

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

**PEOPLE OF THE STATE OF NEWYORK, §
BY LETITIA JAMES, ATTORNEY §
GENERAL OF THE STATE OF NEW §
YORK §**

Plaintiff,

v.

**THE NATIONAL RIFLE ASSOCIATION §
OF AMERICA, INC., WAYNE §
LAPIERRE, WILSON PHILLIPS, JOHN §
FRAZER, and JOSHUA POWELL, §**

Defendants.

INDEX NO. 451625/2020

**THE NRA'S MOTION PURSUANT TO CPLR 3104(d) FOR REVIEW OF
THE SPECIAL MASTER'S DISCOVERY ORDER DATED OCTOBER 25, 2022**

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PRELIMINARY STATEMENT

The National Rifle Association (“NRA”) seeks review of the Special Master’s determination that the NRA failed to assert, and consequently waived, various privileges with regard to a report prepared by Jacob Frenkel, Esq., then-counsel for the NRA (“Frenkel Report”). For the reasons set forth below, the NRA respectfully requests that the Court review the Special Master’s determination and hold that the privileges were not waived. Alternatively, the NRA requests that the Court review the documents *in camera*.

PROCEDURAL BACKGROUND

The New York Attorney General’s Office (“NYAG”) filed this action on August 6, 2020 (NYSCEF 1). NYAG served its First Set of Requests for the Production of Documents on the NRA in June 2021. In December 2021, the NRA produced to the NYAG a set of notes prepared by a member of the Audit Committee of the NRA’s Board of Directors (“Notes”). Exhibit A. Those Notes refer to an anonymous letter to the Board (circa 2007) (“Anonymous Letter”) and the Frenkel Report.

On June 15, 2022, during the NYAG’s deposition of David Coy, a member of the NRA’s Audit Committee, the NYAG introduced the Notes as an exhibit and proceeded to question Mr. Coy regarding its contents. Ex. B, David Coy Depo. Tr. at 205:16-206:2. The NYAG then attempted to question Mr. Coy about the Frenkel Report, at which point counsel for the NRA objected to the line of questioning based on privilege grounds.

On June 22, 2022, approximately six months after the NRA produced the Notes referencing the Frenkel Report to the NYAG, the NYAG for the first time requested the Frenkel Report from the NRA. Exhibit C. Although the NRA and NYAG conferred regarding the discoverability of the Frenkel Report following Mr. Coy’s deposition, the parties could not reach an agreement.

Consequently, on July 6, 2022, the NYAG filed an application to the Special Master to compel the NRA to produce the Frenkel Report. Exhibit D. The Special Master conducted a hearing on the NYAG's application on July 7, 2022. During this hearing, the Special Master determined that the NRA was entitled to file a response to the NYAG's application. The NRA responded to the NYAG's application on July 12, 2022. Exhibit E. In its response, the NRA objected to the production of the Letter and the Frenkel Report arguing that the NYAG's requests sought irrelevant information and its requests were untimely. Importantly, the NRA also reserved its rights to object based on privilege.

On July 15, 2022, the Special Master issued a Discovery Order related to the NYAG's application. The order specifically focused on the fact that the disputed documents, including the Frenkel Report, were potentially relevant, and that production was not precluded merely based on the fact the documents date from over a decade ago (in the case of the Frenkel Report, nearly two decades ago). Exhibit F at 4. On July 22, 2022, the NRA appealed the Special Master's Discovery Order via Motion for Review pursuant to CPLR 3104(d). Exhibit G, NYSCEF 809. The NYAG filed its opposition to the NRA's Motion for Review on August 03, 2022. Exhibit H, NYSCEF 818. On September 29, 2022, the Court heard from the parties regarding these matters, and subsequently issued its opinion and order on October 17, 2022, finding that the Special Master's ruling that the Frenkel Report is "material and necessary" is "neither clearly erroneous nor contrary to law." *See* NYSCEF 859 at 5.

Thus, the only matter at issue in previous motion practice was the Frenkel Report's discoverability as a general matter. The NRA's privilege assertions were neither waived nor decided, and still apply to the Frenkel Report.

Disagreeing, the NYAG asked the Special Master for a Conference on October 23, 2022 to resolve this discovery matter. Exhibit I. The parties conferred with the Special Master on October 25, 2022, where the Special Master ordered the Frenkel Report to be produced. The NRA now moves this Court to review the Special Master's determination that the NRA waived its privilege assertions with regard to the Frenkel Report pursuant to CPLR 3104(d).

