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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF APPELLATE ADVOCATES,

Appellant,

-against-

NYSDOCCS,

NO. 91

Respondent.

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92 Franklin Street  
Buffalo, New York  
November 15, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 THE BAILIFF: All please rise. Judges are in the  
2 court.

3 CHIEF JUDGE WILSON: Good afternoon. The next  
4 matter on the calendar is the Matter of Appellate Advocates  
5 v. DOCCS.

6 Counsel?

7 MR. LAZEBNIK: Good afternoon. May it please the  
8 court. I'm Ron Lazebnik on behalf of Appellate Advocates.

9 JUDGE RIVERA: Sorry, could you speak into that  
10 mic?

11 MR. LAZEBNIK: Certainly. Sorry, Your Honor.

12 JUDGE RIVERA: Thank you.

13 MR. LAZEBNIK: Ron Lazebnik on behalf of  
14 Appellate Advocates. I'd like to reserve three minutes of  
15 rebuttal time.

16 CHIEF JUDGE WILSON: I'm sorry, how many minutes?

17 MR. LAZEBNIK: Three minutes.

18 CHIEF JUDGE WILSON: Yes.

19 MR. LAZEBNIK: Thank you. The issue before the  
20 court are an agency's broad use of the attorney-client  
21 privilege and FOIL interagency exemption to withhold  
22 disclosure of certain training materials, such as a  
23 collection of favorable cases to the agency, which  
24 according to Judge Lynch at the Appellate Division, are  
25 devoted solely to informing the Board of Parole of its duly

1 codified statutory and regulatory duties and with other  
2 fact-specific discussion.

3 The supreme court's and Appellate Division's  
4 extension of this court's precedents, starting with Priest  
5 v. Hennessy and Spectrum, create an incentive for  
6 government attorneys to insert themselves into - - -

7 JUDGE GARCIA: And so when you're talking about  
8 Spectrum, are you asking us to apply a different attorney-  
9 client privilege standard in this context than we would in  
10 any other?

11 MR. LAZEBNIK: No, Your Honor. I'm asking for  
12 you to clarify one of the bounds of it. What this court  
13 has said in Hennessy and in Spectrum - - - repeated in  
14 Spectrum - - - is that, at all times, the application of  
15 the attorney-client immunity should always be consistent  
16 with its purpose.

17 JUDGE GARCIA: So the rule we promulgate here  
18 would apply to an attorney-client dispute involving  
19 discovery in any context?

20 MR. LAZEBNIK: Yes, Your Honor.

21 JUDGE GARCIA: Thank you.

22 CHIEF JUDGE WILSON: So if a client asks counsel,  
23 could you send me a set of favorable cases instead of  
24 unfavorable cases for the - - - the bear on either conduct  
25 I've taken or I'm about to take, why wouldn't that be

1 protected?

2 MR. LAZEBNIK: So that - - - that could be  
3 protected, Your Honor. But that's different than what  
4 occurred in this case. Because in the first instance, the  
5 hypothetical you've just posed is client-initiated request.

6 CHIEF JUDGE WILSON: Okay. So let's take it the  
7 other way. Suppose that you are in-house counsel, and you  
8 provide your employer, and you're in the legal department,  
9 with a set of unfavorable cases that relate to a course of  
10 conduct the employer is thinking about taking.

11 MR. LAZEBNIK: So again, it's slightly different  
12 than the issue in this case, and could potentially be the -  
13 - - the question there in the context of whether the  
14 attorney-client privilege should apply is what is that  
15 course of conduct, in the sense of, is it a course of  
16 conduct that everybody knows this - - - in your - - - in  
17 your hypothetical corporation would be taking or is this  
18 something that is currently being considered by - - -

19 CHIEF JUDGE WILSON: Let's suppose - - - let's  
20 suppose it's a course of conduct that the business has  
21 already taken. They have decided to deploy a fleet of  
22 self-driving cars, and they've deployed them. And there  
23 are some unfavorable cases out there, and counsel says, I  
24 want to send you some unfavorable cases having to do with  
25 your liability for the self-driving cars.

1 MR. LAZEBNIK: So I would say, at that moment,  
2 that's when the question arises as to what does the  
3 privilege - - - what does the privilege serve when it's  
4 asserted. Because I think it is important to recognize  
5 that there are two moments in time.

6 There's the moment in time when the communication  
7 occurs, and that's always covered by the confidentiality  
8 that a lawyer would adhere to. And then there's the moment  
9 in time when somebody is requesting the documents, and the  
10 lawyer or the client bring forth the privilege. And that's  
11 the moment that the court is supposed to look at whether  
12 the person asserting the privilege has met the burden to  
13 say this is something that needs to be protected.

14 And in doing so, we ask this court to remind the  
15 court below is that the purpose has to serve the under - -  
16 - the - - - the immunity there has to serve the underlying  
17 purpose of the privilege. And the purpose of the  
18 privilege, as stated in Hennessey and reiterated in - - -

19 JUDGE TROUTMAN: Is the government entitled to  
20 less protections of a privilege? The ability to consult  
21 freely with their counsel than others?

22 MR. LAZEBNIK: I don't believe so, Your Honor.  
23 But there is a little bit of a hitch there. And it's  
24 brought out by the amici, the Coalition for Open  
25 Government.

1           And the - - - the hitch is that, when this court  
2 discussed how the role of an attorney who's in house is a  
3 little bit different than an outside attorney, because  
4 often the - - - the attorney works on both business matters  
5 and legal matters, some of the things the attorneys will  
6 say are not covered and some of the things the attorney  
7 will say will be covered.

8           But when we're talking about a government agency,  
9 as the amici points out, the business of the agency is the  
10 law that it's supposed to enforce and - - - and practice,  
11 and so - - -

12           JUDGE TROUTMAN: And comply - - - and they  
13 consult their counsel to make sure they're in compliance  
14 with the law. Isn't that what is fostered by an attorney-  
15 client privilege? The ability to freely communicate with  
16 your attorney?

17           MR. LAZEBNIK: That is part of the purpose of the  
18 privilege. But the question is: is the agency asking  
19 counsel for advice regarding, in the case of the Board of  
20 Parole, a particular hearing or appeal, or is it asking for  
21 advice on how it's supposed to act at all times?

22           JUDGE HALLIGAN: It's your view that - - - that  
23 the privilege only extends to the first category, in other  
24 words, that - - - that it has to be with respect to some  
25 specific interaction. And - - - and if so, where, in the

1 case law, do you see that constraint?

2 MR. LAZEBNIK: So I think that's a little narrow  
3 than I need - - - need to say.

4 JUDGE HALLIGAN: Please tell me what to mean. I  
5 didn't mean to put words in your mouth.

6 MR. LAZEBNIK: So in the first instance, the  
7 attorney - - - this court has indicated, right, that the  
8 attorney-client privilege is covering statements made by  
9 the client seeking legal advice. And then a natural  
10 extension of that - - - that that is discussed in - - - in  
11 Priest, Hennessey - - - Priest, Spectrum, and Rossi is that  
12 some communications from counsel to the client also need to  
13 be protected to shield those confidences.

