SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE J.S.C.
Justice

PART 15

People of The State of NY

-v-

Ackerman McQueen

INDEX NO. 451825-19

MOTION DATE

MOTION SEQ. NO. 1

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

The Motion is Decided in Accordance with the Accompanying Decision and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-21-2020

HON. MELISSA CRANE, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES, Attorney General of the
State of New York,

Petitioner,

Index No.: 451825/2019

-against-

Mot. Seq. No. 001

ACKERMAN McQUEEN and the NATIONAL RIFLE
ASSOCIATION OF AMERICA, INC,

Respondents.

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MELISSA A. CRANE, J.S.C.:

Ackerman McQueen ("AMQ") has provided public-affairs advice and services to the National Rifle Association of America, Inc (the "NRA") for over thirty years. The two entities fostered a deep, decades-long collaboration. AMQ entered into third-party contracts and purchased goods and services on the NRA's behalf. It also deployed the NRA's intellectual property across media platforms, liaised closely with NRA members and donors, and operated the NRA's websites that required disclosure of personal information of NRA supporters. AMQ handled the NRA's public relations strategy, managed branding, and administered the NRA's digital assets, including NRATV. AMQ often communicated with the public as the face of the NRA. In these ways, the NRA says AMQ acted as its agent.

In 2017 alone, the NRA paid AMQ nearly $40 million pursuant to a "Services Agreement" contract. The Service Agreement contained a confidentiality provision (the "NDA"). The NDA provision states:

> AMC shall not disclose, directly or indirectly, to any…data, materials or information…made known to AMC as a result of AMC's providing [contracted-for services] without the prior express written permission of the NRA
> (Petition ¶ 22, exh 5).

The provision prohibits AMQ's unauthorized disclosure of nonpublic information that the NRA entrusted to AMQ in the course of doing business. Apparently, the Service Agreement's "subpoena response protocol" requires, that, when AMQ receives a subpoena involving NRA-related documents, it will inform the NRA. The NRA can then object, move to quash the subpoena, or review outgoing documents for potential privilege. The Services Agreement also included a Records-Examination Clause that requires AMQ to open its files for the NRA's inspection upon reasonable notice during the contract's term. The Property-Return Clause in the Services Agreement requires AMQ to return the NRA's confidential documents upon the termination of the Agreement.

In 2019, the NRA's relationship with AMQ began to deteriorate. There are now four ongoing litigations between the NRA and AMQ. On April 12, 2019, the NRA filed a lawsuit against AMQ, alleging that AMQ breached the April 30, 2017 Services Agreement. The NRA sued AMQ for specific performance of the Records-Examination Clause. AMQ subsequently threatened a coordinated media "leak" of employee-expense information. In response, on May 22, 2019, the NRA filed its second lawsuit, alleging that the AMQ breached the NDA. Soon after, on June 25, 2019, the NRA terminated the Services Agreement with AMQ.

Petitioner, the Office of the Attorney General of the State of New York (hereinafter, "OAG"), commenced an investigation into the NRA's operation as a not-for-profit entity. New York affords OAG broad discretion to oversee and investigate not-for-profit entities, like the NRA, that solicit donations from the public. OAG started an investigation after a review of the NRA's public reports like IRS Form 990 and CHAR500 official filings, as well as audited financials, unearthed inaccuracies. OAG is concerned about allegations of financial

improprieties, improper related party transactions between the NRA and its officers and board members, and false or misleading disclosures in its regulatory filings.

On May 3, 2019, OAG issued a document preservation notice to AMQ. On May 16, 2019, AMQ indicated it would cooperate with OAG's investigation and agreed to meet the following week, on May 22, 2019. However, on May 20, 2019, AMQ cancelled the scheduled meeting, explaining that the NRA viewed the meeting as a breach of the NDA. On June 6, 2019, OAG and the NRA discussed the NDA in its Services Agreement. On June 26, 2019, the NRA asserted that it would continue to insist that third-party vendors, like AMQ, notify the NRA in advance so it can review potential disclosures to OAG.

