



## Alerts

### Federal Judge Sets Aside Magistrate's Controversial Corporate Attorney-Client Privilege Ruling

January 11, 2011

*Lawyers for the Profession® Alert*

*Gucci America, Inc. v. Guess?, Inc.*, No. 09 Civ. 4373, 2011 WL 9375 (S.D.N.Y. Jan. 3, 2011)

#### Brief Summary

The U.S. District Court for the Southern District of New York set aside a magistrate judge's controversial corporate attorney-client privilege ruling, and held that a corporate client's communications with its in-house lawyer are privileged even though the attorney was not actively licensed at the time of the communications.

#### Complete Summary

Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York set aside a controversial ruling by a magistrate judge regarding the corporate attorney-client privilege. The magistrate judge had held in June 2010 that a corporate party's communications with an in-house lawyer were not privileged because the attorney was not actively licensed at the time of the communication. See *Gucci America, Inc. v. Guess?, Inc.*, No. 09 Civ. 4373 (S.D. N.Y. June 29, 2010). Judge Scheindlin held that this ruling was clearly erroneous.

Under federal common law, the attorney-client privilege generally only will attach to communications with a member of the Bar of a court. Judge Scheindlin held that although the lawyer was on inactive status as a member of the Bar in California, he was a member of at least one federal court Bar, and therefore was an attorney for purposes of invoking the privilege. In reaching this conclusion, Judge Scheindlin further held, contrary to the magistrate judge's ruling, that privileged communications need not be made to a person who is actually authorized to practice law.

Judge Scheindlin further held that the communications at issue were privileged because the client had a reasonable belief that it was communicating with an attorney. This holding effectively set aside two of the magistrate judge's rulings. First, it did so by indicating that the rule which has long applied to individual clients—that the client's reasonable belief in the existence of an attorney-client relationship effectively creates such a relationship and protects the client's

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communications accordingly—also applies to corporate clients. Second, corporate clients have no heightened duty to perform due diligence and ensure that their in-house counsel are actively licensed attorneys. Such a duty, Judge Scheindlin held, would place an unfair burden on corporate entities because “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.”

Finally, in finding the client’s belief reasonable as a factual matter, Judge Scheindlin focused on the client’s knowledge that its counsel had a law degree, the fact that the client paid the counsel’s California Bar membership fees, and the fact that the individual had handled a variety of legal matters competently over a number of years.

### **Significance of Opinion**

This opinion is exceptionally important, setting aside one of the most controversial and troubling rulings from any court in the nation in 2010 in the area of attorney-client privilege. It is likely to be widely accepted and should return a degree of normalcy to internal corporate affairs in this area. Pursuant to this decision, corporations may communicate freely with in-house lawyers without having to constantly monitor each attorney’s Bar membership status, so long as there is some reasonable factual basis for a belief that the lawyer is an active licensed member of a Bar.

On a more conceptual level, the decision also reinforces the important general principle that domestic corporate clients are no less entitled to protection than individual clients with respect to their relationships with their lawyers when the entity is engaged in seeking and obtaining legal advice.

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