



Chair:

Jeanne Elaine Helton
Smith Hulsey & Busey
225 Water St., Suite 1800
Jacksonville, FL 32202-5182
(904) 359-7700/FAX: (904) 359-7712
E-mail: jhelton@smithhulsey.com

Chair-elect:

Troy A. Kishbaugh
North Broward Hospital District
303 S.E. 17th Street, Suite 308
Ft. Lauderdale, FL 33301
(954) 831-2792/FAX: (954) 355-4966
E-mail: tkishbaugh@nbhd.org

Treasurer:

Lester J. Perling
Broad and Cassel
1 Financial Plaza, Suite 2700
Ft. Lauderdale, FL 33394
(954) 745-5261/FAX: (954) 713-0968
E-mail: lperling@broadandcassel.com

Secretary:

Cynthia A. Mikos
2018 E. 4th Avenue
Tampa, FL 33605-5216
(813) 248-1200/FAX: (813) 248-1204

Board Liaison:

Tim Sullivan
Ogden & Sullivan, P.A.
113 S. Armenia Ave.
Tampa, FL 33609
(813) 223-5111/FAX: (813) 229-2336
E-mail: tsullivan@ogdensullivan.com

Immediate Past Chair:

Laurie J. Levin
Baker & Hostetler LLP
P.O. Box 112
Orlando, FL 32802
(407) 649-4076/FAX: (407) 841-0168
E-mail: llevin@bakerlaw.com

EXECUTIVE COUNCIL

Terms Expiring 2009:

Charmaine Chiu
Jacksonville
Lewis W. Fishman
Miami
Spencer D. Levine
Ft. Lauderdale
Cynthia A. Mikos
Tampa
Bernabe Icaza
Ft. Lauderdale

Terms Expiring 2010:

Mildred Beam
Winter Park
Sandra P. Greenblatt
Miami
Rodney M. Johnson
Pensacola
Jodi L. Laurence
Plantation

Terms Expiring 2011:

Walter Carfora
St. Petersburg
William Dillon
Tallahassee
George F. Indest, III
Altamonte Springs
Monica Rodriguez
Miami

Program Administrator:

Valerie Yarbrough
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300
(850) 561-5630/FAX: (850) 561-5825
E-mail: vyarbrough@flabar.org

AGENDA

September 11, 2008, 3:30 p.m. – 5:30 p.m.
Broward Room – Tampa Airport Marriott

- I. Call to Order – Jeanne E. Helton, Chair
- II. Opening Remarks – Jeanne E. Helton, Chair
- III. Approval of Previous Meeting Minutes – Cynthia Mikos, Secretary (Exhibit A)
- IV. Financial Report – Lester Perling, Treasurer (Exhibit B)
- V. Council of Sections Update – Harold E. Kaplan
- VI. Committee Reports
 - a. Education, Training & Information, Charmaine Chiu
 - i. CLE Calendar 08-09 (Exhibit C)
 - b. Section Effectiveness – Lew Fishman
 - i. Law School Outreach Reports
 - c. Communications & Technology – Bernabe Icaza
 - i. Website – Chet Barclay
 - d. Health Information Technology – William Dillon
 - e. Public Health Committee – Rodney Johnson
- VII. Old Business
 - a. Health Law Handbook – Jeanne Helton and John Buchanan
- VIII. New Business

- a. CLE Financials –Yvonne Sherron (Exhibit D)
- b. Emergency Responder Legislation – Nick Romenello of Palm Beach County Health Department
- c. Legislative Representation of Section – Steven Grigas
- d. Job Postings on Website
- e. Attorney Client Privilege Task Force Comments (Exhibit E)

IX. Chair-elect Comments – Troy Kishbaugh

X. Next Executive Council Meeting January 16, 2009, the Florida Bar Mid-Year Meeting - Miami

**EXECUTIVE COUNCIL
THE FLORIDA BAR HEALTH LAW SECTION**

June 19, 2008

I. Call to Order

The meeting was called to order by Chair, Laurie Levin, at 3:15 p.m. in the Royal Palm Board Room IV of the Boca Raton Resort and Club, Boca Raton, Florida. Executive Council members in attendance either in person or via telephone were: Laurie Levin, Jeanne Helton, Rodney Johnson, Cynthia Mikos, Charmaine Chiu, Greg Chaires, Allen Grossman, George Indest, Spencer Levine, Lewis Fishman, Harold Kaplan, Trpy Kishbaugh, Lester Perling, Sandra Greenblatt

Also in attendance either in person or via telephone were: Andrei Boyarshinov, Valerie Yarbrough, Chet Barclay, Bernabe Icaza, John Buchanan, Richard Lewis, Christine Whitney, William Dillon

II. Opening Remarks – Laurie Levin, Chair

Laurie Levin opened the meeting by welcoming everyone. Ms. Levin thanked everyone for a great year. Ms. Levin specifically noted the accomplishments in continuing legal education and the Health Law Handbook. Ms. Levin introduced Al Robinson and Charlotte Kohler from Navigant Consulting. She thanked Navigant Consulting for sponsoring the reception that followed the meeting. Ms. Kohler briefly presented the abilities of Navigant Consulting in auditing and monitoring compliance of health care providers.

III. Approval of Previous Minutes – Lester J. Perling, Secretary

The minutes of the January 17, 2008, meeting were reviewed. It was noted that Cynthia Mikos and Gregory Chaires were both present but not noted. The minutes were approved as corrected.

IV. Election of Officers and Executive Council Members

Laurie Levin welcomed Jeanne Helton as the new chair of the Health Law Section. The nominees for Health Law Section officers for 2008-2009 were approved by acclamation as follows: Chair-Elect, Troy Kishbaugh of Fort Lauderdale; Treasurer, Lester Perling of Fort Lauderdale and Secretary is Cynthia Mikos of Tampa.

