

January 14, 2005

Martha Harrell Chumbler, Esq.
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215 S. Monroe, Suite 500
Tallahassee, FL 32301

Re: Attorney Client and Work Product Privileges

Dear Ms. Chumbler:

The City, County, and Local Government Law Section of the Florida Bar files this response to the ABA State and Local Government Law Section Task Force's solicitation for written comments on the effect of current regulations on the confidentiality of attorney-client communications and work product privileges. Due to the complexity and confusion of the application of these privileges in the public sector, Elizabeth Waratuke and I co-authored and published a law review article on this topic in the Winter of 2001. The Executive Council at its meeting in January 2005 adopted the article as its response to the Task Force. The article addresses the basis and purpose of the privileges, the application of these privileges in the public sector, and recommendations for protecting these privileges in view of case and statutory law. To date, no legislation or other regulation has been adopted to address our issues and recommendations.

I am able to provide oral testimony as well if the Task Force would find it beneficial. Thank you for the opportunity to address this important issue.

Respectfully submitted,

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Attachment

cc: Craig H. Coller,
Chair

THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES OF GOVERNMENT ENTITIES

Marion J. Radson*

Elizabeth A. Waratuke**

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 client are confidential. Confidentiality encourages people to seek legal assistance early and promotes communication between the attorney and the 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 also is well accepted and generally understood that corporations and other business entities are, like individuals, entitled to invoke the attorney-client privilege.¹ Complications arise, however, in the application and scope of the privilege to business entities. Because businesses can communicate only through individuals, the question arises about which individual communications will be protected. The United States 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 and thus the communications should be protected.²

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 that face a corporation also face a government when determining which individual communications can be protected by the privilege. The additional complication that is unique to government is the nature of its business — it does the people's business and owes a duty to the people. For this reason, some conclude that there is no place for confidentiality in government.

The advent of open meetings laws and public records laws led some state courts to conclude that the attorney-client privilege was waived completely by the legislatures.³ 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 that a government attorney has no duty to maintain confidentiality. To counteract this conclusion, the Florida legislature recently enacted a law that seeks to protect and renew the existence of the privilege for state and local governments.⁴ The specific application and scope of the privilege nevertheless

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1. ABA Model R. Prof. Conduct 1.13 cmts. 2, 6 (2000).

2. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 395 (1981) (holding that corporate employees' communications with the corporation's attorney were protected by the attorney-client privilege).

3. *E.g. McKay v. Bd. of County Commrs. of Douglas County*, 746 P.2d 124, 125 (Nev. 1987).

4. Fla. Sen. 794, 16th Legis., 2d Reg. Sess. 3308 (June 19, 2000).

remains an issue for the courts to resolve on a case-by-case basis.

Federal appellate courts recently addressed the application of the attorney-client privilege to the federal government.⁵ For the first time, 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.⁶ 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 work product privilege as it is to the attorney-client privilege.

This Article will examine the development of policy decisions that support the attorney-client privilege and the related work product privilege for government, with particular application to Florida's state and local governments. A careful analysis of the case law leads 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 suggestion of legislative intent to waive the attorney-client privilege for government. However, additional legislation is needed 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-1500s.⁷ American jurisprudence fully embraced the privilege by adopting the English common law. The purpose was “to encourage the full and frank communication” between the attorney and the client.⁸ 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.⁹ Because 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.¹⁰

The attorney-client privilege is codified in most states in both the rules of evidence and the rules of professional conduct for attorneys.¹¹ The rules of evidence protect confidential information from being disclosed in any official proceeding where an attorney is compelled to produce evidence or testimony.¹² 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.¹³

As a general rule, in order to assert the attorney-client privilege, the following eight factors must be met: (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 confidential,

5. *E.g. In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (discussing whether the attorney-client privilege existed between the president and the deputy white house counsel).

6. 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.” *U.S. v. Nobles*, 422 U.S. 225, 239 (1975); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974); *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977). English common law recognized the protection as a privilege. *Hickman v. Taylor*, 329 U.S. 495, 510 n. 9 (1947). There is no practical difference between the use of one term over the other. In this Article, the Authors will refer to the protection under the modern theory of privilege.

7. John Henry Wigmore, *Evidence in Trials at Common Law* vol. 8, § 2290, 542–543 (John T. McNaughton ed., Little, Brown & Co. 1961).

8. *Upjohn*, 449 U.S. at 389.

9. 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.”

10. *Upjohn*, 449 U.S. at 389.

11. *E.g.* Alaska R. Evid. § 503 (1999); Cal. Evid. Code § 954 (West 2000); Fla. Stat. § 90.502 (2000); Wash. Rev. Code § 5.60.060(2) (2001); R. Regulating Fla. B. 4-1.6 (2000).

12. Fla. Stat. § 90.502.

13. ABA Model R. Prof. Conduct 1.6 (2000).

(5) the client must make the communication, (6) the client must insist that the communication be protected permanently, (7) the information cannot be disclosed to any third party by the client or by the attorney, and (8) the privilege must not be waived.¹⁴

In Florida, the common law regarding the disclosure of privileged communications is codified in the evidence code.¹⁵ Section 90.502 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.”¹⁶ 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 when required to produce evidence.¹⁷ The privilege extends to legal advice rendered by the attorney, as well as other confidential communications between the attorney and the client.¹⁸

The protection of confidentiality afforded under the evidence code extends only to judicial and other covered proceedings.¹⁹ Attorneys also are required to maintain the confidences of their clients in other situations under the respective state’s rules of professional conduct. In Florida, Rule 4-1.6 imposes this duty.²⁰ The client must give consent to the attorney revealing confidential information, except in certain circumstances.²¹ Thus, the privilege belongs to the client and the client alone.

The attorney-client privilege must be balanced against another time-honored principle of law — that the public has a right to every person’s evidence in search of the truth.²² The attorney-client privilege can deny a fact finder information that may be relevant and probative in the pursuit of truth.²³ 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.²⁴ 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.²⁵

B. Application of the Attorney-Client Privilege

1. Natural Persons

The attorney-client privilege was created to prevent attorneys from being compelled to testify to a client’s confidential communications.²⁶ To quote an old maxim, “The first duty of an attorney . . . is to keep the secrets

14. Wigmore, *supra* n. 7, at § 2292, 554.

15. Fla. Stat. § 90.502(2).

16. *Id.*

17. *Id.* § 90.502(3)(e).

18. *See Moore v. Tri-City Hosp. Auth.*, 118 F.R.D. 646, 648–649 (N.D. Ga. 1988) (holding that the privilege extends to communications that reveal other confidential communications); *S. Bell Tel. & Telegraph Co. v. Deason*, 632 S.2d 1377, 1387 (Fla. 1994) (holding that counsel cannot ask questions during a deposition that would require the individual being deposed to reveal confidential communications).

19. *See* Fla. Stat. § 90.502 (giving the requirements for protecting communications between a lawyer and his client).

20. R. Regulating Fla. B. 4-1.6.

21. *Id.* The rule states,

(b) 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) 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.

Id.; *see In re Lindsey*, 158 F.3d at 1273 (discussing the general duty of a government attorney to disclose wrongdoing).

22. *U.S. v. Nixon*, 418 U.S. 683, 709 (1974) (citing *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).

23. *Id.* at 709–710.

24. *Id.* at 710 n. 18 (citing *Elkins v. U.S.*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

25. *Id.* at 709–710.

26. Wigmore, *supra* n. 7, at § 2290, 542–543; *see Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (holding that the attorney-

of [the] clients.”²⁷ In the evolution of the common law, the privilege was intended to protect the client’s freedom when consulting with an attorney.²⁸ The attorney-client privilege thus developed in the context of private individuals.²⁹ Consequently, the privilege is at its broadest when it is applied to natural persons.

