Professional Responsibility

When Are Unlicensed Attorneys' Communications Privileged?

In *Anwar v. Fairfield Greenwich Ltd*, No. 09 Civ. 118 (S.D.N.Y. July 8, 2013), the court granted plaintiffs' motion to compel over defendants' privilege objections. During discovery, plaintiffs deposed a senior Dutch in-house lawyer, and defendants instructed the in-house lawyer not to answer questions on the basis of attorney-client privilege. The senior Dutch in-house lawyer, though educated in law, was not licensed.

The defendants argued that, under U.S. law and relying on *Gucci America, Inc. v. Guess?*, Inc., their communications with the Dutch in-house lawyer were privileged even though he was not licensed because they had a reasonable belief that he was their attorney. In *Gucci America, Inc. v. Guess?* Inc., Gucci's communications with its in-house counsel, an inactive member of the California bar, were privileged because Gucci proved that it had a reasonable belief the in-house counsel was a licensed attorney. No. 09 Civ. 4373 (S.D.N.Y. Jan. 3, 2011).

The court rejected defendants' argument and distinguished the *Gucci* case:

1. The Dutch in-house lawyer had never been licensed in any jurisdiction, whereas Gucci's counsel previously was an active member of the California bar.
2. Defendants provided no proof that the lawyer ever held himself out as a licensed attorney or performed tasks, such as appearing in court, that would have suggested he was licensed. Gucci's counsel routinely appeared in court and before administrative agencies, and Gucci had paid the in-house counsel's California bar membership fees throughout his tenure.

The court also found important the fact that Dutch in-house lawyers are frequently unlicensed. Dutch law requires the employer of a licensed in-house lawyer to sign a professional charter committing to honor the attorney's independence. Because defendant never signed the professional charter, defendant could not credibly argue it was reasonably mistaken as to his licensure status. As a result, plaintiff was entitled to discover communications between the defendant's employees and the Dutch in-house lawyer.

**Practice Advice from the *Anwar* opinion:***

A company should know the licensure status of in-house counsel when hired and keep an actively updated list. A company should remind in-house counsel to keep bar membership current and remain on active status.

If the company has offices in other countries and employs in-house counsel there, the company must know the relevant laws there. For example, if defendant had known about the professional charter requirement when a licensed attorney is employed under Dutch law, defendant would have known that its in-house counsel was not licensed.
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