



Administrative Law Section



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P.U.L.C. CHAIR:

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EXECUTIVE COUNCIL:

Terms Expiring 2008:

F. Scott Boyd
Tallahassee
Clark R. Jennings
Tallahassee
Deborah K. Kearney
Tallahassee
Bruce D. Lamb
Tampa
Wellington H. Meffert
Tallahassee
Shaw P. Stiller
Tallahassee
T. Kent Wetherell, II
Tallahassee

Terms Expiring 2009:

Donna E. Blanton
Tallahassee
Allen R. Grossman
Tallahassee
Lisa S. Nelson
Tallahassee
Daniel E. Nordby
Tallahassee
Linda M. Rigot
Tallahassee
W. David Watkins
Tallahassee
William E. Williams
Tallahassee

SECTION ADMINISTRATOR:

Jackie Werndli
651 E. Jefferson St.
Tallahassee, FL 32399-2300
(850)561-5623

Administrative Law Section Executive Council February 21, 2008 – 1:00 p.m. (CST)

AGENDA

- I. CALL TO ORDER – Andy Bertron, Chair
- II. PRELIMINARY MATTERS
 - A. Consideration of Minutes
 1. October 26, 2007 – Executive Council Meeting
 2. January 9, 2008 – Executive Council Conference Call
 - B. Treasurer's Report – Cathy M. Sellers
 1. 1/14/08 Detail Statement of Operations
 - C. Chair's Report – J. Andrew Bertron, Jr.
- III. COMMITTEE/LIAISON REPORTS
 - A. Continuing Legal Education – F. Scott Boyd
 1. Practice Before DOAH – Wellington H. Meffert
 2. Practice Before the PSC – Michael G. Cooke
 3. Pat Dore Conference – Seann M. Frazier
 - B. Publications – Elizabeth W. McArthur
 1. Newsletter – Donna E. Blanton
 - a. Agency Snapshots – Amy W. Schrader
 2. TFB *Journal* – Deborah K. Kearney
 - C. Legislative – Wellington H. Meffert/Linda M. Rigot/ William E. Williams
 - D. Public Utilities Law – Michael G. Cooke
 - E. Membership – T. Kent Wetherell, II
 - F. Webpage – Daniel E. Nordby
 - G. Uniform Rules of Procedure – Linda M. Rigot
 - H. Board of Governors Liaison – Lawrence E. Sellers, Jr.
 1. Meeting Summary – December 14, 2007
 2. Meeting Summary – February 1, 2008
 - I. Law School Liaison – Bruce D. Lamb
 - J. CLE Committee Liaison – M. Catherine Lannon
 - K. Council of Sections – Allen R. Grossman/Clark R. Jennings
 - L. Section/Division Liaison
 1. Environmental and Land Use Law – Cathy M. Sellers
 2. Health Law – Allen R. Grossman
 3. YLD Liaison – Rhonda Chung-DeCambre Stroman
 - M. DOAH Update – Lisa S. Nelson/Linda M. Rigot/T. Kent Wetherell, II

IV. OLD BUSINESS

V. NEW BUSINESS

- A. Invitation to Comment on Preliminary Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector
- B. 2008-2009 Section Preference Form
 - 1. Recommendations for BOG Liaison, Council of Sections Representative, and CLE Committee Representative
- C. Section Leadership Conference – July 11, 2008

VI. INFORMATIONAL

- A. Executive Council List
- B. 2007-08 Committee List

VII. TIME AND PLACE OF NEXT MEETING

- A. June 20, 2008 – Boca Raton Resort & Club, in conjunction with The Florida Bar Annual Convention

VIII. ADJOURNMENT

Minutes
Administrative Law Section Executive Council Meeting
January 9, 2008

I. CALL TO ORDER: The following participated in the ALS conference call on January 9, 2008 at 9:00 a.m.:

Present: Andy Bertron, F. Scott Boyd, Seann Frazier, Allen Grossman, Patrick "Booter" Imhof, Clark Jennings, Deborah Kearney, Elizabeth McArthur, Wellington Meffert, Lisa Nelson, Daniel Nordby, Linda Rigot, Lawrence Sellers, Jr., Shaw Stiller, David Watkins, Jacki Werndli, T.K. Wetherell, II.

