Law Firm Risk Management Alert

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Connecticut Supreme Court To In-House Counsel: Your Internal Communications Are Privileged Only If Their "Primary" Purpose Was To Give Legal, Not Business, Advice

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In September 2016, the Connecticut Supreme Court issued a decision providing guidance on questions that frequently bedevil in-house counsel: are internal communications to and from in-house counsel protected by the attorney-client privilege if they contain a mix of both legal and business advice? Is that determination informed by *the purpose for* which the advice was sought? Or by the particular role or function counsel was performing at the time of the communication? *Harrington v. Freedom of Information Commission*, 323 Conn. 1 (2016).

Background of the Case. The *Harrington* case did not arise from internal communications to and from an in-house attorney. Instead, it stemmed from a request to a Connecticut state agency that it release certain documents under the state's Freedom of Information Act. The FOIA request included e-mail messages between the agency's board of directors and outside law firms that performed legal services for the agency. However, the individual outside lawyers in question played two distinct roles for the agency: as lawyers and as registered lobbyists.

Some of the communications "exclusively addressed nonlegal matters, such as soliciting employment opportunities, facilitating business connections . . . and burnishing the [agency's] public image . . ." Other communications appeared to relate exclusively to *legal matters*. Still others were a hybrid of both legal *and* nonlegal advice.

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The Freedom of Information Commission concluded that all the communications at issue were exempt from public disclosure under the state FOIA's exemption for communications subject to the attorney-client privilege. The Connecticut Supreme Court reversed.

What is the Lawyer's "Primary" Role? The Court acknowledged the distinct possibility that a lawyer whose primary role is providing *business* advice to a client on nonlegal matters *could* nonetheless also provide the client with *legal* advice. But where the lawyer's "primary role" is providing business as oppose to legal advice, the court imposed a particular burden on the party invoking the attorney-client privilege: that the party demonstrate "a clear basis to conclude that the information was being conveyed to [the lawyer] for the purpose for having him act in the role of legal advisor or that he was providing a legal opinion."

What About Communications To or From the Lawyer That Arguably Contain *Both* Nonlegal and Legal Advice? Here the Court adopted the so-called "primary purpose" test: that is, if the admittedly nonlegal aspects of a communication are nonetheless "integral to the legal assistance given and the legal assistance is the primary purpose of the consultation" between lawyer and client, the privilege will apply. And in the event the legal advice or analysis portion of a communication can be separated from the business advice, the Court recognized that the party claiming privilege will be entitled to redact the legal advice portions of the communications. However, consistent with "primary purpose" test, the Court concluded that when such redactions are *not feasible,* both the legal and nonlegal aspects of the communication will be protected "as long as the primary purpose is legal advice."

What Was the Client's Intent in Seeking the Advice? In determining whether the proponent of the privilege has met the primary purpose test, the Court noted that the crucial threshold inquiry will be the intent of the client in communicating with the lawyer in the first place. Was it to obtain legal advice on "the interpretation and application of legal principals to guide future conduct or to assess past conduct?" Or to obtain advice on something else, such as recommendations on management, personnel, or public relations. Acknowledging that the line between legal advice and business advice is not always a clear one, the Court suggested that evidence of the client's expectations, while not dispositive, will be a factor in applying the primary purpose test.

What Does the Decision Mean for In-House Counsel? For those in-house lawyers who routinely field questions from management on topics that do not neatly fall into either the "nonlegal" or "business" category, the decision in the *Harrington* case suggests several practical steps for safeguarding attorney-client privilege where in-house counsel routinely provide both legal and nonlegal advice:

1. Ask managers, to extent possible, to pose questions on legal topics *separately from* communications on business or managerial topics. When a manager seeks legal advice in writing, he or she should *explicitly*

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say so. If the communication is via e-mail, the subject line should include some reference to a request for "legal advice."

2. To the extent an in-house lawyer routinely carries out nonlegal functions, such as service on a personnel review or compensation committee, the lawyer should make an effort to keep communications arising from management roles separate and apart from communications containing legal advice or analysis of legal matters.
3. Periodically review communications to be certain that company personnel (lawyers and nonlawyers) are not routinely marking as "privileged" or "legal advice" communications that are more properly designated as business advice. Overly broad or indiscriminate use of the "legal advice" designation may trigger skepticism about whether communications are legitimately entitled to protection under the attorney client privilege.

For additional information about the Harrington decision, or to discuss how your legal department can preserve the attorney-client privilege for internal communications, please contact David P. Atkins (datkins@pullcom.com) or Marcy Tench Stovall (mstovall@pullcom.com).