



# Administrative Law Section

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## Administrative Law Section Executive Council Conference Call

March 12, 2008 – 4:00 p.m.

### AGENDA

- I. CALL TO ORDER – Andy Bertron, Chair
- II. SECTION LEGISLATIVE POSITIONS
  - A. Rollover of Current Positions 1-5
  - B. Revised Language for Current Position 6
  - C. New Position - Funding Support for DOAH
    1. Proposed Position
    2. Master List of TFB Legislative Positions
- III. TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE
  - A. Invitation to Comment
  - B. Draft Statement of the Government Lawyers Section
  - C. Draft ALS Response to The Florida Bar

**Administrative Law Section**  
**2006-2008 Legislative Biennium**  
**July 28, 2006**

1. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation, that undermines the rule-making requirements of the Administrative Procedure Act by allowing statements of agency policy without formal rule-making.
2. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation to deny, limit or restrict points of entry to administrative proceedings under Chapter 120, *Florida Statutes*, by substantially affected persons.
3. Opposes exemptions or exceptions to the Administrative Procedure Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, *Florida Statutes*.
4. Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, *Florida Statutes*, and supports confidentiality of discussions in mediation; but opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.
5. Supports uniformity of procedures in administrative proceedings under Chapter 120, *Florida Statutes*, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.
6. Opposes amendment to Chapter 120, *Florida Statutes*, that limits, restricts, or penalizes full participation in the administrative process, in the absence of compelling justification or non-anecdotal evidence which demonstrates that the existing provisions of law are not adequately protecting the administrative due process rights of all participants.

## **Administrative Law Section Legislative Position**

### **Current Position**

6. Opposes amendment to Chapter 120, *Florida Statutes*, that limits, restricts, or penalizes full participation in the administrative process, in the absence of compelling justification or non-anecdotal evidence which demonstrates that the existing provisions of law are not adequately protecting the administrative due process rights of all participants.

### **Revision**

6. Opposes amendments to Chapter 120, *Florida Statutes*, or other legislation, that limits, restricts, or penalizes full participation in the administrative process, ~~in the absence of without~~ compelling justification ~~or non-anecdotal evidence which demonstrates that the existing provisions of law are not adequately protecting the administrative due process rights of all participants.~~

### **Recommended Position**

6. Opposes amendments to Chapter 120, *Florida Statutes*, or other legislation, that limit, restrict, or penalize full participation in the administrative process without compelling justification.

*II B (1)*

## **Proposed Legislative Position**

Supports adequate funding of the Division of Administrative Hearings and other existing state administrative dispute resolution forums in order to ensure efficient resolution of administrative disputes.

## **Legislative Activity**

### **Legislative Positions**

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Here you will find the master list of all Bar, section, division and committee positions for the 2004-2006 legislative biennium.

## **Master List of Legislative Positions**

Detailed below is the master list of legislative positions for the **2006-2008 Legislative Biennium**, to date.

The list contains all current positions of The Florida Bar, sections and committees.

### **I. FLORIDA BAR LEGISLATIVE POSITIONS**

### **II. SECTION LEGISLATIVE POSITIONS**

**Administrative Law Section**

**Appellate Practice Law Section**

**Business Law Section**

**Criminal Law Section**

**Elder Law Section**

**Entertainment, Arts & Sports Law Section**

**Family Law Section**

**Government Lawyer Section**

**Health Law Section**

**International Law Section**

**Public Interest Law Section**

**Real Property, Probate and Trust Law Section**

**Tax Section**

**Trial Law Section**

**Workers' Compensation Section**

**Out of State Division**

**Young Lawyers Division**

### **III. COMMITTEE LEGISLATIVE POSITIONS**

**Code and Rules of Evidence**

*ITC 2 (1)*

## Legal Needs of Children Committee

### I. FLORIDA BAR LEGISLATIVE POSITIONS

September 29, 2006

1. The Florida Bar supports the adoption of Amendment 3, "Requiring Broader Public Support for Constitutional Amendments or Revisions", as a measure toward protecting the integrity of Florida's Constitution.

December 8, 2006

2. Opposes amendments to the Florida Constitution that would alter the authority of the Supreme Court of Florida to regulate the admission of persons to the practice of law or the discipline of persons admitted.

3. Opposes amendment of Article V, Section 2(a) of the Florida Constitution that would alter the Supreme Court's authority to adopt rules for practice and procedure in all courts, or that would change the manner by which such rules may be repealed by the legislature.

4. Supports adequate funding of the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel.

5. Supports adequate funding for civil legal assistance to indigent persons through the Florida Access to Civil Legal Assistance Act.

6. Supports language in the Legislative Appropriations Act to permit the payment of government attorneys' Florida Bar membership fees and continuing legal education costs from funds within budget entities.

*II C 2(2)*

7. Supports legislation to require that a child have a meaningful opportunity to consult with an attorney before waiving his/her right to counsel in a delinquency proceeding.

8. Supports legislation to create reasonable financial student loan assistance for all government lawyers and legal aid attorneys who have served in that capacity for more than 3 years.

9. Opposes the indiscriminate use of chains and shackles in juvenile court proceedings, and encourages the adoption of a ban on the indiscriminate use of chains and shackles in juvenile court proceedings through court rule, legislation and executive branch policy.

January 26, 2007

10. Supports legislation consistent with the Supreme Court of Florida's December 14, 2006 certification of need for new judges.

February 12, 2007

11. Supports immediate Congressional action to enact a substantial pay increase for the federal judiciary consistent with the recent analysis by Paul Volcker, former chair of the National Commission on the Public Service, which recognized the inadequacy of federal judicial salaries and that increases in federal judicial salaries have not even kept pace with increases in average American worker wages.

April 16, 2007

12. Supports legislation that would waive civil court costs and fees for a person whose income is equal to or below 150 percent of then-current federal poverty guidelines.

June 1, 2007

*IC 2(3)*

13. The Florida Bar strongly supports the preservation of, and opposes policies and procedures that have the effect of eroding, the attorney-client privilege and work product doctrine, both of which are essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to:

- (1) promote compliance with law through effective counseling,
- (2) ensure effective advocacy for the client,
- (3) ensure access to justice and
- (4) promote the proper and efficient functioning of the American adversary system of justice.

February 1, 2008

14. Supports legislation consistent with the Supreme Court of Florida's January 17, 2008 certification of need for new judges.

## **II. SECTION LEGISLATIVE POSITIONS**

### **Administrative Law Section**

July 28, 2006

1. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation, that undermines the rule-making requirements of the Administrative Procedure Act by allowing statements of agency policy without formal rule-making.
2. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation to deny, limit or restrict points of entry to administrative proceedings under Chapter 120, *Florida Statutes*, by substantially affected persons.
3. Opposes exemptions or exceptions to the

*II C 2(4)*



Administrative Procedure Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, *Florida Statutes*.

4. Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, *Florida Statutes*, and supports confidentiality of discussions in mediation; but opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

5. Supports uniformity of procedures in administrative proceedings under Chapter 120, *Florida Statutes*, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.

6. Opposes amendment to Chapter 120, *Florida Statutes*, that limits, restricts, or penalizes full participation in the administrative process, in the absence of compelling justification or non-anecdotal evidence which demonstrates that the existing provisions of law are not adequately protecting the administrative due process rights of all participants.

### **Appellate Practice Law Section**

January 26, 2007

1. Opposes amendment of Article V, Section 2(a) of the Florida Constitution that would alter the Supreme Court's authority to adopt rules for practice and procedure in all courts, or that would change the manner by which such rules may be repealed by the legislature.

2. Supports maintaining an independent judiciary.

3. Supports pay raises for appellate judges and support personnel consistent with the Florida Supreme Court 2007

*TC 2 (5)*

budget request.

4. Supports legislation consistent with the recommendations of the DCA Workload and Assessment Committee and the recommendations of the Supreme Court in the Certification Opinion as to additional judges, but opposed the creation of a new DCA or the changing of the boundaries of the current courts.

### **Business Law Section**

July 28, 2006

1. Opposes legislation that would re-enact the Bulk Sales Act, Article 6 of the Uniform Commercial Code.

2. Supports adequate funding of the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel.

3. Opposes legislation to impose income tax on limited liability companies and subchapter 5 corporations.

4. Supports legislation consistent with the Supreme Court of Florida's November 30, 2004 certification of need for additional judges.

5. Supports the passage of Revised Article I of the Uniform Commercial Code, as developed by the National Conference of Commissioners on Uniform State Laws (NCCULS), with the exception of s. 1-301 re choice of laws, with an effective date of "upon becoming law."

6. Supports passage of a Revised Model Trademark Act, Ch. 495, Florida Statutes.

September 29, 2006

7. Supports amendment to §222.25 F. S. to provide an exemption from legal process of not to exceed \$4,000 in personal property, provided a resident debtor does not

*IC 2(6)*

claim or receive the benefits of a homestead exemption under Article X, Section 4 of the Florida Constitution.

8. Supports proposed technical, clarifying and modernizing revisions to Chapter 617 F. S. re not for profit corporations. The scope of such amendments includes changes to Ch. 617 that will conform that chapter to changes made in Ch. 607 re for profit corporations since 1990.

December 8, 2006

9. Supports legislation to update or modernize the assignment for benefit of creditors in Chapter 727, Florida Statutes.

February 21, 2007

10. Support "glitch" amendments of a technical, corrective and clarifying nature to Florida Statutes Chapter 620 re: Uniform Limited Partnership Act.

11. Support the funding and allocation of appropriated and necessary resources to fund complex business litigation pilot projects in the 9th, 11th, 13th, and 15th judicial circuits, provided that pilot project funding is to be in addition to existing court funding.

12. Support legislation to eliminate duplicate names among limited liability companies, paralleling existing Delaware corporate law: (1) providing that an LLC name not distinguishable from the name of an existing corporation or partnership without permission of the prior name holder not be permitted; (2) providing a "grandfather" clause that would permit existing names on record to remain; (3) applying to both domestic and foreign corporations; and (4) conforming the amendments to partnership and corporate statutes.

*HC 2(7)*

13. Supports RPPTL position "supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests" provided that single member LLC's are eliminated from the scope of the legislation.

October 5, 2007

14. Supports the replacement of word "files" and "filing" with "serves" and "serving" wherever they appear in subsection (1) of §768.79, the Offer of Judgment and Demand for Judgment Statute.

15. Supports glitch amendments of a technical, corrective and clarifying nature to Florida Statutes, Chapter 607 re: Corporations and Chapter 608 re: Limited Liability Companies.

