IN THE SUPREME COURT OF FLORIDA

HOWARD NEU, et. al.

Petitioners

vs. CASE NO. 64,151

MIAMI HERALD PUBLISHING COMPANY, et. al.

Respondents

_____/

CERTIFIED QUESTION
FROM THE THIRD DISTRICT
COURT OF APPEAL OF FLORIDA

BRIEF OF AMICUS CURIAE

FLORIDA LEAGUE OF CITIES

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INTRODUCTION

The Petitioners, Howard Neu, Robert Lippelman, James Devaney, Diane Lord Brannen and James A. Haggerty, as members of the North Miami City Council, were Defendants in the trial court and Appellees in the District Court of Appeal. The Respondents, State of Florida ex.rel., Janet Reno, and the Miami Herald Publishing Company were Plaintiffs in the trial court and Appellants in the District Court of Appeal. The Florida League of Cities is an amicus curiae, pursuant to motion filed with this Court, and represents the interests of the cities of the State of Florida. In this brief the "Petitioners" and "Respondents" will be referred to as they stand before this Court and the Florida League of Cities, Inc. will be referred to as the "League".

STATEMENT OF CASE AND FACTS

The League will accept the Statement of Case and Facts presented by the Petitioner in its brief.

QUESTION CERTIFIED

WHETHER THE SUNSHINE LAW APPLIES TO MEETINGS BETWEEN A CITY COUNCIL AND THE CITY ATTORNEY HELD FOR THE PURPOSE OF DISCUSSING THE SETTLEMENT OF PENDING LITIGATION TO WHICH THE CITY IS A PARTY.

ARGUMENT

WHETHER THE SUNSHINE LAW APPLIES TO MEETINGS BETWEEN A CITY COUNCIL AND THE CITY ATTORNEY HELD FOR THE PURPOSE OF DISCUSSING THE SETTLEMENT OF PENDING LITIGATION TO WHICH THE CITY IS A PARTY.

A. Section 90.502, Fla. Stat., "Lawyer-Client Privilege" Creates A Statutory Exemption To Section 286.011 "The Florida Sunshine Law" Which Permits A City Council To Meet With Their City Attorney For The Purpose Of Discussing Settlement Of Pending Litigation.

Sec. 286.011, Florida Statutes (1981), which was originally enacted in 1967, requires that "all meetings" of "commissions" of "municipal corporations" to be "public meetings", "open to the public". Subsequent to the adoption of the "Sunshine Law" the legislature enacted Sec. 90.502, Fla. Stat. (1981) "Lawyer-Client Privilege" which provides for confidential communications between a lawyer and his client. The "Lawyer-Client Privilege" statute creates a statutory exemption to the Sunshine Law which allows for a City Council to meet with its attorney for the purpose of discussing settlement of pending litigation.

The legislature may create exemptions to the "Open Government Laws" (Sunshine Law sec. 286.011, Fla. Stat., and Public Records Law, Chapter 119, Fla. Stat.) by either general or special law. Tribune Company v. School Board of Hillsborough County, 367 So.2d 627 (Fla. 1979); City of Tampa v. Titan Southeast Construction Co., 535 F.Supp. 163 (M. Dist. Fla. 1982). The statutory language which creates the exemption need not specifically refer to the existing statute which it effects. Rather, the exempting statute must only demonstrate that it is intended to control the behavior specified therein. Marston v. Gainesville Sun Publishing Company,

341 So.2d 783 (Fla. 1st DCA 1976); Tribune Company, supra.[1]

> It is not for us to pass upon the wisdom of this legislative exception. Rather we are obliged to read the provisions of the general law together with the subsequent special act and harmonize them if possible, and if there is an unresolvable conflict between the provisions, the latter special act as a more specific expression of the legislative will, will be given effect. Tribune Company v. School Board of Hillsborough County, supra at p. 629.

