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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lance Hagen,	)	Supreme Court No. 20210111
	)	
Petitioner, Appellee, and Cross-Appellant,	)	Burleigh County No. 08-2019-CV-03559
	)	
v.	)	
	)	
North Dakota Insurance Reserve Fund,	)	
	)	
Respondent, Appellant, and Cross-Appellee.	)	

APPELLANT'S BRIEF

Appeal From The Burleigh County District Court *Notice to Parties* dated August 12, 2020 (Dkt. #58); *Order on Respondent's Motion to Dismiss, Order on Respondent's Response and Objections to Notice to Parties and Partial Findings on Petition for Writ of Mandamus* dated September 15, 2020 (Dkt. #78); *Order on Amended Petition for Writ of Mandamus* dated February 10, 2021 (Dkt. #94); and *Judgment* dated April 7, 2021 (Dkt. #103)

South Central Judicial District
Burleigh County, North Dakota
The Honorable John Grinsteiner

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STATEMENT OF THE ISSUES

[¶1] The North Dakota Insurance Reserve Fund ("NDIRF") is a private non-profit corporation. It offers risk management services to public entities in North Dakota. An NDIRF member was sued by an entity controlled by Appellee; NDIRF provided its member defense of the claim, including litigation counsel. Upon completion of the underlying litigation, Appellee requested privileged and protected documentation from NDIRF related to the defense. NDIRF declined. Appellee received a writ of mandamus ordering NDIRF to provide some of the documentation. Three broad issues exist:

1. Whether the district court granting Appellee leave to file an amended petition complying with the requirements of N.D.C.C. § 44-04-21.2 after the deadline for commencing the action expired should be reversed;

2. Whether the district court's conclusion NDIRF is a "public entity" subject to open records requests should be reversed; and

3. Whether the district court erroneously interpreted and applied N.D.C.C. § 44-04-19.1(8), and failed to afford protection to attorney-client privileged communication in issuing the writ.

STATEMENT OF THE CASE

[¶2] Lance Hagen ("Hagen") filed his Petition for Writ of Mandamus on November 19, 2019, seeking privileged and protected documents from NDIRF. Appendix ("App.") 7-10. NDIRF filed its Answer on November 19, 2019. App. 11-16. A scheduling order was issued December 20, 2019. District Court Docket ("Dkt.") #13.

[¶3] Hagen filed a brief in support of petition on March 2, 2020. Dkt. #15. NDIRF responded in opposition on April 15, 2020. Dkt. #30. Hagen replied on May 13, 2020. Dkt. #46. A hearing took place July 21, 2020. App. 4.

[¶4] The district court issued a "Notice to Parties" on August 12, 2020. App. 19-22. NDIRF filed its response and objection to the Notice to Parties on August 20, 2020. Dkt. #59. Hagen filed an amended petition for writ of mandamus on August 20, 2020. App. 23-31. NDIRF moved to dismiss the amended petition on August 27, 2020. Dkt. #67. Hagen filed his response opposing the motion to dismiss on September 3, 2020. Dkt. #70. NDIRF replied in support of its motion on September 14, 2020. Dkt. #76. On September 15, 2020, the district court issued its Order on Respondent's Motion to Dismiss, Order on Respondent's Response and Objections to Notice to Parties, and Partial Findings on Petition for Writ of Mandamus. App. 32-50. NDIRF filed is Answer to the amended petition on September 16, 2020. App. 51-57.

[¶5] NDIRF filed its Memorandum Re In Camera Documents and a privilege log on December 11, 2020. Dkt. #90-91. On February 10, 2021, the district court issued its Order on Amended Petition for Writ of Mandamus. App. 58-62. The district court issued an order adopting a stipulation to stay disclosure of documents pending appeal on April 7, 2021. Dkt. #101. Judgment was issued on April 7, 2021. App. 63. Notice of entry of judgment was filed on April 9, 2021. Dkt. #106. NDIRF filed its notice of appeal on April 9, 2021. App. 64-66. Hagen filed his notice of cross-appeal on May 6, 2021. App. 67-69.

STATEMENT OF THE FACTS

A. What is the North Dakota Insurance Reserve Fund?

[¶6] NDIRF is a private nonprofit corporation organized in North Dakota as a

self-insurance pool that offers liability, automobile, and property risk coverage to North Dakota political subdivisions. App. 17, ¶ 2; N.D.C.C. ch. 26.1-23.1. Political subdivisions are permitted to protect themselves against risk by self-insuring, by purchasing coverage from NDIRF, by purchasing coverage from an insurance company, or through a combination of those methods. *See* N.D.C.C. § 32-12.1-07; App. 17, ¶ 3.

[¶7] NDIRF is not an "insurance company" or an "insurer" subject to N.D.C.C. title 26.1. N.D.C.C. § 26.1-23.1-02; App. 17, ¶¶ 2-3. The relationship between NDIRF and political subdivisions participating in the self-insurance pool is similar to the relationship between an insurance company and a political subdivision purchasing insurance coverage. *Id.* at ¶ 3. Political subdivisions become members of NDIRF by exchanging monetary contributions for risk coverage, like premiums paid to an insurance company for coverage. *Id.*; Dkt. #16, p. 3. The relationship between NDIRF and its members as to litigation is also comparable to that between an insurance company and its insureds: while NDIRF may provide its members a defense, NDIRF may not be made a party to litigation based on its issuance of liability coverage. *See* N.D.C.C. § 32-12.1-05.

B. Who is Hagen and What Does He Want?

[¶8] Hagen has been involved in litigation through an entity he controls against one of NDIRF's members, the City of Lincoln. App. 17, ¶¶ 4-5. "Lincoln Land Development sued the City in February 2015 for inverse condemnation, trespass and nuisance relating to the City's 2011 improvement of [a] road." *Lincoln Land Dev., LLP v. City of Lincoln*, 2019 ND 81, ¶ 3, 924 N.W.2d 426; *see also* Final Order, *Lincoln Land Dev., LLP v. City of Lincoln*, Civil No. 08-2015-CV-00348, Dkt. #763. A taking occurred

and this Court affirmed a decision in favor of Lincoln Land Development. *Lincoln Land*, 2019 ND 81 at ¶¶ 4, 27.

[¶9] An attorney was retained to represent the City in the inverse condemnation action. App. 17, ¶ 4. NDIRF provided the City a defense of the lawsuit under the terms of coverage. *Id.* Naturally, the City worked closely with NDIRF and its attorney. Email correspondence, status reports, and a confidential mediation statement were exchanged between the attorney, the City, and NDIRF. App. 17-18, ¶ 5. Hagen seeks this attorney work product and/or attorney-client privileged documentation. *Id.*; App. 30.

