To be Argued by:
NOAH PETERS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK, by Letitia James,
Attorney General of the State of New York,

Plaintiff-Respondent,

Appellate Case No.: 2022-05187

– against –

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Defendant-Appellant,

– and –

WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER
and JOSHUA POWELL,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

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Defendant-Appellant the National Rifle Association of America (the "NRA" or the "Association") appeals the Decision and Order entered on October 3, 2022 (the "Decision"), by the Supreme Court, New York County (The Honorable Joel M. Cohen, J.S.C.).

The Decision requires the NRA to disclose the work product of its attorneys to its opponent in litigation—the Attorney General of the State of New York (the "NYAG"). The sole ground for the determination is that the documents at issue (the "Documents") were shared confidentially with the NRA's trusted tax preparer and auditor (Aronson LLC). The Decision also forces the NRA to disclose materials it prepared in anticipation of trial in this matter to its litigation adversary—even though the NYAG made no showing that it had "substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means," as the CPLR requires.[1]

Therefore, the Decision violates the absolute protection for attorney work product codified in CPLR 3101(c). The Decision also violates the near-absolute protection for materials prepared in anticipation of litigation contained in CPLR 3101(d)(2). To break these protections, there must be knowing and intentional

[1] CPLR 3101(d)(2).

waiver.[2] But the record makes clear that there was no knowing or intentional waiver in this case.[3]

Taxes are complicated and often require professional assistance. This is especially so for large non-profits like the NRA. Some sharing of attorney work product documents with tax preparers is often the prudent thing to do if those non-profits are to comply with their obligations to properly prepare tax forms. In seeking to keep Aronson up to date on the status of certain disclosures, non-legal NRA staff forwarded to Aronson communications from lawyers evidencing the status of their review of those disclosures.

The Decision erroneously creates a bright-line rule that any sharing of attorney work product documents with tax preparers (and auditors) waives *all* privileges—even where, as here, the disclosure was made in a setting where it was

[2] *See Acadia 1 Corp. v. Ins. Co. of N. Am*., 38 Misc. 3d 303, 306, 953 N.Y.S.2d 447, 450 (Sup Ct, New York County 2012) ("[I]t is axiomatic that waiver 'is an intentional relinquishment of a known right and should not be lightly presumed.' Such intention "must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act." (internal citations omitted)); *see also Manufacturers & Traders Tr. Co. v. Servotronics, Inc*., 132 A.D.2d 392, 399, 522 N.Y.S.2d 999, 1004 (4th Dep't 1987) ("Intent must be the primary component of any waiver test. The Supreme Court [of the United States] has defined waiver as an intentional relinquishment . . . of a known right." "The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure." (internal citations omitted)).

[3] The NRA offered to submit the privileged communications at issue in this appeal to the lower court for in-camera inspection. However, the lower court elected not to review the privileged communications before issuing its Decision holding that privileges were waived. The privileged communications at issue in this appeal are therefore not part of the Appendix. If the Court requests, the NRA will provide the privileged communications for this Court's review *in camera*.

reasonable for that party to believe that no privileges were being waived.[4] That rule is contrary to New York law and must be rejected.

PRELIMINARY STATEMENT

The NRA entered into a contract with Aronson LLC under which Aronson agreed to perform various services for the NRA and its affiliates, including financial statement audit and preparation services.[5] Aronson also agreed to review and prepare certain NRA tax forms.

In its retention agreement, Aronson acknowledged that information shared with it by the NRA is confidential and that it would maintain its confidentiality. Confidentiality was a crucial part of the agreement. At the time, the NRA had been sued civilly by the NYAG.[6] The NYAG alleged that the Association had filed its tax forms incorrectly.[7]

Among the tax forms for which Aronson was engaged was IRS Form 990. The Form 990 requires the NRA to disclose, among other items, information about its operations, compensation practices, and excess benefit transactions.[8] Alleged

[4] R. 6; R. 232 at 13:1-13.

[5] R. 109; The contract is dated October 26, 2020.

[6] *See* the NYAG's Verified Complaint and Amended Verified Complaint (NYSCEF Doc Nos. 1 and 11), dated August 6, 2018 and August 10, 2020 (seeking the NRA's dissolution, seizure of its assets, and application of those assets to "charitable uses").

[7] *Id*. at pp. 65-68, 102-106, 131-135, 155.

[8] This form was also submitted by the NRA to the NYAG's Charities Bureau.

deficiencies in previous Forms 990 filed by the NRA were the focus of the NYAG's lawsuit.[9] Thus, in preparing its Form 990 for 2019, the NRA sought assistance from Aronson and its counsel, including the NRA's General Counsel and other in-house counsel within and without the NRA.

Between September and November 2020, various attorneys provided legal advice and shared their mental impressions in connection with the NRA's draft Form 990 for fiscal year 2019. These confidential attorney-client and work product materials included discussions of the NRA's Form 990 disclosures regarding (i) officer and director compensation and compensation practices of the organization (Schedule J); (ii) certain financial transactions between the organization and disqualified persons (Schedule L); and (iii) the organization's operations and responses to various tax form questions (Schedule O).

Originally, members of Aronson's team were not copied on these communications. Subsequently, however, an NRA employee—a non-lawyer—sent Aronson's tax preparation team copies of these communications. The purpose of sending the communications was to keep Aronson informed of the status of the draft filing. There was no indication in any communication that the NRA employee had any idea that forwarding the email would waive privileges or confidentiality. Another non-lawyer NRA employee forwarded other communications to Aronson,

[9] *See supra* note 7.

in order to share the latest draft of the Form 990 and seek information about filing deadlines.

