IN THE SUPREME COURT OF FLORIDA

Case No. 64,151

HOWARD NEU, Mayor; ROBERT LIPPELMAN, JAMES DEVANEY, DIANE LORD BRANNEN and JOHN A. HAGERTY, Members of the North Miami City Council,
Petitioners,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
Intervenor/Respondent,

and

STATE OF FLORIDA ex rel. JANET RENO, State Attorney for the Eleventh Judicial Circuit of Florida and a Citizen of the State of Florida,
Respondents.

QUESTION OF GREAT PUBLIC IMPORTANCE
CERTIFIED BY THE THIRD DISTRICT
COURT OF APPEAL OF FLORIDA

RESPONDENTS' ANSWER BRIEF

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INTRODUCTION

This Court has three times addressed and rejected the claim that Florida's fundamental commitment to open government should be abridged in order to exclude the public from communications between public bodies and public attorneys concerning litigation involving the public's business. In bringing this claim for a fourth time to this Court, the City of North Miami presents no factual predicate and no sound legal basis for overruling the controlling precedents of this Court, rejecting the decision of the Third District Court of Appeal below, or abandoning the well-established "Sunshine" jurisprudence of this Court. In fact, the City's argument here consists solely of its wholesale misrepresentation of the facts of this case, and its reckless disregard for prior decisions of this Court. This Court should answer the certified question in the affirmative, or summarily dismiss the Petition.

STATEMENT OF THE FACTS

Two critical misrepresentations animate the City's statement of the facts and the argument upon which it is based.[1] First, Petitioner erroneously asserts that the purpose of the proposed "non-public" City Council meeting was

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1. A disregard for the actual facts of this case has characterized Petitioner's argument throughout the appellate phase of this litigation. Unfortunately, it now appears that the City is recommending that this Court adopt the same course (Br. 2). ("There are few facts which need concern this Court in resolving this appeal."). North Miami's statement of facts was written by appellate counsel who was not privy to the proceedings below. (None of the three lawyers who did represent North Miami in the trial court participated in the briefing of this appeal.) Thus, North Miami's factual representations have been written by an attorney without personal knowledge of the facts and without reliance upon the record. All Petitioners are referred to hereinafter as "Petitioner", or "the City", or "North Miami".

to open previously secret discussion (Br. 3-5). Second, the City states that the contemplated meeting was to be merely "discursive" and that no "official acts" or "formal actions" were to be taken (Br. 6-7). Both of these claims are simply contary to the stipulated facts—set out in the pre-trial stipulation filed jointly by all parties—upon which this case was tried (R. 51-55). No other facts were presented. Respondents therefore respectfully submit the following statement of facts to correct any false impressions the City may have created and to provide a more complete and accurate account of the facts and proceedings below.

The Departure From A Tradition Of Public Access

The incidents culminating in this litigation began with the appointment of a new City Attorney. He immediately initiated an aggressive policy of nondisclosure, seeking to close to public and press both his files and his meetings with the City Council. Asserting that all the records in his files should be exempt from public inspection, the City Attorney flatly denied *The Miami Herald's* formal requests for public records. He further sought by petition to this Court a determination that disclosure of his files pursuant to the Public Records Act would violate Disciplinary Rule 4-101 of the Code of Professional Responsibility. *The Florida Bar Re: Tobias Simon v. Knight-Ridder Newspapers, Inc.*, Case No. 61,158. Although the Court dismissed his petition on September 10, 1981, the City Attorney continued his policy of denying records requests without even reviewing the files requested. In response to the City Attorney's own legal action and in light of his consistent refusal to produce the documents requested, *The Miami Herald* itself brought suit against the City. That suit, *Miami Herald Publishing Co. v. The*

City of North Miami, Case No. 83-688, is now pending in the Third District Court of Appeal for the second time. *See Miami Herald Publishing Co. v. The City of North Miami*, 420 So.2d 653 (Fla. 3d DCA 1982).

The City Attorney's policy with respect to litigation meetings with the City Council was the same as his policy on litigation files. He stated publicly that all meetings concerning litigation would be closed and that he would sharply curtail his own public comments on that subject. This represented a marked departure from North Miami's prior practice for, contrary to Petitioner's baseless assertions here, the parties stipulated in this case that "[petitioners had] never employed closed meetings to resolve any litigation". (R. 53). The protestations of the City's new appellate counsel notwithstanding, the record in no way suggests that Petitioners had been "compelled" by the Sunshine Law "to conduct their case conferences . . . in complete secrecy, by means of sequential telephone calls and individual discussions."[2] (Br. 3). The facts of this case are that North Miami has always settled its litigation in the "Sunshine".

The Proposed Secret Meeting

Accepting the City Attorney's closure policy, the City Council passed Resolution No. 81-82 (R. 13-15), rewriting the Sunshine Law to eliminate public access to its future litigation meetings. As "window-dressing" the ordinance provided that citizen representatives of the City Advisory Boards and Commissions, representatives of the

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2. Indeed, had Council members actually been engaging in the activities that counsel for Petitioner alleges, they would have been guilty of violating the Sunshine Law and been subject to penalties. *See Florida Parole & Probation Comm'n v. Thomas*, 364 So.2d 480 (Fla. 1st DCA 1978); *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971).

State Attorney, the City Manager, the City Clerk, and selected members of the media could attend the meetings under a "gag order". This "watchdog" committee would be required to keep all matters discussed confidential until the conclusion of litigation, no matter how long the litigation lasted and no matter how improper the proceedings at the meeting. The City did not bother to find out whether any third party would consent to attend under such conditions. The State and the press flatly declined. Thus, Petitioner's assertion here that the "*only* restriction" on the openness of the meeting was that it not be accessible to the City's adversaries in the litigation is patently untrue (Br. 4).

Moreover, the City Attorney had initially not even planned on the presence of these third parties at the proposed settlement meetings. As his letter of October 28, 1981 to Janet Reno makes clear, the meetings were initially supposed to be "private", no "watchdog" committee being contemplated:

> I have therefore reached the conclusion that a private meeting of the City Council of the City of North Miami is the only way to protect the citizens of the community. . . . The City Council has scheduled such a private meeting. . . .

(R. 11). Only after the State of Florida and *The Miami Herald* warned the City that such meetings would be unlawful was the "watchdog" committee idea devised (R. 53-4). The portrait Petitioner draws of the City Attorney and Council nobly seeking to "*achieve* the public interest in open government" by "accommodating it" with the "interest in effective government and effective legal representation" is pure fabrication (Br. 4-5).

North Miami proceeded to schedule its first closed meeting for December 8, 1981, at 6:00 p.m. As the record makes clear, the subject of the proposed meeting was "the settlement of pending litigation."[3] (R. 52). There can be no doubt that the City fully intended to consider and decide the issues pertaining to settlement. Meeting with the City Attorney, the Council would decide whether to settle and for how much, and thus instruct the City Attorney on how to proceed. The Pretrial Stipulation agreed to by the parties states:

> 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.

