

Privilege Invoked If Company Reasonably Believes In-house Counsel is a Lawyer

In a remarkable reversal, the U.S. District Court for the Southern District of New York recently held that a corporation did not lose the attorney-client privilege for communications with its in-house lawyer who it later discovered did not hold an active state bar license to practice law. The Court overturned the federal magistrate judge's ruling that Gucci America forfeited its right to invoke the privilege because it failed to exercise due diligence in ascertaining whether its in-house lawyer was entitled to practice law. Accordingly, the Court granted the corporation's motion for a protective order to prevent disclosure of privileged communications. *Gucci America, Inc. v. GUESS?, Inc.*¹ The magistrate judge's prior order was the subject of Moses & Singer's previous Client Alert, "[No License, No Privilege: Says Magistrate Judge in Gucci v. Guess](#)".

Member of the Bar of a Court

The Court rejected the magistrate's holding that, in order for the attorney-client privilege to attach, the communication must be made to a person who is "actually authorized to engage in the practice of law." Instead, the Court applied the privilege test first articulated in the seminal case *U.S. v. United Shoe Mach. Corp.*², which requires only that the person be "a member of the bar of a court."

Although the in-house lawyer was an inactive member of the California Bar, the Court noted that he remained a member of the California Bar as well as the Bar of the Central District of California. Therefore, the court ruled, he held the status of an attorney for the purpose of applying the attorney-client privilege. The Court recognized that the in-house lawyer held the position of legal counsel and director of legal services, Gucci was his sole client, and Gucci intended its communications with him on legal matters to be protected by the privilege. The Court observed that "Gucci should not be penalized because its attorney, a member of the bar in two jurisdictions, may not have been 'authorized to practice law' based on his 'inactive' status as a member of the California bar."

Reasonable Belief Test

The Court held Gucci's belief that its in-house lawyer was an attorney was reasonable. It relied on the well established "reasonable belief exception" that the attorney-client privilege can be invoked even when the communications were not made with a member of the bar, if the client reasonably believed that it was communicating with an attorney. The Court found plenty of evidence demonstrating that Gucci reasonably believed its in-house counsel was an attorney. Gucci knew, when it employed him, that he had a law degree and hired him to do legal work, promoted him to various legal positions, and paid his California bar membership fees (albeit for inactive membership). In addition, he performed his legal services to Gucci competently over the years and several Gucci executives and its outside counsel declared that they considered him to be an attorney.

The Court pointed out that "[W]hile an attorney has an obligation to ensure that he is properly practicing law – and faces the specter of disciplinary action if he engages in unauthorized practice –

the sins of the attorney must not be visited on the client so long as the client has acted reasonably in its belief that its counsel is, in fact, an attorney."

Due Diligence Impractical

Rejecting a requirement of due diligence to determine bar status, the Court reasoned on policy grounds that "any other result would place an unfair and potentially disruptive burden on corporate entities. To require businesses to continually check whether their in-house counsel have maintained active membership in bar associations before confiding in them simply does not make sense." However, the Court did not eschew good corporate hiring practices, observing in a footnote that "a corporation's failure to demonstrate a 'respectable degree of caution' in hiring an individual to serve as in-house counsel may in some cases shed light on the reasonableness of its belief that the individual was its attorney."

Best Practices

Considering the importance of the attorney-client privilege to organizations, and the potential risk of having to litigate the reasonableness of the belief that in-house counsel are lawyers, best practices would include corporate employers confirming a prospective in-house lawyer's status: bar membership, good standing, and authorization to practice.

1. Case No. 09 Civ. 4373, 2011 WL 9375 (S.D.N.Y., Jan. 3, 2011).
2. 89 F. Supp. 357 (D. Mass. 1950).

If you have questions regarding this Alert, please contact the co-chair of Moses & Singer's [Legal Ethics & Law Firm Practice](#), **Devika Kewalramani** at 212.554.7832 or dkewalramani@mosessinger.com.

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