

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:**

**NATIONAL RIFLE ASSOCIATION OF
AMERICA,**

Petitioner,

v.

**LETITIA JAMES, IN HER OFFICIAL
CAPACITY AS THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK,**

Respondent.

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Index No. _____

Mot. Seq. 001

**MEMORANDUM OF LAW IN SUPPORT OF
THE NRA'S APPLICATION FOR AN ORDER TO SHOW CAUSE**

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*ATTORNEYS FOR THE NATIONAL
RIFLE ASSOCIATION OF AMERICA*

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The National Rifle Association of America (the “NRA”) files this Memorandum of Law in Support of its Application for an Order to Show Cause why an Order should not be issued, pursuant to CPLR 2304 (motion to quash, fix conditions, or modify) and 3103 (protective orders): (a) fixing conditions of or modifying the Subpoena Ad Testificandum issued by the New York Attorney General, on July 26, 2019, to Lt. Col. Oliver North (“North”) (the “Subpoena”), or granting a protective order, to permit NRA counsel and NRA Board counsel to be present during the examination of North, and to lodge concise objections aimed at preserving privileges belonging to the NRA, its counsel, and its Board counsel, including communications protected by the attorney-client privilege, the work product doctrine, and as trial preparation material; (b) suspending the NYAG’s examination of North pursuant to CPLR 3103(b) pending the Court’s ruling on the NRA’s Petition; and (c) granting such other relief that the Court deems fair and appropriate:

I.

PRELIMINARY STATEMENT

The NRA seeks expedited relief to prevent the disclosure of its privileged information in connection with an NYAG testimonial subpoena to its former president, North. The NRA does not seek to quash the Subpoena entirely, nor to impose any rigid, prescribed limits on the subject matter of the NYAG’s examination. Rather, the NRA asks only that it be granted an opportunity to lodge concise objections preserving its privileges—which it unequivocally has standing to assert.

Issued July 26, 2019, the Subpoena commands North to produce documents and appear for examination. It is undisputed that North, as a former president and current director of the NRA, has been privy to substantial attorney-client privileged information, including regarding issues covered by the Subpoena’s document requests (*i.e.*, those which are of evident interest to

the NYAG, and will presumably be topics for examination). The NRA—not North—is the owner of these privileges, and the only party that can assert or waive them.¹

Therefore, the NRA made a request to the NYAG, as well as North's counsel, that the NRA be permitted to (i) review for privileged information the documents North intended to produce to the NYAG; and (ii) be present at North's examination in order to object to the disclosure of the NRA's privileged information. Both the NYAG and North's counsel agreed to allow the NRA to review the proposed production for any potential additional redactions. The documents North is producing to the NYAG make clear that he was exposed to—and possesses—significant privileged information. Inexplicably, however, the NYAG is refusing to allow the NRA to be present at North's examination before the NYAG, thus denying the NRA its right to protect the same exact or similar information from oral disclosure.

The NRA therefore moves for an order to show cause why, pursuant to CPLR 2304 (motion to quash, fix conditions, or modify) and 3103 (protective orders) the Court should not issue an order (a) modifying the Subpoena and/or issuing a protective order, to allow the NRA's attorneys to be present for North's examination by the NYAG, or any testimony by North, in response to the Subpoena, to enable the NRA's attorneys to object to the disclosure of information protected from disclosure under the attorney-client, work product, or any other applicable privilege or immunity; (b) suspending the NYAG's examination of North pursuant to CPLR 3103(b) pending the Court's ruling on the NRA's Petition; and (c) granting such other relief that the Court deems fair and appropriate.

¹ The NRA Board of Directors also has independent counsel and may own certain privileges in certain instances. During the meet-and-confer discussions that preceded this motion, the NRA also sought permission for its Board counsel to attend North's examination and lodge privilege-based objections—which the NYAG likewise refused to allow.

II.

FACTUAL BACKGROUND²

1. The Petition presents a Special Proceeding brought under Article 4 and Section 7804 of the CPLR.
2. The Court has jurisdiction over this matter pursuant to CPLR 2304.
3. Venue is proper in this Court because the Subpoena was issued in this county, commands testimony in this county, and commands a document production returnable in this county.
4. The NRA is a not-for-profit corporation organized under the laws of the State of New York with its principal place of business in Fairfax, Virginia. The NRA is America's leading provider of gun-safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment to the United States Constitution. The NRA has over five million members, and its programs reach millions more.
5. Lt. Col. Oliver North is a former President of the NRA and a current member of the NRA Board of Directors.
6. On or about April 26, 2019, the Honorable Letitia James, Attorney General of the State of New York, issued document preservation notices to the NRA (Exhibit 1³) and its affiliates, in which she stated that her office "is currently investigating conduct by the [NRA] and affiliated entities, including related party transactions between the NRA and its Board members; unauthorized political activity; and potentially false or misleading disclosures in regulatory filings."