Section 90.502, Fla. Stat. (1981) was enacted after the "Sunshine Law" and is directly related to the specific conduct of legal communication between an attorney and his client, the "governmental body", as opposed to the broad provisions of the "Sunshine Law" which regulates conduct of all meetings of the governmental body. The latter and more specific pronouncement of the legislature, § 90.502, Fla. Stat. (1981), must control, especially in light of the specific legislative intent expressed in Sec. 90.102, Fla. Stat. (1981), that, "This chapter shall replace and supersede existing statutory or common law in conflict with its provisions". See City of Tampa, supra. The attorney-client provisions of Chapter 90, Fla Sta. were clearly intended to govern settlement discussions of pending litigation between a City Council and its attorney.

The attorney-client privilege established by Sec. 90.502, Fla. Stat. (1981) was intended to apply to public agencies and public officials as well as private entities. City of Tampa v. Titan Southeast Construction Co., 535 F.Supp. 163 (M. Dist. Fla. 1982); Aldredge v. Turlington, Case No. 79-1023 (2nd Cir. Leon County 1979) affd 378 So.2d 125 (Fla. 1st DCA 1980) cert denied 383 So.2d 1189 (Fla. 1980).

[1] Both Marston and Tribune Company are cases dealing with exemptions to Sec. 286.011, Fla. Stat., the same statutory provision involved in the case sub judice.

> A "client" is any person, public officer, corporation, association, organization or entity either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer. Sec. 90.502(1)(b), Fla. Stat. (1981) (emphasis supplied).

The attorney-client privilege extended to both public and private agencies at common law. Connecticut Mutual Life Insurance v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955). Had the legislature intended to make a drastic change from common law and exclude municipalities, a public corporation (entity), from the protections afforded by the attorney-client relationship, it would have specifically done so. In fact the definition of client in the statute envinces a strong intent by the legislature to preserve the attorney-client relationship for public entities. Sec. 90.502(1)(b), Fla. Stat. (1981).

The very purpose of an attorney-client privilege is to allow communication between an attorney and his client in order that the lawyer may adequately represent his client.

> The attorney-client privilege is the oldest of the privileges for confidential communication known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. As we stated last term in Trammel v. United States, 445 U.S. 40, 51, 63 L.Ed.2d 186, 100 S.Ct. 906 (1980): "The lawyer-client privilege rests on the need for the advocate and the counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out". And in Fisher v. United States, 425 U.S. 391, 403, 48 L.Ed.2d 39, 96 S.Ct. 1569 (1976) we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S.

> 464, 470, 32 L.Ed. 488, 9 S.Ct. 125 (1888) ("privilege is founded upon necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences of apprehension of disclosure") Upjohn Company v. U.S., 449 U.S. 383, 389, 66 L.Ed.2d 584, 591, 101 S.Ct. 677 (1981).

The importance of this confidential communication between attorney and client to adequate representation of the client has also been recognized by the courts of this state. See for example Seaboard Air Lines R. Co. v. Timmons, 61 So.2d 426 (Fla. 1952);

> The policy behind the attorney-client privilege is to promote freedom of consultation with legal advisors through removing the apprehension of compelled disclosure by such advisors. 8 Wigmore Evidence § 2291 (McNaughton Rev. 1961) Anderson v. State, 297 So.2d 871, 872 (Fla. 2nd DCA 1974).

The nature of the communication between attorney and client, be it oral, written or through physical action does not matter as long as it is an attempt to communicate information. Anderson v. State, 297 So.2d 871 (Fla. 2nd DCA 1974).

The argument that the statutory attorney-client privilege is an evidentiary privilege and is only intended to prevent admission into evidence of privileged communications, but does not provide for private consultation between attorney and client, ignores the very purpose of the attorney-client privilege to allow a candid exchange of information between the attorney and his client. It further presumes that the legislature was unaware of the existing law of attorney-client privilege and ignores the rule of law that the privilege is waived when the attorney-client communication is revealed to persons not subject to the attorney-client relationship.

A similar evidentiary argument was raised in challenging the statutory attorney-client privilege in the case of City of Tampa v. Titan Southeast Construction Co. and rejected by the court, which reasoned:

> The defendant's interpretation would render meaningless the lawyer-client privilege that the legislature created for public entities when it enacted the Evidence Code. Therefore it cannot be accepted. It should never be presumed that the legislature intended to enact purposeless and therefore useless legislation. Shearer v. Hotel Corporation of America, 144 So.2d 813, 817 (Fla. 1962). 535 F.Supp. 163, at p. 166 (1982).