14 JUDGE HALLIGAN: Including, I think, Spectrum  
15 says where the communication is intended to guide the  
16 client's course of conduct. And so what I'm grappling with  
17 here is, it seems to me, if you agree, as I think you said  
18 you do, that we would judge this under the same standard  
19 that we would judge invocation of the privilege in another  
20 circumstance.

21 But there are a lot of attorney-client  
22 relationships where the attorney is well aware of the  
23 ongoing business of the client and - - - and the choices  
24 that they have to make every day, and may provide guidance,  
25 not always at the explicit request, but under the

1 understanding that that is their role. So what do we do  
2 with that?

3 MR. LAZEBNIK: So in those instances, this is  
4 where the - - - the federal courts commentaries are  
5 helpful. But also, there was at least one lower court here  
6 in New York that - - - that kind of touched on this. When  
7 the attorney is merely reciting the legal standard, right?  
8 That - - - and reciting it does not reveal any of the  
9 client's confidences beyond what is already known by the  
10 public, and this is especially true in the case of an  
11 agency, there is no function served by shielding that  
12 communication because you are not revealing the client's  
13 confidences when you're talking about the fact that the  
14 Board of Parole has to adhere to the laws passed by the  
15 legislature. That's too broad of a category. What - - -

16 JUDGE HALLIGAN: You think that it has to reveal  
17 the client's confidences as opposed to telling the client,  
18 given that the law is X, in other words, here's a decision,  
19 you should consider whether and how to conform your  
20 specific conduct accordingly?

21 MR. LAZEBNIK: I think the - - - I'm trying to  
22 parse the hypothetical you just posed, Your Honor, to make  
23 sure I understand it correctly. And what - - - what I'm  
24 saying is that when it's at a level where the lawyer  
25 doesn't have to recite any special - - - any legal position



1 other than to say, for instance, you are a pharmaceutical  
2 company, the FDA has passed a new law that you have to  
3 adhere to, that is a very high level. And in fact, most of  
4 the time, firms - - -

5 CHIEF JUDGE WILSON: Well, is some judgment there  
6 about whether the client does have to adhere to that new  
7 law?

8 MR. LAZEBNIK: There - - - there might be some  
9 judgment, but that go - - - but that is why we're not  
10 pushing for this redefinition of what is the professional  
11 skills or legal advice. It's whether or not the legal  
12 advice or professional skill rises to the - - - to the  
13 level that it needs to be protected to shield the client's  
14 previous communications. Because at the core, this  
15 immunity is about making sure that the client feels  
16 comfortable coming to an attorney with both good and bad  
17 facts, not just when something has occurred, but in  
18 planning.

19 JUDGE CANNATARO: So Counsel, going back to this  
20 idea of list, if - - - if - - - if you were to list a  
21 series of adverse decisions, and as the attorney reviewing  
22 those decisions, highlight the conduct that the court found  
23 objectionable, you know, to - - - to make it an adverse  
24 decision, that, to me, seems to have a sort of cautionary  
25 tone to it, which is, these are the things that you should

1 not do in the conduct that - - - that is part of your  
2 business. What is the problem with that under your role or  
3 is there no problem?

4 MR. LAZEBNIK: So - - - so I'm not sure that  
5 there is a problem. But I would point out that I don't  
6 know exactly what the - - - the packet of cases looks like  
7 in this case. Judge Lynch's description of them was that  
8 the only legal advice associated with it was that it was  
9 essentially packeted as unfavorable cases in one hand and  
10 favorable cases in the other.

11 JUDGE CANNATARO: I'm just positing a  
12 hypothetical because I don't want to - - - I don't want to  
13 violate any confidentiality or anything like that. But if  
14 you were to - - - if the attorney were to do some  
15 interpretive gloss on the - - - on the precedent, the case  
16 and say, you know, these are the things that the court  
17 didn't like, without - - - without saying, do it, don't do  
18 it, avoid it or anything like that, would you agree that  
19 there's sort of a - - -

20 MR. LAZEBNIK: Yeah.

21 JUDGE CANNATARO: - - - cautionary aspect to  
22 that?

23 MR. LAZEBNIK: There - - - there is. And I think  
24 the tests we're asking for still allows for protection in  
25 that instance versus how Judge Lynch described the

1 documents here. The - - -

2 JUDGE TROUTMAN: What is fostered by it being  
3 required that they give you their legal research?

4 MR. LAZEBNIK: You mean, why does the court  
5 advocates want that?

6 JUDGE TROUTMAN: Let's just say that you've  
7 informed your client, this - - - this is a case law; you  
8 review it. Why - - - what public policy is encouraged by  
9 that?

10 MR. LAZEBNIK: So the - - - in the first  
11 instance, I would point out that these documents are issued  
12 because the agency itself identified them as training  
13 materials for the board.

14 And what the petitioner in the case requested  
15 was, what are the documents that you use to help train the  
16 board? Now, the - - - technically, FOIL does not require a  
17 petitioner to actually say why they want the documents.  
18 FOIL just provides a mechanism for the petitioner to  
19 request them.

20 But here, on the public policy side, as - - - as  
21 we discussed and as the amici parole prep indicate further,  
22 the parole system is one that has a lot of discretion in  
23 the board's decisions and not a lot of review. And that's  
24 because, for a person to appeal a parole decision, they  
25 have to first appeal within the agency and then file an

1 Article 78 petition.

2 And what often happens is, by the time the  
3 Article 78 petition is heard and considered, a new parole  
4 hearing is scheduled because there's a twenty-four-month  
5 period. And so the person has to decide - - -

6 JUDGE TROUTMAN: The point is?

7 MR. LAZEBNIK: The person has to decide whether  
8 or not they're going to continue the appeal or - - - or sit  
9 for a new hearing because sitting for a new hearing often  
10 moves out the petition. And the reason - - -

11 JUDGE TROUTMAN: And how is that impacted by what  
12 is disclosed or not disclosed?

13 MR. LAZEBNIK: So the - - - the parole - - - the  
14 individuals who are seeking parole don't have the right of  
15 counsel in that moment. They - - - the only thing they can  
16 do is prepare in advance for the hearing. And the way that  
17 they can prepare is to understand better how the Parole  
18 Board is going to consider them. That is, what conduct can  
19 they begin to consider or to bring up, that they have done,  
20 during a hearing for parole that - - - that might persuade  
21 the board that they can - - -

22 JUDGE RIVERA: But - - - but that just means that  
23 a person who doesn't have counsel is in a difficult  
24 position of having to, in this - - - in this example,  
25 persuade a group of people based on the law that that group



1 of people has to abide by.

2 So I'm not really sure how having the in-house  
3 counsel, as you've referred to the lawyer - - - lawyers'  
4 training material matters because it's - - - or - - - or  
5 helps or pushes this public policy that, I think, you're  
6 trying to refer to when it's - - - it's the status of the  
7 law. You make your argument, if - - - again, if you think  
8 that the parole violation or the - - - excuse me, the  
9 denial of parole violates the law, then you have the legal  
10 arguments.

11 MR. LAZEBNIK: Well, it would - - - what it would  
12 help, though, is both in the moment of preparation, but  
13 also in - - - to the extent that they are denied parole.  
14 It puts them in a better position to consider whether there  
15 is a claim that the parole board acted against the - - -  
16 the guidance.