However, even as to natural persons, the attorney-client privilege is not absolute. In Florida, as in many states, both the evidence code and the rules of professional conduct permit the disclosure of confidential information under limited circumstances.³⁰

2. Corporations and Other Business Entities

As previously stated, complications arise when the client is not a natural person.³¹ A corporation is an artificial creature of the law and can act only through natural persons. Since the early part of the twentieth century, the United States Supreme Court has assumed that the attorney-client privilege applied to corporations.³² However, lower federal courts were inconsistent in applying the privilege to the communications of natural persons on behalf of corporations.³³ 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. . . .”³⁴ Other federal courts applied the “subject matter” test — whether the employee was

sufficiently identified with the corporation so that his communication to the corporation’s lawyer was privileged where the employee made the communication at the direction of his superiors and where the subject 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.³⁵

Having recognized that it was important for individuals and their attorneys to know whether their conversations were protected, both the United States Supreme Court and the Florida Supreme Court recognized that such certainty also would be important to corporations.³⁶ As the United States Supreme Court stated,

[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict 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.³⁷

In the federal courts, the landmark decision was *Upjohn Company v. United States*,³⁸ in which the United States Supreme Court acknowledged the important policy considerations supporting a broader attorney-client privilege and the related work product privilege in the corporate setting.³⁹

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

client privilege is necessary to the administration of justice and must be free from the possibility of disclosure).

27. Wigmore, *supra* n. 7, at § 2290, 543 n. 2 (quoting *Taylor v. Blacklow*, 3 Bing. N.C. 235, 249, 132 Eng. Rep. 401, 406 (C.P. 1836)).

28. *Id.* at § 2291, 545.

29. Kenneth S. Brown et al., *McCormick on Evidence* vol. 1, § 88, 355 (John Strong ed., 5th ed., West 1999).

30. *E.g.* R. Regulating Fla. B. 4-1.6(b) (stating that a lawyer must reveal information “to prevent a client from committing a crime” or to “prevent a death or substantial bodily harm”); *Id.* R. 4-1.6(c)(2)–(4) (stating that a lawyer may reveal other confidential information generally relating to establishing criminal or civil defenses). 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 in the attorney-client relationship. Fla. Stat. § 90.502(4)(a), (c).

31. *See supra* pt. I (discussing the problems that arise when applying the privilege to corporations or government entities).

32. *U.S. v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336–337 (1915).

33. *Jarvis v. Am. Tel. & Telegraph Co.*, 84 F.R.D. 286, 290–291 (D.D.C. 1979).

34. *Phila. v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962); *Jarvis*, 84 F.R.D. at 291.

35. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977).

36. *Upjohn*, 449 U.S. at 391; *see Deason*, 632 S.2d at 1383 (explaining the test set out in *Meredith* to determine if the attorney-client privilege applies to corporate communications).

37. *Upjohn*, 449 U.S. at 393.

38. 449 U.S. 383 (1981).

39. *Id.* at 393.

all conceivable future questions in [those] area[s].”⁴⁰ The Court noted that corporate officers and agents often possess information needed by the corporate attorney.⁴¹ However, the Court also recognized that

[m]iddle-level — and indeed lower-level — employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.⁴²

In reaching this decision, the Justices recognized that one purpose of the attorney-client privilege is to protect the client giving information to the lawyer, a purpose that is not met by the “control group” test.⁴³

Thirteen years later, the Florida Supreme Court addressed the application of the attorney-client privilege to corporations.⁴⁴ Finding the policy considerations underlying the subject matter test persuasive, the Florida Supreme Court, like the United States Supreme Court in *Upjohn*, rejected the “control group” test.⁴⁵ Instead, the Florida Supreme Court adopted a slightly modified version of the subject matter test set forth in *Diversified Industries, Incorporated v. Meredith*⁴⁶ by using the following criteria to determine 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.⁴⁷

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.”⁴⁸ As a safeguard to prevent the latter from occurring, it stated that “claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny.”⁴⁹ The party claiming the attorney-client privilege bears the burden of establishing the privilege.⁵⁰

3. The Government

The government, like a corporation or other legal entity, can act only 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.⁵¹ The federal courts include “governmental

40. *Id.* at 386.

41. *Id.* at 391.

42. *Id.*

43. *Id.* at 392; *see* ABA Model Code Prof. Resp. EC 4-1 (1983) (stating that “[a] lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our 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.”).

44. *Deason*, 632 S.2d at 1377.

45. *Id.* at 1382.

46. 572 F.2d 596 (8th Cir. 1977).

47. *Deason*, 632 S.2d at 1383.

48. *Id.* (quoting *First Chi. Intl. v. United Exch. Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989)).

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

50. *Id.*

51. R. Regulating Fla. B. 4-1.13 cmt. (2000). The comment to this rule states that “[t]he duty defined in this rule applies to governmental organizations.” *Id.* However, this comment also places a higher duty on government lawyers because of the nature of their business. *Id.*; *see* Fla. Stat. Ann. § 90.502(1) l. rev. council n. (West 1999) (stating that the term “client” includes governmental bodies).

bodies” within the definition of “client.”⁵² Section 124 of the *Restatement (Third) of the Law Governing Lawyers* also extends the privilege to the government.⁵³

The Florida evidence code, on its face, clearly extends the privilege to the government.⁵⁴ Section 90.502(1)(b) defines a “client” as “any person, *public officer*, corporation, association, or other organization or entity, *either public or private*, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.”⁵⁵

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 reason and experience.”⁵⁶ 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.⁵⁷

Rule 4-1.6 of the Rules of Professional Conduct for Florida Lawyers imposes an ethical obligation on attorneys to keep the information provided by the client and the professional legal advice given to the client confidential.⁵⁸ Because a government client is an “organization” under Rule 4-1.13, “organization as client” must be read in conjunction with Rule 4-1.6.⁵⁹ The comment to Rule 4-1.13 plainly states that the rule “applies to governmental organizations.”⁶⁰ 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.”⁶¹

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

The attorney-client and work product privileges in Florida and many other states are limited by the Government-in-the-Sunshine Law,⁶² commonly referred to as the Open Meetings Law or the Sunshine Law and the Public Records Act.⁶³ However, these laws and the interpretive case law do not eliminate the attorney-client privilege.

The Florida Supreme Court first considered the effect of the statutorily created Sunshine Law on the attorney-client privilege in *Neu v. Miami Herald Publishing Company*.⁶⁴ The court held that the Sunshine Law applied to “*meetings* between a *City Council* and the *City Attorney* held for the purpose of discussing the

52. Proposed Fed. R. Evid. 503 advisory comm. n. (a) and cases cited therein. This rule was ultimately rejected.

53. *Restatement (Third) of Law Governing Lawyers* § 124 (proposed final draft 1996). It states, Unless applicable law otherwise provides, the attorney-client privilege extends to a communication of a governmental organization as stated in § 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 §§ 118–122.

Id.

54. Fla. Stat. § 90.502(1)(b).

55. *Id.* (emphasis added). Despite this clearly worded definition, in *Sarasota County v. Palmer Ranch Enterprises, Incorporated*, No. 96-1381-CA-01 (Fla. Cir. 12th Dist. July 7, 1997), an interlocutory order of the trial court held that there was no attorney-client privilege for communications between the deputy county administrator and the county attorney. However, an amendment to Section 90.502, adopted during the 2000 legislative session, discussed later in this Article, may address this issue. *Infra* nn. 159–172 and accompanying text.

56. Fed. R. Evid. 501 (2000) (emphasis added).

57. *E.g. In re Lindsey*, 158 F.3d at 1268; *Coastal Sts. Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980); *Jupiter Painting Contracting Co. v. U.S.*, 87 F.R.D. 593, 598 (E.D. Pa. 1980).

58. R. Regulating Fla. B. 4-1.6.

59. *Id.* R. 4-1.13 cmt.

