

**THE CASE FOR THE ATTORNEY-CLIENT
AND WORK PRODUCT PRIVILEGES
FOR GOVERNMENT ENTITIES**

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I. INTRODUCTION

The oldest and most respected privilege known to the legal profession is the attorney-client privilege. The confidentiality inherent in the privilege lies at the heart of the American judicial system. It is well accepted and generally understood that communications between an attorney and an individual are confidential. Confidentiality encourages people to seek early legal assistance and promotes communication between the attorney and client. Only when the attorney receives full and frank information from the client can the proper legal opinion be formed and advice rendered to the client.

Today, it is also well accepted and generally understood that corporations and other business entities are entitled to invoke the attorney-client privilege. Complications arise, however, in the application and scope of the privilege to such entities. Since businesses communicate only through individuals, the question arises as to which individual communications will be protected. The U.S. Supreme Court, recognizing the importance of clearly establishing the scope of the privilege, decided that employees at all levels of a corporation can possess valuable information that can affect the legal rights of a corporation.

Further complications arise in the application and scope of the attorney-client privilege to federal, state and local governments. Like corporations, governments function through individuals. The same concerns face a government as to which individual conversations can be protected by the privilege. The additional complication unique to the government is the nature of its business – it does the people’s business and is responsible to the people. For this reason, some conclude that there is no place for confidentiality in government.

The advent of open meeting laws and public record laws led some state courts to simply

conclude that the attorney-client privilege was completely waived by the legislatures. Moreover, the special duty of government attorneys to represent the “government” and to uncover wrongdoing and corruption of public officials and employees led others to conclude that there is no expectation of confidentiality by government officials and employees and no duty on the government attorney to maintain any confidentiality. To counteract this conclusion, the Florida legislature very recently enacted a law that seeks to protect and renew the existence of the privilege for state and local governments. Nevertheless, the specific application and scope of the privilege remains an issue for the courts to resolve on a case by case basis.

Federal appellate courts have recently addressed the application of the attorney client privilege to the federal government. For the first time the federal appellate courts confronted the existence of the attorney-client privilege for government, recognizing in their decisions the unique nature of government and the role of the government attorney.

Closely related to the attorney-client privilege is the attorney work product privilege.¹ While they are separate and distinct privileges, the purpose behind the privileges is the same – to promote the proper representation of the client and the administration of justice. The principle of confidentiality is as important to the attorney work product privilege as it is to the attorney-client privilege.

This article will examine the development and policy decisions that support the attorney-client privilege and the related work product privilege for government with particular application

¹ While some courts label work product a “doctrine”, the majority of courts, including the United States Supreme Court, have referred to the protection as a qualified privilege. United States v. Nobles, 422 U.S. 225, 239 (1975); In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977); Duplan Corporation v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974). English common law recognized the protection as a privilege. Hickman v. Taylor, 329 U.S. 495, 510 (1947). There is no practical relevance to use one term over the other. In this article, we will refer to the protection under the modern theory of privilege.

to Florida's state and local governments. A careful analysis of the case law leads one to the conclusion that, despite a broad open government and public records law, neither the legislature nor the courts have eliminated the privileges for state and local governments in Florida. Moreover, the newly enacted state law removes any legislative intent to waive the attorney-client privilege for the governments. Additional legislation is needed, however, to strengthen the attorney client and work product privileges for government entities.

II. THE ATTORNEY-CLIENT PRIVILEGE

A. Basis and purpose of the Privilege

The attorney-client privilege is the oldest of the privileges in the attorney-client relationship with roots as far back as the mid 1500's.² American jurisprudence fully embraced the privilege by the adoption of the common law. The purpose was to encourage the full and frank communication between the attorney and the client. Confidentiality encourages the free flow of information to the attorney no matter how damaging or incriminating the information may be. Only when the attorney is aware of all relevant facts can a proper legal judgment be formed and legal advice rendered.³ Since attorneys are charged with the duty of upholding the law and advising their clients to follow the law, the privilege actually promotes the administration of justice.⁴

The attorney-client privilege is codified in most states in both the rules of evidence and the rules of professional conduct for attorneys.⁵ The rules of evidence protect confidential information from being disclosed in any official proceeding that seeks to compel an attorney to

² 8 J. Wigmore Note 1, § 2290 at 542.

³ As the United States Supreme Court observed in Trammel v. United States, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."

⁴ Upjohn Company v. U.S., 449 U.S. 383, 389 (1981).

⁵ See e.g. § 90.502, Fla. Stat. (1999) and Rule 4-1.6 Rules Regulating the Florida Bar; California Evidence Code, § 945 (1999); Alaska Rules of Evidence, § 503 (1999); Washington Revised Code Annotated, § 560.060(2) (1999).

produce evidence or testimony. The rules of professional conduct prohibit an attorney from disclosing confidential communications received in the rendition of professional legal services in settings other than the judicial context.

As a general rule, the attorney-client privilege consists of eight elements: (1) the advice sought must be legal, (2) it must be sought from the attorney in the attorney's professional capacity, (3) the communication must relate to the advice sought, (4) the communication must be made in confidence (5) the communication must be made by the client, (6) the client must insist that the communication be permanently protected, (7) the information cannot be disclosed to any third party by the client or by the attorney, (8) the privilege must not be waived.⁶

In Florida, the common law as to the disclosure of privileged communications is codified in the Evidence Code.⁷ Section 90.502, Fla. Stat. (1999), provides that "a client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications...made in the rendition of legal services to the client".⁸ Thus the privilege protects the client from compelled disclosure of confidential information by third parties in judicial and other proceedings. Additionally, the lawyer is prevented from disclosing confidential information when called as a witness or required to produce evidence. The privilege extends to legal advice rendered by the attorney as well as other confidential communications from the attorney to the client.⁹

The protection of confidentiality afforded under the Evidence Code extends only to judicial and other covered proceedings. Attorneys are also required to maintain the confidences

⁶ 8 Wigmore, Evidence § 2292 at 554.

⁷ Chapter 90, Fla. Stat. (1999).

⁸ Section 90.502(2), Fla. Stat. (1999).

⁹ As to the Florida Rules of Civil Procedure: See Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1387 (Fla. 1994); As to the Federal Rules of Civil Procedure: See Moore v. Tri-City Hospital Authority, 118 F.R.D. 646, 648 (N.D. Ga. 1988).

of the clients in other situations under their respective states' rules of professional conduct. In Florida, Rule 4-1.6 imposes this duty. The client must consent to the attorney revealing confidential information except in certain circumstances.¹⁰ The privilege thus belongs to the client and the client alone.

The attorney-client privilege must be balanced against another time-honored principle of law – the public has a right to every person's evidence in search of the truth.¹¹ The attorney-client privilege can deny a finder of fact information that may be relevant and probative in the pursuit of truth. For this reason, the privilege is recognized only to the extent that confidentiality serves a public good that transcends the principle of using all rational means for ascertaining the truth.¹² The courts seek to strike a balance between encouraging people to seek legal counsel and allowing the privilege to thwart discovery and conceal the truth.¹³

B. Application of the Attorney-client Privilege

1. Natural persons

The attorney-client privilege has its origins in preventing the compelled testimony of attorneys of a client's confidential communications.¹⁴ To quote an old maxim, "(t)he first duty of an attorney is to keep the secrets of (the) clients". In the evolution of the common law, the

¹⁰ Rule 4-1.6(b) and (c) states:

(b) When Lawyer must reveal information-A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer may reveal information-A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed; (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client; (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (5) to comply with the Rules of Professional Conduct. Rules Regulating the Florida Bar. See In Re Lindsey, 158 F 3d 1263, 1273 (D.C. Cir. 1998) for discussion of general duty of government attorney to disclose wrongdoing.

¹¹ See U.S. v. Nixon, 418 U.S. 683, 709 (1974).

¹² See dissent of Mr. Justice Frankfurter in Elkins v. U.S., 364 U.S. 206, 234 (1960).

¹³ See United States v. Nixon, 418 U.S. 683, 710, n.18 (1974).