Exhibit A

New Executive Council members effective July 1, 2008, as follows, one year term Bernabe Icaza, Fort Lauderdale; three year terms, William Dylan, Tallahassee; Walter Carfora, St. Petersburg; Monica Rodriguez, Miami; and George F. Indest, III, Altamonte Springs.

V. Financial Report – Troy Kishbaugh

Mr. Kishbaugh reported that the budget for 2008-2009 was approved by Executive Council members via e-mail. Mr. Kishbaugh reviewed the current report of income and expenses.

The Executive Council discussed finances related to continuing legal education (“CLE”). It was noted that while there was good revenue, there was very little money flowing to the bottom line due to expenses as allocated by the Bar. The Executive Council recognized that CLE is a service but also should be a revenue producing activity. It was decided to continue the Ad Hoc Budget Committee in order to further understand CLE revenue/expense issues as well as to analyze other budget issues as necessary. Mr. Perling will chair this Committee and will be assisted by Alan Grossman, Harold Kaplan, Charmaine Chiu and Troy Kishbaugh. It was requested that Yvonne Sherron from the Bar be invited to attend the next meeting to explain the CLE budget.

VI. Council of Sections Update – Christine Whitney

Ms. Whitney reported that there has not been a meeting of the Council of Sections. She reported that Alan Grossman will be the new Chair of the Council of Sections. Laurie Levin will represent the Section.

VII. Committee Reports

a. Education, Training & Information – Charmaine Chiu

Ms. Chiu thanked Lester Perling for his assistance in chairing the annual Representing the Physician Program. Ms. Chiu noted that she attended the video replay of this program in Jacksonville and that there was a problem because the program was recorded on VHS, rather than on DVD. Not all facilities have VHS players any longer. She also reported that the lunch speaker was not taped. A motion was made seconded and approved to continue to co-sponsor this program next year with the Tax Law Section.

Ms. Chiu thanked Sandra Greenblatt for her work in chairing the Health Law Certification Review Course. Ms. Chiu reported that this program was reviewed by the Bar anonymously and received a very positive report. Ms. Greenblatt stated that it was

her goal to be relieved of this duty and it was determined that she would continue to chair this Program for one more year but she would be assisted during that year by a co-chair who would take over this position.

Ms. Chiu reported that there were two successful CLE telephone conferences held and that on Friday, June 20, 2008, the Health Law Hot Topics CLE was going to be presented.

Ms. Levin thanked Ms. Chiu for an excellent job as CLE chair.

b. Section Effectiveness – Lew Fishman

Mr. Fishman stated that he had no report.

c. Communication & Technology – Bernabe Icaza

Mr. Icaza thanked Chat Barkley for an excellent job in monitoring and maintaining the website.

i. Website – Chet Barkley

Mr. Barkley reported that the website was functional and operational and he was pleased note that there were more frequent submissions of material for the website. Mr. Barkley reported that the information about the Section and its Committees is very old and stale and that he needs input from the Executive Council regarding updating this information. Mr. Barkley also reported that he does not receive agenda or minutes from council or related meetings, Ms. Yarbrough was asked to begin to routinely furnish these items to Mr. Barkley.

Sandra Greenblatt asked whether an e-mail could be transmitted when there is a new item added to the website. Mr. Barkley said that the Bar can do that and he stated that he would start sending particularly interesting materials to Ms. Yarbrough for an e-mail blast.

ii. Newsletter – Bernabe Icaza

Mr. Icaza thanked the authors of the recent newsletter which he believed was a very good edition. He stated that continuing volunteers to submit articles are needed and that he will be begin soliciting articles again in July for the next edition.

d. Health Information Technology – William Dillon

Mr. Dillon reported that the Agency for Health Care Administration's Security Working Group was continuing to meet and that we will continue to be represented in those meetings.

e. Public Health Committee – Ron Johnson

Mr. Johnson reported that this Committee had its first meeting on June 18, 2008. Regular meetings will be conducted on the third Wednesday of every even month at 3:00 p.m. via teleconference. Mr. Johnson reported that the Committee talked about a potential CLE program to be determined at a later date and that it had five newsletter articles in process.

VIII. Old Business

a. Health Law Handbook – Jeanne Helton and John Buchanan

Ms. Helton and Mr. Buchanan reported that they were continuing to work on the 2009 handbook. They noted, however, that the 2007 handbook was still selling. They reported that there will be seven new chapters in the 2009 handbook, which may require a two volume set. The first draft of chapters is due on July 31, 2008, and the second draft on September 1, 2008. They plan to make the book available in January 2009. They also reported that they were investigating making the handbook available on a searchable CD and possibly raise the price to cover the cost of this additional benefit.

The Council discussed giving a discount to individuals who purchased the 2007 handbook. A motion was approved to offer a 10% discount to such individuals.

Ms. Levin thanked Ms. Helton and Mr. Buchanan for their hard work in organizing and preparing the 2009 handbook.

IX. New Business

a. Legislative Positions

Ms. Levin reported that the Bar has asked the Executive Council to review its existing legislative positions and notify it of any requested changes. Mr. Johnson asked for the Council to take a position on amending federal law to allow public schools to report communicable diseases if required by state law to their local health department. Current federal law prohibits this practice. It was noted by the Council that it could only formerly take positions on Florida law issues.

It was noted that the Bylaws provide for a Legislative Committee to review the Council's legislative positions. Ms. Helton stated that she will appoint such a committee.

