KEOUGH MOODY

March 2021 Newsletter

After a snow-filled February, we welcome March. As we look ahead to spring, this newsletter has a lot of information. We have information on this month's webinar, loosening of COVID-19 restrictions in the City of Chicago, and we continue with our series on communicating more effectively within your association. We also are sharing some tips on what to do with problem tenants within your community association, in light of the eviction moratorium.

Please let us know if you have any questions about the information within this newsletter. As always, we welcome your ideas for suggested topics in our newsletter and/or for our webinars. We thank you for your continued trust in our firm.

Chuck Keough

KEOUGH & MOODY WEBINAR:
Part 2 OF 3 ON RULES & ENFORCEMENT
Adopting Enforceable Rules and Regulations
March 17, 2021 at 12:00 p.m.

Join the attorneys of Keough & Moody for a webinar on Wednesday, March 17, 2021 from 12:00 p.m. – 1:00 p.m. and learn more about adopting enforceable Rules and Regulations. We will walk you through the process from start to finish—from the initial drafting to adoption. Learn how to avoid common mistakes when adopting rules and regulations, that will make enforcement easier. Attendees can register here:
http://events.constantcontact.com/register/event?llr=gyjn4vdab&oeidk=a07ehnx4zb4ebfda50d

THE CITY OF CHICAGO LOOSENS COVID-19 RESTRICTIONS

Recently, the City of Chicago moved into "Phase 4" of the Illinois COVID-19 mitigation plan. However, residents should be aware that Chicago's Phase 4 restrictions are not identical to restrictions elsewhere in the State. While many of these changes will have little direct effect on residential associations, Boards of Chicago associations should be aware of the following:

- For associations with fitness rooms and associated amenities: health and fitness centers may now allow 40% capacity with no more than 50 people per space. Locker rooms may remain open if strict and frequent cleaning measures are in place; ancillary accommodations such as saunas must remain closed if social distancing is not possible.
- For all associations: Indoor gatherings within private residences (condominium or townhome units) is limited to 10 individuals.

- For associations with conference rooms or party rooms: Indoor gatherings in amenity spaces such as a party room is limited to 40% or 50 individuals, while ensuring social distancing.

While loosening of restrictions on bars, restaurants and museums, and the reopening of lakefront parks, might lead residents to think that the pandemic is reaching its end (and hopefully it is!), associations must be mindful that many restrictions and requirements still apply. For example, face coverings and social distancing should be continued, as should enhanced cleaning and sanitation of common areas. Further, associations should continue to utilize posted waivers and signed releases for those who choose to use amenities where the risk of transmission might be elevated.

REMOVING A BAD TENANT DURING THE PANDEMIC: CAN THE COMMUNITY ASSOCIATION TAKE SUCH ACTION?

It is not uncommon for one who lives in a community association to have experienced living above or near someone who cannot or will not abide by the community's standards. If that person is a tenant in a community association, a Board of Directors should understand that there are more tools available to address a problem tenant than those found in the association's governing instruments. And pre-pandemic, using those other tools were easier than they are today.

Enforcement would begin by sending notices of violation to an owner with a problem tenant. You know, the one who entertains noisy gatherings, flaunts other rules or damages common elements? Sometimes those notices are enough to curb the bad behavior. Naturally, the Board should first follow its own Rules and prescribed path therein to persuade the owner to correct the tenant's annoying or destructive ways. Further, this demonstration of seeking a peaceful resolution (and creating a record while doing so) will benefit the association. However, if notices of violation and fines are not enough to compel the owner to cause the tenant to end this bad behavior, it may be time to seek removal of the tenant.

The Illinois Code of Civil Procedure provides a nifty remedy (735 ILCS 5/9-104.2(c-5)). There, it states that the board shall notify the tenant *and* the owner in writing that the tenant has ten (10) days to leave the unit as a consequence of the tenant's failure to abide by the cited applicable portion of the Association's governing documents. Then, either the tenant leaves voluntarily, or the parties achieve an acceptable resolution among them. If the tenant fails to vacate and no accord is reached, the Association could then bring suit against the tenant *and* the owner. Possession would be sought from the tenant and court costs and attorney's fees would be sought from the owner.

Problem solved, right? Not so fast. Unfortunately, the remedy above has been superseded by Governor Pritzker's Executive Order 2020-72. The Order states that all law enforcement officers are instructed to cease enforcement of orders of eviction for residential premises *unless*

the tenant has been found to pose a direct threat to the health and safety of other tenants or an immediate and severe risk to property. In other words, the standard to actually evict bad tenants has substantially changed for condominiums and common interest communities. I have experienced first-hand that at least one Cook County judge treats the duo of "direct threat to health and safety" and "immediate and severe risk to the property" as high hurdles for associations to climb over. In her ruling, the judge was troubled by a lack of evidence showing the *immediacy of the harm* posed to the other owners/residents and to the property itself.

