

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-04

Date issued: January 17, 1992

Requested by: Helen Tracy, Executive Director, Workers  
Compensation Bureau

- QUESTIONS PRESENTED -

I.

Whether N. D. C. C. ' 44-04-19.1(3)(c) exempts attorney work product prepared in anticipation of an adversarial administrative proceeding from disclosure.

II.

Whether N. D. C. C. ' 44-04-19.1 exempts attorney work product prepared prior to the effective date of the statute from disclosure, when the request for disclosure is made after the effective date of the statute.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that attorney work product prepared in anticipation of an adversarial administrative proceeding is exempt from disclosure under N. D. C. C. ' 44-04-19.1(3)(c) if the requirements of N. D. C. C. ' 44-04-19.1(3)(a) and (b) are also met.

II.

It is my further opinion that attorney work product prepared prior to the effective date of the statute is exempt from disclosure when the request for disclosure is made after the effective date of the statute.

- ANALYSES -

I.

N. D. C. C. ' 44-04-19.1 states, in part:

1. Attorney work product is exempt from the provisions of section 44-04-18 [the open records law]. Attorney work product and copies thereof shall not be open to public inspection, examination, or copying unless specifically made public by the public agency receiving such work product.

. . . . .

3. "Attorney work product" means any document or record which:
  - a. Was prepared by an attorney representing a public agency 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 agency; and
  - c. Was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings.

. . . . .
6. "Adversarial administrative proceedings" include only those administrative proceedings where the administrative agency acts as a complainant or respondent in an adverse administrative proceeding. This term does not refer to those instances where the administrative agency acts in its own rulemaking capacity.
7. 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 agency.

To be exempt from North Dakota's open records law, attorney work product must meet the requirements of parts a, b, and c of subsection 3 of N. D. C. C. ' 44-04-19. 1.

Your first question relates specifically to the meaning of part c. The correct grammatical reading of part c would require the attorney work product to be prepared:

1. exclusively for civil or criminal litigation or,
2. exclusively for adversarial administrative proceedings in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings.

This reading of part 2 above is unclear, however, because it would allow an exemption for attorney work product prepared exclusively for adversarial administrative proceedings held in anticipation of imminent adversarial administrative proceedings. Any attorney work product prepared exclusively for an adversarial administrative proceeding is also prepared in anticipation of the adversarial administrative proceeding. Such wording is repetitious and raises the question of the intent of using the apparently redundant language regarding adversarial administrative proceedings.

In enacting a statute, it is presumed that "[t]he entire statute is intended to be effective" and that "[a] . . . reasonable result is intended." N. D. C. C. ' 1-02-38. "In order to . . . interpret the act so as to accomplish . . . [the legislative] purpose, obvious mistakes and omissions may be corrected or supplied, and . . . language of doubtful import should be given a meaning consistent with the legislative intention as disclosed by the act taken as a whole." Mankato Citizens Telephone Co. v. Commissioner of Taxation, 145 N. W. 2d 313, 317 (Minn. 1966).

In order for these presumptions to be given effect, it is necessary to read (c) as if an "or" were inserted before "in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings." In fact, the testimony presented to both the House and Senate Judiciary Committee members shows that was what was intended. "The bill narrowly applies only to documents . . . which were prepared for civil or criminal litigation, adversarial administrative proceedings, or in anticipation of imminent litigation or proceedings." Hearing on S. 2231, Before the House and Senate Comms. on the Judiciary, 51st N. D. Leg. (1989) (written testimony of Terry L. Adkins, Assistant Attorney General) (emphasis added.) Thus, it appears that the ", or" was inadvertently omitted from the bill. Adding further support to this conclusion is the language in Florida law, upon which Senate Bill No. 2231 was based:

A public record which was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from the provisions of subsection (1) until the conclusion of the litigation or adversarial administrative proceedings.

Fla. Stat. ' 119.07(3)(o), 1988. (Emphasis added.)

Both the testimony from the Attorney General's office which initiated the bill, and the Florida law upon which the bill was based, support the conclusion that a mistake was made in the drafting of the bill whereby ", or" was omitted before the words "in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings." There is no discussion in either the House or the Senate Judiciary Committees which indicates that the legislators' understanding of this portion of the bill was different than that which was represented to them by the Attorney General's office which drafted the bill and requested that it be introduced.

I conclude, therefore, that part c of N.D.C.C. ' 44-04-19.1(3) should be interpreted to include the underlined language as follows:

- c. Was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings.

It is therefore my opinion that attorney work product prepared in anticipation of an adversarial administrative proceeding is exempt from disclosure under N.D.C.C. ' 44-04-19.1(3). In order to be exempt, however, the attorney work product must have been prepared in anticipation of the adversarial administrative proceeding and must meet the requirements of parts a and b, as well as part c of subsection 3 of N.D.C.C. ' 44-04-19.1.

## II.

The second issue is whether attorney work product prepared prior to the effective date of the statute is exempt from disclosure when the request for disclosure is made after the effective date of the statute.

N.D.C.C. ' 44-04-19.1(1) indicates that attorney work product is exempt from the open records law. Thus, upon this statute's effective date, viz., July 6, 1989, attorney work product, as defined in this statute, is exempt from the open records law. One of the requirements for a document or record to qualify as attorney work product is that it be prepared exclusively for litigation or for adversarial administrative proceedings, or in anticipation of imminent litigation or adversarial administrative proceedings. N.D.C.C. ' 44-04-19.1(3)(c). Thus, when a document or record is requested after the statute's effective date of July 6, 1989, if that document or record was prepared exclusively for litigation or for adversarial administrative proceedings, or in anticipation of imminent litigation or adversarial administrative proceedings, regardless of the date of preparation, and also meets the requirements of parts a and b of N.D.C.C. ' 44-04-19.1(3), then the document or record is exempt from the open records law. Therefore, it is my opinion that N.D.C.C. ' 44-04-19.1 exempts attorney work product prepared prior to the effective date of the statute from disclosure, when the request for disclosure is made after the effective date of the statute.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

ATTORNEY GENERAL' S OPINION 92-04  
January 17, 1992  
Page 19

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