² This factual background is based on the Affirmation of Svetlana M. Eisenberg dated August 16, 2019.

³ All exhibits referenced in this Memorandum of Law are exhibits attached to the accompanying affirmation of Svetlana M. Eisenberg.

7. On July 29, 2019, Brendan Sullivan, counsel for North, sent an email message to the NRA's Secretary and General Counsel. To the email message, Mr. Sullivan attached two things: (i) the Subpoena, dated July 26, 2019 (Exhibit 2); and (ii) a letter from Brendan Sullivan, dated July 29, 2019 (Exhibit 3).

8. The Subpoena Ad Testificandum and Duces Tecum, dated July 26, 2019, from the Attorney General of the State of New York is addressed to North and commands him to "appear and attend before Letitia James, . . . , on August 20, 2019 at 9:00 am . . . at the offices of the New York State Attorney General's Office, 28 Liberty Street, New York, NY 10005, and to testify in connection with an investigation into potential violations of [the laws of the State of New York, including the Executive Law, the Estates, Powers and Trusts Law, and the Not-for-Profit Corporation Law] or any matter which the Attorney General deems pertinent thereto."

9. The Subpoena also commands North to produce to the NYAG "any and all documents requested in the attached schedule that are in [his] possession, custody or control, including documents in the possession, custody and control of any agent you may have." The Schedule specifies that North is commanded to produce "[a]ll documents concerning allegations You [North] have made, or concerns You have raised, of financial impropriety, mismanagement, misuse or waste of assets, governance failures or other wrongdoing at the National Rifle Association of America, Inc. ("NRA"), including without limitation, the allegations or concerns addressed in (a) the April 18, 2019 letter You and Richard Childress directed to John Frazer, and Charles Cotton; and (b) Your memorandum to the Executive Committee of the NRA, dated April 25, 2019."

10. By virtue of his positions as President and Board member at the NRA, North was afforded access to and learned of information, communications, and documents that are protected

by the attorney-client privilege, the work product doctrine, and as trial preparation materials. He, however, is not the holder of the privileges. Rather, it is the NRA and/or its Board who has the prerogative to assert or waive privileges they respectively possess. In addition, work product protections cannot be waived without the consent of the counsel who holds them.

11. The letter attached to Mr. Sullivan's email message to the NRA was a letter from Mr. Sullivan, dated July 29, 2019, in which Mr. Sullivan states in part: "The [NYAG] has assured us that they will be sensitive to protecting the NRA's privilege when taking testimony. We also will be sensitive to protecting the NRA's privilege. In addition, we plan to redact materials that are compelled by the [NYAG's] subpoena to protect information that may be privileged to the NRA."

12. The letter from Mr. Sullivan went on to state: "Lt.Col. North will comply with the New York Attorney General's subpoena unless the NRA secures an order from a New York court directing Lt.Col. North not to comply."

13. On August 10, 2019, counsel for the NRA informed North's counsel that the NRA objects to, for the reasons set forth in its letter (Exhibit 4), North's production of documents to the NYAG until the NRA has reviewed those materials and ensured that all appropriate redactions have been made to ensure that "any privileges belonging to the NRA or its Board – including, without limitation, attorney-client privilege and the work product doctrine – can be properly asserted and logged."

14. The NRA's August 10, 2019 letter to North's counsel also stated that the NRA's counsel must be permitted to be present at the examination of North "in order to object to questions on privilege or attorney work product grounds and to caution [the witness], an NRA fiduciary, not to divulge protected information."

15. On August 12, 2019, counsel for the NRA was sent 899 pages of documents North's counsel had prepared for production to the NYAG, which they stated they had "redacted . . . to protect material that potentially is privileged." North's counsel stated: "If there are additional redactions that you believe are necessary to protect privilege, please provide those redactions to me no later than Wednesday, August 14, at 3 PM ET." (Exhibit 5).

16. In subsequent days, counsel for the NRA worked diligently to review North's draft production to the NYAG. The review of a portion of the production was completed on August 14, 2019, and the entire review was completed by approximately 5 p.m. on August 15, 2019. This review of North's draft production only further underscored the NRA's concern regarding the need to be present during North's examination in order to protect the privileged information belonging to the NRA, its counsel, and its Board Counsel. For example, the review identified a document that is wholly privileged on attorney-client privilege and work product grounds and needed to be withheld from the production in its entirety. In addition, there were 37 additional redactions that needed to be applied to the draft production, but that North's counsel had not made.

