IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2020-018192-CA-01
SECTION: CA27
JUDGE: Oscar Rodriguez-Fonts

Florida Department of Financial Services
Plaintiff(s)

vs.

Guillermo Saavedra et al
Defendant(s)
_____/

ORDER DENYING RESPONDENT'S MOTION TO DISMISS PETITION

THIS CAUSE came before the Court on the Petition of Florida's Department of Financial Services, Division of Insurance Agent and Agency Services ("Petitioner") to Enforce a State Agency Investigative Subpoena ("Petitioner's Subpoena"), the Motion to Dismiss Petition filed by Contender Claims Consultants, *et. al.*, ("Respondent's Motion to Dismiss"), and Petitioner's Response to Respondents' Motion to Dismiss ("Petitioner's Response"). The Court having reviewed the Petitioner's Subpoena, Respondent's Motion to Dismiss, and Petitioner's Response, and being otherwise fully advised in the premises, hereby finds as follows:

I. Motion to Dismiss

On a motion to dismiss, the standard of review is whether the plaintiff has stated a cause of action on which relief can be granted. *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001); Fla. R. Civ. P. 1.140(b). The purpose of a motion to dismiss is to test the legal sufficiency of the complaint, not to determine factual issues. *Landmark Funding, Inc., on Behalf of Naples Syndications, LLC., v. Chaluts*, 213 So. 3d 1078, 1079 (Fla. 2d DCA 2017). When determining whether or not to grant a motion to dismiss, the trial court is limited to the four corners of the complaint and attachments incorporated into the complaint. *Id.* at 1079. "All allegations of the complaint must be taken as true and all reasonable inferences drawn therefrom must be construed in favor of the nonmoving party." *United Auto. Ins. Co. v. Law Off.'s of Michael I. Libman*, 46 So. 3d 1101 (Fla. 3d DCA 2010) (internal citations omitted).

Respondent argues Petitioner's petition should be dismissed because it failed to comply with the requirements of Section 624.317, of the Florida Statutes. Resp Mot. to Dismiss, 1. Particularly, Respondent argues Petitioner failed to state its "reason[s] [for believing] that Mr. Grados' used [] 'unlicensed individuals' or [whether such] individuals were exempt from licensure as a 'non-lawyer assistant' pursuant to Fla. Stat. 626.854 (1) and Fla. Stat. 626.860 and Florida Bar R. 4-5.3-5.7." *Id.* at 2. Petitioner on the other hand, argues

> [t]he Department has the clear authority to subpoena records to further its investigation. Section 624.321(1)(b), Florida Statues, authorizes the Department to 'require by subpoena the production of books, papers, records, files, correspondence, documents, or other evidence which is relevant to the inquiry' of any investigation under the Florida Insurance Code.

Pet'rs Resp., 2. These arguments will be analyzed.

II. Basis for Investigation

Section 624.307 (3), of the Florida Statutes states

> [t]he department or office may conduct such investigations of insurance matters, in addition to investigations expressly authorized, as it may deem proper to determine whether any person has violated any provision of this code within its respective regulatory jurisdiction or to secure information useful in the lawful administration of any such provision. The cost of such investigations shall be borne by the state.

Section 624.317 (1), of the Florida Statutes also states

> [i]f [the department] has *reason to believe* that any person has violated or is violating any provision of this code, or upon the written complaint signed by any interested person indicating that any such violation may exist: *The department shall conduct such investigation as it deems necessary of the accounts, records, documents, and transactions pertaining to or affecting the insurance affairs of any agent, adjuster, insurance agency, customer representative, service representative, or other person subject to its jurisdiction, subject to the requirements of s. 626.601.*

(emphasis added). Section 626.601 (1)-(3), of the Florida Statutes further states

