

Alerts

No Attorney-Client Privilege for Corporation That Failed to Confirm In-House Attorney's Licensure Status

July 8, 2010

Lawyers for the Profession® Alert

Gucci America, Inc. v. Guess?, Inc., No. 09 Civ. 4373 (S.D.N.Y. June 29, 2010)

Brief Summary

A magistrate judge in the Southern District of New York held that communications between a corporate client and its in-house attorney were not privileged because the lawyer was not actively licensed. The court held that the client had no reasonable basis for believing that the attorney was actively licensed because it had failed to investigate the attorney's credentials.

Complete Summary

U.S. Magistrate Judge James L. Cott held that a corporate plaintiff's communications with its in-house attorney were not privileged because the lawyer was an inactive member of the State Bar of California. Judge Cott reached this conclusion under two separate attorney-client privilege tests.

The first test, which was based primarily on Southern District of New York (S.D. N.Y.) precedent, required that the attorney be "a member of the bar of a court." The court made clear that the lawyer's status as an inactive member of the California Bar did not meet this standard, and that it did not matter whether the attorney's inactive status was voluntarily or involuntary (i.e., resulting from disciplinary sanctions). In reaching this conclusion, the court focused on the fact that in California the practice of law is explicitly limited to active members. Further, although the lawyer had been admitted in two California federal districts, Judge Cott noted that such membership requires admission to the State Bar of California, and that therefore the attorney was constructively suspended from practice in both districts.

The second test was based on Supreme Court Standard 503, which requires that the client reasonably believed the attorney to be authorized to practice law. Judge Cott, relying on a factually similar S.D.N.Y. opinion written by U.S. Magistrate Judge Ronald L. Ellis, held that plaintiff did not have a reasonable basis to believe that the attorney was authorized to practice law because plaintiff never investigated the attorney's qualifications. Judge Cott held that, at a minimum, the employer must confirm the attorney's licensure to practice law in some jurisdiction without suspension or pending disciplinary sanctions.

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Significance of Opinion

This opinion requires corporate clients to confirm the licensure of in-house attorneys in order to assert the attorney-client privilege as to communications with such attorneys. Although for some purposes an attorney-client relationship may be recognized between a client and a non-attorney, Judge Cott's ruling forecloses this possibility for purposes of the attorney-client privilege. The reach of Judge Cott's decision is unclear, but this opinion suggests that it may be limited to situations involving corporate clients and in-house counsel.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.