

CLIENT UPDATE

WORK EMAILS TO SPOUSES MAY NOT BE PROTECTED BY MARITAL PRIVILEGE

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Yesterday in a criminal case, *United States v. Hamilton*, 2012 WL 6000731, the U.S. Court of Appeals for the Fourth Circuit held that emails the defendant sent to his wife over his employer's email system were properly admitted as evidence against him. At the time he sent the emails, his employer had no computer usage policy, but it subsequently adopted a policy providing that "users have no expectation of privacy in their use of the Computer System." The court held that because the defendant failed to delete his old messages once he knew that policy was in effect, he waived his privacy rights and the messages could be used against him.

The unanimous panel reached its decision after citing a 1934 Supreme Court opinion, *Wolfe v. United States*, involving a defendant who dictated a marital communication to his stenographer and therefore could not claim privilege. The Fourth Circuit yesterday said that "email has become the modern stenographer," and said that if spouses wish to communicate privately, they can and should do so "without using a work email account on an office computer."

The Fourth Circuit cautioned that "[i]n an era in which email plays a ubiquitous role in daily communications," courts should not "lightly find[] waiver of marital privilege by email usage." The panel said it found against the defendant only because he "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."

The decision highlights the importance to employers of having policies in place clearly communicating employees' expectation of privacy – or lack thereof – and the equal importance to employees of understanding what the absence of an expectation of privacy actually means: If you want to exchange a truly private written communication with your spouse, do not send or receive it through a system or on a device provided to you by your employer.

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Please do not hesitate to contact us with any questions.

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