There was a motion approved to renew the Council's current legislative positions with the following revisions: Revise Position 1 to read: "supports confidentiality of Professional Resources Network and Intervention Program for Nurses." Revise Position

4 to replace “the Board of Medicine” with “all health care licensing boards.” Revise Position 6 to include chapter 393, Florida Statutes, in addition to chapter 120, Florida Statutes.

Cynthia Mikos, Jeanne Helton and Laurie Levin will prepare an appropriate report.

b. Florida State University Health Law Chair

Ms. Levin reported that Lois Sheppard has resigned from Florida State University. A discussion was held concerning sending a delegation to meet with the Dean of the Law School. Discussion were held regarding possible alternatives, such as an adjunct. John Buchanan, Bruce Lamb, Alan Grossman and George Indest will address this situation with the Dean.

c. Health Law Section Support of ABA 2009 Emerging Issues and Health Law Conference

Ms. Levin reported that the American Bar Association requested that the Section support its 2009 emerging issues in health law conference. This would include placing an announcement on the Section’s website and provide a mailing list at no cost. In exchange, Section members would get an ABA member rate. It will also be requested that we be able to market our Handbook at the seminar and advertise our health law certification program. Additionally, we will request the opportunity to have a slot for a speaker. Motion was carried to respond in this fashion.

d. House Bill 7049 – Physician Dispensing

Sandra Greenblatt reported that this bill creates a new pharmacy permit for “Health Care Clinic Establishments,” which are not the same as licensed health care clinics. The bill will allow professional associations and professional limited liability corporations to obtain such permits, but only these entities are included. It will allow the group to purchase drugs in its own name rather than the drugs having to be purchased and dispensed by the individual physician.

e. Vendor Support for Certification Program

A discussion was held concerning the appropriateness of seeking vendor’s financial support for the health law certification program as well as other CLE programs. The CLE chair will follow up on this as appropriate.

f. Health Law Fundamentals

Chet Barkley recommended that the Section conduct a CLE on health law fundamentals on an annual basis. The CLE Committee was asked to review the potential for this seminar.

g. Health Law Journal

Chet Barkley raised the prospect of the Section publishing a scholarly health law journal on at least an annual basis. The consensus of the Executive Council was that this was probably more ambitious than could reasonably be undertaken at this time. A discussion was held regarding publishing this type of article through the Florida Bar Journal in either a dedicated issue or an article to be published by the Section. A motion was carried to solicit interest to prepare such an article through the newsletter.

IX. Chair – Elect Comments – Jeanne Helton

Ms. Helton stated that she was very excited about the prospect of the coming year and was looking forward to a lot of exciting developments. She thanked Laurie Levin for the outstanding job that she did as chair over the past year. She presented a plaque to Ms. Levin in recognition for her service.

X. Adjournment

The meeting was adjourned at 5:30 p.m. It was announced that the next Executive Council meeting will be held on September 11, 2008, at the Florida Bar General Meeting, Tampa Marriott Airport, Tampa, Florida.

	June 2008 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Total Health Law				
31435 Admin Fee Adj	6,688	8,926	0	*
31431 Section Dues	120	39,780	42,000	94.71
31432 Affilliate Dues	100	775	300	258.33
31433 Admin Fee to TFB	(110)	(23,408)	(24,620)	95.08
Total Dues Income-Net	6,798	26,073	17,680	147.47
32191 CLE Courses	(17,270)	(690)	12,406	(5.56)
32293 Section Differential	75	2,102	0	*
35201 Sponsorships	0	0	2,000	0.00
35603 Bd/Council Mtg Regis	0	0	750	0.00
36506 Section Handbook	278	18,261	7,500	243.48
36991 Allowances	0	(95)	0	*
38499 Investment Allocatio	102	2,591	4,303	60.21
Other Income	(16,815)	22,169	26,959	82.23
Total Revenues	(10,017)	48,242	44,639	108.07
36998 Credit Card Fees	(22)	177	100	177.00
84101 Employee Travel	505	1,037	1,240	83.63
84001 Postage	0	272	880	30.91
84002 Printing	10	2,712	750	361.60
84003 Officers Office Expe	0	0	100	0.00
84006 Newsletter	0	0	3,000	0.00
84009 Supplies	0	42	50	84.00
84010 Photocopying	6	46	300	15.33
84051 Officers Travel Expe	0	301	3,000	10.03
84052 Meeting Travel Expen	0	0	1,250	0.00
84054 CLE Speaker Expense	0	0	2,500	0.00
84101 Committee Expenses	0	0	750	0.00
84200 General Meeting	0	547	750	72.93
84201 Board Or Council Mee	25	1,143	1,500	76.20
84202 Annual Meeting	13,763	12,283	10,000	122.83
84204 Midyear Meeting	0	2,971	4,000	74.28
84301 Awards	0	171	500	34.20
84308 Writing Contest	0	0	7,500	0.00
84416 Handbook	10	1,641	500	328.20
84422 Website	0	1,863	4,500	41.40
84501 Legislative Consulta	0	0	7,500	0.00
84701 Council Of Sections	0	300	300	100.00
84998 Operating Reserve	0	0	5,290	0.00
84999 Miscellaneous	71	258	250	103.20
88252 Course Credit Fee	0	0	300	0.00
Total Operating Expenses	14,368	25,764	56,810	45.35
8431 Meetings Administrat	0	0	152	0.00
86543 Graphics & Art	438	4,867	1,323	367.88

	June 2008 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Total Health Law	-----	-----	-----	-----
Total TFB Support Services	438	4,867	1,475	329.97
Total Expenses	14,806	30,631	58,285	52.55
Net Operations	(24,823)	17,611	(13,646)	(129.06)
21001 Fund Balance	0	73,980	61,467	120.36
Total Current Fund Balance	(24,823)	91,591	47,821	191.53