¹⁴ 8 J. Wigmore Note 1, § 2290 at 542; Hunt v. Blackburn, 128 U.S. 464, 470, (1888).

privilege sought to protect the client's freedom when consulting with an attorney. The attorney-client privilege thus developed in the context of private individuals.¹⁵ Consequently, the privilege is the broadest as applied to natural persons.

Even as to natural persons, however, the attorney-client privilege is not absolute. In Florida, as in many states, both the evidence code and rules of professional conduct permit the disclosure of confidential information under limited circumstances.¹⁶

2. Corporations and other business entities

As previously stated, complications arise when the client is not a natural person. A corporation is an artificial creature of the law and can only act through natural persons. Since the early part of the 20th Century, the U.S. Supreme Court has assumed that the attorney-client privilege applied to corporations.¹⁷ However, lower federal courts were inconsistent in applying the privilege to the communications of natural persons on behalf of corporations. The majority of federal courts applied the "control group" test – whether the employee making the communication was in a "position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney".¹⁸ Other federal courts applied the "subject matter" test – whether the employee was "sufficiently identified with the corporation so that his communications to the corporation's lawyer [were] privileged, where the employee made the communication at the direction of his supervisors and where the subject

¹⁵ See generally 1 McCormick on Evidence § 88 (5th ed 1999).

¹⁶ For example, under the Florida Rules of Professional Conduct, a lawyer must reveal information to prevent a client from committing a crime or to prevent a death or substantial bodily harm. Rule 4-1.6(b). A lawyer may reveal other confidential information generally relating to establishing criminal or civil defenses. Rule 4-1.6(c) Similarly, under Florida's evidence code, there is no attorney-client privilege when the services of a lawyer are obtained to aid in the commission of a crime or fraud or relating to a breach of duty by the attorney. Section 90.502(4), Fla. Stat. (1999).

¹⁷ United States v. Louisville & Nashville Railroad Company, 236 U.S. 318 (1915).

¹⁸ Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962), petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. den., 372 U.S. 943 (1963).

matter upon which the lawyer's advice was sought by the corporation and dealt with in the communication was within the performance by the employee of the duties of his employment".¹⁹

Having recognized that it was important for individuals and their attorneys to know when their conversations were protected, both the United States Supreme Court and the Florida Supreme Court recognized that such certainty would also be important to corporations.²⁰ As the U. S. Supreme Court has stated: "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to protect with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."²¹

In the federal courts, the landmark decision is Upjohn Company v. United States.²² In Upjohn, the U.S. Supreme Court acknowledged the important policy considerations supporting a broader attorney-client privilege and the related work-product privilege in the corporate setting. The Court extended the privilege to include the employees' communications with their corporate counsel beyond the managerial "control-group" test, but declined to "lay down a broad rule or series of rules to govern all conceivable future questions in those areas".²³ The Court noted that corporate officers and agents often possess the information needed by the corporation attorney. The Court, however, also recognized that middle level and indeed lower level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties. "[I]t is only natural", the Court said, "that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to

¹⁹ Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977).

²⁰ Upjohn Company v. U.S., 449 U.S. 383, 393 (1981); Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1383-84 (Fla. 1994).

²¹ Upjohn Company v. U.S., 449 U.S. 383, 393 (1981).

²² 449 U.S. 383 (1981).

²³ Id. at 396.

such actual or potential difficulties”.²⁴ In reaching this decision, the Court recognized that one of the purposes of the attorney-client privilege was to protect the giving of information to the lawyer, which purpose was not met by the control group test.²⁵

Thirteen years later, the Florida Supreme Court addressed the application of the attorney-client privilege to corporations. Finding the policy considerations behind the subject matter test to be persuasive, the Florida Supreme Court, as did the Court in Upjohn, rejected the “control group” test.²⁶ Instead, the Court adopted a slightly modified version of the subject matter test set forth in Diversified.²⁷ The Florida Court used the following criteria to judge whether a corporation’s communications are privileged:

- 1) the communication would not have been made but for the contemplation of legal services;
- 2) the employee making the communication did so at the direction of his or her corporate superior;
- 3) the superior made the request of the employee as part of the corporation’s effort to secure legal advice or services;
- 4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee’s duties; and
- 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents...²⁸.

In adopting these criteria, the Court considered the important balance between encouraging corporations to seek legal advice and “preventing corporate attorneys from being used as shields to thwart discovery”.²⁹ As a safeguard to prevent the latter from occurring, the Court stated that

²⁴ Id. at 391.

²⁵ Id. “See ABA Code of Professional Responsibility, Ethical Consideration 4-1: “A lawyer should be fully informed of the facts in order for his client to obtain the full advantage of the legal system. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.”

²⁶ Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1383-84 (Fla. 1994).

²⁷ 572 F.2d 596 (8th Cir. 1977).

²⁸ Southern Bell Telephone and Telegraph Company v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994).

²⁹ Id. citing First Chicago International v. United Exchange Co., Ltd., 125 F.R.D. 55, 57 (S.D. N.Y. 1989).

“claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny”.³⁰ The burden of establishing the privilege lies with the party claiming it.

3. The Government

The government, like a corporation or other legal entity, can only act through its officers, employees or agents. In Florida, both the Evidence Code and Rules of Professional Conduct treat governments the same as private corporations with respect to the attorney-client privilege.³¹ In the federal courts, the proposed Federal Rules of Evidence, which the federal courts use as evidence of common law practices, include “governmental bodies” within the definition of “client”. The Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1) also extends the privilege to the government.³²

The Florida Evidence Code, on its face, clearly extends the privilege to the government. Section 90.502, Fla. Stat. (1999), defines a “client” as “any person, public officer, corporation, association, or entity, whether public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer” (emphasis added).³³

In the federal courts, Federal Rule of Evidence 501 states that “the privilege of a witness, person, government, State, or political subdivision thereof, shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of

³⁰ Id. Although the court did not specify the nature of “heightened scrutiny”, the application of the criteria alone limits the claiming of the privilege.

³¹ Comment to Rule 4-1.13, Florida Rules of Professional Conduct, “Government Agency”: “The duty defined in this rule applies to governmental organizations”. The commentary to the Rule, however, places a higher duty on government lawyers because of the nature of their business. See discussion supra.

³² Restatement (Third) of Law Governing Lawyers, § 124 (Proposed Final Draft No. 1, March 29, 1996) states: “Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in section 123 and of an individual officer, employee, or other agent of a governmental organization as a client with respect to his or her personal interest as stated in sections 118-122”.

³³ Despite this clearly worded definition, in Sarasota County v. Palmer Ranch Development, Ltd., No. 96-1381-CA-01, Div. C (Fla. 12th Cir. Ct., July 7, 1997) cert. den. 711 So.2d 546 (Fla. 2d DCA 1997) an interlocutory order of the trial court ruled that there is no attorney-client privilege for communications between the deputy county administrator and the county attorney. But, an amendment to subsection (6) of Sec. 90.502 adopted during the 2000 legislative session, discussed later in this article, may address this issue.

reason and experience” (emphasis added). Similar to Florida’s Evidence Code, the proposed Federal Rule 503(a)(1), to which the courts refer as evidence of common law practices, defines “client” to include “a person, public officer, or corporation, association, or other organization or entity, either public or private”³⁴ (emphasis added). The Advisory Committee’s note to the proposed Rule states that the definition includes “governmental bodies”.³⁵ The federal governmental attorney-client privilege has been recognized in a number of decisions, usually involving a request for documents under the Freedom of Information Act.³⁶

Rule 4-1.6, Florida Bar Rules of Professional Conduct, imposes the ethical obligation on attorneys to keep confidential the information provided by the client and the professional legal advice provided to the client. Since a client government is an “organization”, Rule 4-1.13, “Organization as client”, must be read in conjunction with Rule 4-1.6. The Comment to Rule 4-1.13 plainly states that the Rule “applies to governmental organizations”. The Comment also recognizes that in the government context “a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved”.

a. Application of Florida’s Open Meetings Law to the privilege.

The attorney-client privilege and work product privilege in Florida and many other states are limited by the Government-In-The-Sunshine Law,³⁷ commonly referred to as the open

³⁴ In Re Lindsey, 158 F.3d 1263, 1269 (D.C. Cir. 1998) and cases cited therein.

