IN DETROIT, MAYOR Kwame Kilpatrick faces perjury charges after sexually explicit text messages between him and his former top aide emerged, contradicting his earlier testimony in a whistleblowers' trial.

In Houston, Harris County District Attorney Chuck Rosenthal resigned earlier this year amidst a scandal involving racist, pornographic and political e-mails stored in his inbox.

In Missouri, Gov. Matt Blunt is being investigated by the state's attorney general for deleting e-mail records in violation of the state's open records laws. In response, Blunt has counterattacked by demanding several years' worth of computer records from his opponents.

These and other recent high-profile scandals involving electronic messages should make us all more cautious about how we use e-mail. No doubt, e-mail is a convenient and beneficial tool. About 183 billion e-mails were sent each day in 2006—that's more than two million e-mails every second, estimates the Radicati Group, a technology market research firm.

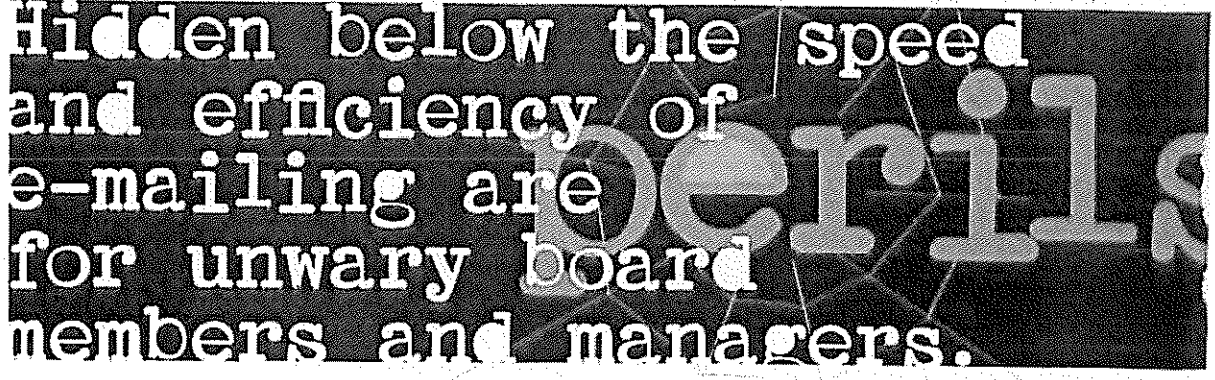
Like everyone else, community association board members are riding the wave of the e-mail flood, relying on the speedy missives to communicate with their fellow board members, managers, vendors and even association attorneys.

Yet, hidden below the speed and efficiency of e-mailing are perils for unwary board members and managers. What if a board member makes insulting remarks about an owner? Are decisions by e-mail a violation of open meeting laws? Do owners have the right to inspect board members' e-mails? Can e-mails be used against the association in a lawsuit? A little forethought can go a long way in avoiding embarrassing and potentially expensive conflicts.

The potential for careless remarks by e-mail is endless. Consider these hypothetical examples:

- Frustrated with Mr. Jones' constant complaints, the board president zaps an e-mail to the other board members: "His kind shouldn't have bought in our community."

  Another board member replies, "What's more, Jones is six months behind in assessments; we should make an example of this DEADBEAT."
- Or, a board member writes the others, "Mrs. Smith built a fence without getting our okay first. Now she wants to inspect our records. She's just crazy."
- A manager asks the association's attorney for an opinion, then forwards that opinion to the board with her own postscript: "More legal B.S."



How would other people interpret "his kind" or "deadbeat?"

To avoid careless remarks, "e-mails should be composed with the same diligence as a formal letter," advises Houston attorney Marc D. Markel, a member of CAI's College of Community Association Lawyers (CCAL).

Because e-mail is quicker and more casual than formal letters, the tone of e-mail messages can be exaggerated and misinterpreted. One rule of thumb is to avoid composing e-mail while angry, says Sandy Denton, CMCA, LSM, PCAM, general manager of the Sienna Plantation Residential Association in Missouri City, Texas. "If you write something in all caps, it looks like you're yelling," Denton says.