Absent: Cathy Sellers, Michael Cooke, Bruce Lamb, Donna Blanton.

II. REVIEW OF 2008/2009 BUDGET: The Administrative Law Section Executive Council gathered to review the 2008/2009 proposed budget, and to compare the original 2007/2008 budget with an updated projection of that year's expected revenues and expenses.

In general, updated projections of revenues for 2007/2008 show slightly higher revenues than expected and slightly lower expenses than expected. The latest projections of 2007/2008 revenues stand at \$35,335 versus an original budget of \$31,216. The 2007/2008 updated projections place expenses at \$43,493 against an earlier budget of \$47,718. These figures still amount to a projected loss of more than \$8,000 for the year. However, many expense items which remain within the budget are not expected to be spent.

Jackie Werndli provided an overview of the latest projected budget for 2007/2008 and the proposed budget for 2008/2009. Jacki made note of certain line items.

Revenues

The CLE Courses line item is projected to include income of \$7,000 for the 2007/2008 year. However, the current figure for CLE courses is \$5,752. Revenues for this item may be affected by a recording malfunction during a recent CLE. The audio portion of the recent "Practice Before DOAH" seminar wasn't recorded properly. Thus, no sales of audio tapes can be expected for that CLE course.

Clark Jennings questioned the \$5,000 revenues projected within the budget in both 2007/2008 and 2008/2009 for "Member Services Programs." He noted that, in the past, revenues projected under this line item were not achieved. Jackie Werndli reported that this line item relates to a Public Utility Law program that was to be held on January 15, 2008. Approximately 40 - 50

lawyers were expected to attend the program. So, some revenues should be expected for this seminar in the 2007/2008 year.

Expenses

Jackie Werndli next provided a overview of particular line items for expenses contained in the proposed budget for 2008/2009.

Due to new allocations of costs to sections and a general reorganization by the Florida Bar, certain line items have been moved. The changes have made it more cumbersome to compare past expenses with current budgets. Expenses for certain line items were no longer comparable. For example, mailing overhead costs were moved to the postage cost line item. Printing overhead has been moved to a general line item for printing expenses.

Jackie reviewed some line item expenses in order to determine whether they overstate costs that may be expected in the 2007/2008 year. The "Newsletter" expenses were on budget and were not expected to exceed projected expenses. Line items for office travel, budgeted at \$2,500, are expected to be much lower than budgeted, perhaps amounting to only a few hundred dollars. The line item for a "Law School Liaison," budgeted for \$4,900, is expected to total less than \$1,500. Additionally, the website line item budgeted for \$3,000 was not expected to exceed \$500. Finally, the line item for legislative consultant budgeted at \$5,000 is not expected to be spent.

Net Gain or Loss

Seann Frazier noted that when overstated expenses are removed, a net gain can be expected for 2007/2008. The gain may show the Section "in the black" by a few thousand dollars, rather than at a loss of \$8,000 for 2007/2008.

The Section budget for 2008/2009 projects a loss of \$10,505 for the year. However, the budget contains many overstated projections of expenses, along with conservative, achievable projections of revenue. If history holds true, expenses will be less than expected and a net gain may be achieved.

T. Kent Wetherell, II moved to approve the budget. Allen Grossman seconded the motion. The Council voted unanimously to approve the 2008/2009 Budget.

On motion, duly seconded, the meeting adjourned.