³⁵ Reprinted in 56 F.R.D. 183, 237 (1972).

³⁶ See In Re Lindsey, 158 F.3d 1263, 1267 (D.C. Cir. 1998); Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 598 (E.D. Pa. 1980).

³⁷ Section 286.011, Fla. Stat. (1999), commonly known in Florida as the Sunshine Law, requires that all “meetings” of “any Board or Commission” of state or local government at which official actions will be taken be open to the public. In 1992, a constitutional amendment created a self-executing constitutional open meetings law, including meetings of the state legislature, “except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution”. Art. I, § 24, Fla. Const.

meetings law, and the Public Records Act.³⁸ However, these two laws and interpreting case law do not eliminate the attorney-client privilege.

The Florida Supreme Court first considered the effect of the statutorily created open meeting law on the attorney-client privilege in Neu v. Miami Herald Publishing Co.³⁹ The court held that the Sunshine Law applies to “meetings between a City Council and the City Attorney held for the purpose of discussing the settlement of pending litigation to which the City is a party”. (emphasis added) The court expressly rejected the arguments that either the Evidence Code or the Rules of Professional Conduct created an exception to the Sunshine Law. Since meetings of the city council must be held in public, the court reasoned that “there are no confidential communications to protect”. The court acknowledged that its holding would provide an unfair advantage to an adversary of the government, but deferred to the legislature for any exemptions.

The concurring opinion of two justices carefully distinguished the Court’s holding from a “conference (that) occurs between an attorney and a government executive, e.g., the governor, a county or city manager, a mayor where he is the chief executive officer of a municipality, or an agency executive officer”. A conference of this type does not constitute a “meeting” under the Sunshine Law.⁴⁰

In spite of this clearly worded and limited holding, some commentators and lower courts concluded as a result of Neu that there was little or no attorney-client privilege left to

³⁸ Chapter 119, Fla. Stat. (1999).

³⁹ 462 So.2d 821 (Fla. 1985).

⁴⁰ In Accord, Mitchell v. School Board of Leon County, 335 So.2d 354 (Fla. 1st DCA 1976). Sunshine law not applicable to meetings between superintendent and director of personnel services and school board attorney.

government.⁴¹ The Neu court, however, did not eliminate the privilege, but simply recognized that the open meetings law eliminated the ability of the governing body to meet in private.⁴² Because the governing body must meet in the open, and confidential communications with the government attorney cannot be held in an open meeting, one of the elements necessary to the establishment of the privilege was missing.⁴³

The Neu decision did mark a major departure in another area -- the court abdicated its supervisory role over government attorneys who represent the state and local governments. For the first time, the legislative branch dictated when and under what circumstances a government attorney could privately confer with the government client. The court chose to defer the matter to the legislature who had plenary power over Florida's local governments.

After the Neu decision, the legislature created an exemption to the Sunshine Law, sometimes referred to as the attorney-client or shade session. Section 286.011(8), Fla. Stat., permits a "board or commission of any state agency or authority of any county, municipal corporation, or political subdivision and the chief administrative or executive officer of the governmental entity" to meet in a private session with their attorney to discuss "pending litigation". The subject matter is "confined to settlement negotiations or strategy sessions related to litigation expenditure". The entire session must be recorded by a certified court reporter and the transcript is made a part of the public record "upon conclusion of the litigation". While these

⁴¹ See John G. Hubbard, The Local Governmental Lawyer and Attorney-Client Privilege, 22nd Annual Local Government Law in Florida, April 16-17, 1999, at 6.31. School Board of Duval County v. Florida Publishing Company, 670 So.2d 99-100 (Fla. 1st DCA 1996); City of Melbourne v. A.T.S. Melbourne, Inc., 475 So.2d 270 (Fla. 5th DCA 1985). Citing to Neu, the Florida Attorney General stated in AGO 97-61 that "[n]o general attorney-client privilege has ever been recognized for purposes of the Government in the Sunshine Law". The opinion went on to state (without any authority) that since it was the school board as a collegial body that was the client and not individual board members nor the superintendent of schools, conversations between the individual board members and the attorney and between the superintendent and the attorney were not protected by the attorney-client privilege.

⁴² See limited exemption discussed supra.

⁴³ See discussion of elements page 4 supra.

requirements create an unnatural setting for an attorney-client discussion, at least government attorneys were provided a means to obtain directions from the legislative body “client” without violating the sunshine law.

This attorney-client exemption from the open meetings law has been narrowly and strictly construed by the courts.⁴⁴ In the most recent case on the subject, Zorc v. City of Vero Beach,⁴⁵ the court held that since the attendance of the city clerk and department directors was not expressly authorized by the statute, the shade session violated the sunshine law.⁴⁶ The disturbing aspect to government attorneys is the court’s finding that the City violated the sunshine law when it authorized its counsel to include language in a consent decree and to sign documents which would settle the City’s claim in a bankruptcy proceeding. The court strictly limited the discussion in an attorney-client session to the literal words of the statute, i.e. “settlement negotiations or strategy sessions related to litigation expenditures”. The court acknowledged that its decision was likely to cause uncertainty, saying that there is no “bright-line rule as to when advice becomes decisive action”. Nevertheless, the court was disturbed by the words of the counsel at the session that “discussing the settlement in a public forum could potentially be an opening of a door for other people to get into the Consent Decree”.⁴⁷ The court was persuaded by language in the legislative staff report for the bill that enacted section

⁴⁴ Failure to disclose names of city and outside attorneys in attorney-client session as required by § 286.011(8)(d) violates the Sunshine Law. City of Dunnellon v. Aran, 662 So.2d 1026 (Fla. 5th DCA 1995). AGO 98-21 opines that “pending litigation” means that a lawsuit that has been filed; but cf. Brown v. City of Lauderhill, 654 So.2d 302 (Fla. 4th DCA 1995) where city is not yet a party to ongoing litigation, the term “presently” does not mean “now” but applies to a time period from now into the future, that is, a short while. Discussions regarding methods to achieve compliance with federal desegregation mandate does not fall within the exception for “settlement negotiations”, Freeman v. Times Publishing Co., 696 So.2d 427 (Fla. 2d DCA 1997).

⁴⁵ 722 So.2d 891 (Fla. 4th DCA 1998).

⁴⁶ Consultants are not authorized to attend the attorney-client session, School Board of Duval County v. Florida Publishing Co., 670 So.2d 99 (Fla. 1st DCA 1996).

⁴⁷ Zorc v. City of Vero Beach, 722 So.2d 891, 900 (Fla. 4th DCA 1998).

286.011(8) that “[n]o final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings”.⁴⁸

A literal reading of the statute as construed by the Zorc court seems to negate the legislature’s intent to place the government on an equal footing in litigation.⁴⁹ As a practical matter, a government attorney will be unable to bring an offer of settlement to a client the same as an attorney representing a private client can. Instead, the government attorney must be careful to merely seek “direction” regarding “settlement negotiations” or “litigation expenditures”. Arguably, seeking authorization to conditionally offer a settlement within certain monetary limits is permissible as long as the acceptance is conditional on a final decision to settle at a public meeting, if one is required.⁵⁰ Moreover a government attorney will be constrained to steer discussions away from settlement and merely discuss the status of settlement negotiations, obtain some direction, and discuss strategy related to litigation expenditures. The benefits of the attorney-client session are therefore greatly diminished when balanced against the risk of immediately making the transcript of the attorney client session available for public inspection if the law is violated.⁵¹

b. Other States’ applications of the privilege on the open meetings law

In rejecting an independent basis for the attorney-client privilege between the governing body and the government attorney in Neu, the Florida Supreme Court is one of the few state high courts to do so. Courts in other states have recognized an independent basis for the privilege, often based on the strong policy considerations that apply to private clients.

⁴⁸ Id. at 901.

⁴⁹ Id. at 899.

⁵⁰ Under a 1999 amendment, cities and counties are no longer required to hold a public hearing before the settlement of a lawsuit that involves the expenditure of more than \$5000. Ch. 99-279, § 13, Laws of Florida.

