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CLOSED SESSIONS UNDER THE ATTORNEY-CLIENT PRIVILEGE

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The open meetings law permits public bodies to hold closed sessions to protect matters within the attorney-client privilege. G.S. 143-318.11(a)(3) reads as follows:

> A public body may hold a closed session . . .
>
> To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

This authorization for closed sessions has been the subject of four court of appeals decisions in recent years, and for that reason it is appropriate to undertake a detailed consideration of the authorization, both to review the recent court of appeals decisions and to discuss other

aspects of the statutory language.[1] The purpose of this Local Government Law Bulletin is to present a broad review of questions that are likely to arise under this authorization.

By way of introduction, recall that attorney-client confidentiality is the subject of two separate, albeit related, fields of law: the attorney-client privilege, a construct of the law of evidence, and the rules of confidentiality established by the rules of professional ethics. The attorney-client privilege protects confidential communications between attorney and client, generally refusing to allow such communications to be discovered or testified about during litigation. The rules of ethics protect the same information[2] but in addition protect information that is not privileged but that is "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[3] By using the term *attorney-client privilege*, the open meetings law is referencing the evidentiary privilege and not the broader directions of the ethics rules.[4] For that reason it is the law of the privilege that shapes the authorization for closed sessions and not the rules of ethics.

In Brandis and Broun on North Carolina Evidence, the authors list five requisites of the attorney-client privilege in this state:[5]

1. "The attorney-client relation must have existed at the time of the communication."
2. "The communication must have been made in confidence."
3. "The communication must relate to a matter concerning which the attorney is employed or is being professionally consulted."
4. "[T]he communication must be made in the course of seeking or giving legal advice for a proper purpose."
5. "The privilege is that of the client."

1. Because the authorization limits closed sessions to consultation with an attorney about matters within the attorney-client privilege, an attorney who represents the public body must be present at any closed session held pursuant to the authorization.

In *Multimedia Publishing of North Carolina, Inc. v. Henderson County* (hereafter *Multimedia I*),[6] the county argued that the closed session authorization set out at the beginning of this Bulletin actually created two separate authorizations for closed sessions: one for confidential discussions with a public body's attorney, and a second for consideration of claims, judicial actions, mediations, arbitrations, and administrative procedures. (The county's argument mirrored an analysis of the authorization that appeared in the then—current edition of the Institute's book on the open meetings law[7] and in a 1994 Local Government Law Bulletin that discussed the authorization and other 1994 amendments to the statute.)[8] The court of appeals disagreed. It concluded that discussions regarding claims, judicial actions, and the like were examples of consultations about matters within the privilege and not an independent authorization of closed sessions. In reaching its conclusion the court noted that the statutory language is part of a single paragraph that replaced two clearly separate paragraphs in the prior version of the statute. The practical effect of this reading of the authorization is that a public body may not

1. The four cases are H.B.S. Contractors v. Cumberland County Board of Education, 122 N.C. App. 49, 468 S.E.2d 517 (1996); Multimedia Publishing of North Carolina, Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000); Sigma Construction Co. v. Guilford County Board of Educ., 144 N.C. App. 376, 547 S.E.2d 178 (2001); and Multimedia Publishing of North Carolina, Inc. v. Henderson County, 145 N.C. App. 365, 550 S.E.2d 846 (2001).

The first Multimedia case is discussed in DAVID M. LAWRENCE, *The Court of Appeals Addresses Closed Sessions for Attorney-Client Discussions,* LOCAL GOV'T LAW BULLETIN NO. 93 (March 2000). The second Multimedia case is discussed in A. FLEMING BELL, II, *Attorney-Client Confidentiality, Minutes, and General Accounts of Closed Sessions: Some Questions and Answers from Multimedia II*, LOCAL GOV'T LAW BULLETIN NO. 101 (Feb. 2002).

2. "'Confidential information' refers to information protected by the attorney-client privilege." Revised Rules of Professional Conduct, Rule 1.6(a).

3. Id.

4. From 1979 until 1994, the open meetings law permitted closed sessions "to consult with an attorney to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." (1979 N.C. Sess. Laws, c. 655.) The provision under discussion in this Bulletin replaced this earlier language. The earlier language at least arguably referenced the broader confidentiality rules of the rules of ethics.

5. KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE, § 129 (5th ed. 1998).

6. 136 N.C. App. 567, 525 S.E.2d 786 (2000).

7. DAVID M. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA, SOME QUESTIONS AND ANSWERS 20 (Question 73) (5th ed. 1998).

8. DAVID M. LAWRENCE, *1994 Changes to the Open Meetings Law*, LOCAL GOV'T LAW BULLETIN NO. 64 (Sept. 1994).

hold a closed session to consider claims, judicial actions, mediations, arbitrations, or administrative procedures unless an attorney who represents the public body is present and the consideration is undertaken within the confines of the attorney-client privilege.[9]

2. The attorney at the closed session must be in an attorney-client relationship with the public body.

That there is an attorney present in a closed session is not, in and of itself, sufficient to bring the closed session within the statutory authorization. The attorney must be, in the statute's language, "employed or retained" by the public body—that is, the public body must be the attorney's client.[10] If that is the case, however, it probably does not matter that an attorney is not the public body's general counsel or has not been retained for the specific matter under discussion, as long as the public body is seeking the attorney's legal advice. Of course, if an attorney has been retained for a specific matter and his or her advice is not being sought on an unrelated matter, that attorney should probably not be present in a closed session involving the unrelated matter.

