IN THE SUPREME COURT
OF FLORIDA

HOWARD NEU, et al.,

Petitioners,

vs. CASE NO. 64,151

MIAMI HERALD PUBLISHING
COMPANY, et al.,

Respondents.
_____/

APPEAL FROM THE THIRD DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

# BRIEF OF AMICUS CURIAE, FLORIDA SCHOOL BOARDS ASSOCIATION, INC.

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## PRELIMINARY STATEMENT

This appeal has been taken by members of the North Miami City Council from an adverse decision of the Third District Court of Appeal. The Florida School Boards Association, Inc., (hereinafter "FSBA") is a nonprofit corporation that represents Florida's sixty-seven (67) district school boards and respective school board members. The Court's decision in this matter will determine the right of school boards to meet privately with their attorneys to discuss pending litigation, and it is of vital concern to the efficient and responsible conduct of school board business. Accordingly, FSBA moved for leave to file an amicus curiae brief, and that motion was granted. The FSBA hereby submits its brief supporting the position of the North Miami City Council.

All emphasis in this brief is that of the FSBA, unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

In the matter now before this Court, the City Council of North Miami sought to confer in closed session with its attorney regarding pending litigation. The parties stipulated that:

> At such meeting the City Attorney intended to discuss the potential liability and strengths and weaknesses of pending cases to which the City was at that time a party and evaluate them so that the City Council could make a determination as to a settlement position, including a range of settlement figures and conditions.

State ex rel. Reno v. Neu, 434 So.2d 1035, (Fla. 3d DCA 1983). The city obtained a declaratory judgment which held that such a meeting was privileged and therefore not subject to the provisions of Fla. Stat. §286.011, popularly known as Florida's "Government in the Sunshine Law" (hereinafter the "Sunshine Law"). The state attorney and the Miami Herald appealed that decision, and the Third District Court of Appeal reversed on the authority of two Florida Supreme Court opinions. Id. at 1035-36. It further held that the lawyer-client privilege was not a valid exception to the Sunshine Law because that law provides that such exceptions must be constitutional. Id. at 1036. Acknowledging the importance of its ruling, the district court certified to this Court the following question of great public importance, pursuant to Art. V, §3(b)(4) of the Florida Constitution:

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.

Id.

## ARGUMENT

### POINT I

LEGISLATIVE ENACTMENT OF THE LAWYER-CLIENT PRIVILEGE CREATED A VALID STATUTORY EXCEPTION TO FLORIDA'S "GOVERNMENT IN THE SUNSHINE" LAW.

In 1967, the Legislature passed Fla. Laws ch. 67-56, now codified at Fla. Stat. §286.011.[1] That statute provides in pertinent part:

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

Fla. Stat. §286.011(1).

The district court relied on the underscored language to reject the city's argument that a later statute could create an exception to the Sunshine Law. Thus, the Third District has determined that "exceptions to the

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1. Subsection (1) of the Sunshine Law, with which this litigation is concerned, remains as passed in 1967. Subsection (3), which concerns penalties for violations, was amended in 1971. Subsections (4) through (7), which deal primarily with enforcement, were added by the 1978 Legislature.

Sunshine Law may be created only by 'the Constitution.'" 434 So.2d 1036.

The 1976 Legislature enacted Fla. Laws ch. 76-237, which is the Florida Evidence Code. Contained within that code is section 90.502 of the Florida Statutes, which pertains to the lawyer-client privilege. It provides in pertinent part:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications because they were made in the rendition of legal services to the client.

Id. at §90.502(2). This language grants clients a substantive right to retain the confidentiality of communications with counsel. As such, it is distinguishable from procedural provisions, such as the hearsay rule which is intended to insure the trustworthiness of evidence.

The lawyer-client privilege codified in §90.502 is rooted in policy that is basic to our system of jurisprudence: "The lawyer-client privilege encourages full disclosure by the client to the attorney in the furtherance of the administration of justice." Law Revision Council Note to §90.502, Fla. Stat. Annot. 484 (West 1979) (citing McCormick, Evidence §89 (2d ed. 1972). See also Seaboard Air Line Railroad v. Timmons, 61 So.2d 426, 428 (Fla. 1952) (describing the then common law lawyer-client privilege as

"a sacred [relationship] and one that is indispensable to the administration of justice.")