⁵¹ School Board of Duval County v. Florida Publishing Company, 670 So.2d 99 (Fla. 1st DCA 1996).

An oft-cited case that reconciles the application of the privilege and the open meetings law is Sacramento Newspaper Guild v. Sacramento County Board of Supervisors.⁵² The California appellate court held that the attorney-client provisions of the evidence code operated concurrently with the California open meetings law. The court considered the separate policy objectives of an open meetings requirement against the “value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed”.⁵³ The lack of evidence of any intent of the legislature to abrogate, by implication or otherwise, the attorney-client privilege led the court to conclude that the privilege can operate concurrently with the open meetings law. In dicta, the court offered the following practical observations:

[t]he two enactments are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed (citation omitted). As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications “in confidence”. Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney’s presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash.⁵⁴

Similarly, in Oklahoma Association of Municipal Attorneys,⁵⁵ the Supreme Court of Oklahoma found no legislative intent to abrogate the attorney-client privilege in enacting the open government law. The open government act read “all meetings...shall be held...except as

⁵² 263 Cal. App. 2d 41 (Cal. 3d DCA 1968).

⁵³ Id. at 53.

⁵⁴ Id. at 58. Subsequently, the State of California adopted a statute similar to Florida’s attorney-client session that permits closed sessions between the local governing body and its attorney after written notice in regard to pending or threatened litigation. Cal. Gov. Code § 54956.9 (West 1999).

⁵⁵ 577 P.2d 1310 (Okla. 1978).

hereinafter specifically provided”.⁵⁶ In reaching its decision, the court quoted at length from Sacramento Newspaper Guild;

[p]ublic agencies are constantly embroiled in contract and eminent domain litigation and, with the expansions of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentions (sic) as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, supra, (citation omitted): ‘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.’⁵⁷

An attorney’s ability to fulfill the ethical duties under the attorney-client privilege was not changed by Alabama’s Sunshine Law. The court balanced the legislative powers with the “inherent, continuing and plenary” powers the judiciary has over its attorneys as officers of the court.

A Texas appellate court held the attorney-client privilege was protected in spite of an open meetings law in Markowski v. City of Marlin⁵⁸. The Texas Open Meetings Act permits a governing body to meet privately with its attorney about pending or contemplated litigation. In holding that the privilege protected the discussion, the court found that “a governmental body has as much right as an individual to consult with its attorney without risking the disclosure of important confidential information”. The court reasoned that “logic dictates that the information discussed at that meeting should be protected”.⁵⁹

⁵⁶ Id. at 1312.

⁵⁷ Id. at 1313.

⁵⁸ 940 S.W.2d 720 (Tex. App. 1997).

⁵⁹ Id. at 727.

The Supreme Courts of West Virginia, Minnesota, Alaska, Iowa, and Alabama also recognized the continued existence of the time honored attorney privilege after the passage of open meetings laws.⁶⁰ The Supreme Court of Iowa shared the Alaska and California courts' views that the privilege must be carefully circumscribed so as to prevent abuse.⁶¹

The Arkansas and Nevada Supreme Courts are aligned with the Supreme Court of Florida. In Laman v. McCord,⁶² the Supreme Court of Arkansas held that the attorney-client privilege contained in the evidence code does not create an exemption to the sunshine law. Similarly, in McKay v. Board of County Commissioners of Douglas County,⁶³ the Supreme Court of Nevada found no implied attorney-client exception to the public meetings law.

c. Other factors unique to government

Case law has placed additional limitations on the attorney-client privilege in the government sector. The limitations stem from the special duty of government attorneys to uphold the public trust and the nature of the government as a corporate or organizational entity.

President Clinton's personal problems have resulted in a body of law in the attorney-client privilege area that is likely to trouble government entities until the issue is resolved by the United States Supreme Court. For the first time, the federal courts confronted head on the very existence of the attorney-client privilege for the government. The lower federal courts have significantly limited the privilege in the context of criminal investigations.

In In Re Grand Jury Subpoena Duces Tecum,⁶⁴ the Office of Independent Counsel sought production of documents created during meetings between the White House Counsel and Hillary

⁶⁰ Peters v. County Commission of Wood County, 205 W. Va. 481 (W. Va. 1999); Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 1248 (Alaska 1993); Dunn v. Alabama State University Board of Trustees, 628 So.2d 519 (Ala. 1993); Tausz v. Clarion-Goldfield Community School District, 569 N.W.2d 125 (Iowa 1997).

⁶¹ Tausz v. Clarion-Goldfield Community School District, 569 N.W. 2d 125, 128 (Iowa 1997).

⁶² 432 S.W. 2d 753 (Ark. 1968).

⁶³ 746 P.2d 124 (Nev. 1987).

⁶⁴ 112 F.3d 910 (8th Cir. 1997).

Rodham Clinton. The Office of the Independent Counsel argued that a federal governmental entity could not assert either the attorney-client or work product privilege before a federal grand jury. The lower court declined to reach this issue, deciding that the privilege prevented the production based upon a “genuine and reasonable (whether or not mistaken)” belief that the conversations were privileged.⁶⁵ The Eighth Circuit held that, even if there were a governmental attorney-client privilege, the privilege could not be asserted to withhold potentially relevant information from the grand jury.⁶⁶ One factor the court strongly considered was the special duty of government lawyers to report wrongdoing, and the general duty that public service places upon government employees and agencies to favor disclosure over concealment. Specifically, the court found the principles of corporate privilege promulgated in Upjohn inapplicable to the government in a criminal context.⁶⁷

The dissent took issue with the majority’s refusal to even acknowledge that a governmental attorney-client privilege existed, calling it a “well-recognized principle” that governments were entitled to claim both the attorney-client and work product privileges.⁶⁸ The dissent went on to argue that there was no precedent for holding that the privilege did not apply because a criminal investigation was ongoing⁶⁹ and that the policy considerations for applying the privilege to an individual’s relationship with a lawyer were just as strong for government entities with a government lawyer.⁷⁰

In a second Clinton case, the D.C. District Court similarly held that “[w]hen government attorneys learn, through communications with their clients, of information related to criminal

⁶⁵ Id. at 914.

⁶⁶ Id. at 915, 925-26. The court declined to reach the issue of whether the general governmental attorney-client privilege exists in civil litigation against private parties. Id. at 917.

⁶⁷ Id. at 920.

⁶⁸ Id. at 926-27.

⁶⁹ Id. at 929.

⁷⁰ Id. at 931-32.

misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury”.⁷¹ In Re Bruce R. Lindsey,⁷² involved the refusal of Deputy White House Counsel Lindsey to answer questions of the Office of Independent Counsel on the basis of attorney-client or work product privilege in response to a subpoena from a federal grand jury.⁷³ Unlike In Re Grand Jury, the D.C. District Court acknowledged the existence of the general government attorney-client privilege, citing the common law as recited in the proposed Federal Rules of Evidence and Restatement (Third) of the Law Governing Lawyers.⁷⁴ More significantly, the Court found that the privilege existed independently under common law.⁷⁵ Like the Eighth Circuit, however, this Court declined to extend that privilege in the criminal context, citing the special duty of government attorneys to report wrongdoings of elected and appointed officials that militates against the privilege. The dissent made many of the same arguments as did the dissent in In Re Grand Jury Subpoena Duces Tecum, including the policy considerations.

At the same time the D.C. Circuit wrestled with the privilege of the then current Deputy White House Counsel, the United States Supreme Court considered the Independent Counsel’s argument for a posthumous exception to the privilege of the deceased former Deputy White House counsel Vincent W. Foster, Jr. The Supreme Court reversed the D.C. Circuit in Swidler & Berlin v. U.S.⁷⁶, concluding that the privilege survives the death of a client. The Court specifically rejected the D. C. Circuit’s use of a balancing test in criminal proceedings.

⁷¹ In Re Lindsey, 158 F.3d 1263, 1266 (D.C. Cir. 1998).

⁷² 158 F.3d 1263 (D.C. Cir. 1998).

⁷³ Id. at 1267.

