

**KEOUGH & MOODY WEBINAR**  
**LEGAL OPINIONS ARE NOT ALWAYS BLACK AND WHITE:**  
**WHOSE SIDE ARE YOU ON?**



**November 1, 2023**

**12:00 p.m. - 1:30 p.m.**

2 hours of continuing education credit will be provided

There are times when a client or an attendee from one of our presentations says we are saying something different than what they heard from another attorney. In fact, some people even say, “That is not what Dawn says!” or “That is not what Gabby says!” So, does that mean someone is wrong? Not necessarily. Attorneys can have a differing opinion, without one being technically wrong. If you frequent our webinars on a regular basis, you know that while Gabby Comstock and Dawn Moody agree on a lot, there are a number of topics where they have a difference of opinion.

Join Gabby and Dawn on **Wednesday, November 1, 2023, from 12:00 p.m. to 1:30 p.m.**, where they will discuss a variety of situations where their legal and practical takes on a matter differ. In this engaging webinar, board members and managers will see that a situation is not always black or white and that attorneys often have different perspectives on certain issues.

Join us for what we believe will be a very beneficial webinar to all board members and managers and you can be the Judge on who you think is right! As always, come learn and

have your questions answered.

**Registration is required.** Please register in advance for this webinar below.

When registering and when you log in for the webinar, please be sure to include your first and last name to ensure receipt of your continuing education certificate.

“Legal Opinions are not Always Black and White: Whose Side Are You On?” is approved by Community Association Managers International Certification Board (CAMICB) to fulfill continuing education requirements for the CMCA® certification.

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### **Recusing and Excusing Board Members**

Illinois law is clear that members of a board of directors of a common interest community association have a fiduciary duty to the association, and to its members. This means that, at all times, directors must put the interests of the association ahead of the director's personal interests. If a director cannot do so for any reason, his fiduciary duty obligates him to recuse himself from participating in the deliberation and decision regarding the topic in which he has an interest. If a director refuses to recuse himself when circumstances dictate that he should, the remainder of the board must decide if the subject director should be excused. Recusing yourself and excusing others becomes necessary from time to time, and it is best practice to ensure that board actions are in the best interests of the association and its members. Yet, individual directors and boards often hesitate to recuse or excuse when warranted. There is no need for this reluctance and, in fact, acknowledging a potential conflict and taking proper action is a ***good thing***.

#### ***When does a conflict arise?***

Members of the board of directors are not only board members. They are owners, residents, friends, family members, professionals, and people with personal preferences and beliefs. Above all, members of the board of directors are human beings, who should not and cannot be expected to act with absolute detachment and impartiality when taking action on a matter that has a personal impact for them or for their family or business. It

should not, therefore, be surprising that situations arise when a director finds himself unable to be wholly impartial. This could arise if the board is considering hiring a vendor with whom a director has strong professional ties. It could also arise if a director is the complaining party or alleged violator in a rule violation proceeding. It also comes up if a director falls behind paying assessments. It is not difficult to imagine countless scenarios when a director may have a personal stake in the outcome of a matter before the board.

### ***Why Recusal is Not a Bad Thing***

As noted above, having a conflict is not inherently a bad thing. It is foreseeable, and it is a neutral event – it simply means that a director's role as a member of the board and his role as a person/family member/business person/et cetera intersect in such a way that the director's judgment may be impacted. A conflict does not mean that a director is a bad person, or that he has engaged in wrongdoing. Rather, a conflict simply means that a director should step back from the single issue, to ensure that he does not inadvertently allow his personal feelings or interests to play a role in their decision-making.

While having a conflict is not a good thing nor a bad thing, acknowledging the conflict is positive and good. When a director acknowledges that he may not be able to act entirely impartially when addressing a certain issue, he is doing what his fiduciary duty requires of him – he is ensuring that the interests of the association and its members are always first. He is always helping to make sure his fellow members of the board meet their fiduciary obligations.

If a director believes he may have an actual or even a potential conflict, he should disclose that to his fellow board members in executive session. The conflicted director may voluntarily recuse himself (remove himself from consideration, discussion, and decision-making on the particular issue), or the balance of the board may ask the subject director to step back from the issue. Once the board is in an open meeting, the board member's decision to recuse himself from the issue should be stated in the open meeting and reflected within the association's meeting minutes. No vote of the board is required. Further, the board member can simply state that he has decided to recuse himself from the issue due to a conflict or potential conflict of interest.

### ***What to Do if You Believe a Fellow Director Has a Conflict?***

From time to time, it may become apparent that a director has a conflict of interest, yet he refuses to recuse himself. The fiduciary duty of the rest of the board will be implicated in such a situation. Not only does a director have a duty to separate himself from an issue in which he cannot act impartially, but the entire board should take steps to ensure that no single director is acting under a conflict of interest. If this occurs, the rest of the board, by a majority vote, can decide to excuse the subject director. To do this, each board member should be polled to determine if he believes the subject director can be impartial under the circumstances. If a majority of the board answers that question in the negative, they may vote by a majority to exclude the subject director from further deliberations and decisions on the specific topic. *This does not mean that the rest of the board has decided that a certain director is bad or dishonest.* Rather, it simply means that a majority of the board has decided that in order to protect impartiality and to honor fiduciary obligations, a certain director should not vote on a particular issue. Such a vote does not impact the

subject director's participation in other board matters. The board must remember even though the discussion to excuse a board member from a particular issue will be addressed in an executive session, the actual vote must be made in an open meeting of the board and be reflected within the association's meeting minutes.