In the Michigan case of *Manning v. City of East Tawas,*[11] the city attorney had met in closed session with the city council about pending litigation. But because the city retained special counsel to actually conduct the litigation, the other party to the litigation argued that the closed session was improper, because not within the attorney-client privilege. The Michigan Court of Appeals disagreed, holding that the city attorney's representation was broad enough to permit him to properly participate in the closed session. The North Carolina courts should reach the same conclusion.

First, unless a public body's regular attorney has withdrawn from representing the local government on a particular issue, the regular attorney's responsibilities include all legal affairs of the local government. Thus, even if the local government has retained special counsel for a particular matter, the unit's regular attorney (and other attorneys in that person's office who assist in local government matters) continues to represent the local government on that matter and may attend and participate in a closed session concerning that matter.

Moreover, the mere fact of the attorney-client relationship is probably sufficient to bring communications under the privilege when the client is relying on that relationship in making the communications. In *Guy v. Avery County Bank,*[12] the defendant attempted to have introduced at the trial a deposition from an attorney about a conversation with the plaintiff that was pertinent to the issue in the case. The attorney testified that he had not been retained by the plaintiff with respect to the matter under litigation but had represented the plaintiff for several years in a number of transactions. Furthermore, he testified, the plaintiff had come to him because of this long-standing attorney-client relationship and had communicated certain matters to the attorney because he was an attorney. The court held that it was clear that the communications had been made by the plaintiff "under a sense of absolute privilege" and therefore they were protected by the privilege. If there is an attorney-client relationship, and the client communicates confidentially with the attorney in reliance on the relationship, it appears that the North Carolina courts will hold the communications to be privileged.

If a local government's regular counsel has withdrawn from representing the local government on a particular issue—for example, because of a conflict—that attorney should not participate in or be present at any closed sessions concerning that issue. In that circumstance it is clear that the attorney is not representing the government on that matter, and the client ought not to proceed as if he or she were.[13]

3. In order for the privilege to attach, the discussion must be confidential. Therefore, only the attorney, the client, and their agents may be present at the closed session.

It is basic that in order for the attorney-client privilege to attach, the conversation between attorney and client must be confidential in an objective sense. If outside parties are present, the conversation is per se

9. The attorney-client privilege also covers communications from a client to the attorney's agent, such as a paralegal. The open meetings law, however, only permits a closed session "to consult with an attorney".

10. That is also a requirement of the evidentiary privilege. State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947).

11. 593 N.W.2d 649 (Mich. Ct. App. 1999).

12. 206 N.C. 322, 173 S.E. 600 (1934).

13. In Advisory Opinion 301, dated 2 April 1997, and found on the N.C. Department of Justice webpage, the attorney general's office addressed the situation in which the regular counsel for a public hospital had been involved in negotiating some contracts but had subsequently been conflicted out of the matter and so had withdrawn from future involvement in administration of the contracts. The hospital board, however, wished to discuss matters that had arisen while the attorney was still representing the hospital on the contracts, and the attorney general's office advised that a closed session would be proper, because those matters were still privileged.

not confidential,[14] and a closed session may not be held. Therefore it is crucial that the public body and its attorney be careful about who is allowed in the room while the closed session is in progress.

Who is the client? When the client is a local government, the client is the corporate entity and not any single person or group of persons who act for the entity, including the governing board.[15] That is, the city attorney represents the city government as a whole, not just the council; the county attorney represents the county government as a whole, not just the board of commissioners; an attorney for a school administrative unit represents the unit and not the school board; and so on. The governing board is not the client but merely one entity—albeit the most important entity—through which the client acts. Therefore, a closed session may properly include officials and employees of the client other than the governing board and not result in a loss of the confidentiality necessary to the privilege.

What employees and officials of the client are included within the privilege? There is a large body of case law nationally that addresses which employees of a private corporation are included within the corporation's attorney-client privilege. Although there are very few cases that address these same issues with respect to public corporations such as counties and cities, there is no particular reason to think a state's courts would develop different rules for the two sorts of corporations.

Unfortunately, not all states have resolved the issues about private corporation employees in the same way, and there is no North Carolina case or statute that addresses the issue at all. So we cannot be sure how the issue will be resolved in North Carolina. As a practical matter, however, it is likely that any local government official or employee whose presence is relevant to a matter being discussed by a public body and its attorney will be considered a sufficient representative of the client so that his or her presence will not destroy the confidentiality of the closed session.