The Decision forces the NRA to disclose the privileged communications described above. But the communications at issue are protected from disclosure under CPLR 3101(c) and 3101(d), and these protections were not waived when the communications were shared with the NRA's tax preparer, Aronson.

Thus, the Court should reverse the lower court's Decision and hold that the communications are not discoverable and protected by the work product and trial preparation privileges. At the very least, this Court should remand to the lower court for a clarification of the basis of its ruling and/or in camera review of the Documents.

QUESTIONS PRESENTED

1. Where lawyers give legal advice concerning a client's IRS Form 990, do those communications constitute attorney work product within the meaning of CPLR 3101(c)?

The lower court answered in the negative.

2. When a client shares attorney work product protected by CPLR 3101(c) with the client's tax preparer (who is contractually bound to maintain the information confidential), does the disclosure mean that the information will be revealed to the client's litigation adversary?

The lower court answered in the affirmative.

3. Where lawyers give legal advice concerning a client's IRS Form 990 during a time when litigation is pending wherein the client is defending against allegations of false or misleading tax filings, do those communications constitute materials prepared in anticipation of litigation or for trial within the meaning of CPLR 3101(d)?

The lower court implicitly answered in the negative.

4. When the client shares trial preparation material protected by CPLR 3101(d) with the client's tax preparer (who is contractually bound to maintain the information confidential), does the disclosure mean that the information will be revealed to the client's litigation adversary?

The lower court answered in the affirmative.

STATEMENT OF RELEVANT FACTS

The NRA is America's leading provider of marksmanship and gun safety education for the military, law enforcement, and civilians.[10] It is also the foremost defender of the Second Amendment to the United States Constitution.[11] The NRA has millions of members, and its programs reach millions more.[12]

The Attorney General of the state of New York is Letitia James. Before

[10] *See* the NRA's Original Verified Answer and Counterclaims (NYSCEF Doc No. 230) at 137.

[11] *Id*.

[12] *Id*.

assuming office, and without evidence that the NRA had done anything wrong, James vowed to weaponize the supervisory powers of the NYAG to destroy the NRA.[13] James made it clear that she intended to harm the NRA because she disagreed with the NRA's constitutionally-protected political speech in favor of the Second Amendment to the U.S. Constitution.[14]

In February 2019, after James became Attorney General, her office held a meeting with representatives of Everytown for Gun Safety Action Fund ("Everytown") about the NRA.[15] The purpose of the meeting was for Everytown to advise the NYAG of a complaint about the NRA's Form 990 for 2017.[16] Two months after this meeting, the NYAG opened an investigation into the NRA.[17]

More than a year later, on August 6, 2020, the NYAG sued the NRA and four individuals under the N-PCL, the EPTL, and the Executive Law.[18] As relevant here, the NYAG alleges the NRA violated Executive Law Section 172-d(1) because its filings with the Charities Bureau, including its Form 990 filings, allegedly contained

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[13] *Id*. at 1; *see also* the NRA's Amended Answer to the NYAG's Second Amended Verified Complaint ("Answer") (NYSCEF Doc No. 889) at 1.

[14] *See* Answer (NYSCEF Doc No. 889) at 2.

[15] *Id*. According to Everytown's website and a recorded statement by its president, Everytown is a 501(c)(4) organization that "was created to serve as a counterweight to the NRA" that "focuses on advocacy and legislative work and fights to end gun violence with every legal tool available."

[16] *Id*. at pp. 2-3.

[17] *Id*. at 3.

[18] *See* the NYAG's Verified Complaint (NYSCEF Doc No. 1).

materially false or misleading statements. As a result, the NYAG claimed that the NRA should be dissolved and permanently enjoined from soliciting donations.[19]

On October 26, 2020, after the NYAG filed its action against the NRA based on alleged deficiencies in the NRA's tax filings, the NRA engaged Aronson to "assist in preparing [the NRA's] federal and state information and tax returns" and to "audit its consolidated financial statements."[20] As part of this agreement, Aronson specifically agreed to maintain the confidentiality of information shared with it by the NRA.[21] Around the same time, the NRA also retained outside tax counsel, Donald Lan, to assist with preparing its Form 990.[22]

In November 2020, while preparing the organization's IRS Forms 990 and 4720 for 2019, NRA executives sought legal advice in connection with several disclosures and draft language included in the tax documents.[23] Specifically, the NRA sought legal advice pertaining to disclosures for officer and director

[19] *Id*. at 155, 162.

[20] R. 19, 20, 83; *see also* R. 109-128, Aronson Engagement Agreement.

[21] R. 111 ("[Aronson] remain[s] committed to maintaining the confidentiality and security of your information. Accordingly, we maintain internal policies, procedures, and safeguards to protect the confidentiality of your personal information. In addition, we will secure confidentiality agreements with all service providers to maintain the confidentiality of your information and we will take reasonable precautions to determine that they have appropriate procedures in place to prevent the unauthorized release of your confidential information to others. In the event that we are unable to secure an appropriate confidentiality agreement, you will be asked to provide your consent prior to the sharing of your confidential information . . . .").

[22] R. 20.