(R. 52). The City Council's own resolution restricting access defines its purpose as the making of settlement decisions:

> WHEREAS, the City Council has been advised that the City Attorney desires advice concerning the parameters of proposed settlements of litigation in which the City is a party; and
>
> WHEREAS, *discussion of these matters involves decisions about the expenditures of public monies* and affects the fiscal integrity of the City's budget and Risk Management Fund, and. . . . (emphasis added)

(R. 14).

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3. The cases to be discussed were *Servio v. City of North Miami* (Dade County Circuit Court) (still pending); *Melanie Spector v. City of North Miami* (Dade County Circuit Court) (still pending); *Geneva Manning v. City of North Miami* (Dade County Circuit Court) (tried in 1981 to jury verdict).

In fact, North Miami's Affirmative Defenses filed in this case explicitly state that secrecy was a necessity because both the decision to settle and the determination of the proper range of settlement would be made at the proposed meeting:

> . . . Settlement discussions require frank consideration with the client of his or her potential liability, of the strengths and weaknesses of the case. Generally, at the end of the process, an attorney is given certain authority to settle the case, not at a precise figure, but within a certain range. It then becomes the attorney's duty to meet with opposing counsel to see whether agreement can be reached on terms most beneficial to the client.
>
> 3. An open and frank discussion of the strengths and weaknesses of the case and the maximum and minimum settlement figure, cannot be discussed at a public meeting at which all persons, including adversaries, are permitted to attend. The maximum settlement figure authorized by the client would immediately become the adversary's lowest demand.

(R. 7-8). North Miami's Memorandum of Law filed in the trial court similarly stated that the purpose of the proposed meeting was to discuss "the settlement of pending litigation as to which [the City] is a party" (R. 56). Finally, at the hearing, the factual predicate both sides argued was whether a closed meeting held to settle cases and set settlement figures would be lawful (R. 76, 117-18). The record is thus entirely contrary to Petitioner's contention that "the proposed discussion was exclusively for the purpose of general discourse—for sharing of information and views." (Br. 6). Rather, every document highlights the decisional character of the intended settlement meeting.

After the resolution was adopted on November 24, 1981, the State Attorney filed the Complaint for Declaratory and Injunctive Relief (R. 1-4) which began this action to determine the lawfulness of the proposed nonpublic meeting. The meeting was postponed, but North Miami has stipulated that it intends to hold such closed meetings in the future (R. 54).

The Trial Court Proceedings

A non-jury trial was held on November 5, 1982, and the case tried pursuant to the parties' pretrial stipulation providing that the following issues were before the Court:

(1) Whether the meeting proposed by the City Council, and all similar meetings to discuss litigation, must be open to the public under the Sunshine Law, Section 286.011, Florida Statutes (1981).

(2) Whether requiring such meetings to be open would violate the right to effective assistance of counsel as guaranteed by Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment of the United States Constitution.

(3) Whether requiring such meetings to be open would violate Article VIII, Section 2(b) of the Florida Constitution.

(R. 54). At trial, the arguments of the parties were principally directed to the stipulated issues. The City did not even claim that the closure of the meeting to the public would serve to further the goals of open government or that the settlement decisions to be made at the meeting were not "formal acts" or "official actions" within the scope of the Sunshine Law (R. 5-8, 56-66).

North Miami acknowledged it had presented no evidence showing public access had ever interfered with the

orderly and favorable settlement of one of its cases or otherwise injured it, but asserted it did not need to make any such factual showing (R. 116-17). The Stipulation contains no reference to any facts showing such past or future harm to North Miami; and, in fact, it states that North Miami has never resorted to closed meetings to settle litigation (R. 51-55). No party contended that the decision to settle a case and the setting of maximum and minimum figures for settlement were not "formal acts" of the City Council or that the reach of the Sunshine Law was in any way limited to the performance of "formal acts" (R. 123-127). Nor was this an issue included in the Stipulation (R. 54).

To the frank amazement of all the parties, the trial judge entered his judgment approving exclusion of the public from litigation meetings solely on a ground not briefed or argued by any party. In a detailed and explicit statement of his ruling, following a recess after the conclusion of argument, the judge held the settlement decisions to be made at the secret meeting "are not *formal actions*" and thus need not be conducted in the Sunshine (R. 139-42). When specifically asked whether he had based his decision on a finding that some applicable constitutional provision created an exemption to the Sunshine Law for the proposed meeting, he emphatically stated such was not the case:

> [THE COURT]: . . . I am going to rule that the statute, the ordinance as framed, does not violate the Sunshine Law statute 286.011.
>
> MR. BOHRER: Is there a particular provision that you are holding as exception to rule 286.011?
>
> THE COURT: Are you saying, do you go on article 2, section whatever?

MR. BOHRER: Any particular provision?

THE COURT: No. My decision is based on what I said it was based on.

MR. OVELMEN: What constitutional provision are you referring to? Are you adopting their argument as to the provision[s of the] constitution . . . that they point to?

THE COURT: I don't feel any of it is relevant. It does not matter to me, as I read Bassett. That is not the key. The key is whether it is a formal action or an executive discussion which when it leads to formal action it will be in the open and the Sunshine.

MR. OVELMEN: You are saying those are not formal actions? Is there any more to the ruling is what we want to know.

THE COURT: No. I think I stated my ruling. It is on the record. I am sure you can get it typed up.

(R. 141-142) (Transcript of November 5, 1982 Hearing at 73-74). The basis for the trial court's ruling was made doubly clear by its reciting of the "important langauge" of Section 286.011, which recitation explicitly excluded any reference to the Sunshine Law's requirement that any exemption from it be found in the Florida Constitution (R. 137-138). The trial judge also specifically asserted that "Although *Bassett* deals with the constitutional exemption, that is the right of collective bargaining, I don't think that is the basis of the decision at all." (R. 138). Thus, the trial court entered its judgment excluding the public and press from the meeting on a ground never argued by any counsel, to prevent an alleged harm for which no evidence was presented at trial, and based upon a reading of *Bassett v. Braddock,* 262 So.2d 425 (Fla. 1972), that no party endorsed.

At the conclusion of the hearing, *The Miami Herald* asked the court if it would like counsel for North Miami to draw an Order. The court so directed and added that it should be presented to Respondents' counsel for review:

> MR. BOHRER: Would you like the city attorney to draw an order?
>
> THE COURT: And show it to counsel.
>
> (Thereupon, the hearing concluded).

(R. 141-142). Despite this direct order on the record, counsel for North Miami did not provide Respondents with a copy of the proposed order prior to its entry, and because the Final Order entered did not conform to the trial court's ruling, counsel moved for rehearing or for relief from the Order (R. 144-221). This relief was requested because counsel for North Miami inserted into the Final Order the following finding not made by the trial court:

> In determining that the restricted meeting sought to be held by the City of North Miami does not constitute the performance of "official acts" or "formal action" required to be in the "Sunshine Law" this Court takes note of City of North Miami Resolution R81-82 which sets forth numerous safeguards for the eventual public review of the discussions and the deliberations engaged in during the restricted meeting. Although it is not necessary to reach the conclusion reached herein to address the adequacy of those safeguards this Court does note that the Ordinance effectively protects the public's right to information as well as the municipality's right to effective legal representation.

(R. 145, 232). In fact, such finding could not have been made because the press stated it would not attend such meetings under an unconstitutional "gag order" (R. 136).