The two principal competing standards for determining whether intra-corporate communications are privileged are the *control group* standard and the superceding standard articulated in the *Upjohn* case.[16]

The control group standard was first articulated in *Philadelphia v. Westinghouse Electric Corporation*.[17] The standard attempts to identify which employees have authority to control a decision, the right to play a substantial role in making the decision, or the right to direct the entity's action based on the attorney's advice. Only these persons are included within the privilege. The standard had and has its supporters, but it was heavily criticized for making very difficult an attorney's attempts to develop information held by persons lower in the corporate hierarchy. The United States Supreme Court rejected the control group standard, for the federal courts, in *Upjohn Co. v. United States*.[18] Under *Upjohn* it's clear that communications with senior management are included within the privilege, as they would be under the control group standard, but in addition communications with lower-level employees are also included if they meet a set of tests:

- the communications are made to the corporation's attorneys on direction from the employees' superiors, in order for the corporation to receive legal advice;
- the information needed by the attorneys is not available from upper-level management;
- the information involves matters within the scope of the employees' corporate duties;
- the employees knew the communications were intended to assist the corporation in receiving legal advice; and
- the communications were directed to be kept confidential and they have so remained.

Upjohn is binding upon the federal courts but not on the state courts, and several states have refused to follow it. As noted, the North Carolina appellate courts have not had occasion to address the issue. Regardless of how the North Carolina courts do ultimately resolve the issue, however, either standard will normally allow a closed session that includes those employees or officials most likely to be present. Take, for example, a closed session held by a city council. In addition to the council and the city's attorney, the session is likely to include the city manager and the city clerk and may include assistant or deputy managers and one or more other attorneys from the city attorney's staff or law

14. *E.g.*, State v. Murvin, 304 N.C. 523, 284 S.E.2d 289 (1981) (conversation at which client's aunt and friend present therefore not confidential); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973) (attorney's spouse present during conversation with client and therefore not confidential); Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889) (deed prepared and signed in presence of several people and therefore accompanying conversations not confidential).

15. *See* JOHN WILLIAM GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE (hereafter GERGACZ), § 2.04 (3rd ed. 2001); Rule 1.13, Revised Rules of Professional Conduct of the North Carolina State Bar.

16. This summary of these two competing standards relies heavily on GERGACZ, especially §§ 3.69 and 3.83.

17. 210 F. Supp. 584 (E.D. Pa. 1962).

18. 449 U.S. 383 (1981).

office. Beyond that core group, clearly part of the control group under the first standard and part of senior management under the *Upjohn* standard, the closed session will probably be limited to the senior officials of the operating department or departments affected by the legal issues under discussion. These persons, as well, would be legitimately covered by the privilege, regardless of the standard used.[19]

These standards do suggest, though, that a public body should be cautious in bringing in persons beyond the core group to a closed session held to protect matters within the attorney-client privilege. A department head whose responsibilities are not involved in the legal issues should probably be excluded from such a closed session, so that there can be no question of the privilege being lost.

What about outside agents of the client? The privilege can cover communications between an attorney and agents of the client, but the courts construe this extension of the privilege narrowly.[20] Communications from an agent are covered by the privilege only if the client needs the agent to communicate effectively with the attorney, such as to explain difficult matters or interpret because of language problems. That the agent is *useful* to the attorney's representation is unimportant; rather, the agent's presence or communications must be *indispensable*. Among the sorts of client agents whose communications have been held *not* to be covered by the privilege are accountants and auditors, investment bankers, and various consultants.[21] Therefore, in most circumstances these sorts of persons should not be allowed within the closed session, because their presence will cause the communications to be outside the privilege.

What agents of the attorney are included within the privilege? The privilege also covers communications to agents of the attorney, and the courts have been much more forgiving in construing this extension of the privilege than they have with the attempted extension to agents of the client. Agents of the attorney might include his or her staff, investigators, other attorneys, and a variety of other professionals and consultants.[22] Basically, if the attorney needs the outsider's assistance in order to provide legal advice to the client, communications to that person or in the presence of that person are protected by the privilege. Nevertheless, public bodies and their attorneys should still be cautious in allowing agents of the attorney to attend a closed session, to minimize any risk that such a person's presence can cause the communications to be outside the privilege.

What about citizens, contractors, and the like? Sometimes a local government may be involved in an issue in which it shares an interest in common with an outside party. For example, a city may be working with a citizen's group in drafting a new ordinance or developing a new program, or working with a developer to redevelop abandoned downtown buildings. It may in some circumstances seem efficient to include the representatives of the citizens' group or of the developer in a discussion of legal issues with the city attorney, inasmuch as the outsiders share that common interest with the city. That may be, but to include such outsiders in the briefing will normally demonstrate that the matters discussed are not confidential, therefore not privileged, and therefore not a valid basis for a closed session. Only if such outside parties can be shown to be joint clients of the city's attorney on the matter at issue[23] or joint defendants with the city in actual litigation[24]—forms of representation that are generally unlikely—can their presence be allowed without destroying the privilege.

What about the opposing party in a mediation or in litigation? Sometimes members of a public body would like to meet in closed session and directly negotiate or otherwise discuss issues with the opposing side in a matter. Obviously, if the other party to a proceeding is present at a conversation with the government's attorney, the discussion cannot be characterized as confidential, and therefore the privilege cannot attach.[25] Such a closed session may not be held.[26]

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19. If the local government is being sued because of an alleged tort by a low-level employee, and the employee is being represented by the same attorney as the government, clearly the employee could also be present in the closed session.

