

PROFESSIONAL LIABILITY ALERT

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UPDATE: Ruling Reverses Restrictive Application of Attorney-Privilege for In-House Counsel Communications

In a ruling entered on January 3, 2011, in *Gucci America, Inc. v. Guess, Inc.*, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York reversed a controversial ruling entered in the case by a magistrate judge in June 2010. In the earlier ruling, the magistrate held that communications between Gucci America and its in-house attorney were not privileged, because at the time of the communications the attorney did not hold an "active" law license.

On Gucci's request for review of the magistrate's order, Judge Scheindlin concluded, contrary to the magistrate's earlier ruling, that: (a) 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 single 'inactive' status as a member of the California bar"; and (b) Gucci had "demonstrated that it had a reasonable belief that [its director of legal services] was its attorney when it communicated with him in the course of his employment as its in-house counsel."

Judge Scheindlin's ruling has, for the time being, vacated a ruling contrary to a long-held assumption: that application of the attorney-client evidentiary privilege within a corporation should not depend on whether the corporate client routinely checks on whether its in-house counsel staff each have maintained an "active status" for their respective state law licenses. As Judge Scheindlin characterized it, this would pose "an unfair and potentially disruptive burden" on business entities with a legal department.

However, those in-house counsel who have been certified in Connecticut as "authorized house counsel" (AHC) have an independent obligation, as a condition of maintaining their AHC certification, to

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monitor the status of their state law license or licenses. The court rule providing for AHC certification in Connecticut is expressly premised on the attorney being "...licensed to practice in jurisdictions other than Connecticut."

Notwithstanding the reversal of the restrictive ruling on privilege in the *Gucci America* case, the advice to those in-house counsel holding Connecticut AHC certifications remains unchanged; they should not allow their bar memberships in another state or states to lapse, even if they do not intend to return to practice in those states.

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