THE FLORIDA BAR

651 EAST JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

850/561-5600
WWW.FLORIDABAR.ORG

F. HARKNESS, JR.
CUTIVE DIRECTOR

July 22, 2008

To: Chairs of All Florida Bar Sections, Select Committees, and Interested Parties

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

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

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

Summary

In January, 2008 you received a Request for Comment on 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, to strengthen the attorney-client privilege work product protections in the public sector. The proposal was developed by The Florida Bar's Task Force on Attorney-Client Privilege.

The task force received 20 comments from sections and committees, as well as other interested parties not directly affiliated with The Florida Bar. In response to the comments, the task force revised and pared down its original proposal. The revised proposal is being sent to you for any additional review and comment before it is considered by the Board of Governors of The Florida Bar.

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

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

Background

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

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

The task force has already submitted recommendations to the Board of Governors, many of which have been approved. A list of the recommendations and their current status is attached for your information. FN1 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 a report to the full task force. FN2 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. After receiving and considering the comments on its preliminary proposal, the task force pared down the proposal and is referring it back out to the sections, select committees, and interested parties for comment before submitting the proposals to the Board of Governors.

Analysis

The attached Report of the Attorney-Client Privilege Task Force on the Attorney-Client Privilege in the Public Section 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 strengthen the attorney-client

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

2 See, Report of the Attorney-Client Privilege Task Force on the Attorney-Client Privilege in the Public Sector, Appendix B.

privilege and work product doctrine. The report also includes the proposed amendments for your review and comment. FN3

Changes Made From The Preliminary Proposal to the Revised Proposal

1. The preliminary proposal expanded the work product exemption to include fact work product. The revised proposal maintains that expansion but, in response to comments, would limit fact work product to information prepared by the attorney for specific civil, criminal or adversarial proceedings.

2. The preliminary proposal eliminated the disclosure of the work product at the conclusion of the litigation. The revised proposal maintains this provision.

3. The preliminary proposal would 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. In response to comments, the revised proposal eliminates this provision entirely.

4. The preliminary proposal allowed necessary persons to attend an attorney-client session. As there were no real objections to this proposal, the provision remains in the revised recommendations.

5. The preliminary proposal allowed the substantive discussions in the attorney-client session to include any matter raised in a claim or lawsuit or anticipated lawsuit

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3 Id.

against a public agency. The revised provision allows the discussion to include matters regarding anticipated or pending litigation.

6. The preliminary proposal eliminated the requirement that the session be transcribed and made available at the conclusion of the litigation. In response to comments, the revised proposal maintains the requirement that the session be transcribed, but allows the transcript to be sealed unless opened by a court order.

7. The preliminary proposal required litigants against a public agency to obtain documents through the normal discovery process during pendency of the litigation. In response to comments, the revised proposal eliminates this provision entirely.

8. In response to comments, the revised proposal clarifies that any final agency action, as a result of the attorney-client session, must be made in an open public meeting.

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

APPENDIX A

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

1. Adopt the following resolutions:

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

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

agreement with an employee; (4) that the organization shared its records with an employee. (Resolution 2) APPROVED BY THE BOARD OF GOVERNORS

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 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 CONSIDERED A SUBCOMMITTEE REPORT IN JUNE, 2008 AND RECOMMENDED A PROPOSED RULE ON INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS. THE RULE MUST BE REVIEWED BY THE TASK FORCE AND THE BOARD OF GOVERNORS.

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 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 CONSIDERED A PROPOSED RULE AMENDMENT TO Rule 1.280(B)(4)(e) BUT VOTED NOT TO ADOPT IT.

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

REPORT OF THE
ATTORNEY-CLIENT PRIVILEGE TASK FORCE
ON THE
ATTORNEY-CLIENT PRIVILEGE IN THE PUBLIC SECTIOR

JUNE 2008

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VI. PROPOSED BILL:
AN ACT PROVIDING APPROPRIATE PROTECTION TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS AND ATTORNEY WORK PRODUCT FOR ALL PUBLIC AGENCIES; AMENDING S. 119.071 F.S., REVISING THE EXEMPTION FOR THE ATTORNEY'S WORK PRODUCT OF A PUBLIC AGENCY; AMENDING S. 286.011 F.S., REVISING THE CRITERIA FOR THE ATTORNEY-CLIENT SESSIONS OF A PUBLIC AGENCY AND PROVIDING THE TRANSCRIPT OF THE PROCEEDINGS SHALL BE SEALED UNLESS OPENED BY COURT ORDER; PROVIDING AN EFFECTIVE DATE.