⁷⁴ Id. at 1268-69.

⁷⁵ The court found that the exemption of attorney-client privileged materials under the Freedom of Information Act does not create the privilege. “Rather Congress”, the Court said, “intended that agencies should not lose the protection traditionally afforded through the evidentiary privileges simply because of the passage of the FOIA”. Id. at 1269.

⁷⁶ 524 U.S. 399 (1998).

While Swidler involved a government employee consulting with a private attorney, the analysis used by the Supreme Court to arrive at its conclusion calls into question the analysis used by the D.C. and Eighth Circuits. In rejecting the Independent Counsel's argument for, and the D.C. Circuit Court's finding of, an exception to confidentiality for criminal proceedings, the Supreme Court stated "there is no case authority for the proposition that the privilege applies differently in criminal and civil cases and only one commentator ventures such a suggestion (citation omitted)".⁷⁷

Once again rejecting a balancing test to determine whether the privilege should apply,⁷⁸ the Court in Swidler emphasized the important policy concern that the parties be able to predict with some degree of certainty whether the conversation's confidentiality would be protected. The Court noted that the client may not know at the time he confides in his attorney whether the information might at some time be relevant to a criminal matter, thus creating uncertainty.⁷⁹

Following the Supreme Court's analysis in Swidler that no precedent or reason existed for a different application of the privilege in the criminal versus the civil context, the rationale leading to the holding of the D.C. and Eighth Circuits that the criminal nature of the investigation made the privilege inapplicable is called into question. Most troubling about the Eighth and D.C. Circuit's opinions is the uncertainty that they inject into the confidentiality of the attorney-client privilege. As pointed out by the Supreme Court, how can a client, or even an attorney for that matter, know what may become of some relevance to a criminal investigation in the future? This

⁷⁷ Id. at 408-09.

⁷⁸ A balancing test was also rejected in Upjohn Company v. U.S., 449 U.S. 383, 393 (1981) and Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996).

⁷⁹ Swidler & Berlin v. U.S., 524 U.S. 399, 409 (1998).

injection of uncertainty into the privilege is something that the Supreme Court has repeatedly cautioned against in its opinions.⁸⁰

The reasoning in In Re Grand Jury Subpoena Duces Tecum was used by the Sixth Circuit to find that City council members were not clients of the government attorney. In a case of first impression, the Sixth Circuit held that the attorney-client privilege did not apply to statements made in a nonpublic meeting between two council members, the city manager, the fire chief and the city attorney. In Reed v. Baxter,⁸¹ a discrimination case was filed by two firefighters against the Fire chief and the City of Murfreesboro, Tennessee. One council member requested the private meeting to inquire into the circumstances of a promotion that triggered the lawsuit. The plaintiff firefighters sought to compel disclosure of the statements made during the private meeting. The trial court excluded the statements of the two commissioners based in substantial part on the attorney-client privilege. On appeal, the Sixth Circuit declined to acknowledge the existence of the attorney-client privilege, finding that the presence of the two commissioners in the meeting essentially waived the privilege for the management “client”. The court found that the council members were not clients at this meeting with their lawyer. Rather, the court said, “they were elected officials investigating the reasons for executive behavior”. Following the reasoning in In Re Grand Jury Subpoena, supra, the court also declined to find any commonality of interest between the city manager and city council members. The dissent cited conflict with the principles of corporate privilege in Upjohn under the subject matter test, and distinguished In Re Grand Jury as a criminal investigation.

C. Importance of the Privilege to Government

1. Policy Considerations

⁸⁰ Upjohn Company v. U.S., 449 U.S. 383 (1981); Jaffee v. Redmond, 518 U.S. 1 (1966).

⁸¹ 134 F.3d 351 (6th Cir. 1998).

Because of increasing demands to provide expanded services and protections to the citizenry, governments are more involved in regulating activities and providing services than in the past. The governments' decisions can have significant consequences both for the citizens and the government officials who carry out the decisions. A "wrong" decision can result in the loss of a citizen's liberty or property. Mistakes or intentional wrongdoing can result in substantial monetary damages for the government and for the government officials, as well as criminal penalties.⁸²

The need for the attorney-client privilege in the government sector is at least equal to the need for the privilege in the private sector. Attorneys representing a government need to be placed on an equal footing with attorneys representing private clients who seek to further the individual interests of their clients. Government officials and employees should have access to attorneys to inform them of the requirements of law. They should be able to communicate with the government attorney without fear that their communications may be revealed if relevant to a future criminal investigation. Likewise, government attorneys should be able to advise their clients with some degree of certainty that their communications are protected from disclosure. The revisions recommended in this article to the laws are necessary to accomplish these goals, and to restore the benefits of the time-honored attorney-client privilege and related work product privilege for the government.

In the aftermath of the Clinton decisions and Reed, the government attorney, early in a consultation, must consider the following factors to determine if the confidentiality of the consultation will be protected. First, the subject of the consultation should be a matter of government business. Government attorneys should not provide legal advice in personal matters

⁸² See e.g. §§ 110.127, 111.012(2), 112.3188(2)(c)(4), 112.317, 119.02, 119.10, 213.053, 286.011, 402.165, 403.161, Chapter 839, Fla. Stat. (1999); 42 U.S.C. § 1983.

of any elected or appointed officer or employee. Second, although no reported decision of either the federal courts or a Florida appellate court has applied the corporate privilege principle to government, it is advisable for government attorneys to apply the Deason criteria, whenever the confidentiality of communication is sought. The criteria can assist the government attorney and the client in focusing on the subject matter and limiting the dissemination of the confidential information to those with a need to know. Finally, the government attorney and client must be aware that the privilege may dissolve if the information becomes relevant to a criminal proceeding. As a practical matter, government attorneys should steer elected and appointed officers and employees to private attorneys for advice relative to criminal investigations and criminal matters. The government may, under some circumstances, be required to pay the private attorneys fee at a later date; however, the expenditure of public money to defend a public official against groundless charges should be considered a normal cost of business in the complex legal world of the 21st century.⁸³

2. Recent Florida Legislation

In order to remove uncertainty about the applicability of the privilege in the government context, and counteract lower courts' misconstruction of the Florida Supreme Court's opinion in Neu, the 2000 Florida Legislature enacted Senate Bill 1620.⁸⁴ The bill amends section 90.502 of the Evidence Code by adding a special provision to the lawyer-client privilege, which clearly expresses the intent of the legislature. It reads:

(6) A discussion or activity that is not a meeting for purposes of S. 286.011 (the Sunshine Law Chapter) shall not be construed to waive the attorney-client privilege

⁸³ See Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990); Lomelo v. City of Sunrise, 423 So.2d 974 (Fla. 4th DCA 1982).

⁸⁴ Fla. S. Comm. on Governmental Oversight and Productivity CS for SB 1620 (April 12, 2000). (NOTE: The Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.).

established in this section. This shall not be construed to constitute an exemption to either S. 119.07 (the Public Records Chapter) or S. 286.011.

The amendment does not create an additional exemption under the Sunshine Law. All meetings that were previously required to be held in the open must remain public. Elected and appointed officers who are subject to the Sunshine law must be careful to adhere to the spirit, intent, and requirements of that law. Similarly, government attorneys must not act as a conduit of information between elected or appointed officials who seek advice on matters that are, or likely to become, the subject of public meetings.⁸⁵ Government attorneys must also be vigilant about maintaining the confidentiality of information received in private discussions with elected and appointed officials unless the privilege is waived.

Of significance, senate bill 1620 contains the terms “discussion or activity” instead of the word “communication”, which is the term used in previous subsections of the statute.⁸⁶ Although no explanation is offered in the bill or guidance provided in the Senate Staff Analysis, the specific wording likely arises out of the legislature’s paramount intent not to create an exemption to the Sunshine Law, and to distinguish a “discussion” or “activity” from a public meeting. Additionally, the use of the words “discussion” or “activity” allows the privilege to extend not only to individuals who are elected or appointed officers, but also mid-level managers and employees of the government. A meeting between one elected official and other parties is not ordinarily subject to the sunshine law. Appointed officers and public employees regularly attend administrative staff meetings and meetings with citizens and government attorneys that are not subject to the sunshine law as part of their normal duties.