16. Supports the creation of §702.55 Florida Statutes, providing for notice to homeowner in mortgage foreclosure action of possibility of relief under U. S. Bankruptcy Code.

February 1, 2008

17. Supports HB 17 re regulation of auctioneers.

### **Criminal Law Section**

TBA

### **Elder Law Section**

July 28, 2006

1. Supports legislation that protects individual rights by removing all barrier language which imposes greater restrictions on incapacitated persons, as discussed in

*II C 2 (8)*

*Browning.*

2. Opposes legislation that would limit awards, attorney's fees and costs in liability actions brought against nursing homes or assisted living facilities.
3. Supports legislation that would increase staffing ratios, governmental oversight and Medicaid reimbursement rates to improve the general quality of care for elderly and disabled persons residing in nursing homes.
4. Opposes legislation that would restrict or revoke driving privileges based solely upon aging factors.
5. Supports legislation that would enhance enforcement of existing provisions to revoke driving privileges from persons who are determined to be impaired.
6. Opposes any legislative effort which would eliminate or diminish the rights of residents of nursing homes and other long term care facilities, as currently provided under Chapter 400, F.S.
7. Opposes any legislation that would allow the Clerks of Court in any and/or all circuits to assess and collect audit fees or other fees in guardianship or probate cases that would be a percentage of the total amount or value of the respective guardianship or probate estate.
8. Opposes any legislation that would decrease current Court authority and control over guardianship or probate matters while increasing, correspondingly or otherwise, the Clerk of Courts authority over these same matters.
9. Supports adding public guardians to the definition of professional guardians, and streamlining the registration process for professional guardians.
10. Supports SB 472 (2006) regarding Florida's

*IT C 2 (9)*

Guardianship law as originally filed on 10/25/05, with two exceptions: (1) the proposed amendments to §744.441 (19), Florida Statutes; and (2) the proposed amendments to §744.474(20) Florida Statutes.

11. Supports creating Chapter 736, Florida Statutes, to codify the law of trusts and makes conforming revisions to other Florida Statutes.

February 19, 2008

12. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

February 28, 2008

13. Supports the development and implementation of a public education program stressing the need for screenings for memory impairment and the importance of early diagnosis and treatment of Alzheimer's disease and related disorders; and supports the mandate that the Department of Elder Affairs conduct, or provide support for, a study on the benefits of memory screenings and the scientific evidence on the techniques for memory screening.

### **Entertainment, Arts & Sports Law Section**

July 28, 2006

1. Supports full and complete state funding for the arts and the arts education programs in Florida, as well as the continued existence of the Corporations Trust Fund, and urges the Florida legislature to continue and increase the funding of these arts programs and organizations.

### **Family Law Section**

July 28, 2006

*TC 2(10)*

1. Supports amendments to Florida's domestic violence laws that would include:

- a. amending §741.30(6)(c), *Florida Statutes*, to substitute the term "permanent" instead of "final" with regard to judgments on injunctions for protection against domestic violence;
- b. amending §741.30(6)(a)7, *Florida Statutes*, to authorize the court to enter relief to protect minor children of a domestic violence victim as well as the victim;

2. Opposes legislation that would seek to remove from the courts in any way the establishment, modification or enforcement of family support, and/or that would seek to place consideration, effectuation or adjudication of these issues under the jurisdiction of the Department of Revenue or any other governmental or administrative body.

3. Supports modification of child support guidelines, Chapter 61, *Florida Statutes*, to eliminate the 25% reduction from the total cost of child care prior to allocating that cost between the parents, and to allow consideration of any available tax credit received by one parent as a result of child care expenses when determining allocation of costs.

4. Supports adequate funding for dependency courts and for all Chapter 39, F.S. proceedings relating to children.

5. Supports the establishment and funding of programs to provide dependency mediation services in each judicial circuit.

6. Opposes creation of an evidentiary privilege for parent-child communications.

IC2C11)

7. Supports amendment of §61.13(1), *Florida Statutes*, to clarify that a court may require either or both parents to carry life insurance or to otherwise secure child support obligations.

8. Supports legislation amending s.119.07(3)(i)(1), *Florida Statutes*, to extend to General Masters and Child Support Hearing Officers the exemption from public disclosure granted therein.

9. Supports legislation amending §119.07(3)(i)(1), *Florida Statutes*, to exempt from public disclosure the home addresses, telephone numbers, places of employment, and names and locations of schools and day care facilities of grandchildren of Justices, District Court of Appeal Judges, Circuit Court Judges, County Court Judges, General Masters and Child Support Hearing Officers.

10. Opposes removing or deleting the word "imminent" from §741.30(1)(a), *Florida Statutes*.

11. Supports amending Chapter 61, *Florida Statutes*, by adding a new § 61.406, *Florida Statutes*, authorizing an award of reasonable fees and costs to a duly appointed guardian ad litem, and further authorizing the guardian to apply for and enforce such an award in his or her own name without the necessity of counsel.

12. Supports amending § 742.045, *Florida Statutes*, allowing the award of appellate fees and costs in paternity matters, consistent with existing language of § 61.16, *Florida Statute*.

13. Opposes any proposed legislation that disturbs the finality of judgments determining parentage of children without consideration or inclusion of a statute of repose, a best interests of child standard consistent with established public policy of the State, and the elements and burden of

IV C 2 (12)



proof of fraud.

14. Supports amending § 61.13(3), Florida Statutes, by adding as a factor for consideration of shared parental responsibility and primary residence of a child "the willingness of a parent to confer and cooperate with the other parent."

16. Supports an amendment to §61.121, Florida Statutes, (Rotating Custody) inserting a second sentence that reads:" There shall be no presumption for or against an award of rotating custody."

17. Supports an amendment to §61.30 (1) (a), Florida Statutes (Child Support Guidelines; Retroactive Child Support), deleting the words ""or mediation agreement"" in the second to last sentence.

18. Opposes any extension of administrative procedures for a determination of paternity outside of the constitutionally established judiciary branch of state government.

19. Supports the amendment of §63.042, Florida Statutes, to permit a court to excuse the consent of an adoptive parent's spouse when the court finds that an adoption is in the best interests of the child. The court, rather than the Department of Children & Families, should be vested with the authority to determine whether an adoptive parent's disability should prohibit the person from adopting.

20. Supports the elimination of any language concerning non-adoption issues such as §63.043, Florida Statutes, regarding the screening for the sickle cell trait.

21. Supports adequate funding of the state courts system, state attorneys' offices, public defenders' offices and court-appointed counsel

22. Supports amending *Florida Statutes*, Chapters 61 and

*II C 2(13)*

742, Florida Statutes, to make it clear that the court has the appropriate discretion and authority to, upon good cause shown by a party, modify temporary support orders on a retroactive basis, even in the absence of a showing of a substantial change in circumstances.

23. Opposes legislation deleting the term "repeat violence" in F. S. 784.046 for purposes of protective injunctions.

24. Supports the creation of a parenting coordination statute that would apply in certain family law cases.

25. Supports the statutory recognition of collaborative law as a form of alternative dispute resolution in family law cases and the establishment of a privilege regarding the disclosure of information related to collaborative proceedings.

26. Supports legislation to create a reputable presumption for the purposes of imputation of income in a child support case that every parent in the State of Florida can earn minimum wage.

27. Supports the establishment of supervised visitation program standards and Senate Bill 466.

28. Opposes House Bill 152 and senate Bill 1181 and the termination or modification of alimony based upon a finding that a de facto marriage exists.

29. Supports 2006 Senate Bill 408 amending Florida Statutes Chapter 63 on Adoption.

30. Supports the amendment of Florida Statutes 61.08 and 61.14 to fix certain "glitches" created by the 2005 amendment of the Florida Statutes which provided for the termination or modification of alimony based upon a finding that a *de facto* marriage occurred.

II C 2 (14)

31. Supports amendment to Florida Statutes section 61.13 (1)(a)(1), (2) and (3) to require that the trial court set forth in every order establishing or modifying child support a schedule containing specific findings designating the child support award for multiple children based upon current net income, so that as each child attains the age of majority or otherwise emancipates, the aggregate number of remaining minor children for whom child support is being paid is accordingly reduced, to the appropriate child support amount as set forth on the schedule, until such time as the total child support obligation is extinguished.

32. Supports an amendment to Florida Statutes 61.14 to include subparagraphs (1)(a)1, (2), (3) (a) and (b), as well as (4) to enable a court to temporarily reduce support under certain defined circumstances post-judgment.

33. Supports the amendment to Florida Statutes section 61.30 (16) to adjust the child support statutory guidelines no less than every 3 years to ensure that Federal Poverty Guidelines are properly adjusted within those statutory guidelines.

34. Supports the creation of a remedy to set aside a determination of paternity for the express purpose for terminating prospective court ordered child support under certain defined circumstances.

35. Supports the amendment of Florida Statutes Chapter 61 to include a section modeled, in part, on the Uniform Premarital Agreement Act.

36. Supports amending §61.30(6) F.S. which would provide that when the parents combined income exceeds

II C 2 (15)

the child support guidelines schedule amounts that the percentages contained at the end of subparagraph (6) not be used as a basis for awarding child support beyond the reasonable needs of the parties' children.

37. Supports amending §61.30 11(a)10 F. S. and §61.30 11(b) F. S. to require mandatory deviation in the calculation of child support and the continuing utilization of the "gross-up" method for child support calculation when the particular parenting arrangement provides that parties' children spend a substantial amount of time with the non-custodial parent. The threshold for determination of "substantial time-sharing" should be reduced from 40% to 20% of the overnights.

38. Supports an amendment to §61.30 11 (d) F.S. which would codify current case law addressing the formula for calculating child support in split custody cases.

39. Strongly opposes any amendment to 61.30 F.S. which would delegate the obligation to review and if appropriate, reconfigure the child support guidelines schedule in Florida Statutes, Chapter 61, to the Supreme Court of the State of Florida or the State of Florida, Department of Revenue.

40. Opposes the incorporation of Family Team Conferencing as an alternative dispute resolution mechanism unless it incorporates the appropriate procedural safeguards.

41. Opposes any amendment to the current definition of parent under Chapter 39, Florida Statutes unless it is consistent with the definition set forth in Florida Statutes Chapter 63.

42. Supports the inclusion of the definition of "incarcerated parent" in Chapter 3, Florida Statutes and

II C 2 (16)

## Chapter 39, Florida Statutes.

43. Supports an amendment to §827.03 F. S. to incorporate a fourth category of child abuse provided that the definition of corporal punishment is amended to define excessive corporal punishment as consistent with definitions thereof set forth in § 39.01 (30)(a) 4 a.-k.; as well as the incorporation of the phrases "permanent or temporary" in reference to i. disfigurement and j. loss or impairment of a body part or function.

