SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1620

SPONSOR: Governmental Oversight and Productivity Committee and Senator Diaz-Balart

SUBJECT: Lawyer-Client Privilege

DATE: April 12, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable
2.	Rhea	Wilson	GO	Favorable/CS
3.				
4.				
5.				

I. Summary:

This committee substitute amends s. 90.502, F.S., which is the section of the Florida Evidence Code providing a lawyer-client privilege. The committee substitute would add subsection (6) to s. 90.502, F.S., to provide that a discussion or activity that is not a meeting for purposes of s. 286.011, F.S., is not to be construed to waive the attorney-client privilege. Further, the committee substitute provides that this provision does not create a new exemption, or alter an existing exemption, to either s. 119.07, F.S., or to s. 286.011, F.S.

This committee substitute amends section 90.502, Florida Statutes.

II. Present Situation:

Attorney-Client Privilege

At common law, communications between attorney and client were privileged in order to allow the client to receive effective legal advice and to permit a lawyer to prepare for litigation. Total disclosure by the client is encouraged when the client knows that disclosure of any communication between the client and the attorney may be prevented. Any harm to the search for justice by limitations on inquiry into all relevant facts is considered to be outweighed by the benefits of full disclosure by the client. When an attorney is aware of all the facts in a matter, the attorney can discourage useless litigation or encourage the pursuit of a valid claim.[1] For the most part, the attorney-client privilege is now codified in s. 90.502, F.S., which is part of the Florida Evidence Code.

[1] *Erhardt, Florida Evidence* s. 502.1 (1999 Ed.), citing *Brookings v. State*, 495 So.2d 135, 139 (Fla. 1986).

The Florida Evidence Code[2] replaces and supersedes the existing statutory and common law which is in conflict with its provisions.[3] Section 90.103(1), F.S., provides that the Code is applicable in the same proceedings in which the rules of evidence were applied prior to the adoption of the Code. Judicial decisions, statutes, and rules of court have all spoken to different proceedings in which the strict rules of evidence, and therefore the Code, are inapplicable. Some of the proceedings where the Code is inapplicable are grand jury proceedings, extradition proceedings, preliminary hearings in criminal cases, proceedings involving sentencing, the granting or revoking of probation, the issuance of arrest and search warrants, bail proceedings, habitual offender proceedings, and bar disciplinary proceedings.[4]

Section 90.502, F.S., which contains the attorney-client privilege, generally provides that neither an attorney nor a client may be compelled to divulge confidential communications between a lawyer and client which were made during the rendition of legal services. There must be an attorney-client relationship before the privilege exists.[5] Section 90.502(1)(b), F.S., includes within the definition of the term *client*

> . . . 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.

Thus, it appears that governmental bodies and units are included within the definition of clients who possess a lawyer-client privilege, though this privilege is limited by the application of public records and meetings requirements.

A corporation, governmental entity, or other legal entity differs from a natural person in that it can only speak through its employees. In order for an attorney to communicate with a governmental entity who is a client, the attorney must communicate with governmental employees. Not all employees, however, may be associated closely enough with the governmental authority to be considered as speaking for the client. Section 90.502, F.S., does not specifically address the issue of which corporate or governmental employees have a sufficient identity with the corporation or government so that communications between the attorney and certain employees will be protected by the attorney-client privilege.

The Florida Supreme Court reviewed the application of the attorney-client privilege in the corporate context in the case of *Southern Bell Tel. & Tel. Co. v. Deason*.[6] The opinion focused upon the need for the free flow of information between attorney and client to enable the attorney to provide legal advice. The following criteria were established by the court to determine whether communications in the corporate context are protected by the attorney-client privilege:

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[2]Chapter 90, F.S.

[3]Section 90.102, F.S.

[4]*Erhardt*, at s. 103.1, and cases cited therein.

[5]*Erhardt*, at s. 502.2.

