

Corporation Counsel Privilege Blown By Attorney's Inactive Status

July 8, 2010

In what will be a cold shower for many businesses and their in-house counsel, a New York federal court has held that a General Counsel's taking inactive status in his state bar association exposed all his client communications to discovery by the opposing side in pending litigation (*Gucci America Inc. v. Guess? Inc., et al*, Case No. 09-cv-4373, USDC, SDNY).

The Gucci court held the communications were not privileged because for the privilege to apply, the communication must be with one "authorized to practice law." The lawyer had taken inactive status and, under California law (the lawyer's state), inactive members are not permitted to practice law while in that status.

The court also held that Gucci did not have a reasonable expectation it was dealing with an authorized lawyer because it did nothing to check his qualifications or credentials. (Easy enough to do by going to the state bar website and searching for his name.) The court held that when putting the lawyer in a legal position in the corporation, Gucci had "some obligation of due diligence" and the record was devoid of any. And, re-activating his membership didn't cure the problem. Instead it confirmed his inactive status during the relevant period.

All is not lost for Gucci yet. The court will next consider whether the work product privilege applies.

For more information on the attorney client privilege and its application within businesses, please contact:

Mike Coakley
+1.313.496.7531
coakley@millercanfield.com