> *[t]he department or office may*, upon its own motion or upon a written complaint signed by any interested person and filed with the department or office, *inquire into any alleged improper conduct* of any licensed, approved, or certified licensee, insurance agency, agent, adjuster, service representative, managing general agent, customer representative, title insurance agent, title insurance agency, mediator, neutral evaluator, navigator, continuing education course provider, instructor, school official, or monitor group under this code. *The department or office may thereafter initiate an investigation of any such individual or entity if it has reasonable cause* to believe that the individual or entity has violated any provision of the insurance code. . . . *In the investigation by the department or office of any alleged misconduct, an individual or entity shall, whenever so required by the department or office, cause the individual's or entity's books and records to be open for inspection for the purpose of such investigation. Complaints against an individual or entity may be informally alleged and are not required to include language necessary to charge a crime on an indictment or information.*

The Court in *Florida Department. of I0ns. & Treasurer v. Bankers Insurance Co.*, 694 So. 2d 70, 74 (Fla. 1st DCA 1997), ruled that the Department of Insurance and Treasurer "must be permitted" to investigate an agency's books and records in order to determine whether or not the agency is complying with the Insurance Code.

Respondents alleges "[t]he crux of Petitioner's investigation is [a] conclusory allegation without any stated 'reason to believe that Nicola Grados used 'unlicensed loss consultants' or individuals who were exempted due to their status as a 'non-lawyers assistant to a lawyer' to act as public adjusters." Resp. Mot. to Dismiss, 3.

Petitioner on the other hand argues Respondents argument is illogical because,

> [t]o say that the Department must present proof of a violation before it is allowed to investigate whether there has been a violation is backwards. This argument would render all investigations impossible, as the Department would have notably to gather the evidence needed to determine whether there was a violation in order to conduct an investigation. It would also render all investigations redundant, as the Department would not need to initiate an investigation if it already had proof of a violation."

Pet'rs Resp., 3. Petitioner also contends Respondents' argument is unsupported by section 624.307, of the Florida Statutes, "[b]ecause section 624.307(3), of the Florida Statues, authorizes the Department to investigate to determine whether there has been a violation, it must necessarily mean the Department is authorized to investigate in a scenario where the Department does not initially have evidence of a violation." *Id.* at 4. Petitioner further argues that its Petition contains the factual basis to support a violation of the Insurance Regulation Code by Respondents, as evidenced by the affidavit from Investigator Chris McGuire, which specifically states that Department's basis for the Investigative Subpoena was an allegation that Respondents were using unlicensed "loss consultants to act in the capacity as public adjusters." *Id.*

> The Department asserts that the conduct referred to in Paragraph 9 [stating that [d]uring an investigation of Contender, the Department discovered that Contender regularly referred clients to Strems Law Firm, who in turn referred clients to set up adjusting appointments through employees of Contender] of the Petition constitutes solicitation. Section 626.854, Florida Statutes, clearly states that anyone who solicits on behalf of a public adjuster or in connection with their own professional license, must be licensed as a public adjuster.

Pet'rs Resp., 5.

"Inquire" is defined as to "put a question: seek for information by questioning." *Inquire*, Merriam Webster Dictionary. *Black's Law Dictionary* defines "reasonable suspicion" as a "reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime." Probable Cause, *Black's Law Dictionary* (11th ed. 2019). It is more than a mere suspicion. *Id.* The Department began to investigate after receiving notice that Defendant Nicola Grados ("Defendant Nicola") was using loss consultants as public adjusters in his adjusting agency. *Id.* at 4. Department record shows Nicola Grados was appointed by the Strems Law Firm. *Id.* The Strems Law Firm registered 8315 NW 51st Manor, Coral Spring Florida 33067, as its address, which is the home address of Defendant Nicola and Defendant Miguel Grados ("Defendant Miguel"). *Id.* Furthermore, the Strems Law Firm used Defendant Nicola's social security number as its Federal Employer Identification Number ("FEIN"). *Id.* at 3. However, the Strems Law Firm "did not designate a primary adjuster by filing a primary adjuster form with the Department." *Id.* at 4. These facts form the basis for Petitioners initial investigation, as Petitioner argues that they are in direct violation of

Section 626.854, of the Florida Statutes, which specifically states that anyone who solicits on behalf of a public adjuster or in connection with their own professional license, must be licensed as a public adjuster. Respondent on the other hand argues that there is no violation because the loss consultants are exempted under Section 626.854, of the Florida Statues, as attorney assistants. Therefore, Respondent argues Petitioner had no reasonable basis to investigate and subpoena the requested documents.