17 That even though they were on notice that they  
18 were supposed to follow certain factors or not - - - not  
19 consider certain factors, something in either their  
20 decision on parole or decision on appeal does not conform  
21 with that. And it creates more room for people, both who  
22 are incarcerated and seeking parole, those who want to be  
23 watchdogs of whether the Board of Parole is too lenient,  
24 and those who want to make sure that the - - -

25 JUDGE RIVERA: You see. That's why I'm having

1 difficulty with this argument. All that means is that a  
2 lawyer has advised the board members - - - the  
3 commissioners - - - as to the state of the law based on  
4 the lawyer's opinion, what's the state of the law, and the  
5 persons denied parole wants to argue that they're not in  
6 compliance with the law. That's your argument. They're  
7 not in compliance with the law.

8 MR. LAZEBNIK: Well, that's the argument with  
9 regard to the particular document. Such an analysis would  
10 have to occur for each of the documents. And there are  
11 additional policy considerations that might be considered  
12 or - - - or weighed differently, but yes. So this court  
13 can find that public policy does not require.

14 But separate from public policy, there is the  
15 question of, is the immunity actually served by shielding  
16 these documents in the first place? That is, does - - - is  
17 the Board of Parole harmed by having the fact that their  
18 attorney let them know that this case exists, in some way,  
19 affects their confidence in being able to come up to their  
20 attorney and ask a question.

21 JUDGE RIVERA: But is that the question of  
22 whether the free flow between the attorney and the client  
23 is going to be chilled by the fact that something like  
24 these materials have been made available - - -

25 MR. LAZEBNIK: You're - - -



1 JUDGE RIVERA: - - - pursuant to this FOIL  
2 request?

3 MR. LAZEBNIK: The more recent cases refer to it  
4 as a free flow conversation. The original purpose laid out  
5 in Hennessy is more about - - - is more client focused and  
6 about thinking about whether the client would be chilled in  
7 seeking it. Which makes sense, because at the end of the  
8 day, the purpose of the privilege is to incentivize the  
9 client to speak to the attorney. The coverage of what the  
10 attorney says to the client is ancillary to that goal.

11 CHIEF JUDGE WILSON: I have to say that your  
12 argument scares me as somebody who was responsible for the  
13 production and receipt of hundreds of millions of pages of  
14 documents and determinations, probably, of millions of  
15 documents over thirty years in private practice. The  
16 thought that I would have to have people examine the public  
17 policy implication, which turns on the substance of what's  
18 in those documents, rather than simply, was it a  
19 communication made by an attorney for the purpose of  
20 conveying legal advice is really frightening.

21 MR. LAZEBNIK: But Your Honor, it doesn't  
22 actually - - - what we're pushing for is, one, not to  
23 change what's already made clear by your precedent, because  
24 in most instances, most of the documents that Your Honor  
25 probably reviewed were communications where the client

1 asked the question and the lawyer answered that question.

2 CHIEF JUDGE WILSON: No.

3 MR. LAZEBNIK: The lawyer knowing something - - -

4 CHIEF JUDGE WILSON: No. At least a large number  
5 or maybe more were where the lawyer initiated, you know,  
6 said I'm advising you about something.

7 MR. LAZEBNIK: So - - - so if the lawyer - - -  
8 the precedent, both in federal court and I think by this  
9 court, is if the lawyer is acting on facts that they know  
10 that are specific to this client and letting them know the  
11 - - - a legal position, that's all the privilege log has to  
12 say is: providing legal advice regarding x based on  
13 previous communications, right? The question that is posed  
14 - - -

15 CHIEF JUDGE WILSON: I mean, I, myself, have sent  
16 memoranda to - - - legal memoranda to a former client or  
17 clients saying there's a new statute or a new regulation  
18 and it may affect what you do the following way, and you  
19 should be careful with the following things.

20 MR. LAZEBNIK: So - - - so what's interesting  
21 about that hypothetical is something very similar occurs  
22 very frequently by firms here in New York all the time.  
23 They send circulars to their client - - -

24 CHIEF JUDGE WILSON: There's a difference. Those  
25 are public and then there's no confidentiality.





1 MR. LAZEBNIK: Well, if you think about it,  
2 though, right? If this was truly legal advice that was  
3 important to their client, the duty of confidentiality  
4 would say, no, don't make that public. You have to - - -  
5 you have to send each one of them that - - - in - - - in  
6 secret to let them know. But the very fact that we say,  
7 oh, this is public, this is - - - it's - - - it's for this  
8 very reason, Your Honor. It's at a level of generality  
9 that we're not concerned about when the lawyers say, oh,  
10 here's a new obligation by the SEC.

11 JUDGE TROUTMAN: Aren't you creating a potential  
12 where the client wouldn't want this information because  
13 you're going to use it against them as opposed to,  
14 prospectively, again, being in compliance with the law.  
15 You are making everything they do subject to disclosure and  
16 discovery by people outside of that attorney-client  
17 relationship. Why should they bother to take those  
18 proactive measures?

19 MR. LAZEBNIK: So I'm not sure that laying out  
20 instances where an attorney knows that - - - and again,  
21 I'll use the pharmaceutical industry example, right? That  
22 the attorney knows a client in the pharmaceutical industry  
23 and, you know, a drug manufacturer.

24 The attorney becomes aware FDA publishes a new -  
25 - - a new - - - a law, right? I - - - I don't know that



1 the client wouldn't want the attorney to send them, oh, by  
2 the way, here's an update, regardless of whether or not  
3 that - - - that communication is a privilege.

4 Well, the follow up, though, the - - - the  
5 question that the client then asks the attorney, so what  
6 does that mean to me, right? And - - - and asks, so what  
7 does this mean about this new product we were thinking  
8 about? That, we agree, is a privileged conversation at  
9 that point. The question - - -

10 JUDGE TROUTMAN: So again then, you get a heads  
11 up on what they've conveyed - - - the attorney has conveyed  
12 to his client. Here's information. I've collected these  
13 cases. And you're saying that you're entitled to all of  
14 that.

15 MR. LAZEBNIK: In - - - in certain instances,  
16 yes. If all the attorney did is say, oh, here's a new case  
17 that relates to you, I don't think that this court's  
18 guidance on when the immunity should apply rises to that  
19 level. That is - - - that is too high of a level of  
20 generality.

21 JUDGE GARCIA: Let's say it's an accounting fraud  
22 case from the SEC with a specific problem in it with a  
23 internal employee doing something. And you say, here, you  
24 know, this case may apply to you. You get that?

25 MR. LAZEBNIK: I'm sorry, did - - -

1 JUDGE GARCIA: So you send the case over, and  
2 like the Chief Judge, I've had these types of client  
3 relationships where you send advisory materials out and new  
4 decisions. But let's say you send one of those out, it's  
5 an SEC decision or whatever, enforcement decision, and it  
6 says specific facts on an internal control failed. There  
7 was a particular individual with a title that committed  
8 some type of conduct that the SEC found it had a problem  
9 with. And I send that to my client, and I say, you really  
10 want to look at this one; this may apply to you.

11 MR. LAZEBNIK: So if you say you may really want  
12 to look at this one; this could apply to you, and it's just  
13 because that they are in the industry that the SEC  
14 regulates, that's too high of a level.