Respectfully submitted,

Seann Frazier
Secretary

	December 2007 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Administrative Law				
31431 Section Dues	0	27,995	27,500	101.80
31432 Affilliate Dues	0	100	50	200.00
31433 Admin Fee to TFB	0	(20,428)	(19,290)	105.90
Total Dues Income-Net	0	7,667	8,260	92.82
32012 Sct Share Online CLE	0	0	700	0.00
32191 CLE Courses	1,148	6,900	5,000	138.00
32293 Section Differential	688	960	0	*
35700 Member Service Progr	0	0	5,000	0.00
38499 Investment Allocatio	3,141	8,123	12,106	67.10
39999 Miscellaneous	0	0	150	0.00
Other Income	4,977	15,983	22,956	69.62
Total Revenues	4,977	23,650	31,216	75.76
51101 Employee Travel	2	2	1,306	0.15
84001 Postage	0	31	208	14.90
84002 Printing	0	80	2,808	2.85
84003 Officers Office Expe	0	0	500	0.00
84006 Newsletter	0	1,363	3,000	45.43
84007 Membership	0	0	500	0.00
84009 Supplies	0	0	50	0.00
84010 Photocopying	1	15	156	9.62
84051 Officers Travel Expe	0	0	2,500	0.00
84052 Meeting Travel Expen	0	0	3,000	0.00
84054 CLE Speaker Expense	0	0	100	0.00
84101 Committee Expenses	0	0	500	0.00
84201 Board Or Council Mee	0	0	600	0.00
84202 Annual Meeting	0	0	1,950	0.00
84205 Section Service Prog	0	0	5,000	0.00
84209 Retreat	0	0	4,500	0.00
84299 Public Utility Comm	0	0	500	0.00
84301 Awards	0	0	600	0.00
84310 Law School Liaison	0	0	4,900	0.00
84422 Website	215	215	3,000	7.17
84501 Legislative Consulta	0	0	5,000	0.00
84701 Council Of Sections	0	0	300	0.00
84998 Operating Reserve	0	0	4,338	0.00
84999 Miscellaneous	0	65	500	13.00
Total Operating Expenses	218	1,771	45,816	3.87
86431 Meetings Administrat	0	0	32	0.00
86543 Graphics & Art	608	1,581	1,870	84.55
Total TFB Support Services	608	1,581	1,902	83.12

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	December 2007 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Administrative Law				
Total Expenses	826	3,352	47,718	7.02
Net Operations	4,151	20,298	(16,502)	(123.00)
21001 Fund Balance	0	199,292	172,945	115.23
Total Current Fund Balance	4,151	219,590	156,443	140.36

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**Practice Before D.O.A.H.
COURSE # 0544
November 16, 2007 – Tallahassee**

SPEAKER RATING

TOPICS/SPEAKERS	PRESENTATION
Pre-Hearing and Post-Hearing Matters	
Cathy M. Sellers, Broad and Cassel	4.6
Evidentiary Issues in Administrative Proceedings	
Seann M. Frazier, Greenberg Traurig, P.A.	3.6
Preparation and Examination of Fact Witnesses	
John F. Gilroy, Iii, John F. Gilroy, III, P.A.	4.2
Expert Witnesses: Selection, Preparation, and Examination	
Paul H. Amundsen, Amundsen & Smith	4.6
Mock Administrative Hearing: Environmental Resource Permit Challenge	
ALJ: Honorable T. Kent Wetherell, II, DOAH	4.6
Moderator: J. Stephen Menton, Rutledge, Ecenia, Purnell & Hoffman, P.A.	4.5
Agency Attorney: Francine M. Ffolkes, DEP	4.2
Agency Expert Witness: Robert M. Brown, SFWMD	4.3
Applicant's Attorney: Eric T. Olsen, Hopping Green & Sams, P.A.	4.3
Applicant's Expert Witness: J. Chris Herin, P.G., Geosyntec Consultants	4.4
Petitioner's Attorney: William L. Hyde, Fowler White Boggsbanker, P.A.	4.4
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PRESENTATION AS A WHOLE	4.3

TOTAL ATTENDANCE: 102

TOTAL EVALUATIONS RECEIVED: 32

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**Practice before the Public Service Commission: Things You Should Know About Public
Service Commission Ethics Requirements**