I. MEMBERS OF THE TASK FORCE

Marcos D. Jimenez, Chair
Miami, FL

Adele I. Stone, Vice Chair
Ft. Lauderdale, FL

Professor Anthony V. Alfieri
Coral Gables, FL

Hilarie Bass, ABA Liaison
Miami, FL

Dana Gibson Bradford, II
Jacksonville, FL

Steven E. Chaykin
Miami, FL

Professor Timothy P. Chinaris
Montgomery, AL

Ian M. Comisky
Philadelphia, PA

Professor Charles Winton Ehrhardt
Tallahassee, FL

Ellen M. Fitzsimmons
Jacksonville, FL

Professor Roberta Kemp Flowers
St. Petersburg, FL

Jesus A. Gonzalez-Pita
Springfield, AR

Robert Stephen Gristi
Gainesville, FL

William F. Jung
Tampa, FL

Katherine C. Donlon
Tampa, FL

Roberto Martinez
Coral Gables, FL

Paul Ignatius Perez
Jacksonville, FL

Marion J. Radson
Gainesville, FL

Professor Michael S. Seigel
Tampa, FL

Neal Russell Sonnett,
ABA Liaison
Miami, FL

Bruce Lee Udolf
Ft. Lauderdale, FL

Sylvia H. Walbolt
Tampa, FL

Sheryl Grimm Wood
West Palm Beach, FL

II. RECOMMENDATION OF THE ATTORNEY-CLIENT PRIVILEGE TASK FORCE

The Florida Bar take a legislative position in support of a bill to amend § 119.071(1), Florida Statutes, to provide enhanced protection for attorney work product for all governmental entities; and to amend §286.011, Florida Statutes, to revise the criteria for the attorney-client session for governmental entities, and to seal the transcript of the session unless opened by court order.

III. BACKGROUND

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 Marion Radson, met by telephone on several occasions and ultimately submitted its report to the full task force. In summary, the report called for revisions that would:

(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.

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. On January 25, 2008, the preliminary proposal of the task force was sent to all sections, committees and divisions of The Florida Bar with an invitation to comment on the proposals. Comments were received from approximately 18 entities and individuals, including some entities not directly related to The Florida Bar.

On April 15, 2008, the task force met to consider the comments received on its preliminary proposal. After reviewing the comments and after careful consideration, the task force agreed to permit the sub-committee to further study this issue in view of the comments, and recommend any revisions at the next meeting of the task force. The sub-

committee met by conference call on May 2, 2008 and voted to revise and pare down its original proposal. In response to comments, this report limits the proposed changes to:

(1) expanding the work product exemption to include fact work product, but limits fact work product to information prepared by the attorney for specific civil, criminal, or adversarial proceedings;
(2) eliminating the disclosure of the work product at the conclusion of the litigation;
(3) allowing necessary persons to attend an attorney-client session;
(4) allowing the substantive discussions to include anticipated or pending litigation of a public agency while retaining the requirement that the session be transcribed, but allowing the transcript to be sealed unless opened by court order;
(5) clarifying that any action, as a result of the attorney-client session, must be made in an open public meeting.

The task force on June 20, 2008, considered the Final Report of the Public Sector Subcommittee and its recommendation to support the statutory amendments as enumerated above. The task force recognizes the value and benefit of the government-in-the sunshine law and the public records law in Florida. Similarly, the task force recognizes the time-honored value and benefit of the attorney-client privilege and work product doctrine. The attorney-client privilege and the related work product doctrine encourage communications between the attorney and client, and allow the attorney to provide informed legal counsel that actually promotes the administration of justice. Like a majority of states that have considered this issue, the task force believes that the two public interests (sunshine/public records laws and the attorney-client/work product privileges) are capable of concurrent operation as long as the attorney-client privilege and work product doctrine are permitted to occur within the parameters and safeguards as recommended. The task force further believes that these revisions will encourage public officers and employees to seek legal counsel from government attorneys who are charged with the duty of upholding the law and advising their clients to follow the law, thus enhancing the rights of all people.