The State Attorney concurred. The motion for rehearing was, however, denied. It is the Final Order and the denial of rehearing which were appealed by a Joint Notice of Appeal on December 30, 1982 (R. 226-27), 15 days after rendition of the Rehearing Order.

The Decision In The Third District Court Of Appeal

On appeal before the Third District, the trial court's decision was reversed in an opinion reported at 434 So.2d 1035 (Fla. 3d DCA 1983). The District Court found controlling this Court's decisions in *Board of Public Instruction of Broward County v. Doran,* 224 So.2d 693 (Fla. 1969), and *City of Miami Beach v. Berns,* 245 So.2d 38 (Fla. 1971), which held that meetings to discuss pending litigation were required to be held in the Sunshine. The Court further held that any exception to the Sunshine Law would have to be based on a constitutional provision, and that none applicable here had been so created. Thus, the Court reasoned, neither *Bassett v. Braddock,* 262 So.2d 425 (Fla. 1972), in which a constitutional provision had supplied the basis for the exception, nor the statutory attorney-client privilege "arguably granted" cities by the Evidence Code, Section 90.502, Florida Statutes, supported the City's argument.

However, because of the continuing significance of the issue raised and to afford this Court an opportunity to revisit the issue, the appellate court, pursuant to Rule 9.030(a)(2)(A)(v) of the Florida Rules of Appellate Procedure, certified the following question as one of great public importance:

> 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.

It is this question that is currently before this Court.

ARGUMENT

The argument presented by the City essentially requests this Court to overrule two of its most important Sunshine Law precedents and their progeny. Yet no fact was presented to the court below to even suggest that public access to City Council meetings has ever, or would ever, seriously impair the City's ability to fairly litigate cases. Moreover, the City has presented no convincing argument as to why the precedents of this Court should be abandoned or why this Court should legislate an exemption to the Sunshine Law that could only be created by the People of Florida through an amendment to the Florida Constitution or by the Legislature through a direct amendment of the Sunshine Law itself. The certified question should be answered in the affirmative.

I. THE SUNSHINE LAW APPLIES TO PROHIBIT THE PROPOSED NON-PUBLIC MEETING BETWEEN THE CITY COUNCIL AND THE CITY ATTORNEY.

A. The Court Has Uniformly Interpreted The Sunshine Law To Prohibit The Exclusion Of The Public From Meetings Of Public Bodies Through The Use Of "Executive Sessions" Such As That Proposed By The City.

Since its enactment in 1967, the Sunshine Law has consistently been construed in a manner designed to give substance to Florida's profound commitment to open government. Thus, attempts to evade the law by means of "informal gatherings" or "executive sessions" have routinely been turned aside by vigilant courts.

1. The Meeting Between The City Council And The City Attorney Must Be Held In The Sunshine Because The Meeting Would Be An Integral Part Of The City's Decision-Making Process.

This Court's most recent statement of the breadth and importance of the Sunshine Law was in *Wood v. Marston,* 8 Fla.L.Wkly. 471 (No. 63,341 Fla. December 1, 1983). In considering whether the Sunshine Law applied to meetings of a faculty search-and-screen committee, the Court held that, because "the Committee performed a policy-based, decision-making function," *id.* at 472, its meetings had to be held in the Sunshine. That the committee was nominally an "advisory group" was not relevant. The fact that its decisions could be reviewed and rejected did "not alter the fact that [it made] those decisions." *Id.* The decisions were "official acts" and, as such, they had to "be made in the Sunshine." *Id.*

The settlement determinations that the City Council and the City Attorney planned to make in their closed meeting are even more clearly decisions that the law requires a board to make in the Sunshine. The City Council cannot limit access to its litigation meetings simply by allowing the public to witness its ultimate formal ratification of a particular settlement agreement. It is "the act of decision-making", not "the proximity of the act to the final decision," that mandates that the operations of a particular board or committee be "open to public scrutiny." *Id.* The record is clear that at the proposed meeting the City Council would decide (1) whether a case should be settled or litigated and (2) what terms and conditions should be offered if settlement were deemed appropriate. The City Council intended to set "a range

of settlement figures and conditions" (R. 52) at the meetings; such "decisions about the expenditure of public monies" (R. 14) are *a fortiori* official acts necessarily taken in the Sunshine and integral elements of the decision-making process to which the public must be party.

Because it is the government's "decision-making process" which must be open to public scrutiny and participation, this Court has consistently taken the position that the Sunshine Law applies to all meetings of government boards or commissions concerning matters on which "foreseeable action" would be taken. *Tolar v. School Board of Liberty County,* 398 So.2d 427, 428 (Fla. 1981); *Town of Palm Beach v. Gradison,* 296 So.2d 473, 477 (Fla. 1974); *City of Miami Beach v. Berns,* 245 So.2d 38, 40 (Fla. 1971); *Canney v. Board of Public Instruction of Alachua County,* 278 So.2d 260, 263 (Fla. 1973); *Board of Public Instruction of Broward County v. Doran,* 224 So.2d 693, 698 (Fla. 1969). The Court formulated the "foreseeable action" standard almost 15 years ago in *Doran* in recognition of the public's "inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." *Doran, supra,* at 699. Thus, this Court has long realized that governmental decisions are made though a *deliberative process,* and that public access to that process, not just the formal ratification of a decision, is crucial. Facing a question very similar to the one now before it, this Court in *Doran* concluded that it had been the "obvious intent [of the legislature] to cover any gathering of the members [of a board] where the members deal with some matter on which foreseeable action will be taken by the board." *Id.* at 698. Thus, the *Doran* Court explicitly ruled, if the board "wanted to confer *with their counsel,*" they would have to do so

openly and in accord with the Sunshine Law. *Id.* at 696 (emphasis added).

Some two years later, the Court, facing again the issue of the relation between the Sunshine Law and the attorney-client privilege, reiterated the position that it had taken in *Doran.* In *City of Miami Beach v. Berns,* 245 So.2d 38 (Fla. 1971), the Court held the "law's intent" to be "that any meeting relating to any matter on which foreseeable action will be taken, occur openly and publicly." *Id.* at 41. The "evil" of the "closed door operation of government" is too great; the Court would make "no exceptions" failing legislative amendment of the law itself. *Id.* The City Council could not hold "informal executive sessions" and exclude the public from its "discussion of . . . pending litigation." *Id.* at 40.

Eight years after *Doran,* this Court resolved the parallel access issue under the Public Records Act (the "companion statute" to the Sunshine Law) by holding in *Wait v. Florida Power & Light Co.,* 372 So.2d 420 (Fla. 1979), that the common law attorney-client privilege creates no exemption to the public inspection provisions of Chapter 119, Florida Statutes. This Court rejected the very same "public policy" argument made here by North Miami, stating "This argument should be addressed to the legislature." *Id.* at 424. The Legislature has not amended the Sunshine Law, and no provision of the Florida Constitution creates an exemption for a board meeting with a public attorney. (*See infra* at pp. 29-30).

Since, as the Third District held, the proposed meeting was one where the Council members would discuss matters on which foreseeable action would be taken regarding public litigation, *Doran* and *Berns* require it be in the Sunshine.

