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Federal Court Applies Attorney-Client Privilege to “Functional Employee” of Corporation

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The U.S. District Court for the Western District of Washington recently applied the attorney-client privilege to a “functional employee” of a corporate defendant. *National Products, Inc. v. Innovative Intelligent Products LLC*, 2023 WL 6215296 (W.D. Wash. Sept. 25, 2023) (unpublished), is a patent infringement case. During discovery, the plaintiff took the deposition of an outside contractor with his own company who worked closely with the defendant in developing the latter’s product designs. The defendant’s attorney asserted privilege and instructed the contractor not to answer when the plaintiff’s attorney asked questions about conversations the defendant’s attorney had with the contractor concerning the litigation. The plaintiff moved to compel. The Court denied the motion.

In doing so, the Court noted (at *4) that “[t]he attorney-client privilege is applicable to communications between a corporation’s attorney and independent contractors or consultants who are the ‘functional equivalent’ of corporate employees.” The Court explained (at *4) that “[t]he dispositive question is the individual’s relationship to the company, and whether he or she ‘possesses information about the company that would assist the company’s attorneys in rendering legal advice.’” In this instance, the contractor did not have a formal

written agreement memorializing his relationship with the defendant.

Nonetheless, the Court found that his close and extensive involvement in the defendant's design process was central to the defense of the case and, therefore, he fell within the standard for a "functional employee" when the defendant's attorney reached out to him to discuss the claims involved.

Because the dispute was over patents, the case fell within federal question jurisdiction. Therefore, the Court looked to federal law—principally *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010)—in deciding the privilege issue involved. Washington, however, also recognized the concept of "functional employees" in *Hermanson v. MultiCare Health Systems, Inc.*, 196 Wn.2d 578, 475 P.3d 484 (2020).

Although *National Products* doesn't blaze any new trails, it is a useful reminder of the potential breadth of the "functional employee" concept in an era when not everyone involved in a corporation's activities is necessarily a direct employee.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee

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