44. Supports the inclusion of limiting language in setting aside paternity based upon fraud or misrepresentation for child support termination purposes.

45. Opposes Senate Bill 2012 unless the current language intended to amend § 39.407(5) is deleted thereby leaving the authority of the judiciary to order that a child receive developmental disability services intact under Florida Statutes Chapter 39.

September 29, 2006

46 Supports an amendment to § 61.13 (1)(a)(1),(2) and (3) to require that the trial court set forth in an order establishing or modifying child support a schedule containing specific findings designating the child support award for multiple children based upon current net income so that as each child attains the age of majority, the aggregate number of remaining minor children for whom child support is being paid is accordingly reduced, to the appropriate child support amount as set forth on the schedule, until such time as the total child support obligation is extinguished.

47. Supports an amendment to §61.30(2)(b) to include subparagraphs 1.,2., 3. and 4. which defines the criteria

II C 2 (17)

for imputation of income for child support calculation purposes under the statutory child support guidelines, assigns the evidentiary burden to the party seeking to impute the income; makes mandatory the obligation to make findings of fact when imputation of income occurs; creates a rebuttable presumption pertaining to imputation of the minimum wage to parties residing in the State of Florida and outside of the State of Florida; and finally limits those circumstances when a court may not impute income beyond minimum wage requirements.

48. Supports the adoption of legislation that will enhance parental responsibility for and time-sharing of children involved in dissolution of marriage, domestic violence and paternity matters, when in a non-intact family unit, including: (1) the elimination of labels and presumptions previously associated with custody and visitation issues; (2) the promotion of co-parenting between parents so long as domestic violence does not prevent such co-parenting concepts; and (3) minimizing the detriment (emotional, financial or otherwise) that might arise from prolonged litigation that is often inherent when parents are adversaries in proceedings involving their child(ren)

49. Supports the adoption of legislation that will authorize the courts to enhance current "traditional" in-person and telephonic time-sharing and communication via "virtual visitation" by parents with their child(ren) utilizing technology currently available [including but not limited to electronic mail (e-mail), web-cam, video conferencing, other wired or wireless technologies via the Internet], or such other prospective technology. When considering whether or not to order "virtual visitation" the court should consider certain factors, including but not limited to (a) the child(ren)'s best interests in connection therewith;

II C 2 (18)

(b) the parents' finances; (c) whether the equipment and/or technology is reasonable available, financially and otherwise, to the parents and child(ren); and (d) any other relevant factors.

50. Supports an amendment to Chapter 39 F. S. applying Florida's Putative Father Registry to all termination of parental rights actions. An unmarried biological father's consent is on required when he acts to protect his parental rights by legally establishing his rights or registering with Florida's Putative Father Registry prior to the date the petition to terminate parental rights is filed with the court.

51. Supports amendment to Chapter 39 F. S. which would clearly set forth the intent that application of the Florida Putative Father Registry would differ in Dependency/Shelter proceedings and Termination of Parental Rights Proceedings as the interests of the child were different in each proceeding.

52. Supports an amendment to Chapter 39 F. S. which would provide juvenile judges with the authority to enter legally recordable paternity judgments, child support order and income deduction orders.

53. Supports amendment to Chapter 339 F. S. that applying Florida's Putative Father Registry to Dependency/Shelter proceeding by personally providing a father identified as a result of §39.503 F. S. inquiry with a disclosure on his paternal responsibility to register with Florida Putative Father Registry, support his child and legally establish his rights to the child. Such a father would have 30 days from personal receipt of the disclosure to assert his rights by registering with Florida's Putative Father Registry.

II C 2(19)

August 17, 2007

54. Supports legislation intended to clarify the nature of marital and non-marital assets in *Florida Statutes Chapter 61* proceedings.

55. Supports legislation intended to end the confusion caused by conflicting case law involving the manner and methodology for asserting and calculating special equity in property in *Florida Statutes Chapter 61* proceedings.

October 5, 2007

56. Supports legislation to create §61.075 (6)(a)(7) Florida Statutes, to clarify the burden of proof to overcome the gift presumption and require proof by a clear and convincing showing to demonstrate that real or personal property held in joint tenancy by the entities is marital property.

57. Supports legislation to create a presumption in Florida Statutes Chapter 61 proceedings by the addition of §61.075 (6)(a)(6) to provide that personal property titled jointly by the parties as tenants by the entireties shall be presumed to be a marital asset. However, that presumption may be overcome by a challenging party who has the burden of proof to rebut that presumption by establishing that the personal property, in whole, or in part, is non-marital in nature.

58. Supports legislation to create §61.075(5) to provide trial courts the discretion to make interim partial equitable distribution awards when justified by extraordinary circumstances and upon a sworn motion setting forth such good cause.

II C 2(20)



59. Supports legislation to allow the trial court to modify child support relative to military service members called into service.

60. Supports legislation allowing trial courts to temporarily reduce, suspend or abate child support in temporary circumstances necessitating a reduction of support.

### **Government Lawyer Section**

July 28, 2006

1. Supports language in the Legislative Appropriations Act to permit the payment of government attorneys' Florida Bar membership fees and continuing legal education costs from funds within budget entities, and further supports amendment to general law to authorize all Florida government agencies to pay their government attorneys' Florida Bar membership fees and continuing education costs.

2. Supports amendment to §119.07(3)(x), *Florida Statutes*, to exempt from disclosure under the public records law, the home addresses and telephone numbers of all current and former government agency employees.

3. Supports full legislative funding of the Prosecutor/Public Defender Training Program.

4. Supports legislative intent language to clarify that statutory restrictions or prohibitions on the private practice of law by government lawyers (other than judges and their staff) do not preclude such lawyers from providing pro bono legal services as contemplated by the Supreme Court of Florida in *Amendments to Rules Regulating The Florida Bar*, 630 So. 2d 501 (Fla. 1993), which establishes an aspirational goal of 20 hours per year of such services by each Florida lawyer.

II C 2(21)

## Health Law Section

July 28, 2006

1. Supports confidentiality of Physician Recovery Network records.
2. Supports, for administrative disciplinary proceedings before regulatory boards within the Division of Medical Quality Assurance of the Department of Health, the adoption of a statute of limitations of no less than four years from the time of the conduct giving rise to the complaint, or from the time the conduct is discovered or should have been discovered, but in no event should the statute of limitations be extended more than seven years -  
- said limitations being inapplicable in cases involving:  
fraud, concealment or intentional misrepresentation of fact by the investigated licensee which affect discovery of the alleged misconduct within the limitations period; a complainant whose minority, incapacity or other legal impediment prevented discovery of the alleged misconduct within the limitations period; claims of sexual activity between a licensee and patient; or alleged conduct that involves fraud or misrepresentation of a material fact in the context of an original or renewal license application.
3. The Health Law Section opposes legislation that imposes onerous financial burdens on health care licensees:
  - who elect or are required to participate in the state's impaired practitioner program;
  - who elect to exercise rights provided pursuant to Chapter 120, F.S.;
  - who are subjected to the unilateral assessment of costs, rather than those limited to a non-prevailing party; or
  - who are subjected to mandatory disciplinary fines

II C 2(22)

incapable of discretionary adjustment by an agency.

4. Supports amendment of §456.072, Florida Statutes; to provide the Board of Medicine with discretion regarding the imposition of costs against any party; to permit assessment of costs on an individual basis; to provide a mechanism for determining such costs; and to exclude attorneys' fees from costs, as in matters of civil litigation.

5. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation, that undermines the rule-making requirements of the Administrative Procedure Act by allowing statements of agency policy without formal rule-making.

6. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation to deny, limit or restrict points of entry to administrative proceedings under Chapter 120, *Florida Statutes*, by substantially affected persons.

7. Opposes exemptions or exceptions to the Administrative Procedure Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, *Florida Statutes*.

8. Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, *Florida Statutes*, and supports confidentiality of discussions in mediation; but opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

9. Supports uniformity of procedures in administrative proceedings under Chapter 120, *Florida Statutes*, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.

II C 2(23)

10. Opposes amendment to Chapter 120, *Florida Statutes*, that limits, restricts, or penalizes full participation in the administrative process, in the absence of compelling justification or non-anecdotal evidence which demonstrates that the existing provisions of law are not adequately protecting the administrative due process rights of all participants.

### **International Law Section**

July 28, 2006

1. Supports amending 685.101 F.S. and 685.102 F.S. to give Florida courts jurisdiction to hear contractual disputes involving parties choosing Florida as governing law as a forum for dispute resolution, even where no other contacts may exist with Florida.
2. Supports amending § 55.502 F.S. to correct a glitch by conforming language defining "judgments" to the language of the uniform Foreign Money Recognition Act which includes judgments rendered by courts of U. S. possessions not located within a state of the U S.
3. Supports enabling the Secretary of State to accept service as an agent of a Florida corporation where no other agents are present in this state.

### **Public Interest Law Section**

July 28, 2006

1. Supports legislation recognizing the state's legal obligation to provide medical, mental health and developmental services to all children in state custody who need such services.
2. Supports adequate funding for mandated programs

II C 2 (24)

under the state's Families in Need of Services and Children in Need of Services legislation pursuant to Chapter ~~39~~ 984, *Florida Statutes*.

3. Supports legislation prohibiting discrimination in employment, housing and accommodations on the basis of sexual orientation.

4. Opposes any legislation that would eliminate, impair, or change the Interest on Trust Accounts (IOTA) Program.

5. Supports extending jurisdiction of the juvenile courts through age 21 for young adults who remain in foster care beyond their 18th birthday.

6. Supports legislation to clarify that children in shelter or foster care be accorded the protections of § 39.4085, *Florida Statutes*.

7. Supports legislation to extend child health insurance coverage, including special health care needs, dental care, presumptive eligibility and continuous eligibility, to all children who are eligible for coverage under KidCare.

8. Supports legislation to allow relatives with custody of a child pursuant to any court order to receive financial assistance under the Relative Caregiver Program.

9. Supports legislation to restore a convicted felon's right to vote one year after completion and satisfaction of all sentences, unless a majority of the Board of Executive Clemency objects.

10. Supports a legislative prohibition against executing a mentally retarded capital felon.

11. Supports legislation providing for court-appointed attorneys for children who are subject to abuse and neglect proceedings, to advocate for the children's interests in legal proceedings affecting their placement and needed services.

*II C 2 (25)*

12. The Public Interest Law Section resolves to call upon the state of Florida to not carry out the death penalty until Florida implements policies and procedures that are consistent with the following policies intended to 1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and 2) minimize the risk that innocent persons may be executed through:

a. Implementing the American Bar Association's "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1999) and ABA policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, and August 1996);

b. Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings; and

c. Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant.