Section 626.601, of the Florida Statutes specifically states that the Department has the authority to inquire into any alleged improper conduct. In order to inquire, questions must be asked and research must be performed. Once information is gathered, the level of review is heightened as now the Department must have reasonable cause to conduct an investigation. However, it is unreasonable to the Department to proffer proof of an actual violation in order for it to be able to inquire as to an alleged violation and begin its investigation. Therefore, upon receiving notice of the use of loss consultant as public adjusters, there was a basis for investigation, as Section 626.854 requires public adjuster's to be licensed, unless this individual is an attorney. However, before a violation is found, this Court must first determine whether or not loss consultants are public adjusters, and if not, whether these individuals are exempt from the licensing requirement.

III. **Adjusters Defined** Statutory Construction

To discern legislative intent, the court's first look at the plain and obvious meaning of the statute's text. *Rollins v. Pizzarelli*, 761 So. 2d 294, 297–98 (Fla. 2000). A statute's plain meaning can also be discerned from a dictionary. *Id.* If that language is clear, unambiguous, and conveys a clear and definite meaning, the courts apply that unequivocal meaning and will not engage in statutory construction. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). However, when there is ambiguity, the court should engage in statutory construction, in order to determine the Legislative intent. *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606–07 (Fla. 2006). The courts can examine the statute's legislative history and the purpose behind its enactment in trying to determine the legislative intent. *Id.* Based on the rules of statutory construction, [courts] are required to give effect to "every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage." *Edwards*, 229 So. 3d 277, 284 (Fla. 2017) (quoting *Goode v. State*, 50 Fla. 45, 39 So. 461, 463 (1905). "[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *Id.* at 284-85.

Section 626.854 (1), of the Florida Statutes defines a public adjuster as,

> any person, ***except a duly licensed attorney at law as exempted under s. 626.860***, who, for money, commission, or any other thing of value, directly or indirectly prepares, completes, or files an insurance claim for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims. The term also includes any person who, for money, commission, or any other thing of value, directly or indirectly solicits, investigates, or adjusts such claims on behalf of a public adjuster, an insured, or a third-party claimant. The term does not include a person who photographs or inventories damaged personal property or business personal property or a person performing duties under another professional license, if such person does not otherwise solicit, adjust, investigate, or negotiate for or attempt to effect the settlement of a claim.

(emphasis added). An all-lines adjuster is defined as

> a person who, for money, commission, or any other thing of value, directly or indirectly undertakes on behalf of a public adjuster or an insurer to ascertain and determine the amount of any claim, loss, or damage payable under an insurance contract or undertakes to effect settlement of such claim, loss, or damage. All-lines adjuster also includes any person who, for money, commission, or any other thing of value, directly or indirectly solicits claims on behalf of a public adjuster, but does not include a paid spokesperson used as part of a written or an electronic advertisement or a person who photographs or inventories damaged personal property or business personal property if such person does not otherwise adjust, investigate, or negotiate for or attempt to effect the settlement of a claim; . . . .

Id.

A public adjuster apprentice is defined as a person that is

> licensed as an all-lines adjuster who is appointed and employed or contracted by a public adjuster or a public adjusting firm; assists the public adjuster or public adjusting firm in ascertaining and determining the amount of any claim,

> loss, or damage payable under an insurance contract, or who undertakes to effect settlement of such claim, loss, or damage; and satisfies the requirements governing public adjuster apprentice appointment and qualifications.

Id.

