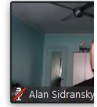


# COOPERATOR **EVENTS** *Virtual Town Hall*



WEBINAR

## COVID, COMMUNICATIONS, & THE LAW - Practical Advice for Boards & Managers

Sponsored by Gallet Dreyer & Berkey, LLP

Will Start Momentarily



The Cooperator Events presents a virtual town hall sponsored by Gallet Dreyer & Berkey, LLP Wednesday May 13 at 2:00 PM.

- **David L. Berkey** - Mr. Berkey has been a featured panelist at Habitat Magazine and a speaker at seminars sponsored by the City Bar Association, New York State Bar Association, New York County Lawyers Association, Practising Law Institute, [Council of New York Cooperatives & Condominiums, Inc.](#) and the [Community Associations Institute](#), among others. He has presented, written and advised on countless issues critical to co-ops and condos including fiduciary duties and responsibilities of board members and managing agents, the rights of minority shareholders, workouts and sponsor defaults, the purchase and sale of cooperative apartments and condominium units and current developments in co-op and condo law. A seasoned litigator, Mr. Berkey has served as a faculty member of Cardozo Law School's Intensive Trial Advocacy Program for more than thirty years.
- **Alan Sidransky** - a staff writer/reporter for The Cooperator, and a published novelist.

- **Scott M. Smiler** -Partner Gallet Dreyer & Berkey, LLP For the past two decades, Scott's practice has focused primarily on [transactional real estate matters](#).
- **Marc J. Luxemburg** - Mr. Luxemburg specializes in real estate law, cooperative and condominium law and civil litigation. A recognized authority on the legal needs of cooperatives and condominiums, Mr. Luxemburg is the [President of the Council of New York Cooperatives & Condominiums](#), and has drafted the revised form of proprietary lease that was promulgated by the Council.

**Question - How should Boards handle information regarding COVID-19 diagnosed residents, whether positive, self-isolating, under mandated quarantine? Are building staff entitled to know the names or unit numbers of infected persons**

David L. Berkey

It is an interesting question because there are divergent points of view. The NYC DOH has distributed a FAQ where the DOH says NO, Boards and management should NOT identify people who are quarantining or infected, but we think that advise goes too far.

We have recommended to Boards and management that they approach the unit owner or shareholder and obtain written consent so that the privacy issue is addressed by getting consent to divulge the information. Most people when asked will give consent because they understand the fears that others have.

It is a different issue when it is an employee. The ADA required medical information to be kept confidential, so even if that person were to sign a release, it may still be questionable whether the name should be shared. Employers have duty to protect others, so they need to inform others that they have been in close contact with someone who may have been infected – to ensure they create a safe environment. Boards should inform employees when a unit owner has become sick so that necessary steps can be taken. They may also wish to notify other occupants that there is someone infected in the building and they should take special precaution with what they touch etc. Also, if work needs to be done or deliveries made, special precautions need to be taken e.g. masks, leaving things at the door etc. to protect the occupant and the employee

**Question - If someone was infected and the information got out but not through the board or management, would the coop or condo have any liability relative to the person who had the COVID-19 and may be upset about the info getting out**

David L. Berkey

If neither the coop nor management are at fault, there is no liability - but that does not mean they will not still get sued. So (Board or Management) will need to inform insurance carrier. The concern I have is if information is not exchanged and someone gets sick then there are liability concerns.

**Question - How much leeway do Boards have in enforcing safety measures, can they fine residents for noncompliance if not what tools to Boards have to compel them to do the right thing**

Marc Luxemburg

There is not much leeway because safety requirements are somewhat mandatory particularly in public areas. What can the board do to make sure people comply? 1) pass a rule - Boards should utilize their power to create house rules - have a board meeting, pass a rule, notify the residents in the usual ways e.g. email building link, signs, telling people what it is they must do. What happens when someone does not comply? The first thing to do is remind them of the rule. When the staff sees someone, who is not wearing a mask, bringing in groups of people etc., staff should remind them and encourage them to obey. 2) fine people. There is a split in the legal profession whether you can enforce fines. Some thing needs to be in house rules others think it needs to be added to proprietary lease. You need to have a proper fining system e.g. *notice of fine, opportunity to contest the fine, may be per person per violation e.g. if 5 people come in without masks can fie the unit owner \$100 for each incident.*

If people still do not want to comply there is a procedure in proprietary lease "*objectionable conduct*" (*notice of default does not work because of the 30-day cure period*). You can be served with *Objectionable Conduct*, depending on procedure, the shareholder can be evicted (*leaving aside the current moratorium on L&T actions*).

