SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
COMMERCIAL DIVISION

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK **Plaintiff,** **v.** **THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,** **Defendants.**	§ § § § § § § § § § § § § § §	**INDEX NO. 451625/2020**

THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION PURSUANT TO CPLR 3104(d) FOR REVIEW OF THE SPECIAL MASTER'S RULING REGARDING DISCOVERABILITY OF CERTAIN DOCUMENTS

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I.

PRELIMINARY STATEMENT

The NRA seeks review of the Special Master's determination that privileges associated with two discrete attorney-client communications, and attached privileged materials, were waived. The documents at issue (the "Documents") are internal drafts of tax schedules prepared by the NRA's outside tax counsel and shared with the NRA's tax preparer. As demonstrated below, tax counsel's confidential work product is immune from disclosure under CPLR 3101(c) and related provisions. The Court should review the Master's rulings, consider the Documents *in camera* if necessary, and hold that the privileges were not waived.

II.

PROCEDURAL BACKGROUND

In 2021, the NYAG subpoenaed Aronson LLC— an outside accounting firm retained as the NRA's auditor, but also as its tax advisor and preparer.[1] Aronson produced over 18,000 pages of documents but, at the NRA's instruction, withheld certain documents on privilege grounds.

The NYAG then requested that the Honorable Peter O. Sherwood, a Special Master for Discovery (the "Master"), Order Aronson to nonetheless produce all documents that the NRA instructed Aronson to withhold.

After the NRA opposed the motion and the Master reviewed the documents *in camera*, on April 11, 2022, he ruled that:

[1] Agreement between NRA and Aronson, attached as Exhibit 3 to the Affirmation of Svetlana M. Eisenberg ("Aff."). Different staff within Aronson performed audit and tax-advisory functions; therefore, when the NRA consulted with Aronson on tax matters, it was not communicating invariably with audit personnel.

- Some of the documents were properly withheld because he deemed them to be "privileged"; and

- Other documents must be produced because either they are "not privileged" or the privileges were "waived."

The Documents are privileged for *multiple independent reasons*, and privileges were not waived. Even if the Court agrees with the Master that one or two of the asserted privileges were waived, it should still reverse his ruling because the Documents remain non-discoverable if there is at least one privilege that was not waived.

III.

FACTUAL BACKGROUND

The NRA retained Aronson in 2020 to "audit its . . . financial statements" and "assist in preparing [the NRA's] federal . . . information and tax returns." Aff., Ex. 3.

Around the same time, the NRA retained outside tax counsel, Don P. Lan, to assist it in preparing its IRS Form 990. In November 2020, Mr. Lan sent a privileged email to NRA executives providing legal advice about the NRA's upcoming Form 990 filing. The email attached draft language for certain schedules of the NRA's tax return. As *in camera* consideration would show, the attached language was not final or near-final, *i.e.*, it was not intended for dissemination to the IRS or the public. Instead, the Documents contained bracketed inserts and unmistakably embodied thoughts and impressions memorialized by outside counsel in a confidential draft as part of his legal advice to his client. Subsequently, an NRA employee who appeared in the thread forwarded the attachments to representatives of Aronson assisting the NRA with the Form 990.

IV.

ARGUMENTS BELOW

A. The NYAG's motion to compel production argued that the Documents are discoverable.

On March 18, 2022, Aff. Exhibit 5, the NYAG asked the Master to order production of the Documents. She conceded that "Aronson . . . assisted with the preparation of the NRA's Form 990 tax filing." Aff. Ex. 5 at 2-3. Yet, she claimed that "information conveyed to an independent nonparty [could not] be privileged." *Id.*

Specifically, the NYAG argued that "the NRA [had] waived any claim of attorney-client privilege it had over communications that were shared with nonparty Aronson" and that the "NRA [had] failed to establish that the withheld information is entitled to the immunity from disclosure given to attorney work product." Aff. Ex. 5 at 4. She also argued that "the NRA [had] failed to establish that the materials provided to Aronson are trial preparation materials."

As to the attorney-client privilege, the NYAG conceded that "[a] limited exception to waiver of attorney-client privilege exists," but argued, among other things, that it applied only "where the presence of [a] third part[y] is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality." *Id.*

As to the attorney work product under CPLR 3101(c), the NYAG conceded that the privilege "applies . . . to documents prepared by counsel acting as such . . . ." *Id.* at 6. She argued nonetheless that the NRA failed to "demonstrate that the documents withheld were prepared by counsel and contain only counsel's mental processes . . . ." *Id.* Further, the NYAG argued that the "NRA [had] not shown that the disclosure of such information to Aronson did not waive the privilege." *Id.*

As to materials "prepared in anticipation of litigation or for trial" under CPLR 3101(d)(2), the NYAG argued that the privilege did not attach and that she had "substantial need of the materials." *Id.* at 7 (claiming substantive need in conclusory terms). Notably, the NYAG did not argue that, if the protection did apply *ab initio*, it was waived.

