

Confidentiality Of Board Of Directors Communications and Deliberations; Constraints On Informal Communications Due To Discoverability In Case Of Litigation Against ARRL

In analyzing the ability of the ARRL to be as transparent as possible in communicating with its membership its actions and policy decisions and the bases and assumptions underlying those actions and decisions, while at the same time maintaining the necessary level of confidentiality of the internal deliberations of its Board of Directors to permit open and free exchange of ideas, it is necessary to assess the consequences of informal, electronic or written communications between and among Board members about matters that may become the subject of litigation at some later time. Because there have been substantial changes in the rules of discovery in civil litigation, there is reason to avoid certain types of informal communication, lest those communications be made public and used to damage ARRL.

The concern about confidentiality of Board communications is dictated in part by court rules which are very liberal in establishing what must be produced by a party involved in civil litigation. If ARRL is named as a defendant in connection with a matter in which an Officer or Director has participated or discussed, the communications to and from that Officer or Director may be discoverable and may be misconstrued or used against ARRL in that litigation. Amended Rule 26(a) of the Federal Rules of Civil Procedure governs document production, even without being asked for such. According to Rule 26(a):

A party must, without awaiting a discovery request, provide to other parties a copy of, or a description by category and location of all documents, electronically stored information, and tangible things....

Furthermore, Rule 34 of the Federal Rules of Civil Procedure defines what must be produced in the way of documents in the course of Federal civil litigation:

Production of documents includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, and translated, if necessary, by the respondent into reasonably usable form.

Under the Federal Rules, for example, e-mail correspondence between or among Board Members may be required to be produced to the plaintiff in a civil action against ARRL. The definition of “electronically stored information” in the Federal Rules of Civil Procedure is extremely broad. It is as follows:

Any information created, stored, or best utilized with computer technology of any type. Includes, but is not limited to, data, word processing documents, spreadsheets, presentation documents, e-mail, graphics, animations, images, instant messages, audio, video, and audiovisual recordings, voicemail stored on databases, networks, computers, and computer systems, servers, archives, back-up or disaster recovery systems, disks,

CDs, diskettes, drives, tapes, cartridges and other storage media, printers, the Internet, personal digital assistants, handheld wireless devices, cellular telephones, fax machines, and voicemail systems.

While these very liberal disclosure requirements apply only to Federal court litigation, and while most litigation in which ARRL has been involved has historically been state court litigation, the Federal Rules of Civil Procedure tend to serve as models for State court civil procedure rules. Since ARRL does business in all States, it is not just the rules of the State of Connecticut which govern the disclosure of information in litigation contexts, because litigation against ARRL might be initiated in any State.

Therefore, only the broadest guidelines are available to assist Board members in deciding what is reasonable to disclose to members and the general public concerning ARRL proceedings, and what subjects are best not debated in e-mail or written correspondence outside the Board Meeting context. These can be summarized as follows, with the understanding that factual circumstances require the exercise of individual judgment and discretion by Officers, Directors, and Vice Directors.

1. Do not make disclosures outside the Board room concerning matters previously discussed or to be discussed by the Board or by a committee of the Board that are the subject of pending or threatened litigation. Threats of litigation include communications by a person or persons to a Board member or Officer, or a member of the Staff, noting that a matter has been referred to an attorney or is to be or may be litigated.
2. Do not discuss in e-mail correspondence, even between members of the Board, matters which are or may reasonably be assumed to be potential litigation subjects, such as election qualification matters.