FURTHER RESOLVED, that in adopting this recommendation, apart from the policies enunciated above, the Public Interest Law Section of The Florida Bar take no position on the death penalty, other than that relating to offenders who are mentally retarded or under the age of 18 at the time of the offenses.

13. Supports legislation that would give a criminal court

II C 2(26)

judge greater latitude to impose the most appropriate sanction on a juvenile offender.

14. Opposes the expansion of the use of detention for purposes other than in response to charges for alleged acts of delinquency of a child.

15. Supports legislation that would allow children, convicted and sentenced in criminal court, to serve their sentences under the jurisdiction of the Department of Juvenile Justice.

16. Consistent with the final report of the Special Committee on the Legal Needs of Children, supports legislation giving the public access to information to properly scrutinize the Department of Children and Family Services' and the Department of Juvenile Justices' performance of its statutory duties to protect children from harm while protecting the confidentiality of the individual children and families involved.

17. Consistent with the final report of the Special Committee on the Legal Needs of Children, supports legislation to provide for procedures to ensure that psychotropic medications are administered to children in the custodial care of the Department of Children and Families or in the juvenile justice system only when medically necessary and appropriate, rather than to control behavior of children who simply need mental health counseling or non-medication services.

18. Consistent with the final report of the Special Committee on the Legal Needs Advocate of Children, supports legislation providing for the creation of a "Statewide Office of the Children's" to provide attorneys for all children needing court representation, but particularly those children who are subject to abuse, abandonment, or neglect proceedings through:

II C 2 (27)

1) providing legal counsel to ensure that the child's legal positions, needs, and wishes are meaningfully represented to the court,

2) ensuring/providing for expansion of the Florida Guardian Ad Litem Program to ensure that every child in dependency has a guardian ad litem (GAL), whether staff GAL or volunteer GAL,

3) ensuring that the Office of the Children's Advocate is independent from all other participants in dependency litigation, as well as insulated from undue influence by other agencies and by branches of government

4) preserving the discretion of the court to appoint private attorneys to serve as legal counsel for children when the court deems that appointment appropriate.

19. Consistent with the final report of the Special Committee on the Legal Needs of Children supports the following principles concerning school discipline:

a. schools should have strong policies against gun possession and be safe places for students to learn and develop;

b. in cases involving alleged student misbehavior, school officials should exercise sound discretion that is consistent with principles of due process and considers the individual student and the particular circumstances of misconduct; and

c. alternatives to expulsion or referral for prosecution should be developed that will improve student behavior and school climate without making

II C 2(28)



schools dangerous.

20. Opposes, in principle, "zero tolerance" policies that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student's history.

21. Supports legislation that would revise Florida Statutes which mandate a ""zero tolerance"" policy for Florida schools.

22. Supports modification of the statutory provisions of the Road to Independence Act to enhance and expand the transition program to provide an option for continuation of foster care to youth ages 18 through 23, and to provide reasonable accommodations for youth with disabilities.

23. Supports legislation stating that persons with any disabilities should not be deprived of any right guaranteed by law and should be free from any discrimination because of such disability.

24. Supports the repeal or amendment of 775.0837 F. S. Habitual Misdemeanor offenders to the extent that it effects Florida's homeless population.

25. Supports legislation to reduce the use, by the state and private providers, of physical restraints on minors.

26. Supports legislation that prohibits the use of Tasers on minors.

27. Supports legislation to facilitate unaccompanied, abused, neglected, or abandoned immigrant minor's ability to access services including juvenile visas.

28. Supports legislation to require that a child have a meaningful opportunity to consult with an attorney before

*II C 2 (29)*

waiving his/her right to counsel in a delinquency proceeding.

29. Supports legislation to assure that state funding, resources and policies are directed to provide adequate housing for extremely low income persons, including persons with special needs.

30. Opposes the indiscriminate use of chains and shackles in juvenile court proceedings, and encourages the adoption of a ban on the indiscriminate use of chains and shackles in juvenile court proceedings through court rule, legislation and executive branch policy.

October 5, 2007

31. Supports adding "homelessness" as a protected category to Florida's existing hate crimes law at § 775.085 F. S.

### **Real Property, Probate and Trust Law Section**

July 28, 2006

1. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.

2. Opposes any efforts to enact a statutory will.

3. Supports a constitutional amendment removing the restriction on devise of homestead property; also to provide that homestead rights are limited to the head of a family with a surviving spouse or dependent heir.

4. Supports legislation to resolve the cloud on Florida land titles resulting from potential claims that portions of property that appear from the face of deed in the chain of title to have been conveyed into private ownership are subject to a claim of ownership by the State of Florida as

II C 2 (30)

sovereignty lands, and further supports a commission to review the issue.

5. Supports amendments to Chapter 718, *Florida Statutes*, Condominiums, and Chapter 719 *Florida Statutes*, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.

6. Supports amendment to §695.26(3)(a), *Florida Statutes*, to provide that its requirements do not apply to instruments executed before July 1, 1995.

7. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.

8. Supports amendment to Chapter 723, *Florida Statutes*, specifying that each mobile home owner/owners shall have only one vote at elections or meetings, and to allow association bylaws to specify less than a majority for a quorum.

9. Supports amendment to §162.09(3), *Florida Statutes*, to clarify the relative priority of recorded municipal code enforcement liens created pursuant to the Local Government Code Enforcement Boards Act.

10. Supports amendment to §673.3121, *Florida Statutes*, to provide a cross reference in it to §673.4111, *Florida Statutes*, stating that if an official check is not paid, then the person entitled to enforce the official check is entitled to compensation from the obligated bank for refusing to pay.

11. Supports legislation to amend the Baker Act to include

II C 2(31)

a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.

12. Supports legislation to amend § 744.108, *Florida Statutes*, to allow fees for court proceedings determining compensation of guardians or their attorneys to be paid from the guardianship estate in the same manner as personal representative fees are paid from a decedent's estate.

13. Opposes efforts to create a lien on real property for work that does not add value to the property, and would permit liens against the property of a person other than the party owing a debt.

14. Opposes §718.1255, *Florida Statutes*, or targeted budget reductions or other governmental action having the purpose or effect of diminishing or eliminating the jurisdiction of the Arbitration Division of the Department of Business and Professional Regulation's Division of Land Sales.

15. Supports legislation to amend F.S. §733.2121(1) to delete the requirement that any notice to creditors state that claims must be filed against the estate within the two-year time period set forth in F.S. §733.710.

16. Supports legislation to amend F.S. §744.444(16) to allow a guardian, without court approval, to pay from the assets of the guardianship estate the costs and fees of persons -- including attorneys, auditors, investment advisers or agents -- employed by the guardian to advise or assist the guardian in the performance of his or her duties.

17. Supports legislation to amend F.S. §394.467 to add as criteria for involuntary placement the substantial and

ITC 2(32)

imminent likelihood of inflicting serious emotional or psychological harm on another person, and the causation of significant damage to property in the recent past with substantial and imminent likelihood of doing so again.

18. Supports legislation to amend F.S. §744.3145 to streamline the educational requirements for parents appointed as guardians of the property of their minor children.

19. Supports legislation to amend F.S. §725.06 to make contracts for indemnity for acts of omissions of an indemnitee unenforceable except in certain limited situations and/or to the extent of insurance coverage.

20. Supports the regulatory approval of a proposed ALTA Junior Loan Policy Form, but opposes legislation that would exclude from the statutory definition of title insurance the insuring of mortgage liens covering second mortgages and home equity line mortgages.

21. Opposes SB 2300 (condominium association pre-litigation disclosures) which imposes burdensome pre-suit disclosures for condominium homeowners associations members, but supports changes to mitigate some of these requirements.

22. Supports amendment of §55.141, *Florida Statutes*, to also allow the clerk of court to issue a satisfaction of judgment, rather than only the judgment holder

23. Supports legislation to repeal §734.1025, *Florida Statutes*, because the dollar amount for summary administrations found in § 735.201-2063, *Florida Statutes*, has been increased thus, making §734.102, *Florida Statutes*, duplicative.

24. Support legislation to amend §201.02, *Florida Statutes*, to clarify and better define the circumstances

II C 2 (33)

under which the documentary stamp tax will apply to instruments conveying real property to and from various entities.

25. Supports legislation to amend §558.001, Florida Statutes, relating to construction defects, to make compliance requirements more practical, clarifying vague provisions, and maintaining consistency with similar statutes enacted in other states.

26. Oppose legislative restrictions on condominium associations' rights to govern themselves and their own documents, but do not oppose further disclosure requirements to a purchaser concerning rental provisions.

27. Opposes proposed §518.117, Florida Statutes, and related amendments abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

28. Opposes legislation amending Part 1 of Chapter 394, Florida Statutes authorizing the court to order involuntary outpatient placement but provides no funding for needed mental health treatment.

29. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

30. Supports legislation to preserve homeowner association governance and/or assessment regimes notwithstanding extinguishment of community covenants and restrictions by the Marketable Record Title Act.

31. Supports an amendment to F. S. 222.01 to provide persons with the same procedure for determination of real property homestead status against foreign judgments as currently is provided against domestic judgments.

32. Supports condominium unit owner's ability to exercise

*II C 2(34)*

self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.

33. Supports the revision of 718.117 F. S. process for terminating condominium property.

34. Supports amending 29.007 F. S. to provide authority to appoint and compensate attorneys and professional guardians to serve as guardian advocates and guardian ad litem for indigents in civil commitment and treatment proceedings in proceedings under the mental retardation statutes (ch. 393), Baker Act (ch. 394) and Marchman Act (ch. 397).

35. Supports amending §701.02 (Assignment of Mortgages) to conform it to revised UCC Article 9 and provide that:

1. perfection of UCC security interest in a pledged mortgage is governed solely by the UCC and not by §701.02, and
2. filing of a UCC financing statement is not "notice" under §701.02 and does not affect reliance rights of creditors and bona fide purchasers without notice with respect to instruments executed by the "mortgagee of record" as determined under §701.02.

36. Supports amending §704.01(2) to provide landlocked landowners with a statutory way of necessity.

37. Opposes Section 2 of Senate Bill 298 creating §117.055, which requires that notaries keep a detailed journal of all notarial acts including: the date, time and type of notarial act; the date, type and description of each document; the name of the signer; and description of the evidence of identity.

*II C 2 (35)*

38. Supports changes to the Florida Construction Lien Laws governing conditional payment bonds and changing procedures for determining whether a claim will be covered by such bonds.