20. THOMAS E. SPAHN, A PRACTIONER'S GUIDE TO THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, § 2.206 (Virginia Law Foundation, 2001).

21. Id.

22. Id., §§ 3.601 through 3.605.

23. *See*, Michael v. Foil, 100 N.C. 178, 6 S.E. 264 (1888).

24. *See* GERCACZ, § 3.64.

25. Allen v. Shiffman, 172 N.C. 578, 90 S.E.2d 577 (1916); Carey v. Carey, 108 N.C. 267, 12 S.E. 1038 (1891).

26. *See* CHAD FORD, *Behind Open Doors: North Carolina's Open Meetings Act and Mediator Standards of Confidentiality*, LOCAL GOV'T LAW BULLETIN NO. 94 (April 2000).

4. The public body and its attorney may discuss any matter within the privilege and are not limited to discussions of claims, judicial actions, mediations, arbitrations, and administrative proceedings.

In *Multimedia I* the county board of commissioners had held a closed session to obtain legal advice about a proposed noise ordinance and a proposed moratorium on construction or operation of motor speedways (the particular noise leading to consideration of the ordinance). The plaintiff newspaper brought suit, arguing that the open meetings law does not authorize a closed session for such a discussion. Rather, the newspaper argued, a public body may not hold a closed session with its attorney, *except* to "consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure." The court of appeals rejected the plaintiff's argument.

In its opinion the court of appeals reviewed the progress of the 1994 open meetings amendments through the General Assembly, showing how the provision on claims, judicial actions, and other procedures changed as it moved through committees and the floor of each house. The language of the original bill clearly supported the newspaper's reading of the statute, but the court concluded that the changes made thereafter evidenced the General Assembly's intention to allow a public body to discuss a broader range of legal issues with its attorney or attorneys. "Accordingly, we hold that the present attorney-client exception in section 143-318.11(a)(3) does not require a claim to be pending or threatened before it may be invoked by the governmental body."[27]

5. The scope of discussions within a closed session under this authorization is shaped by the rules that govern the attorney-client privilege.

The statute permits a closed session in order to "preserve the attorney-client privilege." Therefore, the kinds of discussions that may be held in such a closed session are those that are privileged—no less and no more. There are several points to make in this respect.

Communications by the attorney. In North Carolina it is clear that the privilege extends to communications *from* the attorney to the client as well as to the attorney from the client.[28] Therefore, there can be no question but that it is legitimate to hold a closed session in order for the attorney to provide legal information and advice to the public body. The attorneys for Henderson County did just that in the closed session under attack in the Multimedia cases, and in *Multimedia Publishing of North Carolina, Inc. v. Henderson County* (hereafter *Multimedia II*)[29] the court of appeals held that the closed session was within the statutory authorization.

Legal advice only. The privilege does not extend to all conversations between attorney and client, or even to all conversations that the client might wish remain confidential.[30] Rather, the conversations must concern *legal* matters. Attorneys for local governments are sometimes looked to for advice other than legal advice—political advice, business advice, policy advice. If the purpose of the closed session is to receive one of these non-legal forms of advice, the conversation would not be privileged, and therefore the closed session would be invalid.[31] One troublesome area under the privilege involves communications that involve both legal and non-legal advice.[32] There is no North Carolina case law that addresses such communications, but the general rule nationally appears to be that such communications are privileged if the legal element is dominant and are not privileged if the non-legal element is dominant.[33] Obviously, when advice is a mixture of legal and non-legal advice, whether it is privileged will be entirely fact-based.

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27. 136 N.C. App. at 573, 525 S.E.2d at 790.

28. Jones v. Marble Company, 137 N.C. 237, 49 S.E. 94 (1904).

29. 145 N.C. App. 365, 550 S.E.2d 846 (2001).

30. Of course, the attorney's ethical duty of confidentiality does extend to those conversations that the client wishes to remain confidential, regardless of whether the privilege applies.

31. In giving advice about a legal issue, an attorney may legitimately bring in non-legal considerations. Revised Rules of Professional Conduct, Rule 2.1, states that in "rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." As long as the basic issue is legal, bringing in these other factors ought not destroy the privileged nature of the conversation.

32. The mere fact of some non-legal advice does not render a communication non-privileged. As Judge Wyzanski wrote a half-century ago:

> The modern lawyer almost invariably advises his clients upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

United States v. United States Machinery Corp., 89 F.Supp. 357, 359 (D. Mass. 1950).