Although a qualified individual may be licensed as a public adjuster or an all-lines adjuster, this same person cannot hold be licensed both as a public adjuster and an all lines adjuster concurrently. Tracy Bateman, J.D.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Elizabeth M. Bosek, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; John Glenn, J.D.; Noah J. Gordon, J.D.; Tammy E. Hinshaw, J.D.; Rachel M. Kane, M.A., J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Jeanne Philbin, J.D.; Mark T. Roohk, J.D.; Kimberly C. Simmons, J.D.; Susan L. Thomas, J.D.; Mary Ellen Tomazic, J.D., of the staff of the National Legal Research Group, Inc.; Mitchell J. Waldman, J.D.; Mary Ellen West, J.D.; Elizabeth Williams, J.D.; and Lisa A. Zakolski, J.D.; § 651. Adjusters, generally, Fla. Jur. (2d. ed. Dec. 2020). Furthermore, an "unlicensed person," is defined as a person who is not currently licensed by the Florida Department of Financial Services as a public adjuster or public adjuster apprentice. State Healthcare Laws Library – *Florida, Chapter 69B-220. Adjusters, FAC RULE 69B-220.051 Conduct of Public Adjuster and Public Adjuster Apprentices*, A Wolters Kluwer business (2019).

A loss consultant is someone who evaluates, estimates, and apprises the damages of the property. Colucci Law Group, *Understanding The Role of a Loss Consultant*, https://www.coluccilawgroup.com/insurance-law/loss-consultant/ (last visited Feb. 22, 2021). "Loss consultants evaluate, estimate / appraise, document and photograph damages to your client's property. The loss consultant ascertains the necessary details of the client's loss as well as the direct and indirect damages that the insurance companies consistently fail to acknowledge." Ocean Point Claims Company, *Professional Insurance Claim Loss Consultants*, https://oceanpoint.claims/services/loss-consulting/, (last visited Feb. 22, 2021).

The definition of a loss consultant is contrary to the definition delineated in Section 626.854, of the Florida Statues. First, Section 626.854, of the Florida Statutes states that a public adjuster is not someone who photographs, while a loss consultant is defined as someone who

photographs a client's damages. Furthermore, a public adjuster negotiates a client's loss, while a loss consultant only evaluates and estimates a client's loss. Therefore, Defendant Nicola adjusting company cannot use loss consultant as public adjuster, because in doing so, he is violating Section 626.854, of the Florida Statues which requires public adjusters to be licensed.

a. No Public Adjuster Listed

Furthermore, Section 626.112(3), of the Florida Statutes states "[n]o person may act as an adjuster as to any class of business for which he or she is not then licensed and appointed." As stated above, the Strems Law Firm did not designate a primary adjuster by filing a primary adjuster form with the Department. Therefore, the loss consultants cannot act as public adjusters, as these individuals are not licensed and appointed by the Strems Law Firm.

IV. **Licensed Attorney Exemption**

Section 626.860, of the Florida Statutes states

> [a]ttorneys at law duly licensed to practice law in the courts of this state, and in good standing with The Florida Bar, shall not be required to be licensed under the provisions of this code to authorize them to adjust or participate in the adjustment of any claim, loss, or damage arising under policies or contracts of insurance.

> The general prohibition against acting as an adjuster without a license is subject to the following exceptions and limitations: (1) attorneys at law duly licensed to practice law in the Florida courts, and in good standing with the Florida bar, are authorized to adjust or participate in the adjustment of any claim, loss, or damage arising under policies or contracts of insurance without being licensed under the provisions of the Insurance Code; and (2) a licensed and appointed insurance agent may, without being licensed as an adjuster, adjust losses for the insurer represented by him or her as agent if so authorized by the insurer.

Tracy Bateman, J.D.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Elizabeth M. Bosek, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; John Glenn, J.D.; Noah J. Gordon, J.D.; Tammy E. Hinshaw, J.D.; Rachel M. Kane, M.A., J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Jeanne Philbin, J.D.; Mark T. Roohk, J.D.; Kimberly C. Simmons, J.D.; Susan L. Thomas, J.D.; Mary Ellen Tomazic, J.D., of the staff of the National Legal Research Group, Inc.; Mitchell J.

Waldman, J.D.; Mary Ellen West, J.D.; Elizabeth Williams, J.D.; and Lisa A. Zakolski, J.D.; *§ 558. Acting as insurance adjuster without license*, Fla. Jur. (2d ed. Dec. 2020).