The Florida Bar Health Law Section
CLE Calendar
2008-2009
Jeanne E. Helton, Chair

January 16, 2009

Program Title Representing the Physician 2009 (C0740)
Location: Miami – Hyatt Regency
Program Chair: Lester Perling
Brochure Deadline: October 17, 2008
Materials Deadline: November 17, 2008

March 5 & 6, 2009 (tentative date)

Program Title Health Law Certification Review (C0754)
Location: Orlando - Rosen Shingle Creek Hotel (Tentative)
Program Chair: Sandra Greenblatt, Chet Barclay
Brochure Deadline: December 5, 2008
Materials Deadline: January 5, 2009

June 26, 2009

Program Title Health Law Hot Topics (C0757)
Location: Orlando - The Florida Bar Annual Meeting
Program Chair: Charmaine Chiu
Brochure Deadline: January 15, 2009 (Due to early deadline for Florida Bar Annual Meeting
Brochure)
Materials Deadline: April 26, 2009

The Health Law Section of The Florida Bar
CLE Calendar
2005-2006
Allen Grossman, Chair

January 20, 2006 Live

January – February 2006 Replays

Representing the Physician 2006

Course #0274

Hyatt Regency, Miami (Live)

West Palm Beach, Orlando, Jacksonville, Tampa, Tallahassee, Pensacola

Co-sponsored by Health and Tax Law Sections

Total Registrants: 98

Section Financial Gain: \$350.50 per section

March 30-April 1, 2006

Health Law Institute – Medicaid (C#0373)

Health Law Certification Review Course (C#0272)

Emphasis: Medicaid and Health Law Certification Review

Caribe Royale, Orlando

Program Chair: Sandra Greenblatt – Health Law Cert Review Course

Program Chair: Steve Grigas and Spencer Levine – Health Law Institute

Total Registered HLI Medicaid: 23

Program Lost - <\$3,873.00> (The Florida Bar CLE budget takes the loss – no loss to the section)

Total Registered Health Law Cert Review: 62

Section Gain = \$2,402.50

June 23, 2006

Health Law Update

Boca Raton Resort & Club

The Health Law Section of The Florida Bar

CLE Calendar

2006-2007

Harold Kaplan, Chair

September 15, 2006

Program Title: Emergency Public Health Legal Preparedness (C#0420)
Location: Hyatt Regency, Tampa
Program Chair: Walter Carfora
Attendance: 7
Other Sales: A: \$1435(11) C: \$1690(11) M: \$35(50)
R: \$2325(20) V: \$550(4)
Revenue: \$5822 (2007 only)
Expense: \$17918
Section Share: (\$11,028)loss

October 2006 – January, 2007

Program Title: Emergency Public Health Legal Preparedness (C#0420)
Location: ~~West Palm Beach, Orlando, Jacksonville, Ft. Myers, Tallahassee, Pensacola, Miami~~

January 19, 2007

Program Title: Representing the Physician 2007 (C#0393)
Location: Hyatt Regency in Miami
Program Chair: Lester Perling and Alan Gassman
Attendance: 46
Other Sales: A: \$2500(16) C: \$6325(41) M: \$490(166)
R: \$13875(90) V: \$775(5)
Revenue: \$23,222
Expense: \$32,129
Section Share: (\$8,502)loss

January-February, 2007

Program Title: Representing the Physician 2007 (Video Replays) (C#0393)
Location: West Palm Beach (4), Orlando(12), Jacksonville(4), Tampa(3), Ft. Myers, (3)Tallahassee(1), Pensacola(2), Fort Pierce (2)

February 15, 2007

Program Title: ~~Health Care Clinic Act~~
Location: ~~Telephonic CLE (1.5 hours)~~
Program Chair: ~~Speaker—Rodger L. Hochman~~

April 13-14, 2007

Program Title Health Law Certification Review (C#0487)
Location: Caribe Royale, Orlando
Program Chair: Sandra Greenblatt
Attendance: 46
Other Sales: C: \$7427(19) M: \$540(79) R: \$19732(47)
Revenue: \$27,905
Expense: \$34,863
Section Share: (\$11,294)loss

June 29, 2007

Program Title Health Law Hot Topics
Location: Orlando - The Florida Bar Annual Meeting
Program Chair: Charmaine Chiu

The Florida Bar Health Law Section

CLE Calendar

2007-2008

Laurie Levin, Chair

January 17, 2008

Program Title: Representing the Physician 2008 (C0574)
Location: Miami – Radisson Hotel
Program Chair: Lester Perling
Attendance: Miami 92, Jacksonville 11, Tallahassee 7, Fort Myers(cancelled), West Palm Beach(cancelled), Tampa(cancelled), Orlando 21
Other Sales: A: \$640 (4) C: \$13,805 (84) M: \$595 (251) R: \$25,885 (141) V: \$1,300 (6)
Revenue: \$41,417
Expense: \$38,981
Section Share: \$2,061

March 7 & 8, 2008

Program Title: Health Law Certification Review (C0611)
Location: Orlando – Shingle Creek Resort
Program Chair: Sandra Greenblatt
Attendance: Orlando 51
Other Sales: C: \$6,870 (26) M: \$770 (90) R: \$16850 (52)
Revenue: \$23,909
Expense: \$45,426
Section Share: (\$18,290) loss

May 28, 2008

Program Title: Physician Dispensing in Florida: An RX for Compliance (C0794)
Location: Teleconference
Program Chair: Charmaine Chiu
Attendance: 20
Revenue: \$1,500
Expense: \$1,920
Section Share: (\$357)loss

June 6, 2008

Program Title: Melding of Quality Care: Compliance Issues (C0795)
Location: Teleconference
Program Chair: Charmaine Chiu
Attendance: 14
Revenue: \$1,050
Expense: \$467 – does not include phone line charges, bill received after end of year
Section Share: \$496 – does not reflect payment of phone line charges