33. GERCACZ, §§ 3.45, 3.46.

Furthermore, once the attorney has given his or her legal advice, and the legal discussion has ended, the public body may not continue the closed session and discuss other aspects of the issue, such as the merits of the policy in question. The appellate panels in both Multimedia cases addressed this point. The panel in *Multimedia I,* writing without the specific facts developed in *Multimedia II*, emphasized the narrowness of the closed session authorization when it listed what was appropriate and what was inappropriate in a closed session with a public body's attorney. Using the Henderson County case as an illustration, the court wrote that "discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session. Discussions regarding their constitutionality and possible legal challenges would likewise be so included. But as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends."[34]

In *Multimedia II* the court had before it the complete general account of the closed session in that case, and the account showed that the following sequence of events took place in the closed session:

1. The county attorney informed the board that the county's enactment of a moratorium would be challenged in court.
2. The county attorney explained to the board the difference between a land-use ordinance and one adopted under the county's general police power.
3. The attorney and board discussed the legality of making the proposed moratorium longer than 90 days.
4. The participants concluded that 90 days would be sufficient time to enable the county's staff to prepare the noise ordinance.
5. The county attorney suggested some wording changes to the proposed moratorium.
6. The board, after discussions with the attorney, reached a consensus to amend the proposed moratorium ordinance as proposed by the attorney.

Upon reviewing the general account, the court of appeals held that it revealed that there had been *no* discussion of general policy matters or of the propriety of the moratorium, and therefore "the discussion above falls completely within the privilege of N.C. Gen. Stat. § 143-318.11."[35]

34. 136 N.C. App. at 575, 525 S.E.2d at 792.

35. 145 N.C. App. at 372, 550 S.E.2d at 851.

Although the result of the closed session may quickly become public, the discussion may still be held in closed session. In addition to being objectively confidential—that is, limited to the attorney, the client, and their immediate agents—a privileged communication must also be subjectively confidential—the client must intend that it be held confidential. The North Carolina courts have not allowed the privilege to be invoked in an evidentiary context when the client seeks to block an attorney's testimony about conversations that then were communicated to outside parties. For example, in *Blaylock v. Satterfield*,[36] the plaintiff's attorney had written a letter to the defendant at the plaintiff's request. When the plaintiff then sought to stop introduction of the letter into evidence, the court held the privilege did not apply because "it appears that the letter was written at the instance or by the consent of plaintiffs for the purpose of communicating plaintiffs' claims to the defendant."[37] Similarly, in *Dobias v. White*,[38] the parties reached a tentative settlement, under which defendants agreed to convey title to certain property to plaintiff in return for plaintiff's release of associated promissory notes. The plaintiff and defendants conveyed this information to the plaintiff's lawyer, and the plaintiff then instructed the attorney to prepare a deed and have the defendants sign it. After this was done, and the plaintiff was told of that fact, the plaintiff went to his attorney's office, announced that he had changed his mind, and refused to accept the deed or release the notes. At the trial the attorney testified as to the plaintiff's instructions to him, and the plaintiff argued on appeal that the instructions were within the privilege. The supreme court disagreed, holding that the plaintiff's statements "were made for the very purpose of having the information relayed to defendants"[39] and therefore were not privileged. These holdings do not mean, however, that conversations that lead to instructions or other matters that are to be communicated to outsiders are not privileged while they were occurring. It is just the final product that is not privileged. Therefore, even if the immediate

36. 219 N.C. 771, 14 S.E.2d 817 (1941).

37. Id., at 771, 14 S.E.2d at 817. *See also,* State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994)(defendant had gone to attorney to ask attorney to turn defendant into police, and therefore attorney's explanation of why defendant surrendering was not privileged); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977) (attorney's testimony about client's signature that he notarized not privileged, because entire purpose of notarizing is to be able to testify about validity of signature).

38. 240 N.C. 680, 83 S.E.2d 785 (1954).

39. Id., at 685–86, 83 S.E.2d at 789.

result of a closed session with an attorney is some action on the part of the public body or the attorney that ends the confidentiality of the closed session, that does not mean that the closed session was invalid. Rather, it simply means that the public body has no continuing grounds for sealing the minutes and general account of the closed session.

A public body may discuss the legal issues during the closed session. A closed session held to protect the attorney-client privilege is not limited to communications directly between the attorney and the public body. Rather, the public body and other agents of the client who are present in the closed session may discuss the legal issues among themselves and with the attorney as they develop their response to the legal issues. This is clear from *Multimedia II*. Recall that in the closed session the participants in the session discussed the legality of a moratorium lasting longer than 90 days and whether a 90-day moratorium would be sufficient to allow the county's staff to prepare the desired noise ordinance. The court in *Multimedia II* held that these discussions were legitimately part of the closed session.[40]

Examples of topics that might or might not be discussed in a closed session held to protect the attorney-client privilege. It is impossible to be exhaustive in listing the kinds of matters that might legitimately be the subject of a closed session with the public body's attorney, but a number of matters can be suggested by example, based on the North Carolina cases, on cases from other states, and on advisory opinions issued by the North Carolina attorney general.

1. Matters that are or may be in dispute. The statute explicitly permits a closed session to consider the "handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure."