15 JUDGE GARCIA: So who makes that decision? So  
16 then I would have to submit all that to a judge, and a  
17 judgment would then conduct some type of inquiry to see how  
18 far that aligns with what you're doing?

19 MR. LAZEBNIK: To some extent, yes, Your Honor.  
20 But - - - but that's the whole point - - -

21 JUDGE TROUTMAN: Aren't you creating them even  
22 greater unreasonable burden upon trial courts? I've been  
23 in a position where banker boxes have filled my office on a  
24 single case. How can the court ever, in a timely manner,  
25 resolve all of those?

1 MR. LAZEBNIK: So it's a fair question, Your  
2 Honor. But the issue is - - - and it's important to  
3 remember that, ultimately, it's not that the court makes  
4 these decisions in a vacuum. It is the party that's  
5 asserting the privilege that has the burden to convince the  
6 court - - -

7 JUDGE TROUTMAN: Right. But you're talking about  
8 an in-camera review. If there's a dispute, you create a  
9 privilege log, there's an in-camera review process, and  
10 ultimately, each side's saying it represents one thing or  
11 the other. You're creating an - - - an extra onerous  
12 burden. I will tell you, trial judges hate in-cameras, but  
13 it is a process that they're required to. But what you're  
14 suggesting here seems even more difficult - - -

15 MR. LAZEBNIK: So I - - -

16 JUDGE TROUTMAN: - - - or unnecessary, arguably.

17 MR. LAZEBNIK: I would say to Your Honor that,  
18 one, I don't think attorneys like in camera or privilege  
19 log reviews any more than judges do. But the - - - the  
20 thing to highlight there is that the in-camera review  
21 becomes necessary.

22 This is often when it's come up at the Appellate  
23 Division level. The in-camera review is noted as necessary  
24 when the party, in their privilege log and affirmations to  
25 support the privilege log, have not supplied the court with

1 sufficient information to say - - -

2 JUDGE GARCIA: My hypothetical, would the company  
3 have to come in and make a representation, yeah, our CFO  
4 was doing the same thing?

5 MR. LAZEBNIK: So they - - - if - - - if they  
6 said that the - - - if the attorney in this hypothetical  
7 said, you know - - -

8 JUDGE GARCIA: Well, the attorney just sends it  
9 over and says, look, you might want to look at this case.  
10 And it involves a CFO who's committing some type of what  
11 the SEC considers an improper act. And then the company  
12 would have to come into a judge and say, yeah, our CFO is  
13 doing the same thing.

14 MR. LAZEBNIK: So if the attorney sends it to the  
15 company sua sponte without knowing any worries about the  
16 CFOs conduct a priori, that communication does not - - -

17 JUDGE GARCIA: Let's say there's nothing on the  
18 face that indicates that one way or another.

19 MR. LAZEBNIK: So that original communication  
20 from the attorney to the client wouldn't need to be  
21 covered. The follow-ups by the clients to the attorney  
22 would be covered.

23 JUDGE SINGAS: But that's punishing the lawyer  
24 who's being proactive in serving their client by saying,  
25 look, I'm anticipating what the issues are here. We have

1 this relationship. It's been ongoing for years. I know  
2 what - - - you know, I know what your concerns are. I know  
3 what we've dealt with before. And here's this case. And  
4 you - - - you should look at it.

5 MR. LAZEBNIK: So I don't - - - I don't think we  
6 are because, again, the only question is if the knowledge  
7 that the attorney sent it to the client somehow chills the  
8 client from following up, that is when the immunity is  
9 triggered, right? It is not a punishment of the attorney,  
10 right? It is - - - and that is why attorneys often at - -  
11 -

12 JUDGE TROUTMAN: But there's still - - -

13 MR. LAZEBNIK: - - - the high level say - - -

14 JUDGE TROUTMAN: There's still the free flow of  
15 information. Attorneys who have an ongoing retainer  
16 agreement are going to be reluctant to just send over  
17 things because of the rule that you're proposing. It seems  
18 like everything is subject to being turned over.

19 MR. LAZEBNIK: If the attorney is basing it just  
20 on a high-level generality of this is a person in this  
21 industry and therefore this law applies to it, that is not  
22 something that this court should endorse as something that  
23 - - -

24 JUDGE RIVERA: No, no. I think - - - I may have  
25 misunderstood my colleagues' hypotheticals, but I'll say

1 I'm understanding this back and forth as, you have a  
2 client. You understand the needs of the client. You've  
3 made a legal assessment as to whether or not some bit of  
4 information, whether it be a recent statute or regulation,  
5 cases, whatever it may be, that somehow may affect that  
6 client's conduct. And you're - - - you're putting them on  
7 the alert about that. They may follow up, but they may  
8 not.

9 MR. LAZEBNIK: So in those instances, right?  
10 This goes to your - - - this court's precedent to say, what  
11 the attorney's advice in that moment is based on past  
12 confidences, and that is still covered by the privilege,  
13 right? If - - - if - - -

14 JUDGE GARCIA: How do you prove that then on a  
15 case-by-case basis? The client would have to come in and  
16 tell a judge, yeah, they knew my CFO was committing fraud.  
17 You kind of win the battle there, but I'm not sure about  
18 the war.

19 MR. LAZEBNIK: If the - - - if the attorney had  
20 previously had conversations with the client saying we're  
21 concerned about - - -

22 CHIEF JUDGE WILSON: So - - - but then do you  
23 have to just - - -

24 MR. LAZEBNIK: I think that the - - -

25 CHIEF JUDGE WILSON: The question is: do you

1 have to disclose that either on the privilege log or in  
2 court to be able to sustain the privilege?

3 MR. LAZEBNIK: Right.

4 CHIEF JUDGE WILSON: Because you say it's an  
5 element of what you have to prove.

6 MR. LAZEBNIK: I think on the privilege log, you  
7 do have to say that the communication from the attorney to  
8 the client is connected to something, right? Otherwise - -  
9 -

10 CHIEF JUDGE WILSON: You can't say that. You  
11 have to say not connected to something. That's not going  
12 to be enough, right?

13 MR. LAZEBNIK: Though, there's some - - -

14 CHIEF JUDGE WILSON: Connected - - -

15 MR. LAZEBNIK: - - - there's something - - -

16 CHIEF JUDGE WILSON: Connected to the possibility  
17 of securities fraud under section 20, right?

18 MR. LAZEBNIK: So - - - so - - -

19 CHIEF JUDGE WILSON: Which is exactly that then  
20 breaches the privilege.

21 MR. LAZEBNIK: I - - - I think the - - - I - - -  
22 if you go at that granularity, yes. But you could say - -  
23 -

24 CHIEF JUDGE WILSON: If you don't, the log is  
25 going to be insufficient. And then you got to go to court





1 with an affidavit saying the same thing, and maybe file  
2 that under the seal. But this is a huge labor.

3 MR. LAZEBNIK: The log could say advice sent to  
4 client based on previous conversations related to  
5 accounting.

6 JUDGE HALLIGAN: But that alone, my guess is that  
7 happens once, and a client will be very reluctant to share  
8 a range of information which an attorney might find very  
9 useful in terms of guiding compliance on the front end.

