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**WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT:
UNIFYING THE SPLIT IN NEW YORK'S ANALYSIS OF
IN-HOUSE ATTORNEY-CLIENT PRIVILEGE**

*Thomas O'Connor**

As one surveys the vast and ever-changing landscape of law and litigation, few things stand out as so unanimously exalted and carefully guarded as the privilege protecting attorney-client communications. Yet there is today a surprising lack of uniformity and predictability in the reasoning by which New York courts determine whether a communication made by in-house counsel to its corporate client will—or will not—enjoy the protection of that privilege. Rather than follow a single and predictable analysis to resolve the question, New York courts have oscillated between one line of decisions focusing primarily on the purpose of the communication, and another in which the primary focus is on content. This variability has created a judicial landscape where privilege disputes virtually identical on the facts have entirely different outcomes. Exacerbating this problem is the large number of nonlegal functions that today's in-house counsel perform for their corporate clients. In the execution of these nonlegal duties, in-house counsel often send communications that are a mix of legal and business advice and thus fall into a gray area of the law in regards to privilege. Without any statutory guidance to suggest otherwise, judges must then meticulously parse through the communications at issue and make a case-by-case determination as to whether the

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communication is mostly legal in nature, and thus protected by the attorney-client privilege, or related mostly to business matters, and therefore freely discoverable by opposing counsel. Two simple solutions exist that can help restore order and predictability on this issue in New York. By adopting a unified method of analysis that includes consideration of both purpose and content, and by creating a signal that explicitly denotes privileged communication between in-house counsel and client, New York State courts can more accurately and efficiently adjudicate this issue, and bring some much needed uniformity and predictability to this area of the law.

INTRODUCTION

In-house counsel—counsel retained as an employee of the corporation which it advises—employed by a corporate client turns on its head the otherwise straightforward doctrine of attorney-client privilege. Unlike the typical attorney-client relationship, not all communications between in-house counsel and its corporate client are presumptively privileged, and thus shielded, from disclosure to an adversary in litigation.¹ Rather, the privilege applies only to those communications where in-house counsel is functioning as a legal representative.² Due to the growing trend of in-house counsel assuming and performing functions which are not strictly those of a lawyer confidentially advising a client, the question of whether to extend the privilege to any given in-house counsel communication has become increasingly challenging.³ The split in New York's judicial authority with regard to resolving the issue has only

¹ See *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989).

² See *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 376 (N.Y. Sup. Ct. 2003).

³ See Jonathan C. Lipson et al., *Who's in the House? The Changing Nature and Role of In-House and General Counsel*, 2012 WIS. L. REV. 237, 237–43 (2012); see also Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 956–60 (2005) (discussing the shift in the everyday responsibilities and functions of in-house counsel in the United States of America that took place during the 1940s to the 1970s).

complicated matters for lawyers trying to predict the outcome on this critical question.⁴

This issue stems from the fact that the doctrine of attorney-client privilege, a doctrine that shields communications between an attorney and client from discovery, is simply not as sharply defined as one might expect.⁵ As prevalent as the employment of in-house counsel has become in the corporate context, New York statutes that address the subject of attorney-client privilege fail entirely to define how and when in-house counsel is functioning as a legal representative to its corporate client, as opposed to functioning in some other capacity, such as a corporate officer or business advisor.⁶ Importantly, the New York Court of Appeals has noted that “no ready test exists for distinguishing between protected legal communications and unprotected business or personal communications.”⁷ As a result of this lack of statutory and judicial direction, New York courts have routinely struggled to distinguish between situations where in-house counsel is acting as legal representative, and those where the function and associated communications are more properly characterized as those of a business advisor.⁸ Complicated as the challenge has been for New

⁴ See DeMott, *supra* note 3, at 967, 974.

⁵ See *Rossi*, 540 N.E.2d at 705; see also *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991) (discussing how no “ready test” exists at common law in New York to determine whether the attorney-client privilege should apply to a communication between in-house counsel and his/her client and that the inquiry is largely “fact-specific”); *Baliva v. State Farm Mut. Auto. Ins. Co.*, 713 N.Y.S.2d 376 (App. Div. 2000) (finding that the inquiry as to whether attorney-client privilege protects a communication between in-house counsel and corporate client is “fact-specific” to each individual case); EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* §6.2.4 ATTORNEY-CLIENT RELATIONSHIP (2d ed. 2016) (describing the differing justifications for the privilege consisting of instrumental and humanistic theories).

⁶ See generally N.Y. C.P.L.R. § 4503 (McKinney 2016) (stating that the attorney-client privilege applies to protected communications “made between the attorney or his or her employee and the client in the course of professional employment” but not further defining the term “professional employment”).

⁷ *Rossi*, 540 N.E.2d at 705.

⁸ Compare *Cooper-Rutter Assoc. v. Anchor Nat. Life. Ins. Co.*, 563 N.Y.S.2d 491, 492 (App. Div. 1990) (“The documents, prepared more than six months prior to the commencement of the instant action, concern both the

York's judiciary, it has given rise to a well-defined split in the analytical approach and reasoning used by New York courts to resolve issues of attorney-client privilege for cases involving communications by in-house counsel.⁹ This split has resulted in substantial and dangerous unpredictability when New York courts must resolve the issue of privilege. This unpredictability, if perpetuated and left unchecked, can only tend to inhibit the fullest and highest function of in-house counsel, which is to provide useful legal advice to its client.¹⁰ Certain solutions exist that, if implemented, may work to combat this unpredictability and restore stasis to the ways in which courts address this issue.

business and legal aspects of the defendants' ongoing negotiations with the plaintiff with respect to the business transaction out of which the underlying lawsuit ultimately arose. As such, the documents were not primarily of a legal character, but expressed substantial nonlegal concerns."), *with ABB Kent-Taylor, Inc. v. Stallings and Co., Inc.*, 172 F.R.D. 53, 56–57 (W.D.N.Y. 1996) ("In giving advice to a client, the role of an attorney is certainly not restricted to citing cases and espousing legal theories. The record here indicates the negotiations leading up to the cancellation of the closing were protracted and, at times, acrimonious . . . the possibility of more lawsuits loomed depending on the outcome of the asset transfer . . . [counsel's] legal advice to [defendant] on whether to consummate the closing, even if such advice was based in part on [counsel's] assessment of [plaintiff's] credibility or trustworthiness would, in [the court's] view, be privileged."). *See also Rossi*, 540 N.E.2d at 705 ("[N]o ready test exists for distinguishing between protected legal communications and unprotected business or personal communications; the inquiry is necessarily fact-specific.").

⁹ As explored further below, a long line of decisions in New York have diverged: one line of precedent focuses on the purpose of the communication at issue, and one line of precedent focuses on the content of the communication at issue; *see Rossi*, 540 N.E.2d at 705; *Cooper-Rutter*, 563 N.Y.S.2d at 492; *In re Matter of Stenovich*, 756 N.Y.S.2d 367, 376 (Sup. Ct. 2003).

¹⁰ *See Upjohn Co. v. United States*, 449 U.S. 383, 393 ("But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). *See also* Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability And the Rule of Law: Stare Decisis as Reciprocity Norm*, UNIV. TEX. SCH. L. 1, <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> (last visited Sept. 10, 2016) ("In the absence of stability and predictability in law, citizens have difficulty managing their affairs effectively.").

Part I of this Note provides an overview of the attorney-client privilege doctrine, and explains its interpretation by New York's courts and legislature. Part II focuses on the history of in-house counsel throughout the United States and the progression, as well as regression, of duties and roles that in-house counsel have taken within corporations. Part III explores the dual functions of today's in-house counsel as both legal representative and business advisor. This part will also explore the specific roles that in-house counsel take under these functions, and the ways in which these roles affect in-house counsel's ability to serve its corporate client. Part IV explores how New York courts have applied the attorney-client privilege to in-house counsel. Specifically, this part focuses on several notable cases that summarize the two distinct lines of precedent which New York courts, with no clear or discernible reason for choosing one over the other, have followed when applying the attorney-client privilege doctrine to communications of in-house counsel. Conclusively, Part V proposes a two-part solution to this issue and explains how these changes, particularly when taken together, can restore uniformity and predictability to New York's decisional law on the attorney-client privilege as applied to communications between in-house counsel and their corporate clients.

I. THE ATTORNEY-CLIENT PRIVILEGE

A. The Attorney-Client Privilege Generally

The days when a client retained a lawyer merely to provide legal advice or to appear in court on his behalf are long gone.¹¹ Today, law firms take on more roles in the representation of their client than ever before.¹² For example, firms now “find themselves rendering

¹¹ See David E. Bland & Scott G. Johnson, *Applying the Attorney-Client Privilege to Investigations Involving Discovery: What is Fair Game in Discovery?*, in THE ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 271, 282 (Vincent S. Walkowiak et al. eds., 5th ed. 2012).

