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The Do's and Don'ts of Electronic Correspondence

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Over the years, e-mail has become our primary means of communication. One could argue that the ease and efficiency of e-mail has led to the demise of "snail mail" and less reliance on and use of the postal service. The truth is, when we want to send or receive an immediate response, we shoot off an e-mail. However, while e-mail certainly has its benefits, there are many pitfalls of e-mail communications that can arise in the world of community associations. This article will provide you with some reminders and cautions regarding the do's and don'ts of e-mail communications.

E-mails Can Easily Be Sent to the Wrong Recipients!

First and foremost, the recipient list on an e-mail chain should always be checked before an e-mail is sent. While this may seem obvious, too many times have we encountered a panic stricken client who hit "reply all" when trying to only communicate with one party and/or only with counsel. Board members and property managers should be mindful that the attorney-client privilege can be waived if third-parties are unwittingly included on an e-mail chain with counsel.

E-mails Are Often Considered "Books and Records" of an Association

E-mails can be considered part of the "books and records" kept by an association that are accessible to homeowners. As an example, the Virginia Condominium Act and the Virginia Property Owners' Association Act provide that "books and records" kept by associations shall be available for examination or copying by homeowners after reasonable notice. The Virginia Freedom of Information Act (FOIA) provides that electronic correspondence may be considered a "book or record" when the electronic correspondence is routinely filed and stored by the governing body. As the books and records provisions of the Virginia Condominium Act and the Virginia Property Owners' Association Act are based upon the FOIA, if the Board or managing agent routinely files e-mails exchanged between Board Members and the managing agent, a homeowner is entitled to inspect such e-mails. The laws in Maryland and Washington, DC have similar requirements. Boards should keep this in mind when creating record retention policies that specifically identify which items are and are not considered records of the association. In addition, Boards and managers should certainly keep this in mind before exchanging e-mails that they may not want a homeowner to review.

Before an e-mail is sent, the sender should review the e-mail to ensure that they have not included any information that they would not want a homeowner or the public-at-large (or a judge) to read. If the e-mail were turned over in a document request, would the e-mail contain potentially libelous or defamatory comments regarding a homeowner or board member that could result in litigation? If the e-mail is an exchange with the attorney, does it contain the appropriate disclosures regarding attorney-client privilege and/or confidentiality? Although this process can be painstaking, a quick review of an e-mail before it is sent could save the association significant expense in the long run.

E-mails May Be Discoverable in Litigation

As a rule, we regularly advise clients to minimize e-mail communications whenever possible. If e-mail must be used, it should be for informational purposes only and not for purposeful deliberation or decision-making. One too many times we have had to review hundreds of e-mails exchanged between managing agents and board members when a lawsuit is filed by a disgruntled owner or third-party vendor. This is not only time consuming and expensive but also leads to increased exposure for the association. If an e-mail is not protected by the attorney-client privilege or some other protection provided for in the law, it is often discoverable and could ultimately prove damaging. The sender should consider if he or she would want a judge to review the e-mail as written. If not, the e-mail should not be sent.

Of course, we recognize that e-mail is necessary in certain situations. If a Board member plans to engage in e-mail communications, an e-mail account that is solely dedicated to Board business should be created. Board members should refrain from sending or receiving any e-mails at their personal or work e-mail addresses. For obvious reasons, a Board member would not want their personal or work e-mail account entangled in protracted litigation. In addition, if an e-mail account is accessible by a third-party, it could lead to a waiver of the attorney-client privilege. Further, we recommend that if a Board intends to communicate with homeowners via e-mail, an association e-mail address should be created for this purpose.

E-mails Can Lead to Invalid Board Meetings and/or Decisions

As we know all too well, one e-mail can turn into dozens in the blink of an eye. Unfortunately, there are many instances when a Board might find themselves in trouble as a result of seemingly innocent e-mail exchanges. A common example occurs when a property manager sends an e-mail to the board with three proposed vendor contracts and asks the board to review the contracts to decide on a vendor at the next scheduled meeting. One board member who has first-hand experience with the first vendor might send an e-mail response regarding his prior experiences. Suddenly the other board members are responding with multiple e-mails regarding the pros and cons of each vendor.

Although it may appear innocent, dependent upon the Court's interpretation of the association's governing documents and the applicable law, the board might be engaging in the deliberative process of vendor selection in a

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closed e-mail session without providing the notice necessary for a board meeting. In most instances, governing documents require such decisions to be made during an open, official meeting of the board. In addition, if only a few of the board members are participating in the e-mail exchange, it may lead to claims of hidden dealings by other board members who did not participate. As such, it is simply safer to withhold such discussions until the board is gathered in a duly held meeting.

If a Board needs to be able to make decisions via e-mail in certain situations (such as responding to a delinquent owner's settlement offer or payment plan proposal) prior to the next regularly scheduled Board meeting, then the process for doing so should be clearly established in a duly adopted resolution.

This same analysis applies to committees for the Association. Often, an Architectural Committee finds that it is under a tight deadline to approve or deny an application. In such instances, e-mail may be the most efficient method by which to gather the thoughts of it members. However, before engaging in any communication that could be considered deliberative, the Committee must first consider whether it is authorized to engage in such discussions under the governing documents and the applicable law.

In sum, we generally counsel our clients to use caution and restraint when utilizing e-mail as a method of communication amongst the Board or Committee members. Courts may find that e-mail discussions of members of a Board or Committee were in fact "meetings" that should have been noticed and open to the membership.

We hope this provides you with some helpful reminders regarding electronic correspondence. If you have any questions as to whether your community is compliant with its governing documents and the law in its use and retention of e-mail correspondence, please do not hesitate to contact one of our community association attorneys and we would be glad to help.

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