2. Potential claims. A public body may hold a closed session to consider potential claims that a public body might have against others, or that others may have against the public body, even if those claims have not been filed or even explicitly threatened. As the attorney general's office argued in an advisory opinion, "confidential discussions between a public body and its attorneys concerning potential litigation may frequently be as critical to protection of the public body's legal position as discussion occurring after litigation has been initiated. Strategy sessions focused on claims avoidance or settlement of disputes which may evolve into litigation cannot, as a practical matter, be held in the presence of opposing parties."[41]

3. Contract administration. In *H.B.S. Contractors v. Cumberland County Board of Education*,[42] the school board had held a closed session to consider the performance of plaintiff under a construction contract. In the closed session the board voted to terminate the contract the next day, and the court of appeals held that such action in a closed session was not permitted by the open meetings law.[43] There is no suggestion in the opinion, however, that the discussion of the legal issues leading up to the board's vote was improper, and there can be no doubt that a closed session may be held to discuss whether a contractor is in compliance with a public contract and what options the public body may have under the contract.

4. Contract negotiation. Whether a public body may hold a closed session to establish its negotiating position and negotiating strategy in forming a contract, however, is sometimes more problematic, even if the attorney is conducting the negotiation on the public body's behalf. If the issues under negotiation are legal, such as the allocation of risk under the contract, then developing the government's negotiating position should be covered by the privilege. But if the issues are business-related, such as which party will pay for what, the discussions would not be privileged and a closed session would not be permissible.[44]

5. Ordinance drafting. The closed session at issue in *Multimedia I* and *Multimedia II* involved a presentation and board discussion of issues related to drafting a moratorium ordinance. The court in *Multimedia II* held that the closed session was within the privilege.[45]

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40. *See also*, Booth Newspapers, Inc. v. Regents of the University of Michigan, 286 N.W.2d 55 (Mich. Ct. App. 1979) in which the court held that the defendant board could hold a closed session under the attorney-client privilege in order to consider a legal opinion given to the board by its attorneys.

41. Advisory Opinion No. 407, dated 9 February 1999 and found on the N.C. Department of Justice Web page. The opinion contains citations to a number of cases from other jurisdictions that support its advice.

42. 122 N.C. App. 49, 468 S.E.2d 517 (1996).

43. This aspect of the case is discussed below, at note 47.

44. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, p. 93 (American Bar Association, Section of Litigation, 1997), makes the point that the privilege does not cover communications made to an attorney who is acting as a business negotiator for the client. *See* Santrade, Ltd. v. General Electric Co., 150 F.R.D. 539 (E.D.N.C. 1993) (documents are not privileged when they relate to business agreements with third parties or to general business matters).

45. *Accord,* City of Prescott v. Town of Chino Valley, 803 P.2d 891 (Ariz. 1990) (court upholds closed sessions held to discuss legal issues associated with privilege license tax ordinance being considered by board).

6. Quasi-judicial decisions. The open meetings law requires that a public body that is making a quasi-judicial decision hold its discussions in public.[46] But if such a public body wishes to receive legal advice preparatory to its decision-making, there is no reason such advice would not be privileged and therefore appropriately given in a closed session.

7. Negotiating with the attorney. The privilege does not cover negotiations between a client and attorney as to the fee to be charged or the business terms and conditions of the attorney's employment, and therefore these matters cannot be the subject of a closed session.[47]

6. The public body may give instructions in certain circumstances to its attorney during the closed session, but other actions growing out of the closed session may only be taken in open session.

May the public body, during the closed session, take any actions as a result of the advice received and discussion held during the closed session, and not reveal those actions once back in closed session? Both the language of the closed session authorization itself, and the contours of the evidentiary privilege shape the answers to this question.

The public body may reach a consensus on possible action during a closed session, then take the action once back in open session. It was noted above that in *Multimedia II* the court related that the county board of commissioners, in closed session, reached a consensus on the form a proposed moratorium ordinance should take, and then the board adopted that ordinance once back in open session. The court specifically held that the closed session was proper in all respects, and therefore reaching such a consensus is clearly permissible.[48]

The public body may give instructions to its attorney during the closed session "concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure." The statute specifically permits instructions of this sort.

The public body may not give instructions to its attorney on other matters when those instructions will be communicated to an outside party. It was noted above that in order for an attorney-client conversation to be considered confidential, the client must intend that it be and remain confidential; and that when the conversation involves matters that the client intends be communicated to an outside party, that intention is not present. In *H.B.S. Contractors v. Cumberland County Board of Education,*[49] the school board held a closed session to consider the performance of plaintiff under a construction contract and in the closed session voted to terminate the contract the next day. Because the decision to terminate was intended to be communicated to the contractor the next day (and was in fact so communicated), the court of appeals held that it was not confidential and therefore not privileged. Therefore, the board should have reconvened in open session and only then voted to terminate the contract.

In this respect the statutory language quoted in the preceding paragraph should be understood as a partial exception to the general rule that underlies *H.B.S. Contractors*. The statute permits a public body to instruct its attorney in closed session to bring an action, to offer specific terms of settlement, to take a specific position in an administrative procedure, and so on. Each of these instructions is intended to be communicated to outside parties and therefore each would not be privileged, but the statute permits them to be made in closed session anyway. The school board defendant in *H.B.S. Contractors* attempted to bring the board's direction to its attorney within the terms of the exception, arguing that the contract dispute was an administrative procedure, but the court of appeals rejected the argument.