¹² *Id.*; see CARLA R. WALWORTH ET AL., PRIVILEGE LAW, ITS GLOBAL APPLICATION, AND THE IMPACT OF NEW TECHNOLOGIES, A.B.A. MIDYEAR CONF. 1, 7 (Feb. 3, 2012),

investigative, as well as legal, assistance in a myriad of different factual settings.”¹³ Whether the claim is breach of contract or a shareholder derivative action, legal counsel, during its representation of the client, often undertakes substantial investigative work to better determine the strength of a given claim or defense, among other tasks.¹⁴ Counsel communicates the results of these investigations to the client and a dialogue takes place between the attorney and client pertaining to the claims available, the strength of those claims, as well as other issues that may arise.¹⁵ These communications are subject to attorney-client privilege and may be protected from disclosure.¹⁶ Specifically, “[w]hen the client’s adversary seeks discovery of the communications between the client and the attorney . . . in subsequent litigation, a dispute often arises as to what documents or information must be produced.”¹⁷ Whether the communications are privileged is generally dependent on whether counsel were, at the time the communication was made, acting in his function as legal counsel.¹⁸ Although this may seem like a relatively simple inquiry, the question can become extraordinarily difficult to answer when involving in-house counsel and a corporate client.¹⁹

http://www.americanbar.org/content/dam/aba/publications/young_lawyer/attorney_client_privilege.authcheckdam.pdf.

¹³ Bland & Johnson, *supra* note 11, at 282; see Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future – Or Is It the Past?*, 44 ARIZ. L. REV. 621, 629 (2002).

¹⁴ See Bland & Johnson, *supra* note 11, at 282.

¹⁵ See *id.* Different from work-product privilege that protects “a lawyer’s notes, observations, thoughts and research,” the attorney-client privilege “only protects the essence of the communications actually had by the client and lawyer and only extends to information given for the purpose of obtaining legal representation.” SUE MICHMERHUIZEN, CTR. FOR PROF. RESP., CONFIDENTIALITY, PRIVILEGE: A BASIC VALUE IN TWO DIFFERENT APPLICATIONS (May 2007), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf.

¹⁶ See Bland & Johnson, *supra* note 11, at 282.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 144 (S.D.N.Y. 2003) (“Application of th[e] [attorney-client privilege] is complicated in situations where communications claimed to be privileged involve in-house as

Courts and legal scholars have frequently commented on the importance of the attorney-client privilege as an essential characteristic of the attorney-client relationship.²⁰ The attorney-client privilege “provides absolute protection to most confidential communications between clients and their lawyers.”²¹ One principal goal of the doctrine is to provide peace of mind to clients.²² Specifically, “lawyers cannot help their clients if the clients worry that third parties might later learn what clients tell their lawyers.”²³ In this sense, the attorney-client privilege is similar to the physician-patient privilege in that it promotes the exchange of information and ensures that the patient or client will not worry about third-party access to the disclosed information.²⁴

Federal courts have also recognized the sanctity of attorney-client privilege.²⁵ Specifically, the Supreme Court of the United States dubbed attorney-client privilege “the oldest privilege for confidential communications known to the common law.”²⁶ As described by John Henry Wigmore in his renowned treatise on evidence, attorney-client privilege applies where:

opposed to outside counsel because ‘in-house attorneys are more likely to mix legal and business functions.’”).

²⁰ See Sarah H. Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1008–09 (2007) (enforcing the attorney-client privilege during the general counsel’s investigation of a corporation’s internal matters); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 240 (2001) (maintaining the attorney-client privilege during legal/business boardroom meetings); WALWORTH ET AL., *supra* note 12 (preserving the attorney-client privilege in various countries).

²¹ WALWORTH ET AL., *supra* note 12, at 1.

²² *Id.*; see *People v. Osorio*, 549 N.E.2d 1183, 1185 (N.Y. 1989).

²³ WALWORTH ET AL., *supra* note 12, at 1.

²⁴ *Privileged Communication*, FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/privileged+communication> (last visited Sept. 10, 2016).

²⁵ See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

²⁶ *Id.*

(1) [L]egal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.²⁷

Stated differently, the attorney-client privilege protects confidential communications by a client to an attorney made in order to obtain legal assistance from the attorney in his or her capacity as a legal advisor.²⁸ Some jurisdictions have further extended privilege to communications that consist of “advice given by the lawyer in the course of representing the client.”²⁹ This variation between jurisdictions with regard to the scope of the attorney-client privilege has resulted in significant unevenness in its statewide application.³⁰ Equally as important to what the attorney-client privilege does protect is what it does not.³¹ As the Supreme Court of the United States made clear in its decision in *Upjohn Co. v. United States*, the protection of the attorney-client privilege extends only to communications involving the legal advice rendered by the attorney, rather than to the facts underpinning the case itself.³² Further, information which may be exchanged between attorney and client will not be considered “privileged” merely because it has been mentioned or exchanged in the course of attorney-client communications, where that same information can be obtained from an independent third-party source outside the attorney-client relationship.³³

²⁷ 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughten rev., 1961).

²⁸ WALWORTH ET AL., *supra* note 12, at 1.

²⁹ *Id.*

³⁰ *See Upjohn*, 449 U.S. at 396–97 (holding that questions of attorney-client privilege will be judged on a case-by-case basis).

³¹ *See id.* at 395–96; WALWORTH ET AL., *supra* note 12, at 1–2.

³² *Upjohn*, 449 U.S. at 395–96; WALWORTH ET AL., *supra* note 12, at 1–2.

³³ MICHMERHUIZEN, *supra* note 15 (“The underlying information is not protected if it is available from another source. Therefore, information cannot be placed under an evidentiary ‘cloak’ of protection simply because it has been told to the lawyer.”).

B. Attorney-Client Privilege in New York

Although Wigmore's definition refers solely to communications made by a client to their attorney, "the modern approach in most U.S. jurisdictions protects communications from the lawyer as well."³⁴ New York is one such jurisdiction.³⁵ New York's codification of the attorney-client privilege is found in Civil Practice Law and Rules § 4503, which states in pertinent part:

Unless the client waives the privilege, an attorney or his or her employee . . . who obtains . . . a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, . . . or by the legislature or any committee or body thereof.³⁶

In the 1864 decision of *Whiting v. Barney*—one of the earliest New York decisions which began to define the boundaries of the attorney-client privilege—the Court of Appeals held that attorney-client privilege extends only to communications that have some "relation to some suit or other judicial proceeding, either existing or contemplated."³⁷ Therefore, all that was required to establish privilege under *Whiting* is that the communication has *some* relation to a judicial proceeding, even if a judicial proceeding never took place.³⁸

Sixteen years later, the Court of Appeals in *Bacon v. Frisbie* further broadened the *Whiting* court's interpretation of attorney-client privilege.³⁹ The *Bacon* court held that attorney-client privilege extends to all communications between attorney and client when

³⁴ Raymond L. Sweigart, *Attorney-Client Privilege: Pitfalls and Pointers for Transactional Attorneys*, BUS. L. TODAY (Apr. 2008), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/bizcom_priviledge.html.

³⁵ See N.Y. C.P.L.R. § 4503 (McKinney 2016).

³⁶ *Id.*

³⁷ *Whiting v. Barney*, 30 N.Y. 330, 342 (1864).

³⁸ *Id.*

³⁹ See *Bacon v. Frisbie*, 80 N.Y. 394, 398 (1880).

made in the attorney's professional capacity.⁴⁰ Specifically, the *Bacon* court stated that "[a]ll communications made by a client to his counsel, for the purpose of professional advice or assistance, are privileged."⁴¹ *Bacon* clarified that communications between attorney and client need not be related to a pending or contemplated claim in order to be privileged.⁴² Rather, by extending privilege to "any . . . matter proper for such advice or aid,"⁴³ the *Bacon* court rendered nearly every communication between an attorney and his client privileged, and thus shielded from discovery.⁴⁴ This decision placed greater emphasis on identifying the communication's purpose, rather than examining its content.⁴⁵ After *Bacon*, the content of the communication became a distant thought, if not an almost entirely irrelevant one, in courts' determinations of whether a communication was privileged.⁴⁶

In 1957, almost one hundred years after *Bacon* was decided, the same basic principles were reaffirmed in *In re Lanza*.⁴⁷ *Lanza* clarified that "[w]hile the right of privileged communications between lawyer and client originally arose and extended only to communications actually made in a pending suit, our highest courts have broadened this view to embrace all communications."⁴⁸ Thus, after *Lanza*, "all communications"—that is, any discussion at all between attorney and client—were entitled to the privilege, whether that discussion was regarding a legal claim or the latest ballgame.

The policy goals that New York courts sought to achieve at the time of the *Whiting* and *Bacon* decisions played a large role in the courts' resolution of issues related to attorney-client privilege.⁴⁹ For many years, New York courts had interpreted the attorney-client

⁴⁰ *Id.* at 398–99.

⁴¹ *Id.* (alteration in original) (emphasis added).

⁴² *Id.*

⁴³ *Id.* at 399.

⁴⁴ *Id.* at 398.

⁴⁵ *See id.* (emphasis added).

⁴⁶ *See id.*

⁴⁷ *In re Lanza*, 163 N.Y.S.2d 576, 580–81 (Sup. Ct. 1957) *aff'd*, 164 N.Y.S.2d 534 (App. Div. 1957).