**Ill advised rules** - problem area - if someone comes to the door without a mask can staff stop them from entering? This is problematic because you do not want a confrontation at the door or have to call the police, although you may have to. You must be careful with do not enter rules. You may be able to enforce this against messengers, delivery people and contractors who are not using masks or PPE. You can tell them no.

**Question – What changes should Boards adopt, as to how they hold meetings votes and elections. Is this simply a matter of electronic voting and virtual meetings?**

Scott Smiler

**Board meetings** – we all realize that life goes on - Boards need to make decisions and shareholders expect services and management needs to manage.

Board meetings are easier to address since is usually only 5-7 board members. What authority does board have to meet virtually? Newer By-Laws may already provide for allowing telephonic or other communication equipment allowing all parties at the meeting to hear each other simultaneously.

For coops that do not have that provision, there is a section in 708C of BCL which memorializes the virtual meeting allowance... to the extent it is not prohibited by by-laws. This will cover most coops in terms of authority. From practical point of view, when having virtual meeting should always have a moderator to ensure tally votes, attendance etc., to ensure things are documented for the board minutes - *“who is making motion, who is seconding”* and go down roll call to collect votes.

**Annual shareholder meeting** – these are more complicated logistically because you can have 100 - 500 shareholders. Most by laws do not address a virtual annual shareholders meeting, usually referring back to physical in person meeting. 602B BCL, just adopted in October, did start to bring in virtual concept to annual shareholder meeting. Was fairly new and many Boards were reluctant to adopt it because they weren't familiar with the tech. But today people are looking at this again. It permits shareholders to attend meeting virtually, so long as the board implements certain safeguards. Now we have gone 100% virtual because of an Executive Order 202.8 issued on 3/20/20, which temporarily suspended certain sections of BCL with respect to meetings allowing all to go virtual. The EO has been extended to June 7<sup>th</sup>. What happens after June 7<sup>th</sup> we do not know - it may be extended.

Even if you can meet virtually, should you? Many Boards are postponing elections until the Fall.

**Question – With regards to move in and out procedures – what considerations and policies should be put in place to keep safe and orderly?**

Marc Luxemburg

The opening of the economy requires that things be done with an eye toward protecting people and continuing to maintain social distancing - so if a board determines they want to allow Moving in and out, they need to make sure it is done with due regard to the procedure *e.g. along with collecting a COI from the moving company, the moving company provide a statement of procedures it will follow to confirm employees will use PPE and clean up and comply with the rules.*

**Question - To what extent can Boards limit access to buildings? Can they ban guests, forbid roommates, or forbid allowing a family member to occupy unit if they are not staying there (with the primary owner/resident)?**

David L. Berkey

The proprietary lease in a coop and by-laws in condo regulates use rights. Coop Boards often have, in the past, restricted use to only those allow the shareholder and anyone already living with them. Under traditional interpretations, a board's consent would be needed to allow family to use unit. Current circumstances may make them more flexible, but they have the right to refuse. Condo have similar rules. Boards can be very strict with respect to access and who lives there. We've always told Boards that health care providers must be allowed up, but Boards are making strict rules with respect to third parties especially now... some bar housekeepers, workers, painters, to wait until all restrictions are lifted and risk of exposure disappears

**Question - What liability does a board have if they open amenities and an owner/shareholder/resident claims infection from using common areas.**

Marc Luxemburg

The board has an obligation to maintain reasonable security and protection. If they do not follow the rules, they open themselves up to lawsuit. At this point nothing is “opened up”. Reopening amenities now is a risky operation. To determine liability, look to what the common practices are. When you have guidelines by CDC to use masks, sanitize etc. – if they do not comply with guidelines, they will be subject to claims. I doubt it will be easy to prove [someone caught COVID-19 on-site], but you could still be sued.

