THE POTENTIAL IMPACT OF EMAIL COMMUNICATION ON THE ATTORNEY-CLIENT PRIVILEGE
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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 an attorney 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 attorney, 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 attorney 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 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, for corporate type entities (such as a condominium association) the “client” for purposes of the attorney-client communications is the “control group” which encompasses members of the Board and perhaps the managing agent; thus, communication or disclosures to anyone outside that group would not be protected by the privilege. Note that for purposes of the privilege, unit owners are not part of the “control group” and disclosures to them will waive 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, we often communicate via email correspondence.

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. Note that for purposes of the privilege, unit owners are not part of the “control group” and disclosures to them will waive 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 the privilege is waived, then non-discoverable/disclosable information may become available to other parties in litigation or otherwise.
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.

Also related to the attorney-client privilege is the attorney work product doctrine under which the thoughts, strategies and mental impressions of the attorney are protected from disclosure to third parties.

When you request our review and comment on contracts or other documents, please keep in mind that the attorney’s notes and comments reflect mental impressions which generally should not be handed over to the other side. As such, it is a good practice to review the markup and commentary, and not just hand them over to opposing counsel, without first checking with the attorney. Sometimes, an edited version of the markup document (removing the attorney’s mental impressions or advice) can be prepared for distribution to the other side. Otherwise, the other side may inappropriately gain an insight into the client and attorney’s strategy on the matter.

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.