⁴⁸ *Id.* at 580.

⁴⁹ *See, e.g.,* *People v. Cassas*, 646 N.E.2d 449, 451 (N.Y. 1995); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989).

privilege's rationale as helping to facilitate open, unfettered communication between attorney and client.⁵⁰ In 1989, the New York Court of Appeals in *Rossi v. Blue Cross Blue Shield of Greater New York* upheld the extension of attorney-client privilege to communications between an attorney and client.⁵¹ The court noted that the "legislative purposes of CPLR 4503 . . . include fostering uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice."⁵² Six years later, in *People v. Cassas*, the New York Court of Appeals reaffirmed this longstanding view.⁵³ Notably, the *Cassas* court found that "[t]he attorney-client privilege 'exists to ensure that one seeking legal advice will be able to confide fully and freely in his . . . attorney, secure in the knowledge that his . . . confidences will not later be exposed to public view to his . . . embarrassment or legal detriment.'"⁵⁴ Further, the New York Court of Appeals explicitly recognized that the protected, confidential quality of attorney-client communications is at the very heart of the attorney-client relationship.⁵⁵ For example, in *People v. Osorio*, the court noted that the attorney-client privilege "enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes."⁵⁶ These decisions made it vividly clear that New York courts were intent on molding the doctrine of attorney-client privilege in a way that best facilitated communication between attorney and client.

Over the past several decades, the Supreme Court of New York County has held that the attorney-client privilege should be extended only where it would meet policy goals that are nearly identical to those set forth in *Rossi* and *Cassas*.⁵⁷ Specifically, the court in *Stenovich v. Wachtell, Lipton, Rosen & Katz* stated that

⁵⁰ See, e.g., *Cassas*, 646 N.E.2d at 451; *Rossi*, 540 N.E.2d at 705.

⁵¹ *Rossi*, 540 N.E.2d at 706.

⁵² *Id.* at 705.

⁵³ See *Cassas*, 646 N.E.2d at 451.

⁵⁴ *Id.* (quoting *In re Priest v. Hennessy*, 409 N.E.2d 983, 985 (N.Y. 1980)).

⁵⁵ See *People v. Osorio*, 549 N.E.2d 1183, 1185 (N.Y. 1989).

⁵⁶ *Id.*; see N.Y. C.P.L.R. § 4503 (McKinney 2016).

⁵⁷ See *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 376 (N.Y. Sup. Ct. 2003).

“[the attorney-client] privilege is intended to facilitate the rendition of legal representation.”⁵⁸ The court further held that the attorney-client privilege “applies only where necessary to achieve its purpose.”⁵⁹ The policy goals behind the extension of attorney-client privilege have been a major consideration for courts when confronted with the issue of whether to extend privilege over communications made between client and counsel. New York courts have sought to apply the attorney-client privilege in ways that would best reinforce a client’s faith and confidence in his attorney,⁶⁰ thereby helping to “facilitate the rendition of legal representation,”⁶¹ and ultimately, the “administration of justice.”⁶²

II. IN-HOUSE COUNSEL IN THE UNITED STATES

One reason why courts have been divided on how and when to extend privilege to communications between in-house counsel and its corporate client is because of the evolving role of in-house counsel in corporations throughout the last century.⁶³ The dual role of in-house counsel as corporate advisor and attorney has been present since the 1930s.⁶⁴ At that time, in-house counsel acted as both attorneys and business associates.⁶⁵ In this dual role, in-house counsel were “well regarded and compensated by senior management.”⁶⁶ Specifically, “[a]s ‘both business and legal advisers,’ counsel then ‘were held in high repute.’”⁶⁷ Many in-house counsel were making “approximately sixty-five percent of the

⁵⁸ *Id.* at 376.

⁵⁹ *Id.* (citing *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

⁶⁰ *See People v. Cassas*, 646 N.E.2d 449, 451 (N.Y. 1995).

⁶¹ *Stenovich*, 756 N.Y.S.2d at 376 (quoting *Note Funding Corp. v. Bobian Inv. Co.*, No. 93 CIV. 7427 (DAB), 1995 WL 662402, at *2 (S.D.N.Y. Nov. 9, 1995)).

⁶² *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989).

⁶³ *See Lipson et al.*, *supra* note 3, at 237–43; *DeMott*, *supra* note 3, at 958–60.

⁶⁴ *See Lipson et al.*, *supra* note 3, at 238.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *DeMott*, *supra* note 3, at 958 (quoting *Liggio, Sr.*, *supra* note 13, at 621).

CEO's remuneration,"⁶⁸ and were "among a corporation's three most highly compensated individuals."⁶⁹ In-house counsel played a major role in a company's leadership and their counsel and advice were "'regularly sought' by members of senior management."⁷⁰ However, this level of prestige held by in-house counsel quickly came to an end.⁷¹ By the 1940s, the prestige and status of in-house counsel had decreased dramatically due to a growing trend on the part of corporations to retain large outside law firms to handle their most important legal affairs.⁷² As a direct consequence, the role of in-house counsel dwindled, and the services they performed became, with increasing frequency, limited to "handling routine matters of corporate housekeeping"⁷³ and "serving as liaison between members of management and counsel's former law firm."⁷⁴ As the duties of in-house counsel receded, so did their prestige and compensation.⁷⁵

By the 1970s, the pendulum began to swing back, with corporations moving towards increased reliance on in-house counsel.⁷⁶ As legal costs from the use of outside firms escalated, corporations sought to internalize and better control legal expenses by hiring and expanding in-house legal departments.⁷⁷ Specifically, "corporate financial officers and general counsel perceived the fiscal and professional wisdom of making salaried lawyers responsible for the delivery of nonroutine, complex legal services."⁷⁸ Accordingly, the United States saw a 40 percent increase in the number of

⁶⁸ *Id.*

⁶⁹ *Id.* (citing Liggio, Sr., *supra* note 13, at 621).

⁷⁰ *Id.* (quoting Liggio, Sr., *supra* note 13 at 621).

⁷¹ *See id.* at 959; Lipson et al., *supra* note 3, at 238–39.

⁷² *See* DeMott, *supra* note 3, at 959.

⁷³ *Id.* *See also* Lipson et al., *supra* note 3, at 238–39 ("[L]arge law firms sought to control corporate representation, thus limiting in house counsel duties to routine matters." (emphasis added)).

⁷⁴ DeMott, *supra* note 3, at 959.

⁷⁵ *Id.* at 960.

⁷⁶ Lipson et al., *supra* note 3, at 239.

⁷⁷ *Id.*

⁷⁸ Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1060 (1997).

attorneys working in-house between 1970 and 1980.⁷⁹ With the rapid rise in the sheer number of lawyers working as in-house counsel came greater corporate reliance on in-house legal departments, as well as a marked expansion in their duties and responsibilities.⁸⁰ In-house counsel not only acted as a legal representative of the corporation, but also advised the corporation as to regulatory matters and acted as liaison between retained outside law firms and corporate managers.⁸¹

In the 1980s, the increased cost of legal fees, heightened client expectations to be involved in "any big strategic issue at the heart of the organization," and stronger governmental regulations, boosted the reliance of corporations on their in-house counsel.⁸² In turn, corporate legal departments became more pronounced as further expansion of in-house legal departments became a desirable alternative for corporations seeking to maintain control over legal fees, while still retaining sound and reliable legal advice.⁸³ As a result, the 1980s saw another sizeable increase—approximately 33 percent—in the number of lawyers working in-house in the United States.⁸⁴ In fact, even private law firms began to hire their own in-house counsel.⁸⁵

⁷⁹ *Id.* at 1059.

⁸⁰ *See id.* at 1059–60; *see* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277 (1985); Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 933–34 (2002).

⁸¹ Daly, *supra* note 78, at 1061–62; *see* Lipson et al., *supra* note 3, at 239.

⁸² *See* Daly, *supra* note 78, at 1060–62; Lipson et al., *supra* note 3, at 239.

⁸³ *See* Regan, Jr., *supra* note 80, at 933–34; *see also* Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 611 (2002) ("[V]isibility of the in-house bar has grown in recent years . . . due largely to a shift in the balance of power between outside and in-house counsel. The move toward a client-driven marketplace and related economic trends—whereby, increasingly, in-house lawyers call the shots . . . in-house counsel have worked hard to improve their management skills and economic leverage such that they have become more attractive providers of legal services.").

⁸⁴ Lipson et al., *supra* note 3, at 240.

⁸⁵ *See* Terry Carter, *Counseling Counselors*, ABA J. (Aug. 12, 2006), http://www.abajournal.com/magazine/article/counseling_counselors/; Duggin, *supra* note 20, at 1000–01.