[23] *Id*.

compensation and compensation practices of the organization, certain financial transactions between the organization and disqualified persons, and the organization's operations and responses to various tax form questions. To assist with the preparation of the NRA's tax forms, outside tax counsel and the NRA's litigation counsel provided mental impressions, prepared drafts, and otherwise exercised their skills as lawyers from both a litigation and tax perspective.[24]

As in camera consideration would show, the communications were not intended for dissemination to the IRS, the public, or any other third party.[25] Instead, the Documents unmistakably embody professional skills, thoughts and impressions memorialized by counsel in a confidential communication as part of legal advice provided to the client in order to comply with its tax reporting obligations.[26] Subsequently, a non-lawyer NRA employee forwarded the communications to representatives of Aronson to keep Aronson informed of the status of the draft filing.[27] She did so with no intent whatsoever to waive any privileges. Another non-lawyer NRA employee forwarded other communications to Aronson. His intent was also to share the latest draft of the Form 990 and seek information about filing deadlines.

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[24] R. 225.

[25] R. 20.

[26] *Id*.

[27] *Id*.

On June 21, 2021, the NYAG issued a subpoena duces tecum to Aronson.[28] In response, Aronson provided the NRA with over 18,000 documents to review for potentially privileged information belonging to the Association.[29] The NRA reviewed each document for privilege and determined that several documents should either be withheld from production or produced to the NYAG in redacted form.[30] Only the latter category of documents—the redacted ones—are now at issue.[31]

Thereafter, the NYAG sought to compel production of the documents (the "Motion to Compel").[32] In its Motion to Compel, the NYAG argued that (i) the NRA waived any claim of attorney-client privilege it had over communications that were shared with Aronson; (ii) the NRA failed to establish the withheld information is entitled to the immunity from disclosure given to attorney work product; and (iii) the NRA failed to establish the materials provided to Aronson are trial preparation materials, and in any event the NYAG is entitled to disclosure of any such materials

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[28] R. 192.

[29] *Id*.

[30] *Id*.

[31] Should the Court wish to review the Documents in order to determine the issues on appeal, the NRA offers to submit the Documents in-camera.

Despite this appeal, the NRA agreed to produce the Documents to the NYAG pursuant to a stipulation. Under that stipulation, the NYAG agreed to treat these Documents as confidential under the Protective Order entered in this action. (NYSCEF 869). Among the NYAG's obligations under this agreement is its obligation to return these Documents to the NRA should the Association prevail on this appeal.

[32] R. 33-39. The letter motion was filed before a Special Master appointed to resolve discovery issues on March 18, 2022.

provided to Aronson.[33] The NRA opposed these arguments.[34]

After oral argument, the Special Master reviewed withheld and redacted documents in camera, and on April 11, 2022, issued an initial ruling solely in connection with the NRA's privilege determinations for the withheld documents.[35]

On May 12, 2022, the Special Master issued a "Second Amendment to Order" ruling with respect to the redacted documents.[36] He ruled that (i) some of the documents were properly redacted because the redacted matter is privileged; and (ii) other redacted documents must be produced because either the redacted matter is not privileged, or the privileges were waived. [37] More specifically, the Special Master held that seven of the Documents at issue were not privileged[38] and that privileges applicable to fifteen of the Documents had been waived.[39]

Notably, the Special Master's "Second Amendment to Order" did not address the attorney work product or trial preparation privileges invoked by the NRA.[40]

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[33] R. 35-39.

[34] R. 83.

[35] On April 12, 2022, the Special Master issued an Amended Order regarding the withheld documents, clarifying certain privilege determinations in his prior order dated April 11, 2022.

[36] R. 12-16.

[37] *Id*.

[38] R. 15-16. *See* columns B and K. Documents deemed "not privileged" include document numbers 27, 32-36, and 45.

[39] *Id*. Documents deemed "waived" include document numbers 1-5, 12, 16, 20, 24-26, 28-29, and 37-38.

[40] R. 12-14.

However, the Special Master's Second Amendment to Order asserted that the NRA's disclosure of the materials to Aronson, after the NRA and its counsel initially took steps to exclude them, resulted in intentional waiver of the privilege.[41] But he did not explain why the NRA's disclosure of privileged documents to its specially-retained tax preparer, with whom it had an engagement letter preserving confidentiality and who had been retained in anticipation of this litigation, should result in waiver.

As a result, on May 19, 2022, the NRA moved for review—pursuant to CPLR 3104(d)—of the Special Master's ruling (the "Motion for Review").[42] In its Motion for Review, the NRA explained that the redacted material in the documents is privileged for three independent reasons, and that the three applicable privileges were not waived.[43]

On September 29, 2022, the lower court held oral argument on the NRA's Motion for Review. After oral argument, the lower court issued the Decision denying the motion:[44]

> Upon the foregoing documents, and for the reasons stated on the record after oral argument on September 29, 2022, it is hereby ORDERED that Defendant NRA's motion to review the Special Master's Second Amendment to Order regarding redacted Aronson Documents is

[41] R. 13-14.

[42] R. 190-203.

[43] R. 193.

[44] R. 6.

DENIED.

