COMMUNITY MATTERS

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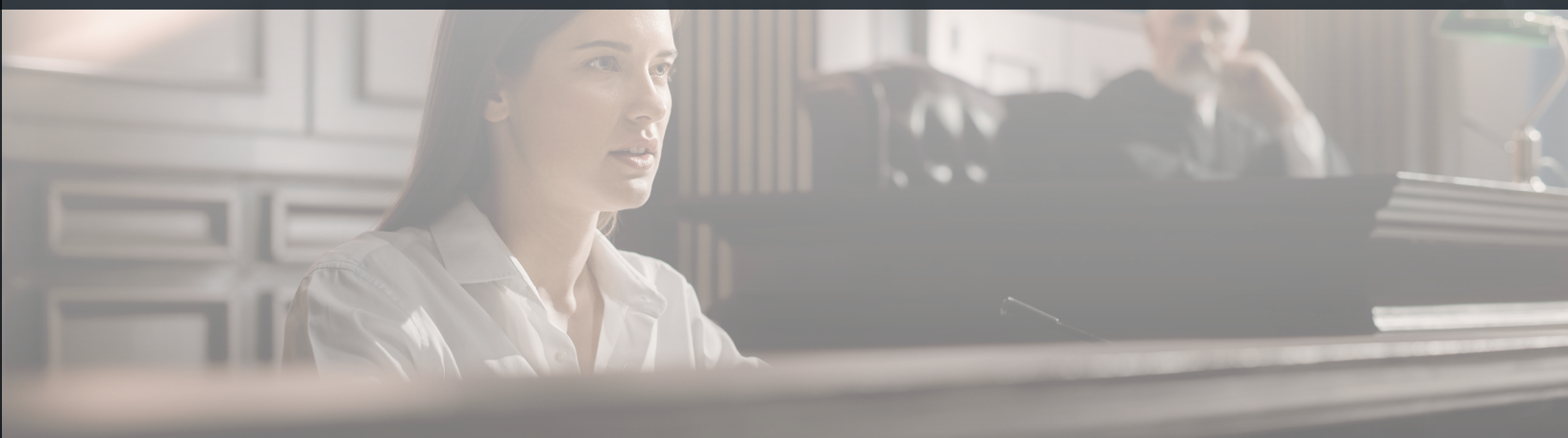
News and Trends in Community Association Law

Articles:



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Can I Get a Witness?
Preparing to Be a Witness in Court

by **Harrison J. Woodworth, Esq.**

Movies and television shows featuring courtroom drama often have pivotal scenes where witness testimony provides the key break that sways the case in one direction or another.

Perhaps it is a dramatic reveal offered in testimony, or a shrewd cross-examination causing a story to fall apart. The reality, as is often the case in the legal world, is much less dramatic than what is shown on film or television. Still, there can be an understandable sense of apprehension when a board member or manager is called upon to testify in litigation involving their community association.

The first question a potential witness often asks is "Why me? What information am I being called upon to provide?" For litigation involving collection of assessments, the witness is often called upon to lay the foundation to enter the Association's records as evidence. That record is most commonly the ledger for a homeowner's account. This is straightforward: the witness describes their role with the association, how they are familiar with the owner and their account, how the record is maintained, and whether any assessments, late fees, and interest accrued, as well as any payments received. Without a witness to lay the foundation for the account ledger, it cannot be used as evidence.

A board member or manager may also be called upon to testify in non-collections litigation, such as a covenant enforcement case. For such a case, the witness might be called upon to explain the nature of a violation, which parts of the covenants are being violated, or to enter media such as pictures or video into evidence. This would often be a very fact-specific line of questioning and would vary based upon the nature of the case.

This all might sound like a complex process, and indeed it might well be. Spending time in advance with your community association's attorney will be essential. As a witness, you will not go into the testimony blind. The attorney will prepare a roadmap of the potential testimony. This could be as simple as an outline of the areas to cover or as detailed as an actual list of prepared questions and answers. This "script" will be based upon information that the witness already knows, but this process will help funnel it into items that the witness, parties, and judge can efficiently understand. This initial phase of questioning in testimony is called "direct examination" and will involve your community association's attorney asking questions relevant to the case. The judge may have questions for the witness as well.

Wait, the judge might ask a question?! That wasn't in our script! Don't tell me the opposing counsel will also have questions?! Yes, all of that is true.