C. Why are the Parties Arguing?

[¶10] The City informed NDIRF it does not waive its attorney-client privilege or the attorney work product doctrine. App. 18, ¶ 6. Hagen requested documentation and petitioned for a writ ordering NDIRF to produce attorney-client privileged and attorney work product documentation in the form of emails and status reports between the City of Lincoln, its attorney, and NDIRF claims persons as well as a confidential mediation statement provided to a mediator. App. 7-10 and 30. The district court issued a writ ordering some of the protected documents be disclosed to Hagen. App. 60-61.

STANDARD OF REVIEW

[¶11] A grant of a writ of mandamus will be reversed if, "as a matter of law, the writ should not issue or the court abused its discretion." *Kadlec v. Greendale Tp. Bd. of Tp. Sup'rs*, 1998 ND 165, ¶ 8, 583 N.W.2d 817. "[A] court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process." *Id.*

[¶12] This Court uses "the *de novo* standard of review for legal conclusions and a clearly erroneous standard for factual findings." *Bolinske v. Herd*, 2004 ND 217, ¶ 7, 689 N.W.2d 397. "Issues regarding interpretation and application of statutes are questions of law and are fully reviewable on appeal." *Lund v. Swanson*, 2021 ND 38, ¶ 13, 956 N.W.2d 354. The questions of whether NDIRF's motion to dismiss should have been granted, as well as whether our open records laws are inapplicable here, are reviewed *de novo*.

LAW AND ARGUMENT

I. THE WRIT SHOULD HAVE BEEN DISMISSED FOR FAILURE TO SATISFY THE STATUTORY REQUIREMENTS FOR SEEKING RELIEF

[¶13] The district court erred by failing to dismiss Hagen's writ due to his failure to comply with the statutory requirements for bringing an action alleging an open records violation. Hagen requested the records at issue in this action under N.D.C.C. § 44-04-18, which establishes requirements for making and responding to open records requests. App. 30-31. He then brought this action alleging NDIRF violated N.D.C.C. § 44-04-18 by failing to provide the requested records. App. 7-10.

[¶14] The statutory requirements for bringing a civil action alleging a violation of N.D.C.C. § 44-04-18 are established by N.D.C.C. § 44-04-21.2 which was enacted in 1997. 1997 N.D. Sess. Laws ch. 381, § 20. The statute requires that "[f]or an alleged violation of section 44-04-18, the complaint must be accompanied by a dated, written request for the requested record." N.D.C.C. § 44-04-21.2(1). The statute also establishes a limitations period which, in this case, required the action to be commenced within sixty days of when Hagen knew, or should have known, of the alleged violation. *Id.*

[¶15] Hagen was aware of the alleged violation no later than October 28, 2019, when he received a letter from NDIRF advising that the requested records would not be

provided. App. 8, ¶ 7. He served his petition for writ of mandamus on November 15, 2019, within 60 days of receiving the letter. Dkt. #2. However, he did not attach to his petition a copy of the dated, written records request. App. 7-10.

[¶16] NDIRF argued in its response to Hagen's petition that the petition must be dismissed due to Hagen's failure to attach a copy of the request. Dkt. #30, ¶¶ 9-11. Hagen did not seek leave to amend his petition. However, after briefing on the petition and oral argument were complete, the district court issued an order *sua sponte* granting Hagen leave to file an amended petition attaching a copy of his request. App. 19-21, ¶¶ 2 & 6. Before Hagen filed his amended petition, NDIRF filed an objection to the order permitting the amendment, and, after the amended petition was filed, NDIRF moved to dismiss because a copy of the records request was not filed within sixty days of the alleged violation. Dkt. #59, ¶¶ 4-7 & #67, ¶¶ 14-16. The district court overruled NDIRF's objection and denied the motion to dismiss. App. 37-39, ¶¶ 18-26.

[¶17] The plain language of N.D.C.C. § 44-04-21.2 requires a party bringing an action alleging a violation of N.D.C.C. § 44-04-18 to bring a complaint "accompanied by a dated, written request for the requested record" within sixty days of the alleged violation. N.D.C.C. § 44-04-21.2(1). There is no dispute that Hagen failed to file a copy of his written request within sixty days of learning that NDIRF would not provide the documents. His petition should be dismissed for failure to satisfy the statutory requirements for bringing an action alleging a violation of N.D.C.C. § 44-04-18.

II. THE WRIT SHOULD BE REVERSED BECAUSE NDIRF IS NOT A PUBLIC ENTITY

[¶18] The district court erred by concluding NDIRF is a "public entity" required to respond to open records requests. Both Hagen and the district court relied almost

exclusively on a 1999 Attorney General's opinion to support the conclusion that NDIRF is subject to the open records laws. App. 42-46, ¶¶ 34-46; Dkt. #15, ¶¶ 6-10. Attorney General's opinions are not binding on the courts and should not be followed when they are not persuasive, including when they are inconsistent with reasonable statutory interpretation. *Sauby v. City of Fargo*, 2008 ND 60, ¶ 12, 747 N.W.2d 65. This Court should not follow the 1999 Attorney General's opinion because it misconstrues the relevant statutes, misinterprets this Court's decisions, and is contrary to the open records statutes.

[¶19] The most significant flaw with the Attorney General's opinion is that it provides no basis for distinguishing NDIRF from a private insurance company. That is, if the opinion's reasoning was applied to a private insurance company insuring a North Dakota political subdivision, the private insurance company would be required to comply with North Dakota's open records and open meetings laws. That fact is recognized in the Attorney General's opinion itself and was acknowledged by Hagen. The Attorney General's opinion states, "Furthermore, NDIRF's unsupported statement that a private insurance company representing a public entity is not subject to the open records and meetings laws is questionable[.]" 1999 N.D. Op. Att'y Gen. O-5, p. 5, Dkt. #19. Hagen's attorney stated:

> So, now, they [NDIRF] again keep saying that we [NDIRF] should be treated like a private insurance company and a private insurance company would not have to provide this attorney work product. Well, Judge, a private company does have to disclose private records. . . . For example, if the City of Lincoln had hired Zurich . . . certain records could be made public, but Zurich would not have to turn over the records if it insured Judge Grinsteiner.

Tr. 49:09-49:21. While North Dakota's open records laws are broad, the plain language of the relevant statutes shows that our Legislature did not intend for them to extend to private

entities like NDIRF or Zurich that provide North Dakota political subdivisions risk or insurance coverage.