2. Access To The Proposed City Council Meeting Would Serve Each Of The Compelling Interests The Sunshine Law Is Intended To Secure.

In decision after decision, court after court has made it abundantly clear that the most fundamental policy goal of the Sunshine Law is to make government accountable to the people. Clever maneuvers designed to sidestep the Sunshine Law and undermine this State's firm commitment to a system of open, accountable, and participatory government will not be tolerated. Thus, courts have often stated that they will construe the law "so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison,* 296 So.2d 473, 477 (Fla. 1974). In fact, the Court's "liberal construction" of the Sunshine Law—so vehemently condemned by Petitioner—is no more than an attempt to defeat circumvention of the "plain provisions" of the law. *See Canney v. Board of Public Instruction of Alachua County,* 278 So.2d 260, 264 (Fla. 1973).

Indeed, the body of decisions interpreting the Sunshine Law were, in part, specifically designed to thwart efforts to evade the law. Thus, in *Gradison, supra,* and in *IDS Properties, Inc. v. Town of Palm Beach,* 279 So.2d 353 (Fla. 4th DCA 1973), where at issue were the meetings of citizen planning committees created to make recommendations to the local zoning board, the courts focused on the fact that the committees, though not the ultimate decision-makers, were nonetheless "an indispensable requisite and integral part" of the decision-making process. *IDS,* 279 So.2d at 356; *see Gradison,* 296 So.2d at 477. Public officials would not be allowed to do "indirectly" what they were "prevented from doing directly." *IDS,* 279 So.2d at 356. In order to prevent boards from "crystalliz[ing] secret decisions to a point just short of cere-

monial acceptance" in private premeeting conferences, the courts would construe the Sunshine Law to "embrac[e] the collective inquiry and discussion stages within [its] terms." *Gradison,* 296 So.2d at 477.

In each case, the emphasis of the Court has been on ensuring the public's access to that phase of the process during which issues are being discussed and evaluated, whatever that phase happens to be called. Thus, in *News-Press Publishing Co. v. Carlson,* 410 So.2d 546 (Fla. 2d DCA 1982), a case just endorsed by this Court in *Wood v. Marston, supra,* at 472-73, the Court explicitly distinguished the case of staff meeting together as a committee from the case of staff members meeting separately with subordinates for fact-finding purposes. Holding that the internal budget committee of a public hospital was subject to the Sunshine Law, the *News-Press* Court wrote: "[W]hen [staff members] put on their committee 'hat' . . . and discuss, deliberate, and take action to formulate a proposed budget," their meetings must comply with the requirements of the Sunshine Law. *News-Press,* 410 So.2d at 549. If this Court permitted secret meetings of boards and their public attorneys, the opportunity to evade the Sunshine Law through such meetings would be overwhelming. "Ideal citizens" (Br. 43) and corrupt politicians alike would find that opportunity impossible to resist.

There are many reasons why the courts have recognized the evaluative, decision-making process as the focal point of the Sunshine Law and construed the law in a manner to defeat efforts to limit access to that process. These reasons were thoroughly canvassed by the Third District Court of Appeal in *Krause v. Reno,* 366 So.2d 1244 (Fla. 3d DCA 1979), another opinion recently approved by this Court in *Wood v. Marston, supra.* There,

the court—holding that a citizen screening committee created to recommend candidates to the City Manager for the position of City of Miami Police Chief had to comply with the Sunshine Law—listed seven fundamental societal goals served by open government. Open meetings, the *Krause* Court first noted, create an avenue for citizen input which may well improve the quality of public decision-making. Here, public access to the proposed litigation meeting, particularly by members of the Bar from the local community, would prevent the systematic or occasional misevaluation of the litigation pending between the City and its residents. Second, the *Krause* opinion noted that access to government meetings enables government to be responsive to the wishes of the governed. Here, public attendance at the Council meeting would enable Council members to adopt a position in the litigation that their constituents could endorse. This possibility is particularly important with respect to suits alleging sexual and racial discrimination or cases in which some instrumentality of the City has injured one of its own citizens. Moreover, *Krause* observed the presence of press and public at board meetings produces a beneficial "checking effect," curbing abuses of government power, and thus generating stability and confidence in government. It is obvious that litigation against the City could be handled in a corrupt, incompetent or unfair manner. Access to the Council meeting would prevent such abuses and help convince the public that the City handles properly the claims brought against it.

Additionally, the *Krause* Court concluded that public meetings both convey to citizens the specific information they need to meaningfully participate in government and foster a general knowledge of the decision-making process. Without access to litigation meetings of the sort

at issue, the public cannot understand how the City disposes of its lawsuits. Finally, the Third District stated that attendance at public meetings allows citizens to see and evaluate the performance of their officials. Exclusion of the public from the litigation meeting would essentially insulate the performance of the City Attorney from public scrutiny, and it would diminish the public's ability to evaluate the City Council.

For all the reasons enumerated in *Krause,* this Court should require the proposed meeting between the North Miami City Council and the City Attorney to be held in the Sunshine. It is undisputed that the purpose of the meeting is to evaluate settlement possibilities and decide upon settlement parameters. It is also undisputed that a council's acts of evaluation and decision must be open to the public. This Court should reject, as it and other courts have consistently in the past, this latest attempt to evade the requirements of the Sunshine Law.

3. The City Has Misconstrued Numerous Decisions Of This Court.

Petitioner has represented to this Court that there are two disparate lines of cases interpreting the Sunshine Law and that it must here choose to follow one or the other. This is patently untrue. Of the three cases cited by Petitioner as comprising this alternate line of decisions (Br. 9),[4] not one departs from the standard that even

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4. Petitioner also notes several cases "following" this alternate line of analysis. Each is easily distinguishable. In *Mitchell v. School Board of Leon County,* 335 So.2d 354 (Fla. 1st DCA 1976), the court held that the Sunshine Law was inapplicable because there had been *no meeting, id.* at 356, not that a meeting did not have to be held in the Sunshine. In *Bigelow v. Howze,* 291 So.2d 645 (Fla. 2d DCA 1974), the court *found* a Sunshine Law violation because discussion among de-

(Continued on following page)

Petitioner admitted below to be the one "universally accepted." (App. Ans. Br. 15, n. 6).

The foundation of this alternate line, according to Petitioner, is *Bassett v. Braddock,* 262 So.2d 425 (Fla. 1972). *Bassett,* however, creates no such deviant line for two reasons. First, in exempting labor negotiations from the Sunshine Law, the *Bassett* Court was careful to ground the exemption in a "literal *constitutional* exception." *Id.* at 426 (emphasis in original). This Court in *Bassett* carefully noted that the Sunshine Law recognizes only exemptions based on constitutional provisions, and based its exemption on Article I, Section 6 of the Florida Constitution.[5]

Footnote continued—

cision-making members of a public body was required to be conducted in the open. In *Killearn Properties, Inc. v. City of Tallahassee,* 366 So.2d 172 (Fla. 1st DCA 1979), the court refused to invalidate a city contract on Sunshine Law grounds when it believed the city to be employing the law to escape a contract. In *Florida Parole & Probation Comm'n v. Thomas, supra,* the issue presented was not whether the Sunshine Law required a particular meeting to be open, but whether a particular decision that had been made by an *individual* in fact should have been made at a meeting. As in *Mitchell,* the Sunshine Law never even applied.

