The Attorney-Client Privilege: Disclosure of Confidential Information to Property Management Companies in Furtherance of Representation of Condominium or Homeowner's Associations

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Attorneys are not only ethically, but lawfully obligated to keep certain divulged information confidential in furtherance of representing a client. However, issues may arise whereby certain documentation may need to be transmitted to a third party. For example, an attorney represents a homeowner's association whose property management company is responsible for maintaining records including contracts and invoices. In the interest of acquiring discoverable records, the attorney must communicate with the management company and disclose otherwise privileged information. Is the attorney-client privilege waived if information crosses paths with the management company? The answer is no, based on a careful interpretation of the Florida statutes.

Florida law provides:

> A communication between lawyer and client is 'confidential' if it is not intended to be disclosed to third persons other than:
>
> (1) Those to whom disclosure is in furtherance of the rendition of legal services to the client.
> (2) Those reasonably necessary for the transmission of the communication.

Fla. Stat. Ann. § 90.502(c) (2012).

While § 90.502(c) provides an extension of the attorney client privilege to certain third parties, it does not provide specifics as to which third parties this applies to. In particular, § 90.502 does not define the scope of an employee or agent relationship the third party must have with the client.

It has been well established that certain corporate employees are protected under § 90.502(c). See Gen. Motors Corp. v. McGee, 837 So. 2d 1010, 1032 (Fla. 4th DCA 2002)

(finding that the attorney-client privilege applied to a letter sent by outside counsel to a "very junior employee" because it was in the interest of litigation and was not intended to be disclosed to third persons). Although courts will recognize the attorney-client privilege in the context of a corporation's or organization's employees, the privilege is subjected "to a heightened level of scrutiny." Am. Tobacco Co. v. State, 697 So. 2d 1249, 1253 (Fla. 4th DCA 1997) (citing S. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994)).

Nonetheless, deciphering which "employees" are protected by statute is still unclear. In S. Bell Tel. & Tel. Co. v. Deason, the Florida Supreme Court discussed this issue and established factors to determine whether communications in the corporate context are protected by the attorney-client privilege. The factors are as follows:

> (1) the communication would not have been made but for the contemplation of legal services;
> (2) the employee making the communication did so at the direction of his or her corporate superior;
> (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
> (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
> (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. The application of the last criteria apparently provides that an otherwise privileged communication will not lose its protected status if it is distributed to those employees to subsequently use the information for a business purpose within the company.

632 So. 2d 1377 (Fla. 1994).

Likewise, the Deason factors should be utilized in interpreting whether the attorney-client privilege applies to communications with employees of other organizations or associations. Doe on Behalf of Doe v. Archdiocese of Catholic Church of Miami, 721 So. 2d 428, 429 (Fla. 3d DCA 1998). The Deason factors create a starting point in evaluating an employee within an

organization and whether communications between such employee and an attorney who represents the organization will be safeguarded.

A reasonable interpretation of § 95.502(c) and case law implies that communications with a property management company of a condominium or homeowner's association would be protected under the attorney-client privilege, as the property management company is likely an agent of the association.

To establish an agency relationship, a party must show: (1) acknowledgement by the principal that the agent will act for it; (2) the agent's acceptance of the duties to act; and (3) control by the principal over the actions of the agent. Bernardele v. Bonorino, 608 F. Supp. 2d 1313 (S.D. Fla. 2009). A property manager should be considered an agent of a condominium or homeowner's association if the property manager is only acting under the control and direction of the association. Furthermore, an agency relationship has been defined as an express or implied contract based on consideration or an undertaking, by which one party entrusts in the other party the management of some aspect of business to be transacted on behalf of the former by which the latter assumes responsibility and renders an account for it. 2 Fla. Jur 2d Agency and Employment § 1 (2012). Considering the very nature of the management engagement, and often the express language of the property management agreement, it is undeniable that property management companies act as association agents in many capacities. This agency relationship should also extend to the attorney-client relationship.

An attorney representing a condominium or homeowner's association must be able to communicate with individuals who will assist in his or her ability to provide effective legal representation. Similar to a corporation, an association's duties will generally be delegated out to individual persons or outside agents. Consequently, it is reasonable to infer the privilege of

confidentiality must be extended outside the immediate attorney-client relationship and to that of a property manager.

Practice Areas: Condominium Law