IV. 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 Privilege 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); *Cool Homes, Inc. v. Fairbanks North Star Borough, et al.,* 860 P.2d 1248 (Alaska 1993); *Tausz v. Clarion-Goldfield Comm. Sch. Dist.* 569 N.W.2d 125 (Iowa 1997); and *Peters v. County Comm'n of Wood County*, 519 S.E.2d 179 (W.Va. 1999).

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).

V. SUMMARY OF PROPOSED BILL PROVIDING PROTECTION TO ATTORNEY-CLIENT WRITTEN COMMUNICATIONS AND AMENDING THE CONDITIONS OF THE ATTORNEY-CLIENT SESSION

Revisions to statutory law are recommended to remove barriers that impede the government attorney's ability to provide effective legal counsel to the government as client. Attorney-client written communications that meet the definition of opinion work product and fact work product should be kept confidential. Additionally, the attorney-client session should be amended to encourage its use and provide the government, as client, with a forum to obtain effective legal counsel.

Summary of the Draft Bill:

Section 1: CURRENT LAW: The current law does not protect from disclosure the work product of a government attorney or a private attorney retained by the government. The current law only permits a temporary limited opinion work product that terminates at the conclusion of the litigation.

PROPOSED BILL: The proposed bill expands the work product exemption to include fact work product. The bill eliminates the termination of the exemption for work product at the conclusion of the litigation. In response to comments, the bill limits fact work product to information prepared by the attorney for specific civil, criminal or adversarial proceedings. Additionally, in response to comments, the bill does not include a confusing reference to discovery in the civil context.

Section 2: CURRENT LAW: The current law does not allow for a confidential attorney-client session between a government lawyer, or a private lawyer retained by the government, and the governing body of a public agency. The current law only permits a

chief executive officer to be present with the governing body and the government attorney, and the transcript of the session is made public at the conclusion of the litigation.

PROPOSED BILL: The proposed bill would allow additional necessary persons to attend attorney-client sessions, and allow the substantive discussions to include any anticipated or pending litigation of a public agency. In response to comments, the proposed bill retains the requirement that the session be transcribed, but then sealed unless opened by court order. Additionally, in response to comments, the bill clarifies that any final agency action, as a result of the attorney-client session, must be made in an open public meeting.

VI. PROPOSED BILL

A bill to be entitled

An act providing appropriate protection to attorney-client privileged communications and attorney work product for all public agencies; amending s. 119.071 F.S., revising the exemption for the attorneys' work product of a public agency; amending s. 286.011 F.S., revising the criteria for the attorney-client sessions of a public agency and providing the transcript of the proceedings shall be sealed unless opened by court order; providing an effective date.

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

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

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

(1) AGENCY ADMINISTRATION.--

(d)1. A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that either (1) reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, or (2) is factual information, and that was prepared ~~exclusively~~ for that specific civil or criminal litigation or for adversarial administrative proceedings, or that was

prepared in anticipation of ~~imminent~~ that specific civil or criminal litigation or ~~imminent~~ adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution ~~until the conclusion of the litigation or adversarial administrative proceedings~~. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

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

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

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

(8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the

governmental entity, and any public employees or agents who possess relevant information needed by the entity's attorney, may meet in private with the entity's attorney to discuss anticipated or pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the anticipated or pending litigation.

(b) The subject matter of the meeting shall be confined to advice ~~settlement negotiations or strategy sessions~~ related to matters regarding the anticipated or pending litigation ~~expenditures~~.

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

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

shall announce the termination of the session. Any final agency action required, as a result of the attorney-client session, shall be requested at the reopened meeting or at a subsequent public meeting.

(e) The transcript shall ~~be~~ remain sealed. The record may be opened by court order following a finding ~~and~~ after an in-camera proceeding by a petition filed in circuit court that the entity failed to materially comply with the provisions of this subsection. If such a finding is made, the court may order the transcript be made part of the public record upon conclusion of the litigation.

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