

What Can I Say? What Can I Do?

Reviewing the changing boundaries of what managers can say to, about, and around owners.

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The First Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



The First Amendment Only Applies to State Actors – Or Does It?

- In 2018, the Illinois Appellate Court found that the First Amendment applies to condominium associations by way of Section 18.4(h) of the Illinois Condominium Property Act – *Boucher v. 111 East Chestnut*, 2018 IL App (1st) 162233
- Section 18.4(h) provides: “no rule or regulation may impair any rights guaranteed by the First Amendment to the Constitution of the United States or Section 4 of Article I of the Illinois Constitution including, but not limited to, the free exercise of religion, nor may any rules or regulations conflict with the provisions of this Act or the condominium instruments”

A Bit of History on this “State” of Affairs

- The common conception is that the First Amendment applies only to actions by the government, not private actions.
- *Goldberg v. 400 East Ohio Condominium Assn.*, 12 F. Supp. 2d 820 (N.D. Ill. 1998), held a condominium association does not become a state actor by virtue of its power to use state court to enforce its covenants.
- There are limits, but those limits can be changed by statute or contract = 18.4(h) of the Act
- Other states do not have the same degree of express protections such as 18.4(h), but some have more.

What Does This Mean?

- Associations cannot enforce rules that would violate the First Amendment
 - Pamphleting/leafletting
 - Freedom of religion
 - Expressing political opinions
 - Including Association “politics”
 - Expressing displeasure or negative opinions about management, the Board, or Association employees
- Associations cannot take legal action or threaten legal action against owners for exercising their First Amendment rights
- US and Military Flags (18.6)
- Reasonable Accommodation for religious practices and objects in certain areas (18.4(h))

Exceptions to the First Amendment

- Not all speech is protected by the First Amendment
 - True Threats/Fighting Words
 - Obscenity
 - Defamatory Speech
 - Speech Integral to Criminal Conduct
- Just because a rule limits speech does not mean it violates the First Amendment
 - Time, place, and manner
 - Content-based

True Threats

Encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals



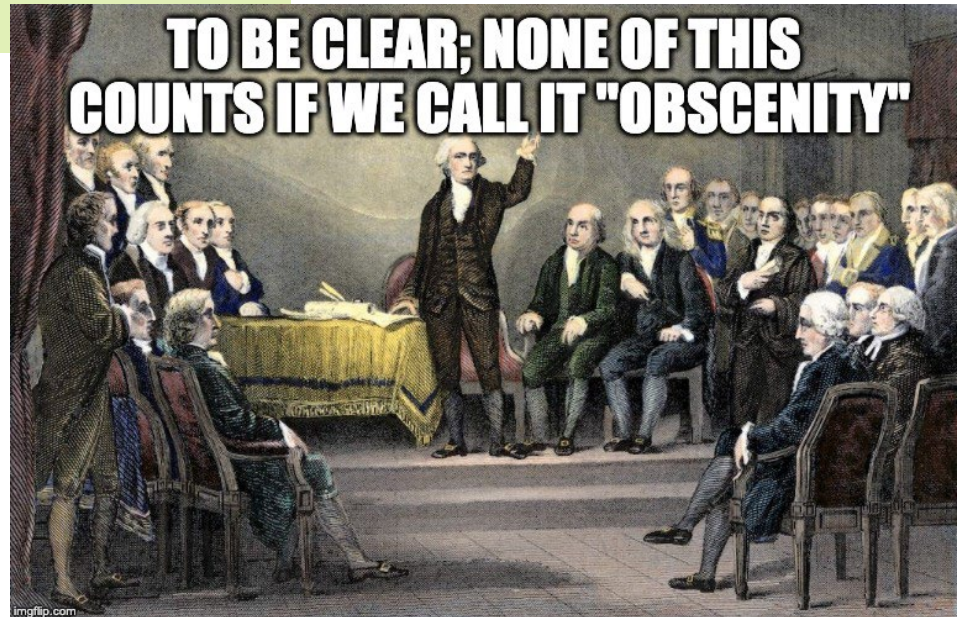


What Can You Do?

Annie is an avid runner and she is training for a hilly marathon. Since there are no hills in Chicago, Annie decides to do her training in her Association's parking garage. Every morning, Annie runs up and down the parking garage ramps. Eloise is a high power attorney with places to go. She is sick and tired of being slowed down exiting the parking garage by Annie's running habits. One morning, Eloise revs her engine and yells out the window at Annie, "One of these days, you are going to get killed running here!" and zooms off. Annie is shocked and immediately reports to the property manager that she feared for her life. What should the Association do?

Obscenity

Speech that is of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality



We Couldn't Resist It . . .

- *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)
- “nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard. We simply hold that when... a pig has entered the parlor, [exercise of regulatory power] does not depend on proof that the pig is obscene.”
- Would you know it if you saw it?
- Considerations on content based versus content neutral restrictions and rules
- Allowing certain art versus no art at all; where would the Board be able to regulate the content without treading close to the First Amendment line?