[¶20] The question before the Attorney General and the district court when determining whether NDIRF was subject to open records requests and before this Court now is whether NDIRF is a "public entity" as that term is defined in N.D.C.C. § 44-04-17.1(13). The statutory definition of "public entity," and several other definitions, were enacted at N.D.C.C § 44-04-17.1 in 1997. 1997 N.D. Sess. Laws ch. 381, § 2. The statute provides, in relevant part, that "public entity" means all:

> b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state . . ; and
>
> c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.

N.D.C.C. § 44-04-17.1(13).

[¶21] The standards for statutory construction are well established. *Lund*, 2021 ND 38 at ¶ 13. The primary goal in statutory construction is to ascertain the legislature's intent with the first step of looking at the plain language of the statute and giving each word its ordinary meaning. *Id*. If a statute is unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Id*. If a statute is ambiguous or adherence to its strict letter would have an absurd result, extrinsic aids such as legislative history may be used. *Id*. Statutes are construed "in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted." *Id*.

[¶22] The Attorney General and the district court did not apply these rules of statutory construction. Rather, they considered whether NDIRF fell within a "definition" of "public entity" that was created in a 1998 Attorney General's opinion with essentially

no explanation and was then quoted in the Attorney General's 1999 opinion concluding NDIRF is a "public entity." *See* 1998 N.D. Op. Atty. Gen O-104, p. 4; 1999 N.D. Op. Att'y Gen. O-5, p. 2; Dkt. # 19 & 34. Under the relevant portion of the Attorney General's definition, a nonprofit corporation is a "public entity" for purposes of the open records and open meeting laws when:

> 3. The organization is supported in whole or in part by public funds or is expending public funds. *See* N.D.C.C. § 44-04-17.1(9), (12)(c)[1] (definitions of "organization or agency supported in whole or in part by public funds" and "public entity") [or]
>
> 4. The organization is an agent or agency of a public entity performing a governmental function on behalf of a public entity [or] having possession or custody of records of the public entity. *See* N.D.C.C. § 44-04-17.1(12), (15) (definitions of "public entity" and "record").

1999 N.D. Op. Att'y Gen. O-5, p. 2 (citing 1998 N.D. Op. Atty. Gen O-104, O-107).

[¶23] The Attorney General and the district court concluded NDIRF is a public entity because it performs a governmental function as an agent or agency of its political subdivision members and because it is supported by or expends public funds. App. 43-44, ¶¶ 39 & 41; 1999 N.D. Op. Att'y Gen. O-5, p. 6; Dkt. #19. Both conclusions are erroneous.

A. NDIRF is Not an Agency of a Political Subdivision.

[¶24] NDIRF is not a "public entity" under N.D.C.C. § 44-04-17.1(13)(b) which provides, in relevant part, that public entities include "[p]ublic or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state[.]" The plain language of that definition unambiguously excludes private corporations like NDIRF

[1] The definition of "public entity" was originally enacted at N.D.C.C. § 44-04-17.1 subsection 12 and was moved to subsection 13 in 2011 when a new definition was added to the statute. 2011 N.D. Sess. Laws ch. 332, § 2; 1997 N.D. Sess. Laws ch. 381, § 2. The language of the definition of "public entity" has not changed since § 44-04-17.1 was enacted.

because the adjectives "public or governmental" and the phrase "of any political subdivision of the state" modify each noun in the disjunctive list of covered entities. That is, the N.D.C.C. § 44-04-17.1(13)(b) definition of "public entity" includes (1) public or governmental bodies of any political subdivision, (2) public or governmental boards of any political subdivision, (3) public or governmental bureaus of any political subdivision, (4) public or governmental commissions of any political subdivision, and (5) public or governmental agencies of any political subdivision. *See* N.D.C.C. § 44-04-17.1(13)(b). NDIRF is not an "agency" of a political subdivision because it is not a public or governmental entity—it is a private nonprofit corporation. *See* App. 17, ¶ 2.

[¶25] The Attorney General and the district court concluded NDIRF is a "public entity" under the Attorney General's definition because it is an agent or agency of a public entity performing a governmental function on behalf of its political subdivision members. App. 43, ¶ 39; 1999 N.D. Op. Att'y Gen. O-5, pp. 3-4 & 6; Dkt. #19. The Attorney General's creation of that definition of "public entity" appears to be the result of the misapplication of this Court's decisions in *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543 (N.D. 1960) and *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986). Those cases were decided before the N.D.C.C. § 44-04-17.1(13) definition of "public entity" was enacted and discussed the word "agencies" in previous versions of the public records statute now codified at N.D.C.C. § 44-04-18. This Court has not construed the word "agencies" in N.D.C.C. § 44-04-17.1(13)(b).

[¶26] In *Lyons*, the issue before this Court was whether, under the relevant open records statute,[2] county courts were "public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state[.]" 101 N.W.2d at 545. Unlike this case, which involves a private corporation, the "public or governmental" requirement was satisfied in *Lyons* because that case involved county courts. *Id*. The analysis in *Lyons* turned on whether the "of the state" requirement was satisfied and on whether the county courts were "agencies of the state." *Id*. at 546.

[¶27] This Court concluded county courts were not "agencies of the state" because the legislative history did not include "any indication that the Legislature intended 'agencies of the state' to include the courts" and because county courts were not "agencies" under the plain meaning of that term. *Id*. The Court stated that "the word 'agency' denotes a relation created by law or contract whereby one party delegates the transaction of some lawful business to another" and concluded that county courts are not "agencies of the state" in that sense of the word. *Id*. (citing BLACK'S LAW DICTIONARY, 3d Ed., p. 78).

[¶28] The *Lyons* Court concluded that *public or governmental entities* are "agencies of the state" for purposes of the open records law when the state, by law or contract, delegates the transaction of some lawful business to the entity. 101 N.W.2d at 546. It did not conclude, as the Attorney General's opinion suggests, that a *private entity*, like NDIRF, becomes a public or governmental entity subject to the open records laws when the state delegates the same type of legal or contractual duty to the private entity.

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[2] In *Lyons*, the Court interpreted N.D.R.C. § 44-0418 (1957), which provided, in part, that "all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state . . . shall be public records[.]" *Lyons*, 101 N.W.2d at 545.

[¶29] Similarly, this Court's decision in *Forum Publishing*,[3] does not support the conclusion that private entities like NDIRF are subject to the open records laws. The issue in *Forum Publishing* was whether the City of Fargo, a political subdivision that was indisputably subject to the open records laws, was required to disclose employment applications for the City's police chief position in the possession of non-party Personnel Decisions, Inc. (PDI), a private consulting company. 391 N.W.2d at 169-71.