The lower court set forth its reasons for the order in cursory fashion at page 13 of the transcript.[45] Specifically, the lower court stated:

> I think the defendant's view of the scope of the privilege is unreasonably broad, and its view of the waiver of such a privilege is unreasonably narrow, so…I agree with the Special Master that any privilege attaching to the documents was waived.[46]

The Decision was served with Notice of Entry by the NYAG on October 3, 2022, and a Notice of Appeal was timely served and filed by the NRA thereafter.[47]

ARGUMENT

I. STANDARD OF REVIEW

The Appellate Division's authority to review an appeal from an order of the Supreme Court is broad.[48] While the Supreme Court's discretion to resolve discovery disputes is significant, the Appellate Division is "vested with its own discretion," which it has the "power to substitute . . . for that of the trial court" "even in the absence of abuse."[49] Here, reversal of the lower court's Decision is warranted

[45] R. 232.

[46] *Id*.

[47] R. 3-5.

[48] CPLR 5501(c).

[49] *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845, 901 N.E.2d 732, 734 (1st Dep't 2008) (*citing Andon ex rel. Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745, 731 N.E.2d 589, 592 (2000)).

as a matter of law and in the exercise of the Appellate Division's discretion.[50]

II. THE DOCUMENTS ARE PROTECTED BY THE ATTORNEY WORK PRODUCT PRIVILEGE

A. The Documents are covered by attorney work product privilege.

The lower court erred in finding the Documents are not protected by the attorney work product privilege. Specifically, the lower court erred in finding that the NRA's view of the scope of the privilege is "unreasonably broad."[51] The lower court's observation that it was "dubious about the privilege to begin with to the extent that it's this sort of separate standing work product privilege as applied to these auditors and accountants" reflects confusion and misunderstanding regarding the privileged documents (which the lower court never reviewed, despite the NRA's offer) and the basis for the NRA's privilege claims.[52] Contrary to what the lower court may have believed, the NRA was not arguing that the work product doctrine applied to the work of its auditors and accountants.[53] Rather, it was arguing that its disclosure of work product materials to its specially-retained tax preparer did not waive the privilege.[54]

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[50] *See, e.g., Mann v. Cooper Tire Co.*, 33 A.D.3d 24, 28-29, 816 N.Y.S.2d 45, 50-51 (1st Dep't 2006) (modifying discovery order based on finding that trial court "misapplied the law, and exercised its discretion improvidently").

[51] R. 232 at 13:4.

[52] *Id*. at 13:9-12.

[53] *Id*.

[54] R. 25-26; *see also* R. 223 at 4:25-R. 224 at 5:5.

Attorney work product is not synonymous with material prepared in anticipation of litigation.[55] Instead, the attorney work product privilege, codified in CPLR 3101(c), covers "materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy."[56] An attorney's work product can be reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways."[57] The work product protection extends to draft documents containing the attorneys' legal research, analysis, conclusions, legal theory or strategy.[58] The Court may not order disclosure of such materials.[59]

Here, the Documents are immune from disclosure because they are "uniquely the product of a lawyer's learning and professional skills."[60] Moreover, disclosure

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[55] *See Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep't 1980) ("Under CPLR 3101 [attorney work product and material prepared in anticipation of litigation] are not synonymous").

[56] *Id*.

[57] *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

[58] *See, e.g., Peerenboom v. Marvel Entm't, LLC*, 75 N.Y.S.3d 131, 132 (1st Dep't 2018) (explaining that under 3101(c) "draft pleadings or emails discussing changes to such pleadings" constitute protected attorney work product); *Nab-Tern-Betts v. City of New York*, 618 N.Y.S.2d 306, 307 (1st Dep't 1994) (holding that a draft bill of particulars and a draft contractual provision were protected attorney work product).

[59] CPLR 3101(c) (The work product doctrine grants absolute immunity from disclosure to "[t]he work product of an attorney," which "shall not be obtainable."); *see also Corcoran v. Peat. Marwick*, 151 A.D.2d 443, 445 (1st Dep't 1989).

[60] *Hoffman*, 73 A.D.2d at 211; *see supra* note 26.

would reveal the NRA attorneys' mental impressions and legal analysis of their client's tax form disclosures and litigation strategy.

The redacted material in the Documents includes email correspondence between the NRA and its legal counsel (collectively, "NRA Counsel"). The Documents reveal NRA Counsel's legal analysis and impressions with regard to draft language and specific disclosures in the Association's Form 990.[61] Specifically, NRA Counsel provides legal advice in connection with the adequacy and sufficiency of disclosures in the NRA's Form 990 concerning financial transactions between the organization and disqualified persons, and officer and director compensation for disclosure on the NRA's Form 990.[62]

There are five series of communications that together comprise the 22 redacted Documents at issue. In the first communication, the NRA's Managing Director of Finance—a non-lawyer—seeks advice from NRA General Counsel concerning updates and specific disclosures to Schedules L and O for the Form 990. Based on his analysis of the NRA's Form 990, NRA General Counsel communicates his impression in connection with a missing disclosure in the latest drafts of Schedule L in the Form 990, which constitutes attorney work product. In the same communication, the same NRA employee makes a related but separate inquiry to an

[61] *See supra* note 26.

[62] *See supra* pp 9-10.

Aronson representative and requests an update on the status of Aronson's review of the Form 990.

The second series of communications includes all NRA Counsel. Outside tax counsel provides his mental impressions and legal analysis regarding various disclosures and draft language to Schedules L, O, and J in the Form 990. The communication from outside tax counsel also seeks additional information from litigation counsel concerning certain disclosures. Collectively, NRA Counsel provides specific input and analysis for various sections of the Form 990 to ensure compliance with the NRA's tax reporting obligations and consistency with the NRA's litigation defense strategy. By law, this constitutes attorney work product. Subsequently, the NRA's Managing Director of Finance loops in an Aronson representative with the tax preparation team to update the representative on status and specific filing recommendations of counsel.