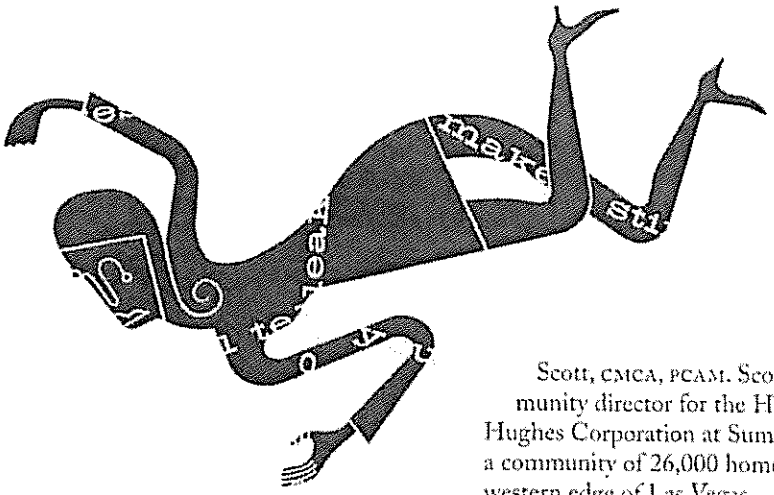
Markel, who conducts programs on e-mailing for clients, says e-mails should be written as if they will be used as exhibits in a lawsuit. "E-mail is easily misunderstood through a lack of context, tone or punctuation," he says.

Some directors have lengthy e-mail conversations about a dispute with an owner, then forward the thread to the association's attorney for advice on the dispute. Under this scenario, derogatory personal statements would not likely be protected by attorney-client privilege, cautions Richard S. Ekimoto, a Honolulu attorney and CCAL member.

Moreover, it's easy to forward e-mails, thus increasing the odds that imprudent comments will be seen by those you didn't intend to receive them. Once you click "send," an e-mail may be recalled, but the recipient may have already read it. E-mails you thought had been deleted can still be recovered by a forensic expert, and it's a very expensive process.

So, it goes without saying that board members, managers and attorneys should exercise care before sending an e-mail. For example, if board members are communicating about an owner's violation, the owner shouldn't be included in any e-mail. "If the lawyer clicks 'reply all,' the advice could accidentally go to the opposing party" and waive the attorney-client privilege, says attorney Joseph E. Adams of Fort Myers, Fla., and a CCAL member. Denton warns against clicking "reply all" unless specifically requested.

Certainly, e-mail fosters more efficient use of time. "As the attorney handles more communications by e-mail, support staff can spend their time more productively than preparing letters," Phoenix lawyer Beth Mulcahy observes. Ekimoto likes the convenience of mobile messag-



ing and the ability to respond to e-mail at any time, but is concerned that e-mail users expect quick responses.

"E-mail increases access and expectations," says attorney Lucia Anna "Pia" Trigiani of Alexandria, Va., a member of CCAL and the board of the CAI-affiliated Foundation for Community Association Research. It's so fast and easy that senders look for an instant response, which has its drawbacks.

"E-mail has just made me way too accessible," observes Sheilah Buettner, CMCA, AMS, community manager at The Smith Management Group, AAMC, in St. Louis. "Residents can sit up until one and two o'clock in the morning writing e-mails, but I do not have the luxury of staying up all night to answer them, and there are more of them than there is of me."

DECISIONS, DECISIONS

For community association leaders, a key question is: When does e-mail take the place of a meeting?

The potential for violation of open meetings laws "is one of the greatest dangers of e-mailing by directors," Ekimoto warns. "E-mail should be used to gather information such as distribution of packets for board meetings, but not for decisions."

Most states do not recognize decisions made online as official actions, whether intentional or not. "Some state open-meeting laws specifically prohibit board decisions by e-mail," says North Carolina attorney Jim Slaughter, a CCAL member.

"In Nevada, except for narrowly defined emergencies, boards may take action only at meetings, on items placed on the agenda and noticed to the membership," says community manager Pam Scott, CMCA, PCAM. Scott is community director for the Howard Hughes Corporation at Summerlin, a community of 26,000 homes on the western edge of Las Vegas.