**Question - Should capital projects and alterations be halted?**

Scott Smiler

Apartment alterations – I think the governing philosophy is that if it is an emergency situation it should be addressed. The Governor and Executive Orders have stated that if it is for the purpose of making safe e.g. an emergency situation, then it’s fine. Outside of an emergency, most buildings are struggling with the fact that right now, with all the guidelines you cannot do all the projects you used to be able to do. Many owners or properties are suffering from carrying costs related to projects that have been halted for months *e.g. scaffolding that must be kept in place, or a license agreement with a neighbor*, they are obligated to pay the fees, but work cannot get done. So, there are monetary concerns. If there are loans tied to capital improvement projects with deadlines – you may want to look at that. You want to limit the number of workers and activity in the building, using common amenities like service entrance and serve elevator

Marc Luxemburg

Also, if you have LL 11 work and the exterior of the building is hazardous, that’s essential work and should continue because it is a safety issue and the contractor will need to follow rules. The problem is the internal work that one needs to watch out for. You have to be careful with the number of people one allows into the building

**Question – What about renovations in newly purchased units. Renovations started before crisis began but must be finished before space is habitable. Can that work be completed?**

David L. Berkey

There is definition of “*essential work*” – this does not include an apartment renovation.

It might include the completion of work that is to maintain the integrity of a building or to build low- or moderate-income housing, but a renovation is not included in that definition. That said, if the apt. work could be done by 1 employee then the work might be allowed.

**Question – Does COVID-19 diagnosis count as an ADA protected condition?**

David L. Berkey

It really does not. COVID-19 is a type of flu currently does not qualify as a long term disability - *but* because of the crisis and the feelings that exist, people such as the EEOC governors are saying that information that one receives regarding an infection should be treated as though it is medical information that should be kept confidential.

**Question – If a building has dozens of cases could the case be made that the building is uninhabitable?**

Marc Luxemburg

If the people who are infected are self-isolating, then the rest of the building should not be at any more risk than anyone else.

**Question – Our board did not purchase adequate PPE for staff. Several employees contracted the virus, can they hold the board liable?**

David L. Berkey

Yes, they do have a risk. Boards are required to give all employees masks and PPE, if they do not do it while others did, they run a risk

**Question – What are some of the “do’s and don’ts” when it comes to disclosing resident information? Does HIPPA apply here?**

David L. Berkey

The disclosure rules do not apply, they only apply to medical practitioners. The Shield act does not apply because it is about personal financial information. When it is a resident and not an employee, ADA does not apply. The board must be reasonable and use its judgement... while the law does not specifically prevent it, there are still risks:

- 1) if they disclose the information and they are wrong, liable and slander cases if someone sues,
- 2) political – what would you want done if you or your family was infected? You would want to have your privacy maintained

So, try to understand you should use best practices – try to get consent from them to share information so you can notify staff and others. With consent the problems evaporate. Send a notice to occupants and staff to inform that there have been infections and then follow all CDC guidelines and outline them so people can follow

**Question – What are reasonable accommodations e.g. care animal, health care professionals etc.?**

Scott Smiler

I think Boards and management companies are trying to be as accommodating to as many people as they can on a case by case basis. If you have a dog walker, family checking on an elderly parent etc., if you lay out procedure for non-residents to follow that’s better than simply blocking them all – take extra reasonable and well defined precautions, then you can accommodate people.

David L. Berkey

If an individual is truly disabled and has a comfort animal, you can’t remove the reasonable accommodation because of the COVID pandemic – you must find a balance – find a way to work out a mechanism so that the accommodation can occur with the least intrusion on any one else.

**Question – Should social distancing and masking rules for indoor common spaces different for outdoor common spaces... e.g. private garden vs. lobby?**

Marc Luxemburg

The rules are pretty fixed, you need to wear a mask in public area and stay 6 feet away... the space makes no difference whether inside or out.

**Question – With respect to buildings with linguistically diverse populations - What duty do managers have to ensure that all notices are accessible to all?**

Scott Smiler

The biggest take away is to be as transparent as possible. The more info you can get to shareholders the better. With all the diverse populations it would be ideal if postings were translated into other languages. Many agencies already do the work for you. *“No good deed goes unpunished”* e.g. if you put it out in Mandarin the Cantonese community might get upset... so do what you can and try to get all the info out there; err on the side of having more info than not. There is a political price if you do not.