June 20, 2008

Program Title: Health Law Update
Location: Boca Raton - The Florida Bar Annual Meeting
Program Chair: Charmaine Chiu



"Jeanne E. Helton"
<jhelton@smithhulsey.com>
07/30/2008 06:38 PM

To "Troy Kishbaugh" <tkishbaugh@nbhd.org>, "Lester Perling"
<lperling@broadandcassel.com>, "Cynthia Mikos"
<cmikos@allendell.com>, <llevin@bakerlaw.com>
cc "Valerie Yarbrough" <VYarbrough@flabar.org>

bcc

Subject Requests for Comments

Good afternoon/evening

Please see the email below and the attached copy of the Request for comments on the Atty Client Privilege Task Force product. What do you all think? I am inclined to forward this to the Executive Council and ask them to review it and be prepared to give any comments to me before or no later than the Sept. Health law Section meeting, about a week before the Sept. 15 deadline. Are we in agreement?

Jeanne E. Helton, Esq.
Smith Hulsey & Busey
1800 Wachovia Bank Tower
225 Water Street
Jacksonville, Florida 32202
(904) 359-7761 Direct Dial
(904) 359-7712 Facsimile

From: Mary Ellen Bateman [mailto:mbateman@flabar.org]
Sent: Wednesday, July 30, 2008 6:30 PM
To: Section Chairs 2008-2009
Cc: Program Administrators PD
Subject:

Please find below a Request for Comment from Marcos D. Jimenez, the chair of Task Force on Attorney-Client Privilege. The task force is asking that the section consider the revised proposal of the task force as outlined in the request and forward comments or suggestions, if any, to me by September 15, 2008. Please feel free to contact me if you have any questions. Thank you.

(See attached file: 2nd Request for Comment July 2008.tif)

Mary Ellen Bateman
Division Director
Ethics & Advertising, UPL and Special Projects
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32309-2300
(850)561-5777

Exhibit E

mbateman@flabar.org

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2nd Request for Comment July 2008.tif

Exhibit E



THE FLORIDA BAR

651 EAST JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

850/561-5600
WWW.FLORIDABAR.ORG

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

July 22, 2008

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

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

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

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

Summary

In January, 2008 you received a Request for Comment on a preliminary proposal for revisions to s. 119.071 and s. 286.011 of the Florida Statutes, and for the creation of s.119.0710 of the Florida Statutes, to strengthen the attorney-client privilege and work product protections in the public sector. The proposal was developed by The Florida Bar's Task Force on Attorney-Client Privilege.

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

Exhibit E

Request for Comment
July 22, 2008
Page 2

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

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

Background

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

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

The task force has already submitted recommendations to the Board of Governors, many of which have been approved. A list of the recommendations and their current status is attached for your information. FN1 The task force is considering several additional recommendations for referral to the board. This proposal is one of them.

After becoming aware of the issues related to the erosion of the attorney-client privilege and the work product protections in the public sector in Florida, the task force created a Public Sector Subcommittee to study the issue. The Public Sector Subcommittee, chaired by task force member Marion Radson, met by telephone on several occasions and ultimately submitted a report to the full task force. FN2 The task force reviewed the report on January 17, 2008, approved it, and asked that it be referred to the appropriate sections, committees and divisions of the bar for comment. After receiving and considering the comments on its preliminary proposal, the task force pared down the proposal and is referring it back out to the sections, select committees, and interested parties for comment before submitting the proposals to the Board of Governors.

Analysis

The attached Report of the Attorney-Client Privilege Task Force on the Attorney-Client Privilege in the Public Section provides an analysis of the issue of the erosion of the attorney-client privilege and work product doctrine in the public sector in Florida, as well as an analysis of the proposed recommendations to strengthen the attorney-client

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

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

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

Changes Made From The Preliminary Proposal to the Revised Proposal

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

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

3. The preliminary proposal would protect the public attorney's work product from discovery in the same manner that an attorney's work product is privileged in the civil discovery context. In response to comments, the revised proposal eliminates this provision entirely.

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

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

³ Id.

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

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

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

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

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

APPENDIX A



THE FLORIDA BAR

651 EAST JEFFERSON STREET
TALLAHASSEE, FL 32399-2300

850/561-5600
WWW.FLORIDABAR.ORG

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

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

1. Adopt the following resolutions:

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

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

THE FLORIDA BAR

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

c. That the attorney-client privilege and work product doctrine should be preserved with respect to audits of company financial statements. (Resolution 3) APPROVED BY THE BOARD OF GOVERNORS

2. Approve the following recommendations:

a. That The Florida Bar take a legislative position in support of the legislation introduced by U.S. Senator Arlen Specter (S.186) or similar comprehensive legislation. APPROVED BY THE BOARD OF GOVERNORS. THE FLORIDA BAR SENT LETTERS TO CONGRESS ON THIS ISSUE AND CONTINUES TO MONITOR THE PROPOSED LEGISLATION. HOUSE BILL 3013 APPROVED NOV. 13, 2007 BY THE HOUSE.

b. That The Florida Bar make no proposal at this time to amend section 90.502 to include a selective waiver provision. ACCEPTED BY THE BOARD OF GOVERNORS

c. That the concepts on inadvertent waiver contained in ABA Recommendation 120D be adopted and referred to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of