5. North Miami also cites two cases decided under the Public Records Act in support of its argument for a statutory exception to the Sunshine Law. *Aldredge v. Turlington,* 378 So.2d 125 (Fla. 1st DCA 1980) (*per curiam*); *City of Tampa v. Titan Southeast Construction Corp.,* 535 F.Supp. 163 (M.D. Fla. 1982). Neither is relevant here given that the Public Records Act lacks the constitutional exception language present in the Sunshine Law. Moreover, *Aldredge,* as a *per curiam* affirmance has no precedential value. *See Department of Legal Affairs v. District Court of Appeal,* 434 So.2d 310 (Fla. 1983) (*per curiam* affirmance with no written opinion has no precedential value and may be stricken where cited). The propriety of a statutory provision that limits exceptions to those based upon the constitution is not in dispute here. Amicus Curiae, Florida School Boards, Inc., nonetheless argues that such a provision is improper and unenforceable because a legislature cannot bind its successors. While the general principle enunciated by amicus is certainly correct, it is of no relevance here: the Legislature is always free to amend the Sunshine Law to delete the provision, if it so chooses.

Id. at 426. Second, in *Bassett,* the Court stressed that the discussions were to be only "preliminary" to the eventual resolution of the contract dispute. Moreover, the Court further indicated that the "preliminaries" it considered to be beyond the reach of the Sunshine Law were those "informal exchanges of ideas and possibilities . . . (at the Coke machine, in a foyer, etc.) [in which] there is no relationship at all to any meeting at which any foreseeable action is contemplated." *Id.* at 427. So, far from overruling *Doran* and *Berns* as Petitioner asserts (Br. 9), the *Bassett* Court cited *Doran* and *Berns* approvingly, holding only that the facts before it did not trigger the requirements of the Sunshine Law.

The other two cases that Petitioner sets against the *Doran* and *Berns* construction of the Sunshine Law are *Occidental Chemical Co. v. Mayo,* 351 So.2d 336 (Fla. 1977), and *Tolar v. School Board of Liberty County,* 398 So.2d 427 (Fla. 1981). As this Court recently noted in *Wood v. Marston, supra, Occidental Chemical* does not create a "staff" exception to the Sunshine Law. The Court in *Occidental Chemical* did hold that staff members may meet privately with decision-makers to "inform and advise" them, but "it did *not* hold that a delegation [of the decision-making function] to staff members would be similarly privileged." *Wood v. Marston, supra,* at 473. There were simply no facts in the record in *Occidental Chemical* to support the implication that the board was using its staff to circumvent the Sunshine Law. *Id.*

Nor does *Tolar* support Petitioner's argument. There, this Court actually applied the "foreseeable action" test and held the board's discussions violative of the "express terms" of the Sunshine Law. *Tolar,* 398 So.2d at 428. Petitioner relies on *Tolar's* holding that this violation was "cured" by a later "independent, final action in the Sun-

shine." *Id.* at 429. But this case does not involve the question of whether a settlement arrived at in a secret meeting should be voided (where it was subsequently ratified in public). This Court should not allow the City Council to legislatively declare violations of the Sunshine Law a part of its routine procedures.

Thus, Petitioner's argument that Sunshine Law jurisprudence is inconsistent and contradictory is groundless. The courts have consistently construed the law to defeat attempts to evade its requirements. And those cases cited by Petitioner as counter to the rule of liberal construction themselves interpret the law to lend substance to its guarantee of open government.

B. The City Has Offered No Persuasive Argument For Rejecting This Court's Sunshine Law Jurisprudence.

As the record makes abundantly clear, the purpose of the proposed meeting was to decide whether to settle certain cases involving the City and what the settlement parameters should be in those cases. Under *Doran* and *Berns,* the meeting—which would involve solely discussion of matters on which decision by the Council was "foreseeable," indeed, planned—would have to be held in the Sunshine. This conclusion is equally mandated by *Wood v. Marston.* So clear and undisputed is this application of the governing law to the facts of this case that neither Petitioner nor Respondents even argued the issue at trial (R. 70-143). In fact, the City flatly admits in its brief before this Court that under existing case law the proposed meeting is "clearly . . . illegal." (Br. 21, 27).

Petitioner acknowledges the rule of *Doran* and *Berns,* so recently applied in *Wood v. Marston,* so he asks this Court to reverse itself and abandon *Doran* and *Berns* and

all of the cases through *Wood v. Marston* following those landmark decisions. In support of this request, Petitioner suggests: (1) that the *Doran* Court misinterpreted the significance of the timing of the enactment of the Sunshine Law and that it impermissibly usurped the Legislature's power by construing the terms of the Sunshine Law as liberally as it did; (2) that the Court's construction of the Sunshine Law renders the law too vague to follow; (3) that the Court's construction of the Sunshine Law is unrealistic in light of the political system and therefore has encouraged duplicity on the part of public officials; and (4) that the Court's construction of the Sunshine Law is unconstitutionally overbroad because it interferes with First Amendment rights of public officials. All these contentions offered by Petitioner are without merit.

1. This Court's Construction Of The Sunshine Law Follows The Clear Legislative Intent.

The Sunshine Law, Section 286.011, Florida Statutes, replaced Section 165.20, Florida Statutes, which provided, much like the current Sunshine Law—that "all meetings . . . be held open to the public." Section 165.20 had been restrictively interpreted in *Turk v. Richard,* 47 So.2d 543 (Fla. 1950), however, to reach only "formal assemblages . . . authorized by law to be held for the transaction of official municipal business." *Id.* at 544. Thus, its scope was extremely limited.

In 1967, the Legislature enacted Section 286.011, Florida Statutes, and the question arose whether the scope of the new statute differed from the old. In *Doran, supra,* this Court held that the new law's reach was greater than that of the old. The Court based this holding on certain accepted rules of statutory construction: first, that the Legislature is presumed to be aware of existing law and

the judicial construction of that law, and second, that when the Legislature enacts a new statute, it intends to accord it a meaning different from the meaning accorded the old. *See Seddon v. Harpster,* 403 So.2d 409, 411 (Fla. 1981) (citations omitted). In that the Legislature was presumed to have known both of Section 165.20, Florida Statutes, and its interpretation in *Turk,* the Court reasoned, its intent in passing the new Sunshine Law must have been to expand the scope of the old. Were that not the case, there would have been no need to enact the new law, *Doran, supra,* at 698. Petitioner's interpretation of the significance of *Turk v. Richard, supra* (Br. 16), cannot be correct, for it would render the Legislature's enactment of the Sunshine Law in 1967 redundant. Moreover, the Legislature has readopted Section 286.011 every other year since the *Doran* decision, thereby endorsing this Court's decision in *Doran. See, e.g.,* Section 11.2421, Florida Statutes (1981).