[6]632 So.2d 1377 (Fla. 1994)

- The communication would not have been made but for the contemplation of legal services;
- The employee making the communication did so at the direction of his or her corporate superior;
- The superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- The content of the communications relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; and
- The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[7]

The power to assert the corporation's attorney-client privilege resides in the corporation's board of directors. A person who is a shareholder and a director cannot waive the corporation's privilege.[8]

The Attorney-Client Privilege, the Sunshine Law and the Public Records Act

In November of 1992, Floridians adopted an amendment to the State Constitution which established a constitutional right of access to public records and public meetings. Article I, s. 24(b) of the State Constitution, states:

> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and notices as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Under Article 1, s. 24(c) of the State Constitution, the Legislature is authorized to provide by general law for the exemption of meetings from public access requirements. Exemptions must:

- State with specificity the public necessity justifying the exemption.
- Be no broader than necessary to accomplish the stated purpose of the law.
- Contain only exemptions from the requirements and provisions governing enforcement, and relate to one subject.

In addition to constitutional public records and meetings requirements, two statutory enactments, the Government in the Sunshine Law[9] and the Public Records Act[10] significantly restrict the ability of a Florida governmental body to assert the attorney-client privilege. The Florida Sunshine Law provides:

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[7]*Deason*, at 1383.

[8]*See, e.g., Tail of the Pup, Inc., v. Webb*, 528 So.2d 506 (Fla. 2d D.C.A. 1988).

[9]Section 286.011, F.S.

[10]Chapter 119, F.S.

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the State Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.[11]

The issue of whether an attorney-client privilege was created by section 90.502, F.S., which indicates governmental bodies could meet privately with their attorneys, has been considered by the Florida Supreme Court. The Court stated:

> Section 90.502(1)(c) provides that 'a communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons . . . . The Law Revision Council Note to section (1), Florida Statutes Annotated 90.502 (1979), comments that 'when the communication is made in public . . . the intent to keep the communication confidential is lacking and the privilege cannot be claimed.' The Sunshine Law explicitly provides for public meetings; communications at such public meetings are not confidential and no attorney/client privilege can arise therefrom.[12]

In other words, no attorney-client privilege attaches to public conversations. The Supreme Court rejected arguments that in codifying the attorney-client privilege in s. 90.502, F.S., the Legislature intended to create an exception to the Sunshine Law. Although the court commented that the result of its holding would give the government's adversary an unfair advantage, it suggested that only amendment of the statutes or constitution could result in private meetings with the attorney.

Subsequently, s. 286.011(8), F.S., was added by the 1993 session of the Legislature to provide a limited exception from the Sunshine Law for private meetings between a governmental agency and its chief administrative or executive officer and the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency.[13] This subsection requires certain conditions to be met, including: meeting certain notice requirements; limiting the subject matter of the meeting to settlement negotiations or strategy sessions relating to litigation expenses; and preparing a transcript of the meeting. Subsection (8) also requires the transcript of the meeting to be published when the litigation is concluded.

Chapter 119, F.S., the Public Records Act, opens all state, county, and municipal records for inspection by any person, with certain stated exceptions. In *City of North Miami v. Miami Herald Publishing Co.,*[14] the Supreme Court considered the issue of whether the Public Records Act applied to files and records of confidential communications between the state and its attorneys, which the attorney-client privilege would otherwise protect. The Supreme Court held that the attorney-client privilege in s. 90.502, F.S., does not exempt written communications between the

[11]Section 286.011(1), F.S.

[12]*Neu v. Miami Herald Publishing Co.,* 462 So.2d 821at 824 (Fla. 1985).

[13]*See*, ch. 93-232 L.O.F.

[14]468 So.2d 218 (Fla. 1985),

government and its lawyers from disclosure under the Public Records Act. The Supreme Court ruled that, since public records are not confidential, the attorney-client privilege does not protect the records.

Nevertheless, the Supreme Court recognized that s. 119.07(3)(o), F.S.,[15] did create an opinion work product exception to the Public Records Act. Under this exception, there are three requirements to exempt a public record from the Act so that a claim of privilege may be asserted:

- First, the record must be one that the agency attorney prepared or expressly directed be prepared.
- Second, the record must reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency.
- Third, the record must be one which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or in anticipation of imminent civil or criminal litigation or adversarial administrative proceedings.

Subsection 119.07(3)(l)1., F.S., provides that the work product exemption continues only until the conclusion of the litigation or adversarial administrative proceeding.