> Section 626.854(1) excepts attorneys from the definition of public "adjuster" – and from the requirements of section 626.854, including the twenty percent cap – if the attorney is "a duly licensed attorney at law as exempted under section 626.860." § 626.854(1), Fla. Stat. Section 626.860 explains that "[a]ttorneys at law duly licensed to practice law in the courts of this state, and in good standing with The Florida Bar, shall not be required to be licensed under the provisions of this code to authorize them to adjust or participate in the adjustment of any claim, loss, or damage arising under policies or contracts of insurance."

Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp., 261 So. 3d 613, 621 (Fla. 3d DCA 2018)

Respondent alleges "Petitioner has failed to state a cause of action . . . by failing to allege that the 'unlicensed loss consultants' require a license or are exempt from licensure pursuant to Fla. Sat. 626.860." Resp. Mot. to Dismiss, 5. Respondents allege that the conduct that Department refers in Paragraph 15 and 16, does not violate the Florida Insurance Code because Respondents' loss consultants are acting as lawyer's assistants as contemplated by Fla. Bar. R. 4-5.3-5.7 and should fall under section 626.854 and 626.860, Florida Statutes, which provide that a licensed attorney may perform the duties of a public adjuster without being licensed as a public adjuster.

Petitioner on the other hand argue Respondents argument "is contrary to Florida law . . . . When read together, section 626.854 and 626.860, Florida statutes, are clear that only duly licensed attorneys are permitted to engage in the conduct listed in sections 626.854(19)(a)-(d), Florida Statues, without being licensed as a public adjuster." Petitioners Resp., 6.

> The reading of sections 626.854 and 626.860, Florida Statues, advanced by Respondents is in direct conflict with the plain language of the statutes. Respondents have failed to meet their burden to establish that the exemptions in contained in sections 626.854 and 626.860, Florida Statutes, are applicable in the instant case.

Id. "The Department argues that the decision not to include 'lawyer's assistants' within the plain

language of sections 626.854 and 626.860, Florida Statues, represents a clear legislative intent that only licensed attorneys, and not their support staff, should benefit from the exemption." *Id.* at 6. Petitioner also argues that "Respondents' reliance on the Rules of the Florida Bar to include individuals assisting an attorney within the definition of an attorney is misplaced. The rules regulating lawyers have no application in the statutory framework of the Florida Insurance Code or the Department's duties as prescribed therein." *Id.*

Section 626.860 states that a duly licensed attorney in good standing with the Florida Bar are authorized to adjust or participate in the adjustment of any claim, loss, or damage arising under policies or contracts of insurance. An attorney's assistant does not meet the requirement of being a duly admitted Florida Bar Member in good standing, as only attorneys are regulated by The Florida Bar. Furthermore, Rules 4-5.3-5.7 of the Florida's Rules of Professional Conduct, regulate the conduct of attorneys and not that of legal assistants. These rules were implemented in order to appropriately preserve the independence and accountability of attorneys when working with their assistants. A reading of these rules does not lead to the reasonable conclusion that assistants of attorneys are also protected under rules that exempt attorneys from certain licensing requirements. Therefore, loss consultants are not exempted under Sections 626.854 and 626.860, because these rules apply specifically to attorneys who are duly admitted Florida Bar members and a reading of the statute does not state that non Florida Bar members, *i.e.*, legal assistants, can also fall under the umbrella of the exemption. Consequently, because Section 626.854, of the Florida Statues, specifically states that only public adjusters or a duly licensed attorney, not attorney assistants, can prepare an insurance claim, the Department was entitled to investigate and request the books and records of Defendant Nicola adjusting company in order to further continue its investigation.

V. **Subpoenas**

Section 624.321, of the Florida Statutes states the Department "[s]hall have the power to subpoena witnesses, compel their attendance and testimony, and require by subpoena the production of books, papers, records, files, correspondence, documents, or other evidence which is relevant to the inquiry." Section 626.561 (2), of the Florida Statutes also states "[t]he licensee shall keep and make available to the department or office books, accounts, and records as will enable the department or office to determine whether such licensee is complying with the provisions of this code. Furthermore, Section 624.318 (2), of the Florida Statutes states,

> [e]very person being examined or investigated, and its officers, attorneys, employees, agents, and representatives, shall make freely available to the department or office or its examiners or investigators the accounts, records,

> documents, files, information, assets, and matters in their possession or control relating to the subject of the examination or investigation.