By relying on the language of the Sunshine Law to find that the 1976 Legislature could not create a statutory exception to the Law, the district court has allowed the 1967 Legislature to establish public policy which cannot be amended or modified by its successors other than by constitutional amendment approved by the voters. This conclusion is untenable and incorrect. Although §286.011(1) can properly be read to negate any exceptions based on pre-1967 laws, it does not and cannot bar a later legislature from amending the 1967 law by statute. It is axiomatic that a legislature cannot bind its successors: see, e.g., Straughn v. Camp, 293 So.2d 689 (Fla.), appeal dismissed, 419 U.S. 891 (1974); Tamiami Trail Tours, Inc. v. Lee, 194 So. 305 (Fla. 1940); Sovereign Camp, W.O.W. v. Lake Worth Inlet District, 119 Fla. 782, 161 So. 717 (1935); Kirklands v. Town of Bradley, 104 Fla. 390, 139 So.144 (1932).[2] Thus, the general principle is well-established:

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2. See also City of Cape Coral v. GAC Utilities, 281 So.2d 493, 496 (Fla. 1973) (rejecting the argument that the legislature could not limit the Public Service Commission's jurisdiction by statute: "To say that the jurisdiction of the Public Service Commission cannot be altered by the State Legislature is to admit that the government is beyond the control of the people--that an administrative Frankenstein, once created, is beyond the control of its Legislative creator."

> [T]he legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the amendment of statutes . . . . One legislature cannot bind another as to the mode in which it shall exercise its constitutional power of amendment, or limit or enlarge the general power of amendment, or limit or enlarge the general power of a subsequent legislature in the matter of amendments.

82 C.J.S. Statutes §243 (1953).[3]

In two Florida appellate decisions, including one of the Supreme Court, this principle has been correctly applied to hold that the Florida Legislature may create statutory exceptions to the 1967 Sunshine Law.

At issue in Tribune Co. v. School Board, 367 So.2d 627 (Fla. 1979) was a special act that allowed Hillsborough County teachers to optionally request privacy at any disciplinary hearing. The Court first rejected an "invalid delegation of legislative authority" argument. It then faced the question whether the act created an exception to the Sunshine Law. The Court concluded:

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3. It would seem self-evident that in order for the rule to require that future exceptions be constitutional, the rule itself must be of constitutional stature. While §286.011 expresses an important public policy of this state, it cannot change its stripes. It is a statute, nothing more, and is subject to amendment and even repeal by the Florida Legislature.

> [W]e are obliged to read the provision of the general law together with the subsequent special act and harmonize them if possible, and if there is unresolvable conflict between the provisions, the later special act, as a more specific expression of the legislative will, will be given effect.

Id. at 629. The Court concluded "that Chapter 69-1146, Section 5, as the later legislative expression, is a valid legislative exception to Section 286.011." Id.

Likewise, in Marston v. Gainesville Sun Publishing Co., 341 So.2d 783 (1st DCA 1976), cert. denied, 352 So.2d 171 (Fla. 1977), the First District Court of Appeal found a Sunshine Law exception based on a 1973 statute (Fla. Stat §239.77) that guaranteed privacy or student records. The court noted that although the later statute concerned records, opening the Honor Court student disciplinary hearings to the public would entirely subvert the purpose of the confidentiality statute. The court cited its "duty to regard each act as embodying a solemn legislative purpose, to permit both full reach and, when conflicting policy makes that impossible, to give effect to the later, more specific expression of the legislative will." 341 So.2d at 786. It concluded that the Honor Court proceedings were to be closed because the 1973 Legislature had created a statutory exception to the Sunshine Law when it enacted section 239.77.

Application of these precedents to the case at bar mandates reversal of the District Court's decision. Section 90.502, which was passed after the Sunshine Law, provides a substantive right to maintain confidentiality of attorney-client communications, and defines "client" to include "any person, public officer, corporation, association, or other organization or entity, whether public or private . . ." In view of this later, specific expression of legislative intent, the Legislature must be presumed to have known that it was authorizing confidential communications between public bodies and their lawyers.