### ***What is the Practical Effect of Recusing or Excusing a Director?***

Once a director has recused himself, or has been excused from, a certain matter, he should no longer participate in discussion or voting on that matter. Likewise, confidential documents and information related to the particular topic should not be shared with the excused director. If the topic from which the director has been excused or recused is one of the topics that the board shall take up in executive session (such as rule violations or delinquencies), he should be asked to leave the executive meeting when the topic is being discussed. It should be noted that, if the director was asked to step away from an issue because – for example – he is alleged to have violated a rule of the association, he will still be heard by the board. He just will not have a vote as to whether he was really in the wrong.

If a director steps away from deciding an issue to avoid a conflict of interests, he may still have something to say about the topic. As noted above, this could arise if the director is alleged to have violated a rule, is delinquent in their assessments, or is named in another sort of claim by an owner or third party (such as a claim that the subject director has allegedly engaged in harassing conduct toward a particular owner). In that case, the board should still allow the director to be heard. Usually, this will mean inviting the subject board member to an executive session where he can state his position, and answer any questions the rest of the board may have. Then, before the board deliberates or decides on what they have heard, the excused director will leave the meeting.

In other words, being recused or excused does not mean that you are silenced. You will still be heard. You cannot, however, be a witness and the judge at the same time. If in doubt as to what the board member is allowed to do when he has been recused or excused, the remaining board members should ask themselves what would they allow a non-board member to do in a similar situation? After all, once recused or excused, the board member is just like any other owner within the association.

### ***And What May Happen if the Director is Not Recused or Excused?***

Even though, as we have stated above, there is no shame in admitting that you may have a conflict of interest, many directors will still be hesitant to step back from an issue. As noted above, this implicates not just the subject director's fiduciary obligations, but also those of the rest of the board. If a director has an actual or likely conflict of interests yet continues to deliberate and vote on the issue in which he has an interest, the decision of the entire board may be challenged. Further, allowing a director to continue to act in the face of an apparent conflict may impact the board's credibility and may even jeopardize insurance coverage if a claim is made related to the interested director's participation. Therefore, legal counsel should be consulted to determine the best course of action if the conflicted board member will not agree to recuse himself from a particular situation.

In short, it is safer, and better for the board and the association as a whole to acknowledge that directors do not live in a bubble. Rather, from time to time, a director's decision-making as a member of the board may be affected by some part of that director's personal or professional life outside of the board. In that case, it is in the best interests of the director, the entire board, and the association for the director to sit out to avoid any issues.

### **THE Q&A CORNER**



**This month's question:** Our Association recently had a situation where the seat of an elected Board member was declared vacant because it was subsequently learned that the Board member was not an owner within the Association. This has caused some discord in our Association. Should we be taking some sort of steps to make sure that candidates running for the Board are qualified to serve?

**Answer:** Yes, absolutely. Under both the Illinois Condominium Property Act and the Illinois Common Interest Community Association Act, one must be a member of the Association (an owner) to be duly qualified as a Board member. Both prior to the issuance of the election mailing, which includes the ballot or proxy, and immediately prior to the election itself, the Association, by and through its managing agent or legal counsel, should be reviewing the books and records (and perhaps, public records as well) to confirm that all candidates are eligible to serve as Board members. For those units held in trust or by a corporate entity, the Association should be requesting and receiving information to confirm that the candidate is duly qualified under the terms of the Association's governing documents (that is a trustee or beneficiary of a trust, a partner of a partnership, officer of a corporation, etc.). It is important that membership status be investigated and confirmed prior to the commencement of the annual meeting itself, so as to avoid potential issues. Note, this process should also be followed prior to appointing a member to fill a vacancy on the Board as well. Finally, if it is learned that a Board member is not (or no longer) qualified to serve as a Board member, it is proper for the Association to determine that the seat is vacant.

If you have a general question, please email it to either Dawn or Gabby [dlm@kmlegal.com](mailto:dlm@kmlegal.com)

or [grc@kmlegal.com](mailto:grc@kmlegal.com)). The subject line of your email must state "NEWSLETTER QUESTION". Questions must be general "how to" questions and not specific to your declaration or community only. We look forward to reading your questions!

Thank you for your continued support. Please do not hesitate to contact us if you have any questions.

Chuck Keough ([cmk@kmlegal.com](mailto:cmk@kmlegal.com)); Dawn Moody ([dln@kmlegal.com](mailto:dln@kmlegal.com)) and Gabby Comstock ([grc@kmlegal.com](mailto:grc@kmlegal.com))

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