⁸⁵ See Blackford for Use and Benefit of Cherokee Junior High School Parent Teacher Association v. School Board of Orange County, 375 So.2d 578 (Fla. 5th DCA 1979).

⁸⁶ The original bill in the Senate and the companion bill in the House read differently than the adopted bill. The original bills read: “(6) Sections 119.07 and 286.011 may not be construed as waiving the lawyer-client privilege except for communications contained in a public record or made in a public meeting”. H.R. 2083, 2000 Legislative Session.

The amendment also does not change the times when a confidential communication may be disclosed by process of law. Like the corporate privilege, the privilege in the government context should be subject to the heightened level of scrutiny afforded through the application of the Deason criteria.⁸⁷ While this issue remains unresolved by the U.S. Supreme Court and the Florida Supreme Court, the similarities between a corporation and the government, as previously discussed, justify the application of these criteria by Florida Courts.⁸⁸ The application of the criteria to the government will promote the free flow of information between the government attorney and the client, while subjecting claims of the privilege to a heightened level of scrutiny to minimize the threat of government officials and employees cloaking information with the attorney-client privilege to avoid discovery. Moreover, the regular application of the criteria will encourage the government attorney and the client to focus on the issue of confidentiality, and the proper role of the government attorney to render legal advice and services to government officials and employees on matters within the scope of their duties, and to limit the confidential communications only to those persons who have a need to know. The burden of establishing the privilege should rest on the government as it does for private individuals and corporate entities.⁸⁹

The retroactivity of the amendment is uncertain. The amendment became effective on July 1, 2000, and is silent as to its retrospective application. The Senate Staff Analysis suggests that retroactive application is proper because the amendment is remedial in nature.⁹⁰ The

⁸⁷ Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1383 (Fla. 1994).

⁸⁸ The Senate Staff Analysis to the bill suggests that the criteria of Deason should apply in the government context. Fla. S. Comm. on Governmental Oversight and Productivity CS for SB 1620 (2000).

⁸⁹ Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1383 (Fla. 1994).

⁹⁰ Fla. S. Comm. on Governmental Oversight and Productivity CS for SB 1620 (April 12, 2000) supra. See also Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978); City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986).

amendment is procedural in nature and does not grant or take away substantive rights. Accordingly, retroactive application is warranted.

3. Additional Legislation

Additional legislature is needed to allow an attorney representing a government to communicate effectively with his client. Under the current exemption that permits the attorney-client session, the government attorney can only consult with the governing body when litigation is pending. A Florida Attorney General Opinion concludes that pending litigation means a lawsuit has been filed.⁹¹

There is no rational justification to limit the attorney-client session only to pending litigation where an action has been filed. Notices of claim and threats of litigation are commonplace events for state and local governments. Government attorneys should be able to consult with the governing body to avoid costly litigation or to minimize the damages by providing legal advice and counsel. If the statute is expanded to include notices and threats of litigation, the procedural safeguards already in place will minimize the misuse of the attorney-client session. Any wrongdoing would be exposed at the conclusion of the litigation or claim or threat of litigation when the transcript becomes a public record.⁹² Transcripts of the proceedings could even be reviewed in camera upon a proper showing prior to the conclusion of the litigation or claim or threat.

There is also no reason to exclude experts and other government officers and employees who have relevant information about the lawsuit or claim or threat. Elected officials, like corporate directors, should be afforded all the relevant information in the session with their attorney to make informed decisions on matters that affect the rights of its citizens or the

⁹¹ See n.44 supra.

⁹² Section 286.011(8), Fla. Stat. (1999).

property interests of the community. Again, abuses of the use of the sessions would be exposed under the procedural safeguards already provided in the law. Accordingly, the statute should be amended to allow the attendance of persons who possess relevant information about the lawsuit or pending claim.

III. ATTORNEY WORK PRODUCT PRIVILEGE

A. Basis and purpose of the privilege

Unlike the attorney-client privilege, the work product privilege is not codified in the statutes and is relatively new to American jurisprudence. The privilege is judicially created, with its genesis in the case of Hickman v. Taylor.⁹³ Hickman arose in the context of amendments to the Federal Rules of Civil Procedure. Prior to the amendments, there was limited ability to discover the other party's evidence. The new rules created new discovery and deposition proceedings. The purpose was to eliminate the element of surprise and "to obtain the fullest possible knowledge of the issues and facts before trial".⁹⁴

In Hickman, the plaintiff's attorney demanded witness statements taken by the defendant's attorney, who was also asked to respond to deposition questions or interrogatories outlining what the witnesses had told the defendant's attorney. The plaintiff's attorney demonstrated no other need for this information other than to help prepare himself to question the witnesses and to make sure that he had not overlooked anything in the preparation of his case.⁹⁵ In unanimously rejecting the plaintiff's position, the Court discussed the policy considerations supporting judicial recognition of the work product privilege. While recognizing

⁹³ 329 U.S. 495 (1947); See n.1, supra.

⁹⁴ Id. at 501.

⁹⁵ Id. at 508-09, 516. The Plaintiff's attorney based his entitlement to the evidence on the view that the new rules were to "do away with the old situation where a lawsuit developed into 'a battle of wits between counsel'". Id. at 516. In response to this argument came Justice Jackson's famous remark "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary". Id.

the policy interests in liberalizing discovery, the Court also recognized that proper preparation of a case, crucial to the administration of justice, demands that an attorney

work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.... Were [such] materials open to opposing counsel on mere demand, much of what is now put down in writing, would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would eventually develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.⁹⁶

Balancing the competing interests behind liberalized discovery and protecting the work product of the attorney, the Court set forth many of the principles of the work product privilege. Since Hickman, both the federal court system and most states' courts systems, including Florida, have adopted rules of procedure codifying the principles set forth in the case.⁹⁷ The work product privilege is now uniformly accepted by all courts.

Like the attorney-client privilege, strong public policy considerations support the attorney work product privilege. If an attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, and other tangible and intangible products were discoverable, then "much of what is now put down in writing will remain unwritten".⁹⁸ These "strong public policy" considerations were reaffirmed by the United States Supreme Court 35 years later in the recognition of the work product privilege for corporations in Upjohn.⁹⁹

B. Application of the Work Product Privilege

1. What is an attorney's work product?

⁹⁶ Id. at 510-11.

⁹⁷ Rule 26(b)(3) Fed.R.Civ.P.; Rule 1.280(b)(3) Fla.R.Civ.P. The work product privilege was first officially recognized in Florida in Atlantic Coast Line R. Co. v. Allen, 40 So.2d 115 (Fla. 1949), in which the court followed the then recent Hickman v. Taylor, 329 U.S. 495 (1947) to find that witness statements taken by employees of the defendant were protected from disclosure as work product.

⁹⁸ Hickman v. Taylor, 329 U.S. 495, 511 (1947).

⁹⁹ Upjohn Company v. U.S., 449 U.S. 383 (1981).

What constitutes work product is not capable of concise definition adequate for all occasions.¹⁰⁰ Both the federal and Florida rules of civil procedure describe work product as “documents and tangible things...prepared in anticipation of litigation or for trial by or for another party or by or for that party’s representative...”.¹⁰¹ Not every document prepared in anticipation of litigation or for trial, however, is attorney work product. The document must contain or reflect “the attorney’s legal theories, research, and certain factual information gathered in preparation for proper representation of the client”.¹⁰²

In order for the documents to be protected, they must be prepared in anticipation of litigation or for trial. Documents that are prepared in the ordinary course of business or as part of the record keeping of an agency, even though they may be used in litigation, are not prepared in anticipation of litigation or for trial and therefore are not protected.¹⁰³ The courts have generally found that “anticipated” litigation must be a “substantial likelihood” rather than a “remote possibility”.¹⁰⁴

The courts have distinguished “fact work product” and “opinion work product”.¹⁰⁵ “Fact work product” is factual information that relates to the case and is gathered in anticipation of the litigation.¹⁰⁶ Internal audits and statistical analysis prepared at the request of a corporate counsel

¹⁰⁰ Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 112 (Fla. 1970).

