COMMUNITY COUNSEL

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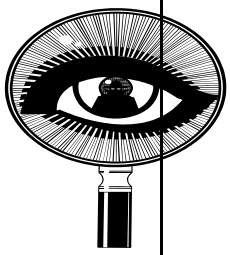
RECENT CASES

- CONTEST OVER CONDO ASSESSMENT AUTHORITY IS PRIMARILY ABOUT LEVY OF ASSESSMENT AND MAY GO DIRECTLY TO COURT.
- FORMER DIRECTORS LIABLE FOR USURPING A CORPORATE OPPORTUNITY.
- REALTY COMPANY COULD NOT USE NAME OF ADJACENT COMMUNITY ASSOCIATION.

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

Privacy Issues - and Your Attorney

Throughout this year you may have received many letters from businesses explaining the privacy policy of each. These missives come to you courtesy of Title V of the Gramm-Leach-Bliley Act of 1999. This federal law also allows banks, insurance companies and securities houses to enter each other's turf. The fifth portion of the Act requires "financial institutions" to disclose their policy on sharing non-public information about you with 3rd parties and affiliates.



While the "financial institutions" required to disclose their policies are those a lay person would understand as being covered by the term, the definition also is broad enough to encompass anyone who maintains a credit, deposit, trust or other financial account for another, and includes anyone who safeguards the money or securities of another. Under that broad definition many utilities, retailers and professionals who hold money of another are covered. Since attorneys regularly hold funds for clients in their trust accounts it is arguable that we too must disclose our "policy" for information sharing.

THE PRIVACY POLICY OF ATTORNEYS IS MANDATORY

In the case of attorneys though, our "policy" is mandatory and is already set forth in the Rules Regulating the Florida Bar (RRFB), which contains a full statement of each attorney's duty to maintain the confidentiality of non-public client information. Maintenance of the confidentiality of client information has long been a cornerstone of legal representation. Rule 4-1.6 of the RRFB addresses our obligation. It provides:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c). and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

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RECENT CASE SUMMARIES

In **Genoveva Villorin, et al., vs. The Village of Kings Creek Condominium Association, Inc.,** 26 Fla. L. Weekly D1640 (Fla. 3rd DCA July 5, 2001), Villorin filed an action in Circuit Court challenging Condominium Association's authority to levy a special assessment against the members to replace disconnect switches for the air conditioner units located on the rooftops and serving individual units. Villorin alleged that the board of directors breached its fiduciary duty to the members of the Association by levying a special assessment in excess of that permitted by the Declaration of Condominium. The trial court dismissed the complaint on the theory that the allegations of the complaint constituted a "dispute" within the meaning of §718.1255, Fla. Stat. and therefore Villorin was required to arbitrate the case prior to instituting a lawsuit in the circuit court. The Third District Court of Appeal reversed the circuit court and held that the allegations of the complaint alleged a ". . . . disagreement that primarily involves the levy of a fee or assessment." As such, under the plain and obvious language of §718.1255, Fla. Stat., the allegations of the complaint did not allege a "dispute" which would require mandatory non-binding arbitration.

In **Florida Discount Properties, Inc., et al., vs. Windermere Condominium, Inc.,** 26 Fla. L. Weekly D1554 (Fla. 4th DCA June 20, 2001) two former directors of Condominium Association formed Florida Discount Properties for the purpose of purchasing from Developer certain common area property of the Association and a recreational facilities lease associated with the property. The purchase price for the property and the recreational facilities lease was $20,000.00. Florida Properties then filed an action against Association to collect $216,000.00 in unpaid rent due under the recreational facilities lease. Association brought a third party claim against the two former directors alleging that they conspired to breach their fiduciary duty and to usurp a corporate opportunity by obtaining the common area property and the associated recreational lease. The trial court held in favor of Association on all counts and furthermore found that the recreational facilities lease was unconscionable and void pursuant to §718.122, Fla. Stat. Additionally, the trial court ruled that Association must be given the right of first refusal to purchase the property for the negotiated price of $20,000.00. On appeal, the Fourth District Court of Appeal affirmed all of the rulings of the trial court. Specifically, the Court found that there was more than sufficient evidence in the record that the former directors had breached the fiduciary duty owed to the Association. As such, disgorgement of the corporate opportunity (*i.e.,* granting the Association a right of first refusal) was an appropriate remedy to cure the breach of fiduciary duty.

In **Tortoise Island Homeowners Association, Inc., vs. Tortoise Island Realty, Inc.,** 26 Fla. L. Weekly D 820 (Fla. 5th DCA March 23, 2001), Association sued Realty alleging infringement and dilution of its trade name and/or service mark. Specifically, Association alleged that the use of the trade name "Tortoise Island" infringed upon and diluted the value of the trade name and caused confusion among the public. Association is a private community located on a spoil island in the Indian River. Realty's office was located just outside the gate of the Association. The logos used by both the Association and Realty were similar, but not identical in appearance, colors and design. Association produced abundant testimony from witnesses which confirmed the public's confusion regarding whether the two entities were affiliated. The trial court denied relief to the Association, holding that "Tortoise Island" is geographic, denoting an exclusive, high-quality residential subdivision located in Satellite Beach and that its use by the Association and by Realty had failed to produce a "secondary meaning." The trial court also held that Realty's sign was not sufficiently similar to cause confusion as to services performed, nor potential injury to Association's reputation, nor dilution. On appeal, the Fifth District Court of Appeal reversed the trial court and ruled that non-profit corporations have the same interest in protecting their identities and goodwill as do profit-seeking corporations. As such, the appellate court held that use of the "Tortoise Island" trade name by Realty would contribute to loss of distinctiveness and its protectability.

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