60. *Id.*

61. *Id.*

62. Fla. Stat. § 286.011 (2000). This Section is commonly known in Florida as the “Sunshine Law” and requires all meetings of any board or commission of the state or local government at which official actions will be taken to be open to the public. *Id.* § 286.011(1). 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.” Fla. Const. art. 1, § 24(b).

63. Fla. Stat. § 119.01 (2000).

64. 462 S.2d 821, 823 (Fla. 1985).

settlement of pending litigation to which the city is a party.”⁶⁵ The court expressly rejected the arguments that either the evidence code or the rules of professional conduct created an exemption to the Sunshine Law.⁶⁶ Because city council meetings must be held in public, the court reasoned that “there are no confidential communications to protect.”⁶⁷ The court acknowledged that its holding would provide an unfair advantage to an adversary of the government, but left it to the legislature to create any exemptions.⁶⁸

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.”⁶⁹ A conference of this type does not constitute a “meeting” under the Sunshine Law.⁷⁰

In spite of this clearly worded and limited holding, some commentators and lower courts concluded that as a result of *Neu*, there was little or no attorney-client privilege left to the government.⁷¹ However, the *Neu* court did not eliminate the privilege; it simply recognized that the Open Meetings Law eliminated the ability of the governing body to meet in private.⁷² Because the governing body must meet in the open and confidential communications with a government attorney cannot be held in an open meeting, one of the elements necessary to establish the privilege was missing.⁷³

The *Neu* decision did mark a major departure in another area — the court abdicated its supervisory role over government attorneys who represent state and local governments.⁷⁴ For the first time, the court deferred to the legislative branch’s plenary power over Florida’s local governments and allowed it to dictate when and under what circumstances a government attorney could confer privately with the government client.⁷⁵

After the *Neu* decision, the legislature created an exemption to the Sunshine Law, sometimes referred to as an attorney-client, or shade, session.⁷⁶ Section 286.011(8) permits a “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” to meet in a private session with its attorney to discuss “pending litigation.”⁷⁷ The subject matter is “confined to settlement negotiations or strategy sessions related to litigation expenditures.”⁷⁸ The entire session must be recorded by a certified court reporter, and the transcript is “made part of the public record upon conclusion of the litigation.”⁷⁹ While these 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.

65. *Id.* (quoting *State ex rel. Reno v. Neu*, 434 S.2d 1035, 1036 (Fla. App. Dist. 3d 1983) (emphasis added)).

66. *Id.* at 824–825.

67. *Id.* at 825.

68. *Id.* at 824.

69. *Id.* at 826 (Overton & Ehrlich, JJ., concurring).

70. *See Mitchell v. Sch. Bd. of Leon County*, 335 S.2d 354, 355 (Fla. Dist. App. 1st 1976) (holding that the Sunshine Law was not applicable to meetings between the superintendent, the director of personnel services, and the school board attorney).

71. *Sch. Bd. of Duval County v. Fla. Publg. Co.*, 670 S.2d 99, 100 (Fla. Dist. App. 1st 1996); *City of Melbourne v. A.T.S. Melbourne, Inc.*, 475 S.2d 270, 271 (Fla. Dist. App. 5th 1985); John G. Hubbard, Speech, *The Local Governmental Lawyer and the Attorney-Client Privilege* (22d Annual Loc. Govt. L. in Fla., Apr. 16–17, 1999) (copy on file with Author). Citing *Neu*, the Florida attorney general stated that “[n]o general attorney-client privilege has ever been recognized for purposes of the Government in the Sunshine Law.” *Annual Report of the Attorney General*, Fla. Atty. Gen. Op. 97-61 at 225, 227 (1997). The opinion went on to state, without any authority, that because the school board, as a collegial body, was the client and not the individual board members or 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. *Id.*

72. 462 S.2d at 824–825.

73. Wigmore, *supra* n. 7, at § 2292, 554.

74. 462 S.2d at 824–825.

75. *Id.* at 826.

76. Fla. Stat. § 286.011.

77. *Id.* § 286.011(8).

78. *Id.* § 286.011(8)(b).

79. *Id.* § 286.011(8)(c), (e).

This attorney-client exemption to the Open Meetings Law has been construed narrowly and strictly by the courts.⁸⁰ In *Zorc v. City of Vero Beach*,⁸¹ the Florida District Court of Appeal for the Fourth District held that because the attendance of the city clerk and department directors was not expressly authorized by the statute, the shade session violated the Sunshine Law.⁸² The disturbing aspect for 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 that would settle the city's claim in a bankruptcy proceeding.⁸³ The court strictly limited the discussion in an attorney-client session to the literal words of the statute — "settlement negotiations or strategy sessions related to litigation expenditures."⁸⁴ 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."⁸⁵ 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.'"⁸⁶ The court was persuaded by language found in the legislative history of Section 286.011(8) that "[n]o final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings."⁸⁷

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.⁸⁸ As a practical matter, a government attorney will be unable to bring an offer of settlement to his or her client confidentially in the same manner as he or she would when representing a private client. Instead, the government attorney must be careful merely to seek "direction" regarding "settlement negotiations" or "litigation expenditures." Arguably, seeking authorization to offer a settlement conditionally within certain monetary limits is permissible, as long as the acceptance is conditioned on a final decision to settle at a public meeting if a meeting is required.⁸⁹ As a result, a government attorney will be constrained to steer discussions away from settlement and merely obtain direction and discuss strategy related to litigation expenditures, as well as the status of settlement negotiations. Therefore, the benefits of the attorney-client session are greatly diminished when balanced against the risk of making the transcript of the attorney-client session immediately available for public inspection, which is required if the law is violated.⁹⁰

b. Other States' Applications of the Privilege to Open Meetings Laws

The Florida Supreme Court is one of the few state high courts to reject an independent basis for the attorney-client privilege between the governing body and the government attorney.⁹¹ Courts in other states have recognized an independent basis for the privilege, often based on the strong policy considerations that apply to private clients.⁹²

80. See *City of Dunnellon v. Aran*, 662 S.2d 1026, 1027 (Fla. Dist. App. 5th 1995) (holding that the failure to disclose names of city and outside attorneys in attorney-client session, as required by Section 286.011(8)(d), violates the Sunshine Law). The Annual Report of the Attorney General opines that "pending litigation" means that a lawsuit that has been filed. *Annual Report of the Attorney General*, Fla. Atty. Gen. Op. 98-21 at 78, 82 (1998); but cf. *Freeman v. Times Publ. Co.*, 696 S.2d 427, 428 (Fla. Dist. App. 2d 1997) (holding that discussions regarding methods to achieve compliance with federal desegregation mandate does not fall within the exception for "settlement negotiations"); *Brown v. City of Lauderdale*, 654 S.2d 302, 303 (Fla. Dist. App. 4th 1995) (stating that when a city is not yet a party to ongoing litigation, the term "presently" in Section 286.011(8) does not mean "now," but applies to a "time period from now into the immediate future . . . a short while" (footnote omitted)).

81. 722 S.2d 891 (Fla. Dist. App. 4th 1998).

82. *Id.* at 898. Consultants are not authorized to attend the attorney-client session. *Fla. Publ. Co.*, 670 S.2d at 101.

83. *Zorc*, 722 S.2d at 900-901.

84. *Id.* at 896 (citing Fla. Stat. § 286.011(8)).

85. *Id.* at 900.

86. *Id.* (quoting Special City Council Meeting on May 9, 1995).

87. *Id.* at 901.

88. *Id.* at 899.

89. However, 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. Comm. Substitute Fla. H. 223, 16th Legis., 1st Reg. Sess. (June 8, 1999).

90. *Fla. Publ. Co.*, 670 S.2d at 101.

91. *Neu*, 462 S.2d at 821.

92. E.g. *Sacramento Newsp. Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480, 492 (Cal. Dist. App. 3d 1968); *Okla. Assn. of Mun. Attys. v. State*, 577 P.2d 1310, 1313 (Okla. 1978).