However, not all materials in the files of a governmental attorney are public records. In *State v. Kokal,*[16] the Supreme Court approved the definition of public records as materials ". . . prepared in connection with official agency business which are intended to perpetuate, communicate, or formalize knowledge of some type." The following materials in lawyers' files have been determined *not to be* public records: drafts and notes intended as mere "precursors" of government records or designed to aid the attorney in remembering things; rough drafts; notes to be used in preparing other documentary materials; tapes and notes that a secretary takes for dictation; an outline of evidence which the attorney may need for trial; a list of questions the county attorney planned to ask a witness: and a proposed trial outline.[17]

Section 119.07(3)(b), F.S., exempts from public disclosure criminal investigative and intelligence information as long as the information is active. Section 119.011(3)(d)(2), F.S., defines an active investigation as an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future. In *State v. Kokal,*[18] since the defendant was seeking post-conviction relief, the Supreme Court compelled disclosure to the defendant of public records in the file of the state attorney relating to the defendant's conviction. The court reasoned that after a defendant's conviction and sentence have become final, the criminal investigative information is no longer active even though a defendant may file, or has filed, a motion for post-conviction relief.

[15]Currently, s. 119.07(3)(l)1., F.S.

[16]562 So.2d 324, 327 (Fla. 1990).

[17]*See, e.g., Orange County v. Florida Land Co.,* 450 So.2d 341, 344 (Fla. 5th D.C.A. 1984); *Bryan v. Butterworth,* 692 So.2d 878, 880 (Fla. 1997).

[18]562 So.2d 324, 326 (Fla. 1990)

Section 624.311(2), F.S., provides a specific exception to the Public Records Act[19] for the records of insurance claim negotiations of any state agency or political subdivision. The confidentiality extends until termination of all litigation and settlement of all claims arising out of the incident. One commentator has indicated that it is important to note that this section only provides that the records are exempt from the Public Records Act.[20] Because of the exemption, the records are subject to the general claim of attorney-client and work product privileges.[21] The section does not provide that the records are privileged.[22] If the state or one of its subdivisions wishes to assert the attorney-client privilege, whether the privilege applies depends on the other general principles of s. 90.502, F.S.[23]

The Attorney General has issued several recent opinions on the attorney-client privilege as it applies to governmental entities. In *Attorney General Opinion 97-61* (1997), the Attorney General answered questions from the Pinellas County School Board attorney concerning communications between the board and the school board attorney, as well as the superintendent of schools and the school board attorney. After determining that school boards are subject to the terms of s. 286.011, F.S., and that discussions involving the school board and its attorney must be held in open meetings, except when the discussions relate to settlement negotiations or strategy sessions concerning litigation expenditures, the Attorney General concluded that no attorney client privilege attaches to public conversations. *Therefore, communications regarding school business between individual members of the school board and the school board attorney are not privileged communications since it is the school board as a body that is the client, and meetings of this body are subject to the Sunshine Law.*

The Attorney General also opined that, in contrast to meetings of the school board, conversations between the school superintendent and the school board attorney are not generally subject to open meeting requirements because the superintendent is an *employee* of the board.[24] On the other hand, while these conversations may not be subject to the Sunshine Law, they are also not privileged conversations for which confidentiality may be asserted. A privileged communication between a lawyer and client is confidential if it is not intended to be disclosed to third persons. According to the Attorney General, *since the privilege belongs to the client school board, the privilege can only be asserted for the narrow exceptions found in s. 286.011, F.S., (i.e. discussions about settlement negotiations or litigation expenditures between the board and its attorney)*. The Attorney General concluded that the attorney's legal services are not personal to

[19]Section 119.07(1), F.S.

[20]*Erhardt,* at s. 502.4.

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*See, e.g., Deerfield Beach Publishing, Inc. v. Robb,* 530 So.2d 510, 511 (Fla. 4th D.C.A. 1988) (requisite to application of the Sunshine Law is a meeting between two or more public officials); an example of when the conversation between the superintendent and attorney would be subject to open meeting requirements is when the superintendent has been delegated the authority to act on behalf of the school board in a decision-making capacity in meetings with the school attorney.

the individual members of the board or the school superintendent and should not be the subject of requests for legal advice from the school board attorney.

