innovation in technology frequently leads to innovation in law. A recent example is the June 2009 decision in Rosen v. Evolution Holdings LLC, enforcing a lease agreement formed via text messages exchanged between the parties. The potential enforceability of commitments made in text messages, e-mail and other forms of electronic communication, as well as the potential loss of confidentiality and the attorney-client privilege when using electronic communications, requires vigilance by co-op and condominium boards in the use of such communications. At the same time, electronic communications have great potential to facilitate board governance and communication with apartment owners by providing flexibility and rapid dissemination of information.

This column highlights federal and state laws regarding electronic communications, and relevant case law. This column also offers suggestions for modifying board practices, co-op proprietary leases and bylaws, and condominium bylaws to permit the use of electronic communication and provide boards and managers with modern management tools in three areas: building management, board action and communication with apartment owners.

Electronic Contract Formation

A strong impetus for electronic commerce was congressional enactment in 2000 of the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”), which allows parties to form valid written contracts through electronic exchanges and signatures. New York’s complement to the E-Signature Act was the 2002 enactment of the Electronic Signatures and Records Act (ESRA) (“New York Act”), which allows parties to form valid written contracts through electronic exchanges and signatures. The act provides that “unless specifically provided otherwise by law, an electronic signature may be used . . . in lieu of a signature affixed by hand [and] shall have the same validity and effect . . . .” Further, New York’s Statute of Frauds provides that for certain financial contracts, “written text produced by telex, telefacsimile, computer retrieval or other process by which electronic signals are transmitted . . . shall constitute a writing and any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signing.” Nonetheless, there remain several types of contracts that are not permitted to be electronically signed. The Appellate Division, First Department, has held that binding settlement agreements can be made via e-mail exchanges. However, notwithstanding the Evolutions Holding decision, it is unclear whether contracts for the sale or lease of real property made by electronic signature or submission are enforceable. In

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However, the E-Signature Act and New York Act, as well as case law, do allow for other types of contracts to be formed electronically. Thus, boards may wish to consider negotiating and forming certain incidental contracts—e.g., for building maintenance, services or cable contracts—through e-mail. Regardless of whether this practice is adopted, the lesson of Evolutions Holdings is that boards and management should remain vigilant in their use of electronic communications so as not to create undesired obligations or commitments.

Maintaining Records

A more fertile area for management innovation is the ability to maintain records electronically. The New York Act provides that an electronic record shall have the “same force and effect as those records not produced by electronic means.” Accordingly, boards and managers may now retain and store documents electronically, a more convenient, less expensive and ecologically preferable means of storage. However, as discussed above, co-op proprietary leases and contract documents relating to the sale of condominium units should be retained in hard copy form with original signatures.

Electronic Board Action

Boards can also make effective use of electronic communication for notification of meetings and to reflect actions taken. New York’s Business Corporation Law permits attendance at board meetings via teleconference or “similar communications equipment allowing all persons participating in the meeting to hear each other at the same time.” Boards should therefore consider holding meetings via Web conferencing or Internet phone services such as SKYPE and may incorporate in their bylaws provisions for such electronic board meeting attendance. A board could require its members to register an e-mail address with the managing agent and designate e-mail as the manner of giving notice of board meetings. In addition, proxy materials can be posted on the Internet or online, by amending bylaws so to provide.

Delaware’s General Corporation Law accommodates the use of electronic communications to an even greater extent than New York’s statutes. Delaware expressly allows board action without a meeting if directors communicate their votes by e-mail or other “electronic transmission,” provided the electronic transmission is filed with the meeting’s minutes. In the case of board minutes, the same is likewise permitted to be maintained and filed electronically.

It should come as no surprise that Google,
incorporated in Delaware, takes full advantage of the flexibility afforded by these provisions. Google's bylaws authorize directors to take board action by e-mail communications. They also permit directors to be notified of meetings by fax or e-mail. Google's directors can attend meetings by telephone or other means of "communication equipment," such as Web video conferencing, provided that all members in attendance can hear one another. Although Google is a Delaware corporation, its bylaws are an excellent example of providing boards with flexibility and expedition in taking board action by modern electronic means of communication.