B. <u>The NRA's opposition argued, inter alia, that the Documents were privileged and the privileges were not waived.</u>

The NRA's opposition to the NYAG's motion, dated March 24, 2022 (Aff. Exhibit 6) requested that the Master deny the NYAG's motion in its entirety because "the NRA rightfully withheld the documents in question under the [1] attorney-client, [2] work product, *and* [3] trial preparation privileges." In the alternative, the NRA requested that "the withheld documents be submitted to Your Honor for in camera review." *Id.* at 2, 8.

The NRA explained, among other things, that withheld drafts of tax returns were discussed with attorneys for purposes of legal advice and drafts were shared with Aronson in its tax-advisory capacity. *Id.*

In addition, the NRA argued that the three separate and independent privileges were not waived when the Documents were shared with Aronson. As to the attorney-client privilege, under *People v. Osorio*, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 1186 (1989)—which constitutes controlling Court of Appeals authority— communications "made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged," because "[t]he scope of the privilege is not defined by the third parties' employment or function, [but instead] . . . on whether the client had a reasonable expectation of confidentiality under the circumstances." *Id.* at 84. The NRA argued that the NYAG relied on *dicta* in the more recent *Ambac Assur. Corp. v. Countrywide Home*, 27 N.Y.3d 616 (2016) decision, attempting to graft onto *Osorio* a requirement that, to avoid breaking privilege, the third-party agent privy to the

communication must be "necessary" to its transmittal, akin to a translator. *Id.* The NRA's opposition also demonstrated that New York courts had repeatedly rejected this maneuver. *Id.* The NRA further argued that even if the Master adopts the phantom "necessity" prong urged by the OAG and implied in the recent, unpublished decision on which the OAG relies,[2] privilege is still maintained with respect to the Documents: draft tax returns, where it was indeed necessary for the NRA's counsel and its tax accountants to collaborate on tax-return disclosures consistent with the NRA's legal strategy in ongoing litigation.

The NRA further argued that the NRA's communications with Aronson are also protected as attorney work product. After all, CPLR 3101(c) protects from discovery "the work product of an attorney" rendering it "not . . . obtainable." The NRA argued that the communications withheld by the NRA "contain work product of various attorneys, including . . . Don Lan" and that the "inclusion of Aronson in the . . . communications did not waive the . . . privilege" because '[s]haring attorney work product with a third party (here, Aronson) results in waiver only when there is a likelihood, based on the disclosure, that the material will be revealed to a litigation adversary under conditions that are inconsistent with the desire to maintain confidentiality." *Id.* (*citing Bluebird Partners. v. First Fidelity Bank*, 248 A.D.2d 219 (1st Dep't 1998)).

The NRA further explained that, contrary to the NYAG's assertion, the privileged work product materials were not created in the ordinary course of Aronson's audit, rather they were created by the NRA's outside counsel Don Lan: "Aronson's involvement would not waive work-product protection even if Aronson were acting in its capacity as the NRA's outside auditor, because waiver of work product protection (unlike waiver of attorney-client privilege) requires

[2] *See People v. Trump*, No. 451685/2020, NYSCEF Doc. No. 302 (Sup. Ct. New York Cnty. 2020).

disclosure to an adversary, and auditors do not qualify." *Id.* The NRA relied on numerous cases, including *In re Weatherford*, 2013 WL 12185082, at *5 (S.D.N.Y. Nov. 19, 2013) ("In this circuit, disclosure to an outside auditor does not generally waive work product protection.").

Finally, the NRA argued that even if the privileges discussed above are determined to be inapplicable, the NRA's communications with Aronson directly related to trial preparation, and therefore, are privileged under CPLR 3101(d)(2). Ex. 6 at 4. The NRA cited cases demonstrating that the trial preparation privilege and similar doctrines are routinely held to extend to documents like tax-strategy memoranda and communications concerning ongoing litigation. *Id.* In her motion, the NYAG did not argue that if the trial preparation privilege applied *ab initio*, it was subsequently waived. In its privilege log and the accompanying certification (Paragraph 22), the NRA explained that, under *People v. Kozlowski*, 11 N.Y.3d 223, 246 (2008), trial preparation privilege "is waived upon disclosure to a third party [only] where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." Aff., Ex. 8 at 11. And the certification made clear that the disclosure to Aronson here did not create such a likelihood because "[t]he communications were not shared in a manner that would make it more likely for a litigation adversary of the NRA to acquire the [documents]"; rather "the communications occurred in a confidential setting pursuant to an undertaking on the part of Aronson to maintain materials confidential . . . ." *Id.* at 12.

