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The Alliance of Delray Residential Associations

proudly present:

***The Defamation of Directors &  
How to Deal With Abusive Members***

By: Joshua Gerstin, Esq.  
Gerstin & Associates

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# *The Law of Defamation*

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1. Two forms of defamation:

- ▶ Slander - spoken form
- ▶ Written – libel

2. Defamation v. free speech has evolved through state common law. People have a right to insult, but not make false statements about, one another.

3. Two types of Slander or Libel

- ▶ Standard “defamation”
- ▶ Defamation *per se*

# Defamation Defined

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1. Florida common law defines “defamation” as: a false statement of fact, communicated to a third party, which is meant to hurt the plaintiff’s reputation or economic well-being.
  - (a) A false statement must be uttered. Most of the time, nasty or stupid comments or insults usually do not qualify.
  - (b) Must incur and be able to prove damages.
  - (c) If a false statement is uttered without causing damages, a claim for defamation does not exist.
  - (d) Must be uttered to a third party. A defamatory statement about you, made to you, with no one else in the room does not suffice.

# *Defamation Per Se*

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1. Often times proving damages from defamation is not possible.
  - (a) However, some types of defamation are considered so socially unacceptable, its mere utterance to a third party is presumed to cause damages.
  - (b) Known as Defamation Per Se, the following defamatory statements do not require a claimant to prove damages:
    - (c) Afflicted with a terminal disease;
    - (d) Engaged in criminal activity; or
    - (e) Acted in a way unbecoming of his or her profession.

For both defamation and defamation *per se* the speaker's utterance only has to be negligent when the target is **not** a "public figure"

# ***Private Figure v. Public Figure***

1. For private figures, the person defamed only has to show the speaker was negligent.
2. For public figures the person defamed has to show the speaker's utterance was malicious. The speaker had "actual malice".
3. Actual malice in the defamation context is defined as: "publishing a statement while either knowing that it is false or with reckless disregard as to the statement's truth or falsity. "
4. *A third category known as "limited purpose public figure" may encompass community association directors. The "actual malice" standard applies to limited purpose public figures.*
5. The courts in Florida have not directly ruled on this issue. However, many other states categorize community association directors as "limited public figures".
6. The standard from the courts within the state of New Jersey that has been used in other states:  
" a person invites the application of the actual malice standard by voluntarily and knowingly engaging in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny".

## *Who is Suing Who?*

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1. Assume a defamatory statement was uttered against a director, who was damaged and the speaker's statement showed actual malice.
2. Can an association use its own funds to sue an owner that defamed a director.
3. Only if the statement can be shown to have defamed or damaged the association or the board of directors as a whole. If not, the director is on his/her own and has to sue the owner using his/her own funds.

# ***The Hurdles in a Nutshell***

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- ❖ The director has to show actual damages, or have been victim of defamation *per se*.
- ❖ The director will most likely have to show “actual malice”.
- ❖ The owner has the defense of “truth”.
- ❖ The director may be funding the lawsuit on his/her own.

# Notes

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# ***What Can Be Done About Abusive Members?***

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- ❖ Community associations are not governmental entities. Rules can be adopted that establish a certain minimum level of behavior, or code of conduct that all members must follow without violating first amendment rights.
- ❖ Rules can be drafted to prohibit defamatory or abusive speech towards the directors.
- ❖ Violators can be fined and if the fines go unpaid for 90 days common area privileges suspended.
- ❖ Drafting such Rules are tricky and community associations must consult their attorneys when doing so.

# *How to Deal With Abusive Members*

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- ▶ Problems often can arise when an owner or owners are not happy with particular board decision or policy. Often times, these situations can be resolved internally through transparency of board decisions and frequent communication to members.
- ▶ Sometimes a problem arises because a member is a sociopath and has a lead a life in which he/she has argued or sued neighbors and almost everyone they come into contact with in the past. No one can change this person and no policy will. The only option is exclusion and court enforcement.

## *How to Deal With Abusive Members, Contd.*

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- ▶ Just because behavior is socially unacceptable does not mean you can seek enforcement or prohibition against a member.
- ▶ Member conduct has to be outlined in specific rules or regulations or it will not be enforceable.
- ▶ Association's should avoid passing Rules and Regulations regarding member's interactions with each other. Otherwise, the Association will be inundated with complaints and a duty will arise to take action.
- ▶ Association's should pass detailed Rules and Regulations regarding member conduct towards staff, employees and directors.

## *How to Deal With Abusive Members, Contd.*

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- ▶ Violations of Rules and Regulations regarding member conduct should be enforced with fines.
- ▶ Thanks to recent legislation if a fine goes unpaid for more than 90 days, the Association can suspend the member and his/her guests common area usage.
- ▶ Violent or threatening members should be reported to the police immediately and forwarded to the Association's attorney to build a potential case for an injunction.
- ▶ All complaints should be in writing.
- ▶ Enforcement must be uniform and documented.

## *How to Deal With Abusive Members, Contd.*

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- ▶ *Attitude is Everything.* Be polite and listen to both sides. Sometimes an owner that is upset is confused or may actually have a valid point and has been treated unfairly.
- ▶ Do not lose sight of the association's purpose. The purpose of an association is to maintain property values, maintain the common scheme of the community, and maintain the enjoyment of all living in the community.
- ▶ Don't lose sight that an association is a business. Make decisions based upon the needs of the business and the long term goals of the business. Don't make it personal.
- ▶ The goal of the board of directors is not to teach a lesson to a homeowner who does not follow the rules. The goal is to further the purpose of the association.

# ***Anecdotes and Words of Wisdom***

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- ❖ *Successful directors need a strong back bone, wishbone and funny bone.*
- ❖ Do not take yourself too seriously and resign if you do not enjoy being a director, it is not for everyone.
- ❖ *No good deed goes unpunished, and do not expect it be rewarded.*
- ❖ There is no way to please everyone, those who try are playing a sucker's game. Split your persona into neighbor and director. When you are a director, listen to others but make your own decision and stick by it.
- ❖ *"Sticks and Stones will break my bones but names will never hurt me"* should guide you through your term.

# Notes

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