ARGUMENT

I. The Frenkel Report Is Clearly Subject to Attorney-Client Privilege and Attorney Work Product Privilege

In New York, the attorney-client privilege is codified in CPLR §§ 3101(b) and 4503(a)(1). It “shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship.” *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 [2016] (citing CPLR 4503[a][1]). The attorney-client privilege enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes. *See People v. Mitchell*, 58 N.Y.2d 368, 373 (N.Y. App., 4th Dept 1983) (“The attorney-client privilege, developed at common law, is now contained in our statute...Its purpose is to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidence will not later be revealed to the public to his detriment or his embarrassment.”). The privilege “belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services.” *People v. Osorio*, 549 N.E.2d 1183, 1185 [1989].

The law is clear that legal advice concerning investigative or compliance matters is fully subject to attorney-client protection. As the New York Court of Appeals has explained, “[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the

law, or simply to guide a client's course of conduct." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991). Thus, "[t]he critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." *Id.* at 379. Whether the legal advice related directly to litigation, or whether to compliance or an investigation, does not matter.

With regards to attorney work product protection, under New York's CPLR § 3101(c), "[t]he work product of an attorney shall not be obtainable." Attorney work product consists of "documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 190–91 [1st Dep't 2005]. Work-product privilege is unqualified and absolute. *Corcoran v. Peat. Marwick*, 151 A.D.2d 443, 445 (1st Dep't 1989); CPLR 3101(c) (it "shall not be obtainable").

A. The NRA Asserted its Privileges and Reserved the Right to Object to Production of the Frenkel Report Throughout the Litigation

Previous motion practice to date has focused only on the Frenkel Report's potential relevance to any issue in this litigation. Contending that the Frenkel Report is irrelevant, the NRA litigated the document's general discoverability before placing the Frenkel Report's privileged status at issue. Nonetheless, at every stage during the litigation, the NRA has asserted and reserved its rights to object to the production of the Frenkel Report based on attorney-client and work-product privilege.

1. The Litigation Over the Frenkel Report So Far Has Focused on the NRA's Relevance Objections

Up until now, the discovery disputes over the Frenkel Report have focused on the NRA's objections to the document's potential relevance and the untimely nature of the NYAG's discovery requests. In its July 12, 2022 letter response to the NYAG's application to the Special Master, the NRA stated that (1) the NYAG's requests were "well outside the temporal scope of prior document requests served in this case, and indeed outside the scope of any conceivable, relevant discovery timeframe," and (2) even if the Frenkel Report "could be countenanced as relevant to this litigation, the time to seek such discovery has long elapsed." The NRA also noted that these objections were "threshold matters." Exhibit E. During the parties' July 7, 2022 conference with the Special Master to address the NYAG's application for a motion to compel, the NRA informed the court of its objections to the Frenkel Report's relevance and to the NYAG's untimely request, noting that the NYAG cannot "in good faith claim that their RFPs cover" the Frenkel Report, because "[t]heir RFPs cut off at 2015." Exhibit J at 125:4-8.

The Special Master's own July 15, 2022 Discovery Order further advances the NRA's position. In it, the Special Master noted that the NRA objects to the NYAG's requests "on grounds the requests are unreasonable, untimely, and unsanctioned by the CPLR." Exhibit F at 3. The Special Master eventually ordered production of the documents because they are "material and necessary or may lead to discovery of matter that is material and necessary." In its order, the Special Master did not discuss privilege at all.

The NRA subsequently filed a Motion to Review the Special Master's Discovery Order with this same Court. Exhibit G. The NRA's motion alleged that the Special Master erred in (1) disregarding the NRA's untimeliness objection, (2) holding that there is no dispute that the requested documents are material and unnecessary. The NYAG responded to the NRA's motion by similarly alleging that (1) the requested documents are material and necessary, and (2) the

NYAG could not have known about the Frenkel Report's existence earlier, and as such, the request was timely. Exhibit H. This Court's own order on to the NRA's Motion to Review the Special Master's Discovery Order granted production of the Frenkel Report on the basis that the Special Master's ruling that the Frenkel Report is "material and necessary" is "neither clearly erroneous nor contrary to law." *See* NYSCEF 859 at 5. Just as the Special Master's Discovery Order, this Court's order did not address privilege.

2. The NRA Asserted its Privileges and Reserved the Right to Object to Production of the Frenkel Report Throughout the Litigation

At every stage during the litigation, the NRA has asserted and reserved its rights to object to the production of the Frenkel Report based on privilege. When the NYAG sought to question Mr. Coy about the Frenkel Report during his deposition, Mr. Coy informed the NYAG that "[t]his most definitely involved legal counsel. It was privileged. And as counsel has directed me, I am not going to answer that question." *See* Exhibit B at 219:5-220:4. On several other instances throughout his deposition, Mr. Coy continued to inform the NYAG that the contents and communications related to the Frenkel Report were privileged. *See, e.g.*, Exhibit B at 221:24-222:10. Counsel for the NRA similarly reiterated its privilege objections. *See* Exhibit B at 224:4-9 ("I object to the question. And, Professor Coy, again, instruct you to answer it only to the extent you can without revealing privileges."). Similarly, in the NRA's July 12, 2022 response to the NYAG's application to the Special Master, in addition to objecting on the basis that the requests are untimely and seek irrelevant documents, the NRA stated that "[i]n the event the Special Master were to order the NRA to locate and produce dated records, the NRA reserves the right to object to the request for the production on other grounds, including privileges." Exhibit E. Lastly, in the NRA's Motion for Review of the Special Master's Ruling regarding the Frenkel Report's relevance and the timeliness of the NYAG's requests, the NRA informed the court that "[t]he