Subsequently, in the 1990s, an economic recession⁸⁶ plagued the United States and forced many corporations to “change [their] expectations surrounding corporate legal functions.”⁸⁷ As a result, in-house counsel became day-to-day business and regulatory advisors, as well as the “the guardian of the company’s reputation and values.”⁸⁸ Moreover, in-house counsel were expected to participate in “high-level strategic decisions as . . . adviser[s] with intimate knowledge of the corporation and its business,”⁸⁹ in addition to advising the corporation in legal matters.⁹⁰

The amount of lawyers working in-house has continued to increase to this day.⁹¹ From 1997 to 2006, “the 200 largest law departments in the United States increased their number of in-house counsel by an average of 4.8% per year.”⁹² In fact, this growth has continued not only within the United States, but also worldwide.⁹³

⁸⁶ See John B. Taylor, *Discretion Versus Policy Rules in Practice*, 39 CARNEGIE-ROCHESTER CONF. SERIES ON PUB. POL’Y 195, 210 (1993), <http://web.stanford.edu/~johntayl/Papers/Discretion.PDF>. Dubbed the “1990 Oil Price Shock” by academics, a strain on the U.S. oil supply caused by the Iraqi invasion of Kuwait saw prices of oil rise from \$17 per barrel in July 1990 to \$36 per barrel in October 1990. *Id.* This dramatic increase in the price of oil resulted in a loss of consumer and business confidence that saw unemployment in the United States rise to a shocking 26.2 percent between 1990-1991. See Jennifer M. Gardner, *The 1990-1991 Recession: How Bad was the Labor Market?*, MONTHLY LAB. REV. 3, 7 (June 1994), <http://www.bls.gov/mlr/1994/06/art1full.pdf>.

⁸⁷ *The Evolving Role of In-House Counsel: Adding Value to the Business*, GEN. COUNS. CONSULTING, <http://www.gcconsulting.com/articles/120280/73/Evolving-Role-of-In-House-Counsel-Adding-Value-to-the-Business/> (last visited Sept. 10, 2016).

⁸⁸ Lipson et al., *supra* note 3, at 241.

⁸⁹ DeMott, *supra* note 3, at 960.

⁹⁰ *See id.*

⁹¹ *See* Lipson et al., *supra* note 3, at 242–43.

⁹² *Id.* at 243.

⁹³ *See* David B. Wilkins, *Is The In-House Counsel Movement Going Global? A Preliminary Assessment of the Role of Internal Counsel in Emerging Economies*, 2012 WISC. L. REV. 251, 263–74 (citing Richard Stock, *The Future for In-House Counsel*, INSIDER CORP. LEGAL, June 2008, at 1, <http://www.catalystlegal.com/Articles/ICL%20June%2008%20-%20FINAL.pdf>) (describing in-house legal departments as the “fastest-growing legal services sector around the world over the last five years,” and how this trend reflects a “compound increase of 15% per year”).

Clearly, the duties, compensation, prestige, and popularity of in-house counsel have fluctuated dramatically over the past century.⁹⁴ This persistent fluctuation is likely to have had at least some role in the inconsistency of court judgments on the issue of extending attorney-client privilege over communications between in-house counsel and their corporate clients.

III. THE DUAL FUNCTIONS OF IN-HOUSE COUNSEL

To better understand the divide among New York courts when deciding how and when to extend privilege to communications between in-house counsel and corporate clients, one must first recognize the two principal functions that in-house counsel assume in their duties to the corporation: (1) as a legal representative, and (2) as a business and corporate advisor.⁹⁵ Although theoretically distinct, the reality is that in practice the two functions often blend into one another in the course of in-house counsel's daily operations.⁹⁶ The overlap of these two functions greatly contributes to the difficulty New York courts have faced in resolving cases of this nature and making uniform and consistent determinations as to whether a given communication was made in the attorney's function as business advisor or as a legal representative.⁹⁷ Before that

⁹⁴ See DeMott, *supra* note 3, at 958–61; Lipson et al., *supra* note 3, at 238–43.

⁹⁵ See Lipson et al., *supra* note 3, at 237–43; DeMott, *supra* note 3, at 957–60.

⁹⁶ See DeMott, *supra* note 3, at 955 (“[A] general counsel’s roles include furnishing legal advice to the corporation’s board of directors, chief executive officer (“CEO”), and other senior executives. But a contemporary general counsel often occupies other roles as well, each complex and interlinked in several ways.”); Robert L. Nelson & Laura Beth Nielson, *Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457, 465 (2000).

⁹⁷ See *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 144 (S.D.N.Y. 2003) (“Application of th[e] [attorney-client privilege] . . . is complicated in situations where communications claimed to be privileged involve in-house as opposed to outside counsel because ‘in-house attorneys are more likely to mix legal and business functions.’”) (citing *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989); Kim, *supra* note 20, at 240 (“At board meetings, the lawyer-director often contributes a mixture of both legal and business advice. In that setting it may be

problem can be resolved, the individual functions must be carefully explored.

A. Legal Representative

Although it is common for in-house counsel to supplement their role of legal representative with other corporate functions, the role of legal representative remains the chief function of in-house counsel.⁹⁸ Indeed, “the most widely recognized and far-reaching duty of contemporary [in-house] counsel is to provide legal advice to officers, directors, and other constituents acting on behalf of entities.”⁹⁹ As part of the corporate structure, it is the in-house attorney who “bears ultimate responsibility for all legal matters affecting the corporation.”¹⁰⁰ However, these legal matters are as varied as the hundreds upon thousands of corporations that populate the United States.¹⁰¹

The actual functions of in-house counsel’s role as legal advisor depend upon “the size of the corporation and its in-house legal department, as well as the complexity and nature of the legal and regulatory questions that the corporation must address.”¹⁰² Further, the type of legal representation and legal advice that in-house counsel provides the corporate client differs greatly from the typical attorney-client relationship.¹⁰³ As described by one in-house counsel at a commercial bank:

impossible for the lawyer-director and the other board members to distinguish clearly between communications that constitute purely legal advice, communications that constitute purely business advice, and communications that involve a combination of the two. Unless those distinctions can be made, all of the statements are potentially subject to compelled disclosure for failure to classify them as legally-related confidential communications.”).

⁹⁸ Nelson & Nielson, *supra* note 96, at 464–65.

⁹⁹ Duggin, *supra* note 20, at 1003.

¹⁰⁰ DeMott, *supra* note 3, at 965 (quoting Kim, *supra* note 20, at 200) (internal quotations omitted).

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ *See* Nelson & Nielson, *supra* note 96, at 464 (“[T]he counsel role implies a broader relationship with business actors that affords counsel an opportunity to make suggestions based on business, ethical, and situational concerns.”).

Forty percent of my time is spent managing the legal position, . . . 20% of my time is as the bank's chief compliance officer: dealing with regulators, overseeing the auditing process within the bank, [overseeing] training done by the legal division Another 30% of my time is as consigliere of executive and senior management: I am the counselor; I am the guy who is asked to draft letters; to advise on particular issues, which can overlap with the first two primarily because it relates to the regulators The remaining 10% of my time I practice law.¹⁰⁴

As the statement above makes clear, legal advice rendered by in-house counsel to its corporate client may address a wide variety of issues, from those concerning solely internal matters, such as corporate governance and management, to outside affairs, such as regulatory matters and litigation.¹⁰⁵

Even within its function as legal representative and legal advisor, in-house counsel remains closely involved in directorial decisions where counsel "draws on both legal and other forms of knowledge, and . . . is highly influential."¹⁰⁶ These roles have sometimes been referred to as "quasi-legal roles,"¹⁰⁷ as they require both legal and directorial skills.¹⁰⁸ Nevertheless, even where the function is effectively a "blend" of the two, distinctions can still be drawn between which particular acts of in-house counsel are characteristically those of a lawyer, and which are instead acts taken as a business advisor, albeit one acting with the benefit of legal knowledge and insight.¹⁰⁹

¹⁰⁴ *Id.* at 465.

¹⁰⁵ Duggin, *supra* note 20, at 1003.

¹⁰⁶ Nelson & Nielson, *supra* note 96, at 465.

¹⁰⁷ Duggin, *supra* note 20, at 1010.

¹⁰⁸ *Id.*

¹⁰⁹ See Nelson & Nielson, *supra* note 96, at 465 ("[W]hen I think of practicing law . . . it's more taking a particular legal problem and finding out what the law is, and then applying the law to the facts That's not what I do most of the time when I am dealing with senior management The law has very little to do with it. An example would be, the regulators have found what they believe to be a regulatory violation. Well, I've got either a member of my staff or outside

It is at this juncture—where in-house counsel’s function as legal representative merges with its function as a business and corporate advisor—that the potential for problems arise. Despite the practicality and utility of the merger of these two functions in the daily business life of a corporation, it nonetheless causes great confusion in litigation, and presents difficult challenges for a court when asked to determine whether, and to what extent, the attorney-client privilege will attach to communications made between in-house counsel and its corporate client.¹¹⁰ Although some distinction can still be made between the two functions, the line between the business and legal functions of in-house counsel is very often a blurry one.

B. Corporate Officer and Business Advisor

Aside from being the corporation’s legal representative and advisor, in-house counsel wears many other nonlegal hats that outside counsel would never wear in a typical attorney-client relationship.¹¹¹ For instance, “[in-house] counsel’s portfolio of responsibilities may include nonlegal functions, including the corporate secretarial, human resources, and governmental affairs functions.”¹¹² In addition, in-house counsel often serves as the

counsel who confer with me on whether it is or isn’t. That’s practicing law. My consigliere role is how I am going to interface between the executive management and the regulators to convince the regulators that it’s not [a violation]. And that has nothing really to do with the law. It’s negotiating; its common sense . . . it’s how it’s communicated.”); *see also* *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 706 (N.Y. 1989) (evaluating a communication between general counsel and their corporate client and noting that “[s]o long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters”).