[¶30] The City argued it was not required to disclose the applications because PDI was an independent contractor rather than an agent of the City. *Id*. at 172. This Court rejected that argument, concluding that the independent contractor/agent distinction was irrelevant because vicarious liability was not at issue. *Id*. This Court concluded PDI was the City's "agent" for purposes of the open records laws and supported that conclusion by citing its decision in *Lyons* "constru[ing] the term 'agencies' as used in Section 44-04-18, N.D.C.C., to mean a relationship created by law or contract whereby one party delegates the transaction of some lawful business to another." *Forum Publishing*, 391 N.W.2d at 172. This Court then affirmed the district court's decision that the City was required to disclose the applications because "[the] purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records." *Id*.

[¶31] The holding in *Forum Publishing* was that the City, a political subdivision, was required to produce copies of records in the custody of a private entity acting as its

[3] In *Forum Publishing,* the Court interpreted a prior version of N.D.C.C. § 44-04-18(1), which provided, in part, that "all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state . . . shall be public records[.]" *Forum Publishing*, 391 N.W.2d at 171.

agent. *Forum Publishing* does not, as the Attorney General's opinion suggests, stand for the proposition that a private entity, like PDI or NDIRF, becomes subject to the open records laws if the private entity is a political subdivision's agent or possesses a political subdivision's records.

[¶32] When *Forum Publishing* was decided, the term "record" was not defined in the open records statutes. *Forum Publishing*, 391 N.W.2d at 171. In 1997, a definition of "record" was enacted that effectively codified the *Forum Publishing* decision. 1997 N.D. Sess. Laws ch. 381, § 2. "Record" is now defined as "recorded information of any kind . . . which is in the possession or custody of a public entity *or its agent* and which has been received or prepared for use in connection with public business or contains information relating to public business." N.D.C.C. § 44-04-17.1(15) (emphasis added). That definition, like the *Forum Publishing* decision, establishes that public entities may be required to produce records possessed by private agents. It does not establish that private entities acting as agents for public entities are subject to open records requests.

[¶33] The language of the definition of "record," which was enacted in the same bill as the definition of "public entity" also shows that the Legislature knew the difference between the words "agent" and "agencies." If the Legislature had intended the definition of "public entities" to include private entities acting as agents for political subdivisions it would have expressed that intent in the plain language of the definition. It did not. The Legislature defined "public entity" to include "[p]ublic or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state[.]" N.D.C.C. § 44-04-17.1(13(b). The plain language of that definition excludes private entities like NDIRF.

[¶34] In addition, other open records statutes show that the Legislature did not intend for private entities to be included in the N.D.C.C. § 44-04-17.1(13) subsection a and b definitions of "public entity" under any circumstances. For example, the N.D.C.C. § 44-04-19 open meetings statute provides, "[t]hat portion of a meeting of the governing body of a public entity as defined *in subdivision c* of subsection 13 of section 44-04-17.1 which does not regard public business is not required to be open under this section." N.D.C.C. § 44-04-19 (emphasis added). That statute shows that the Legislature believed that private entities could be "public entities" under subsection c and created an appropriate open meetings exception. It also shows that the Legislature did not believe private entities could be "public entities" under subsections (a) and (b) because no exception was created for private entities subject to the open meetings laws under those subsections. Similar subsection c exceptions included in N.D.C.C. § 44-04-18.1(3) and N.D.C.C. § 44-04-19.1(10) show that the Legislature intended for private entities to be subject to the open records and meetings laws only if they were "public entities" under subsection c.

[¶35] The Attorney General's conclusion that NDIRF is a "public entity" because it performs the governmental function of providing risk coverage as an agent or agency of its political subdivision members, which the district court adopted, is erroneous. Under the Attorney General's analysis there is no basis for distinguishing a private insurance company from NDIRF as the Attorney General acknowledged by stating that "NDIRF's unsupported statement that a private insurance company representing a public entity is not subject to the open records and meetings laws is questionable in light of the court's decision in *Forum Publishing Co*." 1999 N.D. Op. Att'y Gen. O-5, p. 5; *see* Dkt. #19.

[¶36] The Attorney General's opinion also provides no basis for distinguishing NDIRF from a private entity hired to repair roadways or water mains for a political subdivision because maintaining that infrastructure is a governmental function that could be completed by employees of the political subdivision or a private contractor. In short, the Attorney General's reasoning would make most any private entity performing a function the political subdivision could perform itself subject to North Dakota's open records and open meetings laws. That was not the Legislature's intent. The district court's conclusion that NDIRF is a "public entity" because it performs a legitimate government function on behalf of its political subdivision members and is therefore an agent of those public entities is erroneous and must be reversed.

B. NDIRF is Not Supported by and Does Not Expend Public Funds.

[¶37] NDIRF is not a "public entity" under N.D.C.C. § 44-04-17.1(13)(c) which provides that public entities include "[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds." An "[o]rganization or agency supported in whole or in part by public funds" is defined, in relevant part, as "an organization or agency in any form which has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds[.]" N.D.C.C. § 44-04-17.1(10). "Public funds" are defined as "cash and other assets with more than minimal value received from the state or any political subdivision of the state." N.D.C.C. § 44-04-17.1(14).

[¶38] NDIRF is not "supported" by public funds because it provides services to political subdivisions at their fair market value. North Dakota political subdivisions can choose to protect themselves against risk by self-insuring, by purchasing risk coverage from NDIRF, or by purchasing private insurance. App. 17, ¶ 3. *See* N.D.C.C. § 32-12.1-

07. Political subdivisions that choose to become members of NDIRF pay monetary contributions to NDIRF that are similar to premiums paid to private insurers. App. 17, ¶3. For example, from 2015 to 2019, while the *Lincoln Land Development* case was ongoing, the City of Lincoln paid the following contributions to NDIRF: 2015: $23,616; 2016: $22,451; 2017: $25,344; 2018: $30,976; 2019: $30,455, for a total of $132,842 over that five-year period. Dkt. #16, p. 3. According to Hagen, during that timeframe, significantly more was spent litigating the inverse condemnation actions. Tr. 4:01-4:16. The value of the coverage a political subdivision receives from NDIRF may greatly exceed the cost of the political subdivision's contributions. NDIRF is not "supported" by public funds because the contributions NDIRF's members pay to NDIRF do not exceed the fair market value of the risk coverage NDIRF provides.

