

Are Consultant's Employees Functionally Equivalent To Client's Employees?

Article By:

Keith Paul Bishop

As a general matter, the attorney-client privilege is waived by disclosing a communication to a third party. When a corporation hires an investment banker, the corporation's attorneys will frequently communicate with employees of the investment banker. Are those communications protected by the attorney-client privilege or do those communications waive the privilege? U.S. Magistrate Judge George Foley, Jr. recently addressed these questions in the context of Nevada law. *Fosbre v. Las Vegas Sands Corp.*, 2016 U.S. Dist. LEXIS 5422 (D. Nev. Jan. 14, 2016).

Because a corporation must communicate through its employees, communications with employees do not automatically constitute a waiver. Under federal common law, whether a communication with an employee is privileged will be determined on a case by case basis in light of the following factors:

- the communication concerned matters within the scope of the employee's corporate duties,
- the employee was aware that the communication was for purposes of the corporation obtaining legal advice, and
- the communication was intended to be confidential.

Fosbre at *7 (citing *Upjohn Company v. United States*, 449 U.S. 383, 394 (1981)).

The functional equivalent doctrine extends the attorney-client privilege to third parties who are the functional equivalent of employees. In *Fosbre*, the defendants argued that disclosures to employees of two of the client's investment bankers fell under the functional equivalent doctrine. Plaintiffs argued that the investment bankers' employees were not functionally equivalent to the company's employees because the investment banker had disclaimed a fiduciary relationship with its client. But do lower-level employees of the company itself necessarily owe a fiduciary duty to their employer? Judge Foley found "To the extent that Nevada law governs this issue, it appears that employees, in general, owe a duty of loyalty to their employer". Ultimately, Judge Foley found that while a disclaimer of fiduciary responsibility was a factor to be considered, it did not preclude application of the privilege. He was, however, unsatisfied with the privilege log prepared by the defendants, finding that the log did not provide sufficient information to determine whether each of the many employees

of the investment bankers was within the scope of the privilege. Rather than find a waiver, he directed the defendants to supplement the log.

Readers: It is important to remember that there is no single attorney-client privilege. The scope and exceptions of the attorney-client privilege may be governed by federal common law or state law.

© 2010-2025 Allen Matkins Leck Gamble Mallory & Natsis LLP

National Law Review, Volume VI, Number 29

Source URL: <https://natlawreview.com/article/are-consultant-s-employees-functionally-equivalent-to-client-s-employees>