THE FLORIDA BAR

Evidence Committee for drafting of appropriate rules consistent with the concepts. ACCEPTED BY THE BOARD OF GOVERNORS AND REFERRED TO THE NAMED COMMITTEES. THE CODE AND RULES OF EVIDENCE COMMITTEE RECOMMENDS THAT A COMMITTEE COMMENT SHOULD BE ADDED TO RULE 90.507 AND THAT ANY RULES AMENDMENTS SHOULD BE ADDRESSED BY THE CIVIL PROCEDURE RULES COMMITTEE. THE CIVIL PROCEDURE RULES COMMITTEE CONSIDERED A SUBCOMMITTEE REPORT IN JUNE, 2008 AND RECOMMENDED A PROPOSED RULE ON INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS. THE RULE MUST BE REVIEWED BY THE TASK FORCE AND THE BOARD OF GOVERNORS.

d. That The Florida Bar not pursue amendments to Rule 4-3.8(e) of the Rules of Professional Conduct to restrict a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. APPROVED THE BOARD OF GOVERNORS

e. That the Rules of Professional Conduct (including ABA Model Rule 3.4(g) and Florida's rules) not be amended to address the issue of attorney-client privilege. ACCEPTED BY THE BOARD OF GOVERNORS

f. That the issue of whether state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert be referred to the Florida Bar Civil Procedure Rules

THE FLORIDA BAR

Committee and the Florida Bar Code and Rules of Evidence Committee for review and consideration. ACCEPTED BY THE BOARD OF GOVERNORS AND REFERRED TO THE NAMED COMMITTEES. THE CODE AND RULES OF EVIDENCE COMMITTEE IS RECOMMENDING THAT NO ACTION BE TAKEN BY THE EVIDENCE COMMITTEE AS THE ISSUE IS MORE PROPERLY ADDRESSED BY THE RULES OF CIVIL PROCEDURE COMMITTEE. THE RULES OF CIVIL PROCEDURE COMMITTEE CONSIDERED A PROPOSED RULE AMENDMENT TO Rule 1.280(B)(4)(e) BUT VOTED NOT TO ADOPT IT.

g. That The Florida Bar take no action at this time on the issue of the proposed "firewall amendment" to S.186 or similar comprehensive legislation. ACCEPTED BY THE BOARD OF GOVERNORS

APPENDIX B

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

JUNE 2008

TABLE OF CONTENTS

- I. MEMBERS OF THE TASK FORCE**
- II. RECOMMENDATIONS OF THE SUBCOMMITTEE TO THE TASK FORCE**
- III. BACKGROUND**
- IV. REPORT OF THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN THE PUBLIC SECTOR**
 - A. Preface**
 - B. The Interplay Between Sunshine Law and Attorney-Client Privilege**
 - C. The Interplay Between the Public Records Law and the Attorney-Client Privilege and Work Product Doctrine**
- V. SUMMARY OF PROPOSED BILL PROVIDING APPROPRIATE PROTECTION TO ATTORNEY-CLIENT WRITTEN COMMUNICATIONS AND AMENDING THE CONDITIONS OF THE ATTORNEY-CLIENT SESSION**
 - **Summary of the Draft Bill**
- VI. PROPOSED BILL:**
AN ACT PROVIDING APPROPRIATE PROTECTION TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS AND ATTORNEY WORK PRODUCT FOR ALL PUBLIC AGENCIES; AMENDING S. 119.071 F.S., REVISING THE EXEMPTION FOR THE ATTORNEY'S WORK PRODUCT OF A PUBLIC AGENCY; AMENDING S. 286.011 F.S., REVISING THE CRITERIA FOR THE ATTORNEY-CLIENT SESSIONS OF A PUBLIC AGENCY AND PROVIDING THE TRANSCRIPT OF THE PROCEEDINGS SHALL BE SEALED UNLESS OPENED BY COURT ORDER; PROVIDING AN EFFECTIVE DATE.

I. MEMBERS OF THE TASK FORCE

Marcos D. Jimenez, Chair
Miami, FL

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

Professor Anthony V. Alfieri
Coral Gables, FL

Hilarie Bass, ABA Liaison
Miami, FL

Dana Gibson Bradford, II
Jacksonville, FL

Steven E. Chaykin
Miami, FL

Professor Timothy P. Chinaris
Montgomery, AL

Ian M. Comisky
Philadelphia, PA

Professor Charles Winton Ehrhardt
Tallahassee, FL

Ellen M. Fitzsimmons
Jacksonville, FL

Professor Roberta Kemp Flowers
St. Petersburg, FL

Jesus A. Gonzalez-Pita
Springfield, AR

Robert Stephen Gristi
Gainesville, FL

William F. Jung
Tampa, FL

Katherine C. Donlon
Tampa, FL

Roberto Martinez
Coral Gables, FL

Paul Ignatius Perez
Jacksonville, FL

Marion J. Radson
Gainesville, FL

Professor Michael S. Seigel
Tampa, FL

Neal Russell Sonnett,
ABA Liaison
Miami, FL

Bruce Lee Udolf
Ft. Lauderdale, FL

Sylvia H. Walbolt
Tampa, FL

Sheryl Grimm Wood
West Palm Beach, FL

**II. RECOMMENDATION OF THE ATTORNEY-CLIENT PRIVILEGE
TASK FORCE**

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

III. BACKGROUND

After becoming aware of the issues related to the erosion of the attorney-client privilege and the work product protections in the public sector in Florida, the task force created a Public Sector Subcommittee to study the issue. The Public Sector Subcommittee, chaired by Marion Radson, met by telephone on several occasions and ultimately submitted its report to the full task force. In summary, the report called for revisions that would:

- (1) expand the work product exemption to include fact work product;
- (2) eliminate the disclosure of the work product at the conclusion of the litigation;
- (3) protect the public attorney's work product from discovery in the same manner that an attorney's work product is privileged in the civil discovery context;
- (4) allow necessary persons to attend an attorney-client session;
- (5) allow the substantive discussions to include any matter raised in a claim or lawsuit or anticipated lawsuit against a public agency;
- (6) eliminate the requirement that the session be transcribed and made available at the conclusion of the litigation; and
- (7) require litigants against a public agency to obtain documents through the normal discovery process during the pendency of the litigation.

