

APL-2024-00143

COURT OF APPEALS

STATE OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,

Petitioner-Appellant,

-against-

NEW YORK STATE OFFICE OF COURT ADMINISTRATION,

Respondent-Respondent.

BRIEF OF AMICUS CURIAE

**THE LEGAL AID SOCIETY, THE BRONX DEFENDERS, BROOKLYN
DEFENDER SERVICES
IN SUPPORT OF PETITIONER-APPELLANT**

Dated: May 19, 2025
New York, N.Y.

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R Part 500.1(f), The Legal Aid Society, The Bronx Defenders, and Brooklyn Defender Services disclose that they are non-profit organizations with no parent, subsidiaries, or affiliates.

INTEREST OF AMICUS CURIAE

Amicus curiae The Legal Aid Society (“Legal Aid”) is the country’s oldest and largest private non-profit legal services agency, dedicated since 1876 to providing quality legal representation to low-income families and individuals in New York City. It has served as the primary public defender in New York City since 1965 and, each year, represents thousands of people who are arrested and unable to afford private counsel.

Amicus curiae The Bronx Defenders is a public defender nonprofit in the Bronx, New York that has developed a groundbreaking, holistic model of legal representation, providing systems-impacted individuals with teams of lawyers, social workers, and advocates dedicated to addressing their unique circumstances, radically transforming how low-income people are represented in the legal system. The Bronx Defenders defends thousands of clients each year – the majority of whom are Black and Latino New Yorkers from under-resourced neighborhoods – in criminal, family, immigration, and housing courts.

Amicus curiae Brooklyn Defender Services is one of the largest public defense

offices in New York State, representing low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. For over twenty-five years, BDS has worked, in and out of court, to protect and uphold civil rights and change laws and systems that perpetuate injustice and inequality.

Amici are committed to promoting fairness within the legal system and defending the rights of low-income New Yorkers. As defenders, *amici* regularly litigate cases that push forward new legal theories and protections, including constitutional protections, such as those at issue in *Crawford v. Ally*, 197 A.D.3d 27 (1st Dep’t 2021), litigated by The Bronx Defenders. *Amici* regularly represent clients in *Crawford* hearings, and in other contexts for which OCA memoranda have been released, such as civil cases concerning the Fair Consumer Judgment Interest Act or the U-Visa certification process. Therefore, *amici* have a vested interest in the publication of OCA memoranda, which shape judicial decision making and the adjudication of individuals’ rights.

PRELIMINARY STATEMENT

New York’s courts should be transparent, equitable, and consistent in their treatment of all New Yorkers. But the New York State Office of Court Administration’s (“OCA”) secret memoranda to judges, guiding their interpretations of statute and law, undercut these guarantees. These memoranda clearly fall outside the scope of any attorney-client privilege, but even if this Court finds that privilege attaches to the memoranda, public policy considerations require that they be disclosed. Making OCA memoranda public improves access to justice for low-income people and people of color; strengthens the ability of *amici* and other legal service providers to effectively advocate for their clients; and ensures confidence and trust in New York’s judicial system.

ARGUMENT

I. THE OFFICE OF COURT ADMINISTRATION’S MEMORANDA PROVIDING LEGAL INTERPRETATIONS TO JUDGES MUST BE MADE AVAILABLE TO THE PUBLIC BECAUSE STRONG PUBLIC POLICY GOALS OF EQUAL ACCESS TO JUSTICE AND EFFECTIVE REPRESENTATION REQUIRE DISCLOSURE.

