

## **The Potential Impact of Email Communication on the Attorney-Client Privilege**

by

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The Attorney-Client Privilege is defined by Black's Law Dictionary as, "The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and his or her attorney."

The rule in Illinois is that where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose made in confidence by the client are at the client's choice permanently protected from his own disclosure or disclosure by the legal adviser, except where the protection is waived or where the law requires disclosure (for example, to avoid the perpetration of a fraud).

The purpose of the attorney-client privilege is to encourage and promote full and frank discussion between a client and legal advisor by removing the fear of compelled disclosure of information.

It should be noted that not all attorney-client communication is privileged. To be privileged, the communication must be made between an attorney and his client, in the course of professional conduct, while the attorney-client relationship exists and related to the business and interest of the client or to a matter about which the client is seeking advice. Further, the "client" for purposes of the attorney-client privilege includes members of the Board and perhaps a managing agent to complete a corporate "control group," so communication or disclosures to anyone outside that group would not be protected by the privilege. Moreover, business or other non-legal advice is not protected by the privilege.

In the past, attorney-client privileged communications were confined to face to face meetings, telephone communications or mailed correspondence. While these forms of communication are still widely used today, today, we often communicate via email correspondence.

Notably, with the informality often inherent in the process of communicating by email, the client may understandably forget that the email communication with his her attorney, must be handled carefully to preserve attorney-client privileged information. For example, when emails containing attorney-client privileged information are forwarded to people not covered by the privilege, such action can constitute a waiver of the attorney-client privilege and may make otherwise non-discoverable/disclosable information available to other parties in litigation or otherwise.

In the case of condominium associations, Board members and management representatives are often copied on attorney-client privileged emails. If the Board members or management representatives either purposefully or inadvertently forward

such email correspondence to others who are outside of the privilege, such action can constitute a waiver of the privilege. Also, the privilege may be waived if the client describes the attorney-client discussions with a person not covered by the privilege (such as my lawyer said, “\_\_\_\_\_” or I told my lawyer “\_\_\_\_\_”).

If there is any doubt in your mind as to whether the intended recipient of the email is included within the authorized group of persons, then you should confer with the Association’s attorney.

The client, of course, has a right to waive the attorney-client privilege, but such a waiver can certainly work against the client’s interests and should only be done, if at all, with knowledge and not as a result of inadvertent disclosure.

In summary, while email technology has increased the speed of attorney-client communications, attorneys and their clients must recognize the increased risk of inadvertent disclosure of attorney-client privileged information via email and take necessary steps to prevent such disclosure and safeguard such privileged information.

Finally, while this article is intended to address the potential impact of email communication on the attorney-client privilege, please also note that on those occasions when you request our review and markup of contracts or other documents in advance of their being tendered to opposing counsel, please be advised that such documents often contain our mental impressions which the association may wish to review prior to tendering them to opposing counsel. As such, it may be a good practice to review our markup and provide commentary, and request that we provide a final updated markup in advance of tender to opposing counsel.

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