



# Fourth Circuit Rules Emails Sent from Husband's Work Address to His Wife Are Not Privileged

January 16, 2013

*United States v. Hamilton*, 701 F.3d 404, 2012 U.S. App. LEXIS 25482 (4th Cir. Va. 2012)

On December 13, 2012, the Fourth Circuit found that emails sent from a husband to a wife were not protected by the marital privilege because they were sent from his work computer.

In *United States v. Hamilton*,<sup>[1]</sup> a jury convicted Defendant, a former member of the Virginia House of Delegates, for bribery and extortion under color of official right. The convictions arose from various charges that occurred while the Defendant was a state legislator including, securing state funding for a public university in exchange for employment by the school. After the Defendant secured the employment position by meeting with the university's Dean, he emailed his wife regarding his compensation. The email was used as evidence by the prosecutor to charge the Defendant and the Defendant subsequently argued that it was protected by the marital communications privilege.

It is common knowledge that communications between you and your spouse are protected by the marital communications privilege. That is, "[c]ommunications between . . . spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged."<sup>[2]</sup> However, "voluntary disclosure" of any spousal communication waives the privilege.<sup>[3]</sup> In analyzing whether the emails sent between husband and wife were covered by the privilege, the Fourth Circuit likened the case to the United States Supreme Court's decision in *Wolfe v. the United States*, 291 U.S. 7, 14, 54 S. Ct. 279, 78 L. Ed. 617 (1934):

In *Wolfe*, the Court held that a defendant's communication with his wife did not come "within the privilege because of [his] voluntary disclosure" of the communication "to a third person, his stenographer." (citation omitted). The Court explained that, "[n]ormally husband and wife may conveniently communicate without stenographic aid, and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the testimony of third persons to whom such communications have been voluntarily revealed." (citation omitted). Because "[t]he privilege suppresses relevant testimony," it "should be allowed

only when it is plain that marital confidence cannot otherwise reasonably be preserved,” and “[n]othing in this case suggests any such necessity.” (citation omitted). <sup>[4]</sup>

Her, the Court noted that email has become the modern stenographer and that the Defendant waived the marital privilege by using a work email account on an office computer to send messages even though there were other ways to “conveniently communicate” to her.<sup>[5]</sup> Likewise, the fact that the Defendant “did not take any steps to protect the emails in question, even after he was on notice of his employer’s policy permitting inspection of emails stored on the system at the employer’s discretion”, provides ample support for a finding that there was no “objectively reasonable” belief in the privacy of the emails sent from the work computer. <sup>[6]</sup> Therefore, the Fourth Circuit concluded that the emails were not subject to the marital communications privilege.

If you or your company needs assistance drafting email, internet, or document retention policies, or have a general e-discovery inquiry, please contact James G. Ryan at [jryan@cullenanddykman.com](mailto:jryan@cullenanddykman.com) or via his direct line at 516-357-3750.

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1. <sup>[1]</sup>*United States v. Hamilton*, 701 F.3d 404, 2012 U.S. App. LEXIS 25482 (4th Cir. Va. 2012)
2. <sup>[2]</sup>*Id.* at \*6 (internal citations omitted).
3. <sup>[3]</sup>*Id.*
4. <sup>[4]</sup>*Id.* at \*7
5. <sup>[5]</sup>*Id.* at \*8
6. <sup>[6]</sup>*Id.* at \*11