¹¹⁰ *See* *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 144 (S.D.N.Y. 2003); *Rossi*, 540 N.E.2d at 705; Kim, *supra* note 20, at 240; *see also* 8 WIGMORE, *supra* note 27, at 554 (stating that the attorney-client privilege applies to communications made for the purpose of obtaining legal advice from a “professional legal adviser” acting in that capacity); Duggin, *supra* note 20, at 1016 (“The ability of the board to invoke the attorney-client privilege in seeking legal advice from the general counsel is also imperiled when the general counsel is a director.”).

¹¹¹ *See* DeMott, *supra* note 3, at 967.

¹¹² *Id.*

corporation's "chief compliance officer."¹¹³ Moreover, "the role of general counsel ranges from providing legal advice pertaining to compliance functions to hiring compliance officers and briefing senior managers and directors on compliance matters."¹¹⁴

Further, "[m]any, perhaps most, [in-house] counsel are corporate officers."¹¹⁵ In this role, in-house counsel owes "fiduciary allegiance to the corporation as officers."¹¹⁶ Although subject to the corporation's bylaws,¹¹⁷ the duties owed by in-house counsel shift dramatically where counsel takes on the function of corporate officer.¹¹⁸ Specifically, the identity of the "client" changes from that of only the corporation to the *shareholders* of the corporation, as well as the corporation itself.¹¹⁹ Accordingly, duties that in-house counsel owes to the corporate entity may drastically change upon assuming the position of officer, and become—like other directors and officers—duties owed to the shareholders themselves.¹²⁰ In-house counsel also frequently serve as part of "corporate management or executive committees,"¹²¹ and consequently "participate in formulations of corporate strategy at the highest levels of the management hierarchy."¹²²

¹¹³ Duggin, *supra* note 20, at 1011.

¹¹⁴ *Id.* at 1011–12.

¹¹⁵ *Id.* at 1014.

¹¹⁶ *Id.* 1015.

¹¹⁷ DeMott, *supra* note 3, at 967.

¹¹⁸ See N.Y. BUS. CORP. LAW § 717(b) (McKinney 1989) ("In taking action, including . . . action which may involve or relate to a change or potential change in the control of the corporation, a director shall be entitled to consider, . . . both the long-term and . . . the short-term interests of the corporation *and* its shareholders." (emphasis added)); Pavel Leshchinskiy, *Corporate Fiduciary Duties*, LEGAL MATCH (June 15, 2015), <http://www.legalmatch.com/law-library/article/corporate-fiduciary-duties.html>; Joan M. Secofsky, *Fiduciary Duties in NY may not be in the Eyes of the Beholder*, LAW 360 (Oct. 3, 2013), <http://www.law360.com/articles/476839/fiduciary-duties-in-ny-may-not-be-in-the-eyes-of-beholder>.

¹¹⁹ See BUS. CORP. § 717(b); Leshchinskiy, *supra* note 118; Secofsky, *supra* note 118.

¹²⁰ See BUS. CORP. § 717(b).

¹²¹ Duggin, *supra* note 20, at 1015.

¹²² DeMott, *supra* note 3, at 967.

However, the function of business advisor also overlaps with the function of legal representative.¹²³ For example, “legal feasibility and risk levels are critical factors in the calculus of whether or not to proceed with new projects or redesign existing programs.”¹²⁴ Another area in which the two functions may merge is within in-house counsel’s role as a corporate director.¹²⁵ While in-house counsel can undoubtedly bring “a great deal of insight to a corporate board as a result of his or her intimate familiarity with the organization and sensitivity to the legal ramifications of business matters,”¹²⁶ in-house counsel serving as a director can tarnish the independent role of legal advisor and become “entangled in conflicts between the role of legal advisor and corporate decision maker.”¹²⁷

Despite the utility of in-house counsel accepting dual roles within the client corporation, the assumption of both roles may not only cause confusion and unpredictability in New York courts, but it may also hamper the corporate entity as a whole.¹²⁸ While “[t]he representation of a corporation as a nonhuman entity is already a complex undertaking for lawyers . . . [i]t seems altogether imprudent to complicate further the representation by allowing lawyers to engage in dual service.”¹²⁹ Further, “[d]ual service increases the risk that confidential client communications relating to the provision of legal services will no longer be protected by the attorney-client privilege.”¹³⁰ Due to in-house counsel’s multidisciplinary roles as legal advisor, director, compliance officer, and other nonlegal positions, it becomes difficult for the corporate client to show that the communications at issue were strictly legal in nature and thus entitled to attorney-client privilege.¹³¹

¹²³ Duggin, *supra* note 20, at 1015.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1016.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Kim, *supra* note 20, at 260.

¹²⁹ *Id.*

¹³⁰ *Id.* at 239.

¹³¹ See Duggin, *supra* note 20, at 1016 (“The ability of the board to invoke the attorney-client privilege in seeking legal advice from the general counsel is also imperiled when the general counsel is a director.”); Kim, *supra* note 20, at 240; see also 8 WIGMORE, *supra* note 27, at 554 (stating that the attorney-client

Unless distinctions can be made among communications comprised of legal advice, communications comprised of business advice, and communications involving a mixture of both, all of in-house counsels' correspondence with its corporate client may be subject to disclosure in the discovery process due to the "failure to classify them as legally-related confidential communications."¹³² This is not only detrimental to the corporation, but to in-house counsel's ability to perform any of the roles it takes on within the corporation, whether legal or nonlegal.

IV. IN-HOUSE COUNSEL AND ATTORNEY-CLIENT PRIVILEGE IN NEW YORK

New York courts have extended attorney-client privilege to communications between the corporate client and in-house counsel in several circumstances.¹³³ However, communications between in-house counsel and a corporate client are not protected merely because in-house counsel is an attorney.¹³⁴ Rather, when the

privilege applies to communications made for the purpose of obtaining legal advice from a "professional legal adviser" acting in that capacity).

¹³² Kim, *supra* note 20, at 240.

¹³³ See *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705-06 (N.Y. 1989) (holding that the privilege applied to communications between defendant and its in-house counsel because counsel's "communication to his client was plainly made in the role of attorney" and counsel "was exercising a lawyer's traditional function in counseling his client regarding conduct that had already brought it to the brink of litigation"); *Polycast Technology Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 49 (S.D.N.Y. 1989) ("[Counsel's] status as [defendant's] in-house counsel is not of consequence for purposes of the privilege; as he was a qualified attorney approached for legal advice, his role satisfies the second element of the [attorney-client privilege] test."); *O'Brien v. Board of Ed. of City Sch. Dist. of City of N.Y.*, 86 F.R.D. 548, 549 (S.D.N.Y. 1980) ("The fact that the document was authored by in-house counsel rather than by an independent attorney is of no significance. The relevant inquiry is whether the attorney, regardless of his place of employment, was acting as confidential counsel to the party asserting the privilege. In this instance, the attorney was delivering requested legal opinions in his response to questions propounded by his client. The fact that the attorney and client had a common employer does not itself render communications between the two ineligible for protection by the privilege.").

¹³⁴ See *United States Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994).

extension of privilege over communications between in-house counsel and a corporate client is at issue, courts must distinguish between situations where in-house counsel is functioning in a legal capacity, as opposed to a business capacity.¹³⁵ This has been a difficult task for New York courts, as evidenced by their conflicting decisions when presented with virtually the same set of facts and legal issues.¹³⁶ Indeed, when in-house counsel is “involved in issues of attorney-client privilege, it can be difficult to determine if the communication was legal or business in nature.”¹³⁷

This is not a new issue.¹³⁸ New York courts have been struggling to develop a clear method of resolving how and when to apply privilege to in-house counsel communications for the past several decades.¹³⁹ To properly explore this issue, it is best to begin with a

¹³⁵ See Robert LoBue, *Is It Privileged? Privilege Issues for In-House Counsel*, CORPORATE COUNSEL SECTION NEWSLETTER (New York State Bar Association, Albany, N.Y.), Vol. 30, No. 1, Spring/Summer 2012, at 9, 11 (2012) (stating that “[b]ecause courts require a clear showing that counsel was acting in a legal capacity, it is best to ensure that meetings, documents, and conversations address only one of the counsel’s roles – either business or legal – and attend to the other issues separately.”); Bass, Berry & Sims, *Attorney/Client Privilege for In-House Counsel*, ASSOC. CORP. COUNS. (July 14, 2011), <http://www.acc.com/legalresources/quickcounsel/acpfihc.cfm> (“Because the privilege only applies to legal communications, it is critical to determine the capacity in which an in-house counsel was acting when a particular communication was made. While courts have provided some guidance in this area . . . application of the law in a particular factual setting difficult can prove difficult.”).