¹⁰¹ Rule 26(b)(3) Fed.R.Civ.P.; Rule 1.280(b)(3) Fla.R.Civ.P.

¹⁰² In Re Grand Jury Proceedings, 604 F.2d 798, 801 (3d Cir. 1979).

¹⁰³ See Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1385 (Fla. 1994) (“When a corporation seeks the advice of an attorney, it is difficult to differentiate the role of a legal advisor from the role of a business advisor.”).

¹⁰⁴ In Re Special September 1978 Grand Jury, 640 F.2d 49, 65 (7th Cir. 1980).

¹⁰⁵ Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1384 (Fla. 1994); See also In Re Murphy, 560 F.2d 326, 329 n.1 (8th Cir. 1977) (“opinion work product describes those documents containing the mental impressions, conclusions, opinions, or legal theories of an attorney. Any work product documents that do not fit into this category will be referred to as “ordinary work product”); Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) (“opinion work product includes such items as an attorney’s legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of the witnesses.”).

¹⁰⁶ Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1384 (Fla. 1994).

in response to a regulatory agency’s investigation of the corporation are examples of materials found to be fact work product.¹⁰⁷ “Opinion work product” is information that contains the attorney’s mental impressions, conclusions, opinions, and theories.¹⁰⁸ Summaries of employee’s statements made by corporate counsel are examples of opinion work product.¹⁰⁹

“Fact work product” and “opinion work product” receive different levels of protection under the rules and case law.¹¹⁰ “Fact work product” is discoverable upon a showing that the party seeking the work product has need, and is “unable without undue hardship to obtain the substantial equivalent of the materials by other means”.¹¹¹ “Opinion work product” is subject to greater protection and the majority of courts have given opinion work product nearly absolute protection so that it is discoverable only in rare and extraordinary circumstances.¹¹²

The majority of courts, including Florida, hold that work product retains its protection, whether qualified or absolute, after the termination of the litigation – the protection is perpetual.¹¹³ As the court stated in In Re Murphy,¹¹⁴

[t]he primary purpose of the work product is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party. The work product privilege would be attenuated if it were limited to documents that were prepared in the case for which discovery is sought. What is needed, if we are

¹⁰⁷ Id. at 1385, 1386.

¹⁰⁸ Id. at 1384.

¹⁰⁹ Id. at 1386. See also Upjohn Company v. U.S., 449 U.S. 383, 401 (1981).

¹¹⁰ Rule 26(b)(3) Fed.R.Civ.P.; Rule 1.280(b)(3) Fla.R.Civ.P.; Upjohn Company v. U.S., 449 U.S. 383, 400-01 (1981); Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1384 (Fla. 1994).

¹¹¹ Rule 1.280(b)(3) Fla.R.Civ.P.; Also Rule 26(b)(3) Fed.R.Civ.P., which, in addition, requires the requesting party to have “substantial” need of the materials.

¹¹² In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977). See Rule 1.280(b)(3) Fla.R.Civ.P. and Rule 26(b)(3) Fed.R.Civ.P. (“In ordering discovery of the materials when the required showing [need and hardship] has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney...” (emphasis added)).

¹¹³ In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977); Duplan Corporation v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736 (4th Cir. 1975) cert. den. 420 U.S. 997 (1975); Alachua General Hospital v. Zimmer U.S.A., Inc., 403 So.2d 1087, 1088 (Fla. 1st DCA 1981). As to the duration of protection for public sector work product in Florida, see section III(b)(2) supra.

¹¹⁴ 560 F.2d 326, 334 (8th Cir. 1977).

to remain faithful to the articulated policies of Hickman, is a perpetual protection for work product....

Any work product privilege ceases when the materials are intended for use at trial.¹¹⁵

While the attorney work product privilege and attorney-client privilege are separate and distinct privileges, there is overlap both as to the documents that will be protected and the purpose behind the privileges.¹¹⁶ Attorney-client privileged information supplied by the client may be incorporated into the work product of the attorney, thus providing protection for the document under both privileges.¹¹⁷

Unlike the attorney-client privilege which belongs to the client alone, the work product privilege also seeks to protect the interests of the attorney.¹¹⁸ Thus, while the client alone may waive the attorney-client privilege, the work product privilege must generally be waived by both the attorney and the client.¹¹⁹ Many federal courts have held that even where the client loses the work product privilege as to documents that show ongoing client fraud, the attorney may still claim the privilege to protect the attorney's mental impressions, conclusions, opinions and legal theories about the case.¹²⁰

Also unlike the attorney-client privilege, the work product privilege is generally not waived by sharing the work product with third parties. Since the purpose of the privilege is to protect the work product from the knowledge of, and use by, opposing counsel, sharing the

¹¹⁵ Dodson v. Persell, 390 So.2d 704, 707 (Fla. 1980).

¹¹⁶ In Re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979). See also In Re Murphy, 560 F.2d 326, 337 (8th Cir. 1977) (“Although the attorney-client privilege and the work product doctrine spring from the same common law origin, the work product doctrine under contemporary law is distinct from and broader than the attorney-client privilege (citations omitted)”).

¹¹⁷ In Re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979).

¹¹⁸ In Re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994); In Re Grand Jury Proceedings, 604 F.2d 798, 801 (3d Cir. 1979).

¹¹⁹ In Re Grand Jury Proceedings, 604 F.2d 798, 801-02 (3d Cir. 1979).

¹²⁰ In Re Special September 1978 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1980); In re Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994).

document with third parties does not waive its protection.¹²¹ As a practical matter, sharing work product with so many others as to increase the opportunity for opposing counsel to get the information would act as a waiver.

The work product privilege not only protects documents and other tangible things, but also includes intangible material that would reflect the attorney's thought processes. In Sporck v. Peil,¹²² opposing counsel requested identification and production of all documents reviewed by the defendant in preparation for the deposition. Defendant's attorney refused to allow identification of the documents on the grounds that the gathering and grouping of the documents was attorney work product protected from discovery. Defendant's attorney contended that the selection process itself represented the "mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation". The identification and production of the documents as a group, the attorney argued, would reveal work product.¹²³ The court agreed, finding the gathering and grouping of the documents fell within the "highly protected" category of opinion work product.¹²⁴

2. The work product privilege of the government attorney and the public records law

¹²¹ In Re Grand Jury Proceedings, 43 F.3d 966, 970 (5th Cir. 1944); Bogosian v. Gulf Oil Corp. 738 F.2d 587, 593 (3d Cir. 1984).

¹²² 759 F.2d 312 (3d Cir. 1985).

¹²³ *Id.* at 315. See also Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 113 (Fla. 1970) (An interrogatory which requested the party/attorney evaluate a witness's testimony is an invasion of the work product privilege.); Connolly Data Systems, Inc. v. Victor Technologies, Inc., 114 F.R.D. 89, 96 (S.D. Cal. 1987) (Questions directed toward a deponent as to what questions the attorney asked the deponent in preparing for the deposition were an invasion of the attorney's work product.); International Business Machines Corporation v. Edelstein, 526 F.2d 37, 42-43 (2d Cir. 1975) (a court's order which held that the parties may not interview potential witnesses without the other party being present or having the interview taken down by a court reporter is an invasion of the attorney's work product); Old Holdings, Ltd. v. Taplin, Howard, Shaw & Miller, P.A., 584 So.2d 1128, 1129 (Fla. 4th DCA 1991) (Billing statements by attorneys could reveal mental impressions and opinions of attorneys and may be protected by disclosure by attorney-client privilege and work product privilege.).

¹²⁴ Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985); See also Laxalt v. McClatchy, 116 F.R.D. 438, 443 (D. Nev. 1987) (Questions to private investigator about which witnesses attorney had him interview were protected by work product privilege.).

Florida's public records law is codified in Chapter 119, Florida Statutes. It provides that "all state, county, and municipal records shall be open for personal inspection by any person".¹²⁵ Section 119.011(1), Fla. Stat. (1999) defines public records as "all documents...or other material, regardless of physical form or characteristic, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency".