As stated previously, the very reason for the attorney-client privilege is to promote the free exchange of ideas between the attorney and client by allowing private communication (See Upjohn, supra); not to allow private meetings between the attorney and client is to emasculate the very reason for the statute and render it useless. It must be presumed that the Legislature knew the reasoning, then existing common and statutory law related to attorney-client privilege, the reason for the privilege, and the existence of the Sunshine Law at the time the statutory lawyer-client privilege was enacted. See Times Publishing Company v. Williams, 222 So.2d 470, 473 (Fla. 2nd DCA 1969); Collins Investment Company v. Dade County, 164 So.2d 806 (Fla. 1964). Had it wished to exempt oral communications and private meetings between governmental attorneys, the Legislature could have done so. See Sec. 90.502(4), Fla. Stat., which enumerates exemptions from the lawyer-client privilege. Instead Sec. 90.502(1)(b), specifically includes "consultations" between "public officers" or "public entities" with their attorney for "the purpose of obtaining legal services".

The client of a municipal attorney for the purposes of Sec. 90.502, Fla. Stat., is neither an individual councilman nor the public as a whole. The client of the municipal attorney is the "elected representatives" of the municipal population, the "governing body". 62 C.J.S. Municipal Corporation § 695 (1949). Turk v. Richard, 47 So.2d 543 (Fla. 1950).

Neither individual councilmen nor the City Attorney by himself has the power to make decisions or take official action for the City. Sec. 62 C.J.S. Municipal Corp. § 695 (1949); Turk v. Richard, supra.

In almost all cities throughout the State, the City Attorney is appointed by the governing body (either City Commission or City Council) and is charged by Charter Provision (many special acts of the Legislature) with the specific duty of giving legal advice to the City governing body as a whole. (See appropriate sections of representative charters from Boca Raton, Key West, Marianna, Tallahassee, Clearwater and Miami attached as Appendix "A").

One may argue that the City Attorney's client is the general population of the municipality as a whole for the purposes of Sec. 90.502, Fla. Stat. (1981), but this argument ignores two very basic principles. Those principles include:

1) The governing body is the elected representatives of the municipality as a whole.

As previously mentioned the governing body is the elected representatives of the entire community. The governing body is the entity responsible for making policy decisions and all decisions concerning litigation. Therefore it is the ethical obligation of the attorney to advise his client, the entity in charge of litigation, "the governing body". Times Publishing Company v. Williams, 222 So.2d 474, 475 (Fla. 2nd DCA 1969).

2) A lawyer-client relationship with the public as a whole would be meaningless as there would be no communication which would be confidential.

Sec. 90.502, Fla. Stat. (1981) specifically defines client to include "public entities", thereby presuming that there would be an entity with which the public lawyer could confidentially communicate. If the Legisla-

ture had intended the client to be the public as a whole, this section would be rendered meaningless, as the lawyer cannot confidentially communicate with the entire community. As previously stated, it is well settled that a court should never presume that the Legislature intended to enact purposeless and therefore useless legislation. See City of Tampa and Shearer Hotel, supra.

Therefore, pursuant to Section 90.502, Florida Statutes, a municipal attorney should be allowed to meet in private with his client, the municipal governing body, to discuss settlement of pending litigation.

B. Legislation Which Prohibits An Attorney From Meeting In Private With His Client To Discuss Pending Litigation Would Interfere With The Procedural Fairness Of Litigation And The Appropriate Conduct For Attorneys, Both Of Which Are Matters Strictly Within The Province Of The Judiciary, And Therefore Invalid.

Aricle V, Section 2, of the Florida Constitution prescribes that the Supreme Court shall be responsible for adopting rules of practice and procedure for trial of cases before the courts of this State. See Markert v. Johnston, 367 So.2d 1003 (Fla. 1978) and Military Park Fire District v. De Marois, 407 So.2d 1020 (Fla. 4th DCA 1981).

