

## **KEOUGH & MOODY WEBINAR**

### **COMMUNICATIONS 101- A THREE-PART SERIES**

#### **Part 1: Proper Communication in Legally Required Notices and Documents**

**April 17, 2024  
12:00 p.m. - 1:30 p.m.**

*\*2 hours of continuing education credit will be provided*

*“The difference between mere management and leadership is communication.”  
-Winston Churchill*

Communication is important in every relationship. As leaders of our community associations, we all can use reminders and tips on how to communicate effectively. We communicate with the members of our community associations with the documents we send – including those we are legally required to send. We communicate through emails and letters. We also communicate in meetings. We communicate through the use of words, our facial expressions, our body movements, and even when we are saying nothing, but listening. When we get it right, communication can help develop trust and credibility. Yet, when we get it wrong, communication can create problems and obstacles that seem too great to solve.

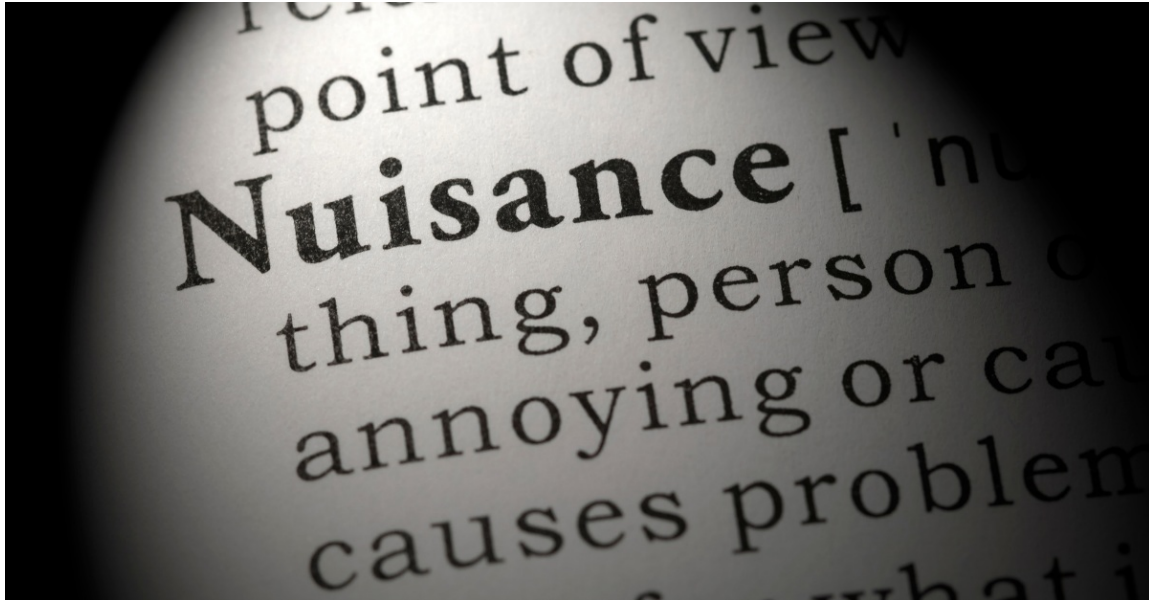
Join Dawn and Gabby as they tackle “Communication 101-A Three-Part Series.” Part 1 will address how to properly communicate in legally required notices and documents. Dawn and Gabby will highlight what must be included in these legally required notices and documents, as well as pitfalls to avoid.

Register in advance for this webinar [here](#).

**“Communications 101-A Three Part Series Part 1: Proper Communication in Legally Required Notices and Documents” is approved by Community Association Managers International Certification Board (CAMICB) to fulfill continuing education requirements for the CMCA® certification.**

*(Save the date for Part 2: In Person and Email Communication to be presented on May 8th and Part 3: Social Media on June 5th. Attendees do not have to attend all three parts, and registration for EACH part is required.)*

Register Here



## **NUISANCE VIOLATIONS: THE CHALLENGE CONTINUES**

One of the obligations of the Board of Directors of a condominium or common interest community association is to enforce the terms of the Association’s community instruments. In many cases, it is relatively easy for the Board to verify whether a violation of the community instruments has occurred. That is, by way of example, it is straightforward to document and determine whether an owner installed an improvement without the prior written approval of the Board of Directors or whether a vehicle is parked in violation of the community instruments. In such cases, as the Board can objectively determine that a violation exists, it can pursue the remedies set forth in its rules and regulations, such as the assessment of fines. In other cases, specifically situations involving the alleged violation of nuisance clauses, such as those related to noise or smoking, determining whether a violation exists is much more complicated.

