

OUTSIDE COUNSEL

New York Court of Appeals Reinforces Attorney-Client Privilege Principles

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A recent New York Court of Appeals decision clarified the scope of the attorney-client privilege under New York law. In *Matter of Appellate Advocates v. New York State Department of Corrections & Community Supervision*, the Court of Appeals held that the documents were privileged where they were created as training materials for the client; did not address a “real world factual situation”; and were not prepared in response to a direct request for legal advice. No. 91, 2023 N.Y. Slip Op. 06466 (N.Y. Dec. 19, 2023).

All practitioners should ensure that they are familiar with the parameters of the attorney-client privilege, which is the oldest common law evidentiary privilege. See *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (N.Y. 1991). While CPLR §4503(a)(1) codifies the privilege in New York, courts also turn to the common law to determine whether materials are exempt from disclosure. *Id.*

By way of reminder, under New York law, the privilege protects communications from *both* the attorney *and* the client; when coming from an attorney, communications are protected when they are made in the course of the professional relationship and they have the purpose of facilitating legal advice or

services. *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (N.Y. 1989).

Courts will view the communication as a whole to determine if it is primarily for legal purposes, as opposed to, for example, business purposes. Communications are protected only if they are confidential and the client has not waived the privilege. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (N.Y. 2016).

In *Matter of Appellate Advocates*, the court revisited and reinforced the long-standing privilege doctrine. Appellate Advocates, a public defender organization, filed a Freedom of Information Law (FOIL) request for documents from the Department of Corrections and Community Supervision (DOCCS) pertaining to the Board of Parole’s decision-making process. DOCCS produced thousands of pages of documents but withheld a small number based on the attorney-client privilege, invoking the FOIL provision which allows agencies to withhold records exempted from disclosure by state or federal statute.

The Court of Appeals applied well-established case-law on the attorney-client privilege to conclude that the DOCCS materials, which “reflect[ed] counsel’s legal analysis of statutory, regulatory, and decisional law,” were privileged and exempt from FOIL disclosure.

The court explicitly noted that the communications were prepared for facilitating legal advice and

services and made in the course of a professional relationship. In addressing the arguments advanced by the requesting party, the court provided guidance on several interesting points.

Specifically, the Court of Appeals rejected Appellate Advocates' claim that the privilege applies only to communications regarding a "real world factual situation." The court emphasized that it has never endorsed this view and cited policy to support its reasoning, explaining that Appellate Advocates' position would discourage a primary purpose of the attorney-client privilege—which is to foster open communication between a lawyer and a client.

Further, the Court of Appeals recognized that attorneys often serve as advisors, and that there are benefits to "[e]ncouraging proactive compliance with the law," even when the client does not anticipate litigation.

The Court of Appeals was unpersuaded by Appellate Advocates' contention that the privilege only

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applies when a client directly requests legal advice or affirmatively discloses confidential information to the lawyer.

In-house counsel and practitioners who work with corporate clients will understand and appreciate this holding, as many lawyers give advice "not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization." See *Rossi*, 73 N.Y.2d at 592-593.

New York courts use the same privilege test whether or not the attorney gives advice in response to a client request. In *Matter of Appellate Advocates*, the court emphasized that counsel

often bring legal issues to the client's attention and such communications can still be protected by the privilege. This holding helps ensure that clients remain informed on pertinent legal issues.

The Court of Appeals also declined to adopt a *per se* rule that training materials are excluded from the privilege, emphasizing the purpose of attorney-client privilege protection rather than the formalities of defining a "communication." Citing multiple federal cases, the court held that training materials are privileged where they convey confidential legal advice.

The court also noted that counsel can determine how and in what format to provide its legal advice: for example, a communication presented as a slide deck during a training session can be protected, so long as it otherwise meets the basic requirements of the attorney-client privilege.

Finally, while New York courts have held that the attorney-client privilege can be overcome by public policy in certain instances, the Court of Appeals found Appellate Advocates' policy argument unavailing. The court acknowledged that FOIL serves the important policy goals of increasing government transparency and allowing the public's access to state records. However, the court made clear that the attorney-client privilege serves the state's policy goals as well. The court noted that the exemption from disclosure fosters honest discussions between attorneys and clients generally, but also highlighted that the privilege indirectly benefits the public. The court explained that open communication is paramount when public actors are involved, since "[t]he public is well served when counsel advises government clients on how to lawfully fulfill their public duties."

Matter of Appellate Advocates provides New York practitioners with important guidance to identify potentially privileged communications. The primary take-away being that the privilege is a flexible concept that depends, case-by-case, on the document's "full content and context."