¹³⁶ See Bass, Berry & Sims, *supra* note 135, at 1; *Cooper-Rutter Assoc. v. Anchor Nat. Life. Ins. Co.*, 563 N.Y.S.2d 491, 492 (N.Y. App. Div. 1990); *ABB Kent-Taylor, Inc. v. Stallings and Co., Inc.*, 172 F.R.D. 53, 56–57 (W.D.N.Y. 1996).

¹³⁷ PAUL R. RICE ET AL., 1 ATTORNEY-CLIENT PRIVILEGE: STATE LAW NEW YORK § 3:14, Westlaw (last updated June 2016).

¹³⁸ See generally *Ford Motor Co. v. O.W. Burke Co.*, 299 N.Y.S.2d 946 (N.Y. Sup. Ct. 1969) (showing that a corporation’s communication with its in-house counsel has been an issue since 1969 where the Supreme Court of New York held that it is, in fact, privileged); *Cooper-Rutter Assoc.*, 563 N.Y.S.2d at 491 (showing that a New York Appellate Court in 1990 found that a corporation’s communications with its in-house counsel was not shielded by attorney-client privilege).

¹³⁹ See, e.g., *ABB Kent-Taylor*, 172 F.R.D. at 56–57; *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989) (discussing the

historical approach that details the unique divergence that has occurred in the holdings of New York courts, despite virtually identical fact patterns. Where some courts opted to follow the *Whiting* method and focus on the *purpose* of the communication between in-house counsel and corporate client, other courts focus on the *content* of the communication between in-house counsel and corporate client.

A. Holdings Where Purpose of Privileged Communication is Determinative

In 1969, the Supreme Court of New York in *Ford Motor Co. v. O.W. Burke Co.* extended the attorney-client privilege to a communication made between in-house counsel and its corporate client, Ford Motor Company.¹⁴⁰ The court rejected other modes of resolving the issue of whether to extend the attorney-client privilege to the communication between in-house counsel and its client,¹⁴¹ instead finding that the communications at issue were “part of the data and information given as confidential communications . . . to the plaintiff’s attorney . . . with a *bona fide intention* of being laid before the lawyer for his legal analysis and advice.”¹⁴²

In 1989, the New York Court of Appeals granted attorney-client privilege over communications made by in-house counsel to the corporate client in *Rossi v. Blue Cross & Blue Shield of Greater New York*.¹⁴³ In *Rossi*, in-house counsel to defendant Blue Cross prepared an “internal memorandum” that consisted of a discussion of both

lack of a clear process through which this issue may be dealt with and stating instead that the resolution of this issue is dependent on the individual facts of the case at bar); *Cooper-Rutter*, 563 N.Y.S.2d at 492 (demonstrating that, ten years subsequent to *Rossi*, still no test existed to determine whether a communication between in-house counsel and client was privileged or not); *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31, 33–36 (N.Y. App. Div. 2016) (relying on the 27 year-old *Rossi* decision, which held that the inquiry is fact-specific, to determine whether the communication between in-house counsel and client was privileged).

¹⁴⁰ *Ford Motor Co.*, 299 N.Y.S.2d at 949.

¹⁴¹ *Id.* at 948.

¹⁴² *Id.* at 949 (emphasis added) (quoting *Danisch v. Guardian Life Ins. Co.*, 18 F.R.D. 77, 80 (S.D.N.Y. 1955)).

¹⁴³ *Rossi*, 540 N.E.2d at 703–04.

legal issues and business matters.¹⁴⁴ The memorandum discussed “conversations between [in-house counsel] and plaintiff’s attorney regarding a possible defamation suit . . . conversations between [in-house counsel] and the FDA regarding plaintiff’s NMR Imaging System . . . [in-house counsel’s] understanding of Blue Cross’s NMR reimbursement policy . . . and [in-house counsel’s] opinion and advice regarding the rejection language of the form.”¹⁴⁵ To resolve this matter, the *Rossi* court placed high importance on the *purpose* behind communication made between in-house counsel and its corporate client.¹⁴⁶ Specifically, the court found that “[f]or the privilege to apply when communications are made from client to attorney, they must be made for the purpose of obtaining legal advice.”¹⁴⁷ The *Rossi* court also noted that “for the privilege to apply when communications are made from attorney to client . . . they must be made for the purpose of facilitating the rendition of legal advice or service.”¹⁴⁸ The *Rossi* court employed a strict purpose-based approach to resolving the issue at bar and, while noting the limitations of a content-based approach,¹⁴⁹ only looked at the content of the communication to determine what the purpose behind the communication was.¹⁵⁰ After examining the purpose of the document, specifically the legal purpose for which the document was written, the court granted attorney-client privilege over in-house counsel’s communication to its corporate client.¹⁵¹

Subsequently, in 1992, the New York Appellate Division, Second Department, in *Kraus v. Brandsetter* extended the attorney-client privilege to protect in-house counsel’s communications to its

¹⁴⁴ See *id.* at 704.

¹⁴⁵ *Id.*

¹⁴⁶ See *id.* at 706.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (“That the memorandum does not reflect legal research is not determinative . . . So long as the communication is primarily or predominantly of legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters.”).

¹⁵⁰ *Id.* (“Here, it is plain from the content and context of the communication that it was for the purpose of facilitating the lawyer’s rendition of legal advice to his client.”).

¹⁵¹ *Id.*

client.¹⁵² In doing so, the court cited *Rossi* and looked to the purpose of the communication, rather than its content, to determine whether the attorney-client privilege applied to the communication in question.¹⁵³ The court found that the communication was “*presented in order to provide a factual basis for the legal recommendations contained therein*,”¹⁵⁴ and subsequently held that the attorney-client privilege applied to protect the communication from discovery.¹⁵⁵ In fact, the *Kraus* court explicitly refused to allow the content of the communication to resolve the issue.¹⁵⁶

In the 2002 decision of *New York Times Newspaper Division v. Lehrer McGovern Bovis, Inc.*, the New York Appellate Division, First Department, again looked to the purpose of the communication at issue to determine whether the attorney-client privilege should apply.¹⁵⁷ Although in its analysis the *New York Times* court reviewed the content of the communication at issue,¹⁵⁸ the determinative factor that the court relied upon was the purpose for which the communication was made.¹⁵⁹ The court found that the purpose of the communication here was to respond to “oral requests

¹⁵² *Kraus v. Brandstetter*, 586 N.Y.S.2d 270, 271 (N.Y. App. Div. 1992).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (“Although the Supreme Court appears to have been influenced by the statement of facts set forth in the reports, a recital of facts in a legal opinion does not defeat the attorney-client privilege.”).

¹⁵⁷ See *N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 752 N.Y.S.2d 642, 644–45 (N.Y. App. Div. 2002).

¹⁵⁸ The Court noted that:

The [communication at issue] satisfies all the essential elements of a protected attorney-client communication The [communication at issue] contained information and analysis with regard to litigation threatened by The Times, including opinions and conclusions of Parsons’ employees concerning possible causes of the alleged problems that were the bases of The Times’ threatened lawsuit.

Id. at 645.

¹⁵⁹ *Id.* at 644–45. “The privilege applies to communications from the client to the attorney when the communication is ‘made for the purpose of obtaining legal advice.’” *Id.* at 645 (quoting *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 704, 706 (N.Y. 1989)).

by attorneys”¹⁶⁰ and “[a]s such, it was protected by the attorney-client privilege and absolutely immune from discovery.”¹⁶¹

Even today, some courts in New York still rely upon the purpose of the communication at issue to determine whether the attorney-client privilege shall apply.¹⁶² In the recent case of *Stock v. Schnader Harrison Segal & Lewis LLP*, decided on June 30, 2016, the New York Appellate Division, First Department, held that attorneys who have sought the advice of their law firm’s in-house counsel may invoke attorney-client privilege to avoid disclosure thereof.¹⁶³ The First Department relied on *Rossi* and found that “[i]n the corporate context, the Court of Appeals has recognized that the attorney-client privilege applies to communications between a corporation’s employees and the corporation’s in-house counsel for the purpose of providing legal advice to the corporation.”¹⁶⁴

The aforementioned cases demonstrate that for the past several decades, each level of the New York State court system has continued to rely on the purpose of the communication at issue, rather than its content, to determine whether attorney-client privilege extends to communications made between in-house counsel and its corporate client. Despite the apparent sensibility of this approach, it completes only half of the inquiry necessary to appropriately determine whether the communication constitutes mere business advice or whether the communication contains legal advice that should be protected from adversarial discovery.

B. Holdings Where Content of Privileged Communication is Determinative

Despite some courts choosing to rely more heavily on the purpose of the communication at issue to determine whether the attorney-client privilege applies to a communication made between in-house counsel and corporate client, other courts have opted to focus on the content of the privileged communication to determine

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *Stock v. Schnader Harrison Segal & Lewis LLP*, 35 N.Y.S.3d 31, 33 (N.Y. App. Div. 2016).

¹⁶³ *Id.* at 38.