On July 8, 2019, OAG served a subpoena *duces tecum* on AMQ, seeking documents related to the NRA's potential misconduct. On July 12, 2019, OAG and AMQ had another meet and confer to discuss whether AMQ would comply with the subpoena. AMQ, again, indicated that it would comply with the subpoena, but that it had to disclose first to the NRA pursuant to the NDA. On July 31, 2019, OAG received AMQ's initial production in response to its subpoena. Following that, OAG instructed AMQ to withhold future productions if AMQ insisted on disclosing first to the NRA. OAG did not receive any further production. OAG determined that the NRA's involvement in AMQ's subpoena compliance, that the NRA pre-screen all document productions, impeded the investigation. A pre-screen would undermine OAG's ability to protect its investigative sources, and to maintain its confidentiality of investigative theories and progress.

On September 26, 2019, OAG and AMQ met. AMQ reiterated that it would comply with the subpoena, but only after it first presented the documents to the NRA. OAG and the NRA then spoke, on September 27, 2019. The NRA stated that the NDA requires AMQ to obtain the

NRA's written consent before producing documents. The NRA also stated that the documents were protected under attorney-client, attorney work product, common interest, and First Amendment privileges. Subsequently, OAG commenced this special proceeding to compel AMQ to comply with OAG's July 8, 2019 subpoena without the NRA's required preview of responsive documents.

Discussion

The NRA relies on four grounds to argue that it can monitor or preview AMQ's outgoing document production: (1) that the NDA creates a contractual obligation that requires AMQ to seek NRA's consent before disclosing information; (2) attorney-client privilege; (3) work-product privilege; and (4) a First Amendment privilege.[1] The NRA bears the burden to prove the basis for the privilege claims and work-product protection through affidavits or a privilege log. In this case, the NRA has provided both items (see Frazer Aff dated October 23, 2019, nyscef doc no 26, and ex E to Frazer Aff, nyscef doc no 31).

Attorney-Client Privilege

Communications made between counsel and its client in the presence of a third party are not privileged (*People v Harris,* 57 NY2 368, 743 [1982]). However, a public relations firm's involvement does not automatically vitiate the attorney-client privilege (*Pecile v Titan Capital Group, LLC*, 119 AD3d 446, 446-67 [1st Dept 2014]). The attorney-client privilege may apply to communications between an attorney and a public relations firm if the communications are otherwise privileged (*id.*). A party who invokes the attorney-client privilege must show (1) a communication occurred between counsel and client; (2) intended as confidential; and (3) made

[1]This court notes that the NRA, in its opposition brief, does not cite to any case-law that would warrant attorney-client privilege or work-product privilege.

for the purpose of providing or obtaining legal advice. The predominant purpose of the communication must involve legal advice (*Gottwald v Sebert,* 58 Misc3d 625, 626-627 [NY County, Sup Ct 2017] *citing to In re Chevron Corp,* 749 FSupp2d 141, 164-65 [United States Dist Ct SDNY 2010]; *Rossi v Blue Cross & Blue Shield of Greater New York,* 73 NY2d 588, 593 [1989]).