The defendant's counsel, or the defendant themselves if they are acting pro se, will have the opportunity to cross-examine the witness. This is the part of testimony that typically makes a potential witness the most nervous, concerned that they might say the "wrong" thing and invite trouble for their community association or themselves. In preparing for testimony, witnesses often want to know what they should do when the time comes for the adversarial party to ask the questions. The first rule is simple: tell the truth. Answer the question honestly, as best as you can, and "I don't know" can be an acceptable answer. We also advise witnesses that they should answer the question, but to avoid the temptation to stray from the question being asked. The opposing party may ask questions that are inappropriate under the Rules of Evidence, and the community association's attorney will bring this to the judge's attention and object as needed. Otherwise, again, the best way to answer a question is always the simplest: truthfully, to the best of the witness' knowledge.

The opposing party's cross-examination may give rise to additional questions from the community association's counsel or the judge, or again the opposing party, but eventually the parties involved will run out of questions and the witness' task will be complete. Ideally, the testimony provided will be a key building block of the community association's successful litigation. Full consultation and planning with the community association's counsel can help make this process as painless as possible.

WHEN:
September 23, 2023
9:00 am – 12:00 pm class
8:00 am continental breakfast offered

WHERE:
Dogwood Room, Smyrna Community Center
200 Village Green Circle, Smyrna GA 30080
In Person and Virtual Options

QUESTIONS:
Contact registration@luederlaw.com
CE Credits Available to Licensed RE Professionals

Loose Lips Sink Ships: Practical Tips to Protect the Attorney-Client Privilege

by | **Elina V. Brim, Esq.**

Disclosure of attorney-client privileged communications is frequently accidental, but it can have significant consequences for your community. A quick email forward, a short chat with a homeowner by the pool, or a conversation with a friend can result in board members and officers waiving protections belonging to your association. This short overview will focus on the legal aspect of the attorney-client privilege, what it is, and why it is important.

Georgia law protects communications between an attorney and his or her client from disclosure. This long-standing policy makes sense, as it ensures that clients can freely discuss legal matters with their counsel without suffering adverse consequences. Honest communication with clients also assists in providing effective legal representation. Of course, as with most things in law, there are exceptions to this rule. For example, a lawyer may reveal information obtained while representing a client, if disclosure of that information is necessary to prevent future criminal conduct or to prevent injury or death. But aside from a handful of limited exceptions, confidentiality will apply to attorney-client communications. Preserving this privilege is essential.

As board members, officers, and managers, it is important to understand the scope of the privilege and how it operates in the context of your association. Georgia appellate courts provide guidance to corporations regarding the applicability of this privilege to communications to corporate counsel. The courts have held that if communications (1) are made for the purpose of securing legal advice, (2) made at the direction of corporate superiors or by the superior, (3) the subject matter of the communication is within the corporate duties and responsibilities of the requesting individual, and (4) the communication is not disseminated beyond those persons who, because of their corporate roles, need to know the information, those communications will be protected. Once an attorney-client relationship is established, the legal advice confidentially communicated to the authorized agents of the client is protected from the discovery process by statute. In layman's terms, this means that communications by directors or officers regarding their roles on the Board or the responsibilities of the association will be protected. Case law is also clear that communications with agents of the association, such as your property manager, are protected by the privilege.

The attorney-client privilege belongs to the principal. That means that the right to waive the privilege rests with the association. As stated above, communications are only protected if they are not disseminated to persons who are outside of the corporate structure or who have no reason to receive this information. Consequently, sharing legal advice given by the association counsel with neighbors or friends would operate to waive that privilege. The consequences can be significant. If you are in litigation, any weaknesses in the association's position identified by corporate counsel may become public and subject to production in discovery. It also puts individual board members at risk for personal liability, as unauthorized disclosure of privileged information can result in a breach of duty claim. Therefore, only the Board of Directors, acting collectively, should decide whether attorney-client privileged information should be revealed.

It should be noted that disclosure of privileged information may be warranted in some circumstances. For instance, if the Board of Directors determines that it is in the best interests of the community for members to understand the association's legal position, the Board can certainly make that decision. However, an appropriate process should be employed before such disclosure occurs. Part of that process is a discussion of the benefits and risks of disclosure and the goal of disclosure. Board meetings present an opportunity for directors to debate and make an informed decision. This process will ensure that the association is not exposed to unnecessary claims. If your board uses committees to assist in operating the association, boards should decide whether and to what extent committee members should receive privileged information. If privileged information would aid in the committee's role, committee members should sign an acknowledgment that opinions of association counsel are to be protected to the extent the opinion is given to assist committee members in their responsibilities.

Whether it is a recommendation regarding a delinquent account, a water leak, or a covenant violation, embracing the concept of confidentiality with your community's attorney will lead to a better functioning association. For any specific issues relating to your neighborhood, please reach out to your association's attorney.

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