39. Technical Assistance - The section does not oppose House Bill 113 as originally drafted, but favors additional changes to numerous construction bond and lien statutes.

40. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.

41. Opposes SB 1520's definition of "travel club" which would remove one type of timeshare program from the traditional regulatory supervision of the Department of Business and Professional Regulation.

42. Supports amending §732.2025 F. S. to eliminate the reference to the provisions of §738.12 F. S. and adds to the definition of an elective share trust, a marital deduction unitrust. Amends §732.2032 F. S. so that it no longer references a dollar amount but rather the annual exclusion amount. Amends § 732.2075 F. S. to reference transfers in which either a charitable gift tax deduction or income tax deduction is allowed. Amends § 222.21 F. S. to allow collections against IRA's to satisfy the elective share.

43. Supports adding definitions for "descendants" and "collateral heirs" to § 731.201 F. S. General definitions; deleting the "lineal" from § 732.102, §732.103, §732.104, §732.108, §732.401, §732.507 and §732.603 F. S.; adds the words "one or more" to §732.401(1) and §732.4015 (1) and adds the words "or children" to §732.4015(1) F.S.

*II C 2(34)*



44. Supports legislation to clarify the law to ensure that communications between a lawyer and client acting as a fiduciary in estate- and trust-related matters are privileged to the same extent as if the client were not acting as a fiduciary.
45. Supports legislation to amend §734.101 F. S. so that the procedural and timing provisions under §734.101 F.S. are consistent with § 655.936 F. S.
46. Supports legislation to amend §731.110 F. S. to statutorily require that a will not be admitted to probate or a personal representative appointed if a caveat has been filed by an interested person other than a creditor until that person is served by formal notice as required by the Florida Probate Rules.

September 29, 2006

47. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.
48. Supports an amendment to §198.13 F. S. to eliminate the requirement of a personal representative of an estate to file a Florida estate tax return with the Department of Revenue, also elimination of the requirement of an individual who would otherwise be responsible for filing a return reporting a generation-skipping transfer with the Florida Department of Revenue if a state generation-skipping transfer with the Florida Dept. of Revenue if a state generation-skipping transfer tax credit is not allowable pursuant to the Code as of a decedent's date of death.

*II C 2(37)*

49. Supports the amendment of Chapter 713 F. S. to change seventeen (17) construction lien law statutes to clarify the statutes and to conform to existing case law.

December 8, 2006

50. Supports legislation which codifies the common law and makes enforceable an arbitration clause in a will or trust requiring beneficiaries, a fiduciary, or any combination thereof, to resolve disputes by arbitration other than the validity of all or a part of a will or trust.

51. Supports the creation of §733.620 F. S. to permit the testator of a will to provide for the exculpation from liability of a personal representative in the same manner as a settler of a trust can provide for the exculpation of a trustee in a trust.

52. Supports the amendment of § 627.404 F. S. to make explicit the requirement of an insurable interest, detail those who may have an insurable interest in the life of another, clearly require the insured's consent to the purchase of a policy of insurance by another, and address the liability of the insurer in the absence of the necessary insurable interest.

53. Support technical amendments to the Florida Trust Code Florida Statutes Chapter 736 and related provisions.

54. Supports amendments to § 689.071 F. S. to conform the cross-references that already appeared in the Florida Land Trust Act to the new Florida Trust Code.

55. Supports legislation requiring the distinguishability of limited liability company names

56. Supports amendments to §§701.04 and 701.041 F. S. in order to clarify ambiguities in the current statutes and

*II C 2(38)*

remove the requirement that a premium be promulgated and charged for the preparation, execution and recording of the affidavit of release contemplated by §701.041 F. S.

57. Opposes proposed omnibus amendments to Florida Statutes Chapter 617, the Florida Not for Profit Corporation Act. The changes intended to facilitate to charitable corporate governance with voluntary membership would impair other non profit corporations' governance with required membership.

58. Supports technical corrections to Florida Land Trust Act (2006).

January 26, 2007

59. Supports legislation to maintain the integrity of the recording system in the State of Florida.

60. Supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests.

61. Supports legislation to provide that the charge by a condominium association or homeowners' association for an estoppel certificate is an obligation of the owner of the unit for whose benefit the estoppel certificate is requested and not the obligation of the closing agent; and to provide for enforcement of any assessment for the charge made for such an estoppel certificate.

February 21, 2007

62. Opposes HB 743 containing proposed changes to the Florida Trust Code that would erode Florida Consumer's rights by enlarging a corporate trustee's ability to engage

*II C 2(39)*

in conflict of interest transactions with its own fiduciary accounts, providing a statute of repose and shortening the statute of limitations in circumstances where the trustee has failed to account and concealed its breach of trust from the beneficiaries, exonerating a co-trustee from liability for a directed co-trustee's breach of trust, and would enlarge the provisions concerning fiduciary exculpatory provisions compromised with the Florida Banker's Association last year.

63. Opposes changes to Florida Statute 732.103 that would extend the intestate distribution scheme to the level of the decedant's great-grandparents.

March 20, 2007

64. Supports legislation permitting consumers to negotiate rates for title insurance services within statutory parameters and suggests revisions to proposed legislation relating to such legislation.

65. Opposes the passage of Senate Bill 2004 and House Bill 1455.

March 30, 2007

66. Supports proposed amendments to Florida Statutes Chapter 718, the Condominium Act. The proposed changes are intended to clarify that changes to a developer prospectus' estimated operating budgets prepared in good-faith that are beyond the control of the developer do not trigger rescission rights under Section 718.503(1), Florida Statutes.

67. Supports legislation to permit condominium unit owners to further subdivide or partition their interest in the condominium and common elements appurtenant thereto pursuant to a sub-declaration of condominium,

*II C 2 (40)*

which subdivided units shall remain subject and subordinate to the existing declaration of condominium, provided such existing declaration of condominium allows for the subdivision.

68. Oppose HB 1437/SB1460, which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

69. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

April 13, 2007

70. Opposes a mandatory 90 day time extension for owners in community associations to pay liens and related attorneys' fees.

April 24, 2007

71. Opposes HB 1373 (2007) and SB 2816 (2007) because they contain amendments to community association regulations which are unconstitutional, impossible or impractical to implement, contradictory, and undermine the ability of volunteers to administer associations.

August 17, 2007

72. Supports legislation to amend §736.0802(10) F. S., to permit a trustee to use trust assets to pay attorneys' fees and costs to defend litigation involving an allegation of breach of trust unless a party obtains an order prohibiting the use of trust assets by showing a reasonable basis for

the court to conclude that a breach of trust occurred.

October 5, 2007

73. Supports amendment of §739.102(8) F. S., to include the definition of "insolvent" solely for the purposes of the Florida Uniform Disclaimer of Property Interests Act.

74. Supports the adoption of §689.28 F. S. to provide that transfer fee covenants recorded after effective date do not run with the title to real property and are not binding on successor owners, purchasers or mortgagees.

75. Supports legislation to amend Chapter 765, Florida Statutes, to improve the law concerning advance directives and to integrate federal HIPPA privacy laws with Florida law.

76. Supports legislation to amend §733.604 Florida Statutes, to treat inventories which are filed with the clerk of court in a probate proceeding in connection with the spousal elective share procedure the same as estate inventories in terms of not being subject to public inspection.

77. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

78. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation

II C 2(42)

and (3) add deferred compensation to the exemption statute.

February 1, 2008

79. Supports amendment of F.S. §§ 689.01 & 692.01, to permit a corporation to execute certain instruments conveying, mortgaging or affecting interests in real property, whether on the corporation's own behalf or in a representative capacity.

February 5, 2008

80. Supports amendment of F.S. §732.402 to update limitations on "exempt property" to: (i) increase the dollar limitation on household goods, from \$10,000 to \$20,000; (ii) change the personal "automobile" limitation to a "motor vehicle" limitation based on gross weight and limit the exemption to two motor vehicles; and (iii) include all qualified tuition plans authorized by IRC § 529.

81. Supports amendment of F.S. §733.602 to remove an unnecessary and incorrect cross-reference to the Florida Trust Code.

82. Supports amendment of F.S. §718.111(11) to clarify what are or are not common expenses when insurance proceeds are insufficient for reconstruction, as well as to restructure the statute to clearly describe and state the adequacy and scope of insurance and responsibilities in the event of reconstruction following a casualty.

83. Supports amendment of F.S. §718.115 to provide that unless the manner of payment or allocation of common expenses is otherwise addressed in the declaration of condominium, the expenses of items or services required by any governmental entity, such as water or sewer meters or fire safety equipment required to be installed by a governmental entity, are common expenses under

*II C 2C43)*

## Chapter 718.

84. Supports amendment of F.S. §718.117(17) to provide that in the event of termination of a condominium, when the proceeds are distributed to purchase-money lienholders on units to the extent necessary to satisfy their liens, such distribution shall not exceed a unit's share of the proceeds.

February 19, 2008

85. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

February 25, 2008

86. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

## Tax Section

July 28, 2006

1. Recommends adoption of the new Uniform Limited Partnership act as approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) subject to such modifications as recommended to conform certain features to existing state law.



2. Supports legislation to address the inconsistency for corporate income tax purposes between the statutory lookback period for audits and statutory lookback period for refund claims in Florida.

3. Supports an amendment to § 198.13 of the Florida Statutes [addition of paragraph (4)].

(4) Notwithstanding the foregoing provisions of this section, if a state death tax credit or a state generation-skipping transfer tax credit is not allowable pursuant to the Internal Revenue Code of 1986, as amended from time to time (the "Code") as of the decedent's death, the following provisions shall apply:

(a) If a state death tax credit is not allowable pursuant to the Code as of the decedent's death, the personal representative of an estate shall not be required to file a return pursuant to paragraph (1) of this section.

(b) If a state generation-skipping transfer tax credit is not allowable pursuant to the Code as of the decedent's death, the person who would otherwise be required to file a return pursuant to paragraph (3) of this section shall not be required to file such a return in connection with such estate.

December 8, 2006

4. Supports amendments to §213.015 F. S. to delete the contingency in the current bill of rights and direct the Department of Revenue to implement all listed taxpayers' rights through rulemaking.

5. Supports amendments to the taxpayer bill of rights to require the Department of Revenue, when auditing taxpayers, to look for both overpayments and underpayments and specifically require that the

II C 2(45)

Department advise taxpayers of any overpayments and explain the taxpayer's rights to recover the same by offset, refund or otherwise.

6. Supports amendments to the taxpayer bill of rights and appropriate refund statutes to allow purchasers to apply for and receive sales tax refunds directly from the Department. The Department would be required to look solely to the dealer, as its collection agent, for verification of remittance of taxes to the State.