[¶39] NDIRF does not "expend" public funds because the monetary contributions NDIRF receives from its members lose their identity as public funds when they are paid to NDIRF. The phrase "expending public funds" in N.D.C.C. § 44-04-17.1(13)(c) must be interpreted as excluding funds exchanged for goods or services at fair market value to avoid the absurd result of making every entity that sells goods or services to the State or a political subdivision a "public entity" under N.D.C.C. § 44-04-17.1(13)(c).

[¶40] This Court applied that interpretation in *Adams County Record. v. Greater North Dakota Association*, 529 N.W.2d 830 (N.D. 1995). In *Adams County Record*, the question before the Court was whether the Greater North Dakota Association, a nonprofit corporation that received membership dues from state government agencies and an appropriation from the state legislature for publication of a magazine, was subject to the open records laws. *Id*. at 831-32. To answer that question, this Court construed a previous

version of N.D.C.C. § 44-04-18(1) which provided, in relevant part, that "all records of . . . organizations or agencies supported in whole or in part by public funds, or expending public funds, are public records[.]"[4] *Adams County Record*, at 832.

[¶41] In its analysis, this Court stated, "The trial court held . . . the mere contracting by a public agency for services with a private company does not bring the company within the purview of the open records law. Once public funds are paid in exchange for goods and services . . . they cease to be public funds." *Id*. at 834. This Court agreed with that analysis, stating that "[t]he open records law requires public funds to be used as 'support' for the organization." *Id*. This Court further explained that "[t]he trial court correctly noted not every transfer of public funds to a private entity is support" because "[i]f it was, every corporation, contractor, and association of the state would be subject to the open records law each time the government paid for services or goods or awarded a contract" which was not the legislature's intent. *Id*. *Adams County Record* establishes that the phrase "expending public funds" in N.D.C.C. § 44-04-17.1(13)(c) must be interpreted as excluding funds received in exchange for goods or services provided at fair market value.

[¶42] The legislative history for the 1997 amendments to N.D.C.C. ch. 44-04 also shows that the Legislature did not intend for the open records laws to extend to private entities providing goods and services at fair market value. The Attorney General's testimony on "private entities receiving public money" provides:

> After the GNDA law suit [sic], the Supreme Court's opinion still left unclear when a private entity was "supported in whole or in part by public funds. . . ." This bill clarifies that only when an entity receives money in excess of the fair market value of the good or services it provides the public agency from which it receives funds would any of its records be open.

[4] The statute included language identical to the definition of "public entity" now codified at N.D.C.C. § 44-04-17.1(13)(c).

Hearing on S.B. 2228 Before Senate Judiciary Comm., 55th N.D. Legis. Sess. (Feb. 5, 1997) (Written Testimony of Heidi Heitkamp, Attorney General); *Hearing on S.B. 2228 Before House Committee of Government and Veterans Affairs Comm.*, 55th N.D. Legis. Sess. (Mar. 13, 1997) (Written Testimony of Heidi Heitkamp, Attorney General); Dkt. #32. The rules of statutory construction, the decision in *Adams County Record*, and the relevant legislative history all show that public funds lose that identity when they are exchanged for goods and services at fair market value. NDIRF does not "expend" public funds because the contributions it receives from its political subdivision members reflect the fair market value of the risk coverage services NDIRF provides.

[¶43] The Attorney General and the district court concluded NDIRF is a "public entity" because it "is supported in whole or in part by public funds or is expending public funds." The Attorney General correctly concluded that "the premium contributions received by NDIRF reflect the fair market value of the services provided by NDIRF and do not constitute 'support by public funds.'" 1999 N.D. Op. Att'y Gen. O-5 (1999), p. 2; Dkt. #19. The Attorney General further explained that "one can assume from the competitive market in which NDIRF operates that the premium contributions it charges its members reflect the fair market value of the self-insurance provided by NDIRF. Otherwise, the members would purchase liability insurance from a private insurance company." *Id* at 4.

[¶44] The district court's analysis is less clear. It may have concluded NDIRF is "supported" by public funds when it stated that "[t]here is no bargained-for exchange of value between the political subdivisions and NDIRF." App. 44, ¶ 41. To the extent the district court concluded NDIRF is "supported," that conclusion is erroneous and must be

reversed. There is clearly a bargained-for exchange for value between NDIRF and its political subdivision members. Affidavit testimony by NDIRF's CEO establishes NDIRF provides risk coverage to political subdivisions in exchange for monetary contributions and that political subdivisions can choose to purchase coverage from NDIRF or to buy private insurance. App. 17, ¶ 3. In addition, the premiums paid to NDIRF were bargained-for in exchange for a policy that provided coverage for the City's defense costs in the *Lincoln Land Development*. Dkt. #16, pp. 3, 5. NDIRF is not "supported" by public funds because it provides risk coverage services to political subdivisions at their fair market value.

[¶45] After correctly concluding that NDIRF is not "supported" by public funds, the Attorney General reached the contradictory conclusion that NDIRF "expends" public funds. The district court adopted the Attorney General's analysis. App. 45-46, ¶¶ 43-45. The Attorney General rejected NDIRF's argument that this Court's *Adams County Record* decision establishes that NDIRF does not "expend" public funds; it attempted to distinguish the case by explaining that in *Adams County Record*, "public funds had been used to purchase specific goods and services" but in NDIRF's case, the funds were not paid for specific goods and services. 1999 N.D. Op. Att'y Gen. O-5 (1999), pp. 2, 4; Dkt. #19. That statement contradicted the Attorney General's previous statement that "the premium contributions received by NDIRF reflect the fair market value of the services provided by NDIRF." NDIRF provides specific goods and services in the form of risk coverage policies in exchange for monetary contributions from its members. App. 17, ¶ 3; Dkt. #16, p. 5.

[¶46] The Attorney General then attempted to support its conclusion that NDIRF "expends" public funds by explaining that the risk coverage services NDIRF provides are the "antithesis" of insurance and stating that "[b]ecause the members of a government self-

insurance pool retain their own risk, rather than purchase insurance, the members' contributions to the pool do not lose their identity as 'public funds." 1999 N.D. Op. Att'y Gen. O-5. In addition to being contrary to this Court's holding in *Adams County Record* that public funds lose that identity when exchanged for their fair market value of services, that analysis is simply incorrect. The risk coverage services NDIRF provides are not the antithesis of private insurance. Political subdivisions become members of NDIRF by exchanging monetary contributions for risk coverage like a political subdivision would pay premiums for insurance coverage. App. 17, ¶ 3. Member political subdivisions pay NDIRF for liability, automobile, and/or public assets coverage policies and in exchange, NDIRF provides liability, automobile, and/or public assets coverage those members. Dkt. #16, p. 5. In short, NDIRF provides risk coverage services at their fair market value to its political subdivision members. The district court's conclusion that NDIRF is a "public entity" because it is an organization supported in whole or in part by public funds or expending public funds is erroneous and must be reversed.