The public body may give instructions to its attorney, when those instructions are not intended to be communicated to an outside party. Not all instructions to an attorney are intended to be communicated to outside parties. The public body may, for example, instruct the attorney as to the general strategy to be followed in negotiating with the outside party, including giving maximum terms for any settlement. These sorts of instructions are often intended to be kept from the outside party and so would continue to be confidential and within the privilege.

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46. The statute exempts *state* quasi-judicial boards from the statute while making their decisions but contains no comparable exemption for *local* quasi-judicial decision-making; and none of the authorizations for closed sessions permits such a discussion in closed session.

47. GERGACZ, § 3.50. Of course, if the attorney will be an employee of the local government, other provisions of the open meetings law permit a closed session to permit the public body to develop its negotiating position on the terms of the attorney's initial employment contract.

48. In Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996), the supreme court held that a local government could reach a tentative consensus in closed session as to economic development incentives to be offered to a business.

49. 122 N.C. App. 49, 468 S.E.2d 517 (1996).

7. If the closed session concerns an existing lawsuit, the motion to go into closed session must identify the parties to the lawsuit; such specificity is not necessary for other closed sessions within the authorization.

G.S. 143-318.11(c) permits a public body to go into closed session only upon a motion made and voted on in open session. In general such a motion must cite one of the purposes for which the statute permits a closed session to be held. Applying that to the authorization under discussion, a motion for a closed session could be stated more or less as follows:

> I move we now hold a closed session to preserve the [public body's] attorney-client privilege.
>
> or
>
> I move we now hold a closed session to discuss with our attorney a matter within the attorney-client privilege.

The statute does require a more specific motion in one circumstance. If the closed session is being held to discuss a specific existing lawsuit, the statute requires that the motion identify the parties to that lawsuit. Because of the statute's specificity, if the closed session is being held to discuss some other sort of proceeding that cannot be characterized as a lawsuit, such as an administrative procedure, the motion need not identify the specific proceeding, although it certainly could. Furthermore, if the closed session is to discuss some matter other than a dispute, such as a proposed ordinance, the motion need be no more specific than the examples set out above.

8. The minutes and general account of the closed session should identify the legal issues discussed and any specific actions taken by the public body; they need not summarize the legal positions taken or the discussion.

G.S. 143-318.10(e) requires that each public body holding a closed session prepare full and accurate minutes of the closed session, as well as a general account "so that a person not in attendance would have a reasonable understanding of what transpired" during the closed session. In *Maready v. City of Winston-Salem*,[50] the supreme court held that *minutes* of a closed session essentially were necessary only when the public body took action within the closed session, because minutes were a record of actions taken. In response the General Assembly added the requirement of a *general account*, which was presumably to be somewhat more descriptive of the conversations taking place in the closed session, regardless of whether any action was taken. There has been some uncertainty about how much detail is necessary in a general account, which uncertainty was, if anything, increased by *Multimedia I*. *Multimedia II*, however, goes far in helping to understand and implement the statutory requirement of a general account.

In *Multimedia I*, the court declared it was unable to determine the propriety of the closed session because all that was before it were affidavits from the county's staff attorney and the clerk to the board of commissioners. The court rejected these as self-serving and instead noted that an "in camera review by the trial court of the *minutes* of the closed session provides the easiest and most effective way for the government body to objectively demonstrate that the closed session was in fact warranted."[51] Although the court seemed to be confusing the minutes with the general account—after all no actions were taken in closed session by the Henderson County board of commissioners—it did appear possible that the general account would have to be fairly detailed in order to serve the purposes envisioned by the court.

In *Multimedia II*, however, the court showed that a general account need not in fact be more than a few sentences long. The court addressed the specific general account prepared by the Henderson County board of commissioners and held that it was adequate to serve the purposes of *in camera* review envisioned in *Multimedia I* and that it fully satisfied the statutory requirement of a general account (and of minutes). In order to discuss and understand the court's holding, it will be useful to set out the county's general account in full:

> **CONSULT WITH ATTORNEY**
>
> Staff Attorney, Jennifer Jackson informed the Board that we have already been informed that action on a moratorium will be challenged. She briefly explained the difference between a "Land Use Ordinance" and a "Police Power Ordinance."
>
> There was discussion about the legality of making the term longer than 90 days. It was decided that 90 days would be enough time to give staff time to complete the noise ordinance.
>
> The County Attorney then suggested some wording changes to the Ordinance as follows:
>
> under Moratorium paragraph it will now read "There is hereby imposed a moratorium on the

50. 342 N.C. 708, 467 S.E.2d 615 (1996).

51. 136 N.C. App. at 576, 525 S.E.2d at 792 (emphasis added).

> construction or operation of racetracks within the County of Henderson. *No permits may be issued by any County department under the control of the Board of Commissioners during the moratorium*. This moratorium shall continue in full force and effect for ninety (90) days expiring at midnight on February 9, 1999." (The underlined sentence was the added verbiage.) Also an additional paragraph was suggested entitled Enforcement which read "This Ordinance may be enforced by any legal and equitable remedies including but not limited to injunctive relief."
>
> After conferring with the County Attorney, it was the consensus of the Board to amend the Moratorium Ordinance as recommended by the County Attorney.

