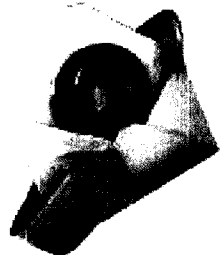




By Hillary Anne Collins, ESQ.

Hillary Collins is an associate with Rees Broome PC in Vienna, Va. She represents homeowners and condominium associations throughout Maryland and Northern Virginia. Her practice focuses on assisting associations with revisions to governing documents and with collection efforts in Maryland and Virginia. Prior to joining Rees Broome PC, Collins handled complex litigation matters in Virginia, Maryland and Washington, D.C.



Few Reminders about Electronic Correspondence

It is 3:15 p.m. on a Monday and I have already sent 34 e-mails. I should add that today is a slow day. On an average workday, I might send between 50 and 75 e-mails. I am certain that many of you find yourselves in a comparable situation each day. Given the volume of e-mail correspondence that we send, it is important to take caution and be reminded of the dangers of e-mail communication in some instances.

Prior to sending each e-mail, I double check my recipients and make sure that I have not included any information that I would not want a judge or the public at large to read. I also make sure that each e-mail contains the appropriate disclosures, if necessary, regarding attorney-client privilege and/or confidentiality. It is painstaking to do this, especially when every part of me wants to shoot off a quick response to an e-mail that I have just received from an angry homeowner or opposing counsel. I do this, however, because e-mails are often discoverable in litigation. If I cannot respond affirmatively to the question, "Would I want a client or judge to read this e-mail?" then I refrain from hitting the send button until I can. This e-mail review process is equally important for board members and community managers.

I 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 been forced to pour over 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.

I'll provide two examples of when the board and/or community managers might find themselves in trouble as a result of seemingly innocent e-mail exchanges. In the first instance, a community manager sends an e-mail to the board with three attached landscaping 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 vendor A quickly sends 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 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 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.

In the second instance, the association attorney sends a dispute to the board regarding violation charges that have been levied against a homeowner. The attorney provides a legal opinion in the e-mail, which in turn makes that e-mail privileged. Then, once the e-mail is reviewed, some of the board members exchange multiple e-mails about the homeowner's dispute and the attorney's legal opinion. If the attorney is not copied on the e-mails that are exchanged between board members, it becomes questionable whether those e-mails are protected by the attorney-client privilege. If the

dispute results in litigation, and those e-mails are kept as part of the association's records, those e-mails could prove discoverable. Let's be honest—I am sure there would be quite a few candid, informal statements in those e-mails that the board would not want anyone, and in particular a judge, to see. Of course, this predicament can be avoided if the members of the board wait to discuss the legal opinion in person.

This brings me to my final point regarding electronic correspondence—e-mails can be considered part of the "books and records" kept by an association, which 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. 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.

In closing, electronic correspondence is an effective and efficient tool by which to communicate; however, in the land of litigation in which we often find ourselves, it is important to be cautious before engaging in such communication. ■