Arizona law requires that all meetings of community associations and their boards be "open to all members of the association or their representatives," with exceptions for emergencies.

The board of Sienna Plantation, a community of 5,200 single-family homes, distributes information for meetings by e-mail, but ratifies all decisions at the next meeting. General Manager Denton says that minutes are approved electronically, which makes them available to members faster.

Without proper precautions, board members may appear to be using e-mail to circumvent state open-meeting requirements. In a case involving a local school district, a Washington state appeals court held in 2001 that "the active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss board business."

In a 2005 opinion, Arizona's attorney general determined that public bodies may use e-mail for "one-way communication by one board member to other members that form a quorum, with no further exchanges between members" without violating the Arizona Open Meeting Law. However, "a communication that proposes legal action to a quorum of the board would violate [the law], even if there is no exchange among the members concerning the proposal."

Association board members are accountable to their members much like elected government officials are accountable to the citizens they are elected to represent. Commenting on Missouri Gov. Blunt's destruction of e-mails used for public business, an editorial writer for *The Springfield* (Mo.) *News-Leader* argued that, "For any governmental body to be effective, it must maintain a sense of accountability with the taxpayers who fund it, and the principal form of accountability inherent in Missouri's government is through the Sunshine Law."

FAIR GAME

Board members and managers also need to be aware of how e-mails can be used in court. Are e-mails considered official records that must be preserved and made available for inspection by owners?

Ekimoto notes that the anti-trust suit against Microsoft was built on internal e-mails. E-mails are internal documents, no different than letters and other forms of written communication between or among directors. Markel advises that important e-mails should be printed and placed in a file; otherwise, they should be deleted.

E-mails are correspondence and may be inspected unless protected as attorney-client communications or other exceptions, says Trigiani. Attorney-client privilege relates to anticipated or pending litigation and to opinions by legal counsel. However, "merely copying the attorney on e-mails would not be sufficient; instead, it would depend on the content of the e-mail," she says.

Whether e-mails are a separate category of records that must be available for inspection is likely to depend on the law in each state. For example, Markel describes Texas law as quite broad, treating e-mails as part of the books and records of the association that an owner has the right to inspect. Florida law favors transparency in board decisions and includes a category of "all other records" that allows e-mails to be inspected, says Adams. However, Ekimoto describes Hawaii law as quite specific, naming the types of books and records that may be accessed by owners, and e-mails are not included in the list.

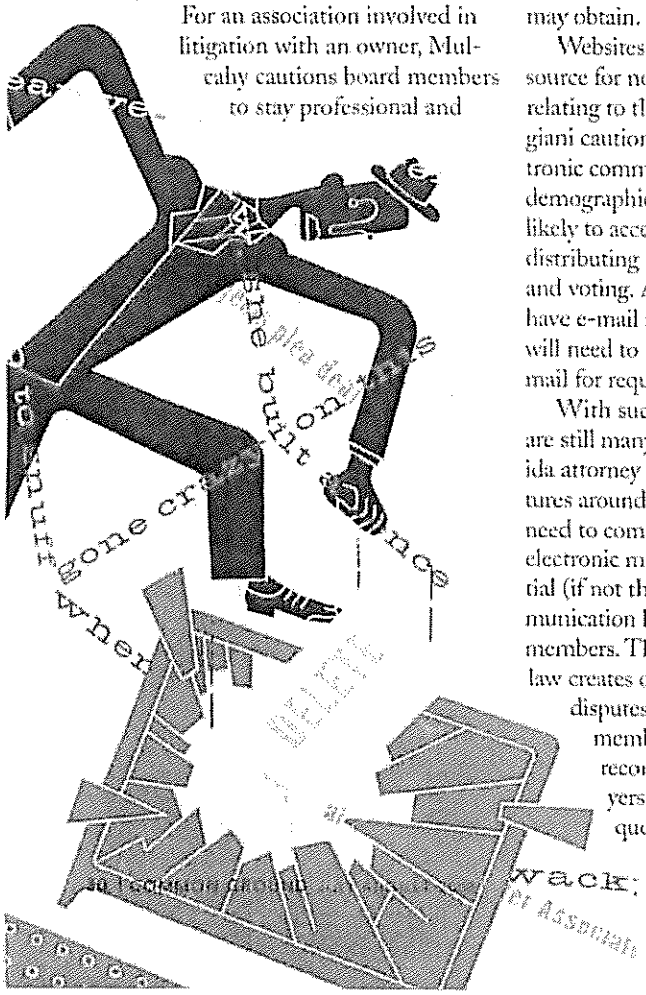
In litigation, the discovery process allows each party to inspect documents, records and correspondence of the other party. Markel cautions that e-mails are fair game in this pre-trial phase of a law-