10 MR. LAZEBNIK: I disagree, Your Honor, because -  
11 - - and this is maybe when it's helpful to go back to the -  
12 - - the documents here versus the broader question because  
13 the documents here suggest - - - for instance, the  
14 interview checklist, right? Is something that everybody  
15 knows the Board of Parole conducts the interviews.

16 JUDGE HALLIGAN: Let's take the example you just  
17 gave us, right? If in a privilege log I say, you know,  
18 advice provided relating to conversation with respect to  
19 accounting, I can guess what one of the questions in a  
20 deposition is going to be. And it's going to be, you know,  
21 exploring that particular entry in a privilege log.

22 So, you know, even at some level of generality,  
23 it seems there is a real risk that you may chill the kind  
24 of communication that can actually be very, very beneficial  
25 because it can help an attorney guide compliance,



1 especially on the front end.

2 MR. LAZEBNIK: So I would say, part of it is only  
3 if the client and the attorney want to withhold that  
4 original communication to say, like, oh, the fact that the  
5 attorney sent over a document saying, you know, that here's  
6 a law about fraud.

7 Somebody had to make the call to say, you know  
8 what? That's something we want protected. And then it  
9 gets into this quandary of, well, what can we say to  
10 protect it? But I want to highlight that what we're  
11 talking about is instances where there is no fact-specific  
12 issue, right? That the - - - the lawyer is sending over  
13 information to the client without it being related to a  
14 known legal position.

15 JUDGE RIVERA: The - - - this seems a bit  
16 nonsensical to me. We're talking about Board of Paroles.  
17 The lawyer knows what the Board of Paroles' duties and  
18 obligations are, just as the commissioners, hopefully, know  
19 what their duties and obligations are under the law. And  
20 the lawyer is making decisions based on that to advise  
21 commissioners how to comply with the law to do exactly what  
22 I understand you are concerned about, right? The proper  
23 determinations of these parole applications. So I'm not  
24 really understanding - - -

25 MR. LAZEBNIK: So - - - so - - -



1 JUDGE RIVERA: - - - this argument right now.

2 MR. LAZEBNIK: So - - -

3 JUDGE RIVERA: It sounds like - - - if I may, it  
4 sounds to me like you're saying, if the lawyer had  
5 communicated to one or more commissioners about a  
6 particular application about a particular parolee interview  
7 that's in a parole, that would be covered. Yeah. But if  
8 the lawyer, knowing that this is the - - - the duty and  
9 responsibility of the members of the board, determines in -  
10 - - in their analysis based on their legal skill, based on  
11 their understanding of the law, that there's something that  
12 they wish to provide to the board, vis-a-vis that  
13 particular duty and obligation, somehow that is not  
14 covered. And I'm - - - I'm having great difficulty  
15 understanding - - -

16 MR. LAZEBNIK: So - - -

17 JUDGE RIVERA: - - - that. I can't find  
18 anything. You're - - - you're right. Of course, if it's  
19 an individual case, yes, the privilege applies. But I - -  
20 - I can't find anything in the law that says if it's not  
21 with respect to a particular case but about the work of  
22 this particular board, that somehow all of a sudden, they  
23 are stripped of the privilege.

24 MR. LAZEBNIK: So this is where Coastal Gas and  
25 Tax Analysts and the other federal cases are helpful, Your

1 Honor. Because what - - - what it highlights is the  
2 concept of agency policy, which doesn't necessarily apply  
3 in in-house positions, right? Where the lawyer is  
4 assisting in the crafting of not just advising the - - -  
5 the client about a particular matter, but actually the  
6 policy that the agency is going to follow. And that does  
7 have a heightened level of interest by the public and  
8 should be more scrutinized than, you know, a typical  
9 communication even though - - -

10 JUDGE RIVERA: Policy versus individual  
11 determinations?

12 MR. LAZEBNIK: The individual determination is  
13 also protected. The - - - but in the context of an agency  
14 counsel telling the agency how to conduct itself - - -

15 JUDGE RIVERA: Can you give me an example of - -  
16 - of how you would distinguish those two? Give me - - -

17 MR. LAZEBNIK: They're not - - -

18 JUDGE RIVERA: - - - a hypothetical example. Of  
19 course, you haven't seen the documents.

20 MR. LAZEBNIK: Yeah. So - - - so I - - - to me,  
21 they're not ones that I have to distinguish. But I - - -  
22 but I guess, like, in one instance, you have, you know, a  
23 pending hearing or appeal, and counsel says, okay, given  
24 the facts and circumstances of this particular appeal, we  
25 recommend the following to the board, right? That is the

1 prototypical conversation between attorney and client that  
2 we all agree is protected.

3 The - - - the other one that - - - case is like  
4 Coastal Gas are about is when the agency is saying how am I  
5 supposed to conduct myself at all times? And what the  
6 federal courts have said is that when you're looking at how  
7 the agency is supposed to conduct itself at all times,  
8 privilege doesn't trump the - - - the need for the public  
9 to know what's going on there. And the immunity isn't  
10 served by a person knowing the - - - the - - - the neutral  
11 contours of how an officer of the agency is supposed to - -  
12 -

13 CHIEF JUDGE WILSON: And this under FOIA is sort  
14 of the working law of the agency doctrine, right? That  
15 that's discoverable under - - - under FOIA. But we're not  
16 under FOIA.

17 MR. LAZEBNIK: We are under FOIA.

18 CHIEF JUDGE WILSON: We're under FOIL.

19 MR. LAZEBNIK: Well, so - - - I apologize here.

20 CHIEF JUDGE WILSON: But the statute is different  
21 in that regard.

22 MR. LAZEBNIK: So this court has previously said  
23 that the guidance of FOIA is very instructive to FOIL.

24 CHIEF JUDGE WILSON: Right.

25 MR. LAZEBNIK: This is apparently not an issue



1 that has come up before the court. The other issues that  
2 have come up before the court, the - - - the court has  
3 found how the federal - - -

4 CHIEF JUDGE WILSON: How is the statute is  
5 different in this regard?

6 MR. LAZEBNIK: The statute is different in this  
7 regard in that the two sections of FOIL that were cited by  
8 the government here are actually one statute under FOIA.  
9 They are Exemption 5 under FOIA, whereas here, it's  
10 87(g) (a) and 87 - - - 87(2) (a) and 87(2) (g). But under  
11 FOIA, the - - - those two are actually the same because  
12 they treat the - - - the claim of privilege and inter  
13 agency exemptions as one kind of potential thing that we  
14 have to be concerned about.

15 And in those instances, the courts have said both  
16 the - - - the attorney-client privilege and the interagency  
17 exemption does not cover the neutral analysis of an  
18 agency's obligation under the law.

19 JUDGE HALLIGAN: The federal - - -

20 JUDGE CANNATARO: Counsel, can I go back, I'm  
21 sorry, very quickly to your distinction between policy and  
22 case advice, which I appreciated. It was easy to  
23 understand. I want to try to put it in the middle of that.  
24 If counsel is aware that there's a recurrent issue that  
25 arises in cases, but is not, at the moment, thinking of

1 some specific case, but is offering advice to - - -  
2 curative to whatever that recurring issue is so that it  
3 could be applied in some future case. Assuming the problem  
4 arises with some frequency, where are we then? Are we  
5 making policy or are we giving advice?