COURSE # 8481 7

January 15, 2008 - Tallahassee

SPEAKER RATING

TOPICS/SPEAKERS	PRESENTATION
Ethics Rules and State Agencies	
<u>Robin N. Fiore, Ph.D., Adelaide R. Snyder Professor of Ethics, Florida Atlantic University</u>	5.0
Unique Ethics Issues for the Public Service Commission	
Michael Cooke, General Counsel, Public Service Commission	4.7
Mary Anne Helton, Deputy General Counsel, Public Service Commission	4.7
<u>Caroline M. Klancke, Attorney, Public Service Commission</u>	4.3
Public Service Commission Clerk's Office Procedures and Ethical Considerations	
<u>Ann Cole, Clerk, Florida Public Service Commission</u>	4.7
Case Studies	
Cindy Miller, Attorney, Florida Public Service Commission	4.5
CarolineM. Klancke, Attorney, Florida Public Service Commission	4.0
Bruce May, Partner, Holland & Knight, LLP	4.5
Richard D. Melson, Former Private Practitioner and General Counsel, Florida Public Service Commission	4.0
<u>Joe A. McGlothlin, Associate Public Counsel, Florida Office of Public Counsel</u>	4.0
PRESENTATION AS A WHOLE	4.4

TOTAL ATTENDANCE: 51

TOTAL EVALUATIONS RECEIVED: 3

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At its December 14 meeting in Amelia Island, The Florida Bar Board of Governors:

- Heard a preview of legislative issues for the upcoming Regular Session of the Florida Legislature, with main assessment being that budget issues will dominate. The Bar is committed to continuing to support adequate funding for the court system and opposing budget cuts that would cripple its ability to timely handle cases.

- Approved the Bar strategic plan for 2008-11, setting as the Bar's top goals protecting the judiciary, promoting the legal profession, ensuring access to the courts and the legal system, and enhancing Bar services for its members.

- Heard a report on the implementing of a new program that has all grievance complaints, written as well as telephonic, screened through the ACAP program. Preliminary results show a dramatic drop in the number of cases referred to Bar counsel for investigation, which is expected to lead to a better use of Bar resources.

- Approved overturning a Bar advertising staff ruling on whether an attorney can answer legal questions posed to a group in an Internet chat room. The Board Review Committee on Professional Ethics is studying the underlying advertising opinion on which that ruling was based.

- Heard a report from the Investment Committee, including that none of the Bar's investments are in mortgage-back securities, and hence the Bar's holdings are not affected by the ongoing subprime mortgage crisis.

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At its February 1, 2008, meeting in Tallahassee, The Florida Bar Board of Governors:

- Approved as a Bar legislative position supporting the Supreme Court's certification of 61 new trial court judges. The board also approved allowing the Legal Needs of Children Committee to push for the creation of a comprehensive state system for representing children in court, which includes the Guardian ad Litem Program, public defenders, and legal counsel for children. The approval came with the understanding the committee may bring specific legislation to the Bar with a request that it be supported as a Bar as well as a committee position.

- Adopted the final report of the 2004 – and first – Diversity Symposium. Board member Eugene Pettis said while many recommendations fall outside the board's purview, many of the goals can be accomplished by the board and the formal approval in concept will give impetus to the proposals from that report, which set out a 10-year plan for improving diversity in the Bar, the profession, the judiciary, and in law schools.

- Heard Florida's Chief Financial Officer Alex Sink say Florida residents facing mortgage foreclosures will need increasing help from lawyers – especially pro bono services. She also urged the Bar to encourage talented young lawyers to enter government service and to recognize talented older attorneys who have dedicated their careers to public service, usually at a much smaller salary than they could have made in the private sector.

- Heard 2008-09 Bar Budget Committee Chair Gwynne Young predict that the 2008-09 budget, which will come to the board for its approval at its March meeting, will be balanced without an increase in annual membership fees, despite a softening national and state economy.

- Heard Chief Justice Fred Lewis ask the Bar for support on court budget needs in the legislature and for the Supreme Court Historical Society. He also talked about the successes of the Justice Teaching Initiative, and took questions from board members.

- Reappointed Miles McGrane III and Julio C. Jaramillo to three-year terms on The Florida Bar Foundation Board of Directors.

- Approved several rule changes on the recommendation of the Board of Legal Specialization and Education, including the final standards for certification in education law and adoption law.