For AMQ's communications with the NRA to warrant protection from disclosure as attorney-client privileged information, the NRA must demonstrate either (i) a waiver exception for communications between an attorney and the agent or employee of her or his corporate client; or (ii) a waiver exception for communications between an organization's lawyers and a third party who acts as the "functional equivalent" of the organization's employee (*Safeco Ins. Co. of America v M.E.S., Inc,* 289 FRD 41, 46 [US Dist Ct, EDNY 2011]). For the functional equivalent exception to apply, the third-party must assume the functions and duties of a full-time employee. For an agency exception to apply, the party claiming privilege must demonstrate that it: (1) had a reasonable expectation of confidentiality; and (2) that disclosure to the third party was necessary for the purpose of facilitating legal services to the client (*Gottwald v Sebert,* 58 Misc3d at 632; *Fine v ESPN, Inc.,* 2015 WL 3447690 [US Dist Ct, ND NY 2015]). Courts may make an exception when the third party is an agent of the attorney or client, because, generally, those situations involve an expectation of confidentiality (*People v Osario,* 75 NY2d 80, 84 [1989]). "Necessity" requires that the third-party is integral to serve a specialized purpose in facilitating attorney-client communications. Where a third party's presence is merely useful or convenient, but not "nearly indispensable," the privilege is lost (*Deutsche Bank AG v Sebastian Holdings, Inc.*, 2019 WL 132534 [NY County Sup Ct, 2019]). Courts look at whether a public

relations professional facilitated legal counsel and aided in legal strategy, or if they merely provided public relations advice.

The NRA first argues that it had a special relationship with AMQ that exceeded standard public relations work, and therefore, its communications with AMQ are privileged. The NRA emphasizes its deep, decades-long collaboration with AMQ. AMQ did perform many services for the NRA, including managing media platforms, like the NRA's website, administered NRA TV, handled branding and strategy, and entered into contracts on behalf of the NRA. However, the NRA's continuous and long-lasting relationship with AMQ does not alter what kind of services AMQ provided – specifically, public relations services as a third-party. Never did AMQ assume the functions and duties of an NRA employee. Rather, AMQ acted in its capacity as a public relations firm. Trust and confidence are important aspects to any business relationship. However, AMQ had clients aside from the NRA. AMQ also has its own employees and legal counsel. That AMQ developed and administered the NRA's website and NRATV, does not render AMQ a "translator" essential for the NRA to understand its lawyer's advice about the Second Amendment. AMQ does not speak a "foreign language," like accountants, so it does not perform translator functions. Rather, AMQ simply acted as a public relations firm when it appeared on TV on behalf of the NRA, and operated the NRA's website. Therefore, the functional equivalent exception does not apply to AMQ's communications with the NRA.

The NRA points to former NRA spokesperson, Dana Loesch ("Loesch"), as an example of how AMQ, it claims, serves as a necessary conduit to facilitate legal strategy under the agency exception (Tr. dated October 31, 2019, p. 14, lines 17-21). AMQ negotiated Loesch's contract. Loesch was an AMQ employee until recently, before AMQ and the NRA parted ways. Loesch appeared on television to iterate the NRA's position on Second Amendment legal issues. That

Loesch repeated the NRA's legal stance on the Second Amendment does not mean she played a necessary role in conveying legal strategy from the NRA's lawyers. Although Loesch's presence on television proved useful to relay opinions on legal issues, it certainly was not necessary. The NRA, or one of its employees, could tell Loesch what to say without ever providing legal advice to AMQ. Further, Loesch, as a spokesperson, operated in the public sphere, and therefore, it would be unreasonable to expect confidentiality under the circumstances. The NRA cannot use its publicist as a sword and a shield, for public outreach when it feels so inclined, and, in other instances, remain tucked away from public view.

Next, the NRA argues that the legal advice that John Frazer ("Frazer"), the Secretary and General Counsel of the NRA, provided via email to AMQ employees, are privileged (Frazer Aff, attached to Memo of Law in Opp, ¶ 5).

