

Forwarding Email to Hotel Front Desk for Printing Waived Privilege!

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Normally I write about recent and interesting tax cases in this blog, but every now and then, I come across a case so important I just have to share it here. *Fourth Dimension Software v. Der Touristik Deutschland GMBh* is such a case with an important cautionary tale. Fourth Dimension Software (“FDS”) is embroiled in a dispute with Der Touristik Deutschland GMBh (“DTD”) regarding DTD’s alleged overuse of a software license for software developed by FDS and licensed to DTD.

Prior to the litigation, in preparation for a meeting with DTD in Berlin to discuss the licensing agreement, FDS’s former outside counsel emailed the president of DTD regarding certain issues for the meeting. As people sometimes do, FDS’s president wanted a hard copy of the email for his notes. Having no printer, FDS’s president forwarded the email to info.berlin@hilton.com with a note in the subject line “Please print one copy. I’m waiting at the front desk. Thanks.”

How DTD got its hands on a copy of the email was not discussed. What **was discussed** was the waiver of the attorney-client privilege as a result of FDS’s president forwarding the email to the front desk of the Hilton in Berlin for printing. When the email came to light, FDS sought to exclude it as an attorney-client communication protected by the attorney-client privilege. As a reminder, **the attorney-client privilege applies to any communication** in which *legal advice is sought or communicated*, not just communications in the context of litigation.

Because the parties were in federal court because they were from different states, and not because the case concerned a question of federal law, California law, not federal law, applied. Under California law, if a client discloses an attorney-client communication *to unnecessary third parties*, the client manifests an intent to waive the privilege. DTD successfully argued that was exactly what happened here. FDS pointed out that under California law, the privilege is not lost solely because the communication is by electronic means (e-mail) or *because persons involved in the delivery, facilitation, or storage of electronic communications may have access to the content of the email*. The Court dryly noted, “That statute does help FDS here.” The Court went on to point out the hotel desk clerk was an unnecessary third party to whom FDS’s president knowingly disclosed the communication.

Though not mentioned in the court’s order, under the court’s analysis, *merely forwarding the email* to an unnecessary third party *would have resulted in a waiver of the privilege* as well. Other states’ laws may not be the same as California, but remember that forum selection clause in that contract you signed that said would only be brought in California? But why risk it? Think twice before forwarding that email to or from your lawyer. Like FDS, you may end up waiving the privilege.