7. Supports legislation to provide for accrual of interest from receipt of refund application with proviso that no interest is payable if the refund is paid within 90 days of filing of the refund application. Legislation also conforms handling of the other refund applications to current law governing corporate income tax overpayments, and changes interest rate payable on refunds paid by Department without audit and later determined to have been paid in error.

8. Supports legislation to simplify the venue statute for taxpayer actions to permit the filing of an action either in Leon County or in any other county in the State where the taxpayer is a resident or has an office, store or other fixed business location.

9. Supports amendments to the taxpayers' bill of rights to require that the Department of Revenue maintain an index of judicial decisions and maintain this index in a form which taxpayers can utilize.

10. Supports legislation to allow taxpayers to submit evidence of the exempt status of a sale in litigation under Chapter 72 or Chapter 120, Florida Statutes, even if that evidence was not previously submitted to the Department of Revenue during audit or any informal protest

*II C 2(46)*

proceeding.

11. Supports the elimination of the requirement under § 198.113 F. S., of a personal representative of an estate to file a Florida estate tax return with the Department of Revenue if a state death tax credit is not allowable pursuant to the Code, as amended, from time to time as of the decedent's date of death. Also supports the elimination of the requirement under §198.13 F. S., of an individual who would otherwise be responsible for filing a return reporting a skipping transfer with the Department of Revenue if a state generation –skipping transfer tax credit is not allowable pursuant to the Code as of a decedent's date of death.

12. Supports the elimination of the existing requirement for a property owner's consent to a tax assessment lawsuit where a non-owner is responsible for the tax.

13. Supports legislation which will allow the use of evidence at a value adjustment board hearing whether or not the evidence was previously produced at the request of either the taxpayer or property appraiser.

14. Supports legislation which will require that the property appraiser comply with uniform standards of professional appraisal practice in considering statutory valuation factors. If the property appraiser does not consider the statutory factors, then the burden of proof should shift to the property appraiser to show that the appraised value is not in excess of fair value by the preponderance of evidence. If the property appraiser does consider the statutory valuation factors, then require that the taxpayer show value in excess of fair value by a preponderance of evidence.

15. Supports legislation which will require that the

II C 2 (47)

property appraisers treat SMLLCs as disregarded entities for Florida property tax purposes when determining whether an entity is a section 501 (c) (3) entity.

April 10, 2007

16. Opposes SB 2482 as filed consistent with the section's white paper of April 6, 2007.

April 24, 2007

17. Supports limitations on the patentability of tax advice, and passage of federal legislation that would amend 35 U.S.C. §102 and restrict the enforceability of tax patents.

### **Trial Law Section**

July 28, 2006

1. Opposes the proposed "Medical Liability Claimant's Compensation Amendment" to the Florida Constitution.

### **Workers' Compensation Section**

July 28, 2006

1. Supports any changes in the current workers' compensation law that would:

a. ensure the independence of the Judges of Compensation Claims' ability to discharge the duties of their office in the adjudicatory process, including a reappointment process that promotes and ensures the independence of the judiciary; and

b. ensure the right of injured workers to have their cases reviewed by an Article V court.

2. Supports any legislation that would streamline and make more efficient the administration of justice in the workers' compensation system.

*II C 2(48)*

3. Supports any legislation that would further enforce the insurance coverage requirements of the Workers' Compensation Act.
4. Supports the elimination of exemptions to workers' compensation coverage within the construction industry.
5. Opposes the creation of a specialty panel of the First District Court of Appeal to exclusively hear workers' compensation appeals.
6. Supports legislation which promotes access to courts and the ability of employer/carriers, self-insureds and employees to obtain legal representation in the handling of workers' compensation claims.
7. Supports legislation which would ensure the independence of the Consumer Advocate within the office of the Chief Financial Officer.
8. Opposes legislation restricting the payment of attorney's fees - either to the attorney of the injured worker or to the attorney for the employer/carrier/self-insured.

### **Out of State Division**

March 30, 2007

1. Supports amendment to §§733.302 and/or 733.304, Florida Statutes, to expand the class of nonresidents who may be appointed to serve as a personal representative of a Florida domestic probate estate to include nonresident Florida Bar members.

### **Young Lawyers Division**

July 28, 2006

1. Supports legislation to create reasonable financial student loan assistance for all government lawyers and

II C 2(49)

legal aid attorneys who have served in that capacity for more than 3 years.

### **III. COMMITTEE LEGISLATIVE POSITIONS**

#### **Code and Rules of Evidence Committee**

March 1, 2007

1. Opposes creation of an evidentiary privilege for parent-child communications.
2. Opposes creation of an exception to the evidentiary privilege for husband-wife communications in criminal proceedings in which one spouse is charged with murder in the first degree.

#### **Legal Needs of Children Committee**

February 1, 2008

1. Supports legislation that would enable Florida to develop a comprehensive system and structure for child representation, which includes guardians ad litem, legal counsel for children, and public defender representation to adequately promote and protect the legal rights and remedies of children.

[Updated: 03-03-2008 ]



## THE FLORIDA BAR

651 EAST JEFFERSON STREET  
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.  
EXECUTIVE DIRECTOR

850/561-5600  
WWW.FLORIDABAR.ORG

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](mailto: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. Cox, 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.<sup>1</sup> 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.<sup>2</sup> 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 comment<sup>3</sup>

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](mailto: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.

---

<sup>1</sup> 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>.

<sup>2</sup> See, Interim Report of the Public Sector Committee, Appendix B.

<sup>3</sup> Id.

## Appendix A

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# THE FLORIDA BAR

## 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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## THE FLORIDA BAR

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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## THE FLORIDA BAR

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

## Appendix B

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**INTERIM REPORT OF THE  
PUBLIC SECTOR SUBCOMMITTEE**

**TO:  
ATTORNEY-CLIENT TASK FORCE**

**JANUARY 2008**

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# **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

## 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

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).

### 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.

IIIAC(17)

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.



1 A bill to be entitled

2 An act providing appropriate protection to attorney-client  
3 privileged communications and attorney work product for all  
4 public agencies; amending s. 119.071 F.S., revising the  
5 exemption for the attorneys' work product of a public agency;  
6 amending s. 286.011 F.S., revising the criteria for the  
7 attorney-client sessions of a public agency; providing an  
8 effective date.  
9

10 Be It Enacted by the Legislature of the State of Florida:  
11

12 Section 1. Section 119.071(1)(d), Florida Statutes, is  
13 amended, and Paragraph 3 is created and added to said Section  
14 to read:  
15

16 119.071 General exemptions from inspection or copying of  
17 public records.--

18 (1) AGENCY ADMINISTRATION.--

19 (d)1. A public record that was prepared by an agency  
20 attorney (including an attorney employed or retained by the  
21 agency or employed or retained by another public officer or  
22 agency to protect or represent the interests of the agency  
23 having custody of the record) or prepared at the attorney's  
24 express direction, that either (1) reflects a mental  
25 impression, conclusion, litigation strategy, or legal theory of  
26 the attorney or the agency, or (2) is factual information, and  
27 that was prepared exclusively for civil or criminal litigation  
28 or for adversarial administrative proceedings, or that was  
29 prepared in anticipation of imminent civil or criminal  
30 litigation or imminent adversarial administrative proceedings,  
31 is exempt from s. 119.07(1) and s. 24(a), Art. I of the State  
32 Constitution until the conclusion of the litigation or

1 ~~adversarial administrative proceedings~~. For purposes of  
2 capital collateral litigation as set forth in s. 27.7001, the  
3 Attorney General's office is entitled to claim this exemption  
4 for those public records prepared for direct appeal as well as  
5 for all capital collateral litigation after direct appeal until  
6 execution of sentence or imposition of a life sentence.

7 2. This exemption is not waived by the release of such  
8 public record to another public employee or officer of the same  
9 agency or any person consulted by the agency attorney. When  
10 asserting the right to withhold a public record pursuant to  
11 this paragraph, the agency shall identify the potential parties  
12 to any such criminal or civil litigation or adversarial  
13 administrative proceedings. If a court finds that the document  
14 or other record has been improperly withheld under this  
15 paragraph, the party seeking access to such document or record  
16 shall be awarded reasonable attorney's fees and costs in  
17 addition to any other remedy ordered by the court.

18 3. A public record that would be privileged in the civil  
19 discovery context is exempt from s. 119.07(1) and s. 24(a),  
20 Art. I of the State Constitution.

21  
22 **Section 2.** Section 286.011(8) is amended to read:

23 286.011 Public meetings and records; public inspection;  
24 criminal and civil penalties.--

25 (8) Notwithstanding the provisions of subsection (1), any  
26 board or commission of any state agency or authority or any  
27 agency or authority of any county, municipal corporation, or  
28 political subdivision, and the chief administrative or executive  
29 officer of the governmental entity, and any public employees or  
30 agents who possess relevant information needed by the entity's  
31 attorney, may meet in private with the entity's attorney to  
32 discuss anticipated or pending litigation to which the entity

1 is presently a party before a court or administrative agency,  
2 provided that the following conditions are met:

3 (a) The entity's attorney shall advise the entity at a  
4 public meeting that he or she desires advice concerning the  
5 claim or litigation.

6 (b) The subject matter of the meeting shall be confined to  
7 ~~settlement negotiations or strategy sessions related to matters~~  
8 raised in the anticipated or pending litigation expenditures.

9 ~~(c) The entire session shall be recorded by a certified~~  
10 ~~court reporter. The reporter shall record the times of~~  
11 ~~commencement and termination of the session, all discussion and~~  
12 ~~proceedings, the names of all persons present at any time, and~~  
13 ~~the names of all persons speaking. No portion of the session~~  
14 ~~shall be off the record. The court reporter's notes shall be~~  
15 ~~fully transcribed and filed with the entity's clerk within a~~  
16 ~~reasonable time after the meeting.~~

17 (d) The entity shall give reasonable public notice of  
18 the time and date of the attorney-client session and the names  
19 of persons who will be attending the session. The session shall  
20 commence at an open meeting at which the persons chairing the  
21 meeting shall announce the commencement and estimated length of  
22 the attorney-client session and the names of the persons  
23 attending. At the conclusion of the attorney-client session,  
24 the meeting shall be reopened, and the person chairing the  
25 meeting shall announce the termination of the session.

26 ~~(e) The transcript shall be made part of the public~~  
27 ~~record upon conclusion of the litigation.~~

28 **Section 3.** This act shall take effect upon becoming a  
29 law.

