

WSGR ALERT

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ATTORNEY-CLIENT PRIVILEGE UPDATE: DISTRICT COURT JUDGE FINDS THAT ATTORNEY-CLIENT PRIVILEGE APPLIES TO INACTIVE BAR MEMBER

In a recent opinion and order in *Gucci America, Inc., v. Guess?, Inc.*,¹ Judge Shira A. Scheindlin of the Southern District of New York set aside the order of Magistrate Judge James L. Cott in which Judge Cott had ruled that the attorney-client privilege did not apply to the communications of Gucci's former general counsel, Jonathan Moss, an inactive member of the California State Bar. Judge Cott had concluded that Gucci did not have a reasonable belief that Mr. Moss was an attorney because Gucci had failed to conduct due diligence to verify Mr. Moss' ability to practice law. Judge Cott's prior order was the subject of a previous WSGR Alert, "Protecting the Attorney-Client Privilege: Recent Ruling Underscores Need to Confirm In-House Counsel's Authorization to Practice Law," dated July 8, 2010.

In setting aside Judge Cott's order, Judge Scheindlin rejected the magistrate judge's two main findings: that Mr. Moss did not qualify as an attorney for the purpose of the attorney-client privilege, and that Gucci's belief regarding Mr. Moss' status as an attorney was not reasonable.

Judge Scheindlin first rejected the conclusion that the attorney-client privilege applies only to communications with a person who is "actually authorized to engage in the practice of law." Instead, the court applied the

privilege standard first articulated in the seminal case *U.S. v. United Shoe Machinery Corporation*: a person is an attorney for the purpose of the attorney-client privilege when he or she "is a member of the bar of a court." Although Mr. Moss was an inactive member of the California Bar, Judge Scheindlin found that he remained a member of the California Bar, as well as the Bar of the Central District of California; therefore, he was an attorney for the purpose of invoking the attorney-client privilege. Judge Scheindlin recognized that Gucci intended its communications with Mr. Moss on legal matters to be protected by the attorney-client privilege, and reasoned, "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."

Furthermore, Judge Scheindlin found that Gucci's belief that Mr. Moss was an attorney was reasonable. In so doing, Judge Scheindlin rejected the exercise of due diligence as a component of the reasonable-belief test. Applying the reasonable-belief test without the due diligence requirement, Judge Scheindlin found that "there can be no real dispute that Gucci has proven that it had a reasonable belief that Moss was an attorney." Gucci knew that Mr. Moss had a law degree when it hired him to do legal

work, promoted him to various legal positions, and paid his bar membership fees (albeit for an inactive membership). Furthermore, Mr. Moss had provided legal services to Gucci competently over a lengthy period, and numerous Gucci executives declared that they considered Mr. Moss to be an attorney. Judge Scheindlin viewed this as "more than sufficient evidence" to support Gucci's reasonable belief that Mr. Moss was its attorney. Judge Scheindlin concluded that the opposite result (reached by Judge Cott in finding that the privilege did not apply) 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."

Although it rejects the due diligence requirement, Judge Scheindlin's opinion does not eschew good corporate hiring practices, stating that "A corporation's failure to demonstrate a 'respectable degree of caution' in hiring an individual to serve as an in-house counsel may in some cases shed light on the reasonableness of its belief that the individual was an attorney." At the very least, employers are encouraged to confirm that a prospective attorney has graduated from law school and is a member of a bar. Best

¹ Case No. 09 Civ. 4373 (SAS) (JLC).

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practices would include regularly confirming that the prospective attorney is in good standing and is authorized to practice in the state in which he or she is located. In California, in-house counsel authorized to practice law in another jurisdiction (and not also licensed in California) may practice in California, but must register annually with the California State Bar to provide legal services to California employers.²

For additional information on this decision or any related matter, please contact any member of Wilson Sonsini Goodrich & Rosati's litigation department.



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² See California Rule of Court 9.46.