However, neither New York nor Delaware law permit a board meeting to be held via e-mail, which is not a form of electronic communication where participants can "hear" one another. Therefore, e-mail exchanges among board members on matters that require board deliberation and action should be discouraged. Such communications not only do not satisfy the legal requirements for a board meeting, they may impair the confidentiality and privileged status of the matter being communicated.

As regards the law, the New York Condominium Act, unlike the Business Corporation Law, contains no provision permitting the use of electronic communication for board meetings, or board action or communications with unit owners. However, the act requires condominium bylaws to provide for the method of calling board and unit owner meetings and permits the adoption of bylaw provisions that are not inconsistent with the act.

Therefore, condominium bylaws can provide or be amended to provide for the same electronic communications as are permitted by the Business Corporation Law as regards board meetings, board actions and communications with unit owners. Moreover, courts have looked to the Business Corporation Law for guidance in addressing certain areas where the act lacks specific provisions.

Shareholders

Perhaps the most useful technological innovations relate to communications between boards and apartment owners. New York's Business Corporation Law permits shareholders to be notified of meetings by electronic means.

Conclusion

Federal and New York state law reflect an eagerness to adapt to electronic methods of communication and seek to facilitate the day-to-day operations of boards for the benefit of owners. And courts are becoming increasingly supportive of these goals. Thus, law and modern technology combine to advance the ways in which we communicate and provide boards with the opportunity and means to update and enhance governance practices.

While boards must ultimately decide which practices best suit their building's individual goals and needs, they should consider taking advantage of this opportunity to amend condominium bylaws, co-op bylaws and proprietary leases and building management policies and practices to take advantage of those innovations in the law and electronic communication in order to maximize management flexibility and the ease and speed of communications and decision making. At the same time, caution is warranted so that unintended commitments are not made, confidentiality is not compromised and the attorney-client privilege is not waived.

The...suggestion that text messages are brief, easy to ignore, and therefore not as serious as phone calls, letters, or e-mails, is without merit. On the contrary, text messages are communicated in writing, just like letters or e-mails, and access the recipient often instantaneously, like a phone call directed to your cell phone. Additionally, the brevity of a text message has no impact on the severity of its meaning.

People v. Limage, 19 Misc.3d 395, 400 (Crim. Ct., Kings County 2008).

1. 15 U.S.C.A. §7001-701 (West 2009). See §7001(a) ("[a] signature, contract, or other record relating to [any transaction in or affecting interstate commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form").


6. Hostcentric Technologies Inc. v. Republic Thunderbolt, LLC, 2005 U.S. Dist. Ct. Lexis 11110 (S.D.N.Y. June 6, 2005). But see also Welden v. 710 East 72nd Owners Corp., NYLJ, April 26, 2007 (Sup. Ct. N.Y. County), p. 19, col. 1, holding that an e-mail exchange of a settlement agreement was not enforceable because it merely summarized proposed terms and did not conform to the requirements of CPLR 2104, which requires that an enforceable settlement must be made either in open court or by a subscribed writing, signed witnesses, and the court must rule on whether the electronic signatures admittedly contained on the parties' e-mails exchanges satisfied CPLR 2104's requirement for a "subscribed" writing.

7. 4 Misc.3d 193 (Sup. Ct. Kings County 2004). The Rosenfeld court ultimately found that a contract was never finalized by the parties because the e-mail communications failed to define the requisite material terms. However, this determination should not diminish the court's holding as to the sufficiency of the e-mail signature with regard to satisfying the Statute of Frauds.

8. 15 U.S.C.§7001(a) (West 2009). See §7001(a) ("[a] signature, contract, or other record relating to [any transaction in or affecting interstate commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form").