Similarly, the third series of communications includes the NRA's Treasurer and Chief Financial Officer requesting advice from tax counsel concerning additional potential disclosures for the Form 990. He also requests information for a Form 4720. Outside tax counsel provides his legal impression and analysis concerning the requested disclosures for the tax forms, constituting attorney work product. After outside tax counsel provides his professional legal opinion in response to the various inquiries, a separate NRA employee—the Director of Accounting

Operations and Financial Reporting—forwards the communications and the latest draft Form 990 to Aronson.

The fourth series of communications is between NRA outside tax counsel, NRA General Counsel, and various non-lawyer NRA staff, including the Chief Financial Officer and Treasurer, the Managing Director of Finance, Executive Director of Human Resources, Manager of Tax and Accounting Analysis, and Director of Accounting Operations and Financial Reporting. NRA Counsel provide their legal opinion on several disclosures on Forms 990 and 4720 including Schedules J and O, constituting attorney work product. The communications were later forwarded to the NRA's tax preparer requesting information for the filing deadline.

The final series of communications is between representatives in the NRA's General Counsel office. The communications concern correspondence received from the Virginia Department of Taxation for unitary business disclosures. The communication is forwarded to Aronson seeking professional tax advice from an Aronson partner on unitary business disclosures in order to inform NRA General Counsel and assist it in formulating its legal opinion. Based on this communication, NRA General Counsel forms his legal conclusion and strategy concerning the business disclosures, which constitutes attorney work product.

Additionally, for the reasons stated in Section III *infra,* the Documents were

prepared in anticipation of litigation. In fact, the legal advice provided in connection with the required tax filings was prepared during the instant litigation. The NYAG alleges the NRA's filings with the Charities Bureau, including its IRS Form 990 filings, allegedly contained false or misleading statements.

In sum, absent waiver, the documents are plainly covered by attorney work product privilege and are not properly subject to disclosure.

B. The work product privilege was not waived when non-lawyer NRA staff disclosed attorney work product to Aronson.

Although the protection of CPLR 3101(c) may be waived under certain limited circumstances, those circumstances are present "upon disclosure to a third party only when there is a likelihood that the material will be revealed to [a litigation] adversary, under conditions that are inconsistent with a desire to maintain confidentiality."[63] Disclosure will not waive the privilege where reasonable precautions were taken to prevent disclosure.[64] Further, the involvement of agents

[63] *Bluebird Partners v. First Fid. Bank,* 248 A.D.2d 219, 225 (1st Dep't 1998) (reversing affirmation of ruling that attorney work product protection under 3101(c) 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 . . . .") (cited at R. 87).

[64] *See Servotronics*, 132 A.D.2d 392, 399, 522 (4th Dep't 1987) ("Intent must be the primary component of any waiver test. The Supreme Court [of the United States] has defined waiver as an intentional relinquishment . . . of a known right." "The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure." (internal citations omitted)).

such as accountants and tax experts does not waive work product protection.[65] Indeed, the work product cloak extends even to the work of the non-lawyer agent in cases where the agent is an "adjunct to the lawyer's strategic thought process."[66]

The Federal Rules of Civil Procedure recognize a similar work product doctrine to New York's CPLR 3101(c).[67] Federal law is persuasive in evaluating work product protections under New York law. The majority view among federal courts is that the attorney work product doctrine is not waived by disclosure to independent auditors.[68] "[A]ny tension between an auditor and a corporation that

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[65] *See infra* note 68.

[66] *See, e.g., Hudson Ins. v. Oppenheim*, 72 A.D.3d 489, 490 (1st Dep't 2010). Other agents whose work has been recognized as "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) (holding that an appraisal report prepared by an expert at counsel's direction was protected as attorney work product under CPLR 3101(c)); *Oakwood Realty Corp. v. HRH Constr. Corp*., 51 A.D.3d 747, 749 (2d Dep't 2008) (holding that a report prepared by a consultant retained by counsel qualified for complete exemption from disclosure under CPLR 3101(c) as well as 3101(d)). 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 were prepared by NRA Counsel, and merely shared with the NRA's tax preparer and auditor.

[67] *Compare* Federal Rule of Civil Procedure 26(b)(3) ("[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).") *with* CPLR 3101(c) ("The work product of an attorney shall not be obtainable.").

[68] *See Merrill Lynch & Co. v. Allegheny Energy Inc.*, 229 F.R.D. 441, 445-46 (S.D.N.Y. 2004); *see also In re Weatherford Int'l Sec. Litig.*, No. 11CIV1646, 2013 WL 12185082, at *5 (S.D.N.Y. Nov. 19, 2013) ("Ernst & Young functioned as Weatherford's outside auditor. In this circuit, disclosure to an outside auditor does not generally waive work product protection." (internal citations omitted)); *Vacco v. Harrah's Operating Co*., No. 1:07 CV 663, 2008 WL 4793719, at *7 (N.D.N.Y. Oct. 29, 2008) ("most courts which have addressed the specific issue of whether the sharing of litigation related statements with outside auditors should result in a waiver" have rejected that position); *American Steamship Owners Mutual Protection and Indemnity*

arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping is simply not the equivalent of an adversarial relationship contemplated by the work product doctrine."[69]

The minority view—set forth in *Medinol*, the primary case cited by the NYAG at oral argument—is that a company waives any work product protection associated with materials it discloses to its independent auditor because the auditor acts as a "public watchdog" with interests not necessarily aligned with those of the organization.[70] But this view "has been almost uniformly rejected."[71] "While disclosure of materials covered by the attorney-client privilege to third parties with no common interest can and generally does result in a waiver of the privilege,[72] the law is not nearly so ungenerous when it comes to the sharing of materials subject to work product protection."[73] A policy underlying the attorney work product

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Association, Inc. v. Alcoa Steamship Co., No. 04 Civ. 4309, 2006 WL 278131, at *2 (S.D.N.Y. Feb. 2, 2006) (holding that disclosure to outside actuary did not effect waiver of the work product privilege).