Amici agree with the New York Civil Liberties Union (“NYCLU”) that OCA’s memoranda offering substantive legal interpretations to judges are not privileged. OCA concedes that elected or appointed judges “are not considered staff of OCA.” *See* Brief of Petitioner-Appellant at 16–17 (citing R. 236 n. 7). Despite that concession, OCA makes the novel claim that its Counsel serves as in-house

counsel to the judges in the Unified Court System who are external and independent of OCA, conferring blanket privilege on its legal memoranda sent to those judges. *See* Brief of Respondent at 42-48. OCA’s reliance on *Appellate Advocates* to make this claim is misplaced. In that case, this Court found legal guidance provided by Board of Parole’s Counsel to Board of Parole *staff* to be privileged and exempt from New York’s Freedom of Information Law (“FOIL”). *See App. Advocs. v. New York State Dep’t of Corr. & Cmty. Supervision*, 40 N.Y.3d 547, 550 (2023). This Court has long recognized that any attorney-client or work product privilege is waived when legal communications and documents are shared with external, third parties, as happens with OCA memoranda disseminated to judges. *See Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016).

Absent an attorney-client relationship, OCA’s memoranda serve as hidden legal authority on which judges rely to issue their decisions. Memoranda that influence substantive judicial opinions are not equivalent to a mere “exchange of ideas” as OCA claims. *See* Brief of Respondent at 38. OCA’s unpublished memoranda are sources of authority, much like published and unpublished decisions, legal treatises, and law review articles, that courts can consult when considering how to decide a matter. These memoranda therefore affect how judicial decisions are made, and depriving litigants and the public of access to the reasoning behind judicial decisions undermines the fundamental fairness of the legal system. Keeping

the memoranda secret also conflicts with FOIL’s aim to “promote open government and public accountability” because “official secrecy is anathematic to our form of government.” *Legal Aid Soc’y v. Recs. Access Officer*, 227 N.Y.S.3d 71, 73 (1st Dep’t 2025) (internal citations omitted). The memoranda should therefore be transparent to the public to ensure that all people, especially the low-income communities that *amici* serve, have the opportunity for equal access to justice and to effective representation in their cases.

Even if this Court were to find that some privilege applies to OCA’s memoranda, the memoranda should still be disclosed to the public because the same strong public policy reasons of ensuring equal access to justice and effective representation require their disclosure. This Court has held that “even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure.” *Priest v. Hennessy*, 51 N.Y.2d 62, 98 (1990) (citing *People ex rel. Vogelstein v. Warden of Cnty. Jail of New York Cnty.*, 150 Misc. 714, 721 (NY Sup. Ct. 1934)). When OCA memoranda are made publicly available, our clients and the public have a fuller understanding of the reasons for judicial decisions and the administration of justice, and their counsel can more effectively litigate on their behalf. Thus, in this case, the strong public policy of ensuring equal access to justice and effective representation outweighs any competing policy of maintaining privilege. *See Vogelstein*, 150 Misc.

at 721 (“As between the two social policies [disclosure or concealment for privilege] competing for supremacy, the choice is clear. Disclosure should be made if we are to maintain confidence in the bar and in the administration of justice.”).

The memoranda requested by NYCLU’s FOIL are specifically those that provide instructions to judges on how to interpret or apply statutes or court decisions, and these instructions directly and significantly impact litigants, their attorneys, and the public.¹ *Amici* offer three examples of OCA memoranda that have had a direct impact on court users and the public to illustrate why publicizing the memoranda responsive to NYCLU’s FOIL is necessary to ensure indigent litigants, the most frequent users of New York’s high-capacity courthouses like criminal court, family court, and housing court, have equal access to justice and effective representation.

Crawford Memorandum

In 2021, OCA provided substantive legal guidance to judges following *Crawford v. Ally*, 197 A.D.3d 27 (1st Dep’t 2021), a decision establishing the right to an evidentiary hearing when temporary orders of protection (“TOP”) issued in criminal cases impact a substantial personal interest, such as a person’s ability to return to their home, or be in contact with their family members. The OCA

¹ NYCLU’s FOIL request does not, for example, seek OCA memoranda addressing courtroom safety or security or its emergency protocols that could otherwise be exempt where there may be a valid reason to withhold the memoranda from the public.