The City's professed concern for the integrity of the legislative process in this situation is admirable, but somewhat misguided. It is not this Court which has overstepped its institutional bounds; it is the City Council of North Miami that has done so. Petitioner repeatedly argues here that the City's proposed secret meeting is actually its way of furthering the goal of open government. Its argument apparently is that government officials will secretly meet behind closed doors if the law does not allow them to openly meet behind closed doors. The logic or illogic of Petitioner's theory aside, however, it is simply not within the City's power to choose the course it wishes to take. It is for the Legislature, and only the Legislature, to "accommodate" the interests at stake, *see infra,* at 37-38. The Legislature has spoken; the City simply refuses to listen.

2. The Court's Construction Of The Sunshine Law Is Neither Vague Nor Ambiguous.

On the one hand, the City admits that the Sunshine Law as it has traditionally been construed would proscribe its proposed meeting. On the other hand, the City charges that the Court's construction of the Sunshine Law renders the law so vague that it cannot tell what conduct is proscribed. If the City truly is perplexed by the law, the solution, offered years ago by this Court, is a simple one:

> If a public official is unable to know whether by any convening of two or more officials he is violating the law, he should leave the meeting forthwith.

Berns, 245 So.2d at 41; *Gradison,* 296 So.2d at 477 ("When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State."). In addition, there is always the remedy for doubt provided by Chapter 86, Florida Statutes; the City might seek a declaratory judgment. In fact, this case *is* before the Court on a complaint for declaratory judgment of the proposed meeting's legality. The complaint was brought, however, by the State Attorney, not the City. Petitioner's difficulty seems not to be one of understanding the dictates of the law, but rather of choosing to comply with them.

3. No Factual Showing Has Been Made That This Court's Sunshine Law Rulings Are Unrealistic.

The City contends that the Sunshine Law as construed by the Court makes unrealistic demands on practical politicians, thereby "forcing" them into duplicity. There are no facts in the record to support Petitioner's rather color-

ful, although unpersuasive, description of the "political process of American government" (Br. 19). Second, Petitioner's argument proves too much. Apparently based on the assumption that "politicians will be politicians;" its logic would defeat the existence of *any* Sunshine Law, even the gutted version recommended by Petitioner here. Respondent would remind the City that law serves a normative function; its purpose is to shape behavior, not describe it. That a strong law may engender a greater number of attempts to circumvent it is no reason to promulgate a weaker law. With all due respect to the City, *The Miami Herald* believes that the Florida Legislature, which passed the Sunshine Law and endorsed this Court's construction of it, has a firmer grip on political reality than does the City's appellate counsel when he ruminates, *dehors* the record, on our political system. The City's argument is tautological: To argue that if there is no Sunshine Law then there will be no law to break is not to argue very much. The "ideal citizens" (Br. 43) on the City Council cannot be allowed to choose the laws they will obey, or to rewrite them to their own satisfaction.

4. The Court's Construction Of The Sunshine Law Does Not Encroach Upon The First Amendment, It Safeguards It.

Petitioner argues that the Sunshine Law, by forcing lawmakers to meet in the open, somehow infringes their right of free speech (Br. 32-36). Again, the City's argument is based on the assumption public officials would rather not talk at all, than talk in public. The First Amendment protects freedom of speech, not the power to conduct public business in private. The City's claim is absurd.

That the City should marshal the First Amendment in its war on open government is particularly offensive.

As many commentators have noted, one of the central purposes of the First Amendment is the preservation of the public's right to know and the maintenance of "wide-open and robust" discussion of public affairs. Petitioner would pervert the rationale that underlies increased access in order to mandate closure, citing only cases that themselves speak of the value of free speech and political discourse.

The City's argument should be summarily dismissed. A meaningful Sunshine Law is an absolute necessity, particularly in the political "real world" that Petitioner posits a world where public officials would rather break the law or remain in complete silence than speak in the presence of the people who elected them. In arguing against this Court's liberal construction of the Sunshine Law in the fashion that it has, the City has made an argument *on behalf* of this Court's continued commitment to an interpretation of the Sunshine Law that embodies this State's strong public policy in favor of open government. The Sunshine Law does not prohibit public officials from speaking freely; it simply provides that when public officials who are members of a public board or commission meet together to consider public business they must invite the public to attend.

II. THERE IS NO EXEMPTION FROM THE SUNSHINE LAW FOR COUNCIL MEETINGS WITH PUBLIC ATTORNEYS.

North Miami argues repeatedly that the special relationship between the City Attorney and his client trumps the fundamental public policy served by the Sunshine Law. This argument ignores the fact that the Legislature, knowing that open government would not be without cost, nonetheless chose to pass a comprehensive open meetings law. "We in Florida have decided this is an acceptable

price to pay for the benefits received, which include greater citizen participation and confidence in government, responsiveness and resistance to abuses and corrupt machines, and a working environment that fosters a vigorous free press." Office of the Attorney General, *Florida Open Government Laws Manual,* Introduction at 5-6 (1982).

The trade off in favor of openness was made explicitly with respect to litigation discussions when Governor Askew vetoed House Bill 1107 in 1977, a measure which would have specifically amended the Sunshine Law to exempt such discussions from the law. In vetoing the Bill, the Governor noted that many decisions "today are directly related to pending litigation" and that such decisions often deal with "matters of great public interest." If public litigation decisions can be made secretly, he argued, "a strong possibility exists of misuse of the condemnation power, of collusive out-of-court settlements, and of other [avoidable] evils." Although not unsympathetic to the concerns of pubilc litigants, Governor Askew nonetheless vetoed House Bill 1107: "there is some merit to permitting public bodies to meet privately with their attorneys, but the potential for abuse outweighs the potential benefit." Journal of the [Florida] House of Representatives, December 13, 1977, at 2-3 (H.B. 1107 veto message). The Legislature declined to pass this Sunshine Law amendment over Governor Askew's veto, and has itself rejected such an amendment at virtually every Session since 1977.

North Miami has adduced no valid interest sufficient to overcome so "compelling a consideration as Florida's commitment to open government at all levels." *Wood v. Marston, supra,* at 11.

A. The Proposed Meeting Is Not Exempt From The Sunshine Law Simply Because It Is Between Attorney And Client.

North Miami posits two arguments based on the assertedly special relationship between attorney and client: first, that the attorney-client privilege codified in the Evidence Code, Section 90.502, Florida Statutes, creates a statutory exemption to the Sunshine Law, and, second, that the ethical standards promulgated in the Code of Professional Responsibility preclude an attorney from meeting with his client in the open. Neither argument has any merit.

1. The Attorney-Client Privilege Codified In The Evidence Code Does Not Create An Exception To The Sunshine Law.

a. Exceptions to the Sunshine Law must be based directly upon a constitutional provision.

The Sunshine Law, unlike the Public Records Act, on its face applies to "all meetings . . . *except as otherwise provided in the Constitution.*" § 286.011, Fla. Stat. (emphasis added). So long as this limitation remains in the Sunshine Law a statute cannot create an exemption to the Sunshine Law. Thus, in *Bassett v. Braddock,* 262 So.2d 425 (Fla. 1972), the Court was careful to ground the exemption of labor negotiations in a "literal *constitutional* exception." *Id.* at 426 (emphasis in original). North Miami's argument that the Evidence Code creates an exception to the Sunshine Law must, therefore, fail simply because the privilege is only statutory.