A frequently-cited case that reconciles the application of the privilege and the Open Meetings Law is *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*.⁹³ The California Court of Appeals held that the attorney-client provisions of the California Evidence Code operated concurrently with the California Open Meetings Law.⁹⁴ The court weighed 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.”⁹⁵ The lack of evidence of any legislative intent to abrogate the attorney-client privilege, by implication or otherwise, led the court to conclude that the privilege can operate concurrently with the Open Meetings Law.⁹⁶ In dicta, the court offered the following practical observations:

The 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. 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.⁹⁷

Similarly, in *Oklahoma Association of Municipal Attorneys v. State*,⁹⁸ the Supreme Court of Oklahoma found no legislative intent to abrogate the attorney-client privilege in enacting the Open Meetings Act.⁹⁹ The Open Meetings Act states that “[a]ll meetings . . . shall be held . . . except as hereinafter specifically provided.”¹⁰⁰ In reaching its decision, the court quoted at length from *Sacramento Newspaper Guild*, which provided,

“Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion 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 contentious 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, ‘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.’”¹⁰¹

The Supreme Court of Alabama also held that an attorney’s ability to fulfill his or her ethical duties under the attorney-client privilege was not changed by Alabama’s Sunshine Law.¹⁰² The court balanced the legislative powers with the “inherent, continuing, and plenary” powers the judiciary has over its attorneys as officers of the court.¹⁰³

93. 69 Cal. Rptr. 480, 492 (Cal. Dist. App. 3d 1968).

94. *Id.*

95. *Id.* at 489.

96. *Id.* at 492.

97. *Id.* (citation omitted). Subsequently, California adopted a statute with provisions similar to Florida’s attorney-client session that permits closed meetings between the local governing body and its attorney, after written notice, to discuss pending or threatened litigation. Cal. Govt. Code § 54956.9 (West 1999).

98. 577 P.2d 1310 (Okla. 1978).

99. *Id.* at 1315.

100. *Id.* at 1312 (emphasis omitted).

101. *Id.* at 1313 (quoting *Sacramento Newsp. Guild*, 69 Cal. Rptr. at 490) (citation omitted in original).

102. *Dunn v. Ala. St. U. Bd. of Trustees*, 628 S.2d 519, 529–530 (Ala. 1993).

103. *Id.* at 529.

Likewise, a Texas appellate court in *Markowski v. City of Marlin*¹⁰⁴ held that the attorney-client privilege was protected in spite of an open meetings law.¹⁰⁵ The Texas Open Meetings Act permits a governing body to meet privately with its attorney about pending or contemplated litigation.¹⁰⁶ 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.”¹⁰⁷ The court reasoned that “logic dictates that the information discussed at that meeting should be protected.”¹⁰⁸

The supreme courts of West Virginia, Minnesota, Alaska, Iowa, and Alabama also recognize the continued existence of the time-honored attorney-client privilege after the passage of open meetings laws.¹⁰⁹ The Supreme Court of Iowa shared the Alabama court’s and California court’s views that “the privilege must be carefully circumscribed so as to prevent an abuse.”¹¹⁰

The Arkansas and Nevada supreme courts are aligned with the Supreme Court of Florida.¹¹¹ In *Laman v. McCord*,¹¹² the Supreme Court of Arkansas held that the attorney-client privilege codified in the state’s civil code did not create an exemption to the Freedom of Information Act — Arkansas’s counterpart to the Sunshine Law.¹¹³ Similarly, in *McKay v. Board of County Commissioners of Douglas County*,¹¹⁴ the Supreme Court of Nevada found no implied attorney-client exemption to the Open Meetings Law.¹¹⁵

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 government attorneys’ special duty to uphold the public trust and the nature of the government as a corporate or organizational entity.¹¹⁶

President William Jefferson Clinton’s personal problems, for example, 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 federal government.¹¹⁷ The lower federal courts have significantly limited the privilege in the context of criminal investigations.¹¹⁸

In *In re Grand Jury Subpoena Duces Tecum*,¹¹⁹ the Office of Independent Counsel sought the production of documents created during meetings between the White House counsel and Hillary Rodham Clinton.¹²⁰ 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.¹²¹ The lower court declined to reach this issue, instead deciding that the privilege prevented the production based upon a “‘genuine and reasonable (whether or not mistaken)’ belief that the conversations were privileged.”¹²² The United States Court of Appeals for the

104. 940 S.W.2d 720 (Tex. App. Waco Div. 1997).

105. *Id.* at 727.

106. *Id.* at 725.

107. *Id.* at 726.

108. *Id.* at 727.

109. *Dunn*, 628 S.2d at 529–530; *Cool Homes, Inc. v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1262 (Alaska 1993); *Tausz v. Clarion-Goldfield Community Sch. Dist.*, 569 N.W.2d 125, 128 (Iowa 1997); *Peters v. County Commn. of Wood County*, 519 S.E.2d 179, 187 (W. Va. 1999).

110. *Tausz*, 569 N.W.2d at 128.

111. *Laman v. McCord*, 432 S.W.2d 753, 754 (Ark. 1968) (holding that the city council could not meet with its attorney in private after the passage of the Freedom of Information Act); *McKay*, 746 P.2d at 125 (stating that the Open Meetings Law affects communications with a client to the extent that the client is meeting as a public body).

112. 432 S.W.2d 753 (Ark. 1968).

113. *Id.* at 756.

114. 746 P.2d 124 (Nev. 1987).

115. *Id.* at 125.

116. *E.g. In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 920–921 (8th Cir. 1997).

117. *Id.* at 915; *In re Lindsey*, 158 F.3d at 1266.

118. *In re Lindsey*, 158 F.3d at 1278.

119. 112 F.3d 910 (8th Cir. 1997).

120. *Id.* at 913.

121. *Id.* at 913–914.

122. *Id.* at 914.

Eighth Circuit held that, even if a governmental attorney-client privilege existed, the privilege could not be asserted to withhold potentially relevant information from the grand jury.¹²³ One factor that the court strongly considered was the special duty of government lawyers to report wrongdoing and “the general duty of public service [that] calls upon government employees and agencies to favor disclosure over concealment.”¹²⁴ Specifically, the court found the principles of corporate privilege promulgated in *Upjohn* inapplicable to the government in a criminal context.¹²⁵

The dissent took issue with the majority’s refusal even to 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.¹²⁶ The dissent went on to argue that there was no precedent for holding that the privilege did not apply because a criminal investigation was ongoing,¹²⁷ and 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.¹²⁸

In a second case involving President Clinton, the United States Court of Appeals for the District of Columbia similarly held that

[w]hen government attorneys learn, through communications with their clients, of information related to criminal misconduct, they may not rely on the government attorney-client privilege to shield such information from disclosure to a grand jury.¹²⁹

*In re Lindsey*¹³⁰ involved Deputy White House Counsel Bruce Lindsey’s refusal to answer the Office of Independent Counsel’s questions regarding a subpoena from a federal grand jury on the grounds that the information was protected by the attorney-client or work product privileges.¹³¹ Unlike *In re Grand Jury Subpoena Duces Tecum*, the District of Columbia Circuit acknowledged the existence of the general government attorney-client privilege, citing the common law as recited in the Federal Rules of Evidence and *Restatement (Third) of the Law Governing Lawyers*.¹³² More significantly, the court found that the privilege independently existed under common law.¹³³ However, like the Eighth Circuit, this court declined to extend the privilege to the criminal context,¹³⁴ citing the special duty of government attorneys to report wrongdoings of elected and appointed officials as militating against the privilege.¹³⁵ The dissent in *In re Lindsey* made many of the same arguments as the dissent in *In re Grand Jury Subpoena Duces Tecum*, including the arguments regarding policy considerations.¹³⁶

At the same time the District of Columbia Circuit wrestled with the privilege of the current Deputy White House Counsel Lindsey, the United States Supreme Court considered the Office of Independent Counsel’s argument for a posthumous exception to the privilege for the deceased former Deputy White House Counsel

123. *Id.* at 915. The court declined to reach the issue of whether the general governmental attorney-client privilege exists in civil litigation against private parties. *Id.* at 917–918.