[69] *International Design Concepts, Inc. v. Saks Inc.*, No. 05 Civ. 4754, 2006 WL 1564684, at *3 (S.D.N.Y. June 6, 2006) (quoting *Merrill Lynch*, 229 F.R.D. at 448).

[70] *Medinol Ltd. v. Boston Scientific Corp*., 214 F.R.D 113, 116 (S.D.N.Y. 2002); *accord First Horizon Nat'l Corp. v. Houston Casualty Co*., No. 2:15-cv-2235, 2016 WL 5867268, at *10 (W.D. Tenn. Oct. 5, 2016) (holding that disclosure of privileged communications to outside auditor waives work product protection).

[71] *Vacco v. Harrah's Operating Co*., No. 1:07 CV 663, 2008 WL 4793719, at *6 (N.D.N.Y. Oct. 29, 2008) (*citing Am. Steamship Owners Mut. Prot. and Indem. Ass'n, Inc. v. Alcoa Steamship Co., Inc., et al*., No. 04 Civ. 4309, 2006 WL 278131, at *2 (S.D.N.Y. Feb 2, 2006)).

[72] *Id*. (internal citations omitted).

[73] *Id*. (*citing U.S. v. Stewart*, 287 F. Supp. 2d 461, 468-69 (S.D.N.Y.2003)).

protection is "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent."[74]

When analyzing waiver of attorney work product, the courts require disclosure to a tangible adversarial relationship before any waiver can occur.[75] The court in *Merrill Lynch* made clear that any tension between an organization and its auditor is not the adversarial relationship contemplated by the work product doctrine.[76] The court found that treating auditors as adversaries and applying a blanket waiver rule raises public policy concerns, including discouraging companies from conducting critical self-analyses and sharing findings with their auditors.[77]

In *United States v. Deloitte LLP*, the United States Court of Appeals for the District of Columbia Circuit adopted the same position, holding that an auditor is not an adversary as contemplated by the waiver standards.[78] Just like here, the government in that case sought to obtain certain work product shared between an organization and its auditor. The government contended the work product protection

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[74] *Id.* (*citing Merrill Lynch*, 229 F.R.D. at 445 (S.D.N.Y.2004)).

[75] *Merrill Lynch*, 229 F.R.D. at 441, 447.

[76] *Id*. at 448 (noting that any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not and should not be the equivalent of an adversarial relationship contemplated by the work product doctrine; "A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud. Indeed, this is precisely the type of limited alliance that courts should encourage.").

[77] *Id*.

[78] *United States v. Deloitte LLP*, 610 F.3d 129, 133 (D.C. Cir. 2010).

was waived because the auditor was a potential adversary or at least a conduit to the organization's adversaries.[79] However, the court rejected these arguments and made clear that an auditor's power to issue an opinion that adversely impacts the interests of an organization "does not make it the sort of litigation adversary contemplated by the waiver standard."[80] Further, due to the auditor's obligation to maintain confidentiality, the organization had a reasonable expectation of confidentiality concerning the information it provided to its auditor.[81] Therefore, the auditor was not a conduit to its client's adversaries.

Effectively, the Decision relied on *Medinol*'s rule that any disclosure to an auditor waives the work product privilege.[82] But it did not acknowledge that *Medinol* set forth a minority rule and its reasoning has been almost unanimously rejected.[83] This Court should follow the majority rule, reject *Medinol*'s analysis, and reverse the Decision.

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[79] *Id*. at 129, 140.

[80] *Id*. at 140 ("[T]he possibility of a future dispute between [auditor] and [organization] does not render [auditor] a potential adversary for the present purpose. If it did, any voluntary disclosure would constitute waiver. Yet the work-product doctrine allows disclosures as long as they do not undercut the adversary process."); *id*. ("Even the threat of litigation between an independent auditor and its client can compromise the auditor's independence and necessitate withdrawal.") (*citing* American Institute of Certified Public Accountants (AICPA), AICPA Professional Standards, Code of Professional Conduct § 101.08 (2005) (discussing the effect of actual and threatened litigation on auditor independence)).

[81] *Id*.

[82] R. 230.

[83] *See, e.g., Vacco*, 2008 WL 4793719 at *6 (noting that *Medinol* has been nearly uniformly rejected).

Here, Aronson—the NRA's trusted tax preparer and auditor—is not an adversary of the NRA. Nor is Aronson a conduit to the NRA's adversaries. On the contrary, Aronson committed in its engagement agreement with the NRA to maintain the confidentiality of information shared with it by the Association.[84] In fact, Aronson also assured the NRA that it maintains internal policies, procedures, and safeguards to protect the confidentiality of the NRA's information.[85] Aronson was retained as an auditor and tax preparer to assist the NRA, not to be an adversary. The NRA would have never retained Aronson had it not agreed to keep the NRA's information confidential.

