



NORRIS McLAUGHLIN
ATTORNEYS AT LAW

Order on Motion to Determine Privilege in Hotly –Contested Construction Dispute

[Nick Duston](#), a Member of law firm [Norris McLaughlin, P.A.](#), prevailed on a novel legal question by obtaining an order protecting the firm's communications with its corporate client's independent contractor under the attorney-client privilege. The decision is a first step in expanding the attorney-client privilege beyond merely an attorney's communications with the corporate client's employees to include the client's independent contractors and non-employee agents as well.

Communications between an attorney representing a corporation and that corporation's employees—even the low-level employees—have long been held privileged by *Upjohn Co. v. United States*, 449 U.S. 383 (1981) and the New Jersey cases following it. When an attorney is representing a corporation, or any other business entity, that attorney's communications with the entity's employees are generally considered privileged, no matter who the employees are, so long as the purpose of the communications is to gather information the attorney needs to provide the client with legal advice. What no New Jersey court had ever decided (at least not in any available published or unpublished decisions) is whether communications between the client's attorney and the client's independent contractors or other non-W-2 employees also falls within the attorney-client privilege.

The New Jersey Superior Court, Somerset County decided, at Nick's urging, that New Jersey would follow the trend in other jurisdictions, including several federal circuit courts and other states, and apply the protection of the privilege to an attorney's communications with independent contractors under circumstances in which the contractor served as the "functional equivalent" of an employee. In other words, the privilege determination did not rise or fall on the tax treatment of an agent's pay (i.e., W-2 vs 1099), but on the nature of the role that agent played in the client's organization. In this case, the court found that an architect serving as an "owner's representative" on a construction project was the functional equivalent of an employee, and upheld the privilege.



NJ: 400 Crossing Boulevard, 8th Floor, Bridgewater, NJ 08807 | P: (908) 722-0700 | F: (908) 722-0755
NY: 7 Times Square, 21st Floor, New York City, NY 10036 | P: (212) 808-0700 | F: (212) 808-0844
PA: 515 Hamilton Street, Suite 502, Allentown, PA 18101 | P: (610) 391-1800 | F: (610) 3961-1805

www.norrismclaughlin.com

E: info@norris-law.com