Respondent alleges "[a]bsent any allegation of a basis for a violation, the department does not have a basis to investigate the Respondents or issue the subpoena." Resp. Mot. to Dismiss, 3. Respondent further alleges:

> [t]he subpoena for which an order from this court is sought, asks for production of a broad and vague requests for Contender Claims Consultants Inc, 'agency papers and electronic records pertaining to insurance adjusting or the effectuating of insurance adjusting transactions by Mr. Nicola Faride Grados and Mr. Miguel Angels Grados from Aug. 1, 2017. . . . The subpoena seeks information beyond its initial inquiry of whether or not Grados has used 'unlicensed' but nevertheless 'exempt' individuals to assist in adjusting claims. The request even seeks bank records. It is unclear why the Department believes it is entitled to three years of documents, emails, and retainer agreements. It appears from the affidavit submitted in its Petition, that the Department believes it is entitled to simply demand, without reason the review of any documents held by licensed individuals. It is also unclear why the Department continues to demand by subpoena documents which the Respondents have previously advised are in "the possession of a third-party law firm."

Mot. to Dismiss, 4-5.

The Court in *Florida Department. of Ins. & Treasurer v. Bankers Insurance Co.*, 694 So. 2d 70, 74 (Fla. 1st DCA 1997), stated that the Department of Insurance and Treasurer must be permitted to investigate an agencies books and records in order to determine whether or not the agency is complying with the Insurance Code. Therefore, the Court ruled that the Department of Insurance and Treasurer was entitled to enforcement of orders and subpoenas for investigation although the Department had not yet claimed a violation of the Insurance Code, because the Department was acting responsibility in thoroughly investigating beforehand whether a violation of the Insurance Code existed. *Id.* As analyzed above, the Department had a valid reason to begin its inquiry. Consequently, it was entitled to inspect and review the agencies books and records in order to determine whether or not there was a violation of the Insurance Regulation Code. However, because Respondent argues these documents are protected under the Attorney Client Privilege and Work Product Privilege, this argument will be analyzed further.

VI. **Attorney Client Privilege**

Section 90.502 of the Florida Statutes defines the contours of the attorney client privilege. Essentially, a client has the privilege to prevent disclosure of confidential communications disclosed during the rendition of legal services. The privilege is only available when all the elements are present, i.e. "(1) [w]here legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived."

International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177, 184–85 (M.D. Fla. 1973) (internal citations omitted). "The privilege, however, does not extend to every statement made to a lawyer. If the statement is about matters unconnected with the business at hand, or in a general conversation, or to the lawyer merely as a personal friend, the matter is not privileged." *Provenzano v. Singletary*, 3 F. Supp. 2d 1353, 1366 (M.D. Fla. 1997) (citing *Modern Woodmen of America v. Watkins,* 132 F.2d 352, 354 (5th Cir.1942))

Mere attendance of an attorney at a meeting, even where the meeting is held at the attorney's instance, does not render everything said or done at that meeting privileged. For communications at a meeting to be privileged, they must relate to the acquisition or rendition of professional legal services and must have a confidential character.

Hoch v. Rissman, Weisberg, Barrett, 742 So. 2d 451, 458 (Fla. 5th DCA 1999).

The burden of establishing the existence of the attorney-client privilege, and thus the existence of a confidential communication, rests on the party asserting the privilege. This burden can be met by describing "the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged[,] ... will enable other parties to assess the applicability of the privilege."

Coffey-Garcia v. S. Miami Hosp., Inc., 194 So. 3d 533, 536–37 (Fla. 3d DCA 2016).

