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HANDLING ATTORNEY-CLIENT PRIVILEGED MATERIALS

By: Sonia A. Bosinger, Esquire

Do these following situations sound familiar to your Association: letters are received from the Association's law firm regarding a requested research topic, letters are sent to owners on behalf of the Association by the Association's law firm regarding a violation, an owner requests to view all of the Association's documents, or a Board Member's term expires? How is the Association to handle such occurrences? Should the Association allow owners to see all of the Association's documents? These situations frequently face Associations. Some of these documents are considered Attorney-Client Privileged ("ACP") materials and are therefore only available to be viewed by certain Members of the Association. Conversely, other documents are required to be available for inspection by all Members of the Association upon request.

What materials qualify for the ACP classification?

Generally, Clayton & McCulloh is of the opinion that ACP material(s) are those material(s) prepared by or at the direction of attorneys in anticipation of or in preparation for litigation or adversarial administrative proceedings. Because Florida Statute § 90.502 only generally defines "lawyer-client privilege," we believe a good definition of privileged materials and/or records not available for document production within community associations is set forth in F.S. § 718.111 for condominium associations and F.S. § 720.303 for homeowner's associations. These statutes set forth the types of records that are not accessible to unit or lot owners, such as records prepared by an association attorney or prepared at the attorney's express direction reflecting a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which were prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which were prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings.

Clayton & McCulloh generally recommends that the Association produce, upon request, all of its non-privileged records, whether technically falling within the classification of "Official Records," (as defined), or not. More specifically, the Association must maintain the "Official Records" and make them open to inspection and available for photocopying by Members or their authorized agents at reasonable times and places within 10 business days for homeowner's association or within 5 business days for condominium associations after receipt of written request for access. Please understand that a literal reading of F.S. § 720.303 and F.S. § 718.111 suggests that only the Official Records must be maintained and open to inspection. There is an express list of Official Records to be maintained and made available for inspection by the Association, such as copies of: plans and/or specifications of the Association property, the Association's bylaws, the Association's declaration, the Association's current rules, the

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ARCHITECTURAL REVIEW BOARDS AND COMMITTEES - MORE POWER THAN THE BOARD?

By: Geald K. Burton, Esquire

This article will review and attempt to answer some of the issues facing Architectural Review Boards or Committees (hereinafter, "ARBs" or "ARB"). These fixtures of Florida Community Associations sometime purported bastions of power come under a variety of other names, but their basic purpose is to regulate and control physical and aesthetic changes, alterations, improvements, and upgrades to the outside of Association members' (hereinafter, "Members") homes and to the Members' Lots. The committee's powers are typically contained in the Association's Covenants, Conditions, and Restrictions (hereinafter, the "Declaration") recorded in the Public Records of the County in which the subdivision is located. Architectural Control usually almost always involves a Homeowners Association (hereinafter, "HOA"), as opposed to a Condominium or Cooperative Association.

ARB's can be critical in the evolution of a subdivision in terms of what it will ultimately look like in the future. ARB's, properly and reasonably operated, according to a specific set of rules and standards (i.e., Architectural Control Covenants, hereinafter, "ACCs") can help to enhance the property values in a subdivision. Likewise, where ACCs are vague and/or improperly and unreasonably enforced, they can contribute to significant depreciation in the subdivisions' property values.

As strange as it may be, sometimes a Member wants to, or in fact does, paint his house red, where everyone else's is light beige. Fortunately for all of us, this battle between individual homeowner rights and the rights of the Association regarding the Association ability to enforce ACCs is, for all intents and purposes, over. The Association and the rights and powers of the ARB appear to have prevailed in the courts. As long as ARB rules and regulations: 1) have been properly established; 2) are applied consistently; 3) are not unreasonable; and 4) are not arbitrarily or unreasonably applied, they are, typically, enforceable.