124. *Id.* at 920.

125. *Id.*

126. *Id.* at 926 (Kopf, J., dissenting).

127. *Id.* at 929.

128. *Id.* at 931–932.

129. *In re Lindsey*, 158 F.3d at 1278.

130. 158 F.3d 1263 (D.C. Cir. 1998).

131. *Id.* at 1267.

132. *Id.* at 1269.

133. *Id.* The court found that the exemption of attorney-client privileged materials under the Freedom of Information Act did 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.* (quoting *Coastal Sts. Gas Corp.*, 617 F.2d at 862).

134. *Id.* at 1278.

135. *Id.*

136. *Compare id.* at 1284 (Tatel, J., dissenting from Part II and concurring in part and dissenting in part from Part III) (stating that the government needs the same assurance of confidentiality to encourage full and frank communication between the government and the attorney to provide reliable legal advice) with *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 927–940 (Kopf, J., dissenting) (stating that the attorney-client privilege should apply to White House counsel because it allows proper legal advice due to candid communications).

Vincent W. Foster, Jr.¹³⁷ In *Swidler and Berlin v. United States*,¹³⁸ the Supreme Court concluded that the privilege survives the client's death.¹³⁹ The Court specifically rejected the use of a balancing test in criminal proceedings.¹⁴⁰

While *Swidler* involved a government employee consulting with a private attorney, the Supreme Court's analysis to arrive at its conclusion calls into question the analysis used by the District of Columbia and Eighth Circuits. In rejecting the Office of Independent Counsel's argument for an exception to confidentiality for criminal proceedings, the Supreme Court stated that "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."¹⁴¹

Once again rejecting a balancing test to determine whether the privilege should apply,¹⁴² the Court in *Swidler* emphasized the important policy concern that the parties be able to predict with some degree of certainty whether the conversation will be considered a privileged communication.¹⁴³ 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.¹⁴⁴

Following the Supreme Court's analysis in *Swidler* that no precedent or reason existed for a different application of the privilege in the criminal context than in the civil context,¹⁴⁵ the District of Columbia Circuit's and the Eighth Circuit's rationale — that the criminal nature of the investigation made the privilege inapplicable — is called into question. Most troubling about the District of Columbia Circuit's and the Eighth Circuit's opinions is the uncertainty that they inject into the application of the attorney-client privilege. As the Supreme Court pointed out, how can a client, or even an attorney for that matter, know what may become relevant to a criminal investigation in the future? This injection of uncertainty into the application of the privilege is something against which the Supreme Court repeatedly has cautioned.¹⁴⁶

The United States Court of Appeals for the Sixth Circuit used the reasoning in *In re Grand Jury Subpoena Duces Tecum* to find that city council members were not clients of the government attorney.¹⁴⁷ 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.¹⁴⁸ In *Reed v. Baxter*,¹⁴⁹ two firefighters filed a discrimination suit against the fire chief and the city of Murfreesboro, Tennessee.¹⁵⁰ One council member requested a private meeting to inquire into the circumstances of a promotion, which triggered the lawsuit.¹⁵¹ The plaintiff firefighters sought to compel disclosure of the statements made during the meeting.¹⁵² 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

137. *Swidler & Berlin v. U.S.*, 524 U.S. 399, 401–402 (1998).

138. 524 U.S. 399 (1998).

139. *Id.* at 410–411.

140. *Id.* at 409.

141. *Id.* at 408–409 (citation omitted).

142. The Supreme Court in *Upjohn*, 449 U.S. at 393, and *Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996), also rejected a balancing test.

143. 524 U.S. at 409–410.

144. *Id.*

145. *Id.* at 408–409.

146. *Jaffee*, 518 U.S. at 18 (stating that "[a]n uncertain privilege . . . is little better than no privilege at all") (citing to *Upjohn*, 449 U.S. at 393); *Upjohn*, 449 U.S. at 393 (holding that the effectiveness of the attorney-client privilege would be greatly diminished if its existence was contingent on a judge's determination of the importance of the protected information).

147. *Reed v. Baxter*, 134 F.3d 351, 356–358 (6th Cir. 1998).

148. *Id.* at 353, 358.

149. 134 F.3d 351 (6th Cir. 1998).

150. *Id.* at 353–354.

151. *Id.* at 353.

152. *Id.*

privilege for the management client.¹⁵³ The court found that the council members were not clients at this meeting with their lawyer, because, according to the court, “they were elected officials investigating the reasons for executive behavior.”¹⁵⁴ Following the reasoning of *In re Grand Jury Subpoena Duces Tecum*, the court also declined to find any commonality of interest between the city manager and city council members.¹⁵⁵ However, the dissent cited conflict with the principles of corporate privilege in *Upjohn* under the “subject matter” test and distinguished *In re Grand Jury Subpoena Duces Tecum*, because it was a criminal investigation.¹⁵⁶

C. Importance of the Privilege to Government

1. Policy Considerations

Because of increasing demands that governments provide expanded services and protections to the citizenry, governments are more involved in regulating activities and providing services than they have been in the past. Governments’ decisions can have significant consequences, both for the citizens and for 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, as well as criminal penalties, for the government and government officials.¹⁵⁷

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 government actors need to be placed on equal footing with attorneys representing private clients who seek to further their clients’ individual interests. Government officials and employees should have access to attorneys to inform them of the requirements of the law. They should be able to communicate with a government attorney without fear that their communications may be revealed if those communications ultimately may be relevant to a future criminal investigation. Government attorneys, likewise, should be able to advise their clients with some degree of certainty that their communications are protected from disclosure. This Article recommends certain revisions to the law that are necessary to accomplish these goals and to restore the benefits of the time-honored attorney-client privilege and the related work product privilege to the government.

In the aftermath of the cases involving President Clinton and the *Reed* decision, a government attorney, early in a consultation, must consider certain factors to determine whether the law will protect the confidentiality of the consultation. First, the attorney must consider whether the subject of the consultation is a matter of government business. Government attorneys should not provide legal advice relating to the personal matters 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, government attorneys should apply the *Deason* criteria¹⁵⁸ whenever they seek to protect client communications as confidential. These criteria can assist the government attorney and the client in focusing on the subject matter of the communication and limiting dissemination of the confidential information to those with a need to know.

Finally, the government attorney and the 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 toward private attorneys for advice relative to criminal investigations and matters. The government may, under some circumstances, be required to pay the private attorneys’ fees 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 twenty-first century.

2. Recent Florida Legislation

To remove uncertainty about the applicability of the privilege in the government context and to counteract lower courts’ misconstruction of the Florida Supreme Court’s opinion in *Neu*, the Florida legislature enacted

153. *Id.* at 358.

154. *Id.* at 357.

155. *Id.* at 357–358.

156. *Id.* at 359–360 (Jones, J., dissenting).

157. *E.g.* 42 U.S.C. § 1983 (1994); Fla. Stat. §§ 110.127, 111.012(2), 112.317, 112.3188(2)(c)(4), 119.02, 119.10, 213.053, 286.011, 402.165, 403.161, 839.04–839.26 (2000).

158. *Supra* nn. 44–50 and accompanying text.