III. ALTERNATIVELY, THE WRIT SHOULD BE REVERSED BECAUSE ATTORNEY WORK PRODUCT AND/OR ATTORNEY-CLIENT PRIVILEGED DOCUMENTS ARE PROTECTED UNDER THE LAW

[¶47] Alternatively, *if* NDIRF is determined to be a public entity, the writ should be reversed because the requested documentation is exempt as attorney work product and/or attorney-client privileged. NDIRF does not concede its above arguments.

A. Our Legislature Provided Specific Protections for Attorney Work Product Barring its Production in this Case.

[¶48] Clients rely on the foundational principal that their attorneys have a duty to protect information created in the course of representation. Our Legislature defined "Attorney work product":

> [It] means any document or record that:
>
> > a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
> >
> > b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
> >
> > c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.

N.D.C.C. § 44-04-19.1(6). It is undisputed the documents sought fit this definition.

[¶49] Our rules of civil procedure independently define "attorney work product": "Ordinarily, 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)." N.D.R.Civ.P. Rule 26(b)(3)(A). This protection survives the end of litigation. *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983) (holding in the context of a Freedom of Information Request "attorney work-product is exempt . . . without regard to the status of the litigation for which it was prepared"); *Soter v. Cowles Pub. Co.*, 174 P.3d 60, 69 (Wash. 2007) (warning us "the looming possibility of disclosure [of attorney work product], even disclosure after termination of the lawsuit, would cause clients and witnesses to hesitate to reveal details to the attorneys, and it would cause attorneys to hesitate to reduce their thoughts or understanding of the facts to writing").

[¶50] Our Legislature provides protection for attorney work product after litigation concludes:

> Following the final completion of the civil or criminal litigation or the adversarial administrative proceeding, including the exhaustion of all appellate remedies, attorney work product must be made available for public disclosure by the public entity, *unless* another exception to section 44-04-18 applies or if disclosure would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable civil or criminal litigation or adversarial proceedings, or *the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity.*

N.D.C.C. § 44-04-19.1(8) (emphasis added).

[¶51] This Court instructs us how to apply statutes to circumstances. *Markegard v. Willoughby*, 2019 ND 170, ¶ 9, 930 N.W.2d 108; *Baker v. Autos, Inc.*, 2019 ND 82, ¶10, 924 N.W.2d 441 (reminding us "every word, phrase, and sentence" means something). We are not free to pursue the subjective "spirit" of a statute—Courts must apply what the ordinary, plain, and unambiguous meaning of what is stated. N.D.C.C. § 1-02-05. Here, N.D.C.C. § 44-04-19.1(8) says attorney work product remains exempt from public disclosure for a public entity even after the conclusion of a litigated matter if the attorney work product contains mental impressions, opinions, conclusion, or legal theories concerning the potential liability of the public entity.

[¶52] The plain meaning of the statute is a public entity can exempt attorney work product even after the close of litigation if such documentation "reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity." N.D.C.C. § 44-04-19.1(8). There is no clear legal right for a writ to be granted to receive the requested attorney work product because such contains the mental impressions, opinions, conclusions, or legal theories regarding the potential liability of the City.

[¶53] What does "potential" mean in terms of "potential liability" in N.D.C.C. 44-04-19.1(8)? Black's Law Dictionary defines potential as "[e]xisting in possibility but not

in act. Naturally and probably expected to come into existence at some future time, though not now existing…." BLACK'S LAW DICTIONARY 1168 (6th ed. 1990). The "potential liability" of the public entity is at any point in time. That is, past or present attorney work product reflecting the mental impressions, opinions, conclusions, or legal theories of potential liability of the public entity continues to be attorney work product forever.

[¶54] Closed cases that contain attorney work product as to the potential liability of the public entity are exempt. For example, the North Dakota Office of Attorney General interpreted a legal memorandum prepared by Workforce Safety and Insurance legal staff relating to the severance pay of a departing director to be exempt from the open records law. 2008 N.D. Op. Atty. Gen. No. O-09, 2008 WL 950765; Dkt. #38. The legal memorandum was deemed attorney work product under N.D.C.C. § 44-04-19.1. The opinion held that such a legal memoranda reflected "a mental impression, conclusion, or legal theory of the attorney." *Id.*

[¶55] The attorney work product developed during a litigated case is naturally raw. That is what attorneys do—we give raw and unfiltered legal interpretation, opinions, mental impressions, and legal conclusions. That a public entity could be found potentially liable for something contained in attorney work product—past, present, or future—is that which our Legislature has determined fit to exempt.

[¶56] Hagen seeks NDIRF's play book on condemnation or similar types of cases. How did the attorney for NDIRF's member react to this or that situation, legal argument, legal theory, legal justification, or legal dispute on a condemnation case? Hagen will find that out and so will the general public if these documents are deemed open records. The threat to NDIRF's hundreds of members who are, or may be, involved in condemnation,

inverse condemnation, or any similar potential legal claim exists. This is not speculation. Since 2005 NDIRF has defended seventy-eight claims related to condemnation for its members; ten were open and unresolved as of April 15, 2020. App. 18, ¶ 7. Opening NDIRF's play book provides a road map to countering available legal defenses, legal arguments, legal theories, legal strategies, legal thoughts, legal conclusions, legal mental impressions of the attorneys retained for NDIRF members for the very reason of protecting and defending them from potential liability.

[¶57] Why should attorney work product developed for a public entity be exempt from disclosure? Aside from our Legislature mandating it, the United States Supreme Court explained:

> Were such materials [(attorney work product)] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). Stated another way, we attorneys will adapt and will not risk including the raw legal advice we provide to clients in writing. This will result in uncertainty—for the client and the attorney. And neither would it serve the public—which is the focus of why the open records laws exist. If the Court does not reverse the district court's decision—any attorney representing a public entity will have a duty *not* to put pen to paper when communicating with a public entity client. And this Court will place those public entities in a separate and lower category from their private peers—who will continue to enjoy the full protections of the work product doctrine.

[¶58] Our Court Rules also exempt the requested documents. "*Except as otherwise specifically provided by law*, all records of a public entity are public records. . .