While, the red house in the beige neighborhood may be a simple issue, problems may arise when an ARB is set up in the Declaration, but there is no real guidance within the Governing Documents as to the relationship between the ARB and the Board of Directors (hereinafter, the "Board"). Can the ARB approve or deny an ARB application, in spite of the Board's opposition? The short answer is probably not. This is because both under the Homeowner's Association Act [see Florida Statutes § 720.303(1)], and the Non-Profit Corporation Act [see Florida Statutes § 617.0801], the Board is required to govern, control, and exercise all powers of the Association. Chapter § 720.303(1) simply provides,

"An association which operates a community as defined in § 720.301, **must be operated by** an association that is a Florida corporation." [emphasis added]

There is some question as to whether this applies to a Homeowners Association, where the ARB is given virtually a separate existence, independent and apart from the Board. Currently, there is no case law which specifically resolves this situation; however, it would appear that, without more, the specific language of F.S. § 720.303(1), cited above, would prevail. It is interesting to note that pursuant to F.S. § 720.303(1), there appears to be no exculpatory language, as in many other HOA and condominium statutes. In other words, there is no language stating like, "except as provided in the Declaration" (or "in the Bylaws" or "in the Articles of Incorporation"). Moreover, there are many distinctions, as well as legal and factual arguments, which could be raised against the ultimate power of the ARB in making its decisions. As there has been no definitive ruling in this regard at this time, it is difficult, if not impossible, to render an opinion regarding this situation without having first reviewed the Association's Governing Documents.

Please also understand that, if the ACCs or the Declaration provides the ARB with the right to render a decision on behalf of the Association, and if that decision is not in compliance with the ACCs or is otherwise invalid or "ultra vires" (i.e., without authority), then the Board must take immediate action to avoid damages to the Member who requested the approval (hereinafter, the "Applying Member"). The immediate action required is to advise the Applying Member not to make the alteration or take the action provided in the ARB. It is extremely important that this warning be given. If this warning is not given

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minutes of all meetings of the Board of Directors and of the Members, as well as other expressly-listed records. As such, records not included within that expressed list ostensibly are not included and may not have to be maintained and made available for inspection and copying. In other words, Clayton & McCulloh can at least interpose a defense for the Association's refusal or failure to produce even non-privileged records, provided they technically do not qualify as "Official Records".

Who determines this? The attorney, the client, the Board, and how?

In general, ACP materials should be determined by the attorney as such material should be prepared by the attorney or at the attorney's expressed direction. The basis upon which an attorney determines ACP material is generally using the parameters set forth above. Please also understand, however, that to the extent that an attorney has delineated information and/or materials which the attorney does not want the association to produce, it would appear appropriate for the Association (i.e., the Board) to refuse to produce such-materials. By way of example, at times, Clayton & McCulloh's bills or portions thereof could fall within the ACP and should not be disseminated or produced.

Who is entitled and not entitled to see these ACP materials?

Generally, the Association's Board of Directors, the Association's officers and individuals and entities working with the Board, its officers and/or the Association's law firm can view the privileged materials. Generally, Board Members have to make decisions based off of those privileged materials, and as such, they need to be apprised of the contents of the privileged materials. Similarly, if the Association has a manager or if Clayton & McCulloh is involved with some other individual or entity to facilitate dealing with litigation or anticipated litigation, such individual or entity could likewise need and should be permitted access to such ACP materials. Despite the above, please understand that at times one or more Board Members or Officers of the Association should not have access to privileged materials. More specifically, if for any reason the ongoing or contemplated litigation is actually against such Board Member or Officer, then that individual should be permitted access to the privileged materials. Similarly, such Board Member or officer should not have access to the materials if the Board Member or officer has a conflict (e.g., a personal interest in such issues).

How should a former Board Member treat such ACP materials in their possession and of which they have knowledge?