a. On February 7, 2018, I provided legal advice by email to Nadar Tavanger, an Ackerman employee, regarding accounting for charitable expenditures relating to NRATV.
b. On February 7, 2018, I provided legal advice by email to multiple recipients, including NRA employees and Ackerman employees, regarding messaging and disclaimers pertaining to a Carry Guard informercial and promotional emails.
c. On July 12 and 13, 2017, I provided legal advice by email to multiple recipients, including NRA employees and Ackerman employees, regarding specific provisions of contracts with NRA firearms instructors for a program jointly developed by Ackerman and NRA staff on behalf of the NRA.
d. On December 5, 2016, I provided legal advice via email addressed jointly to Clay Turner, an Ackerman employee, and Laurie Luebbert, an NRA employee regarding donor privacy issues pertaining to an upcoming article in a magazine jointly produced by Ackerman and NRA staff on behalf of the NRA.
e. On October 28, 2016, I provided legal advice by email to multiple recipients, including NRA employees and Ackerman employees, regarding copyright issues pertaining to the potential use of archival NRA film footage that could be made available to Ackerman for NRA projects;
f. On September 25, 2015, as part of an email chain involving Mr. Tavanger, NRA assistant general counsel Skipp Galythly, and the NRA's managing director of Public Affairs, Andrew Arulanandam, I provided legal advice regarding a proposed email communication to NRA supporters.

(Frazer Aff, attached to Memo of Law in Opp, ¶ 6 [a] – [f]).

In examples [b]-[f], Frazer gave advice to NRA employees in the presence of AMQ employees. All of the examples concern AMQ's public representation of the NRA, that, ultimately, reflect the NRA's legal stance on intellectual property and copyright issues, Second Amendment matters, and donor privacy issues. Yet, merely because AMQ conveyed the NRA's position on legal issues does not necessitate that the NRA provide AMQ employees with legal advice in the presence of NRA employees. Frazer could have advised NRA employees, who then could have directed AMQ how to present these issues to the public.

Frazer does not specifically identify any legal advice in [a]-[f] that required the AMQ's direct assistance (*see, e.g.*, *In re Grand Jury Subpoenas Dated Mar. 24, 2003,* 265 FSupp2d 321, 323 [SDNY 2003] [public relations advice not privileged where it did not assist directly with a lawyer's public advocacy on behalf of a client]; *see also, Calvin Klein Trademark Trust v Wachner,* 198 FRD 53, 54-55 [US Dist Ct SDNY 2000] [counsel's disclosure to hired public relations firm waived any privilege for communications made for the purpose of seeking legal advice because the firm provided ordinary public relations advice]). *Gama Aviation v Sandton Capital Partners* is inapposite to this case, because Frazer did not provide legal advice in the context of trial preparation [99 AD3d 423, 343 [2012] [plaintiff did not waive attorney client privilege when it copied documents to its agent during trial preparation]). Nor is this case akin to *Bew Parking Corp v Apthorp Associates, LLC,* where privilege extended to a management company that acted as an agent for defendant parking garage, but who had no employees of its own and, instead, relied on agents it hired via contracts, 2015 WL 1306994 [NY County, Sup Ct 2015]).

In addition, Frazer never states why he would expect communications that he had with NRA and AMQ emails to remain confidential. Accordingly, this court finds that communications [b]-[f] in Frazer's affidavit are not privileged. However, the court orders an *in-camera* review of communication [a] to determine whether it was necessary for Frazer to email Nadar Tavanger, an AMQ employee, in order to facilitate legal services to the NRA.

Work Product Privilege and Common Interest Privilege

The work product doctrine protects materials that counsel prepared in anticipation or litigation or for trial. The privilege seeks to preserve a zone of privacy for a lawyer to prepare and develop legal theories and strategies "with an eye toward litigation" (*In re Chevron Corp,* 749 FSupp2d 141, 165 [United States Dist Ct SDNY 2010]). The privilege does not protect efforts that include lobbying, media and public relations, and fundraising in a litigation context (*id.* at 143). The common interest privilege applies to communications between counsel and parties as to legal advice in reasonably anticipated litigation where the joint parties have a common interest (*Gipe v Monaco Reps, LLC,* 2013 WL 3389345 [NY County, Sup Ct 2013]). It does not protect business or personal communications (*id.*).