." N.D.C.C. § 44-04-18(1) (emphasis added). Rule 8.8 provides confidential mediation statements are "not subject . . . to other disclosure." N.D.R.Ct. Rule 8.8(d)(1). A rule promulgated by the North Dakota Supreme Court is "law." *See Lamb v. State Bd. of Law Examiners*, 2010 ND 11, ¶ 7, 777 N.W.2d 343 (telling us rules adopted by the North Dakota Supreme Court under its constitutional authority are "law"). The confidential mediation statement is exempt from disclosure as attorney work product *and* because N.D.R.Ct. 8.8(d)(1) exempts it as a matter of law. The district court did exclude disclosure of the mediation statement.

[¶59] The Rules of Civil Procedure provide for an independent protection of attorney work product. *See* N.D.R.Civ.P. Rule 26(b)(3). Such documentation is not limited in any fashion. Because our rules of court are "law," Rule 26(b)(3)(A) and (B) specifically provide that attorney work product is protected. *Lamb*, 2010 ND 11 at ¶ 7; N.D.C.C. § 44-04-18(1). The requested documentation is exempt from disclosure as attorney work product under N.D.C.C. § 44-04-19.1(8) *and* because N.D.R.Civ.P. Rule 26(b)(3)(A) and (B) except it as a matter of law.

B. Communications Between Attorney and Client are Privileged.

[¶60] It is not hyperbole to state that the attorney-client privilege is "perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." *North Dakota v. U.S.*, 64 F.Supp.3d 1314, 1330 (D.N.D. 2014) (quotation omitted). "There is legitimate public interest in protecting confidential communications between an attorney and a client, and the attorney-client relationship extends to communications between the client and the attorney or the attorney's representative." *Ellis v. State*, 2003 ND 72, ¶ 9, 660 N.W.2d 603 (internal

citations omitted). The "attorney client privilege 'is the oldest of the privileges for confidential communications known to the common law.'" *North Dakota*, 64 F.Supp.3d at 1330 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981)). All attorneys know the privilege exists "to encourage full and frank communications between attorneys and their clients." *Id.* Hagen's request to create second-class treatment of this privilege for cities should be rejected. The United States Supreme Court agrees. *Id.* (explaining "the Supreme Court recently suggested in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011) that a governmental entity enjoys the same attorney-client privilege in civil litigation as private litigants").

[¶61] North Dakota law protects communications between a client and attorney, including the representatives of each. *Western Horizons Living Centers v. Feland*, 2014 ND 175, ¶15, 853 N.W.2d 36. Rule 502, N.D.R.Evid., provides in relevant part:

> **(b) General Rule of Privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer,
>
> (2) between the lawyer and a representative of the lawyer,
>
> (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein,
>
> (4) between representatives of the client or between the client and a representative of the client, or
>
> (5) among lawyers and their representatives representing the same client.
>
> **(c) Who May Claim the Privilege.** The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal

> representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.
>
> **(d) Exceptions**. There is no privilege under the rule:
>
> * * *
>
> (7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public office or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

N.D.R.Evid. Rule 502(b), (c), and d(7). Rule 502 includes definitions for client, confidential communication, lawyer, representative of the client, and representative of the lawyer. *Id.* at 502(a).

[¶62] A "City" in North Dakota is legally defined as a political subdivision. N.D.C.C. §§ 32-12.1-02(6); 44-04-17.1(11). For purposes of the open records laws, N.D.C.C. §§ 44-04-17.1 through 44-04-32, a city is explicitly defined as a "political subdivision." N.D.C.C. § 44-04-17.1(11). A city is *not* a "public agency" under North Dakota law.[5] Nor is a city a "public officer" under North Dakota law. In the same way case law is full of instances of this Court pointing out how our Legislature could have, or knew how to, enact a statute a certain way, this Court could have drafted Rule 502 to except political subdivisions. Neither "public agency" nor "public officer" are defined in Ch. 44-04 or Rule 502.

[5] If we were in the context of an agreement between an Indian Tribe and a Public Agency under N.D.C.C. ch. 54-40.2, then in that chapter only "'Public agency' means any political subdivision. . . ." Or in N.D.C.C. ch. 40-33.2, then a city would be a "public agency." We are in the exclusive territory of N.D.C.C. ch. 44-04.

[¶63] How should the Court construe the language used in Rule 502? Court rules are interpreted using the same principles for interpreting statutes. *Olsrud v. Bismarck-Mandan Orchestral Ass'n*, 2007 ND 91, ¶12, 733 N.W.2d 256; *State v. Manke*, 328 N.W.2d 799, 801 (N.D. 1982) (noting our rules of evidence "are not legislative enactments" but "should be interpreted in accordance with principles of statutory construction"). Words are construed in their plain, ordinary, and commonly understood meaning.

[¶64] The City of Lincoln has invoked the privilege in this matter and has specifically informed NDIRF it considers the subject documentation attorney-client privileged and is not waiving the privilege. "Except as otherwise specifically provided *by law*, all records of a public entity are public records. . . ." N.D.C.C. § 44-04-18(1) (emphasis added). Rule 502 specifically provides attorney-client communication is privileged. A rule promulgated by the North Dakota Supreme Court is "law." *Lamb*, 2010 ND 11 at ¶ 7. Rule 502 specifically provides that attorney-client documentation is privileged and such is excepted pursuant to N.D.C.C. § 44-04-18(1). There is no "expiration date" on privileged communication. The district court's decision to allow disclosure of privileged communication should be reversed.

C. Alternatively, N.D.R.Evid. 502(d)(7) is Unconstitutional as Applied

[¶65] If the Court rejects all of the above arguments, NDIRF alternatively argues Rule 502(d)(7), as applied to the NDIRF under the circumstances of this case, is violative of equal protection and is void for vagueness under the United States and North Dakota Constitutions.[6]

[6] North Dakota Rules of Appellate Procedure Rule 44 is inapplicable because NDIRF is challenging a rule of court and not "a statute of the State of North Dakota." *See Walker v. Schneider*, 477 N.W.2d 167, 172 (N.D. 1991) (holding "rules of court are not legislative

1. Rule 502(d)(7) violates the equal protection clause

[¶66] NDIRF is a private non-profit corporation. If it is determined to be a "public agency" or "public officer" under Rule 502(d)(7), such treatment violates the equal protection clauses of the United States and North Dakota Constitutions. The Equal Protection Clause requires "the government to treat similarly situated people alike." *N.D. Farm Bureau, Inc. v. Stenehjem*, 333 F.Supp.3d 900, 913 (D.N.D. 2018).