6 MR. LAZEBNIK: So - - - so in the first - - - so  
7 you - - - you could say that if counsel is merely pointing  
8 out a suggestion and not an instruction of how things are  
9 supposed to - - -

10 JUDGE CANNATARO: It's more like, I know this has  
11 been a problem in the past that comes up a lot. Here's  
12 something that you should know, and - - - and this - - -  
13 this might help you deal with this problem.

14 MR. LAZEBNIK: So if the Board of Parole would  
15 then follow that guidance, that in that moment, is creating  
16 a new agency policy.

17 JUDGE CANNATARO: Okay.

18 JUDGE HALLIGAN: In the federal cases, can you  
19 point me toward anything with respect to whether or not the  
20 attorney-client privilege, as it's set forth under  
21 exemption 5, is contiguous with the privilege that it  
22 otherwise applies in any dispute outside of the FOIL  
23 context?

24 MR. LAZEBNIK: I think the - - - the way Coastal  
25 Gas treats it and whatnot, they - - - they all go from the

1 same Supreme Court cases they - - - they started - - -

2 JUDGE HALLIGAN: Upjohn, et cetera, you mean?

3 MR. LAZEBNIK: They start with Upjohn, and then -  
4 - - and then they apply the same kind of attorney-client  
5 privilege test as far as I understand it.

6 CHIEF JUDGE WILSON: Thank you, Counsel.

7 MR. LAZEBNIK: Thank you.

8 MR. BRADY: Good afternoon, Your Honors. May it  
9 please the court. Frank Brady on behalf of the respondent  
10 in this case.

11 The documents that lie at the center of this case  
12 go to the heart of the attorney-client privilege. As this  
13 court said in Spectrum systems, legal advice is not only  
14 given during the course of litigation or to - - - in  
15 response to a concrete, real-world legal problem, but legal  
16 advice is also given to avoid litigation, to facilitate  
17 compliance with the law, or to guide a client's course of  
18 action.

19 And that's exactly what these documents do. The  
20 - - - the word decisions regarding release of adults and  
21 minor offenders are - - - are - - - involve a complex set  
22 of statutes and regulations, and are governed by a lot of  
23 decisional law.

24 JUDGE HALLIGAN: Counsel, can I ask you - - -

25 MR. BRADY: And so - - -





1           JUDGE HALLIGAN: Can I ask you a few hypothetical  
2 questions about the decisions, not with respect to anything  
3 specifically here? But if counsel were to forward all  
4 decisions from a particular court, say, the US Supreme  
5 Court, any court, to a client on a broad topic, so for  
6 example, to a pharmaceutical company for anything involving  
7 pharmaceutical companies with no commentary, just forwarded  
8 everything, would that be protected in your view?

9           MR. BRADY: It would because I think the  
10 selection of the - - - the legal materials or legal  
11 authorities involves professional judgment.

12           JUDGE HALLIGAN: What if I'm simply using a  
13 search term such as pharmaceutical? Take something very  
14 broad. Or let's say it's a tobacco company, and every  
15 decision that has the word tobacco in the syllabus, I  
16 forward.

17           MR. BRADY: If the intent was to confidentially  
18 advise the client, and the selection of the - - - the  
19 selection of the materials was relevant to that advice, I  
20 would say that would - - -

21           JUDGE HALLIGAN: If there's - - -

22           MR. BRADY: - - - that would be covered. There's  
23 no - - -

24           JUDGE HALLIGAN: If there's no culling - - -

25           MR. BRADY: Excuse me.



1 JUDGE HALLIGAN: If there's no culling of - - -  
2 of decisions which is reflective of advice.

3 MR. BRADY: If there was no culling of decisions  
4 which was reflective of advice, then it wouldn't be advice,  
5 and it wouldn't be covered by the attorney-client.

6 JUDGE HALLIGAN: And if I am forwarding in  
7 separate buckets every case in which there is an affirmance  
8 and every case in which there is a reversal, what I'm  
9 trying to understand is, at what point do we start to see  
10 some legal advice, not with respect to anything here, but  
11 more generally?

12 MR. BRADY: I think that's a - - - it's a  
13 difficult hypothetical because normally when an attorney is  
14 giving, whether it be case law or statutory law to a  
15 client, it comes in the context - - - if it's a - - - it  
16 comes in the context of giving legal advice. It's - - -  
17 it's not - - - it's not for nothing.

18 So you know, I - - - I - - - as an attorney, I  
19 would not want it to be disclosed what - - - what  
20 authorities I had chosen to give my client on any  
21 particular issue. Because really, that - - - the - - -  
22 what I choose to provide my client is a window into what  
23 advice or what I'm thinking about his position or what they  
24 should do or how they should comply with the law. So I  
25 think it's very - - - it's a very close question, Your

1 Honor.

2 JUDGE RIVERA: What if it's not - - - what if  
3 it's not a material that deals with a substantive issue?  
4 And take it this way. Let's - - - let's take this  
5 hypothetical. Let's say I'm on the New York City  
6 Commission for Human Rights, and counsel - - - in-house  
7 counsel, let's call it that; counsel for the commission  
8 provides a book that contains the statutes that create the  
9 commission and sets out how commissioners are appointed.  
10 And again, this is not related to this board. I'm making a  
11 hypothetical.

12 And said this is the statutes - - - these are the  
13 statutes that apply to you, so - - - and in no way contains  
14 any analysis. It's different from what I think you were  
15 trying to work through with Judge Halligan, which is, there  
16 is particular legal reasoning that's going behind, let me  
17 choose these cases; let me not choose those cases. Let me  
18 call these favorable; let me call those unfavorable. This  
19 is just - - - this is the law that deals with you and your  
20 work.

21 MR. BRADY: I would say that's the working law of  
22 the agency. That's not attorney-client privilege. You  
23 know, that's - - - that's a, you know, manual or something  
24 that's for generically - - -

25 JUDGE RIVERA: So that book could be turned over.



1 MR. BRADY: Yes. I don't - - - it wouldn't  
2 contain legal advice. It - - - it simply would be the  
3 working law of the agency, you know.

4 JUDGE RIVERA: Now, what if within that book, as  
5 I've described it, you do have sections that can be  
6 completely compartmentalized that do include some legal  
7 analysis.

8 MR. BRADY: Well, then I think it would - - -

9 JUDGE RIVERA: You'll just redact them?

10 MR. BRADY: Well, this counsel was giving it to  
11 who?

12 JUDGE RIVERA: To - - - I'm sorry.

13 MR. BRADY: In - - - in that hypothetical, I'd  
14 have to know what the context was, you know, that that was  
15 happening. It's not just the content, it's also the  
16 context, it's the circumstances, you know. All these cases  
17 are very fact intensive. And they - - - they turn on  
18 unique facts as we apply these - - - these general  
19 principles.

20 JUDGE GARCIA: I also have a different type of  
21 question. So we've heard from the appellant that we're  
22 applying the same standard for attorney-client privilege in  
23 this context, as we would Spectrum and the other cases,  
24 right? And we all agree on that. But does the fact that  
25 this is a FOIL proceeding have any bearing on the way we

1 approach these issues? Because FOIL, obviously, is very  
2 strong policy in this state, right? Strong policy in  
3 disclosure, different in ways than civil discovery. So how  
4 do we factor that in?

