their attorney if they fear it could embarrass them or be used against them. On the other hand, attorneys can't give effective legal advice without knowing everything related to the case. Thus, any obstacles to frank communication between the lawyer and the board weaken the counsel's effectiveness.

In addition, most community leaders are volunteers, who have no training in association or corporate obligations. They make decisions on a plethora of complex issues including those that require interpreting governing documents and federal, state and local laws. If board members and managers weren't able to speak openly to the attorney, they may not get the advice they need to carry out their duties. Thus, confidential communication is important to facilitate legal and ethical operations.

Some homeowners may argue that they also are entitled to hear the attorney's advice to the board since their assessments help pay the attorney's fees. However, the association is the attorney's client, not individual owners. Since the board has responsibility for handling association affairs, the board as a whole is entitled to assert the attorney-client privilege.

But individual board members may not. The attorney may share information from individual board members with the full board, especially when that information involves action that might be harmful to the association.

TOP SECRET

If information is shared with anyone—even unintentionally—the attorney-client privilege may be waived. If that happens, other communications regarding the case may be disclosed in court.

Consequently, boards should develop guidelines for communicating confidentially with the attorney. Boards need to make sure these guidelines are understood by each board member, the manager and any staff who may have access to the information. Confidentiality guidelines should cover:

Record retention and filing. Confidential records should be clearly labeled and accessible only to board members and others authorized by the attorney. Confidential records must not be shared with contractors, vendors or even owners, even if the record relates to them.

Board members often ask how to interpret various provisions in contracts or how to handle claims by third parties, such as vendors or contractors. Showing a vendor or contractor an attorney's letter, or even a portion of a letter, to try to bolster the association's position is a common mistake board members and managers make. Doing so opens the door for an outside party to see all the other documents, and some may prove detrimental to the as-

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sociation in the long run.

If the association needs to share information with others, the attorney should prepare an appropriate memo or otherwise communicate with the outsider without divulging confidential advice or facts. Other attorney correspondence to the board should be secured in protected areas and clearly marked "confidential." Shred confidential documents before disposing of them. Board members should be required to return confidential documents when they leave office.

Electronic records. Electronic communications are easily disseminated, often by accident. All the recommendations for paper records apply to electronic files as well. If the association designates an e-mail address for the manager, but other employees can access the e-mail account, the confidential nature of the communication is compromised. Confidential correspondence should be preserved in password-protected files and e-mail accounts only accessible to authorized individuals. Similarly, board members should have private e-mail accounts for privileged communications rather than using family or business e-mail addresses. Also, before posting any documents on the association website, remove any confidential material.

Meeting records. Board members who disclose confidential information violate their fiduciary duty to the association. If the board meets with the attorney to discuss confidential legal issues, the minutes should record only the date and place of the meeting, who attended, the time it was called to order and adjourned and the purpose of the meeting—to obtain confidential legal advice.

Distribution. In many cases, all association correspondence is sent to the manager or another employee and then distributed to board members for review. Correspondence from the attorney should not be placed in unmonitored mail slots or left in public areas.

If a confidential document is inadvertently disclosed to the wrong person, an association with procedures in place for retrieving the information is in a stronger position to protect itself.

Unfortunately, if a rogue board member discloses the confidential information, the cat is out of the bag. However, the board can try to protect other documents related to the same issue by designating a legal committee and limiting access to confidential communications to the members of that committee. If the board can show it is trying to protect confidential documents, it will help strengthen its defense against a legal challenge.

Creating reasonable guidelines for protecting confidentiality and verifying that board members, managers and staff are adhering to them may mean the difference between winning or losing a lawsuit or other dispute that may cost your association thousands, or perhaps hundreds of thousands, of dollars. **cg**

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