Under Article V, Section 15, Florida Constitution, the Supreme Court has exclusive jurisdiction to regulate the practice of law in the State and the appropriate conduct of attorneys. See Pace v. State, 368 So.2d 340 (Fla. 1979).

Article II, Section 3, of the Florida Constitution reads:

> Branches of Government - The powers of the State government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers apertaining to either of the other branches unless expressly provided herein.

Where one branch of government attempts to intrude into the powers of another branch, such intrusion is a violation of Article II, Section 3, Florida Constitution. If the intrusion is by the Legislature, the legislation must be declared unconstitutional or limited in its application so as to not improperly intrude into the powers of the executive or judicial branches. Markert v. Johnston, 367 So.2d 1003 (Fla. 1978) and Kanner v. Frumkes, 353 So.2d 197 (Fla.2nd DCA 1977).[2]

In the instant case the issue is whether the Sunshine Law applies to a meeting between a City Attorney and his client to discuss a settlement of pending litigation to which the City is a party. (Certified Question from the Third District Court of Appeal). This question must be answered in the negative, as a positive answer would result in an unconstitutional legislative intrusion into the constitutional power of the courts to regulate the fair and just procedures of matters before the court and to regulate the conduct and practice of attorneys in trial practice.

This Court has never specifically addressed the limited issue of legislative intrusion into the area of an attorney's ability to communicate

[2] In Kanner v. Frumkes, the Second District held that the "Sunshine Law" was inapplicable to Judicial Nominating Commissions since to hold otherwise would involve an unconstitutional invasion into the powers of the executive branch by the Legislature.

with a client during litigation.[3]

In the only case in the State which has specifically dealt with the question of whether § 286.011 the "Sunshine Law" is an impermissable legislative intrusion into the area of attorney-client privilege during pending litigation, Judge Liles of the Second District, in a well reasoned opinion, stated:

> The legislature therefore, is without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court. See Florida Bar v. Massfeller, Fla. 1965, 170 So.2d 834; State ex rel. Arnold v. Revels, Fla. 1959, 109 So.2d 1; Preamble, para. (b), Integration Rule of the Florida Bar, Florida Rules of Court. 1969, 32 F.S.A. This is not to say, of course, that it may not condemn unethical or criminal conduct, but the attorney has the right and duty to practice his profession in the manner required by the Canons unfettered by clearly conflicting legislation which renders the performance of his ethical duties impossible. He cannot be put in the untenable position of choice between a violation of a statute or a violation of a specific Canon insofar as they clearly conflict. We can perceive of the possibility of instances when there may be conflict between the two as they may relate to privacy and confidentiality in the handling of pending or anticipated litigation.
> See Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 1969)

The ability of a client to consult with his attorney during pending litigation has always been recognized as essential to the fairness of judicial

[3] In Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969), the question of whether a City Council could generally confer with its attorney on legal matters was raised, but the issue was not limited to pending litigation nor was the issue of legislative intrusion in violation of Article II, Sec. 3, discussed. In City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971), the question of whether the City Council could meet to discuss pending litigation was raised, however, there was no indication from the facts that the purpose of the Council's meeting was to consult with its attorney or to seek legal advice. The question of legislative intrusion into the consitutional powers of the judiciary was never discussed in this case.

proceedings. Times Publishing Company v. Burke, 375 So.2d 297 (Fla. 2nd DCA 1979).

> The confidential relationship of an attorney and client is a sacred one that is indispensable to the administration of justice.
> Seaboard Air Line R. Co. v. Timmons, 61 So.2d 426 (Fla. 1952).

The abrogation of the attorney-client relationship hinders a lawyer's ability to adequately prepare for litigation and competently represent his client in accordance with Canon 6, Ethical Consideration 6-1 and Disciplinary Rule 6-101 of the Code of Professional Responsibility, adopted by this Court in the opinion, In Re The Integration Rule of Florida Bar, 235 So.2d 723 (Fla. 1970). An attorney must be able to adequately ascertain from his client all facts concerning the litigation. An attorney must also be able to openly advise his client of the strengths and weaknesses of the case and his legal conclusions and strategy so that the client may make knowledgeable decisions as to whether to proceed or settle the litigation. These essential aspects of an attorney-client relationship depend upon the attorney-client privilege.