¹⁶⁴ *Id.* at 35.

whether the attorney-client privilege applies.¹⁶⁵ In *Cooper-Rutter Associates, Inc. v. Anchor National Life Insurance Co.*, the New York Appellate Division, Second Department, refused to extend privilege to documents similar to those at issue in *Rossi*.¹⁶⁶ The case began when Cooper-Rutter Associates, Inc. brought suit against Anchor National Life Insurance Company (“Anchor”) alleging that Anchor breached a contract for sale of a “cable television system.”¹⁶⁷ In response to the complaint, Anchor’s in-house counsel prepared “two handwritten memoranda” that were distributed to the corporate client.¹⁶⁸ Akin to *Rossi*, the court in *Cooper-Rutter* made explicit note of the dual-nature of the handwritten memoranda prepared by Anchor’s in-house counsel.¹⁶⁹ Rather than focus on the purpose of the memoranda, the court looked to the content of the communication at issue to determine whether the attorney-client privilege would apply.¹⁷⁰ The court found that “[t]he documents . . . concern both the business and legal aspects of the defendants’ ongoing negotiations with the plaintiff,”¹⁷¹ and further concluded that the content of the communication “expressed substantial nonlegal concerns,” and for this reason, held that the attorney-client privilege did not apply.¹⁷² Nowhere in the court’s analysis was the purpose of the communication considered.¹⁷³

In 2003, the *Stenovich* court focused primarily on the content of the advice rendered by in-house counsel to its corporate client, just

¹⁶⁵ See, e.g., *Cooper-Rutter Assoc. v. Anchor Nat’l Life Ins. Co.*, 563 N.Y.S.2d 491, 492 (N.Y. App. Div. 1990) (relying on the nonlegal content of a communication between in-house counsel and client to hold that the communication was not privileged).

¹⁶⁶ *Id.*; see *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989).

¹⁶⁷ *Cooper-Rutter Assoc., Inc. v. Anchor Nat’l Life Ins. Co.*, 597 N.Y.S.2d 799, 799 (N.Y. App. Div. 1993) (transferred from 2d Dep’t.).

¹⁶⁸ *Cooper-Rutter*, 563 N.Y.S.2d at 492.

¹⁶⁹ *Id.* (“The documents . . . concern both the business and legal aspects of the defendant’s ongoing negotiations with the plaintiff with respect to the business transaction out of which the underlying lawsuit ultimately arose.”).

¹⁷⁰ See *id.* at 492.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *id.*

as the *Cooper-Rutter* court did more than ten years prior.¹⁷⁴ While not explicitly stating that the content of the communications dictated its holding on the matter, the *Stenovich* court nonetheless took a four-corners approach to the issue by focusing on the language of the advice given in the communications rather than their purpose. Specifically, the *Stenovich* court stated that the attorney-client privilege applies to communications made between in-house counsel and corporate client where “the advice given is predominantly legal, as opposed to business, in nature.”¹⁷⁵ Finding that the communications at issue possessed such a legal “nature,” the *Stenovich* court ultimately held that the communications “are primarily of a legal character and are therefore potentially protected absent any exception to the attorney-client privilege.”¹⁷⁶

Most recently, in *National Casualty Company v. American Home Assurance Company*, the Supreme Court of New York looked only at the content of the communication made between in-house counsel and their corporate client in order to resolve the issue of whether to extend the attorney-client privilege over said communication.¹⁷⁷ The court found that “[a]t no time do these claim notes reiterate a legal analysis or legal advice . . . the details of those discussions [with in-house counsel] are not written on these claim notes.”¹⁷⁸ Moreover, the court noted that “[m]erely because . . . in house counsel’s name appears on a claim note does not give rise to the attorney-client privilege.”¹⁷⁹ The court did not once consider the

¹⁷⁴ Compare *Cooper-Rutter Assoc.*, 563 N.Y.S.2d at 492 (holding that, because the communication at issue expressed “substantial nonlegal concerns,” it was not privileged material), with *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 376–77 (N.Y. Sup. Ct. 2003) (analyzing the language of the communications given by in-house counsel to the client to hold that the communications were “primarily of a legal character and therefore . . . protected absent any exception to the attorney-client privilege”).

¹⁷⁵ *Stenovich*, 756 N.Y.S.2d at 376 (emphasis added) (quoting *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990)).

¹⁷⁶ *Id.* at 377.

¹⁷⁷ *Nat’l Cas. Co. v. American Home Assur. Co.*, No. 105494/06, 2011 WL 5865360 at *3 (N.Y. Sup. Ct. Feb. 25, 2011).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

purpose behind the communication at issue, but rather resolved the issue at bar by examining only the content of the communication.¹⁸⁰

As these cases demonstrate, there remains a very real and palpable divergence in the methods used by New York State courts to resolve the issue of determining when in-house counsel—or even private counsel—is acting as a business advisor as opposed to a legal advisor or representative.

V. SOLUTIONS

Several measures would serve the salutary purpose of reducing the unpredictability of the present decisional law in New York and providing a more efficient and secure relationship between in-house counsel and corporate clients. The first, and perhaps more important, part of the solution is a proposed synthesis of two long and prominent lines of divergent precedent in New York, a dichotomy which has greatly contributed to the gross bifurcation of opinions and results on this issue. The second piece of the solution aims to more clearly distinguish actions taken by in-house counsel in its capacity as legal representative for its corporate client, versus those actions in-house counsel takes in its role as a corporate advisor or in an otherwise nonlegal capacity. Specifically, the two solutions that stand as the focus of the foregoing analysis are: (1) legislative adoption of an ordered two-step process to determine whether privilege should be extended to in-house counsel's communications with its corporate client, essentially a synthesis by which courts would analyze both the intended purpose of the communication, as well as the content of that communication; and (2) as a separate measure, in-house counsel and corporate client's use of a deliberate signal (such as a particular e-mail address or letterhead) to denote communications that pertain to in-house counsel's function as a legal representative or legal advisor rather than a corporate advisor or officer.

For more than a century, New York courts have struggled to distinguish between situations where in-house counsel functions as legal advisor or legal representative, and situations where in-house

¹⁸⁰ *See id.*

counsel functions as a business advisor or corporate officer,¹⁸¹ and little progress has been made toward finding a solution.¹⁸² However, several notable legal scholars have proposed solutions to this issue.¹⁸³ In her article entitled *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, Susanna M. Kim proposed that the dual function of in-house counsel be prohibited altogether.¹⁸⁴ Kim asserts that this dual-role “complicate[s] further the [in-house counsel’s legal] representation by allowing lawyers to engage in dual service.”¹⁸⁵ As support for her solution, Kim noted that “[l]awyers who attempt to fill both roles simultaneously risk a loss of professional independence that can impair their ability to perform either role well.”¹⁸⁶ However, Kim’s solution fails to consider that the dual-role structure of in-house counsel duties did not occur by chance.¹⁸⁷ The increase in the amount of in-house counsel duties is a direct result of the realization of corporations’ intentions to internalize legal costs,¹⁸⁸ the increased government regulations on large corporations engaging in specific industries of the economy,¹⁸⁹ and the influx in the amount of lawyers practicing corporate law and applying for in-house counsel positions.¹⁹⁰ Due to the tremendous force that these external factors have on the functions of in-house counsel, it is difficult to imagine that the dual-role nature of in-house counsel will ever cease entirely. For this reason, the two solutions identified above should be implemented to clarify, rather than curb,

¹⁸¹ See *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705 (N.Y. 1989); *Bacon v. Frisbie*, 80 N.Y. 394, 399 (1880); *Whiting v. Barney*, 30 N.Y. 330, 337–38, 342 (1864); *People v. Beldge*, 399 N.Y.S.2d 539, 540–41 (N.Y. App. Div. 1977).

¹⁸² See *Rossi*, 540 N.E.2d at 705; *Bacon*, 80 N.Y. at 399; *Whiting*, 30 N.Y. at 337–38, 342; *Beldge*, 399 N.Y.S.2d at 540–41.

¹⁸³ See Kim, *supra* note 20, at 260; DeMott, *supra* note 3, at 955.

¹⁸⁴ Kim, *supra* note 20, at 260.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *id.*

¹⁸⁸ See DeMott, *supra* note 3, at 960.

¹⁸⁹ See Lipson et al., *supra* note 3, at 239–43.

¹⁹⁰ See Daly, *supra* note 78, at 1060–61; DeMott, *supra* note 3, at 960; Lipson et al., *supra* note 3, at 237–43.

the performance of in-house counsel in these dual roles so that courts can better identify these functions and more appropriately apply the doctrine of attorney-client privilege.

As previously noted, New York courts have either focused primarily on the *content*,¹⁹¹ or primarily on the *purpose*,¹⁹² of the communication that is the subject of a privilege claim. By doing so, New York State courts have only been fulfilling half of the appropriate inquiries that should occur when this issue is presented. This imbalance calls for a solution that reconciles the divergent methods of reasoning taken by New York State courts when confronted with the question of when privilege should be applied to in-house counsel communications. Instead of isolating the analyses as separate approaches, courts should use *both* approaches to achieve a more holistic, fair, and judicious understanding of both *why* the communication was made—analyzing its purpose—as well

¹⁹¹ See, e.g., *Cooper-Rutter Assoc., v. Anchor Nat. Life Ins. Co.*, 563 N.Y.S.2d 491, 492 (N.Y. App. Div. 1990) (relying on the fact that the content of the communication at issue “expressed substantial nonlegal concerns” to hold that privilege did not apply); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 373 (N.Y. Sup. Ct. 2003) (relying on the fact that the content of the communication at issue contained “advice . . . predominantly legal, as opposed to business, in nature” to hold that the communication was privileged); *Nat’l Cas. Co. v. American Home Assur. Co.*, No. 105494/06, 2011 WL 5865360 at *3 (N.Y. Sup. Ct. Feb. 25, 2011) (relying solely on the content of the communication at issue to determine that, because the communication did not “re-iterate a legal analysis or legal advice,” privilege did not apply).