Senate Bill 794 in June 2000.¹⁵⁹ The legislature amended Section 90.502 of the evidence code by adding a special provision regarding the attorney-client privilege. This new provision clearly expresses the intent of the legislature.¹⁶⁰ It reads as follows:

(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 established in this section. This shall not be construed to constitute an exemption to either s. 119.07 [the Public Records Chapter] or s. 286.011.¹⁶¹

The amendment does not create an additional exemption under the Sunshine Law.¹⁶² All meetings that previously were required to be held in the open must remain public.¹⁶³ 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.¹⁶⁴ Similarly, government attorneys must not act as conduits of information for elected or appointed officials who seek advice on matters that are, or are likely to become, the subject of public meetings.¹⁶⁵ Government attorneys also must be vigilant about maintaining the confidentiality of information received in private discussions with elected and appointed officials unless the privilege is waived.¹⁶⁶

Significantly, Senate Bill 794 contains the term “discussion or activity” instead of the word “communication,” which is the term used in previous subsections of the statute.¹⁶⁷ Although no explanation is offered in the bill, and no guidance is provided in the Senate Staff Analysis of the bill,¹⁶⁸ 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” and an “activity” from a public meeting. Additionally, the use of the words “discussion” and “activity” allows the privilege to extend not only to elected or appointed officers, but also to mid-level managers and employees of the government. A meeting between one elected official and other parties ordinarily is not subject to the Sunshine Law. Appointed officers and public employees regularly attend administrative staff meetings and meetings with citizens and government attorneys as part of their normal duties. Such meetings are not subject to the Sunshine Law.

The amendment also does not change the instances at which 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.¹⁶⁹ While this issue remains unresolved by the United States Supreme Court and the Florida Supreme Court, the similarities between a corporation and the government, as previously discussed,¹⁷⁰ justify the application of the criteria by Florida courts. 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

159. Fla. Sen. 794, 16th Legis., 2d Reg. Sess. at 3308.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See Zorc*, 722 S.2d at 896 (stating that the intent of the Sunshine Law is to require “governmental entities to conduct their business ‘in the sunshine’” for the purpose of eliminating governmental secrecy).

165. *See Blackford v. Sch. Bd. of Orange County*, 375 S.2d 578, 580 (Fla. Dist. App. 5th 1979) (finding that sessions between individual board members and the school board attorney violated the Sunshine Law because the sessions “resulted in six de facto meetings by two or more members of the board at which official action was taken”).

166. *In re Lindsey*, 158 F.3d at 1269 (citing Theodore B. Olsen, *Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. Off. Leg. Counsel 481, 495 (1982)).

167. Fla. Sen. 794, 16th Legis., 2d Reg. Sess. at 3307. The original Senate bill and the companion House bill read differently than the bill as adopted. 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.” Fla. Sen. 1620, 16th Legis., 1st Reg. Sess. (Mar. 7, 2000); Fla. H. 2083, 16th Legis., 1st Reg. Sess. (Mar. 22, 2000).

168. *See* Fla. Sen. Staff Analysis Comm. Substitute Sen. 1620 (amending Senate Bill 794 to add the identical provisions of the Committee Substitute for Senate Bill 1620 as it passed out of the Governmental Oversight and Productivity Committee).

169. 632 S.2d at 1383; *supra* nn. 44–50 and accompanying text.

170. *Supra* pt. II(B)(2)–(3).

scrutiny. This process will minimize the threat of government officials and employees cloaking information with the attorney-client privilege to avoid discovery. The regular application of the criteria, moreover, will encourage the government attorney and the client to focus on the issue of confidentiality and on the proper role of the government attorney as rendering legal advice and services to government officials and employees on matters within the scope of their duties. It also will encourage the parties to limit 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.¹⁷¹

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.¹⁷² The amendment is procedural in nature and does not grant or take away substantive rights. Accordingly, retroactive application is warranted.

3. Additional Legislation

Additional legislation is needed to allow an attorney representing a government to communicate effectively with his or her client. Under the current exemption that permits the attorney-client session,¹⁷³ the government attorney can only consult in private with the governing body when litigation is pending.¹⁷⁴ A Florida attorney general opinion concluded that pending litigation means a lawsuit has been filed.¹⁷⁵

There is no rational justification for limiting the attorney-client session to pending litigation in which an action has been filed. Notices of claims and threats of litigation are common events for state and local governments. Government attorneys should be able to consult with the governing body to avoid costly litigation or to minimize 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.¹⁷⁶ Transcripts of the proceedings even could be reviewed in camera upon a proper showing prior to the conclusion of the litigation or claimed or threatened litigation.¹⁷⁷

There is also no reason to exclude experts and other government officers and employees who have relevant information about the lawsuit or claimed or threatened litigation. Elected officials, like corporate directors, should be afforded all relevant information in the session with their attorney to make informed decisions on matters that affect the rights of citizens or the property interests of the community. Abuses of the sessions would be exposed under the procedural safeguards already provided in the law. Accordingly, the statute should be amended to allow persons who possess relevant information about the lawsuit or pending claim to share that information with a government attorney.

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 was judicially created, with its genesis in the case of *Hickman v. Taylor*,¹⁷⁸ which arose in the context of amendments to the Federal Rules of Civil Procedure.¹⁷⁹ Prior to the amendments, each party to litigation had only a limited ability to discover the other party's evidence.¹⁸⁰ The amendments created new discovery and deposition proceedings.¹⁸¹ The purpose of the amendments was to eliminate the element of surprise and "to obtain the fullest possible knowledge of the issues and facts before trial."¹⁸²

171. *Deason*, 632 S.2d at 1383.

172. Fla. Sen. Comm. Govt. Oversight Productivity, Comm. Substitute for Sen. 1620 (Apr. 12, 2000).

173. Fla. Stat. § 286.011(8).

174. *Id.*

175. *Supra* n. 80.

176. Fla. Stat. § 286.011(8)(e).

177. *Id.* § 286.011(8).

178. 329 U.S. 495, 510–512 (1947).

179. *Id.* at 500–501.

180. *Id.*

181. *Id.* at 501.

182. *Id.*

In *Hickman*, the plaintiff's attorney demanded witness statements taken by the defendant's attorney, who also was asked to respond to deposition questions or interrogatories outlining what the witnesses had told him.¹⁸³ The plaintiff's attorney demonstrated no need for this information other than to "help prepare himself to examine witnesses, to make sure he overlooked nothing" in the preparation of his case.¹⁸⁴ In unanimously rejecting the plaintiff's position, the United States Supreme Court discussed the policy considerations supporting judicial recognition of the work product privilege.¹⁸⁵ While recognizing the policy interests in liberalizing discovery, the Court also recognized that proper preparation of a case, which is 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 inevitably 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.¹⁸⁶

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.¹⁸⁷ Since *Hickman*, both the federal court system and most state court systems, including Florida, have adopted rules of procedure codifying the principles set forth in the case.¹⁸⁸ The work product privilege is now uniformly accepted by all courts.

Like the attorney-client privilege, the work product privilege commands the support of strong public policy considerations. 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 would remain unwritten."¹⁸⁹ The United States Supreme Court reaffirmed these "strong public policy" considerations thirty-five years later when it recognized the work product privilege for corporations in *Upjohn*.¹⁹⁰

B. Application of the Work Product Privilege

1. What Is an Attorney's Work Product?

"What constitutes 'work product' is incapable of concise definition adequate for all occasions."¹⁹¹ 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 other party's representative."¹⁹² However, not every document prepared in anticipation of litigation or for trial is attorney work product. The document must contain or reflect "the attorney's legal theories, research, and certain factual material gathered in preparation for proper representation of the client."¹⁹³

183. *Id.* at 498–499.

184. *Id.* at 516 (Jackson, J., concurring). 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 law suit developed into 'a battle of wits between counsel.'" *Id.* In response to this argument came Justice Robert H. Jackson's famous remark: "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.*

185. *Id.* at 511.

186. *Id.* at 510–511.

187. *Id.* at 511–513.