memorandum interpreted *Crawford* to not require live witnesses or non-hearsay testimony at the evidentiary hearings and instructed judges to “resist—unless absolutely necessary and appropriate—anything approaching a full testimonial hearing.”² OCA’s interpretation of *Crawford* stands in contrast to *Crawford*’s holding that “when the defendant presents the court with information showing that there may be an immediate and significant deprivation of substantial personal or property interest upon issuance of the TOP, the Criminal Court should conduct a prompt evidentiary hearing on notice to all parties and in a manner that enables the judge to ascertain the facts necessary to decide whether or not the TOP should be issued.” 197 A.D.3d at 34. Indeed, the *Crawford* decision demanded that courts give *more* process to criminal defendants facing deprivation of a significant right, yet the OCA memorandum attempts to cabin that process.

Non-disclosure of the *Crawford* memorandum affected *amici*’s criminal defense attorneys’ ability to strategize and advocate for their clients because they were unaware that the memorandum instructed judicial resistance to anything approaching a full hearing. The memorandum also rendered *amici*’s attorney training about the due process protections established in *Crawford* inadequate. For example, Legal Aid’s training on *Crawford* hearings included specific kinds of

² Memorandum from Anthony R. Perri, Deputy Couns.: Crim. Justice to Hons. Vito C. Caruso, George J. Silver, and Edwina G. Mendelson, Deputy Chief Admin. Judges (June 27, 2021).

evidence that attorneys should rely on to show harm to Legal Aid’s clients and specified factors that courts must consider in granting a temporary order of protection, based on the *Crawford* decision. But its training could not account for the hidden authority spurring judicial resistance to a full testimonial hearing. While *amici* noticed a trend of courts denying defense requests for full *Crawford* hearings, *amici* did not know why until OCA’s *Crawford* memorandum was leaked to the press.³ Now, with the OCA memorandum public, *amici* have updated their trainings, and their attorneys are prepared with arguments – and multiple forms of evidence – when they face judicial resistance to full testimonial hearings.

U Visa Certification Memorandum

Another memorandum issued by OCA provides instructions to family court judges on U-visa certification, but unlike the *Crawford* memorandum, the U-visa memorandum remains hidden from the public. A U visa is an immigration status available to victims of qualifying crimes who have been helpful to law enforcement in the investigation or prosecution of those crimes.⁴ Receiving a U-visa certification is the first step in the process of obtaining this visa. The certification attests that the individual has been helpful to law enforcement, and it can be issued by family court

³ Sam Mellins, *New York Judges Lock the Accused Out of Their Homes, Skirting Review Required by Landmark Ruling, Critics Charge*, N.Y. FOCUS (July 23, 2021), <https://nysfocus.com/2021/07/23/new-york-judges-crawford-hearing/>.

⁴ 8 C.F.R. § 214.14 (2007).

judges, Administration for Children’s Services (“ACS”), and the New York Police Department (“NYPD”), among others. Many noncitizens fear going to the police or ACS, even when they are the victims of a crime. Because of this fear, family court is often the only place where noncitizen survivors seek protection from abuse and request U-visa certification.

In response to advocates’ request for public judicial guidance to family court judges on how to issue U-visa certifications, like the public guidance ACS and the NYPD provides on the same issue, the New York City Family Court Administrative Judge’s Chief Counsel reported that OCA had already disseminated a memorandum to family court judges and referees. This memorandum allegedly informed family courts that certification was discretionary, but the language of the memorandum itself remains secret to this day. Because of this secrecy, litigants are not able to evaluate whether they should pursue a U-visa certification and have not been able to tailor their strategy and arguments effectively. The result is that some people who cooperated in family court cases and for whom family court was their only certification option, were never able to apply for a U visa and lost this legal pathway to remain in the United States with their families. In this instance, OCA’s secret process is in direct contrast with the NYPD’s and ACS’s transparent process and clear protocols for U-visa certification. When both agencies were in the process of publishing guidance on their U-visa certification process, advocates were able to

provide feedback to ensure agency protocols aligned with immigration requirements and eligible noncitizens had fair process. As a result, their responses to certification requests have been more consistent and guided by a clear, articulated protocol.