5 MR. BRADY: Well, you know, FOIL, obviously, is  
6 supposed to be narrowly construed because of the important  
7 public policy interest in transparency. And the attorney-  
8 client privilege itself is supposed to be observed  
9 cautiously.

10 So we have two of these kind of yellow lights, if  
11 you will. But that doesn't - - - but the - - - so I mean,  
12 you approach it that way. You will have to be cautious  
13 about it because there is an obvious tension between the -  
14 - - the liberal discovery in the state and the attorney-  
15 client privilege. But the - - - this court has been pretty  
16 robust in saying that the attorney-client privilege  
17 conserves important interest in allowing unfiltered  
18 conversations to go on between attorneys and their clients.

19 And in fact, in a government context, that is in  
20 the public's interest to - - - to enhance compliance with  
21 the law. When there are issues that an agency is  
22 struggling with or that - - - you know, it's very important  
23 that they can have this unfiltered, unfettered  
24 conversations with counsel about the different topics that  
25 the agency has to address.

1 JUDGE SINGAS: Doesn't the public - - -

2 JUDGE GARCIA: And I suppose agencies do hire  
3 outside counsel, right?

4 MR. BRADY: I think they do in specific - - -

5 JUDGE GARCIA: Even federal government, I think  
6 they do.

7 MR. BRADY: I think they maybe do for special  
8 projects.

9 JUDGE GARCIA: Thank you.

10 JUDGE SINGAS: Doesn't the public have an  
11 interest in - - - in knowing how policy is come to in these  
12 agencies? Like, how does that fit in your analysis? The  
13 public has a right to know how the government agencies make  
14 their determinations. And I think it enhances, you know,  
15 their desire to see how government functions, and I think  
16 we should be accommodating of that.

17 MR. BRADY: Well, I think there's - - - there's  
18 obviously, a competing interest in transparency and - - -  
19 and - - - and the public having a right to know. But, you  
20 know, the public - - - and - - - and the petitioners have  
21 pointed out that, you know, people who appear before the  
22 Parole Board have a special interest in - - - in - - - you  
23 know, they want to learn what the advice that counsel is -  
24 - - is giving to the board about their statutory duties,  
25 you know, I - - - I understand that.

1           But I think there's a more important public - - -  
2 public policy interest on the other side, and that is to  
3 ensure - - - to encourage these kind of conversations to go  
4 on between agency counsel and the people who operate the  
5 agency so they can get unfiltered advice so they can  
6 discuss what the statutory and regulatory structure  
7 requires them to do. And that's a very important public  
8 policy interest.

9           CHIEF JUDGE WILSON: So the federal - - - the  
10 federal law around FOIA doesn't restrict working law of the  
11 agency to statutes, right? It actually, will include, if I  
12 understand it correctly, internal memoranda prepared by  
13 lawyers that say, here is how the agency is going to  
14 proceed. And if the agency actually does - - - does, in  
15 fact, proceed that way and follows that guidance, those are  
16 deemed producible under FOIA.

17           So, you know, to take the first item on the list  
18 here, which is, if I believe it, and I'm not - - - I don't  
19 think revealing anything, is a checklist of what should be  
20 reviewed by a parole officer - - - parole board member in  
21 evaluating an application. Why isn't that - - - if it is  
22 law at all, which I'm not sure about, why isn't that sort  
23 of the working law of the agency that should be disclosed?

24           MR. BRADY: Well, it's not the working law of the  
25 agency because it's not binding on anybody. It's just

1 advice that counsel is giving to the board. The board  
2 isn't obligated to follow any of this advice. The board  
3 can do as it pleases. You know, this doesn't divest the  
4 board of discretion, and this is not a final agency policy.

5 It's not - - - it's not - - - it doesn't instruct  
6 anybody what they must do to comply with some kind of  
7 internal agency law. There's no secret agency law here.  
8 These are - - - this is just advice about how to - - - how  
9 to - - - how to conduct these hearings and - - - and  
10 prepare for them in a way that's going to comply with their  
11 statutory duties, and - - - and perhaps create a record  
12 that will withstand judicial scrutiny.

13 CHIEF JUDGE WILSON: So you don't have anything  
14 that - - - there's no internal documentation, at least,  
15 that's being withheld here that you would say is it a  
16 policy that is regularly followed by the Parole Board?

17 MR. BRADY: No. This is advice. This is advice.  
18 Nothing requires the - - - the counsel is - - - is hired by  
19 the board to provide advice. Counsel cannot make the board  
20 follow any of this advice.

21 JUDGE HALLIGAN: So the relationship, I take it,  
22 you're saying is similar, you know, to - - - to the  
23 relationship between a general counsel and a CEO?

24 MR. BRADY: Yes. Yes. And that's, you know - -  
25 - and as petitioner was suggesting, I thought that there



1 had to be some kind of initial communication from the  
2 client to the attorney in order to kind of start the  
3 attorney-client privilege ball rolling. And - - - and  
4 that's just not true under this court's precedents. This  
5 court in - - - in Rossi says that - - - that the  
6 communication need not begin with the client. It can start  
7 with the lawyer in the course - - - when there's an ongoing  
8 professional relationship. And that's exactly what we have  
9 here.

10 I know that - - - and I just wanted to say that  
11 the fact that there's, otherwise, non-privileged materials,  
12 and I think I may have covered this, but, you know, the  
13 fact that there may be statutory law or decisional law in  
14 there doesn't destroy the privilege. It's the foundation  
15 of the legal advice that's being provided. And counsel  
16 selection of those materials are a window into the legal  
17 advice that's being provided. I think it's very important  
18 to - - - as a matter of public policy, that agency counsel  
19 be allowed or be permitted to have these unfiltered  
20 discussions with, in this case, the Board of Parole.

21 JUDGE RIVERA: Although I thought in - - - in my  
22 hypothetical, it was just a book that contains the statutes  
23 that sets up my hypothetical, the commission, I thought you  
24 said that does get turned over. I understand your argument  
25 about the decisional law.

1 MR. BRADY: I'm sorry, Your Honor.

2 JUDGE RIVERA: No, you said statutory or  
3 decisional - - - or decisional law.

4 MR. BRADY: Well, I tried - - -

5 JUDGE RIVERA: It's in your response to my  
6 hypothetical.

7 MR. BRADY: So your hypothetical, basically,  
8 sounded to me like you're - - - you're - - - somebody - - -  
9 somebody has created a manual about the history of the  
10 agency, and how the laws that govern how the agency  
11 operates. And it sounds to me, like, a public or almost  
12 semi-public sort of manual about how - - -

13 JUDGE RIVERA: So - - - but in my hypothetical,  
14 the commission didn't make that public.

15 MR. BRADY: Well, I - - - I - - - maybe they  
16 should. You know, it - - - it was - - - it was the working  
17 law of the agency - - -

18 JUDGE RIVERA: Fair enough. Fair enough.

19 MR. BRADY: It was the working law of the  
20 agencies, you know, it's a manual, you know. There - - -  
21 there are manuals that the parole has or - - -

22 JUDGE RIVERA: Yes, yes, yes.

23 MR. BRADY: - - - or are - - - are out there.

24 JUDGE RIVERA: But your position, of course, is  
25 that none of these documents fit that - - - fit that

1 description?