17. On August 15, 2019, at 12:58 p.m., the NRA's counsel sent a letter to the NYAG's office via electronic mail in which it again asserted the NRA's right, citing authorities, to be present at North's examination by the NYAG in order to make objections based on privilege.

18. Just before 5 p.m. on August 15, 2019, the NYAG's office called the NRA's counsel and informed them that the NYAG refused to allow NRA counsel to be present during North's examination.

19. The NRA will be severely prejudiced if it is not permitted to attend North's examination in order to object to the disclosure of the NRA's protected information by North. Given that the NRA's further review of North's production to the NYAG yielded additional claims of privilege, the NRA has real concerns that, absent the presence of NRA's counsel, North may divulge protected information during his testimony. North's testimony before the NYAG is scheduled for August 20, 2019. The NRA therefore is forced to seek expedited relief from the Court.

20. When the NRA's counsel asked the NYAG if the NYAG would postpone North's testimony, in light of the NRA's concerns regarding the prejudicial effect of its privileged information being divulged, the NYAG's office responded that it would be burdensome and refused.

21. The NRA therefore submits this application for order to show cause to enable the NRA's attorneys to object to the disclosure of information immune from disclosure under the attorney-client, work product, or any other applicable privilege or immunity; and granting such other relief that the Court deems fair and appropriate.

III.

ARGUMENT

A. CPLR § 2304: Modification or Fixing Conditions of a Subpoena

1. Where the property or privilege rights of a party to whom the subpoena is not directed are in danger of being violated, a court may modify a subpoena in order to protect those rights.

Pursuant to CPLR 2304, where a subpoena is "not returnable in a court," a person or entity may move to "quash, fix conditions or modify" the subpoena after "a request to withdraw or modify subpoena [has] first be[en] made to the person who issued it." CPLR 2304.

“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (explaining the importance of the work product privilege); CPLR 3101(b), (c), and (d) (protecting from disclosure privileged matter, attorney work product, and trial preparation materials).

Because the extent to which a deposition or oral examination may violate such rights is necessarily contingent upon the testimony elicited, the party must be able to object to specific questions and topics in order to protect its rights and privileges. *See Holmes v. Winter*, 980 N.Y.S.2d 357, 369 (2013). But in order to assert those rights, the interested or affected party must be present in order to be able to object to the improper disclosure.

Therefore, “[a] person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications.” *Hyatt v. State Franchise Tax Bd.*, 962 N.Y.S.2d 282, 288 (2d Dep’t 2013); *see also State Commission on Governmental Operations of City of N.Y. v. Manhattan Water Works*, 10 A.D.2d 306, 208 (1st Dep’t 1960) (corporation had sufficient interest to warrant its resorting to the courts to protect its rights where subpoena implicated corporate records in the possession of an employee); *Matter of Selesnick*, 454 N.Y.S.2d 656, 658 (Sup. Ct. 1982); *Beach v. Oil Transfer Corp.*, 199 N.Y.S.2d 74, 76 (Sup. Ct. 1960).

It is therefore no surprise that where the property or privilege rights of a party to whom the subpoena is not directed are in danger of being violated, a court may modify a subpoena in

order to protect those rights. *See Hyatt v State v. State Franchise Tax Bd.*, 962 N.Y.S.2d 282, 288 (2d Dep't 2013) (affirming modification of subpoena on motion to quash where movant had "proprietary interest in the subject documents"; court also noting that similar standing would exist in the event of threatened disclosure of privileged communications).

2. *Allowing the examination of North to go forward without the NRA's ability to object during the examination on privilege grounds violates the NRA's right to protect its privileged information.*

On July 29, 2019, North's attorneys notified the NRA that North would be complying with the Subpoena from the NYAG, which commands him to produce documents and appear for an examination concerning allegations North made regarding the NRA.

As President of the NRA from September 2018 through April 2019, and as a current member of the Board of Directors of the NRA, North has been exposed and continues to possess access to confidential, nonpublic information and documents, some of which are immune to disclosure because they are protected under the attorney-client, work product, or any other applicable privilege or immunity that belongs to the NRA.