- Heard a report from board member Murray Silverstein on ongoing studies and efforts related to technology and the courts, including e-filing and online public access to court records. Silverstein said the newly-formed

Florida Courts Technology Commission – on which he serves as a Bar representative – will have a major impact on those issues, and that the Bar and lawyers need to actively participate in those efforts.

- Approved for submission to the Supreme Court several advertising rule amendments, and discussed several other suggested changes, including on the use of nonlawyer spokespersons in electronic ads.



THE FLORIDA BAR

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EXECUTIVE DIRECTOR

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January 25, 2008

To: Chairs of All Florida Bar Sections, Committees, and Divisions

From: Marcos D. Jimenez, Chair, Task Force on Attorney-Client Privilege

cc: Francisco R. Angones; John G. White III; Jesse H. Diner; John F. Harkness, Jr., Paul Hill; Mary Ellen Bateman; Staff Liaisons

Re: Invitation to Comment on Preliminary Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector

Summary

This document sets forth a preliminary proposal for revisions to s. 119.071 and s. 286.011 of the Florida Statutes, and for the creation of s.119.0710 of the Florida Statutes. The proposal was developed by The Florida Bar's Task Force on Attorney-Client Privilege.

The task force has determined that revisions to the law are necessary to remove the legislative or judicial barriers that impede the government attorney's ability to provide effective legal counsel to the government. The revisions:

- (1) expand the work product exemption to include fact work product;
- (2) eliminate the disclosure of the work product at the conclusion of the litigation;
- (3) protect the public attorney's work product from discovery in the same manner that an attorney's work product is privileged in the civil discovery context;
- (4) allow necessary persons to attend an attorney-client session;
- (5) allow the substantive discussions to include any matter raised in a claim or lawsuit or anticipated lawsuit against a public agency;
- (6) eliminate the requirement that the session be transcribed and made available at the conclusion of the litigation; and
- (7) require litigants against a public agency to obtain documents through the normal discovery process during the pendency of the litigation.

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Request for Comment
January 25, 2008
Page 2

Any interested person or entity is invited to provide written comments regarding these preliminary revisions. Comments are requested by March 15, 2008 and may be e-mailed to mbateman@flabar.org or sent by mail to:

**Mr. Marcos D. Jimenez, Chair
Attorney-Client Privilege Task Force
c/o Mary Ellen Bateman
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32301-2399**

Background

In October 2006, then Florida Bar President Henry M. Coxe, III created a task force in response to the adoption of policies by a number of governmental agencies that weaken the attorney-client privilege and the work product doctrine. The appointment of the task force acknowledged the urging of the National Conference of Chief Justices to create state bar committees devoted to the preservation of the attorney-client privilege and work-product doctrine, as well as the urging of the ABA for state and local bar associations to address erosion of the attorney-client privilege.

The task force was asked to examine the purpose behind the attorney-client privilege and its exceptions, the circumstances under which and the extent to which the privilege is being threatened by government waiver policies, and the competing interests being asserted to override the privilege. The task force was directed to identify issues currently impacting the privilege and to report and to recommend resolutions to those issues, if warranted.

The task force has already submitted recommendations to the Board of Governors, many of which have been approved. A list of the recommendations and their current

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status is attached for your information.¹ The task force is considering several additional recommendations for referral to the board. This proposal is one of them.

After becoming aware of the issues related to the erosion of the attorney-client privilege and the work product protections in the public sector in Florida, the task force created a Public Sector Subcommittee to study the issue. The Public Sector Subcommittee, chaired by task force member Marion Radson, met by telephone on several occasions and ultimately submitted the attached report to the full task force.² The task force reviewed the report on January 17, 2008, approved it, and asked that it be referred to the appropriate sections, committees and divisions of the bar for comment.

