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Duty of Confidentiality

By: Todd A. Sinkins

We have recently received numerous inquiries from our clients about what types of information Board members must refrain from disclosing to other members of the community. Given that this issue is often controlled by the particular facts and circumstances at hand, we cannot comprehensively address every issue which relates to the duty of confidentiality; nonetheless, we have prepared this memorandum with the hope that it will provide some general guidance to Board members.

The truth of the matter is that the duty of confidentiality applies to Board members less frequently than the duty to disclose. The general rule is that members of the Board have a fiduciary duty to the members to keep them generally apprised of the Association's business affairs as much as is reasonably possible.

But the law recognizes that there are occasions when it is not appropriate for Board members to openly disclose information to anyone outside of the Board, either because the disclosure may be adverse to the Association's legal interests or the

disclosure may adversely affect a person's interest in maintaining the privacy of certain personal information.

As a general rule, Board members should consider the following types of information confidential:

- ? any information received from the Association's legal counsel in written form marked "attorney-client privilege" or verbally received from the Association's legal counsel in an executive session;
- ? any information related to pending litigation involving the Association which relates to the Board's deliberations or strategy concerning settlement and is not a matter of public record;
- ? any information related to the basis for the Board's decision to terminate the employment of a member of the Association's personnel;
- ? any information related to the Board's deliberations or strategy in pending

enforcement matters involving the Association and a member of the Association;

- ? any information related to the Board's negotiations with a third party over a contract or bid for services; and
- ? any information related to the substance of discussions or comments made by Board members during an Executive Session.

In general, the law does not treat the following information as confidential information:

- ? any information available in public records at the time a Board or Committee member discloses the information to a third party;
- ? any information contained within the Association's books and records which the applicable law requires the Association to make available to any member for review or copying; and
- ? any information a court or administrative agency compels the Board to disclose.

The above-lists are very general guides. Whenever a Board member has any doubt about the confidentiality of a particular informational matter, the best course of action for that member is to seek the guidance of the President or the full Board of Directors BEFORE disclosing the information to a third party. If handled in

that manner, either the President or the Board can evaluate whether the disclosure of the information might harm the best interests of the association or someone's privacy interests, and, if necessary, seek the advice of legal counsel or the community manager.

In light of the fact that inappropriate disclosure of information received from the Association's attorney can have particularly dramatic consequences in litigation, the attorney client privilege deserves particular attention in this memorandum. In general, the law presumes that the information exchanged between a lawyer and a client about the client's legal affairs are confidential; accordingly, the law does not permit a third party to subpoena an attorney's records or a client's legal files, nor does the law permit a third party to require a client of an attorney to testify at trial or in a deposition about his or her communications with his or her attorney, UNLESS the client waives the privilege of confidentiality. If so, the law would permit the subpoena or the questioning at trial or deposition.

In the community association context, it is the prerogative of the Board to determine whether to maintain the Association's legal privilege of attorney-client confidentiality or to waive it. Once the Board waives the attorney-client privilege with respect to a particular matter, it cannot reclaim the privilege; therefore, the decision to waive the privilege must be made judiciously. At a minimum, no single Board member should ever unilaterally make a decision to waive the attorney-client privilege without first obtaining the approval of the full Board of Directors.

These concepts can be very difficult from a practical standpoint, as the duty of confidentiality is not always clear-cut. If you have any questions regarding a particular situation within your community, please do not hesitate to contact us.