It is reasonably likely that, during North's examination, he will be asked questions by the representatives of the NYAG regarding communication and information that, directly or indirectly, implicate these privileges. However, Mr. North is not an attorney and, in answering these questions, he may—wittingly or unwittingly—reveal the substance of protected communications and information. In addition, for the reasons set forth in the NRA's pending lawsuit against North,⁴ the NRA and North are currently adverse, which heightens the need for the NRA's counsel to be present at the examination rather than entrusting an adverse party to

⁴ Case No. 653577/2109 (New York Supreme Court).

protect its confidential information on its behalf. Moreover, it is the NRA—as opposed to North—who holds the NRA’s privileges.

Neither the NYAG nor North’s counsel is in a position to determine whether particular questions implicate—or particular responses might disclose—privileged information. In fact, the NRA’s counsel’s review, agreed to by both the NYAG and North’s counsel prior to North’s eventual production, of North’s intended document production to the NYAG in response to the same Subpoena underscores the NRA’s concerns. NRA’s counsel’s review revealed that the intended production included (i) a multi-page document that is wholly privileged and should be withheld in its entirety; and (ii) multiple instances in which privileged material had not been fully redacted.

In satisfaction of CPLR 2304, the NRA requested that the NYAG and North agree to allow the NRA to protect its privileges from improper disclosure by North in writing as early as August 10, 2019. The NRA in no way wishes to obstruct or impede the NYAG’s investigation or examination of Mr. North. However, the NRA does have the right to have its counsel and its Board counsel present during an examination of a past President and current member of the Board of Directors in order to safeguard its protected information. As the holder of the privileges, the NRA is the only party with an interest in protecting it. Knowledgeable about the issues and facts, the NRA’s attorneys are best positioned to protect the NRA’s privileged information.

The NRA therefore seeks an order modifying the subpoena to allow the NRA’s attorneys to be present for any examination by the NYAG of North, or any testimony by North, in response to the Subpoena, and to enable the NRA’s attorneys to object to the disclosure of

information immune from disclosure under the attorney-client, work product, or any other applicable privilege or immunity.

B. CPLR 3103: A Protective Order

3. *On application of “any person from whom or about whom discovery is sought,” the Court may make a protective order conditioning the use of a subpoena to prevent prejudice to any person.*

Pursuant to CPLR 3103, on application of “any person from whom or about whom discovery is sought,” the Court may make a protective order denying, limiting, conditioning or regulating the use of any disclosure device,” including a subpoena, in order to prevent “prejudice to any person.” CPLR 3103(a).

Service of the papers for relief pursuant to this Section “shall suspend disclosure of the particular matter in dispute.” CPLR 3103(b). Further, “[i]f any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.” CPLR 3103(c).

4. *Allowing the examination of North to go forward without the NRA’s ability to object during the examination will prejudice the NRA*

Privilege is one of the most sacrosanct rights in our judicial system. It is *per se* prejudicial to allow a third party to disclose privileged information that the privilege holder seeks to remain confidential. The NRA stands to suffer prejudice from the improper disclosure of its privileged information because, once information is disseminated to adverse parties, the cat is out of the proverbial bag.

The NRA therefore seeks a protective order to allow the NRA’s attorneys to be present for any examination by the NYAG of North, or any testimony by North, in response to the Subpoena, to enable the NRA’s attorneys to object to the disclosure of information immune from

disclosure under the attorney-client, work product, or any other applicable privilege or immunity.

Pending the Court's resolution of this issue, the NRA invokes CPLR 3103(b) to suspend the examination pursuant to the Subpoena from going forward.

IV.

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE the NRA requests that the Court grant its expedited application for an Order to Show Cause why an Order should not be issued, pursuant to CPLR 2304 (motion to quash, fix conditions, or modify) and 3103 (protective orders):

- (a) modifying the Subpoena from the NYAG, dated July 26, 2019 or issuing a protective order, to allow the NRA's attorneys and the NRA's Board counsel to be present for any examination by the NYAG of North, or any testimony by North, in response to the Subpoena, to enable the NRA's attorneys to object to the disclosure of information immune from disclosure under the attorney-client, work product, or any other applicable privilege or immunity; and
- (b) suspending the NYAG's examination of North pursuant to CPLR 3103(b); and
- (c) granting such other relief that the Court deems fair and appropriate.

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*ATTORNEYS FOR THE NATIONAL
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CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. § 130-1.1a

Svetlana Eisenberg, an attorney duly admitted to practice before the Courts of the State of New York, hereby certifies that, pursuant to 22 N.Y.C.R.R. § 130-1.1a, the foregoing Memorandum of Law is not frivolous nor frivolously presented.

Dated: August 16, 2019
New York, New York

/s/ Svetlana Eisenberg _____
Svetlana Eisenberg