Analysis

The attached Interim Report of the Public Sector Subcommittee provides an analysis of the issue of the erosion of the attorney-client privilege and work product doctrine in the public sector in Florida, as well as an analysis of the proposed recommendations to restore the attorney-client privilege and work product doctrine. The report also includes the proposed amendments for your review and comment³

If you have any questions concerning this invitation to comment, please e-mail Mary Ellen Bateman, counsel to the task force, at mbateman@flabar.org or call at (850)561-5777. If you would like a task force member to attend your meeting or telephone conference when this issue is discussed, please let Ms. Bateman know. We may be able to arrange it.

¹ See, Appendix A. The full Interim Report of the Attorney-Client Privilege Task Force is available at <http://www.floridabar.org/tfb/TFBComm.nsf/6b07501281c8e567852570000072a0b9/cb3c3b701837f2908525723a006b08e9?OpenDocument>.

² See, Interim Report of the Public Sector Committee, Appendix B.

³ Id.

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Appendix A

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Status of Recommendations of Florida's Task Force on Attorney-Client Privilege to the Board of Governors

1. Adopt the following resolutions:

a. That The Florida Bar supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney; opposes policies, practices and procedures of governmental bodies that would erode the privilege; and opposes the routine practice by governmental officials of seeking to obtain waivers of the privilege or work product doctrine by the granting or denial of a benefit. (Resolution 1)
APPROVED BY THE BOARD OF GOVERNORS

b. That The Florida Bar opposes government policies or practices that erode the constitutional and other legal rights of employees by requiring, encouraging or permitting prosecutors or other enforcement authorities to consider the following factors in determining whether an organization has been cooperative: (1) that the organization provided counsel or paid the legal fees of the employee; (2) that the organization chose to retain or declined to sanction an employee who refused a government request for an interview, testimony or other information; (3) that the organization entered into a joint defense or common interest agreement with an employee; (4) that the organization shared its records with an employee. (Resolution 2) APPROVED BY THE BOARD OF GOVERNORS

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c. That the attorney-client privilege and work product doctrine should be preserved with respect to audits of company financial statements. (Resolution 3) APPROVED BY THE BOARD OF GOVERNORS

2. Approve the following recommendations:

a. That The Florida Bar take a legislative position in support of the legislation introduced by U.S. Senator Arlen Specter (S.186) or similar comprehensive legislation. APPROVED BY THE BOARD OF GOVERNORS. THE FLORIDA BAR SENT LETTERS TO CONGRESS ON THIS ISSUE AND CONTINUES TO MONITOR THE PROPOSED LEGISLATION. HOUSE BILL 3013 APPROVED NOV. 13, 2007 BY THE HOUSE.

b. That The Florida Bar make no proposal at this time to amend section 90.502 to include a selective waiver provision. ACCEPTED BY THE BOARD OF GOVERNORS

c. That the concepts on inadvertent waiver contained in ABA Recommendation 120D be adopted and referred to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of Evidence Committee for drafting of appropriate rules consistent with the concepts. ACCEPTED BY THE BOARD OF GOVERNORS AND REFERRED TO THE NAMED COMMITTEES. THE CODE AND RULES

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OF EVIDENCE COMMITTEE RECOMMENDS THAT A COMMITTEE COMMENT SHOULD BE ADDED TO RULE 90.507 AND THAT ANY RULES AMENDMENTS SHOULD BE ADDRESSED BY THE CIVIL PROCEDURE RULES COMMITTEE. THE CIVIL PROCEDURE RULES COMMITTEE IS CONSIDERING A SUBCOMMITTEE REPORT IN JANUARY, 2008 RECOMMENDING A PROPOSED RULE ON INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS.

d. That The Florida Bar not pursue amendments to Rule 4-3.8(e) of the Rules of Professional Conduct to restrict a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. APPROVED THE BOARD OF GOVERNORS

e. That the Rules of Professional Conduct (including ABA Model Rule 3.4(g) and Florida's rules) not be amended to address the issue of attorney-client privilege. ACCEPTED BY THE BOARD OF GOVERNORS

f. That the issue of whether state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert be referred to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of Evidence Committee for review and consideration. ACCEPTED BY THE BOARD OF GOVERNORS AND REFERRED TO THE NAMED COMMITTEES. THE CODE AND RULES OF EVIDENCE COMMITTEE IS RECOMMENDING THAT NO