[¶67] As discussed above, the attorney-client privilege is a bedrock principle in American law. The privilege exists to promote a client to trust an attorney to provide intimate and confidential information so the attorney can craft a proper and full defense (or prosecution) of the client's case. This privilege is fundamental. And if this Court rejects the above arguments, NDIRF will be denied equal protection under the law because it will be treated differently than other similarly situated corporations. The Court should apply the strict scrutiny standard. *Gange v. Clerk of Burleigh Cty. Dist. Court*, 429 N.W.2d 429, 433 (N.D. 1988).

[¶68] The exception for public officers and agencies, as applied to NDIRF, causes NDIRF to be treated differently than other corporations. A private insurance company would be afforded the benefits of Rule 502(b). But not so for NDIRF: because NDIRF is incorporated for the purpose of providing a means for political subdivisions in North Dakota to participate in a self-insurance pool. Rule 502(d)(7) is unconstitutional as applied under equal protection as outlined in the state and federal constitutions. NDIRF is

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enactments"). An act of the judiciary is not an act of the legislature. In the event the Court determines Rule 44 is applicable, NDIRF asks for leave in the alternative to be permitted to comply with the Court's interpretation of N.D.R.App.P. Rule 44.

effectively denied the right to assert the privilege afforded to other corporations simply because it is a government self-insurance pool and its member is a city.

2. Rule 502(d)(7) is void for vagueness

[¶69] If the Court rejects the above arguments and holds NDIRF cannot utilize the attorney-client privilege because it is a "public agency" or "public officer," then Rule 502(d)(7) is void for vagueness under the state and federal constitutions. "The void-for-vagueness doctrine applies to civil rules. . . ." *In re Disciplinary Action Against McGuire*, 2004 ND 171, ¶ 19, 685 N.W.2d 748. "We have said that the due process clauses of the federal and state constitutions require definiteness of statutes so that the language, when measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for judges and juries to fairly administer the law." *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 755 (N.D. 1989). The due process clauses of the federal and state constitutions are violated under the void-for-vagueness doctrine if the challenged language, when measured by common understanding and practice, fails to provide adequate warning of the conduct proscribed and fails to mark boundaries sufficient to determine fair administration of the law. *In re McGuire*, 2004 ND 171 at ¶ 19. In analyzing whether the doctrine applies, a Court should view the rule from the vantage point of a "reasonable person who might be subject to its terms." *Id.*

[¶70] Here, the rule allows a "client" to invoke the attorney-client privilege and provides certain exceptions. The exception in question provides:

> There is no privilege under the rule:
>
> * * *
>
> (7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the

> ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

N.D.R.Evid. Rule 502(d)(7). Again, "public officer" and "public agency" are not defined in the Rule; neither term is defined in the N.D.C.C. ch. 44-04. A city is defined as a "political subdivision" under N.D.C.C. ch. 44-04. If the Court determines that the City of Lincoln is a "public agency," excepted from the privilege afforded clients by N.D.R.Evid. Rule 502(b), then this rule is unconstitutionally vague because it fails to define the very terms it seeks to except from the rule.

[¶71] The rule leaves it open to the whims of interpreting words and phrases that are given specific meaning elsewhere in statute, but not in the relevant chapter, N.D.C.C. ch. 44-04. If the Court wants to except political subdivisions from the attorney-client privilege, it needs to say that. Such a foundational privilege should be clear as to who it applies to and who it does not. The City of Lincoln and NDIRF are the "reasonable persons" that this Rule applies to and the standard is to consider whether such persons would consider the wording inadequate to determine whether the privilege applies to either. Because a reasonable person cannot determine whether the exception to the privilege applies, Rule 502(d)(7) is void for vagueness under the state and federal constitutions.

D. Alternatively, if the District Court's rationale is upheld, additional documents should not be disclosed.

[¶72] Alternatively, if the district court's rationale on "hyper" work product is affirmed (App. 60-61), then under that rationale the following *additional* documents provided to the district court for *in camera* review, as listed on the privilege log (Dkt. #90), fall within the scope of "hyper" work product and should not be disclosed under the rationale provided by the district court:

Document	Document Number	Bates Number
Report	8	13-17
Report	11	20-21
Report	14	26-29
Report	21	38
Report	24	41-43
Report	26	45
Report	29	48
Report	33	52-53
Report	42	63-65
Report	46	69-70
Report	48	72-73
Report	71	102-103
Report	74	106-107
Report	79	112-113
Report	82	116-117
Report	99	141-142
Report	157	227-228
Report	176	253-254
Emails	190	272-274
Report	201	288-289
Report	205	295-296
Report	212	308
Report	220	319-320
Report	250	362-363
Report	269	388-390
Emails	272	395-397
Report	288	420
Report	299	436-437
Report	323	468-469
Emails	345	498-500
Emails	370	565-569
Emails	371	570-571
Report	417	646-647
Report	424	656-657
Report	461	733
Report	463	736
Emails	474	768-774
Report	479	782-783

CONCLUSION, ORAL ARGUMENT, CERTIFICATE OF COMPLIANCE

[¶73] NDIRF requests oral argument. Oral argument will assist the Court in reaching its decision and clarify any questions it may have.

[¶74] The granting of the writ of mandamus should be reversed for all the reasons stated to the district court and in this brief.

[¶75] This thirty-eight page brief complies with N.D.R.App.P. Rule 32(a)(8).

Dated this 4th day of August, 2021.

/ s / Zachary E. Pelham

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lance Hagen, Petitioner and Appellee, vs. North Dakota Insurance Reserve Fund, Respondent and Appellant.	)))))))))	Supreme Court No. 20210111 Burleigh County No. 08-2019-CV-03559 **DECLARATION OF SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter declares under penalty of perjury that on the 4th day of August, 2021, she served a true and correct copy of the following:

1. Appellant's Brief
2. Appellant's Appendix

along with this service document, via electronic mail submission through the Supreme Court filing portal to the following:

Paul R. Sanderson
Evenson Sanderson PC
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/s/ Annette Kirschenheiter
Annette Kirschenheiter

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lance Hagen,	)	Supreme Court No. 20210111
	)	
Petitioner and Appellee,	)	Burleigh County No. 08-2019-CV-03559
	)	
vs.	)	
	)	**DECLARATION OF SERVICE**
North Dakota Insurance Reserve Fund,	)	
	)	
Respondent and Appellant.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter declares under penalty of perjury that on the 6th day of August, 2021, she served a true and correct copy of the following:

1. Appellant's Brief (with updated appendix references)
2. Appellant's Appendix (with updated appendix references)

along with this service document, via electronic mail submission through the Supreme Court filing portal to the following:

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/s/ Annette Kirschenheiter
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