A recent Rule 23<sup>1</sup> decision from the First Judicial Circuit considered the complexities surrounding nuisance complaints in the context of complaints related to smoking in the case of Carey v. The 400 Condominium Association, 2024 IL App (1st) 230358-U. In this case, Carey alleged that the Association breached its fiduciary duty by failing to enforce the terms of its nuisance provision against another owner, who allegedly caused the smell of smoke to infiltrate their unit. The record of the case reflects that Carey made continuing complaints to the Association regarding smoke within the unit. Smoking in the units was permitted within the Association so long as it did not create a nuisance or unreasonable disturbance to others.

In response to the complaints, the Association took steps to investigate the validity of the complaints. Association representatives were unable to verify the smell of smoke within the Carey unit. Nevertheless, they took precautionary steps to seal holes or other areas

where smells could seep between the two units. These steps, however, did not satisfy Carey. When the Association did not take further action, Carey pursued legal remedies against both the Association and her neighbor.

At the trial court level, the Court found that while the Association has a duty to enforce its community instruments, Carey was unable to show that the Association breached the duty as there was no evidence to support that smoke was infiltrating the unit at a level that would be a nuisance to an ordinary, reasonable person. In other words, it was not enough that Carey believed that there was a violation of the smoking restrictions – there must be an objective determination that the smoke was unreasonable. The Appellate Court affirmed this decision.

This case helps bring to light a number of points that both Board members and community association managers should be mindful of with respect to enforcement of nuisance-related provisions, such as noise complaints, smoking complaints, odor complaints and the like:

**(1) Just because you receive a complaint does not mean that there is a violation.** In situations involving nuisance complaints, Board members and community association managers are often bombarded with complaints and demands that immediate action be taken to cease the nuisance. As a result, there is often a knee-jerk response to immediately issue a violation notice (and subsequent violation notices with fines) in response. **That should not be done.** Like in the Carey case (and kudos to the community association manager and Board on this), the appropriate response to a nuisance complaint is for the Board and/or management to further investigate to determine whether the complaint is valid. This may mean inspecting the involved unit(s) to determine whether there is an unreasonable smell of smoke or other odor. If the Board investigates and determines that there is no unreasonable noise or smell, the Board cannot issue violation notices or impose fines. To do so, the Board must first determine whether there has been a violation.

**(2) The mere existence of noise, smoke, or other odor is not an unreasonable nuisance.** Let's be honest, in community living, there is always going to be noise and smells. The mere existence of noise and smells is not a violation of the community instruments. *The question is whether that noise or those smells is unreasonable to a reasonable, ordinary person.* (Remember this when determining if the alleged conduct is an unreasonable nuisance!) Therefore, as with the Carey case, it is not enough that one person is complaining of the smell of smoke, especially when that person is hypersensitive to the smell. An objective determination must be made that the nuisance is unreasonable, and that determination should be made by the Board with or without the assistance of appropriate professionals.

**(3) It is important to have clear language related to nuisances and procedures for investigating nuisances in the Rules and Regulations.** The nuisance provision of the community instruments is essentially used as a catch-all provision for all the conduct, which is viewed as problematic within an association. Unfortunately, in many cases, owners may not realize that their everyday conduct within their unit may be viewed a nuisance and a violation of the community instruments. Therefore, it is important, to the extent possible, in the rules and regulations to spell out what conduct could constitute a nuisance. By way of example, for communities where smoking is permitted, it is important to note that while smoking is allowed in the unit, the owner is under the obligation to ensure that smoke does not travel into other units and the common elements. For noise issues, rules and regulations should identify what time quiet hours are within the building, and if the use of appliances is problematic, prohibit the operation of washers, dryers, and dishwashers during those quiet hours.

In addition, the rules and regulations should outline a process by and through which nuisance complaints will be handled. That is, it should outline what information and evidence must be supplied to the Association in order for it to commence an investigation. The rules and regulations should further outline what cooperation is required from involved parties to allow for the investigation and resolution of the nuisance complaints.

**(4) The Board has a fiduciary duty to all owners.** As the Carey court pointed out, the Association has a fiduciary duty to **all** owners within the Association – not just the

ones that complain. Part of that fiduciary duty is a duty of fairness. That means that the Board needs to determine whether a violation exists **before** taking enforcement steps. Again, if the Board cannot determine that a violation exists, a violation notice cannot be issued and fines cannot be levied. While that may not make the complaining owner happy, the Board's obligation is to all owners and to fairly and objectively enforce its community instruments.

*<sup>1</sup>Decisions filed as a Rule 23 Order are not considered precedential except as otherwise provided in the Supreme Court Rules. However, they are instructive.*

If you have any questions or we can be of assistance, please do not hesitate to contact us.  
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