Even if the Court were to hold sharing privileged information with a tax preparer in some circumstances effects waiver of attorney work product, it is clear on the facts, waiver did not occur. Here, any disclosure of work product to Aronson was not intentional waiver, but an inadvertent, and harmless forwarding of information by the NRA's non-legal staff in a good-faith effort to contribute to the NRA's completion and filing of the Form 990. Those NRA employees simply sought to keep Aronson apprised of the status of its tax filings, not funnel information to a potential adversary. The law does not define Aronson as an adversary of the NRA

[84] *See supra* note 21.

[85] *Id*.

as contemplated by the work product privilege.[86] Further, contrary to what the lower court apparently believed, the NRA did not intend to waive privilege by disclosing the Documents to Aronson. The lower court held that, because certain non-lawyer NRA staff did not take the exact same protective actions as NRA's outside litigation counsel, they therefore intended to waive attorney work-product privilege on behalf of the NRA. This was the primary reasoning of the Special Master,[87] and it was affirmed by the Decision. But it is a non-sequitur to infer that because internal, non-legal staff did not take the exact same precautions as the NRA's outside litigation counsel, those non-lawyers therefore intended to waive the privilege.

Therefore, there is no waiver of the attorney work product privilege because there is no "likelihood" the material shared with Aronson would be revealed to an adversary. Here, the NRA merely shared privileged information prepared by its counsel with Aronson in a confidential communication designed to inform Aronson of the status of its draft regulatory IRS filing.[88]

And, indeed, there was no reason for the NRA's internal, non-legal staff to

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[86] *See supra* notes 76-78; *see also Merrill Lynch*, 229 F.R.D. at 448 (holding that accountants and auditors are not adversaries as contemplated by the work product privilege and disclosure of materials to such professionals did not constitute waiver of the attorney work product privilege).

[87] R. 13.

[88] *See Broadrock Gas Servs., LLC v. AIG Specialty Ins. Co*., No. 14 CV 3927, 2015 WL 916464, at *6 (S.D.N.Y. Mar. 2, 2015) ("Disclosure simply to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver [of attorney work product]." (internal citations omitted)).

take such precautions, given that Aronson entered into a confidentiality agreement with the NRA that specifically stated that "[Aronson] remain[s] committed to maintaining the confidentiality and security of your information."[89] Indeed, it expressly requires Aronson to seek the NRA's consent before sharing its information with Aronson's vendors.[90] The fact that a non-lawyer at the NRA forwarded documents to Aronson in an effort to keep it apprised of the filing status of the Form 990 did not amount to any intentional waiver—and neither the NYAG nor the lower court has cited evidence to the contrary.

As a result, the NRA did not waive work product privilege by sharing attorney work product with Aronson.

III. THE DOCUMENTS ARE PROTECTED BY THE TRIAL PREPARATION PRIVILEGE

A. The Documents are covered by the trial preparation privilege.

The trial preparation privilege, codified in CPLR 3101(d)(2), 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 . . .)."[91] Contrary to the lower court's belief, legal advice provided in connection with required tax filings can also be prepared in anticipation of litigation when litigation or regulatory action

[89] R. 111; *see also supra* note 21.

[90] R. 111.

[91] CPLR 3101(d)(2).

is certain or anticipated—as it was in this case.

For example, in *United States v. Roxworthy*, the court held that documents prepared to assist with a regulatory audit are prepared in anticipation of litigation and constitute privileged material even where they were prepared in connection with a business transaction or served an alternate business purpose.[92] "As other courts have noted, a document can be created for both use in the ordinary course of business and in anticipation of litigation without losing its work-product privilege."[93] Further, despite the lack of any indication from the Internal Revenue Service that it was planning to sue the organization in that case, the court held that the circumstances clearly constituted objectively reasonable anticipation of litigation, and thus the materials were still privileged.[94]

Similarly, in *In re Sealed Case*, the court held work product produced in the absence of a claim can satisfy the prepared in anticipation of litigation standard.[95]

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[92] *United States v. Roxworthy*, 457 F.3d 590, 599 (6th Cir. 2006).

[93] *Id*.

[94] *Id*.; *see also ChevronTexaco*, 241 F. Supp. 2d at 1082 (finding that anticipation of litigation where taxpayer "reasonably believed that it was a virtual certainty that the IRS would challenge the . . . transaction" is covered under the work product doctrine); *see also Deloitte LLP*, 610 F.3d at 129 (holding that pre-transaction tax opinion prepared before the tax return was filed and before actual litigation commenced is protected by the work product doctrine).

[95] *In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998) ("It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur."); *id*. ("If lawyers had to wait for specific claims to arise before their writings could enjoy work-product protection, they would not likely risk taking notes about such matters or communicating in writing with colleagues, thus severely limiting their ability to advise clients effectively.").