The task force reviewed the report on January 17, 2008, approved it, and asked that it be referred to the appropriate sections, committees and divisions of the bar for comment. On January 25, 2008, the preliminary proposal of the task force was sent to all sections, committees and divisions of The Florida Bar with an invitation to comment on the proposals. Comments were received from approximately 20 entities and individuals, including some entities not directly related to The Florida Bar.

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

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

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

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

IV. EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN THE PUBLIC SECTOR

A. Preface

As a result of the work of the Attorney-Client Privilege Task Force, The Florida Bar has affirmed the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney. The Florida Bar has also opposed policies, practices and procedures of governmental bodies that would erode the privilege.

A little more than twenty years ago government entities in Florida lost the ability to invoke the attorney-client privilege in almost all meetings between the governing body and its government attorney. *Neu v. Miami Herald Publishing Co.*, 462 So.2d 821 (Fla. 1983) Similarly, a little more than twenty-five years ago government entities in Florida and government attorneys lost almost all claims of work product privilege under the public records law. *Wait v. Florida Power and Light Co.*, 372 So. 2d 420 (Fla. 1979) There is also confusion and uncertainty about the very existence of the privilege in the public sector in Florida. This uncertainty hampers full disclosure and discussion between the attorney who represents the government and the government as client. As one United States Supreme Court Justice stated, an uncertain privilege is a little better than no privilege at all. (Justice Rehnquist in *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996), quoting from Justice Stevens in *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981))

B. The Interplay Between Sunshine Law and Attorney-Client Privilege

The attorney-client privilege for governments in Florida is limited by the Government-in-the-Sunshine Law, commonly referred to as the Sunshine Law. §119.01 Fla. Stat. (2007). Although the Sunshine Law does not specifically mention the attorney-

client privilege, the Florida Supreme Court held in *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) that the privilege was waived by the Florida legislature by implication. The court declared that the attorney-client privilege could not be claimed for communications made at public meetings. An essential element of the privilege, namely confidentiality, was obviously missing. The Supreme Court declined to find any independent basis for the privilege, like the evidence code or the rules of professional conduct, and deferred to the state legislature to create exemptions for the government.

The Florida Supreme Court is in the minority of state high courts to reject an independent basis for the attorney-client privilege for government. Courts in other states have recognized an independent basis for the privilege, often based on the strong policy considerations that apply to private clients. See e.g., *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (Cal. App. 3 Dist. 1968) and *Dunn v. Alabama State Univ. Bd. of Trustees*, 628 So.2d 519 (Ala. 1993); and *Oklahoma Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310 (Okla. 1978); *Cool Homes, Inc. v. Fairbanks North Star Borough, et al.*, 860 P.2d 1248 (Alaska 1993); *Tausz v. Clarion-Goldfield Comm. Sch. Dist.* 569 N.W.2d 125 (Iowa 1997); and *Peters v. County Comm'n of Wood County*, 519 S.E.2d 179 (W.Va. 1999).

Since the Florida Supreme Court decision in *Neu*, the Florida legislature created a unique type of private "attorney-client" session, sometimes referred to as a shade session. §286.011 Fla. Stat. (2007). Under the current statutory law, a government lawyer can meet in a private session with a board or commission to discuss *pending* litigation. The discussion is limited to "settlement negotiations, or strategy sessions related to litigation

expenditures”. Only specifically designated persons may attend the session. Finally, and most significantly, these sessions must be transcribed by a certified court reporter, and the record is then made public after the conclusion of the litigation.

These artificial limitations have severely limited the usefulness of these sessions. No matter how significant or imminent the threatened litigation, an attorney-client session cannot be held to discuss the claim or related strategies to avoid a lawsuit. Essential information may not be available during the sessions because necessary individuals, who are not specifically authorized by statute, are prohibited from attending these sessions.

Due to these constraints and restrictions, governments are understandably reluctant to hold these sessions. The result is elected officials do not obtain the type of legal advice that is essential to good government and its citizens. As the court aptly stated in attempting to reconcile the open meetings law and the attorney-client privilege: “Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent’s presence may be under insurmountable handicaps.” *Sacramento* 69 Cal. Rptr. at 490.

C. The Interplay Between the Public Records Law and the Attorney-Client Privilege and Work Product Doctrine

Early in the history of Florida’s Public Records Act, the Florida Supreme Court declined to recognize any exemption for a government attorney’s work product or attorney-client privileged documents. In *Wait v. Florida Power and Light Company*, 372 So. 2d 420 (Fla. 1979) the Supreme Court of Florida found that the legislature intended to exempt only those public records that were made confidential by statute. According to the Court, documents that were confidential or privileged as a result of judicial creation –

such as those protected by the attorney-client and work product privileges – were not exempt. Any exemption, the Court noted, must come from the legislature and not from the courts.

In response to the court’s holding in *Wait*, the Florida legislature created a limited and temporary exemption for certain documents of a government attorney.

§119.071(1)(d)(1) Fla. Stat. (2007). First, the exemption protects only “opinion work product”, not the “fact work product” of the government attorney. Second, the litigation or adversarial proceeding must be “imminent” as opposed to “substantially likely”. Finally, and most significantly, the exemption terminates at the conclusion of the litigation.

As a result of these limitations, government lawyers are reluctant to offer legal advice in writing to the public client. Some government lawyers do not take notes of meetings. Government lawyers are reluctant to create records and work product that are subject to disclosure under the public records. They are often placed in ethical dilemmas trying to maintain the confidentiality of information while abiding by the public records law. Inefficiency, unfairness, and sharp practices develop when offering legal advice or preparing for trial.

