K&G LAW GROUP, PLLC

OLD WINE IN NEW BOTTLES: BANKS V. MARIO INDUSTRIES AND THE ATTORNEY-CLIENT PRIVILEGE IN VIRGINIA

This article was prepared by attorneys at the firm of K&G Law Group, PLLC.

I. Introduction

You should never communicate with your lawyer from your work email address. You should also not prepare correspondence, memos, or other documents for your lawyer using your work computer. You should avoid writing to your lawyers from your work email and preparing documents for your lawyers on your work computer because, if you do, you can be virtually assured that such information will be discoverable by your employer and will not be protected by the attorney-client privilege.

To many, the Virginia Supreme Court's holding in *Banks v. Mario Industries* sounds modern and cutting edge; in reality, it is nothing more than a confirmation of ancient common-law principles. For many centuries, Courts in the English-speaking world have held that communications with lawyers must be in a setting that gives rise to an expectation of privacy in order to be protected by the attorney-client privilege. *Banks v. Mario Industries* is actually nothing more than the updating of ancient-common law principles to accommodate the emphasis on the use of electronic means to create, store, and share information.

At K&G Law Group, we specialize in commercial litigation, including business torts, employment law and other complex civil litigation matters such as *qui tam* litigation, so we probably have occasion to emphasize this more than some lawyers practicing in other areas of law. It is surprisingly difficult for some clients to adhere to these rules, and hopefully this open memo will help you understand why they are so important.

It does not matter if you are the Chief Executive Officer of the company. It does not matter if you founded the company. And it certainly does not matter that you made a seven-figure bonus last year, or that you devised a new product model, or that you have hundreds or even thousands of employees working under your direct and indirect supervision. These are just some of reasons various clients have given us over the years to explain why these rather inconvenient rules do not apply to them, but none of these justifications would have helped the clients salvage the attorney-client privilege.

II. The attorney-client privilege and its importance to you

When applicable, the attorney-client privilege absolutely protects your communications with a lawyer. This is your privilege, it is your right, and only you can waive it. Any confidential communications between you and a lawyer, including communications made during an initial consultation or even over the phone when you are still deciding whether to even hire a lawyer, are protected and privileged.

The question of what communications fall under the attorney-client privilege is a question of state law and, thus, may vary slightly from state to state. However, it is fair to say that the four general principles of Virginia law are illustrative.

(1) The communication must have been to an attorney for the purpose of obtaining legal advice;
(2) The communication must have been made in a setting which gives rise to an expectation of privacy (i.e., no third parties are present);
(3) The communication must relate to the matter or matters about which the attorney was

consulted; and
(4) The communication must have been made while consulting with the attorney for a proper purpose (i.e., not for purposes of planning a crime).

Even if the lawyer in question is your brother, sister or other family member to whom you speak on a daily basis, when your communications to that person meet the above criteria, the attorney-client privilege attaches, and those communications are off-limits to anyone else. (As an aside, in Virginia and many other states, communications to a spouse are already protected by the marital communications privilege, regardless of whether the spouse is an attorney.)
The attorney-client privilege is premised on the theory that society benefits when clients can consult their lawyers with absolute candor. Your lawyer needs to know everything about your case, no matter how embarrassing or potentially damaging, in order to be able to provide you with the best advice and input possible; conversely, you need to feel free to share this information with your lawyer without fear that it will later be used to hurt or embarrass you.

Point (2) above is, in particular, often misunderstood by clients in the context of email. While it makes sense that a client can voluntarily waive the privilege—i.e., if it later benefits the client for the attorney to publicly disclose what the client said, the lawyer may make such a disclosure upon the client's instruction to do so in writing—many people do not understand that this waiver *can be inferred from the client's unintentional conduct.*

Scenarios involving a client instructing his or her lawyer to disclose attorney-client communications are few and far between. It is considerably more likely—and far more damaging—for a client to waive his or her attorney-client privilege inadvertently.

III. Banks v. Mario Industries confirms the importance of protecting the attorney-client privilege

A recent case Virginia Supreme Court case, *Banks v. Mario Industries,* 650 S.E.2d 687 (Va. 2007) confirmed the importance of not communicating with your lawyers on work computers or work email addresses. In *Banks*, an employee hatched a plan to resign his position and start a competing business. Wishing to secure legal advice, the employee hired a lawyer and prepared a memo for his counsel on his work computer. Ostensibly, he used a common word processing program such as Word or WordPerfect. He intended this memo—which described in minute detail his plans to resign from his job and then go into competition with his employer—to be seen only by his attorney. After he printed it, he deleted it from the computer and took other steps to ensure that it would not be seen by anyone else.

By ordinary, every-day standards, there is no doubt this employee expected this communication to be private. He undoubtedly thought and expected that when he deleted the memo from his computer, it would be gone forever, and no one but his attorney would see this memorandum. Thus, the employee's first mistake was being ignorant of technology. Everyone should understand that the best bet is to assume that no information is ever truly deleted from a computer. While it is true that "wiping" or erasing a computer's hard drive and then "scrubbing" or reformatting the hard-drive with specialized software might make it unlikely that anyone can access the erased information, it is possible that such information could be reconstructed by an individual with a high degree of skill.

K&G Law Group, PLLC, is a boutique-style civil litigation firm serving all of Virginia, Maryland, and the District of Columbia. Based in Northern Virginia, the firm practices nationwide in the areas of employment law, qui tam litigation and other complex civil litigation matters.

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Perhaps more important, an employee would have no right to completely erase and reformat the hard-drive of a computer that belonged to his or her employer, and any employee who did so would most certainly find herself in deep trouble.

After the employee quit, he returned the computer to his employer, as he was required to do. Once litigation began, the employer, with the help of a computer forensics expert, was able to access this memo on the computer's hard drive. At trial the employee argued that this memo should be covered by the attorney client privilege and should not be admissible as evidence, but the Supreme Court of Virginia disagreed. The Court again confirmed the ancient, time-honored rule and held that the privilege may be expressly waived, or a waiver may be inferred from a person's conduct.

The fact that the employee created the document on a company computer was read by the Court to constitute a waiver of the privilege, as the employee could not have had an expectation of privacy. Thus, the content of the memorandum was disclosed at trial, and the employee was found liable to his former employer for various wrongful acts.

In this case, the employee handbook of the company specifically stated that while employees were permitted to use their work computers for personal tasks, there was no expectation of privacy. While the Court's holding that the memo was admissible seemed to turn on the employee handbook, it is an almost certain bet that even in the absence of such a provision in an employee handbook the result would be the same.

The simple fact is that employers should have company policies—conveyed in a handbook or elsewhere—stating that the employer may monitor computer use or monitor company email accounts. While these are not the only company policies an employer should have regarding technology, other matters would be beyond the scope of this article.

IV. Conclusion

The all-important expectation of privacy is an objective standard when it comes to communications using a work computer or a work email address. An employee seeking legal advice on an issue that concerns his employment is effectively including the opposing party in their communication if such communications take place on a work email or work computer. The holding in *Banks* was not unanticipated; the

lawyers of this firm have been advising clients for years that communications with an attorney should never, ever take place on a work computer or on a work email address.

When otherwise privileged communications are made in the presence of third persons, Courts will infer that there is no expectation of privacy, and the attorney-client privilege is waived. If you communicate with your lawyer on a work email address or draft correspondence to your lawyer on your work computer, it is as if the employer's representative is sitting right there with you while you are consulting with your lawyer.