1                   A bill to be entitled

2           An act relating to the use of the public records in pending  
3 litigation and administrative proceedings; creating s. 119.0710  
4 F.S., providing that a litigant in litigation with a public  
5 agency may not use the public records law to obtain production  
6 or copying of public records during pending litigation or  
7 administrative proceedings; providing an effective date.

8  
9       Be It Enacted by the Legislature of the State of Florida:

10  
11           Section 1. Section 119.0710, Florida Statutes, is created  
12 to read:

13           Section 119.0710 Production of Public Records During  
14 Pending Litigation.--

15           A party, its attorney, or agent that is in litigation or  
16 an adversarial administrative proceeding with a public agency  
17 may not use the public records law to obtain the production of  
18 copying documents that could have been obtained in the  
19 discovery period during the pendency of the litigation or  
20 adversarial administrative proceeding.

21           Section 2. This act shall take effect upon becoming a  
22 law.

## **Statement by The Florida Bar Government Lawyer Section Regarding the Attorney-Client Task Force**

The Florida Bar Government Lawyer Section, after deliberation by its Executive Council, strongly endorses the work of The Florida Bar Attorney-Client Task Force, and its proposed legislation. We urge The Florida Bar to work on amendments to Florida's public records laws, consistent with the Task Force's recommendations. In this document, we explain why the existing laws are flawed, why we support the proposal, and why critics of the proposal are wrong. We also offer a proposed amendment for further consideration.

### **THE EXISTING LAWS ARE FLAWED**

Although rewarding, practicing law in the public sector is difficult, because people suing Florida's government agencies are at a tremendous advantage. With over 20 years of experience with the current laws, we believe the time has come to revisit our current open government framework as applied to legal communications. Due to the combination of (1) an extremely limited attorney work-product privilege, and (2) the requirements governing litigation strategy discussions for collegial bodies, public sector lawyers have limited ability to give candid advice to their clients. The laws create seriously inefficient behaviors by Florida's government lawyers.

In the area of public records, the risk of future disclosure of documents has a significant chilling effect on Florida's government lawyers. Whereas attorneys in all other areas of the profession can rest assured that their written litigation-related advice to their clients remains confidential, Florida's government lawyers must:

- Avoid creation of any documents reflecting any legal strategies, for fear of its future disclosure, which in turn would educate future litigants;<sup>1</sup>
- Refrain from providing written advice to clients, instead, providing it orally;
- Adhere to discovery limitations and rules, while opposing counsel uses the public records request to successfully avoid those rules.<sup>2</sup>

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<sup>1</sup> This is NOT a hypothetical risk. For example, a large group of former police officers filed a suit against the City of St. Petersburg to recover their contribution to the pension system after they left the City prior to vesting. The suit was dismissed and the class never certified. Time passed, and a whole new group of 300 people recently sued the City. The plaintiffs' attorney, in fact, had sent extensive public records requests for the old litigation files on the dismissed case, and the court forced the City to turn over all the previous case files, including attorney's notes and the correspondence between outside counsel and the City's in-house counsel. Thus, the new case was filed with the new plaintiffs fully aware of the City's entire litigation strategy. The Plaintiffs' attorney then sent multiple public records requests to other government agencies seeking information. Attempting to understand the nature of that information, the attorney for the City of St. Petersburg sent a request for production to the plaintiffs, seeking copies of everything they have gotten through public records requests, and trying to find out exactly which other agencies they have obtained records from. In response, the plaintiffs objected that it is all work product and they have refused to disclose any documents at all. In fact, when the City's attorney filed objections in order to seek a court ruling re: some of the documents, the Plaintiffs' attorneys called the City's attorney and verbally threatened her with criminal charges for both violating the public records laws and allegedly tampering with the papers. The matter remains pending before the court.

<sup>2</sup> There are several strategies that misuse Florida's public records laws to unfairly disadvantage the District in litigation. For example, in Smith & Co. v. South Florida Water Management District, requests were served after the close of discovery and shortly before trial. It is well recognized that the purpose for ending discovery after the parties have a fair opportunity to learn the facts is to provide all parties with a fair opportunity to prepare trial

Similarly, due to the Government in the Sunshine laws, the oral advice of counsel given to their government agency clients is not confidential either. The Government in the Sunshine laws dictate that a transcript of closed door sessions be kept for eventual disclosure. This requirement, like the public records laws, also leads to tremendous inefficiencies for Florida's government lawyers, including:

- Briefing members of a collegial body individually on controversial topics, rather than in closed door sessions with the entire body present;
- Limiting the scope of discussion in those meetings, for fear of the future disclosure of the information, which in turn would educate future litigants;<sup>3</sup>
- Electing not to host a meeting to establish any litigation strategy at all; and
- Finding themselves unable to hold a confidential meeting with clients, even in circumstances where the agency has received a formal notice of intent to sue, because merely "imminent" litigation does not allow an agency to hold a closed door session.
- *Need specific examples!!!*

Finally, the combination of public records laws and Government-in-the-Sunshine laws frequently creates entirely new areas of litigation for the already besieged government agencies. Adding to the burdens of existing litigation, savvy opposing counsel often file massive public records requests to force the agency to spend time and energies on the requests, and the defense of privilege documents, at the same time of the merits litigation; sometimes the public records or Government in the Sunshine litigation spawns entirely new independent cases that outlive the original litigation.<sup>4</sup>

All of these consequences stem from Florida's unique public records and sunshine laws – laws that remain very different from many other states. However, the Government Lawyer Section emphasizes that Florida's public records laws are fundamentally different from those applied to the Federal government. In efforts that involve regulation, oversight, cost sharing, or participation by the Federal government, Florida's governmental entities suffer an additional

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presentations based upon those mutually understood facts. Smith & Co.'s public records requests created a need to review and consider numerous additional documents on the eve of trial, thereby diverting attention away from trial preparation at a crucial time. Moreover, because discovery was closed, the District had no opportunity to learn how the records would be used at trial, resulting in a trial by ambush. In Miccosukee v. South Florida Water Management District, Case No. 98-5056-Civ-Lenard, the Tribe obtained lists of people from various government agencies and organizations around the Nation that the District's counsel had consulted. That disclosure inhibited those third parties from communicating with the District.

<sup>3</sup> The Government Lawyer Section notes the favorable opinion issued by the Attorney General concluding that a request for a transcript of a closed door session may be rejected when it follows a voluntary dismissal. Specifically, AGO 94-33 (April 15, 1994) concludes that: "To allow a plaintiff who has voluntarily dismissed a suit to gain access to transcripts of strategy or settlement meetings in order to obtain an advantage in the refile of a lawsuit would subvert the purpose of the statute. Accordingly, it is my opinion that to give effect to the purpose of section 286.011(8), Florida Statutes, a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run." Unfortunately, this limitation does not prevent third parties to the original litigation from seeking the transcript, and using it to their advantage. See footnote 1, above.

<sup>4</sup> This issue is currently occurring in a County who requested anonymity for fear of generating additional public records requests.

disadvantage. Due to the widely differing levels of protection offered to Federal vs. Florida agencies, Federal government attorneys properly refuse to share documents with Florida government lawyers – even when the state and federal interests are closely aligned – because the Federal attorneys seek to avoid a risk of disclosure of their otherwise confidential documents.<sup>5</sup>

### **THE TASK FORCE'S PROPOSAL IS REASONABLE**

Although the issue here relates to litigation, it actually involves two forms of privileges: attorney-client communication, and attorney work product. The attorney-client communication privilege is among the oldest common law privileges. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998). The privilege is intended to ensure full disclosure by clients who feel safe confiding in their attorney. Similarly, the attorney work product protects clients by ensuring effective trial preparation and by immunizing certain information and materials from discovery. The origins of this doctrine rest with the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495, 510 (1947)(preventing unwarranted inquiries into attorneys' files during discovery.)

Florida's existing laws obliterate these privileges. Instead, Florida governmental entities are put at a disadvantage during litigation, because important topics may not be fully discussed, nor sufficiently documented, to produce the most effective trial preparation. The need for these privileges in the context of government litigation have been well articulated. *See* Marion J. Radson, "Restoring the Attorney-Client and Work Product Privileges for Government Entities," The Florida Bar Journal, Vol. 82 (2008) at page 34; *see also*, Radson & Waratuke, "The Case for the Attorney-Client and Work Product Privileges for Government Entities" available online at [http://www.flgov.com/pdfs/og\\_stetsonfinal.pdf](http://www.flgov.com/pdfs/og_stetsonfinal.pdf).

The Task Force's proposal adequately addresses these concerns. Through the proposed legislative amendments, the Task Force has suggested that Florida law should:

- permanently exempt all litigation-related attorney work product from discovery;
- make it easier to have closed meetings between attorneys and their public clients and include outside parties as needed; and keeping the associated transcript confidential at the end of the litigation; and
- prevent litigants suing public agencies from filing voluminous public records requests after the discovery period is over.

All of these changes would help to restore the loss of attorney confidentiality privileges in Florida. But the Government Lawyer Section also notes that the mere fact that we need these privileges *restored* demonstrates that a fundamental injustice has already been done to our

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<sup>5</sup> For example, in NRDC v. US Army Corps of Engineers, a case in which the District intervened, our coordination and sharing of information with the federal government was limited by the federal government's concern with disclosure by Florida of information that would otherwise be privileged as part of our joint defense. Similarly, the Florida Governor struggles with this very issue even as he seeks to resolve the contentious tri-state disputes over water. Despite years of litigation, and despite direct White House participation in an Alabama-Florida-Georgia dispute over the Apalachicola- Chattahoochee-Flint watershed talks, journalists have sharply criticized efforts to keep the mediation confidential. *See*, AP wire story "Secretive Multi-State Deal Over Water Rights Rejects Openness" (2/20/08) available online from The Coalition of Journalists for Open Government at <http://www.cjog.net/>

government agency clients.<sup>6</sup> Only Florida's government lawyers face these concerns. Private entities in Florida, both corporations and individual citizens, bear none of these restraints on their attorney-client communication and attorney work product privileges. In fact, many business groups have been outraged by the recent conduct of the U.S. Department of Justice and its demands that various attorney privileges be selectively waived in the context of certain kinds of litigation.<sup>7</sup> Florida's government lawyers, however, have long been operating with even greater disadvantages, because few of their documents have *ever* been privileged. Indeed, based on the public records laws, Florida's governmental entities, and thus, its citizens, have waived their confidentiality privileges, and their government lawyers routinely disclose their thinking to the public. Thus, even if the Task Force's recommendations are adopted in their entirety, the resulting privileges afforded to government lawyers would still be far less than those currently available to – and demanded by – the private sector. Under the Task Force's proposals, only documents and communications associated with “reasonably foreseeable” litigation would be covered by the privilege, and everything else would continue to be disclosed pursuant to Florida's open government laws. Such a proposal is eminently reasonable.