Now what? If associations have a problem tenant, continue to follow your Rules. Send notices of violation, issue fines if appropriate, and attempt to work with the owner to stop the problematic behavior. If this is unsuccessful and the facts of the situation merit it, the association could treat the tenant's conduct as a nuisance and seek an injunction in chancery court. There may be other legal remedies available to the association to "stop" the conduct. Because the Board of Directors has a fiduciary obligation to all the owners to strictly comply with its governing documents, throwing up your hands and doing nothing is not an option. We encourage boards to seek the advice of its attorney if confronted with a problem tenant that it cannot evict at this time.

COMMUNICATION WITHIN ASSOCIATIONS

Fostering Effective Communication Between the Board, Manager and Association's Attorney

In recent newsletters, we focused on how fellow board members can effectively communicate with one another, as well as with the owners. As one would guess, there are a number of other factors related to communication that impacts the Association's day to day operations, and to ensure that the Board is fulfilling its duties and responsibilities to the association. Specifically, communication between the Board, management, and the Association's legal counsel. After all, the association's Board is not expected to know every law or legal responsibility of the association or of the Board members. Even while a valuable tool assisting in the day to day operations of the Association, the community association manager cannot practice law. Hence, management and members of the Board must rely on the assistance of the association's legal counsel.

In order for legal counsel to adequately assist the Board and management, there must first be clear lines of communication. This starts with designating the point of contact for the association and legal counsel. Typically, when an association is professionally managed, this will be the association's managing agent. Since it is the managing agent who is running the day to day operations, it follows that they should be a point of contact with legal counsel. After all, this helps to ensure compliance with the advice from legal counsel. It is also not uncommon for the Board to select a member of the Board to also act as a point of contact. Designating the point of contact for legal counsel ensures a clear line of communication between legal counsel, the Board and management. Not only does this create a clear understanding, but also it ensures

a seamless transmission of information, opinions and recommendations from legal counsel to the association. It also helps to control legal fees since only persons with authority are directing legal counsel to take action. While only certain persons are designated as points of contact, all information and advice communicated between legal counsel and the association's representatives are intended to be shared with all members of the Board. After the Board decides who will act as the designated contact for the association, we recommend that the Board also establish a procedure as to how that information will be conveyed to the rest of the Board.

When conveying the advice of legal counsel to the rest of the Board, it is important that all steps are taken to protect the attorney-client privilege. The "attorney-client privilege" is the right of a client to refuse to disclose and prevent any person from disclosing confidential communication between the client and the attorney. Generally speaking, attorney-client privilege exists between an attorney and its client regarding communications, whether written or oral. While there are certain exceptions, any information conveyed to and from the Board, from the association's attorney, where no other individuals or parties are present or otherwise included on the communication, will likely be protected by attorney-client privilege. The management company and manager will also be included as a party as far as the "client" goes in an attorney-client privilege, as the manager is an agent of the Board and association acting on or behalf of the Board as it relates to the attorney.

The attorney-client privilege belongs to the client, meaning the Association. As the Board is acting on behalf of the Association, the privilege can only be waived by the Board or by its agent Now, this waiver can be explicit, for example where the Board openly states that it is waiving the privilege and thus shares communications or information provided by the Association's legal counsel. The privilege can also be inadvertently waived when information or communications between the Association and legal counsel is conveyed to a third party. Once the privilege is waived, all related to the subject becomes "fair game" and may have to be disclosed to third parties.

Let's test your knowledge on what you just read and see if you were the actor in the following examples, would you have protected the attorney-client privilege, or would you have inadvertently waived it?

SCENARIO #1

The association's manager sends an email to the association's legal counsel requesting an opinion on who is responsible for a clogged sewer pipe. The association's legal counsel responds to the email and answers the manager's question. The response includes citations to the Declaration, Illinois law and refers to the past actions of the Board. It concludes with the attorney making a recommendation as to what the Board is to do in response to the situation. This association only has the manager as the attorney's designated contact, so upon receipt of the email, the manager presses "FORWARD" and sends the email to all members of the

Association's board with the simple message of "Please see below which is the recommendation from the association's attorney as to what the Board should do to address the clogged sewer pipe."

Is the attorney's opinion on the how to address the clogged sewer pipe protected by the attorney-client privilege?