V.

THE MASTER'S RULING

After reviewing withheld documents *in camera*, on April 11, 2022 (amended ruling dated April 12, 2022, Aff. Exhibit 1), the Master held that some documents withheld at the NRA's instruction were indeed privileged, other such documents were not privileged, and privileges applicable to the Documents had been "waived." Exhibit 1 at 2-3.

VI.

ARGUMENT

A. On a CPLR 3104(d) motion, the Court must conduct a probing review of the Master's rulings.

CPLR 3104(d) states that the motion "shall set forth . . . the [Master's] order complained of, the reason it is objectionable, and the relief demanded." Cases applying CPLR 3104(d) make clear that—at a minimum—(i) evidence in the record must support the Master's ruling; and (ii) he must have properly applied the law. *Gateway Intern., 360 v. Richmond Capital*, 2021 WL 4947028, at *1 (Sup. Ct. New York Cnty. 2021).

The Court can disaffirm the Master's "findings of fact even where there is support in the record for those findings." "When the . . . [C]ourt appoint[ed] a special referee it [did not waive] its discretion and [did not limit] its review." *See Those Certain Underwriters at Lloyds v. Occidental Gems*, 11 N.Y.3d 843, 845 (2008) (in considering a trial court's review of a Master's ruling, the Appellate Division is not restricted by an abuse of discretion standard); Kyle Bisceglie, LexisNexis Practice Guide: New York E–discovery and Evidence § 9.01 (2016) ("A trial court that refers a discovery matter to a referee does not, by making the reference, thereby limit its review of the referee's order.").[3]

B. In finding waiver, the Master did not properly apply the law and failed to ensure that his rulings were supported by the evidence in the record.

1. The attorney-work product privilege was not waived.

The clearest example of error is the Master's ruling that the NRA waived the attorney-work product privilege applicable to the Documents. Attorney work product is absolutely privileged. *Corcoran v. Peat. Marwick*, 151 A.D.2d 443, 445 (1st Dep't 1989); CPLR 3101(c) (it "shall not

[3] https://www.google.com/books/edition/_/CsQwCwAAQBAJ?hl=en&gbpv=1&pg=PP1.

be obtainable"). Work product includes "'statements, memoranda, correspondence, . . . mental impressions, [and] personal beliefs conducted, prepared or held by the attorney."' *Orange County v. County of Orange*, 637 N.Y.S.2d 596, 604 (Sup. Ct. Orange County 1995). As the authority cited in the NRA's brief to Judge Sherwood states, "[t]he . . . privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary." Ex. 6 at 6 (*citing Bluebird Partners. v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998)).

The NYAG points to no evidence that the NRA created a "likelihood that the material [would] be revealed to an adversary." Rather, the NRA pointed to the engagement agreement where Aronson committed to maintain information shared with it by the NRA confidential.[4] *See* Aff., Exs. 2 and 3.

The Court should reverse the Master's ruling. *See Bluebird Partners v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998) (reversing affirmance of special master's ruling that attorney work product protection did not apply; finding no waiver; "Even though the trustees, in asserting the privilege, had the burden of proving they had not effected a waiver . . . , there [was] no evidence that the confidentiality of these records was . . . compromised or intended to be so . . . .").

[4] The involvement of agents such as accountants and tax experts not only fails to waive work product protection—the work-product cloak actually ***extends to the work of the non-lawyer agent*** in cases where the agent is an "adjunct to the lawyer's strategic thought process." E.g., *Hudson Ins. v. Oppenheim*, 72 A.D.3d 489, 490 (1st Dep't 2010); *Delta Fin. Corp. v. Morrison*, 14 Misc. 3d 428, 432 (Sup. Ct., Nassau County 2006) (litigation consultant). Other agents whose work can be designated "attorney work product" include forensic accountants, engineering firms, appraisers, and valuation experts. *915 2nd Pub Inc. v. QBE Ins. Corp*., 107 A.D.3d 601, 601 (1st Dep't 2013) (appraisal report); *Hudson*, 72 A.D. at 490; *Oakwood Realty Corp. v. HRH Constr. Corp.,* 51 A.D.3d 747, 749 (2d Dep't 2008); *Delta*, 14 Misc. 3d at 432. Of course, the Court need not find that any of the above facts are analogous to the ones here in order to sustain the NRA's attorney work-product claim: the documents prepared by Mr. Lan were prepared by counsel himself, and merely ***shared with*** the NRA's tax preparer.