Fair Consumer Judgment Interest Act Memorandum

Finally, in contrast to situations where the OCA has hidden its memoranda, such as in the *Crawford* and U-visa certification examples, when OCA has publicly released memoranda, it has allowed for increased access to justice for litigants and more effective advocacy by *amici*. In 2021, New York passed the Fair Consumer Judgment Interest Act (“FCJIA”), limiting the statutory post-judgment interest rate from 9% to 2% in money judgments involving consumer debt, which went into effect April 2022. When legal services organizations, including *amici*, noticed in 2023 that courts were still not consistently following the statute, advocates reached out to OCA. Advocates informed OCA what they were seeing on the ground, and OCA issued instructions to judges in a *public* memorandum, including clarification of what was encompassed within the term “consumer debt” and that a presumption of 2% interest rate applied in relevant cases, among other advice to improve courts’ application of the FCJIA.

Even though OCA interpreted the statute in a slightly different way than *amici* did, the result was a thoughtful document that is now a tool that attorneys cite in advocating for proper application of the statute to clients’ cases in civil and housing

courts. And, when attorneys see different interest rates being used, they can also reach out to OCA to report the issue and help track consistency across the state. Beyond being a useful resource for our attorneys in court, OCA's transparency in publishing the memorandum gave litigants and *amici*'s attorneys more confidence in the courts and their ability to apply the law fairly to our clients.

These three examples illustrate how judges' reliance on OCA's secret memoranda to issue their decisions negatively impacts our clients and the public, in contexts that have serious material impacts on their lives. *Crawford* hearings are vital protections against wide-ranging harms, such as when TOPs unjustly render someone homeless, or unable to work, or separated from their family. U-visa certifications encourage noncitizen survivors of violence and harm to seek justice and safety. And the FCJIA helps disincentivize predatory consumer debt collection practices. The hidden memoranda obfuscating judicial reasoning in these and other contexts make it more difficult for *amici* to address harmful inconsistencies in applications of law that are vital to the low-income communities we serve. While we only know of the memoranda that have been leaked or released to the public, that these memoranda exist imply that there are more, on vital issues of legal interpretation, remaining hidden from the public. Chief Judge Rowan D. Wilson, in his 2025 State of the Judiciary address, implored New York courts to view themselves as "institutions that attempt to make decisions that will improve the lives

of those we serve.”⁵ But when memoranda are kept secret, OCA leaves litigants in the dark about the legal opinions the courts rely on when issuing decisions.

II. OCA’S SECRET MEMORANDA UNDERMINE CONFIDENCE AND TRUST IN THE RULE OF LAW FOR COURT USERS, WHO ARE DISPROPORTIONATELY LOW-INCOME NEW YORKERS OF COLOR.

Amici are among the primary legal service providers for indigent people in New York City, where “the overwhelming majority of the civil or criminal litigants in the Housing, Family, Civil and Criminal courts . . . are people of color.”⁶ A report released in 1991 by the Minorities Commission concluded that “there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor.”⁷ Nearly 30 years later, in a 2020 report commissioned by Chief Judge DiFiore, the Special Adviser Jeh Johnson concluded that there continues to be “in effect, a second-class system of justice for people of color in New York State.”⁸ *Amici*’s experience corroborates these reports — New York’s communities of color are disparately impacted by the enforcement and surveillance systems that funnel people into court, with Black and Latino families

⁵ N.Y. UNIFIED CT. SYS., THE STATE OF THE JUDICIARY 2025, <https://www.nycourts.gov/ctapps/news/soj2025.pdf>.

⁶ *Report from the Special Adviser on Equal Justice in the New York State Courts* (Oct. 1, 2020), at 3, <https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

⁷ *Report Of The New York State Judicial Commission on Minorities*, 19 FORDHAM URB. L.J. 181, 186 (1992), <https://ir.lawnet.fordham.edu/ulj/vol19/iss2/3/>.