¹⁹² *Ford Motor Co. v. O.W. Burke Co.*, 299 N.Y.S.2d 946, 949 (N.Y. Sup. Ct. 1969) (holding that privilege applied to the communications at issue because they were “part of the data and information given as confidential communications . . . to the plaintiff’s attorney . . . with the bona fide intention of being . . . legal analysis and advice”); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 706 (N.Y. 1989) (holding that “for the privilege to apply when communications are made from attorney to client . . . they must be made for the purpose of facilitating the rendition of legal advice or service”); *Kraus v. Brandstetter*, 586 N.Y.S.2d 270, 271 (1992) (holding that because the communication at issue was “presented in order to provide a factual basis for the legal recommendations contained therein,” the communication was privileged); *N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc.*, 752 N.Y.S.2d 642, 644–46 (N.Y. App. Div. 2002) (holding that because the purpose of the communication was to respond to “oral requests by attorneys”, the communication was “protected by the attorney-client privilege and absolutely immune from discovery”).

as *what* the communication itself consisted of —analyzing its content.

It is the province and duty of the courts to interpret and construe State or Federal statutes, and statutes often provide a procedural and substantive guide that the courts can follow when making their determination regarding the issue at bar.¹⁹³ For this reason, the best application of this solution would be through statute. Of course, a court can also unilaterally adopt this procedure to resolve this issue. Thus, the first solution is legislative adoption of a two-prong requirement that grants attorney-client privilege to protect communications made between in-house counsel and corporate client only where:

- (1) The communication is made for the purpose of rendering legal advice, legal consultation, or is otherwise made in counsel's capacity as legal advisor; and
- (2) The content of the communication consists of legal advice, legal consultation, or other legal analysis that is executed by counsel in his capacity as legal advisor.

This approach recognizes the chief concerns and considerations of both lines of New York precedent: the purpose of the communication and the content of the communication. In doing so, it reconciles the two lines of precedent into one holistic formula that results in a more complete understanding of the communication at issue.

It should be noted that this solution is far from perfect. Indeed, some communications may be not be made for the purpose of rendering legal advice, but may still contain sensitive legal consultation that, if unprotected, may work to the client's detriment. However, this solution does not aim to protect every in-house counsel-corporate client communication, but rather focuses on clarifying for the courts the point at which in-house counsel is acting

¹⁹³ Larry M. Eig & Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, in STATUTORY CONSTRUCTION AND INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS; STATUTORY STRUCTURE AND LEGISLATIVE DRAFTING CONVENTIONS; DRAFTING FEDERAL GRANTS STATUTES; AND TRACKING CURRENT FEDERAL LEGISLATION AND REGULATIONS 1, 45 (2010).

in its legal capacity in such a manner that privilege is warranted. This process ensures that communications with both a legal *purpose* and legal *content* will remain privileged and, as such, shielded from discovery.

In addition to the solution explained above, another proposed solution to help courts determine whether a communication was made for the purpose of rendering legal advice is for in-house counsel and their corporate client to use a particular signal to mark communications that pertain to a legal purpose, as opposed to communications that have a business, or otherwise nonlegal, purpose. In today's corporate environment, "[e-]mail is widely used as a form of business communication."¹⁹⁴ This solution can be best applied in the form of specific e-mail addresses used by in-house counsel and corporate clients solely for the purposes of legal advice and consultation. This solution is especially effective because it makes clear the *purpose* behind the communication made between in-house counsel and the corporate client. For example, if the designated "legal advice only" e-mail addresses are used to communicate, the court will effectively be put on notice that such communication was intended for the purpose of rendering or receiving legal advice. The use of a specific e-mail address between in-house counsel and their corporate client for rendering or receiving legal, or otherwise privileged advice, can be a simple and cost-effective way to make clear to both courts and corporate employees whether a communication is done with a legal or business purpose.

It is important to note that this solution is not a perfect one. Indeed, under this proposed solution, in-house counsel would be encouraged to label *every* communication as one sent with the purpose of rendering legal advice. However, knowingly labeling a business communication as legal advice would likely be a violation of Rule 8.4(c) of the New York Rules of Professional Conduct,¹⁹⁵

¹⁹⁴ Kristie Lorette, *The Use of E-Mail in Business Communication*, HOUS. CHRON., <http://smallbusiness.chron.com/use-email-business-communication-118.html> (last visited Sept. 10, 2016).

¹⁹⁵ See NEW YORK RULES OF PROF'L CONDUCT r. 8.4(c) (N.Y. STATE BAR ASS'N 2014) ("A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

and may result in sanctions.¹⁹⁶ Thus, although the solution is not foolproof, there are rules in place aimed to discourage violation thereof.

In an effort to provide clarity as to the purpose of the communications between in-house counsel and a client, this solution takes what is already an inexpensive tool,¹⁹⁷ and turns it into an extremely beneficial cost-saving device. Between 2000 and 2008, the total litigation costs of Fortune 200 companies ranged from an average of \$66,395,673 in 2000 to \$114,908,977 in 2008.¹⁹⁸ Moreover, “litigation costs have grown nine percent per year.”¹⁹⁹ As stated above, a key consideration that courts make when evaluating this issue is for what purpose the communication was made.²⁰⁰ Indeed, a failure to demonstrate a legal purpose behind a communication can be a complete bar to privilege.²⁰¹ This solution helps make vividly clear to both the court and corporate employees that a communication was made for the purpose of rendering and/or receiving legal advice, rather than business advice. Accordingly, this solution would help to avoid extensive litigation on the matter for the corporate client and the costs that come therewith.

¹⁹⁶ See *id.* at r. 8.5(a) (“A lawyer admitted to practice in this state is subject to the disciplinary authority of this state.”).

¹⁹⁷ See *id.*

¹⁹⁸ LAWYERS FOR CIVIL JUSTICE ET AL., DUKE L. SCH., LITIGATION COST SURVEY OF MAJOR COMPANIES App’x.1, fig.4 (May 10, 2010), http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf.

¹⁹⁹ *Id.* at App’x 1, 8.

²⁰⁰ See *Bacon v. Frisbie*, 80 N.Y. 394, 399 (1880).

²⁰¹ See *id.* at 399 (“All communication made by a client to his counsel, for the purpose of professional advice or assistance, are privileged.”); *Whiting v. Barney*, 30 N.Y. 330, 336–38 (1864); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 540 N.E.2d 703, 705–06 (N.Y. 1989); *In re Priest v. Hennessy*, 409 N.E.2d 983, 985–86 (N.Y. 1980) (“In order to make a valid claim of privilege, it must be shown that the information sought to be protected . . . was ‘confidential information.’”); *Cooper-Rutter Assoc. v. Anchor Nat. Life Ins. Co.*, 563 N.Y.S.2d 491, 491 (N.Y. App. Div. 1990); *People v. Belge*, 399 N.Y.S.2d 539, 540–41 (N.Y. App. Div. 1977) (“In order for the privilege to attach the information must have been given with the expectation of confidentiality and for the purpose of obtaining legal . . . advice.”); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 376 (N.Y. Sup. Ct. 2003).

CONCLUSION

To fix the broader issue of diverging judgments in New York regarding the extension of attorney-client privilege to in-house counsel, one must begin by addressing the root of the issue, namely the struggle New York State courts have faced when they are forced to distinguish between functions that in-house counsel have as a legal advisor, compared with those that in-house counsel have in a business, or otherwise nonlegal capacity. While it is likely that this dual-role function of in-house counsel will continue to exist in the foreseeable future, efforts can still be made to clarify the point at which in-house counsel is acting in its capacity as legal advisor, as opposed to when in-house counsel is acting in its capacity as business advisor, corporate officer, or in some other nonlegal capacity.

New York State courts should reconsider and reevaluate the way in which they have extended the doctrine of attorney-client privilege to cases involving in-house counsel. Rather than continue down a conflicting and contradictory path where *purpose* or *content* is analyzed, courts should consider ways by which these two divergent lines of precedent can be reconciled. Adopting a method of reasoning that unifies both the purpose and content modes of analysis, as well as using a signal to denote privileged communication, could effectively be a means to this end. These solutions help to alleviate the struggle that has been plaguing New York courts for many years now, and are an extremely cost-efficient way of doing so. Neither the practice of hiring in-house counsel, nor the need to protect privilege documents from adversarial discovery will fade any time soon. Thus, it is important to take steps now to address and simplify the means by which courts deal with these issues and hopefully achieve a result that equally benefits counsel, client, and judge alike.