This general account includes two sorts of material. First, it lists the legal subjects presented or discussed in the closed session—the difference between land-use and police power ordinances, the permissible length of a moratorium. The general account does not, however, set out the substance of either the presentation or the discussion—merely its subject matter. Second, it lists each consensus agreed to by the board in the closed session—that the moratorium would be 90 days, and the new language in the moratorium ordinance itself. Even though these were not board actions in the sense necessary for inclusion in the minutes, they were sufficiently like such actions to justify their inclusion. Many closed sessions, of course, will not result in any board action or consensus, and therefore only the first sort of material need be included. (Of course, any public body is free to prepare more detailed general accounts should it wish to.)

9. If a public body has sealed its minutes or general account of a closed session held to protect the attorney-client privilege, it must release the minutes or general account if it explicitly or implicitly waives the continuation of the privilege. Otherwise, because the privilege is perpetual perhaps so too may be the sealing of the minutes and general account.

As was noted in the introductory section of this Bulletin, the attorney-client privilege belongs to the client—the governmental entity. Under the case law concerning the privilege, it is perpetual and, subject to certain exceptions, continues even after the death of the client.[52] G.S. 143-318.10(e) permits a public body to seal the minutes and general account of a closed session "so long as public inspection would frustrate the purpose of a closed session." Because the statutory purpose of the closed session is "to preserve the attorney-client privilege" of the public body, it seems logically to follow that a public body may keep its minutes and general account of such a closed session sealed for as long as the privilege continues to exist—possibly forever. Just because the matter under discussion has been resolved does not end the privilege,[53] and therefore resolving the matter should not automatically require that the minutes and general account be unsealed.[54]

Waiver or loss of the privilege. Of course a client may waive the privilege or take other actions that demonstrate that the communications are not or are no longer confidential. If a governmental client does that with respect to attorney-client communications within a closed session, the minutes and general account must be unsealed and made available, as public records, for public inspection. Just that occurred in the Henderson County litigation, and the court in *Multimedia II* therefore held that the county had violated the public records law by not making the minutes and general account available. The court noted that "when the Board [of county commissioners] reconvened the public session and 'explained that the county attorney had [in the closed session] suggested amendments to the draft of the moratorium previously presented,' the Board then had a duty to disclose the minutes of the closed session to the public since it 'would [no longer] frustrate the purpose of [the] closed session."[55] Because the court focused on the Board's explanation in open session, it appears to be saying that by revealing

52. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (hereafter WIGMORE) § 2323 (McNaughton rev. 1961).

53. Id. ("It has therefore never been questioned, since the domination of the modern theory, that the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client*.")

54. Under G.S. 132-1.1(a) written communications from an attorney to a public entity about litigation or other proceedings is excepted from the public records law. The exception ends, however, three years after the communication was made. This termination provision might be understood as a legislative judgment about how long privileged communications between an attorney and his or her governmental client should remain confidential and therefore be imported into the open meetings law and require the unsealing of the minutes and general account of closed sessions after three years at the latest. Alternatively, though, it might be understood as a recognition that the privilege is perpetual and as creating a specific and limited exception to that rule for the particular communications covered by the statute.

55. 145 N.C. App. at 374, 550 S.E.2d at 852.

what had happened in the closed session, the county ended the confidentiality of the closed session and it was no longer privileged.

There is an alternative ground the court might have used to hold that the privilege no longer protected the closed session in the Henderson County cases. The purpose of the closed session was to discuss and agree upon language in a proposed moratorium ordinance, and once the closed session was over the board of commissioners adopted the ordinance with the language agreed upon in the closed session. Obviously, the consensus-reached language of the ordinance was intended to be made public once the board returned to open session and adopted the ordinance, and therefore that language was—because of the board's *actions* in open session (as opposed to its *explanation*)—no longer privileged. This alternative understanding of the court of appeals' conclusion that the closed session was no longer privileged would apply anytime the primary purpose of the closed session is to reach agreement on language that would soon thereafter be made public or communicated to another party. At that time the privilege will have ended and so too the justification for keeping the minutes and general account sealed.

If the governmental client in some other fashion reveals what went on in the closed session, doing so will normally end the privileged character of the closed session and require that the minutes and general account be unsealed. But such an action must normally be one taken by the proper representatives of client—the governing body or some other responsible official. One member of the governing body may not waive the privilege for the body or entity as a whole, only the entire governing body may do so.[56] Similarly, if the closed session had been overheard by an eavesdropper, it is probable that such an unintended breach of confidentiality does not waive the privilege.[57]

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56. Carver v. Deerfield Township, 742 N.E.2d 1182 (Ohio Ct. App. 2000) ("Therefore, the decision of an individual [township] trustee to testify about what went on at a meeting does not waive the privilege of the board as a whole." Id., at 1191). *See also,* Milroy v. Hansen, 875 F.Supp. 646 (D. Neb. 1995) (a corporate board controls the privilege and therefore a dissident director may not discover privileged materials).

57. Wigmore took the position that if a conversation was overheard by an eavesdropper the privilege was lost, WIGMORE, §§ 2325-26. More recent commentators, however, have criticized Wigmore's approach, *e.g.,* GERGACZ, § 5.42.

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