It is hard to believe that January is already over! Dawn, Gabby and I recently attended the CAI Law Seminar. While we would have rather attended it in Palm Springs, California, we were impressed with how well CAI produced its virtual law seminar. We learned more about how other parts of the country are handling issues related to the pandemic and community associations. Nuisance violations and difficult owners continue to plague associations throughout the country. Also, we gathered further insight into how to deal with sensitive issues within associations. We look forward to sharing what we learned as we advise our clients in 2021.

We also want to thank all of you for attending our webinars. We are grateful that you continue to take the time to attend them. Educating our clients and their managing agents is very important to us. As Gabby often says, we have been fortunate enough to be in this industry for a long time, we "owe" it to others in the community to share what we have experienced. We will continue to provide regular webinars. We are always open to new ideas for suggested topics, so feel free to let me know about any of your ideas (cmk@kmlegal.com).

Chuck Keough

KEOUGH & MOODY WEBINAR: Part 1 OF 3 ON RULES & ENFORCEMENT
Would You Send Out a Violation Notice for THIS?
January 21, 2021 at 12:00 p.m.

Join Gabriella Comstock and Dawn Moody for a webinar on Wednesday, February 24, 2021 from 12:00 p.m. – 1:15 p.m. where Gabby and Dawn and will ask you if you really would send a violation notice based on the complaint submitted. Come learn more about when to get involved and when to walk away. Learn how to avoid that "subjective" enforcement trap that may lead to greater problems for the association and management. Attendees can register here: _____.

COLLECTION POLICY REVIEW

During last month's Keough & Moody's Webinar, Dawn reiterated the importance of every association having a collection policy. She also explained that due to the current Executive Orders in place and recent changes in the eviction process, now is a good time to review your previously adopted collection policy. We want to be sure that all associations are taking all necessary steps to collect assessments.

Have your current collection policy reviewed and updated by K&M for an agreed fee of $350.00. If you are interested in having this review completed, please send your request to Leah Gabel at lsg@kmlegal.com.

COMMUNICATION WITHIN COMMUNITY ASSOCIATIONS:
THINK TWICE BEFORE PRESSING "SEND"

Last month's newsletter reminded all Board members the importance of following communication protocols when addressing owners, whether one-on-one or in a meeting. Board members should remember that what they say to each other can likewise be subject to scrutiny. This month's reminder is that there is no such thing as Board confidentiality or privilege,

so directors must be just as careful when speaking and sending emails to each other. Today, it is the preference of many to shoot off an email rather than to discuss something by telephone or in person. Email is more convenient in that it can be sent at any time, and it is often quicker to send a quick note rather than to schedule a meeting. This tendency has grown even more prevalent now that gatherings and face-to-face proceedings are limited. Using email as a primary form of communication for Boards, however, is ill-advised, as the following examples demonstrate.

Example #1: What a Jerk!

Management receives an architectural modification application from an owner. Per the architectural review procedure established for the subject Association, the manager emails the application to the Board. The President of the Board promptly hits "reply all" to tell fellow Board members that the applicant "is nothing but trouble! If this jerk thinks we're going to allow him to change out his fence after the way he behaved at the holiday party, he's got another thing coming!"

What could go wrong with sending this email? The only people who will see it are the Board, right?

Wrong! As noted above, there is no such thing as Board privilege. That means that emails that directors send to one another can be subject to disclosure in several circumstances. For example, under the case of *Boucher v. 111 East Chestnut Condominium Association* reiterated that which the Court *Palm II* held -- that any time a quorum of the Board is discussing Association business, it is considered a Board meeting and it is therefore subject to open meeting and minute-taking requirements. This includes a quorum of the Board on an email string discussing Association matters. In such a case, not only might the Board be found to have conducted a meeting without giving due notice to owners (if the topic of the emails was such that executive session discussion was not appropriate), but the emails themselves could be deemed to be the Board minutes. That means that when an owner makes a request to inspect the books and records of the Association including meeting minutes, she may be entitled to see such emails. That includes the email where one of the directors who has a personal dispute with the requesting owner called that owner a "jerk" (and worse) because the owner was persistent when making her request for maintenance work to be done. Having such an email shared within the community will jeopardize the Board's standing and credibility with owners.