In 1998, in *Attorney General Opinion* 98-21, the Attorney General provided an opinion regarding whether the exemption afforded by s. 286.011(8), F.S., for pending litigation applied when no lawsuit had been filed but the parties believed litigation was inevitable. The Attorney General stated that Florida courts have held that the Legislature intended a strict construction of the exemption afforded by s. 286.011(8), F.S.[25] The Attorney General was of the opinion that the exemption afforded by s. 286.011(8), F.S., did not apply when no lawsuit had been filed even though both parties believed litigation was inevitable. The Attorney General indicated that, had the Legislature intended to extend the exemption to include impending or imminent litigation, it could have easily so provided in express terms. The Attorney General noted the Legislature had taken that exact measure in s. 119.07(3)(l)(1), F.S., where it clearly indicated that the limited work-product exemption provided for therein applied not only to records "prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings," but also to records that were "prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings[.]"

III. Effect of Proposed Changes:

The committee substitute adds subsection (6) to s. 90.502, F.S. It provides that a discussion or activity that is not a meeting for purposes of s. 286.011, F.S., is not to be construed as waiving the attorney-client privilege. Further, the committee substitute provides that this provision is not to be construed to constitute an exemption, or alter an existing exemption, to either s. 119.07 or s. 286.011, F.S.

Accordingly, an attorney for a governmental entity may assert the attorney-client privilege as provided in s. 90.502, F.S., in a proceeding to which the Florida Evidence Code applies unless the discussion or activity is a meeting for purposes of s. 286.011, F.S. The governmental entity will have to prove, pursuant to s. 90.502(1)(c), F.S., that the communication is confidential and is in furtherance of the rendition of legal services to the governmental entity. This standard arguably will be judged in accordance with the Florida Supreme Court's ruling in *Deason*, which construed the attorney-client privilege in the corporate setting.

Assuming the communication falls within the ambit of the guidelines established in *Deason*, a governmental entity will be able to prevent disclosure of verbal discussions between governmental attorneys and all governmental employees, unless public records or meeting requirements require otherwise. For example, in a personal injury lawsuit involving the governmental entity's alleged negligent maintenance of a floor resulting in a person slipping and falling, a governmental attorney could be able to prevent discovery of the attorney's communications with an employee responsible for maintaining the floor in a safe condition. Under current law, this type of discussion would be discoverable as it does not fall within the exemption contained in s. 286.011(8), F.S., and it is not deemed a confidential communication.

[25] *See, School Board of Duval County v. Florida Publishing Company*, 670 So.2d 99 (Fla. 1st D.C.A. 1996).

The committee substitute has an effective date of July 1, 2000, but does not expressly state whether it will apply retroactively to existing proceedings or only prospectively to proceedings arising on or after July 1, 2000. Typically, matters pertaining to substantive law are applied prospectively.[26] Nevertheless, if a statute is found to be remedial in nature it can be retroactively applied in order to serve its intended purpose.[27] In *City of Orlando v. Desjardins,*[28] the Florida Supreme Court ruled that the statutory exemption to the Public Records Act for records prepared by governmental attorneys in anticipation of, or during, litigation could be applied retroactively because it was addressed to precisely the type of remedial rights arising for the purpose of protecting or enforcing substantive rights.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

See discussion under Current Situation.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The committee substitute should make it easier for governmental attorneys to have confidential discussions with both upper and lower echelon governmental employees. The

[26]*See, Van Bibber v. Hartford Accident & Indemnity Insurance Co.,* 439 So.2d 880 (Fla. 1983).

[27]*See, Village of El Portal v. City of Miami Shores,* 362 So.2d 275 (Fla. 1978).

[28]493 So.2d 1027 (Fla. 1986),

committee substitute should result in an even playing field in those proceedings under the Florida Evidence Code to which the attorney-client privilege applies, as contained in s. 90.502, F.S., as it has a salutary and protective purpose of mitigating the harsh provisions of the Florida Public Records Act and the Government in the Sunshine Law as applied to public entities' confidential communications. *See, Desjardins,* at 1028-1029.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.