



KEOUGH MOODY

November
2019
Newsletter

It is November, and this month we are thankful for strengthening our ability to deliver high quality legal services to our clients by adding new attorneys Kenneth J. Donkel and Nick E. Porter.



On December 1, 2019 Ken will join Keough & Moody, P.C., giving all of our clients greater access to resources and talent from our offices in Chicago and Naperville, and now additionally from our new location in Tinley Park. The newly expanded Keough & Moody, P.C. includes 11 attorneys and 15 support staff members, providing our clients with over 100 years of legal experience in community association law, real estate law, corporate/transactional law and litigation. Our clients should see a seamless transition and continued focus on the matters important to them.

Ken has represented condominium and community associations for 37 years. He acts as general counsel for associations and has represented associations in their collection of delinquent assessments, contract negotiations, litigation, declaration amendments and opinion letters on association procedures and practices. He has extensive experience representing commercial and residential property owners in contractual matters, corporate work, and leasing.

Ken received his Bachelor of Science Degree in Business, Cum Laude, from Northern Illinois University. Ken received his Juris Doctorate Degree from Chicago-Kent College of Law. He will be located at our Naperville and Tinley Park offices and may be reached at kjd@kmlegal.com or at (630) 369-2700 x261.

We are also excited that Nick joined Keough & Moody, P.C. on November 4, 2019. In addition to representing insurance companies in litigation for two years, Nick spent the last two years representing condominium and homeowners' associations with an emphasis on the collection of delinquent assessments. Nick received his Bachelor of Arts Degree in Philosophy from Northern Illinois University. Nick received his Juris Doctorate Degree, Cum Laude from Northern Illinois University College of Law. Nick is located at our Naperville office and may be reached at nep@kmlegal.com or at (630) 369-2700 x208.

Finally, we would like to congratulate Gabriella Comstock for her successful efforts in filing an amicus curiae brief on behalf of the Illinois Chapter of the Community Associations Institute (CAI) in the United States Court of Appeals for the Seventh Circuit in *Horist v. Sudler & Co.* The Court found in favor of Sudler Property Management and Homewisedocs in a case involving the efforts on the part of management companies and third parties in providing the necessary disclosures to buyers and sellers of real estate. For the complete press release, see <https://lnkd.in/g-r7fw5>.

Please enjoy our article this month regarding a Board member's duty of confidentiality.

If you have any questions about the article that follows, please contact Chuck Keough at cmk@kmlegal.com. All of us at Keough & Moody appreciate your continued support. Please write us a review by clicking on one of the links at the bottom of the newsletter!

Chuck Keough

A Board member's duty of confidence

A member of the Board of Directors is privy to information not only regarding the Association and its general business, but also information related to individual owners, such as information regarding financial hardships. A large portion of the information gained by Board members is meant to remain confidential among the Board members, its managing agent, and its professional team, such as legal counsel and accountants. This duty of confidentiality is part and parcel of an individual Board member's fiduciary duty to the Association and a breach of this duty could subject a Board member to potential personal liability. What does this practically mean for a Board member?

First and foremost, Board members should be mindful of the confidentiality of information it receives about a particular owner. In almost all instances, such information must remain confidential. As a result, Board members should not speak with other residents at a Board meeting or elsewhere about the financial plight or rule violation status of other owner(s). In addition, a Board member should not post or otherwise share the name(s) of individuals who are delinquent in the payment of common expenses. Such discussions should always be held in executive session. When residents attend meetings to discuss their personal situations during homeowner forum, they should be quickly advised that their concerns will be addressed in executive session. Information then learned during those executive sessions must never be shared with others, including spouses. And, the information should never be used for a Board member's personal gain.

It can be difficult for a Board member to remain silent or to provide vague answers when owners demand information about a particular matter (i.e., a rule violation or reasonable accommodation). Unfortunately, until such time that litigation begins and the matter becomes one of public record, the Board must keep all associated information confidential. Even after litigation starts, the Board's disclosure should be limited to only that which may be found in the court file. Strategy and settlement discussions cannot be discussed openly at an open Board meeting or with neighbors afterwards at the post-Board meeting happy hour.

Board members also receive bids and other information from current and prospective service-providers. Usually this information is provided to the Board via email or in a Board packet for review and approval at the next open Board meeting. Bids are submitted by service-providers with the understanding that they will remain confidential. The bids should not be shared with non-Board members and other competing contractors, although the Board can disclose the general terms (price, duration, etc.) to the membership during its open meeting. Both the Illinois Condominium Property Act (765 ILCS 605/19) and the Common Interest Community Association Act (765 ILCS 160/1-30(i)) support this position in that only contracts entered into by the Board, and not the bids, are required to be kept and made available for inspection by the membership.

Similarly, particular issues or grievances related to a contractor should not be discussed publicly or specifically noted within the meeting minutes of the Association. Detailed discussions regarding issues with a particular vendor should only occur during executive session. By having these discussions in executive session, the Board members ensure that they are able to speak candidly regarding a particular issue. Further, it protects the Board from allegations that it may be slandering a particular vendor by speaking poorly of them.

In all instances, the specific content of executive session conversations should remain confidential. If the certain members of the Board vote against a position which a particular Board member endorses, it does not authorize the Board member(s) in the minority to discuss the content of the executive session conversations with other residents or third parties. Decisions are made by a majority of the Board. Once such a decision has been made, the other Board members are generally bound to accept that decision and to keep the information confidential. Board members who breach this duty of confidentiality run the risk of being potentially liable for this conduct.

Finally, legal advice must remain confidential among Board members. Opinions received from legal counsel are generally deemed to be privileged and confidential. This means that dissemination should be limited to Board members and authorized agents of the association. Forwarding a legal opinion to a neighbor or other third party or having a joint email account with a spouse may destroy the attorney-client privilege. Therefore, it is important for Board members to have their own, individual email addresses for purposes of receiving Board communication (and preferably one that only receives email related to Association matters) to ensure that privilege is not inadvertently waived and for Board members to recognize that legal opinions must be not shared without the prior approval of the Board.

In sum, Board members should remain mindful that the information that they receive is not always meant for association-wide review and consideration. If there is a question about what can and should be disseminated to the membership, prior to acting, the Board should ask its legal counsel or community association manager. In no event should one Board member, without full Board authorization, forward or share information, which is deemed to be confidential under the Illinois Condominium Property Act or the Illinois Common Interest Community Association. This duty of confidentiality is an important one and continues even when an individual no longer serves on the Board.

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