# Community Association Management *Insider*®

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**FEATURE**

## Understanding Costs, Hazards of Electronic Document Discovery

While technology has made conducting business more efficient, it has also created the potential for new legal problems. "Unless you're sure that your company will never be in a lawsuit, you should be concerned with the costs and hazards of electronically stored information," says attorney Robert Machson, an e-discovery strategy expert. Electronically stored information (ESI) includes any data stored electronically, such as email, documents, voice messages, and digital images.

There is no corner of your office where you will not find a potential source of ESI. The problem is that your office's ESI could be subject to "discovery" during legal proceedings. Discovery happens before the trial occurs. It is the process by which relevant information and documents from the opposing side are gathered to obtain pertinent facts related to the lawsuit. Generally, discovery devices include witness statements, questionnaires, and document production requests.

We will discuss the limits of what is discoverable, when a duty to preserve electronic evidence is triggered, and tips to avoid e-discovery problems.

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**FIRE SAFETY**

## Set Smoke Detector Maintenance Policy for Condo Members

Operable smoke detectors can go a long way toward saving lives and protecting property in condominium communities, where a fire in one unit can damage other units or endanger lives. Unfortunately, sometimes members don't maintain their smoke detectors or may intentionally disable them. Members with battery-operated, rather than hard-wired, smoke detectors often remove the battery when the detector begins chirping to signify that the battery is weak, says California manager Rolf Crocker.

To get members to maintain their smoke detectors, set a policy requiring them to do so and requiring them to certify that their smoke detectors are operable, says New Jersey attorney J. David Ramsey. We'll give you a Model Policy: Protect Condo Community and Members with Smoke Detector Policy, and we'll give you a Model Form: Require Members to Certify that Smoke Detectors Are Operable, which you can adapt for use at your community.

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## *E-Discovery* (continued from p. 1)

### Limits to Discovery

If your management company or your association is sued, you may be required to hand over anything that records a thought and is kept in virtual form. Email messages are no different from letters you may write. You shouldn't assume that because the communications are private, they will be treated as confidential.

**Inaccessible data.** Under the Federal Rules of Civil Procedure—the rulebook on federal court trial procedure—inaccessible data is data that involves too much work to obtain. This data, if requested, must only be identified; it need not be produced. Inaccessible data can include deleted emails.

If a party claims that certain information is inaccessible during the discovery process, the party must show that the information is not reasonably accessible. Accessibility of ESI depends on the media in which it is stored. If the ESI is no longer in a searchable format and would require high cost to restore, a court is likely to determine that the ESI is not reasonably accessible.

**Attorney-client privilege.** In general, communications with your attorney are considered privileged—that is, outside the scope of discovery. However, this protection is not all-encompassing.

While a message between an attorney and a board member offering advice or outlining legal strategies is clearly privileged, email messages among board members discussing the attorney's advice may be at risk. A judge might conclude that a group email discussion of the attorney's advice, even if that group consists solely of board members, destroys the privileged protection of the exchange between the board member and the attorney.

Therefore, board members are best advised to treat their discussions of information provided by their attorney as if those discussions might be subject to discovery, and to avoid having those discussions via email.

Some might try copying all email communications to their attorney as a means of shielding them from discovery. This is probably ineffective, as a court is likely to see this action as an attempt to make all board communications exempt from discovery. Only direct communications between an attorney and client can be reasonably assured of protection.

### Duty to Preserve Evidence

Your office has the obligation to preserve evidence when you are on notice that the evidence is relevant to a current lawsuit or when you should have known that the evidence may be relevant to future litigation. The obligation to preserve evidence does not require you to preserve every scrap of paper. Rather, you should preserve evidence that is reasonably likely to be the subject of a discovery request, even before that request is actually received.

Your duty to preserve electronic evidence is defined by the "trigger date"—for instance, the date of the commencement of litigation, or some other preceding event. You have no duty to preserve evidence before the

(continued on p. 4)

MODEL POLICY

# Email Usage and Retention Policy for Management Staff

Emails are the bulk of electronically stored information in a management office. Our Model Policy establishes email retention rules that you can adapt and use to help your staff understand the legal guidelines associated with email use. Have your employees sign and acknowledge that they understand the policy. Also, consult your attorney about adopting this policy for your own use.