Petitioner requested the following documents

> [a]ll Contender Claims Consultants, Inc., agency papers and electronic records pertaining to insurance adjusting or the effectuating of insurance adjusting transactions by Mr. Nicola Faride Grados and Mr. Miguel Angel Grados, which have taken place at any location (including Coral Springs, Florida) within the period of August 1, 2017, to present. Such records include but are not limited to: public adjuster agreements, emails, contingent fee retainer agreements and statements of clients rights, receipts from insureds, claims files, computer transactions lists, insurance company communications, applications, declaration pages, however, maintained, which are in the possession and control of or, maintained by Contender Claims Consultants, Inc., or any other location (including Coral Springs, Florida) on the agency's behalf. Any and all monthly bank statements for accounts which hold fiduciary funds for Contender Claims Consultants, Inc., from the period August 1, 2017, to present.

Pet'rs Subpoena, 5-6. Petitioner argues that Respondents failed to prove that the subpoenaed documents are protected by Section 626.854, the Attorney-Client privilege. *Id.* at 10. The Attorney Client privilege applies to confidential communications made for legal representation between an attorney and the client. Bank statements, receipts, claim files, transactions list are not document's which can be considered confidential or documents rendered in order to effectively obtain legal representation. The documents requested also lack the element of confidentiality. Therefore, Respondents failed to carry their burden of proving that these documents are protected under the Attorney-Client privilege.

VII. **Work Product Privilege What is Privileged**

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation . . . . If the request is refused, the person may move for an order to obtain a copy.

Fla. R. Civ. P. 1.280(b)(4).

"The rationale supporting the work product doctrine is that 'one party is not entitled to

prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.'" *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994) (quoting *Dodson v. Persell,* 390 So. 2d 704, 708 (Fla. 1980)). The work product doctrine was created as a litigation privilege; therefore, it generally does not apply to ordinary, routine, usual business communications. *Neighborhood Health P'ship, Inc. v. Peter F. Merkle M.D., P.A.*, 8 So. 3d 1180, 1185 (Fla. 4th DCA 2009).

The work product privilege only applies to materials that are obtained or developed in anticipation of litigation or trial. Charles W. Ehrhardt, Evidence, Chapter 5, Privileges, *§ 502.9 Work Product Privilege*, West's Fla. Pract. Series, (May 2020 ed.). The work product does not apply to materials intended to be used as evidence at trial. *Id.* Work product consists of fact and opinion work product. *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 952 (Fla. 3d DCA 2011).

> [F]act work product traditionally protects information which relates to the case and is gathered in anticipation of litigation, while opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions and theories concerning litigation. Generally, fact work product is susceptible to disclosure based on considerations of need and relevance. Conversely, and because proper representation demands that counsel be able to assemble information and plan her strategy without undue interference, opinion work product is generally afforded absolute immunity.

Id.

"Documents and tangible things prepared in the ordinary course of business, pursuant to public requirements unrelated to litigation, or at a time when the 'mere likelihood' of litigation exists are not entitled to protection from discovery under the work product doctrine." *Procter & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1193 (Fla. 1st DCA 1985). However, there are circumstances in which a report that is routinely prepared, may be protected as work product for the purposes of discovery. *Marshalls of M.A., Inc. v. Witter*, 186 So. 3d 570, 573 (Fla. 3d DCA 2016). For example, an insurance company claim file is generally regarded as work product and consequently, protected from discovery. *Homeowners Choice Property and Cas. Ins. Co., Inc. v. Avila*, 248 So. 3d 180 (Fla. 3d DCA 2018). "Without question, materials within an insurer's claim file will frequently fit within the definition of work product." *Progressive Am. Ins. Co. v. Herzoff*, 290 So. 3d 153, 157 (Fla. 2d DCA 2020); *see also Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos,*

Inc., 813 So. 2d 250, 252 (Fla. 3d DCA 2002) ("the claims file is the insurer's work product").