objections set forth . . . are threshold matters. In the event the court were to order the NRA to produce the dated records to the NYAG, the NRA reserves the right to object . . . on other grounds, including privileges.” Exhibit G, NYSCEF 809 at 1 n.1.

3. The NYAG Clearly Understood the Frenkel Report was Still Subject to Privilege

On July 6, 2022, the NYAG applied to the Special Master to compel production of various documents, including the Frenkel Report. Exhibit D. The NYAG sought a motion to compel production based on the NRA’s objections that the documents sought were irrelevant and the request for production was untimely. On footnote 2 of their application to the Special Master, however, the NYAG noted that “Mr. Coy’s deposition, as well as other depositions, have included improper *assertions of privilege* and speaking objections. Those will be the subject of *a separate application*.” (emphasis added). Similarly, during the July 7, 2022 Special Master hearing on the NYAG’s application to compel production, while specifically discussing the Frenkel Report, the NYAG stated that “[a] separate issue, which I hoped to have briefed in front of you today, is the instructions not to answer to Mr. Coy.” Exhibit J, Tr. of Hearing with Special Master Sherwood on July 7, 2022 at 131:7-18.

It is clear by the NYAG’s own statements above that the Frenkel Report’s privileged status, and the NRA’s ability to assert the attorney-client and work-product privileges, was not waived and remained to be litigated separately. The NYAG cannot now claim otherwise.

B. The Frenkel Report States that it Was Prepared by Counsel Pursuant to an Attorney-Client Engagement in Order to Provide Legal Advice

There can be little doubt that, absent any waiver, the Frenkel Report is protected by the attorney-client and work-product privileges. As the Frenkel Report itself states, on March 25, 2003, the NRA’s Audit Committee engaged Jacob S. Frenkel, an attorney then practicing with

Smith, Gambrell & Russell LLP, to author a privileged and confidential report to assist with an internal investigation—in particular, to review the lawfulness of certain employees’ actions and make recommendations to the Audit Committee. The Frenkel Report is clearly marked, on each page, as “**Privileged and Confidential, Subject to the Attorney-Client and Attorney Work Product Privileges.**” It discusses counsel’s findings, legal conclusions, and strategy/recommendations regarding the subject matter of the Frenkel Report. The document was intended to convey confidential legal advice to the NRA, and it was developed in the course of the professional relationship between Frenkel and his client, the NRA. Thus, the attorney-client privilege applies. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d at 623. And because the Frenkel Report documents counsel’s thoughts and mental impressions regarding legal matters, the Frenkel Report is also protected under the attorney work-product doctrine. *Brooklyn Union Gas Co.*, 23 A.D.3d at 190–91.

C. Neither Attorney-Client Privilege Nor Work-Product Privilege Were Waived by Sharing the Frenkel Report with the NRA’s Auditor—as the Audit Committee Itself Recognized

In New York, “[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.” *Bluebird Partners. v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998)). “The 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.” *People v. Osorio*, 75 N.Y.2d 80, 84 (1989).

The NRA’s Audit Committee did not waive its attorney-client nor work product privileges by sharing the Frenkel Report with its auditor, PriceWaterhouseCoopers (“PWC”). The Frenkel Report itself is clear that it was shared in confidence, and that in sharing the Frenkel Report with its auditor, the Audit Committee did not intend waive the privilege by stating that “the Audit Committee has not waived the privilege with respect to any other entity or person.” The NYAG points to no evidence—

as none exists—that the NRA created a “likelihood that the material [would] be revealed to an adversary.” The Court should therefore reverse the Special 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 . . .”).

The involvement of agents such as auditors 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. The Audit Committee’s decision to disclose the Frenkel Report to its retained auditor, PWC, while *expressly noting that in doing so they had no intention to waive the attorney-client and work product privileges*, therefore does not break the privilege.

CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court (i) issue an order holding that the Documents are not discoverable and that the Special Master erred in holding otherwise; (ii) alternatively, review the documents *in camera*; and (iii) grant any other relief the Court deems just and proper.

Dated: November 1, 2022

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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, on this 1st day of November, 2022.

/s/ Noah Peters

Noah Peters

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 October 25, 2022, I advised them that the NRA intends to appeal certain aspects of the Special Master's rulings. AAG Monica Connell 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 Monica Connell at various points in October 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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