## EMAIL USAGE & RETENTION

**PURPOSE:** The purpose of this policy is to ensure the proper use of company email and to help staff determine what information sent or received by email should be retained and for how long.

**EMAIL USAGE:** Email is a communication tool, and you are required to use this tool in a responsible and lawful manner. The [*Company Name*] email system shall not be used in the manner outlined below. Employees who receive any emails with this content from any [*Company Name*] employee should report the matter to their supervisor immediately.

- Sending or forwarding emails with any libelous, defamatory, offensive, racist, or obscene remarks.
- Unlawfully forwarding confidential information.
- Sending an attachment that contains a virus.
- Unauthorized use, or forging, of email header information.

**EMAIL RETENTION POLICY:** This policy is intended to help you determine what information sent or received by email should be retained and for how long. The information covered in these guidelines includes, but is not limited to, information that is either stored or shared via electronic mail or instant messaging technologies.

| Category | Definition | Retention Period |
|---|---|---|
| Administrative Correspondence | Includes, though is not limited to, clarification of established company policy, including holidays, dress code, and workplace behavior. | 4 years |
| Fiscal Correspondence | All information related to revenue and expense for [*Company Name*] and budgetary data. | 4 years |
| General Correspondence | Covers information that relates to client association interaction and the operational decisions of [*Company Name*]. | 1 year |

### ACKNOWLEDGMENT OF RECEIPT OF POLICY

I have read, understand, and acknowledge receipt of the **Email Usage and Retention Policy.** I will comply with the guidelines set out in this policy and understand that failure to do so might result in disciplinary or legal action.

Signature: _____ Date: _____

Printed Name: _____

## *E-Discovery* (continued from p. 2)

trigger date. For example, if a member's guest is involved in a slip-and-fall accident in a common area, and the guest has not yet sued the association, your community's staff should not delete email messages pre-dating the accident, in which a member noted that a section of the common area was iced over from a nearby malfunctioning faucet.

### Volume of Electronic Documents

If you are sued, you still have to review your documents for privilege. This is intimidating when you consider the time and effort involved in reviewing many thousands, even millions, of documents.

Each year, the average office worker produces almost 800 megabytes of recorded information. This is equal to 30 feet of books annually. Consider a management office of 20 employees working 250 days, creating 25 email messages a day. This scenario would produce 125,000 messages. Now, multiply that number by 12 monthly backups. This would create 1.5 million messages residing at stored data locations.

You can also think of the volume this way: One gigabyte of information is approximately 75,000 pages or 40 boxes of information. If one computer has 60 gigabytes of memory, the suing party could request approximately 2,400 boxes worth of information from one computer in your office.

### Avoiding E-Discovery Problems

According to a recently released poll by Deloitte Financial Advisory Services, close to 18 percent of surveyed managers said that their companies were not ready to deal with complex discovery requests. Since the amendment of the Federal Rules of Civil Procedure in late 2006, many companies still remain unprepared to meet stricter court requirements for the discovery and handling of electronic evidence.

The amended rules mandated that businesses must be able to quickly produce such data—including email, digital word documents and images, and digital audio and video—when required by a federal court. Management should explain to their employees that they should not treat communications from their work email accounts as private.

It is recommended that a management office establish a policy requiring the periodic removal of old email messages. The revised federal rules of civil procedure establish a "safe harbor" for information lost "as a result of the routine, good-faith operation of an electronic information system." You can adapt and use our Model Policy: Email Usage and Retention Policy for Management Staff, to help your staff determine what information sent or received by email should be retained.

Management should also decide on policies in the event of threatened or actual litigation. How are the documents relating to the lawsuit to be preserved and archived? The answer depends on each office's computer system and information technology structure. In such instances, information technology decisions must be coordinated with an attorney, and everybody should be informed of ESI rules.

***Insider Sources***

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## *Smoke Detector Maintenance Policy* (continued from p. 1)

### Check Governing Documents

Before you set the policy, check whether your governing documents give you the right to do so. There are a few ways your governing documents might give you this right—for example, if your governing documents give you the right to set policies as needed to protect the health of members and the safety of your community, or if your state law requires all homes to have operable smoke detectors, and your governing documents say that members must comply with all laws. Check with your attorney if you are not sure whether you have the right to set a smoke detector policy.