### **RESPONDING TO THE CRITICS**

The Government Lawyer Section understands the deep rooted sentiments supporting open government in Florida. For example, critics of the Task Force's worthy efforts, including the St. Pete Times in a February 8, 2008 editorial, have argued that “the people have a right to know how things are being litigated in their name.” In general, the Government Lawyer Section fully agrees with the concept that the people deserve to know the business of their government, but we emphasize the point that government lawyers are not seeking personal gain by asking to keep privileged communications confidential. Conversely, the individuals benefiting from the disclosure of confidential communications may not have the People's best interest in mind. For example, when these individuals and their lawyers file suit against government entities, they may be seeking money from the Florida governmental entities, based on alleged personal injury, tort and civil rights claims, inverse condemnation actions, and the Florida Equal Access to Justice Act. The public records and Sunshine laws then further enable those private litigants to educate themselves by reading the prior litigation-related work of the government agency lawyers, to use all the legal research and thinking revealed by the disclosures against the government, and to recover substantial payments in damages, compensation, or attorney's fees from the public treasury.

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<sup>6</sup> Frustrated with a private litigant's efforts to avoid Federal discovery rules by relying upon Florida's public records laws, one Federal court even issued a temporary restraining order against the plaintiff. *See, Lopez v. School Board of Palm Beach County*, 98-08492-Civ-Ryskamp, *Temporary Restraining Order* (May 13, 1998)

<sup>7</sup> *See, e.g.* The Coalition to Preserve the Attorney-Client Privilege, “Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System,” submission to the U.S. Senate Judiciary Committee (Regarding Hearings on September 12, 2006) available online at [http://www.nam.org/s\\_nam/bin.asp?CID=151&DID=237457&DOC=FILE.PDF](http://www.nam.org/s_nam/bin.asp?CID=151&DID=237457&DOC=FILE.PDF). *See also*, Douglas R. Richmond, “The Case Against Selective Waiver of the Attorney-Client Privilege and Work Product Immunity,” American Journal of Trial Advocacy, Vol. 30, No. 253 (2006)(rejecting selective waiver of the attorney-client privilege and work product immunity, and concluding that (1) selective waiver is inconsistent with the purposes of the attorney-client privilege and work product doctrine; (2) these doctrines are not tactical litigation tools to be used as either a shield or a sword at the holder's convenience; and (3) recognizing selective waiver will further erode the protections that the attorney-client privilege and work product doctrine afford.)



The Government Lawyer Section believes that protection of the taxpayers' dollars depends on effective defense and sound litigation planning, and we believe that the current laws are hurting the taxpayers of Florida. We further believe that the Task Force's proposal will better protect the investments of the people from individuals whose lawsuits produce personal benefit at public expense. Good government demands restoration of confidentiality for at least some litigation-related documents and discussions.

The St. Pete Times further argues that "The possibility of having an unlawfully expansive discussion is too great when the public is permanently barred from knowing what went on." The opposition to the Task Force's work is thus based upon an assumption of wrongdoing by government entities and their lawyers. The Government Lawyer Section, however, believes that our representative system of government empowers elected and appointed officials, and their staff, to make decisions in accordance with law – and our state leaders take oaths of office on that point. The Government Lawyer Section believes that our state should base its laws on the assumption that government representatives will continue to serve the best interests of the citizens of Florida, and adhere to the laws adopted on behalf of those citizens.

We emphasize that the Task Force's work is limited to the attorney communications *as they apply to reasonably foreseeable litigation*. Importantly, it is through our judiciary that our Constitution has established checks and balances upon actions by the executive branch. This proposal, therefore, implicates our constitutional balance of powers, and at the core of this dispute is the question of whether governmental entities, when subjected to judicial review, should receive the same procedural rights as the parties engaged in litigation against them. Unfortunately, the existing public records law unfairly advantages people who sue the government, and the public records and Sunshine laws have impaired the ability of government entities to defend themselves in judicial proceedings.

### **POTENTIAL AMENDMENTS**

The Government Lawyer Section generally supports the Task Force proposal, as written. However, we note two points that deserve greater attention, and that might lead the Task Force to amend its proposed legislation.

First, implicit in the opposition to the work of the Task Force is an assumption that *only* the media is capable of scrutinizing the work done in closed door meetings. While the Government Lawyer Section has great regard for the media as the fourth estate, and acknowledges its important role in monitoring the actions of government, the media is not the only appropriate forum for the litigation-related work of government lawyers to be reviewed.

Under current law, when a governmental entity invokes attorney-client privilege during litigation, the agency must produce a list of privileged documents and topics discussed in lieu of the documents themselves. If a litigant seeks to challenge the applicability of the privilege to a particular document, they can file a motion with the Court, and the document can be subjected to *in camera* inspection (literally meaning "in chambers") by the presiding judge, who can determine the appropriateness of the privilege. To address the potential concern that some governmental entity could potentially abuse the attorney-client privilege, the Task Force could apply the principles of *in camera* review to its own proposal.

Recognizing that on January 3, 2007, Governor Charlie Crist issued Executive Order 07-01 to establish the "The Office of Open Government," that entity could also serve as a reviewer of privilege declarations when they arise outside the context of litigation. If a person seeks a copy of a privileged document, or a copy of the privileged transcript associated with a closed door meeting of a collegial body, the documents in question could be submitted to the Office of Open Government, who could order disclosure of the contested materials if appropriate. Alternatively, in the event that the Office of Open Government concludes that the documents were properly designated as privileged, and thus properly remain undisclosed, the person requesting the document could resort to the judiciary – as they can today – and contest the designation of privilege on the documents, which in turn would lead to an *in camera* inspection by a court.

Second, the Government Lawyer Section also notes that litigation associated with rulemaking may require a different level of public availability. Specifically, we recognize that rulemaking activity, in effect, leads to the passage of laws that bind the citizens of Florida, and therefore, the public policy interest in eventual disclosure of these communications increases. In the event that a rule is adopted as law, the Government Lawyer Section would not object to a waiver of the attorney communication privileges. However, if rulemaking related litigation results in a withdrawal or demand of the proposed rule, the confidential communications should remain confidential, because the issues may be litigated anew once if the rule is amended and repromulgated.

## **CONCLUSION**

For over 20 years, Florida's government lawyers have labored without the benefits of the very same attorney-client and attorney work product privileges afforded to every other lawyer – a sad fact for the government clients they serve. Fundamentally, the Government Lawyer Section believes that reform of the existing public records and Government in the Sunshine laws are a necessity, for three reasons:

- (1) Government agencies and decision-makers should be empowered to obtain meaningful advice of counsel without fear of disclosure to, and education of, future litigants;
- (2) By reducing the confidentiality of government lawyer communications, Florida's laws put private litigants at an unfair advantage over the government in judicial proceedings, and alter our Constitutional system of checks and balances; and
- (3) The lack of meaningful advice and confidentiality dramatically increases the risks – and the resulting taxpayer expenses – involved with judicial proceedings against the government.

Furthermore, to the extent that the Task Force considers revisions of its proposal, we encourage them to re-evaluate:

- (A) Whether the Office of Open Government should play a role in reviewing privileged documents?
- (B) Whether confidential documents and communications associated with rulemaking activity and litigation should be disclosed after the litigation has ended?

In sum, the Government Lawyer Section believes that the time has come for legislative reform. For all the reasons above, we strongly supports the Task Force's proposal.

Respectfully submitted, on behalf of the Government Lawyer  
Section, this 29<sup>th</sup> of February, 2008,

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Robert Krauss  
Chair, Government Lawyer Section

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Keith Rizzardi  
Former Chair, Government Lawyer Section

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## Administrative Law Section Draft Statement

The Executive Council of the Administrative Law Section has met to consider the Preliminary Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector prepared by the Task Force on Attorney-Client Privilege. The Administrative Law Section opposes several proposed statutory changes (1) as lacking the public necessity justifying the exemption required by the Constitution of the State of Florida and (2) as being punitive toward the citizens of our State.

The proposals have been reviewed not in the context of civil litigation for which they appear to have been drafted but in the context of administrative disputes. It must be remembered that in the administrative arena, a significant number of cases are filed by the government against regulated persons and businesses. The cases involve public policy, which is not involved in civil litigation, and involve, for example, regulation of professions and occupations, the establishment of paternity and child support, the entitlement to services by persons with disabilities, discriminatory employment practices, certificates of need for health care facilities, exceptional student education, the continued involuntary placement of patients in mental facilities, bid protests, and rule challenges. They seldom involve monetary damages.

As to the proposed amendments to Section 119.071, Florida Statutes, the Administrative Law Section strongly opposes proposed (1)(d)3 which provides an exemption from public record production of those documents which would be privileged in the civil discovery context. The concept of "civil discovery context" is without sufficient meaning to satisfy the requirement in s. 24(c), Art. I of the State Constitution, that as to any document exempted from public records disclosure the "law state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." The proposed language offers no specifically-stated public necessity. Further, whether a document is privileged can depend upon the type of civil case being litigated, in other words, it can be case-specific. The general language of the proposal requires that the agency clerk responsible for producing public records make a determination as to how a judge would rule on a disputed question of privilege in a specific-but-non-existent

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lawsuit. Such responsibility is onerous but under the proposal can be exercised with unbridled discretion. The proposal does not protect the government entity involved in litigation but rather tips the level playing field in favor of the government.

Next, the Administrative Law Section strongly opposes the proposed new Section 119.0710, Florida Statutes. It is highly-inappropriate for The Florida Bar to approve a position which makes a citizen give up one constitutional right in order to exercise another. This proposed statute provides that if someone is involved in a legal proceeding with the government, that person loses his constitutional right to request public records and can only obtain documents through discovery. Again, this proposal fails to state with specificity any public necessity. Further, it is unrestricted and it, therefore, cannot be described as "no broader than necessary to accomplish the stated purpose." This proposal is punitive; it punishes a person for engaging in a civil or administrative dispute with the government by taking away a constitutional right. The Task Force's stated purpose in proposing this new law is to prevent abuses of the public records law, but it is apparent that the only persons affected by this proposed statute and, therefore, the apparent "abusers" are those involved in legal proceedings with the government and that those not involved in legal proceedings with the government are not "abusers." Further, mixing the concepts of public records with discovery is also problematic because those concepts have very different parameters and purposes.

The Administrative Law Section, therefore, urges The Florida Bar to reject the Task Force's proposed new statutes: Subsection 119.071(1)(d)3 and Section 119.0710.

III C(2)