**Question – If you're a shareholder who got infected and you know the board had info they didn't share with you, you'd get very upset if you thought they were using info for themselves and not sharing with the residents.**

Marc Luxemburg

If there were multilingual notices before this came along, then the practice should continue. If you did not do this before, you don't necessarily need to change it now. Look to prior practices and always make best efforts.

**Question – What are the areas of liability Boards should look out for? Is there any way to avoid liability?**

David L. Berkey

The first issue where Boards would be concerned about liability is if they sat on their hands and did not implement procedures to make it a safe building and then someone got sick and went after the board for inaction.

The second area of liability would be if the Board wasn't doing what it can to ensure staff isn't protected *e.g. provide PPE, procedures to maximize health, working in areas of concerns, what systems are put in place to ensure their safety etc.*

A Board that does all that it can to live up to the best practices suggested by NYS DOH and CDC, and guidelines issued by management company and attorneys, they have the least to worry about. All should check their insurance to see if they are protected from these sorts of claims

Marc Luxemburg

These rules are mandatory – there are things you have to do and should do and if you do not you open yourself up to liability, so the basic point is - follow the rules.

**Question – What are some of the effective ways of communicating social distancing and other measures to ensure resident compliance and where to you get pushback?**

Marc Luxemburg

I think the key is communication. You want to remain in contact, post notices, what they should and shouldn't do and you can set up info exchanges in the building, use BuildingLink to have people communicate, and for the board to provide resources to unit owners *e.g. if there are musicians in the building who may want to do a zoom performance, or an unemployed chef who may want to give cooking lessons*

**Question – Vulnerable residents who may also be in dire financial situations. How would you advise board relative to coop and condo owners, who are having problems making their payment and what should they not do?**

David L. Berkey

We understand there are many people who have lost their jobs and are suffering financially. The governor and legislature have enacted rules to suspend lawsuits for non-payment, passed 238A property law preventing late fees, so there's been incremental aid given to people. Boards need to realize they have to look to the long term. If they want a tenant or unit owner to continue to reside the building, they should be engaging in discussions, *e.g. accept smaller payments, defer payments of the balance to be paid out over time.*

Scott Smiler

**Commercial unit owners** – many of our retail spaces and professional offices are also experiencing financial strain. You must look at the long term. Each tenant is a little different depending on their industry and how the phase out is going to work. Look at your stock of tenants and their particular industries, to see how long their leases are and come to a solution that benefits everyone. This may mean deferral agreements. Each deal is different, you need to sit down with the commercial tenant, we are both partners, to find a resolution that makes everyone happy

**Question – If the governor or mayor says non-essential construction work resume, can a board prohibit that work if they are doing so to protect the residents? Can they adopt rules more stringent than the state?**

Marc Luxemburg

Boards have an obligation to protect the residents so I would say yes. They have a greater obligation than the state.

David L. Berkey

Historically, Boards have set rules re when work can occur, so restrictions are not the exception.

**Question – If a confirmed COVID-19 positive resident refuses to wear face protection or self-isolate, what options do Boards have?**

David L. Berkey

This has come up several times. We have addressed this in three steps

1) communicate, convince them of how they are creating a hazard for others, and get their “buy in” to voluntary comply

2) try to have his doctor report him to DOH and CDC because they do not accept phone calls from managers or Boards - only my medical professionals and

3) if there is someone not engaging social distancing or wearing a mask you can call the police who are issuing fines now or possibly arrested

### **Final thoughts**

David L. Berkey

Social distancing will become more the norm than not for a while. What we are discussing will be implemented for many months to come. Boards should be aware what people are getting antsy and suffering from isolation or have fears that we may not have, so Boards should engage in reaching out, talk to residents, calm them, encourage building a sense of community in the building.

Scott Smiler

The main take away - we're all in this together, it's evolving quickly and we never seem to get ahead of it - but something to think about is *“what would you want if you were a resident in the building”* what info would you want to get out if you were on the resident side. Open communication, transparency reasonable accommodations and having a heart are key.

Marc Luxemburg

This is not going away so fast, in terms of normalcy. Boards will need to look ahead and envision the new normal and figure out how this will affect the building moving forward? Will you ever be able to open common area again? With respect to elevators you need to limit how many people use it at once.

We are only starting to see the beginning of the long term affects of this pandemic [on how buildings are operated, and folks interact with each other moving forward.]