Early in the history of this law, the Florida Supreme Court declined to recognize any exemption from the public records law for the work product of the government attorney or attorney-client privileged documents. In Wait v. Florida Power & Light Company,¹²⁶ opposing counsel in litigation requested attorney-client and work product documents from the city pursuant to the public records law. The Supreme Court of Florida found that in section 119.07(2), Florida Statutes (1975), the legislature intended to exempt only those public records made confidential by statute.¹²⁷ Documents that were confidential or privileged as a result of judicial creation, i.e. attorney-client and work product, were found by the court not to be exempt. Any exemption the Court noted, would have to come from the legislature and not the courts.¹²⁸

Unlike the private bar, attorneys representing governments had no protection against opposing counsel's public records request for documents that would otherwise be protected by the work product and attorney-client privileges. In response to the Court's admonition in Wait, the legislature did create an exemption for certain types of attorney work product.¹²⁹ No exemption exists for documents that would otherwise be protected by the attorney-client privilege.

¹²⁵ Section 119.01(1) Fla. Stat. (1999).

¹²⁶ 372 So.2d 420 (Fla. 1979).

¹²⁷ Id. at 424.

¹²⁸ Id.

¹²⁹ See supra, page 35.

Initially, a demand for a government attorney's work product or attorney-client documents, often shrouded in a public records request, requires a careful analysis as to whether the document is even a public record. In Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.,¹³⁰ the Florida Supreme Court defined public record for purposes of the public records act as "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type". The court found that handwritten notes of a consultant, made around the time of an interview, were "merely preliminary materials" made to aid the consultant when he later formalized the knowledge gained during the interviews (emphasis added). These documents were not public records and were therefore not subject to inspection or copying.

Most recently, and of direct application to an attorney's work product privilege, the Florida Supreme Court in Johnson v. Butterworth,¹³¹ found that attorney notes made in preparation for trial were not public records. Because they were not public records, they were not subject to inspection, even after the conclusion of the litigation.

Once it is determined that the requested document is a public record, the document may be withheld pursuant to one of the many exemptions to the public records law. Section 119.07(3), Fla. Stat. (1999), provides for a number of exemptions from the requirement to produce the records. One of the exemptions directly relevant to the work product privilege is a record prepared by or at the express direction of the government attorney

which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or

¹³⁰ 379 So.2d 633 (Fla. 1980).

¹³¹ 713 So.2d 985 (Fla. 1998).

which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings.¹³²

This exemption is functionally equivalent to the protection afforded to opinion work product of private attorneys with two major exceptions. First, the exemption applies only until the conclusion of the litigation. Second, the litigation or adversarial proceeding must be “imminent” as opposed to substantially likely.¹³³

These exceptions, along with the failure to exempt fact work product, impose harsh constraints on the government attorney and, unlike the private sector, expose the government to successive lawsuits.¹³⁴ A government attorney would be naturally reluctant to communicate in writing or to request information in writing in preparation for litigation if the document is subject to inspection at any time.

C. Additional Legislation

Just as there is a need for confidentiality of verbal communications of attorneys and their clients, there is a need for confidentiality of written documents that contain attorney-client information and the work product of the attorney. There is no public purpose served by exposing attorney-client documents to opposing counsel during litigation. Similarly, there is no public purpose served by exposing the government attorney’s mental impressions, conclusions, or litigation strategy to opposing counsel in subsequent litigation.

A solution for restoring the government attorney’s ability to adequately represent the public client is to exempt the government attorney’s documents from inspection under the state’s public records law in a way similar to that enjoyed by federal government attorneys. Like

¹³² Section 119.07(3)(1)(1) Fla. Stat. (1999). There is no exemption for documents that would be otherwise non-discoverable because of the attorney-client privilege. Written communication between the attorney and the client must be turned over unless it otherwise also contains attorney opinion work product.

¹³³ See In Re Special September 1978 Grand Jury, 640 F.2d 49, 65 (7th Cir. 1980).

Florida's public records act, the federal government's counterpart, the Freedom of Information Act, is intended to provide for full agency disclosure of documents unless they are exempt under specific statutory language.¹³⁵ However, Exemption 5 of the Freedom of Information Act¹³⁶ provides that "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency..." are exempt from the obligation to disclose.

Federal courts, including the United States Supreme Court, have interpreted this exemption to cover those documents a private party could not obtain if it were in litigation with the agency.¹³⁷ Citing to the Senate Report adopting the exemption, the United States Supreme Court stated that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties".¹³⁸ Therefore, documents which would be privileged in the civil discovery context, including those documents containing attorney-client protected information and attorney work product, are not discoverable under the Act.¹³⁹

The Supreme Court in N.L.R.B. v. Sears, Roebuck & Co. examined the policy considerations behind the exemption, many of which are the same policy considerations discussed earlier in this article in favor of the attorney-client privilege.¹⁴⁰ As the Court stated

¹³⁴ Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State, 39 U. Miami L. Rev. 291, 300 (1985).

¹³⁵ National Labor Relations Board v. Sears, Roebuck & Company, 421 U.S. 132, 136 (1975).

¹³⁶ 5 U.S.C. §552. Exemptions are contained in section 552(b).

¹³⁷ National Labor Relations Board v. Sears, Roebuck & Company, 421 U.S. 132, 148-49 (1975); E.P.A. v. Mink, 410 U.S. 73, 85-87 (1973).

¹³⁸ National Labor Relations Board v. Sears, Roebuck & Company, 421 U.S. 132, 154 (1975).

¹³⁹ Id.

¹⁴⁰ Id. at 150.

“frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decision and policies formulated would be the poorer as a result”.¹⁴¹

Florida’s citizens would be well served by the adoption of an amendment to the public records law that would exempt the working papers of government attorneys and documents which would fall within the attorney-client or work product privilege if applied to private parties. Any perceived abuse of the exemption could be resolved by *in camera* inspection of the documents by the courts. As noted by the United States Supreme Court, while access to public documents should not be lesser or greater for a litigant than other citizens, the Freedom of Information Act was designed to inform the public about government action and “not to benefit private litigants”.¹⁴²

IV. CONCLUSION

The attorney-client and work product privileges play valuable roles in American jurisprudence. A client can communicate freely with an attorney without fear of compelled disclosure of confidential information. The attorney can formulate legal opinions based upon full information and render sound legal advice to the client. The attorney’s notes, memoranda and trial preparation materials are generally protected from forced disclosure. Private individuals and businesses enjoy these privileges. Private attorneys use these privileges to benefit the interests of their clients.

The federal, state and local governments together with their elected and appointed officers and employees, including government attorneys, have not been permitted to share in

¹⁴¹ Id. See also Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973) citing to S. Rep. No. 813, pg. 9 “[i]t was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that the efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to operate in a fishbowl.”

¹⁴² National Labor Relations Board v. Sears, Roebuck & Company, 421 U.S. 132, 144 (1975).

these same privileges under the well intended principle that all the government's business is open to the public. In actuality, overly broad open meetings laws and public records laws inhibit government officials from seeking legal counsel. Court decisions interpreting these laws create doubt in the very existence of the privileges for the governments. Government attorneys cannot represent with certainty that information received from their clients will remain confidential, and cannot adequately prepare cases for trial in the best interest of the governments because their documents may be compelled to be disclosed.

There is a trend to restore these honored privileges for the governments. Some courts and state legislatures have recognized the importance of restoring these privileges. Government officials must be able to meet privately with their public counsel with reasonable assurance that their information will remain confidential. Government decision makers are best served with the sound advice of attorneys who are fully knowledgeable about their desires and concerns. Government attorneys can then guide the decision makers through the maze of laws that both regulate and protect citizens' personal and property rights.

Additional legislation is necessary, however, to remove legislative or judicial barriers that impede the government attorney's ability to provide effective legal counsel to the government. Government attorneys should be able to prepare cases for trial and defend the interests of the public at large against the private interests of individuals who use these barriers for their own personal benefit. Adequate protections are already in place to avoid abuses and to expose wrongdoing at all levels of government. The restoration of these privileges will serve the public's interest by improving the decision making process of government employees and by placing the governments on an equal footing with private litigants.