### What to Include

A good smoke detector policy should require members to keep all smoke detectors in their units operable at all times and, for battery-operated detectors, to replace batteries as needed. It should also bar members from disabling smoke detectors.

The most important section of the policy would require members, upon moving into their unit, and then once a year afterward, to submit a signed certification. That form confirms that all smoke detectors are operable and that they have not removed or disabled any smoke detectors that were in the unit when they bought it, except to replace the old smoke detector with a new one.

Some associations' governing documents give them the right to enter members' condos for certain purposes. If your association has this right, you might want to include in your policy that if members do not supply the annual certification, the association can enter the condo for the sole purpose of inspecting the smoke detectors, and that it can issue a fine if any smoke detectors are found to be inoperable.

However, Ramsey warns that entering a member's unit can lead to a variety of problems. Therefore, only take this step after having discussed the matter with your association's attorney, and proceed with her guidance.

If your association's governing documents and state law allows you to fine members for violating association rules, mention in your policy that members who don't maintain their smoke detectors in operable condition or who don't submit an annual certification may be fined.

Also, tell members that if they are fined for not maintaining their smoke detectors or for not submitting an annual certification, they will have a right to a hearing before the board to contest the fine.

***Insider Sources***

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**J. David Ramsey, Esq.:** Partner, Greenbaum, Rowe, Smith & Davis LLP, Metro Corporate Campus One, P.O. Box 5600, Woodbridge, NJ 07095; *dramsey@greenbaumlaw.com.*

**MODEL POLICY**

## Protect Condo Community and Members with Smoke Detector Policy

This Model Policy, written with the help of New Jersey attorney J. David Ramsey and California manager Rolf Crocker, requires members to ensure that their smoke detectors are operable at all times. Also, it contains optional language that you can use if your governing documents allow you to fine members who don't comply with community policies.

### SMOKE DETECTOR MAINTENANCE

1. **Importance of smoke detectors.** For the safety of everyone at Shady Acres Community Association, it is essential that all members' units be equipped with one or more smoke detectors and that members maintain their smoke detectors in operable condition.
2. **Members' responsibility.** Members are responsible for ensuring that all smoke detectors in their units are operable at all times and that batteries are replaced as needed. Members must never disable a smoke detector for any reason.
3. **Notify manager.** If a member needs assistance fixing an inoperable smoke detector, the member should notify the manager immediately.
4. **Certification.** Upon moving into a unit, and then at least one time between Jan. 1 and Dec. 31 of each subsequent year, each member must submit to the board or manager a signed certification statement that all smoke detectors in his or her unit are in operable condition. The certification must also state that the member has neither removed nor disabled any smoke detectors that existed in the unit at the time he or she purchased it, except to replace an existing smoke detector with a new one. The board or manager will provide certification forms that members must use for this purpose.

*[5 & 6 Optional: If association's governing documents and state law permit fines]*

5. **Fine for violations.** Members who violate this policy by not maintaining their smoke detectors or by not submitting a signed statement in accordance with the provisions of paragraph 4, above, may be fined.
6. **Hearing.** Members who are fined for violating this policy shall be entitled to a hearing before the board in order to contest said fine.

**MODEL FORM**

## Require Members to Certify that Smoke Detectors Are Operable

Here is a Model Certification that members sign and return to your office to certify that all smoke detectors in their units are operable. Show this certification to your attorney before adapting it for use at your community.

### SMOKE DETECTOR CERTIFICATION

I certify that on [*insert date*] I checked each and every smoke detector in my unit, [*insert unit #*] and found them all to be operable. I further certify that I have neither removed nor disabled any smoke detectors that existed in my unit at the time I purchased it, except where I may have replaced an existing smoke detector with a new smoke detector.

Signature: _____ Date: _____

## DOS & DON'TS

### ✗ Don't Debit Different Amount from Member's Account Without Advance Notice

If a member pays his regular association assessments using automated electronic payments, don't transfer additional fees from his bank account without giving the member advance notice. Overstepping your bounds on automatic payments violates the Federal Consumer Credit Protection Act (FCRA).