suit whether the e-mails are mere chatter or actual decisions. If a judge determines they are relevant, they could be used at trial against the association. Markel recalls one lawsuit in which a board member had used his work e-mail. A copy of the board member's e-mails was requested, yielding 120,000 messages that referenced the association. Not all were relevant, but it cost $10,000 for the association's counsel to review the e-mails for attorney-client privilege.

When discussing legal issues, board members should send copies to the lawyer to preserve attorney-client privilege.

If the manager is involved in the e-mail chain, the contents of the manager's computer could be requested by the opposing party in a legal battle as part of the association's records. If a board member uses his or her employer's e-mail service, the use may be subject to the employer's policy stating that employees have no right of privacy; thus, the e-mails pertaining to association business could be opened to legal opponents.

For an association involved in litigation with an owner, Mulcahy cautions board members to stay professional and objective. If e-mails containing derogatory personal comments are revealed, a judge could rule against the association. "If you don't want to hear it on the six o'clock news, don't write it," Mulcahy advises her clients.



MEETING TIME

Apart from communications between board members, e-mail is increasingly used for other purposes, such as providing notices of meetings and voting by members. If the governing documents call for notices of meetings to be sent by mail, is e-mail an acceptable substitute?

Many states have adopted the Uniform Electronic Transactions Act, which is a general code that provides guidelines for transactions and communications. This act allows e-mail, if both parties agree. The board should survey the owners to request their consent to communicate with the board by e-mail, request their address for this purpose and ask whether the owners want their e-mail address included on the membership list, which other owners may obtain.

Websites are becoming a common source for notices and other information relating to the association. However, Trigiani cautions that successful use of electronic communication depends largely on demographics. Younger members are more likely to accept websites and e-mails for distributing information such as notices and voting. Additionally, not all members have e-mail access. In these cases, boards will need to preserve old-fashioned snail mail for required notices to those owners.

With such a new technology, there are still many unresolved questions. Florida attorney Adams says, "State legislatures around the country, sooner than later, need to come to grips with the fact that electronic media has become a substantial (if not the primary) method of communication between associations and their members. The lack of bright lines in the law creates opportunity for unnecessary disputes." One example is whether a member's e-mail request to inspect records is a written request. "Lawyers could argue either side of that question, but there would be no need to do so if we had clear guidelines in the law," says Adams.

With the ease of forwarding e-mails and the possibility that sensitive matters could find their way into the wrong hands, should board members expect attorney opinions by e-mail?

Board members may request a legal opinion by e-mail, but attorneys should carefully consider whether an opinion should be conveyed in the same manner. The attorney should be flexible in deciding how best to provide the opinion, advises Trigiani. "Ask the board how it would like the services delivered," she suggests, which could be by phone call, letter or e-mail.

Mulcahy and Markel still prefer letters for legal opinions because they have a more formal look than e-mail. Letters also are easier to store in permanent files and easier to protect.

It's no fun being the skunk at a board's picnic, but it's better to be safe than sorry. E-mailing is so fast and convenient that it's easy to overlook the potential problems. However, with a little discipline and planning, prudent board members can maintain an objective and professional tone in their e-mails, avoid violations of open-meeting and open-records requirements and minimize embarrassing surprises in legal disputes involving the association. CG

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AT-A-GLANCE

While e-mail has improved the speed with which we can communicate, it also has created perils for unwary board members and managers. The potential for careless remarks by e-mail is endless.

DECISIONS, DECISIONS. E-mails should be used to gather information, but not for decisions.

FAIR GAME. E-mails may be made public in a lawsuit.

MEETING TIME. With members' consent, e-mail can be used to notify them of meetings.