Defamation

- The speaker made a false statement about the plaintiff;
- The speaker made an unprivileged publication of that statement to a third party; and
- The publication caused the plaintiff damages.



I'd sue you for defamation of character except that I never had any character to defame in the first place.



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Defamation *Per Se*

Certain categories of defamation do not require a plaintiff to show damages:

- words that impute a person has committed a crime;
- words that impute a person is infected with a loathsome communicable disease;
- words that impute a person is unable to perform or lacks integrity in performing her or his employment duties;
- words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and
- words that impute a person has engaged in adultery or fornication

Spar Wars: Return of the Owner

- *Boucher* used harsh language to address managers and building staff
- Court finds that fining an owner for expressing their opinions about the management of the condominium violates Section 18.4(h)
- The discussion in the opinion opens a door: could an Association abridge a free speech right without making a specific rule or enforcing a specific rule (*Cooper v. Pate* on violation of First Amendment alleged without citation to rule the government purported to enforce)

The Umpire Strikes Back?

- Owners have had free reign to “speak their minds” since 2018, but the Appellate Court strikes back in 2024 with *Carey v. Pritzker*.
- Owner sues Manager for defamation about statements made to an alderman, in an email, and in open meetings.
- “For example, there is no difference between saying “Jones is a liar” and “in my opinion Jones is a liar.” Both are defamatory because the core of each statement is capable of a *factual* verification-whether, in fact, Jones is a liar. In *Bryson*, our supreme court held that the defendant's statement that Bryson was a “slut” was actionable, as “[t]he clear impact of the statement was that Bryson was, in fact, sexually promiscuous.” In contrast, in *Solaia Technology, LLC v. Specialty Pub Co*, the supreme court found that a reference to individuals as “deeply greedy” was not actionable defamation, as the word “greedy” had “no precise meaning, and it is not verifiable.” *Id.* It was thus a protected opinion.”
- *Carey* restores some ability for Managers to speak, but

Boundaries Uncharted


- Hate Speech: Matters of Public Concern vs. Purely Private Significance – the hate speech dichotomy – depends greatly on what is said, where it is said, and how it is said.
- 720 ILCS 5/12-7.1 – Illinois Hate Crime statute includes actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, citizenship, immigration status, or national origin of another individual or group of individuals; criminal act includes intimidation, disorderly conduct, transmission of obscene messages, and phone/digital communications.
- Beware of the FHA consequences of inaction . . .

What Can You Do?

Joe is a volunteer board member for his condominium association. Emery is a unit owner who has started to come to board meetings. Emery collects a list of interested unit owners and starts sending those owners emails with recaps on the board meetings.



What Can You Do (continued)?

 Send	To	All Unit Owners
	Cc	
	Bcc	
Subject		Illegal Joe

Illegal Joe

Over the last few weeks you may have received an illegal email from Joe illegally distributing Meribeth's photoshop renderings of the railings. In the illegal email, Joe illegally asked you to vote, and to illegally provide your vote to him and our property manager. He should not have done this, it is illegal. He did not get permission from the Master Board, who is in charge of this project. He did not ask the property manager for his permission to accept such votes. He seems to think the property manager is his personal assistant, he is to do anything he wants, and he is not allowed to question him (see my previous emails for examples). Since he has not worked in an office setting since 1995 he does not know, offices no longer have personal assistants. Joe has once again overstepped the boundaries as a board member with regards to the Master. Last time he did this, the Master Board censured him. We will see what the future holds.

Emery

What Can You Do (continued)?

 Send	To	All Unit Owners
	Cc	
	Bcc	
Subject		Dictatorial Demands

Dictatorial Demands

Once again Joe is spreading lies and fear here at our association. He is making demands that he has no right to.

Senility

In her illegal email, Joe claimed that the 2017 special assessment related to the driveway ramp. It did not. He knows this. He sent out hundreds of annoying emails, with false facts, spreading lies about the special assessment. It only pertained to the apartment projects. His confusion on this issue raises severe questions about his senility.

Financial Fearmongering

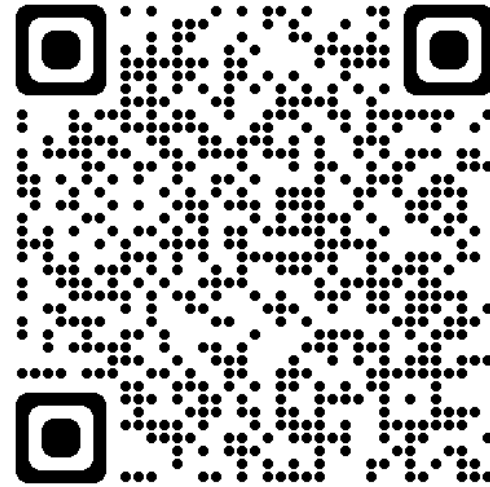
Never trust any financial document from Joe. He does not understand anything financial or accounting related. He discredited Bonnie, but Bonnie is a CPA. If you ever received anything from Joe with a dollar sign on it, consider it wrong and fearmongering. All you have to do is look at the January 2020 board election where he claimed, we were to have \$20,000 per person special assessment if he was not elected back to the board.