ANSWER

Yes, at this point, the communication is protected by attorney-client privilege. The manager is considered part of the "control group" as they are acting on behalf of the Board and association. As the communication has only been forwarded to the Board members (assuming that it is the personal email of the Board member and not also his/her spouse or family), all parties involved are either the attorney or client for sake of the privilege.

SCENARIO #2

An owner sends an e-mail to the association's manager asking if they can install a satellite dish on the roof their building. The association's manager forwards this request to the association's legal counsel requesting an opinion. The association's legal counsel responds to the email and provides his opinion. In reaching his conclusion, the attorney refers to past actions of the Board in response to satellite dish installations, which highlights what the Board did wrong. Hence, the attorney's recommendation refers to the past actions of the Board and how to address those errors to ensure compliance with the law. The attorney does answer the question whether the Board has to allow the installation of the satellite dish by this particular Owner. Upon receipt of the email, the manager, presses "FORWARD" and sends the email this time not only to the members of the Board, but also to the requesting Unit Owner, with a message that states "John (unit owner), Below is the email from the Association's attorney stating you cannot install your satellite dish."

Is the attorney's opinion on whether John can install the satellite dish protected by the attorney-client privilege?

ANSWER

No. By forwarding the attorney's e-mail to the owner, who was not a board member, the attorney-client privilege was destroyed. In addition, the attorney-client privilege may also not apply to any communications related to how the Board addressed other requests to install satellite dishes. It would have been proper to just forward the email to the members of the Board. Then, the response to the Owner should not have been the attorney's e-mail, but instead a summary by management or the Board as to what the attorney said. For example, the manager could have sent the Owner an email stating that the Board asked legal counsel how it

should act in response to the Owner's request. The email could have gone on to state that based on the advice of legal counsel, the Board has decided to allow the satellite dish to be installed on the Owner's deck. Another option for the manager or the Board would have been to ask legal counsel to draft a response to the Owner's request that can be given to the Owner. This would ensure that the attorney did not include any confidential information and since he was not writing it for his client but for an Owner, the attorney- client privilege would not even come into play.

SCENARIO #3

The association's point of contact with legal counsel is both the managing agent and the Board President. The Board President sends the attorney an email seeking an opinion about an owner's challenge to the Board's recently adopted special assessment. In response, the attorney sends his opinion to the Board President and he includes the manager.

Is the attorney's opinion still protected by the attorney-client privilege?

ANSWER

Yes. Both the President and the managing agent are legal counsel's designated contact and part of the association's control group.

SCENARIO #4

Same situation as in Scenario #3, but the Board President's email asks the attorney to call him after he has determined how the Board should proceed. The attorney calls the Board President at a scheduled time when other members of the Board are with the President (as all members of the Board have received the COVID vaccine). During the call, the Board President placed the attorney on speakerphone so all members of the Board could hear his opinion. However, also at the Board President's home was the President's wife and Sally, who lives next door. While the wife and Sally were in a different room than the members of the Board, they could hear everything the attorney said during the call.

Is the attorney's opinion still protected by the attorney-client privilege?

ANSWER

No. Even though one of the third parties is married to the Board President, she, like Sally, is a third party. Even if the Board did not know that the wife and Sally could hear the attorney, they did. Hence, the communication during the call may not be covered by the attorney-client privilege.

SCENARIO #5

Same situation as in Scenario #3, but in this instance, the email is sent to the Board President, who has a shared email account with his wife (boardpres&themrs@anyassociation.com).

Is the attorney's opinion still protected by the attorney-client privilege?

ANSWER

No. Like Scenario #4, the attorney-client privilege is waived as not only does the Board President have access to the email (and the opinion), but also so does his third-party wife. It is important that to the extent that Board members do not have individual emails (which cannot and are not accessible by third parties), they establish separate emails for Association-related business so that a Board member does not inadvertently waive privilege.

The communication between a Board, management and legal counsel must be open as a twist in facts can affect the attorney's opinion. For this reason, the Board and management must do everything they can to protect privilege, while ensuring all persons involved in the day to day management of the association know legal counsel's advice. There will be times when the legal opinions will need to be shared with Owners or other third parties. It is imperative all steps are taken to protect the underlying privileged communication. Hence, when in doubt how best to do that, the association should err on the side of caution and confirm with legal counsel as to how the information should be shared.

If you have any questions about this article or anything else related to your association, please do not hesitate to contact our office.

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

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www.kmlegal.com
info@kmlegal.com

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Keough & Moody, P.C.,
114 East Van Buren, Naperville, IL 60540