188. *See* Fed. R. Civ. P. 26(b)(3) (2000) (stating that an attorney's work product should be protected from discovery by the court unless the proper showing has been made); Fla. R. Civ. P. 1.280(b)(3) (2000) (stating that the court should protect an attorney's work product from discovery unless the proper showing has been made). Florida first officially recognized the work product privilege in *Atlantic Coast Line Railroad Company v. Allen*, 40 S.2d 115, 116 (Fla. 1949), where the court employed the then-recent *Hickman* decision to find that witness statements taken by employees of the defendant were protected from disclosure as work product.

189. *Hickman*, 329 U.S. at 511.

190. 449 U.S. at 395.

191. *Surf Drugs, Inc. v. Vermette*, 236 S.2d 108, 112 (Fla. 1970).

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

193. *In re Grand Jury Proc.*, 604 F.2d 798, 801 (3d Cir. 1979) (citation omitted).

For the documents to be protected, they must be prepared in anticipation of litigation or for trial.¹⁹⁴ 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.¹⁹⁵ The courts generally have found that “anticipated” litigation must be a “substantial likelihood” rather than a “remote possibility.”¹⁹⁶

The courts have distinguished “fact work product” and “opinion work product.”¹⁹⁷ “Fact work product” is factual information that “relates to the case and is gathered in anticipation of litigation.”¹⁹⁸ Internal audits and statistical analyses prepared at the request of corporate counsel in response to a regulatory agency’s investigation of the corporation are examples of fact work product.¹⁹⁹ “Opinion work product” is information that contains “the attorney’s mental impressions, conclusions, opinions, and theories.”²⁰⁰ Summaries of employee statements made by corporate counsel are examples of opinion work product.²⁰¹

“Fact work product” and “opinion work product” receive different levels of protection under the rules and case law.²⁰² Fact work product is discoverable upon a showing that the party seeking the work product has need of the material and is “unable without undue hardship to obtain the substantial equivalent of the materials by other means.”²⁰³ Opinion work product is subject to greater protection, and most courts have given opinion work product nearly absolute protection so that it is discoverable only in rare and extraordinary circumstances.²⁰⁴

The majority of courts, including the Supreme Court of Florida, hold that work product retains its protection, whether qualified or absolute, after the termination of the litigation; the protection is perpetual.²⁰⁵ As the court stated in *In re Murphy*,²⁰⁶

The primary purpose of the work product privilege 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 to remain faithful to the articulated policies of *Hickman*, is a perpetual protection for work product, one that extends beyond termination of the litigation for which the documents were prepared.²⁰⁷ Any work

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

195. *See Deason*, 632 S.2d at 1385 (stating that “[w]hen 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”).

196. *In re Spec. Sept. 1978 Grand Jury*, 640 F.2d 49, 64, 65 n. 19 (7th Cir. 1980).

197. *Deason*, 632 S.2d at 1384; *see Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (holding that “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”); *In re Murphy*, 560 F.2d at 329 n. 1 (quoting Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides that “‘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.’”).

198. *Deason*, 632 S.2d at 1384.

199. *Id.* at 1384–1386.

200. *Id.* at 1384.

201. *Id.* at 1386.

202. Fed. R. Civ. P. 26(b)(3); Fla. R. Civ. P. 1.280(b)(3); *Deason*, 632 S.2d at 1384.

203. Fed. R. Civ. P. 26(b)(3); Fla. R. Civ. P. 1.280(b)(3). Rule 26(b)(3) also requires the requesting party to have a “substantial” need of the materials. Fed. R. Civ. P. 26(b)(3).

204. Fed. R. Civ. P. 26(b)(3); Fla. R. Civ. P. 1.280(b)(3) (stating that “[i]n ordering discovery of . . . 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)); *see In re Murphy*, 560 F.2d at 334 (noting that Rule 26(b)(3) of the Federal Rules of Civil Procedure provides special protection for work product containing opinions).

205. *Duplan*, 509 F.2d at 736; *In re Murphy*, 560 F.2d at 334; *Alachua Gen. Hosp., Inc. v. Zimmer U.S.A., Inc.*, 403 S.2d 1087, 1088 (Fla. Dist. App. 1st 1981); *see infra* pt. III(B)(2) (discussing public sector work product in Florida).

206. 560 F.2d 326 (8th Cir. 1977).

207. *Id.* at 334.

product privilege ceases when the materials are intended for use at trial.²⁰⁸

Although the work product privilege and attorney-client privilege are separate and distinct privileges, there is overlap as to both the documents that will be protected and the purpose underlying the privileges.²⁰⁹ Information falling within the attorney-client privilege may, for example, be incorporated into the work product, thus providing protection for the document within both privileges.²¹⁰

Unlike the attorney-client privilege, which belongs to the client alone, the work product privilege seeks to protect the interests of the attorney as well as the client.²¹¹ Thus, while the client alone may waive the attorney-client privilege, the work product privilege generally must be waived by both the attorney and the client.²¹² Many federal courts have held that, even when the client loses the work product privilege regarding documents that show ongoing client fraud, the attorney still may claim the privilege to protect the attorney's mental impressions, conclusions, opinions, and legal theories about the case.²¹³

Also, unlike the attorney-client privilege, the work product privilege generally is not waived by sharing the work product with third parties.²¹⁴ Because the purpose of the privilege is to protect the work product from the knowledge of and use by opposing counsel, sharing the document with third parties does not waive its protection.²¹⁵ 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, it also includes intangible material reflecting the attorney's thought processes.²¹⁶ In *Sporck v. Peil*,²¹⁷ the plaintiff's counsel requested identification and production of all documents the defendant reviewed in preparation for the deposition.²¹⁸ The 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.²¹⁹ The defendant's attorney contended that the selection process itself represented "mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation."²²⁰ The identification and production of the documents as a group, the attorney argued, would reveal work product.²²¹ The court agreed, finding the gathering and grouping of the documents fell within the "highly protected category of opinion work product."²²²

208. *Dodson v. Persell*, 390 S.2d 704, 707 (Fla. 1980).

209. *In re Grand Jury Proc.*, 604 F.2d at 802; *see In re Murphy*, 560 F.2d at 337 (holding that "[a]lthough '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)).

210. *In re Grand Jury Proc.*, 604 F.2d at 802.

211. *In re Grand Jury Proc.*, 43 F.3d 966, 972 (5th Cir. 1994); *see In re Grand Jury Proc.*, 604 F.2d at 801 (stating that an attorney may assert the work product privilege).

212. *In re Grand Jury Proc.*, 604 F.2d at 801–802.

213. *In re Grand Jury Proc.*, 43 F.3d at 972; *In re Spec. Sept. 1978 Grand Jury*, 640 F.2d at 63.

214. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593 (3d Cir. 1984); *In re Grand Jury Proc.*, 43 F.3d at 970.

215. *In re Grand Jury Proc.*, 43 F.3d at 970.

216. *Hickman*, 329 U.S. at 511.

217. 759 F.2d 312 (3d Cir. 1985).

218. *Id.* at 313–314.

219. *Id.* at 314.

220. *Id.* at 315.

221. *Id.*; *see Intl. Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 42–43 (2d Cir. 1975) (holding that a lower court's order, which stated that the parties may not interview potential witnesses without the other party being present or having the interview taken by a court reporter, invaded the attorney's work product); *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89, 96 (S.D. Cal. 1987) (noting that questions directed toward a deponent as to what questions the attorney asked the deponent in preparing for the deposition invaded the attorney's work product); *Surf Drugs, Inc.*, 236 S.2d at 113 (stating that an interrogatory that requested the party or attorney to evaluate a witness's testimony is an invasion of the work product privilege); *Old Holdings, Ltd. v. Taplin, Howard, Shaw & Miller, P.A.*, 584 S.2d 1128, 1128–1129 (Fla. Dist. App. 4th 1991) (finding that billing statements by attorneys could reveal mental impressions and opinions of attorneys and may be protected from disclosure by attorney-client and work product privileges).