2. The trial preparation privilege was not waived.

The Master also erred in holding that the trial preparation privilege was waived. In fact, as noted, the NYAG did not argue that the privilege was waived. *See generally* Aff., Ex. 5. Rather, the NYAG merely argued in conclusory terms that "there are no other means of discovering what information the NRA supplied to Aronson, and this information is relevant to [certain of] the OAG's claims." *Id.* at 6. Yet, Judge Sherwood ruled that the trial preparation privilege does not apply to the Documents because the NRA purportedly "waiv[ed]" it, not because the NYAG has substantive need for the information.

The trial preparation privilege, codified in CPLR 3101(d)(2), is broader than the work product doctrine. It protects materials "prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney . . .)." CPLR 3101(d)(2). Such materials are protected from disclosure absent a finding of "substantial need." *Id.* Under the analogous federal work product doctrine, tax materials are routinely held to be prepared "in anticipation of litigation" where, as here, litigation looms or is pending regarding the returns' contents.[5] Here, when Mr. Lan provided his advice and prepared his work product, the NRA already faced the instant litigation alleging, *inter alia*, misleading Form 990 filings; counsel's thoughts and impressions regarding litigations strategy and exposure would have been inextricable from the provision of legal advice regarding the NRA's tax return.

[5] *See, e.g.,United States v. Roxworthy*, 457 F.3d 590, 600 (6th Cir.2006) (anticipation of litigation in the form of an anticipated IRS audit); *ChevronTexaco*, 241 F.Supp.2d at 1082 (anticipation of litigation where taxpayer "reasonably believed that it was a virtual certainty that the IRS would challenge the . . . transaction"); *United States v. Deloitte LLP*, 610 F.3d 129 (D.D.C.2010) (pretransaction tax opinion prepared before the tax return was filed and before actual litigation commenced protected by the work product doctrine).

The "privilege governing trial preparation materials 'is waived upon disclosure to a third party [only] where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." Ex. 6 at 6. For the reasons stated in the certification, the disclosure here did not create such a likelihood.[6]

VII.

CONCLUSION

The Court should review the Documents *in camera* if necessary, find that the privileges were not waived, and order such other relief as the Court deems just and appropriate.

Dated: April 18, 2022

Respectfully submitted,

By: */s/ Svetlana M. Eisenberg*

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[6] Although the Court does not need to reach the issue, the attorney-client privilege applicable to the Documents was not waived either. There is no waiver of the attorney-client privilege where communications are "made to counsel through . . . one serving as an agent of either . . . client to facilitate communication" because "[t]he scope of the privilege is not defined by the third parties' employment or function, [but instead] . . . on whether the client had a reasonable expectation of confidentiality under the circumstances." Aff., Ex. 6 at 3.

Here, in 2020, the NRA hired outside tax counsel and Aronson to assist it in the preparation of its Form 990, and the professionals worked together—along with the various employees of the NRA—on preparing the return. Based on the engagement agreement with Aronson, the NRA's expectation of confidentiality was reasonable.

ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, electronic mail upon counsel for Aronson, and First Class U.S. Mail upon counsel for Aronson on this 18th day of April 2022.

/s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg

CERTIFICATE OF CONFERENCE

In compliance with 22 New York Codes, Rules and Regulations (NYCRR) §§ 202.7 and 202.20-f, I conferred with the Office of the Attorney General of the State of New York in a good faith effort to resolve the issues raised by the annexed motion by email. On April 14, 2022, I advised them that the NRA intends to appeal certain aspects of the Master's rulings. AAG Yael Fuchs indicated that an amicable resolution of the dispute is not forthcoming. The parties also had attempted to resolve this dispute amicably previously, including during meet and confer calls involving myself and AAG Yael Fuchs at various points in March 2022.

/s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg

Certification of Compliance with Word Count

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing brief filed by the NRA pursuant to CPLR 3104(d) for review of the Special Master's ruling regarding discoverability of certain documents complies with the word count limit set forth in the Order for Appointment of a Master for Discovery dated February 7, 2022, because the memorandum of law contains fewer than 3,000 words, excluding exhibits. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: *Svetlana M. Eisenberg*
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