Frazer's affidavit states that the NRA and AMQ shared common legal interests in connection with multiple lawsuits, including (i) a lawsuit that Anish Kapoor, a sculptor, filed in 2018 as to the depiction of one of Mr. Kapoor's works in an NRA video, that AMQ produced; (ii) a New York Department of Financial Services ("DFS") investigation, related to Carry Guard; and (iii) a lawsuit that the NRA commenced against affinity-insurance broker, Lockton Affinity, LLC, where AMQ received a third-party subpoena (Frazer Aff, attached to Memo of Law in Opp, ¶ 8). AMQ's responsive documents are protected work-product only to the extent those documents revealed the NRA's legal strategy about conduct of the three litigations mentioned.

Accordingly, the court orders an *in-camera* review of any documents that NRA's legal counsel prepared in anticipation for litigation in those three lawsuits, or in anticipation of litigation, to the extent that they are relevant to OAG's investigation. That includes any meeting notes from NRA's counsel or from AMQ's counsel with regard to Carry Guard, or that involve either the NRA or AMQ providing or requesting legal advice.

First Amendment

The NRA further asserts that AMQ's documents fall under the First Amendment privilege. OAG does not seek bulk information of donor names and information in its investigation. Rather, OAG wants information on party-related transactions. The NRA does not allege the specific ways that, should OAG receive donor information, those donors would face physical threats or great financial harm. Rather than provide concrete examples of the harassment and retaliation the donors' might face should the NRA reveal their identities, the NRA speculates that there are many people in states like New York "who bear animosity toward the NRA and its political speech" (Shropp Aff, attached to Memo of Law in Opp, ¶ 3).

NAACP v State of Ala ex rel. Patterson, that the NRA cites to, is inapposite (337 US 449 [1958]). In *NAACP*, the Supreme Court found that the state mandated public identification of all rank-and-file members of a group had no legitimate government purpose, and that member disclosure could cause economic reprisal and public hostility. On the other hand, in this case, petitioner's need for AMQ's responsive documents, without the NRA first screening those documents, is compelling. Public policy encourages law enforcement to investigate facts fully and fairly. The NRA's preview of these documents might compromise the integrity of the investigation and weed out documents that AMQ would otherwise produce. The NRA's concerns, that AMQ might inadvertently disclose donors' names, does not override OAG's

authority to conduct a confidential law enforcement investigation without interference or monitoring.

Non-Disclosure Agreement

Similarly, to allow not-for-profit entities, like the NRA, to shield its conduct through use of an NDA would frustrate OAG's regulatory and law enforcement duties, and its oversight of charities (*S.E.C. v Jerry T. O'Brien, Inc.*, 267 US 735, 743 [1984] [SEC not required to provide notice to a "target" of an investigation of issuance of subpoenas to third parties because the a notice requirement would impede SEC investigations, potentially discourage compliance of subpoena recipients, and lead to document destruction or alternation]). The NRA, through its use of a private contract, cannot demand to preview responsive documents related to a law enforcement investigation. Agreements against public policy are illegal, void, and unenforceable (*see, Crosby v Am Media, Inc.*, 197 FSupp3d 735, 742 [E.D. Pa. 2016] [settlement agreement provision preventing signatories from disclosing information about crimes to law enforcement unenforceable and against public policy]; *c.f. S.E.C. v Jerry T. O'Brien, Inc.*, 467 US 735, 743 [1984]). Accordingly, the NRA cannot use the NDA from its Services Agreement as a shield to prevent AMQ from answering OAG's subpoena in full.

Accordingly, it is

ORDERED that the court grants OAG's petition, as set forth in this decision; and it is further

ORDERED that the court orders an *in camera* review of communication [a] from the Frazer affidavit, in addition to any documents that NRA's legal counsel prepared in anticipation of litigation to the extent they are relevant to OAG's investigation, and otherwise compels AMQ

to comply with OAG's July 8, 2019 subpoena without allowing the NRA to preview and approve any information released in compliance with the subpoena, and without delaying or altering any aspect of that compliance to conform to any purported obligations under the NDA within the NRA Services Agreement.

Dated: 2-21-2020

ENTER:

HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.