2 MR. BRADY: No, I think - - - you know, Your  
3 Honors have the material. You can see the context that - -  
4 - which this material was provided. It was to - - - you  
5 know, it was to - - - it was advice. It was to - - - it  
6 was to encourage, inspire a discussion. It was to get them  
7 to - - - the board to hopefully, follow the law and - - -  
8 when they're implementing statutes and making release  
9 decisions, writing decisions, conducting the interviews.

10 So I mean, I - - - I think it's - - - I think  
11 this goes to the heart - - - to the heartland of the  
12 attorney-client privilege.

13 Unless the court has any other questions, I'm  
14 prepared to rest.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. LAZEBNIK: I did go longer than - - - than  
17 intended.

18 CHIEF JUDGE WILSON: You have your three minutes.

19 MR. LAZEBNIK: Thank you, Your Honor. So just a  
20 - - - a few points that I want to clarify. First, on - - -  
21 on the record of this case, I - - - I think if you look at  
22 the affirmation of attorney Kiley, that's record page 161,  
23 one of the things that counsel just said that I want to  
24 push against is the context here.

25 One is the affirmation makes clear that these

1 documents were created in connection with training  
2 sessions. And often in the affirmation for one, two,  
3 three, several of them, they are labeled as how-to's, not  
4 necessarily, oh, you know, maybe you want to follow this,  
5 maybe you don't. The context here is important. And one  
6 of the other things to point out about that - - -

7 JUDGE RIVERA: What if they're how to comply - -  
8 - I'm not saying that's what it says, but given the back  
9 and forth between the two of you, how to comply with the  
10 law, in my opinion, as the lawyer?

11 MR. LAZEBNIK: So that - - - that is not  
12 sufficient to overcome the agency policy issue - - - the  
13 work - - - the working law of the agency. And the reason  
14 is because in addition to everything that attorney Kiley  
15 said, she would have also had to say, and they did not  
16 follow this, right? Because once they - - - if - - -  
17 right? If - - - if the burden is on the government to say  
18 - - -

19 JUDGE RIVERA: So you mean the privilege turns on  
20 whether or not your client follows your advice?

21 MR. LAZEBNIK: The working law of the agency  
22 turns on whether or not the agency has actually adopted it  
23 or chosen not to adopt it.

24 CHIEF JUDGE WILSON: But to protect the  
25 privilege, the lawyer has to file an affidavit saying, I

1           advised my client to follow the law, and they didn't follow  
2           it.

3                       MR. LAZEBNIK: They don't have to say I advised  
4           my client to follow the law. I advised my client regarding  
5           X, and - - -

6                       CHIEF JUDGE WILSON: They didn't follow it.

7                       MR. LAZEBNIK: They didn't follow it. And this  
8           wouldn't be an issue in the civil context. But in - - - in  
9           the agency context, that is actually something that - - -

10                      JUDGE TROUTMAN: But doesn't that chill the idea  
11           of being proactive? If you're going to - - - if you're  
12           going to later say, and I didn't follow it, what client is  
13           going to - - - going to consult an attorney to set them up  
14           to lose during litigation that is most likely than not to  
15           follow, especially when there's certain agencies that are  
16           sued with regularity.

17                      MR. LAZEBNIK: So I think the - - - that question  
18           invokes this court's opinion in Fink v. Lefkowitz, which  
19           there - - - the issues were documents about how to conduct  
20           audits. And what - - - and what this court said is that  
21           there's a difference between documents that tell the agency  
22           how to conduct the audit versus documents that tell the  
23           agency this is the law you're supposed to enforce, and go  
24           do it. And the reason this court raised that is because -  
25           - - right - - - it said, "Such information in the hands of

1 the public does not impede the agency. On the contrary,  
2 such knowledge actually encourages voluntary response."

3 JUDGE TROUTMAN: But when you're an agency that's  
4 sued with regularity, consulting your attorney is a  
5 necessary thing.

6 MR. LAZEBNIK: Yes. And if the - - - if the  
7 agency - - - if the attorney that the agency is consulting  
8 with is not being followed, that is actually something of  
9 public import, right? That is a - - - a breach of the  
10 public's trust. They are being told this is how you're  
11 supposed to comply with the law, and you're not. Yes, that  
12 is exactly the kind of situation that we should, from a  
13 public policy - - -

14 JUDGE TROUTMAN: Okay.

15 MR. LAZEBNIK: - - - standpoint, know that  
16 something wrong is occurring within the agency.

17 JUDGE RIVERA: That is - - - can I just clarify  
18 something here? I may have misunderstood you. I take it  
19 that you're saying if the client goes to the lawyer and  
20 says, tell me what statute applies to the work that I have  
21 to do, and the lawyer provides it, are you saying that that  
22 is privileged? I thought you were.

23 MR. LAZEBNIK: If - - - if it's a general - - -  
24 if it's a high level, that's the - - - the area that's a  
25 little tricky, but in general, I think that probably is

1 covered in privilege, which goes to another - - -

2 JUDGE RIVERA: Well, how is that different from  
3 the lawyer providing the statute without being asked?

4 MR. LAZEBNIK: So - - - so this is why I think  
5 it's beneficial to - - - to return to the court's primary  
6 inquiry, right? Is the purpose of the privilege being  
7 served? What is the reason that we need to shield that  
8 particular communication? And I would say, when it's the  
9 high level, at times, you can't - - - right - - - the court  
10 should - - - should consider that that kind of  
11 communication doesn't rise to the level of needing  
12 protection.

13 The other thing that I want to raise here is that  
14 this court has, on several occasions, found - - - has  
15 already contoured legal advice that is not protected,  
16 right? And it has created two guideposts related to that.  
17 One is when the parties don't treat it as confidential,  
18 even though it might be legal advice, it isn't protected by  
19 the privilege. And another is, when the lawyer - - - when  
20 the lawyer and the person are not in actual client-attorney  
21 relationship, even if the lawyer espouses what is legal  
22 advice, we don't consider that privilege.

23 This court has made those separate elements that  
24 are part of the four. But the point is that there are  
25 instances where legal advice does not get protected. And

1           what we're saying here is that, in the instance where it's  
2           a communication from counsel to client that doesn't reveal  
3           any kind of confidences by the client, you should be  
4           skeptical. And then based on - - - since the court has a -  
5           - - a review of this documents, if you do not feel that the  
6           purpose of the privilege is met, those documents should be  
7           released.

8                         Likewise, most of these documents, based on the  
9           description, are not covered by the interagency exemption  
10          because they were created in the context of - - - of  
11          instruction to train - - - to train those. And as posted -  
12          - - pointed out in Coastal Gas, the - - -the purpose of  
13          such an exemption is to make sure that a statement that is  
14          not followed by the agency isn't released as though it is  
15          the position of the agency.

16                         CHIEF JUDGE WILSON: Thank you, Counsel.

17                         MR. LAZEBNIK: Thank you.

18                         (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Appellate Advocates v. NYSDOCCS, No. 91 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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