The importance of this relationship is discussed in Ethical Consideration 4-1 of the Code of Professional Responsibility for Attorneys, supra.

> Both the fiduciary relationship existing between the lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all facts of the matter he is handling in order for his client to obtain the full advantage of the legal system. (emphasis supplied)

This Court has recognized the importance of the attorney-client relationship in the maintenance of appropriate trial procedures and regulation of

of attorney conduct by the adoption of the foregoing ethical consideration and Canon 4 of the Code of Professional Responsibility ("A lawyer should preserve the confidences and secrets of a client"), as well as by punishing those attorneys who violated said Canon. See The Florida Bar v. Brennan, 377 So.2d 1161 (Fla. 1979).

It is clear that the question of procedural fairness of proceedings before the court and the conduct of attorneys is the responsibility of the judiciary. Municipalities have been placed in the position of being litigants in many types of suits. See Sec. 768.28, Fla. Stat. (1981) "Waiver of Sovereign Immunity" and Monell v. Department of Social Services, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) which held that they were "persons" under the meaning of the Civil Rights Law and could be sued pursuant to 42 U.S.C. 1983. To argue that municipalities are not entitled to fair administration of the judicial procedure, as was argued in the lower court, is unfair; to argue that they are not entitled to raise the issue of fairness is ludicrous. See State v. Steele, 348 So.2d 398 (Fla. 3rd DCA 1977).

This Court has previously ruled that it was not the intent of the "Sunshine Law" to unduly hamper the government when dealing in an adversarial relationship with an outside party.

> The public's representatives must be afforded at least an equal position with that enjoyed by those people with whom they deal. Basset v. Braddock, 262 So.2d 425 (Fla. 1972).

As previously stated, to interpret the "Sunshine Law" to preclude discussions between an attorney and his client during pending litigation would result in unfair administration of justice and would unduly restrict an attorney in the proper defense of his client.

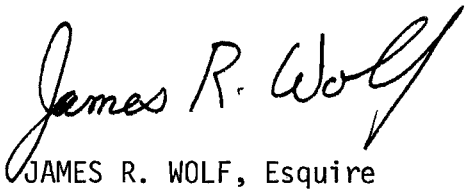
While this Court has been reluctant to limit the scope of legislation, it has done so in accordance with the doctrine of separation of powers where the legislation in question interfered with the fair administration of justice or inappropriately restricted the conduct of attorneys. See Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978) and Pace v. State, 368 So.2d 340 (Fla. 1979).

Therefore this Court should rule that legislation which would prohibit meetings between an attorney and his client during pending litigation would be an impermissable intrusion into the judicial branch of government and answer the certified question in the negative.

CONCLUSION

BASED upon the cases, authorities and policies cited herein, the amicus curiae, Florida League of Cities, respectfully requests this honorable Court to answer the certified question in the negative and to reverse the decision of the appellate court.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been sent by mail this 12th day of October, 1983, to Janet Reno and Thomas K. Peterson, State Attorneys for the 11th Judicial Circuit of Florida, Metropolitan Justice Building, 1351 N.W. 12th Street, Miami, Florida 33125, attorneys for Respondent Janet Reno; Sanford L. Bohrer and Steve M. Kamp, Offices of Paul & Thompson, 1300 S.E. 1st National Bank Building, Miami, Florida 33131, attorneys for Respondent, Miami Herald Publishing Company; Thomas Martin Pflaum, Offices of Simon, Schindler & Hurst, Post Office Box 610847, North Miami, Florida 33161, attorney for the Petitioner; Jim Smith, Attorney General and Gerry Hammond and Joslyn Wilson, Assistant Attorney Generals, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, for amicus curiae, State of Florida; and Robert M. Rhodes, Offices of Messer, Rhodes & Vickers, Post Office Box 1876, Tallahassee, Florida 32302, attorney for amicus curiae, The Florida School Board Association, Inc.

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