COMMUNITY COUNSEL

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DISCOVERY OF ELECTRONICALLY STORED INFORMATION

Effective September 1, 2012, the Florida Supreme Court adopted substantial revisions to the Florida Rules of Civil Procedure relating to the discovery of electronically stored information ("ESI"). The newly adopted rules are substantially based upon similar federal rules adopted by the federal courts. Although the new Florida rules and the federal rules are not identical, they are sufficiently and substantively so similar so as to make the case law decisions rendered in numerous federal court rulings applicable to future decisions to be made by the Florida courts.

It is important to note the intentional use of the relatively vague term "electronically stored information." Most managers or board members, when considering the question of "what is ESI", would easily recognize this to mean the information stored on the hard drives of their computers, either at home or at work and would include email communications. However, **ESI includes any and all information stored electronically**. This could include information on your tablet, personal computer, smart phone, even your MP3 player. ESI also includes electronic information stored in the cloud, even though not also stored on your personal computer. ESI also includes embedded information, such as the GPS locations, dates and times of photographs taken with your smart phone. ESI could also include embedded metadata in documents, which without care could be improperly disclosed to the opposing party. **ESI also includes images from surveillance cameras**. Clearly, what constitutes discoverable ESI in Florida is intentionally very broad and somewhat vague, and will undoubtedly include as-yet unknown stored data as technologies change and evolve. Therefore, it is important for all litigants or potential litigants to understand the sheer depth and breadth was what constitutes ESI.

Built into the new rules are some guidelines for judges who must balance the cost of discovery of ESI with the value of the lawsuit. Judges are now required to consider "proportionality." In other words, does the cost to obtain, and the accompanying cost to review, potentially hundreds of thousands of documents, photographs, emails, etc., justify granting the ESI discovery request, or is the ESI request being used as a weapon to thwart an otherwise valid claim or defense because the opposing party does not have the money or time to comply with the request. As an example, extensive ESI discovery may be justified in class action litigation involving large corporate entities and millions of dollars in potential damages. However, that same extensive ESI discovery may not be justified in a routine small claims matter involving amounts less than $5,000.

Managers and board members, as a practical matter, must now recognize and understand that everything they have that is stored electronically is subject to discovery in every lawsuit in which an association is a party. That information is not necessarily limited to emails between board members and management, demand letters to other owners, etc., but in an appropriate case could include what songs you have on your iPod. Along with that recognition comes **a duty to maintain all ESI during the pendency of the litigation**. There can be no more deleting of emails as a matter of routine when there is pending litigation. **All ESI, whether you believe it to be relevant or not, should be maintained and organized in its electronic form and safeguarded from intentional or accidental destruction during the pendency of litigation.** A failure to do so could have severe and draconian consequences, including but not limited to the drawing of adverse inferences in jury instructions in claims against the association, manager and/or directors for spoilation of evidence.

Association counsel now have an ethical duty to advise our clients to retain ESI during the pendency of litigation. In some cases, if a demand to retain is delivered from opposing counsel, parties and their attorneys have a legal duty to retain ESI. You can expect, as a matter of course, to be receiving letters from your attorneys advising you to retain and maintain ESI during the course of litigation. These notices are not merely form letters sent as C.Y.A. tactics by counsel, but are important and vital reminders to the client of your obligations to maintain ESI during the course of litigation. Managers and directors would be well advised to heed these reminders, as the failure to do so could have drastic and severe consequences for the associations they serve.

RECENT CASES

- NEITHER CONDO ACT NOR DOCUMENTS PREVENT A CONDO ASSOCIATION FROM ASSIGNING INSURANCE CLAIM AND PROCEEDS TO THIRD PARTIES.
- HOA OWNER HAD STANDING TO ENFORCE THE REQUIREMENT THAT HOA TAKE A VOTE OF THE MEMBERS BEFORE COMMENCING LITIGATION INVOLVING IN EXCESS OF $100,000.

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.

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RECENT CASE SUMMARIES

In **Castellanos, et al., vs. Citizens Property Insurance Corporation, et al.,** 37 Fla. L. Weekly D1884a (Fla. 3rd DCA, August 8, 2012) the Former Owners of condominium units in Association entered into negotiation to sell all of their units in 2005 to a single developer. While the parties were negotiating these purchases, Hurricane Wilma struck Miami-Dade County and severely damaged the condominium property. Association had a windstorm policy with Citizens, and submitted a claim for the hurricane damage. Association's policy covered strictly the common elements. Citizens paid part, but not all, of what Association claimed was due. In April 2006, all of the individual condominium unit owners were sold to a developer. Upon closing on all of the units, developer took control of association as the new owner. After the sale, the Former Owners filed a class action suit against Citizens alleging that the property was a total loss and demanded Citizens pay them the full insured amount of the property. The Former Owners argued that, although they were not parties to the insurance contract between Citizens and Association, new developer, as the buyer and Association had, as part of the sale, agreed to assign the right to any future Citizens insurance payout to the Former Owners . A trial was held on Former Owners' claims. The trial court heard evidence and argument on the legal issues of whether Association (pre-sale) could validly assign its right to sue Citizens to the Former Owners, and whether Association (post-sale), with the consent of new developer, could assign any future insurance proceeds to the Former Owners. Ultimately, the trial court granted an involuntary dismissal against Former Owners, finding that the Declaration of Condominium did not grant Association the power to assign the claim of future proceeds to anyone, and that the assignment was *ultra vires*. The trial court also vacated the order granting class certification to the Former Owners. On appeal, the Third District Court of Appeal was required to address only two issues. The first was whether either of two provisions, one in the Declaration of Condominium, and the other in the Articles of Incorporation, prohibited new developer from assigning its potential insurance claim against Citizens to the Former Owners. Second, assuming the condominium documents did not bar an assignment, did this case meet the standard for class certification? The appellate court reversed, finding that neither of the two provisions in the governing documents barred Association from potentially assigning the post-loss insurance claim. The appellate court noted that condominium associations may freely assign post-loss insurance claims under Florida law. Therefore, the appellate court reversed the trial court's holding that Association could not assign its post-loss insurance claim to Former Owners. However, the appellate court affirmed the trial court's decision not to certify the class action and noted that this ruling of the trial court did not constitute an abuse of discretion.

In **Bethany Trace Owners' Association, Inc., vs. Whispering Lakes I, LLC, et al.,** 37 Fla. L. Weekly D2228a (Fla. 2nd DCA, September 19, 2012) Association filed an action against Owner for trespass and breach of covenant. The trial court granted a stay of the action on the basis that Association failed to obtain the required approval of its members before initiating its litigation. Specifically, Section 720.303(1), Fla. Stat., states that before commencing litigation against any party in the name of the Association involving amounts in controversy in excess of $100,000, Association must obtain the affirmative approval of a majority of the voting interests at a meeting of the membership at which a quorum has been attained. Association sought certiorari review of the stay order in the Second District Court of Appeal. On appeal to the Second District Court of Appeal, the appellate court held that the trial court did not depart from the essential requirements of law in ruling that Owner was a "member" of Association and was therefore entitled to enforce the voting requirements of Section 720.303(1), Fla. Stat.

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