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HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: HB 2083

RELATING TO: Lawyer-Client Privilege

SPONSOR(S): Rep. C. Smith

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIARY (W/D)
(2)
(3)
(4)
(5)

I. SUMMARY:

This bill amends s. 90.502, F.S., which is the section of the Florida Evidence Code providing a lawyer-client privilege. The bill would add subsection (6) to s. 90.502, F.S., to provide that ss. 119.07 and 286.011, F.S., may not be construed as waiving the lawyer-client privilege for governmental bodies except for communications contained in a public record or made in a public meeting.

The bill will enable state governmental entities to assert the attorney-client privilege except with respect to communications made during public meetings or in the form of public records.

The bill does not appear to have any fiscal impact on state or local government.

The bill shall take effect on July 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

B. 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 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. Ehrhardt, Florida Evidence s. 502.1 (1999 ed.) See also Brookings v. State, 495 So.2d 135, 139 (Fla. 1986). 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.

The Florida Evidence Code, located in chapter 90 of the Florida Statutes, replaces and supersedes statutory and common law which is in conflict with its provisions. See, s. 90.102, F.S. 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. Ehrhardt, at s. 103.1. (citations omitted).

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. Ehrhardt, at s. 502.2. Section 90.502(1)(b), F.S., defines a client as including any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the view of obtaining legal services or who is rendered legal services. Thus, the section includes governmental bodies and units as clients who possess a lawyer-client privilege.

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. However, not all employees 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 discussed the application of the attorney-client privilege in the corporate context in the case of Southern Bell Tel. & Tel. Co. v. Deason, 632 So.2d 1377 (Fla. 1994). 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 court established the following to determine whether communications in the corporate context are protected by the attorney-client privilege:

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 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
5) The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Deason, at 1383.

The power to assert the corporation's attorney-client privilege resides in the corporation's board of directors. An individual shareholder or director cannot waive the corporation's privilege. See, e.g., Tail of the Pup, Inc., v. Webb, 528 So.2d 506 (Fla. 2d DCA 1988).

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

Two statutory enactments, the Government in the Sunshine Law in s. 286.011, F.S., and the Public Records Act in Chapter 119, F.S., significantly restrict the ability of a Florida governmental body to assert the attorney-client privilege. The Florida Sunshine Law requires that meetings of governmental bodies at which official actions will be taken be open to the public. The Florida Supreme Court considered the issue of the effect of this legislative action upon the State of Florida's attorney-client privilege in Neu v. Miami Herald Publishing Co., 462 So.2d 821 (Fla. 1985). The court held that the Sunshine Law applies to meetings between a city council and a city attorney to discuss the settlement of pending litigation to which the city is a party and that, therefore, these meetings cannot be confidential. Since the communications are not confidential, they cannot be protected by the state's attorney-client privilege. 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 exemption 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. 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., 468 So.2d 218 (Fla. 1985), 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 government and its lawyers from disclosure under the Public Records Act. The Supreme Court ruled that, since the Legislature has determined that 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. (currently s. 119.07(3)(l)1., F.S.), 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, 562 So.2d 324 (Fla. 1990), 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." Id. at 327. 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. See, e.g., Orange County v. Florida Land Co., 450 So.2d 341 (Fla. 5th DCA 1984); Bryan v. Butterworth, 692 So.2d 878 (Fla. 1997).

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 active as relating to 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, 562 So.2d 324 (Fla. 1990), 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.

Section 624.311(2), F.S., provides a specific exception to the Public Records Act (s. 119.07(1), F.S.) 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. Ehrhardt, at s. 502.4. Because of the exemption, the records are subject to the general claim of attorney-client and work product privileges. Id. The section does not provide that the records are privileged. Id. 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. Id.

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 a member of the school board or the school superintendent 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 these meetings are subject to the Sunshine Law.

The Attorney General also opined that conversations between the school superintendent and the school board attorney are not subject to the requirements of s. 286.011, F.S., because the superintendent is an employee of the board. See, e.g., Deerfield Beach Publishing, Inc. v. Robb, 530 So.2d 510 (Fla. 4th DCA 1988) (requisite to application of the Sunshine Law is a meeting between two or more public officials.) However, 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 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. See, School Board of Duval County v. Florida Publishing Company, 670 So.2d 99 (Fla. 1st DCA 1996). 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., (Public Records Act), 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[.]" Attorney General Opinion 98-21, at 243.

C. EFFECT OF PROPOSED CHANGES:

The bill adds subsection (6) to s. 90.502, F.S. It provides that ss. 119.07 and 286.011, F.S., may not be construed as waiving the lawyer-client privilege except for communications contained in a public record or made in a public meeting. Accordingly, a governmental entity may be able to claim the attorney-client privilege as provided in s. 90.502, F.S., in any proceeding to which the Florida Evidence Code applies. 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. 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 will 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.

The bill 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. See, Van Bibber v. Hartford Accident & Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). Nevertheless, if a statute is found to be remedial in nature it can be retroactively applied in order to serve its intended purpose. See, Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978). In City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), 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.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of any funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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