⁸ *Report from the Special Adviser on Equal Justice in the New York State Courts* (Oct. 1, 2020), at 3, <https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

suffering the brunt of the harm. These communities are therefore also disproportionately impacted by the inconsistencies and harms that result from a lack of transparency around OCA memoranda. Furthermore, OCA’s secret memoranda contribute to the public perception that New York has an unfair, two-tiered system of law.

“Transparency and public access to information about the courts are foundational to the rule of law.”⁹ The lack of transparency surrounding the substantive legal interpretations judges receive from OCA’s memoranda not only has a significant impact on *amici*’s ability to advocate for our clients’ liberty, homes, families, and economic circumstances, but also carries grave consequences for the public’s confidence in the fairness and justice of New York courts. Public trust in the courts has been in steep decline, particularly in the last decade. A Gallup survey found that “Americans’ confidence in their nation’s judicial system and courts dropped to a record-low 35% in 2024.”¹⁰ This need for added transparency and accountability within the courts has been noted in the legislation introduced by New

⁹ Logan Cornett & Natalie Anne Knowlton, *Public Perspectives on Trust and Confidence in the Courts*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (June 2020) at 14, (citing *What is the Rule of Law?*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law>; *Overview – Rule of Law*, U. S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law>; *What is the Rule of Law*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>).

¹⁰ Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx>.

York Senator Michael Gianaris and Assemblymember Chris Burdick that would require judges statewide to publish criminal court decisions, allowing advocates and litigants the ability to analyze trends and hold judges accountable.¹¹ When the public is provided with access to information that directs judges' decision making and application of the law, that transparency in the legal process builds trust in legal outcomes. A central pillar of our judicial system's ability to operate as the authority on the rule of law is the unspoken agreement of the public to abide by the rulings of the court. The public's belief in procedural justice is thus paramount to the efficacy of the courts, and publicizing the memoranda guiding judicial decision making will increase trust in the judicial system at a time when it's most needed.

OCA's memorandum providing protocols to enforce the Protect Our Courts Act ("POCA") is an example of how publicly disseminated memoranda help ensure fair and free access to justice and the courts. POCA guarantees that that people using New York's courts will not be subject to warrantless civil arrests (including civil immigration arrests) at courthouses. The POCA memorandum provides members of the public details on how judges and court staff monitor and ensure compliance with

¹¹ Criminal Court Opinion Transparency Act, Senate Bill 3864 (Assembly Bill 4674), N.Y. 2025–2026 Legislative Session. Currently, between 94–99.5% of all criminal court decisions go unpublished, and are therefore totally inaccessible to the public, making it impossible for defender organizations, such as *amici*, to be able to analyze trends in dispositions and hold judges accountable. See SCRUTINIZE, REINVENT ALBANY, *Open Criminal Courts: New York Criminal Court Decisions Should be Public* (Nov. 2023) at 3, <https://static1.squarespace.com/static/635986ea4e3869168261490b/t/655e2700a92fba51d0a5d431/1700669188026/opencriminalcourtsreport.pdf>.

POCA, informing noncitizen court users that they can safely appear for proceedings, without fear of being targeted for civil arrest. With this OCA directive, members of the public have a specific reason to believe that the courts will protect their rights in the face of potential law enforcement overreach and advocates can guide and advise our clients on safe access to the courts.

This Court should address the negative impact that OCA's secret memoranda have on the public's confidence and order the disclosure of the substantive legal directives issued by OCA, making clear to advocates, litigants, and the public at large that the law is being interpreted for all court users in a consistent manner, regardless of race or economic status.

CONCLUSION

For the reasons stated above, this Court should reverse the order of the First Department and order OCA to produce the requested records.

Dated: May 19, 2025
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York, I hereby certify that this Brief was prepared on a computer; that Times New Roman, a 14-point proportionally spaced serified typeface, was used; that the body of the brief is double-spaced; with 12-point, single spaced footnotes; and that, according to the Microsoft Word Processing System used, the total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents, the Table of Authorities, Disclosure Statement, Proof of Service, and Certificate of Compliance is 3,489.

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