This conclusion is buttressed by a related principle of statutory construction that conflicting statutory provisions should be harmonized whenever possible. As noted above, many of the entities subject to the Sunshine Law are defined as "clients" for purposes of lawyer-client privilege. Sections 286.011 and 90.502 therefore conflict because a public entity cannot meet confidentially with its counsel without excluding the public (which could, of course, include adversaries in the legal actions being discussed).

It is well established that a court must presume that statutes are passed with knowledge of prior existing

statutes. And, as noted, it is the duty of the court to construe statutes to harmonize and reconcile conflicting provisions dealing with the same subject. See Woodgate Development Corporation v. Hamilton Investment Trust, 351 So.2d 14, 16 (Fla. 1977) and cases cited therein. Applying these principles, the construction which best harmonizes these statutory provisions is that section 90.502, the later statute, created a narrowly defined exception to the Sunshine Law. To rule otherwise, as the district court did, would deny the attorney-client privilege to a particular group of public clients who are specifically named in the statute as entitled to it. This construction surely fails to give maximum effect to both statutes in a harmonious manner.

The Third District also held the circuit court's declaratory judgment conflicted with two Florida Supreme Court decisions, City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971) and Board of Public Instruction v. Doran, 224 So.2d 693 (Fla. 1969). To the extent these cases can be read to support the district court's opinion, it must be recognized that they preceded the enactment of the Florida Evidence Code and are no longer controlling law on the present question. Furthermore, a careful reading of the Berns opinion refutes the district court's reliance and

reinforces the point made above that the legislature may create statutory exceptions to the Sunshine Law. Although the facts in Berns did involve discussions of pending litigation, there is no indication the discussions were with counsel. Therefore, the attorney-client privilege question was not directly before the Court. Moreover, the Court stated in its opinion:

> Whether Fla. Stat. §286.011, F.S.A., should authorize secret meetings for privileged matter is the concern of the Florida Legislature and unless the Legislature amends Fla. Stat. §286.011, F.S.A., it should be construed as containing no exceptions.

245 So.2d at 41. The legislature subsequently created such an exception by enacting Fla. Stat. §90.502.

The district court's policy will have a far-reaching and unfortunate effect if allowed to stand. The Anglo-American justice system is grounded in the notion that adversaries, litigating by the same rules, will ultimately reach an equitable resolution of their dispute. To deny to one large class of parties the protection of an important rule of the process--the attorney-client privilege--gives its adversaries an unfair advantage that will skew the scales of justice. Public entities, like private litigants, must be able to engage in frank, unfettered discussion of the merits of pending litigation with their counsel. The denial of that right will inhibit

settlement negotiations and place an extra burden on the courts or, in the alternative, give adversaries an advantage that leads to unfavorable settlements that are not negotiated at arm's length and result in improper or unwise expenditures of public monies. The 1976 Legislature expressed its intention to avoid either result by passing section 90.502, which this Court should acknowledge as a legitimate exception to the Sunshine Law.

## POINT II

THE ATTORNEY-CLIENT PRIVILEGE IS A CONSTITUTIONAL EXCEPTION TO THE SUNSHINE LAW.

Although it should be unnecessary to reach this issue in light of the foregoing discussion, the attorney-client privilege qualifies as a constitutional exception to the Sunshine Law. The Second District Court of Appeal so held in Times Publishing Co. v. Williams, 222 So.2d 470 (Fla. 2d DCA 1969). The Williams case was decided before enactment of §90.502. Nevertheless, the court found certain attorney-client communications to be exceptions to the Sunshine Law. It based its conclusion on the attorney's ethical obligation to his or her client:

> There is one aspect of the attorney-client relationship, however, in which there are obligations which bind the attorney; and the aspect involves his duties in the conduct of pending or impending litigation. His professional conduct in these matters is governed by the Canons of Ethics which are promulgated by the Supreme Court under the integrated Bar system in this state. Section 23 [now Section 15] of Art. V. of the Florida Constitution, F.S.A., gives "exclusive" jurisdiction to the Supreme Court in the disciplining of attorneys; and this disciplinary power necessarily includes the exclusive province to proscribe rules of professional conduct the breaching of which renders an attorney amenable to such discipline.
>
> 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.