Joe's illegal emails alarm me. His mental abilities alarm me. He does not understand facts which alarms me. His colluding alarms me. And his fearmongering is alarming, costly, and destructive. Do not listen to anything he says, publishes, or distributes.

What Can You Do (continued)?



"May I remind the jury a guilty verdict for my client will trigger defamation of character lawsuits."



Kay v. 801 South Plymouth Court Master Association Board of Directors

These facts come out of the *Kay* case, which the Illinois Appellate Court decided in 2023.

- The Court first found that the statements were constitutionally protected statements of opinion.
- The Court next found that the statements did not impute a crime because the allegations all involved violations of the Association's By-Laws, which is not a crime.
- The Court also did not believe that the statements imputed an inability to perform the plaintiff's job because "plaintiff is retired and her position as a board member is a volunteer position." "Merely alleging an infraction, even if vehemently and with hyperbolic rhetoric, does not impute a lack of integrity."
- The emails, which the Court noted were "insulting and demeaning" did not rise to defamation *per se*.



What about time,
place, and manner
restrictions?



The association can enforce restrictions on where, when, and how unit owners express themselves without running afoul of the First Amendment, as long as those restrictions do not restrict speech based on content.

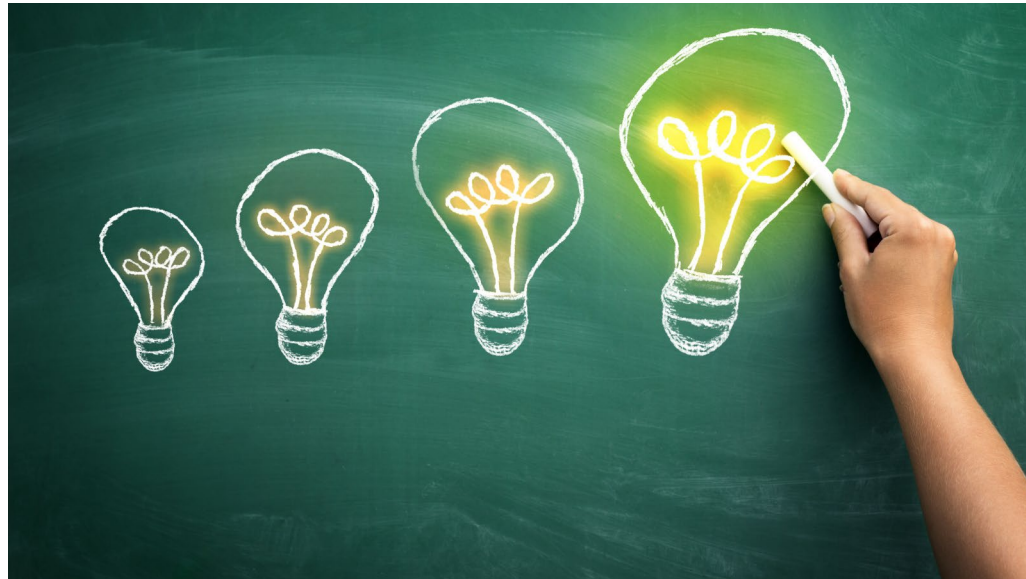
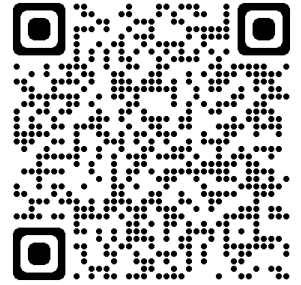
No business like “condo business”?

- Think back to *Apple II* – we are balancing rights and policy, with scrutiny by courts and burdens to support the rule or covenant
- If a Rule is challenged in court, it then becomes the Board’s burden to prove that the restricted “thing” is “antagonistic to the legitimate objectives of the condominium association.”
- Recipe for disaster or food for thought: Time, Place and Manner restrictions and condo business?

What Can You Do?

Theo is a vocal unit owner who attends every board meeting. During board meetings, he often interrupts board members to express his opinion on the matter at hand. If he is ignored, he raises his voice until he is shouting. During open forum, he refuses to let any other unit owners speak and as a result, board meetings are now lasting hours. Now, Theo has also taken to emailing the property manager and board members over and over again asking the same questions and demanding the same information.

Ideas?



Five Key Takeaways

- 1 The First Amendment applies in the Condominium context
- 2 The First Amendment does not protect all speech
- 3 Therefore, managers need to be careful not make statements that could be defamatory
- 4 Time, place, and manner restrictions may remain valid
- 5 It's all a balancing act!

**Any
Questions?**



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