And the court in *United States v. ChevronTexaco Corp* adopted the Second Circuit's standard setting forth that "[a]n attorney's (or a party's) reasoning or research (factual or legal) about anticipated litigation should not be discoverable simply because the work also had to be undertaken to facilitate or consider a business transaction"[96] The court recognized that the rule does not "state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation."[97]

Here, the redacted material in the Documents was prepared by the NRA's attorneys in anticipation of trial in this very litigation. The material in the Documents includes communications prepared between September and November 2020, months after the NYAG filed its complaint against the NRA in August 6, 2020. When the Documents were prepared, the NRA was already defending against the NYAG's allegations of deficiencies in the NRA's previously filed Form 990 disclosures. In fact, the NYAG initiated this action in substantial part because of the NRA's tax filings.[98] The NRA was thorough in its response to these allegations. The NRA sought legal advice from its tax counsel to ensure compliance with all disclosure

[96] *ChevronTexaco*, 241 F. Supp. 2d at 1082 ("Thus we agree with the Second Circuit that, except where a document would have been generated in the normal course of business even if no litigation was anticipated, the work product doctrine can reach documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose.").

[97] *Id*.

[98] *See supra* pp 7-8.

requirements and from its litigation counsel to confirm certain disclosures were accurate and consistent with its litigation defense strategy. While typically the Form 990 may be prepared in connection with a general business practice, here it is indisputable that in the Documents, the NRA sought legal advice to, among other things, defend against the NYAG's active claims against it.

Thus, the Documents are immune from disclosure because they were prepared in contemplation of the pending litigation initiated by the NYAG.

B. The work product privilege was not waived when non-lawyer NRA staff disclosed attorney work product to Aronson.

Like the privilege governing attorney work product, 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.'"[99]

For the reasons set forth above, disclosure of the Documents to Aronson did not create a "likelihood" that the materials would be revealed to an adversary. Aronson is not a litigation adversary of the NRA. Further, Aronson expressly agreed to maintain the confidentiality of all materials shared with it by the NRA.[100] The

[99] R. 24, 198; *People v. Kozlowski*, 11 N.Y.3d 223, 246, 898 N.E.2d 891, 906 (2008) (*citing Bluebird Partners v. First Fid. Bank, N.J.*, 248 A.D.2d 219, 225, 671 N.Y.S.2d 7 (1st Dep't 1998) ("The qualified privilege governing trial preparation materials is waived upon disclosure to a third party 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.").

[100] R. 111; *see also supra* note 21.

NRA forwarded documents to Aronson to keep it apprised of the filing of the Form 990. This did not amount to intentional waiver.

As a result, the NRA did not waive the trial preparation privilege by sharing the Documents with Aronson.[101]

C. The NYAG cannot show the requisite hardship necessary to overcome the trial-preparation privilege.

Unlike attorney work product, the trial preparation materials encompassed by CPLR 3101(d)(2) are only conditionally immune from discovery.[102] Trial preparation immunity can only be overcome upon a showing of two factors: 1) "that the party seeking discovery has substantial need of the materials in the preparation of the case" and 2) "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[103] Whether a particular document is shielded from discovery under trial-preparation immunity is a fact-specific determination that most often requires an in-camera inspection.[104] Even if the substantial need or an undue hardship showing is made, however, "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal

[101] Moreover, as noted *supra*, even if the Documents were not protected by the trial preparation privilege, they are still protected by the attorney work product privilege and therefore are not discoverable.

[102] CPLR 3101(d)(2).

[103] *Id.*

[104] *Fields v. First Liberty Ins. Corp*., 38 Misc. 3d 431, 954 N.Y.S.2d 427 (Sup Ct, Suffolk County 2012).

theories of an attorney...".[105]

Here, the NYAG cannot show injustice or substantial hardship if it does not receive access to the Documents. The NYAG has already received voluminous information regarding the NRA's Form 990 disclosures.

For example, the NRA reviewed and cleared for production over 18,000 pages of Aronson documents to the NYAG.[106] The NRA has also produced over 1.7 million pages of its own documents to the NYAG. Thus, there is no basis for the NYAG's argument that it has a substantial need for the 22 Documents at issue.

Although the NYAG claims that it has a substantial need for the information relevant to its claims—specifically its claims that the NRA's tax returns were "false filings"—a determination of inaccuracy and a finding of liability here would not be premised on counsel's impressions and legal advice regarding the tax forms, but on documents actually filed with authorities—to which the NYAG already has access.[107] The NYAG also has access to underlying factual materials (e.g., financial statements) which the NRA supplied to Aronson as its tax preparer and auditor. It does not require access to NRA Counsel's mental impressions. Therefore, the NYAG cannot overcome the trial preparation privilege to access the Documents.

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[105] CPLR 3101(d)(2); *see, e.g., Matter of Lenny McN.*, 183 A.D.2d 627, 584 N.Y.S.2d 17 (1st Dep't 1992).

[106] R. 19.

[107] R. 88.

CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Appellate Division (i) vacate and reverse the Decision; (ii) hold that the redacted Documents are protected by the work product and trial preparation privileges; and (iii) hold that the privileges were not waived when non-legal NRA staff shared the Documents with the NRA's tax preparer, which was itself bound by a strict confidentiality agreement.

Dated: July 3, 2023

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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General of the State of New York,

Plaintiff-Respondent,

– against –

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Defendant-Appellant,

– and –

WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER and JOSHUA POWELL,

Defendants.

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1. The index number of the case in the court below is 451625/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about August 6, 2020, by filing of a Summons and Verified Complaint. Issue was joined on or about February 23, 2021, by service of a Verified Answer.

5. The nature and object of the action involves alleged negligence.

6. This appeal is from the Decision and Order of the Honorable Joel M. Cohen, dated October 3, 2022, which denied Defendant The National Rifle Association of America's Motion for Review of the Special Master's Second Amendment to Order regarding redacted Aronson Documents.

7. This appeal is on the full reproduced record.