North Miami cites two open-meetings cases in support of the proposition that statutory exemptions to the Sun-

shine Law are available, but neither is relevant here. *Tribune Company v. School Board of Hillsborough County,* 367 So.2d 627 (Fla. 1979); *Marston v. Gainesville Sun Publishing Co.,* 341 So.2d 783 (Fla. 1st DCA), *cert. denied,* 352 So.2d 171 (Fla. 1977).[6] Each of those cases held the exempting act to be a "later, more specific expression of the legislative will." *Marston,* 341 So.2d at 786. In each, the later act was of narrow scope and considered directly "supplementary" to the Sunshine Law. *Tribune,* 367 So.2d at 628 (quoting trial court). In short, they were effectively "amendments" to the Sunshine Law. In the present instance, in contrast, North Miami would read an exemption into the Sunshine Law from a general provision in the Florida Evidence Code codifying the attorney-client privilege. Unlike the specific acts in *Tribune* and *Marston,* the Evidence Code provision indicates no specific intent to amend the Sunshine Law itself.

b. Even if exemptions to the Sunshine Law could be based upon statutes, the attorney-client privilege would not support such an exception.

The Florida Evidence Code, by its express terms, applies solely to judicial proceedings and reaches no further than did the common law privileges. § 90.103, Fla. Stat. North Miami's contention that an *evidentiary* privilege could create an exception to the Sunshine Law for a City Council meeting is mistaken. The Evidence Code speaks only to "the admission of proof at trial." McCORMICK, LAW OF EVIDENCE, Ch. 1, § 1 (1972). Thus, the privilege protects attorney-client communication from entry into evidence, but it does not stand as a general guarantee

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6. It is unlikely that the First District's rationale in *Marston v. Gainesville Sun, supra,* survives *Wood v. Marston, supra.*

against disclosure of those communications. Because the range of matters to which it applies is wholly distinct, and the concerns which underlie its application completely different, the Evidence Code cannot meaningfully be compared with the Sunshine Law. Just as this Court in *Wait, supra,* maintained a clear distinction between discovery procedures and the right to review public records under the Public Records Act, *Id.* at 424, care should be taken here to distinguish between the purely evidentiary attorney-client privilege and the right to attend public meetings under the Sunshine Law.

Even were this Court to hold that the attorney-client privilege and the Sunshine Law are in some "tension", the Sunshine Law would have to be given full effect. It has already been noted that the Sunshine Law is to be liberally construed because of the fundamental public policy which it serves. *See, supra* at 12-22. Evidentiary privileges, in contrast, are generally disfavored and therefore narrowly construed. A "pressing" public policy will defeat a "claim of confidentiality." *See Girardeau v. State,* 403 So.2d 513 (Fla. 1st DCA 1981). Considering even the enormously important Executive Privilege enjoyed by President Nixon, the United States Supreme Court wrote of privileges generally:

> these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

United States v. Nixon, 418 U.S. 683, 711 (1974).

The attorney-client privilege in particular must be very closely considered before it can be employed, even in the traditional context of judicial proceedings. The privilege is "not absolute" and so the decision of whether

to uphold it is a "balancing process." *Burden v. Church of Scientology of California,* 526 F.Supp. 44, 45 (M.D. Fla. 1981).

> In the end, the result in an individual case must turn on a balancing of society's interest in full disclosure against the policies which underlie the privilege.

Id., quoting In re Grand Jury Proceedings, 517 F.2d 666, 671 n.2 (5th Cir. 1975). Here, where the State has repeatedly made clear its commitment to a policy of disclosure and open government, a policy serving the most "compelling" state interests, *Wood v. Marston, supra,* at 11, the evidentiary attorney-client privilege—even if relevant —is far outweighed in any balance.[7]

Moreover, public officials limit their ability to take advantage of the privilege with respect to public litigation when they assume office. Last month, in *Florida Board of Bar Examiners Re: Applicant,* 8 Fla.L.Wkly. 430 (No. 63,161 Fla. November 3, 1983) (petition for rehearing filed November 28, 1983, on other grounds), this Court held that an applicant to the Florida Bar could not invoke the psychotherapist-patient privilege to support his refusal to provide the Bar information regarding his past "regular" psychiatric treatment. The Court found that the Board's inquiry into an applicant's treatment history furthered a legitimate state interest "since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public." The applicant

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7. The rationale underlying the attorney-client privilege itself also suggests this result. The purpose of the privilege is to encourage candor in attorney-client communication. For public officials such as the City Council and the City Attorney, it should be possible to assume candor; the privilege should be unnecessary. If such is not the case—if the privilege is needed to encourage candor, then it is *crucial* that the Sunshine Law override the privilege.

thus "placed his mental and emotional fitness as well as his moral and educational fitness in issue when he filed his [application]." He was, therefore, precluded from claiming the protection of the privilege. Similarly, City Council members and the City Attorney, when they elect to hold public office, effectively place in issue their fitness to hold those positions, including the integrity of their management of the public's litigation. *Cf. Laughner v. United States,* 373 F.2d 326 (5th Cir. 1967) (having put substance of communication in issue, client is precluded from invoking privilege). As there is a legitimate state interest in ensuring the fitness of members of the Bar, so there is a legitimate state interest in ensuring the honesty and accountability of those members of the Bar who handle the public's litigation. Indeed, the Court earlier this month recognized this interest, as furthered by the Sunshine Law, as among the *most* compelling. *Wood v. Marston, supra,* at 473. The City Council and City Attorney, having chosen to place their credibility and performance in issue, cannot now invoke the attorney-client privilege to keep from the public the very information it requires to make an informed assessment.

Finally, it should be noted that the failure to read the privilege provision as an exception to the Sunshine Law will not, as the City argues, destroy its privilege. The privilege, evidentiary in nature, *never* applied to City Council meetings, and still applies to all other unwritten confidential communications between public attorneys and government officials. On the other hand, were the privilege held to constitute an exemption, the Sunshine Law would be substantially impaired. Such a result is counter to numerous rules of statutory construction which indicate both that amendment and repeal by implication are disfavored, and that courts should, if possible, construe statutes not to conflict. *See, e.g., Villery v. Florida Pa-*

role & Probation Commission, 396 So.2d 1107, 1111 (Fla. 1980); *Alterman Transport Lines, Inc. v. State,* 405 So.2d 456, 460 (Fla. 1st DCA 1981).

2. The Code Of Professional Responsibility Does Not Require That The City Attorney Meet With The City Council Behind Closed Doors.

North Miami argues that to require litigation meetings of the City Council to be open, is to require the City Attorney to breach his ethical obligations to his client. This is simply untrue. First, while the City is correct in asserting that the Florida Supreme Court has exclusive jurisdiction to discipline lawyers, it is unjustified in assuming that this jurisdiction confers upon the Court the power to license lawyers to ignore the law. *See Pace v. State,* 368 So.2d 340 (Fla. 1979). Indeed, the Code of Professional Responsibility is specifically written to safeguard attorneys from the kind of conflict that the City contends exists. Thus, Disciplinary Rule 7-102 provides that an attorney shall not "conceal or knowingly fail to disclose that which he is required by law to reveal." And Disciplinary Rule 4-101(D)(1) provides:

> A lawyer shall reveal: Confidences or secrets when required by law, provided that a lawyer required by a tribunal to make such a disclosure may first avail himself of all appellate remedies available to him.