Board Members have a fiduciary duty to the Association. That duty is the highest duty imposed by law. As such, Board Members leaving the Board should turn over all such materials to the existing/future Board. Similarly, such Board Members should not disclose any such information either orally or in writing as such matters are privileged. Please also understand that if such information is disclosed, especially in contravention of the recommendation of the Association's counsel, a breach of fiduciary duty could arise, and such Board Member could be held personally liable. Of course, we would generally only expect personal liability to result in the event a Board Member actually intends to breach his fiduciary duty and such Board Member discloses such information.

When an owner, not a Board Member, requests to see ACP materials, what do they get to see?

Briefly stated, owners do not get to see privileged materials. However, it is possible for portions of materials to be privileged while other portions are not. As such, those portions of Official Records which are not privileged ostensibly should be available to the Membership. Sometimes, the Association may choose to redact the privileged portion of such materials.

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Clayton & McCulloh can redact the sensitive portions of privileged materials for the Association. Alternatively, it may be acceptable for the Association to perform such redaction, provided it is at the direction of Clayton & McCulloh. If an owner requests to inspect an Official Record, Clayton & McCulloh, or if acceptable, the Association can redact and/or black out the ACP materials, then allow the owner to see the marked up ACP materials.

How should materials be marked to identify same as ACP?

Generally, the Association, to the degree it is following the directions of Clayton & McCulloh, can mark the materials "Attorney-Client Privileged" at the top - literally, just using those words. Similarly, Clayton & McCulloh will periodically put a confidentiality paragraph at the beginning of its letters and communications delineating the privileged nature of such letter and instructing the Board of Directors not to disseminate such materials.

What else should we be aware of in these matters, handling, marking, making available for 3rd party review and protecting ACP materials?

Hopefully, the above discussion answers and gives the Association adequate guidance with respect to the topic of handling ACP materials. Nevertheless, if the Association encounters an issue or document and is unsure whether or not it falls within the parameters of ACP materials, please contact us so that we can assist the Association in making the proper determination. Additionally, to the degree that the Association requests written opinions from Clayton & McCulloh, please inform us if the Association believes that they may be of a privileged nature, especially when the Association may have been threatened with litigation regarding a topic. Please understand in these circumstances, generally Clayton & McCulloh's response often will entail privileged information (i.e., information which Clayton & McCulloh would not want disclosed) to the Membership.

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in time, then depending on the circumstances, the Applying Member may have a cause of action against the Association for the damages the Applying Member suffered as a result of the erroneous ARB approval. Damages in this situation could include the costs of making and then having to remove the alteration. Further, the Association may also be liable for the Applying Member's attorneys fees, and costs. Please also note that all warnings should be in writing, if possible.

Because of this, the Board should not wait until the next regularly scheduled Board meeting to consider matters approved or disapproved by the ARB. The Board should receive a report containing the results of the ARB approvals and denials as soon as possible after the ARB renders a decision. One way to avoid a disconnect between the Board and the ARB is to require and/or always have at least one Director serving on the ARB and/or attending ARB meetings, so at least one Director is current on ARB proceedings and activities and can communicate same to the Board.

It is also important to understand that, as the Board is the Association's ultimate managing and operating entity, it has other powers and ways to affect the rulings of the ARB. In most instances, for example, members of the ARB serve at the request of, and/or are appointed by, the Board. As such, ARB members may be subject to being removed by the Board at any time. Depending upon the Governing Documents, there are oftentimes other methods of controlling an ARB, should same become necessary. If the Declaration does not require final approval of ARB decisions by the Board, then the Association may want to consider amending the Declaration to include such approval requirement.

Finally , every ARB is required to render its decisions in accordance with the Association's ACCs or other architectural guidelines. Should a disagreement arise between the ARB and the Board, or any of its Members, regarding the meaning or effect of the ACCs or architectural guidelines, this disagreement may be a fairly good indication that the Association's Architectural Control Covenants or guidelines are not sufficiently specific, and the Board should consider appropriate amendments.