Tapanes Law Firm, the law firm which represented Contender Claims Consultant Inc., and Defendant Guillermo Saavedra, argues that the documents requested are protected by under the Work-Product doctrine, because these documents contain work, which was performed by Defendant Nicola and Defendant Miguel as consultants for attorneys. Petitioner's Subpoena, Ex. 4. "Such consulting work was done for attorneys' in preparation for litigation where Mr. Nicola Faride Grados or Miguel Angel Grados did not act as the attorneys' expert witness or adjusters." Because Respondent argues that some of the documents requested were obtained in anticipation of litigation, there is an argument that the Work Product Privilege can prevent disclosure of the documents Petitioner has requested. However, although the Work Product Privilege may protect some of the requested documents, it does not protect documents such as the public adjusting agreements, receipts from insureds, computer transactions lists, insurance company claim, applications, declaration pages, and bank statements, as these documents seem to be executed in the ordinary course of business. Respondent only provided a blanket conclusory argument that these all documents were protected under the Work Product Privilege; however, as stated above, not all of the documents are protected as work product. Respondents failed to provide proof and specifically allege which documents were protected as work product. Therefore, Respondent failed to carry its burden and prove that all the documents are protected as work product.

VIII. **Inconsistent Pleadings**

> An inconsistency between statements of material facts[2] in the same count of a pleading, or in a count and in a document made part of the pleading,[3] renders the pleading objectionable,[4] especially when such inconsistency has the effect of neutralizing each allegation as against the other.[5] However, this rule does not apply to a case in which the allegations in the pleading and those in the attached or incorporated document do not truly contradict each other.

John A. Gebauer, J.D.; John Kimpflen, J.D.; and Susan L. Thomas, J.D.; § 19 Consistency repugnancy, Fla. Jur. (2d. ed. Dec. 2020). When there are conflicts between the allegations and documents attached as exhibits, the plain language of the documents control. *Geico Gen. Ins. Co., Inc. v. Graci*, 849 So. 2d 1196, 1199 (Fla. 4th DCA 2003).

Respondent alleges "[t]he Petition contradicts itself and negates any alleged impropriety in its Exhibit 1 affidavit with the response letter in Exhibit 4 indicating that the 'unlicensed loss consultant's' are exempted under Fla. Stat. 626.860." Resp. Mot. to Dismiss at 4. Respondent

further alleges "[w]here a document on which the pleaders relies in the complaint directly conflicts with the allegations of the complaint, the variance is fatal and the complaint is subject to dismissal for failure to state a cause of action." *Id.* at 3. Petitioner argues that there is no contradiction in the pleadings.

Exhibit 1 of Petitioner Subpoena is the affidavit of investigator Christopher G. McGuire, in which he states that "[t]he inspection was precipitated by an allegation that All Lines Adjuster Nicola Grados used unlicensed 'loss consultants' to act as public adjusters. It was further alleged that Mr. Grados had no Primary Adjuster form filed with the Department." Petition for Ex. 1. Exhibit 4 is a letter drafted by the Tapanes Law Firm, the law firm which represented Contender Claims Consultant Inc,, and Guillermo Saavedra, which argues that the documents requested are protected by both the Attorney-Client privilege and the Work-Product doctrine. This letter also states that Contender is not in possession of any of the files or records pertaining to insurance adjusting or effectuating of insurance adjusting from Defendant Nicola or Defendant Miguel. A reading of both of these documents and the petition does not lead to the reasonable conclusion that Petitioner's pleading is inconsistent, because the exhibits do not contradict each other. Exhibit 1 was attached to the petition in order to prove the reasonable basis for conducting the investigation, *i.e.*, the use of loss consultant as public adjusters. Exhibit 4 was attached to the petition to prove the lack of success Petition has had in obtaining the required documents. Therefore, there is no inconsistency in the petition.

IX. **Not in Possession of the Documents**

Respondents argue that because it is not in possession of the files or records pertaining to insurance adjusting or effectuating of insurance adjusting from Defendant Nicola or Defendant Miguel Grados, they are not required to provide such documents. However, both Defendant Nicola, Miguel, and the Strems Law Firm are all parties to this action. As such, the fact that Tapanes Law Firm does not possess the files or records of Defendant Nicolas and Defendant Miguel insurance adjusting, is not a valid reason to withhold such documents, as Defendant Nicolas and Defendant Miguel can provide these documents.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that the Respondent's Motion is **DENIED**.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 1st day of March, 2021.

2020-018192-CA-01 03-01-2021 2:09 PM

Hon. Oscar Rodriguez-Fonts

CIRCUIT COURT JUDGE

Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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