This is what happened when a co-op community in New York failed to give advance notice that it had transferred legal fees from a member's bank account. When the member asked for his money back, the bank and the association refused to return the debited legal fees. In court, the association alleged that the member had breached community rules by orally abusing and threatening other members. The association testified that the legal fees were reimbursement for attorney's fees it had incurred when the association's attorney sent the member letters and gathered affidavits regarding the member's actions.

The court ruled in favor of the member, explaining that the FCRA requires advance notice before the debit of a different amount can be made when a member has preauthorized the transfer of money from his bank account for monthly assessments. Such advance notice helps protect members from unauthorized or wrong transfers for which members may stop payment.

The court found that the member did not receive any notice of the amount to be debited or the scheduled date of the transfer. Without advance notice, the court found that the member did not have sufficient time to stop payment of the unauthorized transfer.

- Fair Credit Reporting Act: 15 USC §1693 *et seq.*
- Hodes v. Vermeer Owners Inc., November 2006

### ✓ Provide Sign Language Interpreter at Special Meetings, if Requested

If a hearing-impaired member in your community asks for a sign language interpreter to be present at a special meeting or at an annual meeting as a reasonable accommodation, be sure to provide one. Without a sign language interpreter, the disabled member may not be able to participate in any meaningful way at the meeting. As a result, your refusal to provide an interpreter could lead a hearing-impaired member to claim that you discriminated against him based on his disability.

Under the federal Fair Housing Act (FHA), an association must reasonably accommodate disabled members. This may mean adjusting rules, procedures, or services, to give disabled members an equal opportunity to use and enjoy a home or common space. Therefore, when a disabled member asks you to provide a sign language interpreter at association meetings, treat it as a request for a reasonable accommodation and bear in mind the following:

**Select meetings only.** Colorado attorney Brian Martin of HindmanSanchez handled a matter in which a hearing-impaired homeowner, who was not a board member, requested a sign language interpreter for monthly board meetings. The local fair housing authority stated that the association did not have to provide an interpreter for monthly board meetings. The association said that board meetings require action only by the board members and that nonboard members did not have a vital role in board-only procedures, such as voting.

The board, in this situation, welcomed written submissions from the hearing-impaired homeowner, which allowed her sufficient participation in the procedures. However, special meetings and annual meetings where nonboard members play a more important role would require a sign language interpreter, if requested.

**Association pays.** Under the FHA, reasonable accommodations—such as sign language interpreters—are made at the expense of the association. However, reasonable modifications or reasonable physical changes to common areas, such as the installation of a wheelchair ramp, are made at the disabled member's expense.

**No undue financial or administrative burden.** Once a disabled member asks for an accommodation, you must comply with the request unless doing so would be an undue financial or administrative burden. With this in mind, it may be prudent to set up a policy requiring the hearing-impaired member to provide advance notice to the association that he will be in attendance at a special meeting or an annual meeting.

#### *Insider Source*

**Brian E. Martin, Esq.:** Associate, HindmanSanchez, 5610 Ward Rd., Ste. 300, Arvada, CO 80002; *www.hindmansanchez.com.*

REGULATIONS UPDATE

# Final Guidelines for SORNA Released

If someone tells your association that a sex offender is living in your community, confirming the accuracy of the information has been made easier through the Sex Offender Registration and Notification Act (SORNA). This law established a new, comprehensive set of minimum standards for sex offender registration and notification throughout the United States.

Each state already has some sort of sex offender registration and community notification program. Before SORNA, however, each state differed in terms of how it administers its community notification process, which offenders are required to register, the duration of registration, what information is registered, how the information is shared, whether the public has access to the registry, and methods of access.

Recently, the U.S. Department of Justice announced the final guidelines to SORNA. As a result, the law now includes a more comprehensive group of sex offenders and sex offenses for which registration is required. The guidelines also expand the amount of information available to the public regarding registered sex offenders. States have until mid-2009 to comply with the guidelines.