There is no conflict between the Sunshine Law and legal ethics.

North Miami's reliance on *Times Publishing Co. v. Williams,* 222 So.2d 470 (Fla. 2d DCA 1969), is therefore misplaced. In fact, the Canons were amended in response to the *Williams* decision to avert future conflicts questions,

and now include Disciplinary Rule 7-102, referred to above, to require disclosure in accord with the open government laws. Thus, the Petitioner's assertion that the City Attorney is forced to choose between violating the Sunshine Law and violating the Code of Professional Responsibility, is incorrect; the requirements of the law and the Code are in perfect harmony.

B. North Miami As A City Has No Special Claim That Its Proposed Meeting Be Excepted From The Sunshine Law.

North Miami makes three arguments that its mere status as a city should exempt its proposed meeting from the Sunshine Law: first, that the City possesses a due process right to the effective assistance of counsel which public access to litigation meetings would abridge; second, that its Home Rule power permits it to set its own policy with respect to meetings; and third, that the City cannot be forced to impermissibly delegate its decision-making power to the City Attorney, which it claims application of the Sunshine Law would necessitate. Not only do these arguments fail to generate exemptions from the Sunshine Law; each is internally incorrect.

1. North Miami Has No Due Process Right To Effective Assistance Of Counsel.

North Miami asserts that opening its settlement discussions to public view will deny it the effective assistance of counsel that is its constitutional right. This argument is incorrect on three separate grounds. First, it is well-settled that cities, even home rule cities with their expanded rights and powers, do not have due process rights vis-a-vis the states within which they are located. Municipalities simply do not possess constitutional rights in

the same sense that individuals do. As creatures of the state, they possess only those rights conferred upon them by statute. *See City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1253-55 (5th Cir. 1976); *see also Village of Arlington Heights v. Regional Transportation Authority,* 653 F.2d 1149 (7th Cir. 1981) (home rule provisions fail to affect city's status).[8]

Second, even if cities did possess due process rights as private individuals do, no right to counsel would be implicated by the type of limited liability the City might have in *civil* cases. *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Rush v. Smith,* 573 F.2d 110 (2d Cir. 1978); *In Interest of D.B. and D.S.,* 385 So.2d 83 (Fla. 1980). In fact, in this respect at least, the City has a distinct advantage over the opposing private litigant. The City, unlike the private party who may be unable to afford a lawyer, is able to draw on public funds, even those derived from the property interests of its adversary, to pay for counsel. Thus, the City has the option, not available to the majority of its adversaries, of using a variety of expensive resources to pursue any litigation in which it becomes involved. Having greater resources at their disposal, the City and its officials are nonetheless subject to only limited liability. The City's liability for compensatory damages in tort is limited, Section 768.28(5), Florida Statutes, as is its liability for punitive damages, Section 768.28(5), Florida Statutes, and for attorneys' fees, Section 768.28(8), Florida Statutes. Individual officials are generally immune from suit for acts done within the scope of their employment. § 768.28(9), Fla. Stat. If there is any "unfairness" in

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8. *Murphy v. Escambia County,* 358 So.2d 903 (Fla. 1st DCA 1978), cited by North Miami for the proposition that cities do possess due process rights vis-a-vis the State, is inapposite. In *Murphy,* the county was not challenging the applicability of a statute.

litigation between private parties and local governments, the Sunshine Law acts only to redress it.

Finally, even were a right to counsel to attach when only such limited civil liability is at issue, North Miami has still not made any evidentiary showing of harm to its "right." Indeed, there is no suggestion in the record that North Miami has suffered any harm at all as a result of City Council meetings being in the Sunshine. Failing any such showing of harm, North Miami is precluded from claiming that its "right" has been abridged. *See State v. Matera,* 401 So.2d 1361, 1364 (Fla. 3d DCA 1981) (government wiretap of attorney-client conversation not a violation of Sixth Amendment absent proof that substance of overheard conversation was helpful to prosecutor); *see also United States v. Wood,* 628 F.2d 554, 559 (D.C. Cir. 1980) (denial of effective assistance of counsel results only where incompetency is so serious that counsel falls measurably below the performance ordinarily expected of fallible lawyers); *Saunders v. Eyman,* 600 F.2d 728, 729-30 (9th Cir. 1977) (to sustain burden of proof on claim of ineffective assistance of counsel, habeas petitioner must show that counsel was so incompetent or ineffective as to make trial a farce or mockery of justice).

2. Its Home Rule Power Does Not Give North Miami The License To Regulate In Conflict With Clear State Policy.

North Miami argues throughout its brief before this Court that its resolution to limit access to litigation meetings (R. 13-15) actually furthers the policy of the Sunshine Law. This, as noted above, *see, supra,* at 25-26, is plainly false, and based upon an assumption directly contrary to the record. North Miami's Ordinance is, in fact, in direct conflict with the Sunshine Law, effectively exclud-

ing public and press from a meeting which it is their right to attend.[9] *Cf. State ex rel. Dade County v. Brautigam,* 224 So.2d 688 (Fla. 1969) ("conflict" refers to legislative provisions which cannot coexist).

A city regulation that conflicts, as North Miami's does, with a superior state statute must fail, the city's home rule powers notwithstanding. *See, e.g., City of Miami Beach v. Rocio Corp.,* 404 So.2d 1066 (Fla. 3d DCA), *pet. denied,* 408 So.2d 1092 (Fla. 1981) (city's regulation of condominium conversion conflicts with state act regulating conversion and must fail); *Scavella v. Fernandez,* 371 So.2d 535 (Fla. 3d DCA 1979) (county's 60-day filing provision conflicts with state's three-year notice period and must fail). North Miami cannot abridge the law of the state whenever it deems its own legislative judgment superior; the City's resolution must fail in the face of direct conflict with the Sunshine Law and its policy.

3. The City Council Need Not Improperly Delegate Its Decision-Making Authority To The City Attorney.

North Miami argues that if it must continue to hold litigation meetings in public it will have to delegate unlawfully the power to resolve claims entirely to the City Attorney in order that its settlement plans may remain secret. It should first be noted that such a delegation of responsibility would not solve North Miami's Sunshine Law problems: a decision that ought to be made in a

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9. Although North Miami's resolution ostensibly allows for the attendance of selected representatives of the media and the State Attorney's office, the public is excluded. At trial, counsel for *The Miami Herald* assured the court that no member of the press would attend the meeting if a gag order were in force (R. 136). And the State of Florida has taken the position that it simply lacks the personnel to police the Sunshine Law in this fashion.

meeting must be made in the Sunshine. The law cannot be evaded. However, the answer to North Miami's purported dilemma is quite simple: all it need do is obey the Sunshine Law and its own regulations. North Miami has already established settlement procedures and guidelines delineating the respective powers of the City Manager, City Attorney and City Council (R. 52). All it need do is follow them.

CONCLUSION

For the foregoing reasons the certified question should be answered in the affirmative, or the Petition summarily dismissed.

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