222. *Sporck*, 759 F.2d at 316.

2. The Work Product Privilege of the Government Attorney and the Public Records Act

Florida's Public Records Act is codified in Chapter 119 of the Florida Statutes. The Act provides that "all state, county, and municipal records shall be open for personal inspection by any person."²²³ Section 119.011(1) of the Public Records Act defines public records as "all documents . . . or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."²²⁴

Early in the history of the Public Records Act, the Florida Supreme Court declined to recognize any exemption for a government attorney's work product or attorney-client privileged documents.²²⁵ In *Wait v. Florida Power and Light Company*,²²⁶ the plaintiff's counsel requested attorney-client and work product privileged documents from the City of New Smyrna pursuant to the Public Records Act.²²⁷ The Supreme Court of Florida found that, in Section 119.07(2), the legislature intended to exempt only those public records made confidential by statute.²²⁸ 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.²²⁹ Any exemption, the court noted, must come from the legislature and not from the courts.²³⁰

Unlike members of 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 created an exemption for certain types of work product.²³¹ No exemption exists for documents that otherwise would be protected by the attorney-client privilege.

A demand for a government attorney's work product or attorney-client documents, often shrouded in a public records request, initially requires a careful analysis whether the document is even a public record. In *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Incorporated*,²³² 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."²³³ 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."²³⁴ These documents, therefore, were not public records and were not subject to inspection or copying.

Most recently, and of direct application to the work product privilege, the Florida Supreme Court in *Johnson v. Butterworth*²³⁵ found that an attorney's notes made in preparation for trial were not public records.²³⁶ Because they were not public records, these notes were not subject to inspection even after the conclusion of the litigation.²³⁷

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 Act.²³⁸ Section 119.07(3) provides for a number

223. Fla. Stat. § 119.01(1).

224. *Id.* § 119.011(1).

225. *Wait v. Fla. Power & Light Co.*, 372 S.2d 420, 424 (Fla. 1979).

226. 372 S.2d 420 (Fla. 1979).

227. *Id.* at 422.

228. *Id.* at 424.

229. *Id.*

230. *Id.*

231. *See infra* nn. 238–243 and accompanying text (discussing Florida Statutes Section 119.07(3)(1)(1)).

232. 379 S.2d 633 (Fla. 1980).

233. *Id.* at 640.

234. *Id.* at 641 (emphasis added).

235. 713 S.2d 985 (Fla. 1998).

236. *Id.* at 986.

237. *Id.* at 987.

238. *See* Fla. Stat. § 119.07 (giving exemptions for the inspection, examination, and duplication of records under the Public Records Act).

of exemptions to the requirement to produce the records.²³⁹ One exemption directly relevant to the work product privilege is an exemption for 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 which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings.²⁴⁰

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.²⁴¹ Second, the litigation or adversarial proceeding must be “imminent” as opposed to “substantially likely.”²⁴²

These exemptions, along with the courts’ failure to exempt fact work product, impose harsh constraints on the government attorney and, unlike businesses in the private sector, expose the government to successive lawsuits.²⁴³ A government attorney naturally would be 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 also a need for confidentiality of written documents that contain attorney-client information and work product of the attorney. Disclosing attorney-client documents to opposing counsel during litigation serves no public purpose. Similarly, disclosing the government attorney’s mental impressions, conclusions, or litigation strategy to opposing counsel in subsequent litigation does not serve any public purpose either.

A solution for restoring government attorneys’ ability to represent the public client adequately is to exempt government attorneys’ documents from inspection under the state’s public records law in a way similar to that enjoyed by federal government attorneys. Like 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.²⁴⁴ However, exemption five of the Freedom of Information Act²⁴⁵ provides that “inter-agency or intra-agency memorandums 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.²⁴⁶

Federal courts, including the United States Supreme Court, have interpreted this exemption to cover those documents that a private party could not obtain if it were in litigation with an agency.²⁴⁷ Citing the Senate Report adopting the exemption, the United States Supreme Court stated that “Exemption Five ‘would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.’”²⁴⁸ Therefore, documents that 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 Freedom of Information Act.²⁴⁹

239. *Id.* § 119.07(3). Some of these exemptions include examination questions and answers, criminal intelligence and investigation information, and information revealing the identification of a confidential informant or source. *Id.*

240. *Id.* § 119.07(3)(1)(1). There is no exemption for documents that would be otherwise nondiscoverable because of the attorney-client privilege. *Id.* § 119.07. Written communication between the attorney and the client must be turned over unless it also contains opinion work product. *Id.* § 119.07(3)(1)(1).

241. *Id.*

242. *In re Spec. Sept. 1978 Grand Jury*, 640 F.2d at 64, 65 n.19 (holding that the work product privilege attaches when there is a “substantial likelihood” of litigation, not merely a “remote possibility”).

243. See Robert D. Peltz, *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) (stating that the narrow privilege recognized under Florida’s Public Records Act could allow a party to obtain work product materials from previous lawsuits).

244. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

245. 5 U.S.C. § 552(b)(5) (1994). Exemptions are contained in Section 552(b)(1)–(9).

246. *Id.*

247. *Sears, Roebuck & Co.*, 421 U.S. at 148–149; *EPA v. Mink*, 410 U.S. 73, 85–86 (1973).

248. *Sears, Roebuck & Co.*, 421 U.S. at 154.

249. *Id.* at 154–155.

The Supreme Court in *National Labor Relations Board v. Sears, Roebuck and Company*²⁵⁰ examined the policy considerations underlying the exemption,²⁵¹ many of which are the same policy considerations discussed earlier in this Article in favor of the attorney-client privilege.²⁵² Quoting from the Senate Report, the Court stated that “‘frank discussion of legal or policy matters’ in writing might be inhibited if the discussion were made public; and the ‘decisions’ and ‘policies formulated’ would be the poorer as a result.”²⁵³

Florida’s citizens would be well served by the adoption of an amendment to the Public Records Act that would exempt the working papers of government attorneys and documents that would fall within the attorney-client or work product privileges if applied to private parties. The courts’ in camera inspection of the documents could resolve any perceived abuse of the exemption. The United States Supreme Court noted that, while access to public documents should not be less or greater for a litigant than for other citizens, the Freedom of Information Act was designed to inform the public about government action and “not to benefit private litigants.”²⁵⁴

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 generally are protected from forced disclosure. Private individuals and businesses enjoy these privileges. Private attorneys use these privileges to benefit the interests of their clients.

Federal, state, and local governments, together with their elected and appointed officers and employees, including government attorneys, have not been permitted to share in these same privileges because of the well-intended principle that all the government’s business is open to the public. In actuality, however, overly broad open meetings laws and public records laws inhibit government officials from seeking legal counsel. Court decisions interpreting these laws create doubt as to 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 prepare cases for trial adequately and in the best interest of the government, because their documents may be compelled to be disclosed.

There is a trend to restore these honored privileges to government. Some courts and state legislatures have recognized the importance of restoring these privileges. Government officials must be able to meet privately with public counsel with reasonable assurance that the information they provide will remain confidential. Government decision-makers are best served with the sound advice of attorneys who are fully knowledgeable about the government’s 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.

However, additional legislation is necessary to remove legislative or judicial barriers that impede government attorneys’ ability to provide effective legal counsel to the government. Government attorneys should be able to prepare cases for trial and to 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 governments on an equal footing with private litigants.

250. 421 U.S. 132 (1975).

251. *Id.* at 150.

252. *Supra* pt. II (discussing the attorney-client privilege).

253. *Sears, Roebuck & Co.*, 421 U.S. at 150; *Mink*, 410 U.S. at 87. The Court looked at the legislative history of exemption five and quoted from page nine of Senate Report Number 813 as follows:

It 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 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.”

Mink, 410 U.S. at 87.

254. *Sears, Roebuck & Co.*, 421 U.S. at 143 n. 10.