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THE FLORIDA BAR

ACTION BE TAKEN BY THE EVIDENCE COMMITTEE AS THE ISSUE IS MORE PROPERLY ADDRESSED BY THE RULES OF CIVIL PROCEDURE COMMITTEE. THE RULES OF CIVIL PROCEDURE COMMITTEE IS CONSIDERING A DRAFT REPORT RECOMMENDING A PROPOSED RULE ADDITION TO RULE 1.280(B)(4)(e).

g. That The Florida Bar take no action at this time on the issue of the proposed "firewall amendment" to S.186 or similar comprehensive legislation. ACCEPTED BY THE BOARD OF GOVERNORS

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Appendix B

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**INTERIM REPORT OF THE
PUBLIC SECTOR SUBCOMMITTEE**

**TO:
ATTORNEY-CLIENT TASK FORCE**

JANUARY 2008

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 - C. The Interplay Between the Public Records Law and the Attorney-Client Privilege and Work Product Doctrine**
- III. RECOMMENDATIONS TO RESTORE THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE**
 - A. Summary of the first Draft Bill**
 - B. Summary of the second Draft Bill**

VACID

I. MEMBERS OF THE SUBCOMMITTEE

Marion J. Radson, Chair
Gainesville, FL

Steven E. Chaykin
Miami, FL

Professor Timothy P. Chinaris
Montgomery, AL

Marcos Daniel Jimenez
Miami, FL

Sheryl Wood
West Palm Beach, FL

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II. EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN THE PUBLIC SECTOR

A. Preface

As a result of the work of the Attorney-Client Task Force, the Florida Bar has affirmed the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney. The Florida Bar has also opposed policies, practices and procedures of governmental bodies that would erode the privilege.

A little more than twenty years ago government entities in Florida lost the ability to invoke the attorney-client privilege in almost all meetings between the governing body and its government attorney. *Neu v. Miami Herald Publishing Co.*, 462 So.2d 821 (Fla. 1983) Similarly, a little more than twenty-five years ago government entities in Florida and government attorneys lost almost all claims of work product privilege under the public records law. *Wait v. Florida Power and Light Co.*, 372 So. 2d 420 (Fla. 1979) There is also confusion and uncertainty about the very existence of the privilege in the public sector in Florida. This uncertainty hampers full disclosure and discussion between the attorney who represents the government and the government as client. As one United States Supreme Court Justice stated, an uncertain privilege is a little better than no privilege at all. (Justice Rehnquist in *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996), quoting from Justice Stevens in *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981))

B. The Interplay Between Sunshine Law and Attorney-Client Privilege

The attorney-client privilege for governments in Florida is limited by the Government-in-the-Sunshine Law, commonly referred to as the Sunshine Law. §119.01

Fla. Stat. (2007). Although the Sunshine Law does not specifically mention the attorney-client privilege, the Florida Supreme Court held in *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) that the privilege was waived by the Florida legislature by implication. The court declared that the attorney-client privilege could not be claimed for communications made at public meetings. An essential element of the privilege, namely confidentiality, was obviously missing. The Supreme Court declined to find any independent basis for the privilege, like the evidence code or the rules of professional conduct, and deferred to the state legislature to create exemptions for the government.

The Florida Supreme Court is in the minority of state high courts to reject an independent basis for the attorney-client privilege for government. Courts in other states have recognized an independent basis for the privilege, often based on the strong policy considerations that apply to private clients. See e.g., *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (Cal. App. 3 Dist. 1968) and *Dunn v. Alabama State Univ. Bd. of Trustees*, 628 So.2d 519 (Ala. 1993); and *Oklahoma Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310 (Okla. 1978).

Since the Florida Supreme Court decision in *Neu*, the Florida legislature created a unique type of private "attorney-client" session, sometimes referred to as a shade session. §286.011 Fla. Stat. (2007). Under the current statutory law, a government lawyer can meet in a private session with a board or commission to discuss *pending* litigation. The discussion is limited to "settlement negotiations, or strategy sessions related to litigation expenditures". Only specifically designated persons may attend the session. Finally, and

most significantly, these sessions must be transcribed by a certified court reporter, and the record is then made public after the conclusion of the litigation.