Example #2: Your Honor, I Admit It

Recently, an association had minor repair work completed. The work was performed well and on time, but the Board developed a strong distaste for the contractor when, toward the end of the job, it was discovered that the contractor drove a vehicle with a bumper sticker supporting a political candidate that the Board secretary strongly disliked. Thereafter the Board delayed payment. The contractor sent a final demand for payment by email, before filing a lawsuit to enforce the contract. Instead of issuing payment, the Board secretary responded to the contractor that "I know we owe you money, and I don't care! Maybe we'll pay you after the election!" The contractor promptly had his attorney file a collection action, and the Secretary's email was Exhibit A.

The above is unfortunately very common. Often Board members do not believe their emails will be seen by those for whom they were not originally. Yet, often those emails are part of a

lawsuit when it is filed. Even if a Board email does not end up as an exhibit to a complaint, when litigation is underway, the scope of discovery is broad and – depending on the nature of the claim – communications among and between the Board are almost always requested. When this happens, not only are emails which may be potentially embarrassing (as discussed above) subject to discovery, but so too are emails that could impair – or even lose! – the Association's case. A statement by an office of a corporation is an admission, so the plaintiff's case against the Association can be quickly proven using the Board's own words. Before we press "send," we attorneys often think about "what if a Judge sees this communication." Board members and management should also stop and think twice before putting anything about an Owner or a situation in writing.

Example #3: That is Protected by the Director-Manager Privilege, Right?

There was an email exchange between the Board and management regarding an owner's request for a hardship exception to the association's leasing restriction. The manager initially received the request and, when he forwarded the request to the Board, which were mostly newly elected, the manager wanted to let the Board know how the prior Board handled such requests. Therefore, when forwarding the request to the Board, the manager said in his email "We have never granted an exception. As far as I am concerned, we never should."

It does not seem like there is anything wrong with the above e-mail. It contained true statements and nothing derogatory. However, the Board ultimately denied the request on its merits – not because of the manager's comments. Even so, the unhappy Owner sued the Association and this email came out during discovery. Not only did the discovery of this communication cause embarrassment for the manager and the Board, but it allowed the Owner to argue that the Board does not follow its own procedures to seriously consider hardship applications. As stated in Example #1, there is no such thing as inter-Board communication privilege. Likewise, emails sent between management and one or more Board members are not protected, and are subject to discovery.

Example #4: Approved by the Board…via Email

Board President emails his fellow Board members proposals from three vendors. In the body of the email, the president states that "I prefer XYZ corporation. Not only did they come in with the lowest bid, but I know their work and I think they will do a good job. What do you guys think?" Instead of responding that that the matter will be discussed and voted upon at the next Board meeting in two weeks, other Board members respond with "I agree" and "whatever, you say, Bob, I trust you." Once a majority of the Board responded in this way, XYZ corporation was hired, before the Board meeting.

It is not unusual for Boards to circulate something that requires a Board decision – a proposal from a vendor, or a draft decision in a violation matter – by email. Circulating information in this way is fine, and is an acceptable use of email. The problem is, however, that Boards often find it easy to take the next steps – discussion and voting – by email as well. This is problematic not only for the reasons stated below, but because it violates open meeting requirements of the Illinois Not-for-Profit Corporation Act, the Illinois Condominium Property Act, and the Illinois Common Interest Community Association Act. Each of these statutes requires that all Board member votes be taken at a duly noticed meeting open to all members of the

Association. Hence, a "vote" via email is not proper, and is subject to challenge not only by an owner, but also by any other party who might be affected by the Board's action. (For example, by a vendor who learns that the Association did not properly approve and sign his contract.)

So, how should a Board handle email communication? Emails should be used sparingly, and for only specific purposes. Best practice dictates that Boards and management should only email each other to share information – to forward documents for consideration, to offer dates for meetings, et cetera. In no event should Boards discuss substantive matters, or vote, via email. If this happens, someone must be ready to stop it and schedule an open meeting. Not only does such a practice not comply with the law of Illinois regarding open meetings and meeting minutes, but it could lead to unintended consequences as discussed above. More importantly THINK BEFORE YOU HIT "SEND!" As a Board member or as a manager ask yourself how your email would be taken if it were seen by a judge, or by the person who is the subject of the email. If you would not want them to see what you have written, pick up the telephone instead.

Please let us know if you have any questions about the contents of this newsletter or if we can assist with any of your Association's needs.

Chuck Keough (cmk@kmlegal.com), Dawn Moody (dlm@kmlegal.com), & Gabby Comstock (grc@kmlegal.com)