## Don't Rely on Word-of-Mouth

The SORNA requirements make confirming the accuracy of information regarding a sexual offender living in your community easier in some states. If you hear that a sex offender lives in your community, be sure to verify this information before taking any action.

Your instinct may be to warn others immediately upon hearing of a possible sex offender in the community, but doing so could do a lot of harm if the claim is untrue. In such a scenario, the association could be sued for defamation of character if it spreads incorrect information. Therefore, always confirm the information through the state sex offender registry or your local police.

## Seek Legal Counsel

Always consult your association's attorney when you have verified the presence of a sex offender living in your community. Even if your information is accurate, states have different rules regarding if and when such information can be disclosed to the public.

Be clear about what authority the association may have for disclosing the information before moving forward with disclosure. The association and its attorney may decide that the threat the person poses to the community warrants disclosure.

## SORNA Registry Information Requirements

The amount of publicly available information will still vary slightly from state to state because the final guidelines set minimum standards. However, SORNA establishes and expands the list of the types of registration information that states must include on their public sex offender Web sites. The required information includes:

**Current offense.** The sex offense for which the offender is currently required to register and any other sex offense for which the sex offender has been convicted.

**Employer address.** The address of any place where the sex offender is an employee.

**Name.** The name of the sex offender, including any aliases.

**Photograph.** A current photograph of the offender.

**Resident address.** The address of the sex offender, including any information about where the offender lives with some regularity.

**School address.** The address of any place where the sex offender attends school.

**Vehicle license plate number and description.**

RECENT COURT RULINGS

## ➤ Association Didn't Knowingly Make False Statement

**Facts:** A member sued her association and its management company for their handling of property damage caused by several hurricanes in 2004. To fix the damage, the association had obtained a loan from the Small Business Administration (SBA).

The SBA loan agreement required the association to use the funds exclusively to repair hurricane damage. It also required the association to pass a special assessment approved by a sufficient majority of the association's members to pay off the loan. The suing member claimed that the board did not receive enough votes as required by the loan agreement.

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## *Recent Court Rulings* (continued from p. 7)

A special assessment was imposed, which the member did not pay, and the association imposed a lien on the member's property. The member sued the association for knowingly submitting false information to the SBA for purposes of obtaining the loan.

**Ruling:** A Florida District Court granted a judgment without a trial for the association.

**Reasoning:** The court ruled that the board did not knowingly make a false statement to the SBA. Neither the member nor the board gave enough evidence concerning the outcome of the vote for the loan to give a clear picture of what had occurred. However, the member failed to show that the board had deliberately ignored the outcome of the vote and submitted a loan application.

Innocent mistakes or negligence on the part of the board members is not grounds for a lawsuit under the federal False Claims Act.

- Crenshaw v. DeGayner, June 2008
- False Claims Act: 31 USC §§3729–3733.

### ➤ Association Can Impose Fines

**Facts:** An association claimed that a member misrepresented his ownership of the condo where he was living. The ownership of the condo had changed hands among a father, his son, and the son's company a few times in five years. The association claimed that as a result of the misrepresentation, the member was improperly elected to the board of directors and appointed president. The association held a hearing to determine whether the member should be assessed fines for violating the association's governing documents.

At the time of the hearing, the association had no fine schedule. Therefore, while the board provided notice of the meeting to the member, it did not provide notice of any potential fine schedule. According to the board's decision, the member appeared at the start of the hearing, but did not remain for the entire hearing. The board proceeded without the member's presence and adopted a fine schedule. The board fined the member $49,421.52 and filed a lien against the member's unit for that amount.

The member sued to void the fines, claiming that by fining him, the association had acted unconstitutionally as a state-like institution.

**Ruling:** The Minnesota District Court dismissed the member's lawsuit.

**Reasoning:** The court ruled that the member had wrongly assumed that the power to file a lien and the power to assess fines and penalties are exclusive to state governments. Private entities regularly impose fines and liens. In Minnesota, mechanics and veterinarians are granted lien power, and private entities such as the National Collegiate Athletic Association (NCAA) can legislate rules and impose penalties. Also, the member did not show that the association had deprived him of a right by exercising some privilege created by an unconstitutional rule.

- Lennon v. Overlook Condo. Assn., May 2008