These artificial limitations have severely limited the usefulness of these sessions. No matter how significant or imminent the threatened litigation, an attorney-client session cannot be held to discuss the claim or related strategies to avoid a lawsuit. Essential information may not be available during the sessions because necessary individuals, who are not specifically authorized by statute, are prohibited from attending these sessions.

Due to these constraints and restrictions, governments are understandably reluctant to hold these sessions. The result is elected officials do not obtain the type of legal advice that is essential to good government and its citizens. As the court aptly stated in attempting to reconcile the open meetings law and the attorney-client privilege: "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps." *Sacramento* 69 Cal. Rptr. at 490.

C. The Interplay Between the Public Records Law and the Attorney-Client Privilege and Work Product Doctrine

Early in the history of Florida's Public Records Act, the Florida Supreme Court declined to recognize any exemption for a government attorney's work product or attorney-client privileged documents. In *Wait v. Florida Power and Light Company*, 372 So. 2d 420 (Fla. 1979) the Supreme Court of Florida found that the legislature intended to exempt only those public records that were made confidential by statute. According to the Court, documents that were confidential or privileged as a result of judicial creation – such as those protected by the attorney-client and work product privileges – were not

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exempt. Any exemption, the Court noted, must come from the legislature and not from the courts.

In response to the court's holding in *Wait*, the Florida legislature created a limited and temporary exemption for certain documents of a government attorney.

§119.071(1)(d)(1) Fla. Stat. (2007). First, the exemption protects only "opinion work product", not the "fact work product" of the government attorney. Second, the litigation or adversarial proceeding must be "imminent" as opposed to "substantially likely". Finally, and most significantly, the exemption terminates at the conclusion of the litigation.

As a result of these limitations, government lawyers are reluctant to offer legal advice in writing to the public client. Some government lawyers do not take notes of meetings. Government lawyers are reluctant to create records and work product that are subject to disclosure under the public records. They are often placed in ethical dilemmas trying to maintain the confidentiality of information while abiding by the public records law. Inefficiency, unfairness, and sharp practices develop when offering legal advice or preparing for trial.

In contrast to Florida, the courts of other states have found that public records laws do not abrogate the attorney-client privilege because the two can co-exist while protecting the fundamental purpose of each. See e.g., *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 870 N.E. 2d 33 (Mass 2007).

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III. RECOMMENDATIONS TO RESTORE THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

Revisions to the law are necessary to remove the legislative or judicial barriers that impede the government attorney's ability to provide effective legal counsel to the government. The government should be able to invoke the attorney-client privilege when the government actor seeks legal advice in the performance of public duties.

A. Summary of the first Draft Bill:

Section 1: The current exemption under the public records law protects from inspection or copying certain opinion work product of an attorney, who represents a public agency, until the conclusion of the litigation. The bill expands the work product exemption to include fact work product, and eliminates the disclosure of the work product at the conclusion of the litigation. Additionally, the bill protects the public attorney's work product from discovery in the same manner that an attorney's work product is privileged in the civil discovery context. The revisions essentially treat the work product of a public entity attorney in the same manner as an attorney representing a private entity.

Section 2: The current law permits a public agency attorney to request an attorney client session under very limited and prescribed conditions. The bill would allow necessary persons to attend such sessions, allow the substantive discussions to include any matter raised in a claim or lawsuit or anticipated lawsuit against a public agency, and eliminate the requirement that the session be transcribed and made available for inspection at the conclusion of the litigation. The bill would allow an attorney of a public agency to hold meaningful private sessions with the public client and protect inviolate the communication.

B. Summary of the second Draft Bill

Section 1: The current law permits litigants to obtain production and copying of documents of a public agency and its attorney under the public records law during the pendency of litigation. The bill would eliminate abuses of the public records law by requiring litigants to obtain documents through the normal discovery process during the pendency of the litigation.

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