. . . [T]he 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.

This is brought into focus, for example, if we consider the potential effect of extending the "open meetings" concept to a consultation between a governmental agency and its attorney involving settlement or adjustment of a matter in pending or contemplated litigation. Such settlement or adjustment, in the professional opinion of the attorney, may be fair and favorable to the public and, thus, under Canon No. 8, it would be his duty to so advise. It may further be the professional opinion of the attorney, in the best interests of the public (his real client), that such consultation be private and confidential so as not to jeopardize the settlement. Indeed, he may well feel that such advice would be useless if revealed in such a case, and his duty to so advise would be completely compromised by a requirement that this advice be imparted in public. The client may have the right to accept or reject the judgment that settlement is called for, but it does not have the right to render impossible the attorney's duty to so advise; nor does the legislature have the authority to render this judgment sterile. The attorney's dilemma in the face of such legislation is obvious.

> We emphasize that what we say here is limited only to that area of the attorney-client relationship in which the ethical obligations of the attorney clearly conflict with the dictates of this statute. . . .
>
> It is our conclusion, therefore, that the legislature is fully aware of its constitutional limitations and did not intend, by the enactment of Chapter 67-356, to place attorneys in a position of having no alternative but to violate the Canons of Ethics.

Id. at 475-76.

The concerns and conclusions of Chief Judge Liles' opinion are as viable today as they were when written in 1969. And, although the district court distinguished the case of Bassett v. Braddock, 262 So.2d 425 (Fla. 1972) on its facts in reaching its conclusion below, that case does suggest Supreme Court approval of the reasoning of Times v. Williams. See 262 So.2d at 428 and n. 10.

Art. II, §3 of the Florida Constitution directs that the powers of government be divided into three branches, and that powers of each be exclusive. The right to control the professional conduct of attorneys is vested solely in the judiciary by Art. V, §15, and this Court has jealously guarded that right against legislative infringement. See Ciravolo v. Florida Bar, 361 So.2d 121 (Fla. 1978). An affirmation of the district court's opinion in this case would force those attorneys who represent public entities to choose between their ethical duties to their

clients and the Sunshine Law. In many instances, it will be impossible to comply with both. This court should prevent this unsatisfactory result by reversing the district court.

In the event that this Court finds that a constitutional provision is necessary to create an attorney-client privilege exception to Fla. Stat. §286.011, such an exception is present Art. V, §15 of the Florida Constitution, and implemented by the Florida Code of Professional Responsibility.

## CONCLUSION

The lower court incorrectly held that the enactment of the Florida Evidence Code did not create an exception to Florida's Government in the Sunshine Law. This conclusion is at odds with several basic rules of statutory construction and, in effect, improperly clothes a statute with constitutional status. It also provides an unfair advantage to private parties litigating against public entities.

Further, even if this Court agrees with the Third District that exceptions to the Sunshine Law must be included in the Constitution, a clear exception is provided in Fla. Const. Art. V, §15, and the Code of Professional Responsibility promulgated thereunder.

For these reasons, FSBA respectfully requests the Court to reverse the Third District Court of Appeal and reinstate the judgment of the Circuit Court.

Respectfully submitted,

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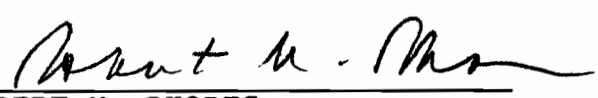

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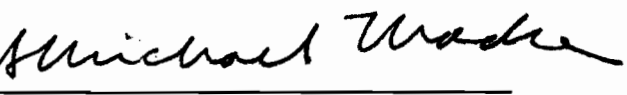

H. MICHAEL MADSEN

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curiae, Florida School Boards Association, Inc., has been served on the following persons this 13th day of October, 1983, by U. S. Mail.

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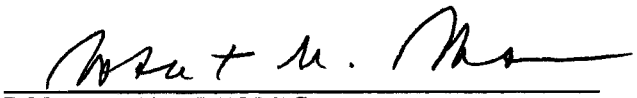

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