In contrast to Florida, the courts of other states have found that public records laws do not abrogate the attorney-client privilege because the two can co-exist while protecting the fundamental purpose of each. See e.g., *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 870 N.E. 2d 33 (Mass 2007).

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

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

Summary of the Draft Bill:

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

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

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

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

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

VI. PROPOSED BILL

A bill to be entitled

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

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

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

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

(1) AGENCY ADMINISTRATION.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HEALTH LAW SECTION EXECUTIVE COUNCIL
(HL001)

46396

Ms. Laurie J. Levin, Chair
Baker & Hostetler, LLP
P.O. Box 112
Orlando, FL 32802-0112
(407)649-4076

520462

Ms. Jeanne Elaine Helton, Chair-elect
Smith Hulsey & Busey
225 Water St., Ste. 1800
Jacksonville, FL 32202-5182
(904)359-7700
Fax: (904)359-7712
Email: jhelton@smithhulsey.com

13854

Mr. Lester J. Perling, Secretary
Broad and Cassel
1 Financial Plz Ste 2700
Fort Lauderdale, FL 33394-0017
(954)745-5261
Fax: (954)713-0968
Email: lperling@broadandcassel.com

149659

Mr. Troy A. Kishbaugh, Treasurer
North Broward Hospital District
303 S.E. 17th St.
Fort Lauderdale, FL 33316-2523
(954)355-5460
Fax: (954)355-4966
Email: tkishbaugh@nbhd.org

283010

Mr. Timon V. Sullivan, Board Liaison
Ogden & Sullivan, P.A.
113 S. Armenia Ave.
Tampa, FL 33609-3307
(813)223-5111
Fax: (813)229-2336
Email: tsullivan@ogdensullivan.com

655449

Mr. Harold Edward Kaplan, Immediate Past
Chair
1515 N. University Dr., Ste. 203
Coral Springs, FL 33071-8919
(954)345-6338
Fax: (954)345-7299
Email: kaplanhealthlaw@aol.com

971928

Ms. Mildred Beam
Adventist Health System
111 N. Orlando Ave.
Winter Park, FL 32789-3675
(407)975-3654
Fax: (407)425-2018
Email: mildred.beam@ahss.org

964808

Mr. Gregory Allen Chaires
Chaires Hammond P. L.
283 Cranes Roost Blvd., Ste. 165
Altamonte Springs, FL 32701-3437
(407)834-2777
Fax: (407)834-2778
Email: gchaires@chlawyers.com

186147

Ms. Charmaine Tsin Ming Chiu
Smith Hulsey & Busey
P.O. Box 53315
Jacksonville, FL 32201-3315
(904)359-7700
Fax: (904)359-7708
Email: cchiu@smithhulsey.com

339024

Mr. James Andrew Farrell
Shutts & Bowen, LLP
250 S. Australian Ave., Ste. 500
West Palm Beach, FL 33401-5006
(561)835-8500
Fax: (561)650-8530
Email: jfarrell@shutts-law.com

August 11, 2008

Health Law Section Executive Council (HL001)

224235

Mr. Lewis Warren Fishman
2 Datan Center
9130 S. Dadeland Blvd., Ste. 1121
Miami, FL 33156-7848
(305)670-2100
Fax: (305)670-0793
Email: lwfpa@aol.com

438006

Ms. Sandra Palsky Greenblatt
Sandra Greenblatt, P.A.
2 S. Biscayne Blvd., Ste. 3500
Miami, FL 33131-1802
(305)577-9995
Fax: (305)577-9951
Email: sg@flhealthlawyer.com

382388

Mr. Allen Richard Grossman
GrayRobinson, P.A.
P.O. Box 11189
Tallahassee, FL 32302-3189
(850)577-9090
Fax: (850)577-3311
Email: agrossman@gray-robinson.com

382426

Mr. George F. Indest III
The Health Law Firm Centerpointe Two
220 E. Central Pkwy., Ste. 2030
Altamonte Springs, FL 32701-3417
(407)331-6620
Fax: (407)331-3030
Email: gindest@aol.com

472387

Mr. Rodney Marcum Johnson
Dept of Health
1295 W. Fairfield Dr.
Pensacola, FL 32501-1107
(850)595-6517
Fax: (850)595-6530
Email: rodney_johnson@doh.state.fl.us

860689

Ms. Jodi Lifshutz Laurence
Health Law Office of Jodi Laurence, P.A.
7805 S.W. 6th Ct.
Plantation, FL 33324-3203
(954)358-0155
Fax: (954)474-9850
Email: jl@jlhealthlaw.com

351334

Mr. Spencer Drew Levine
North Broward Hospital District
303 S.E. 17th St., Fl. 6
Fort Lauderdale, FL 33316-2523
(954)712-2990
Fax: (954)355-4966
Email: sdlevine@nbhd.org

984256

Ms. Cynthia Anne Mikos
2018 E. 4th Ave.
Tampa, FL 33605-5216
(813)248-1200
Fax: (813)248-1204
Email: cmikos@camlaw.net

986283

Ms. Monica Lee Rodriguez
Dresnick & Rodriguez
9100 S. Dadeland Blvd., Ste. 1610
Miami, FL 33156-7817
(305)670-9800
Fax: (305)670-9933
Email: monica@dresnicklaw.com

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Health Law Section Executive Council (HL001)

266272
Mr. Gary Walker
Allen Dell, P.A.
202 S. Rome Ave., Ste. 100
Tampa, FL 33606-1854
(813)223-5351
Fax: (813)229-6682
Email: gwalker@allendell.com