IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 64,151

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

Petitioners,

vs.

MIAMI HERALD PUBLISHING COMPANY,

Intervenor/Respondent,

and

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

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

As a Matter of Great Public Importance

PETITIONERS' INITIAL BRIEF ON THE MERITS

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THE CASE

This brief is filed under Rule 9.120, Fla. R. App. P., to resolve an issue of great public importance -- whether or not the Sunshine Law (Sec. 286.011, Fla. Stat., 1981) prohibits Petitioners from discussing pending litigation with their attorney, in a quasi-public (restricted-attendance) forum, provided they do not take any formal or official government action during such discussions.

At the request of then North Miami city attorney Tobias Simon, State Attorney Janet Reno filed a declaratory judgment action against Petitioners to resolve that issue (R. 1-4). After

hearing the case, the circuit court dismissed Ms. Reno's lawsuit on the grounds that general attorney-client case discussions were not formal or official government action and thus not encompassed by the Sunshine Law. (R. 230-233) The trial court relied substantially on this Court's decision in Bassett v. Braddock, 262 So.2d 425 (Fla. 1972). The trial court also held that frank attorney-client discussions about pending litigation could not, as a practical matter, occur at a public meeting, and that the City's proposal effectively safeguarded the values underlying the Sunshine Law, as well as the city council's need for effective legal representation.

The Third District Court of Appeal reversed on July 26, 1983, holding that 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) required even general attorney-client case discussions to occur in unconditionally public view. (R. 235-237) The District Court certified that issue as one of great public importance, and this Court agreed to review the matter August 25, 1983.

THE FACTS

There are few facts which need concern this Court in resolving this appeal. The basic facts are stated in the parties' stipulations and the City Resolution describing Petitioners' proposal; R.5-15, 51-55. Tobias Simon was appointed North Miami city attorney in late 1981, having had a long and

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successful private practice which he maintained while representing Petitioners. Mr. Simon was dismayed by the Miami Herald's insistence that he could not legally provide these clients the type of aggressive and professional legal representation all his other clients deserved and received. Mr. Simon was also dismayed that the Sunshine Law had been interpreted in such a fashion that these clients were legally compelled, in the name of "open government," to conduct their case conferences with him in complete secrecy, by means of sequential telephone calls and individual discussions. (Mr. Simon's views on this matter were expressed in pre-litigation correspondence with Janet Reno and the Herald's attorneys, which were included as appendix materials to the brief below.)

Mr. Simon believed that Petitioners had as much right to effective legal representation as any other client and that effective legal representation was not possible if attorney-client case conferences were broadcast to the clients' adversaries. Mr. Simon and Petitioners thus sought to devise a solution to the otherwise insoluable dilemma created by a line of cases interpreting the Sunshine Law to encompass attorney-client communication. They proposed to <u>stop</u> having secret sequential discussions and instead to have their discussions about pending litigation in a regulated setting, as public as possible without breaching Mr. Simon's basic obligations as an attorney or injuring the clients' position in litigation.

The City's proposal is described in the Resolution adopted by Petitioners; there is no dispute that these procedures and safeguards would in fact govern the proposed discussions. Petitioners proposed to publicly announce, at a regular city council meeting, that they would have discussions with their attorney on a certain date regarding pending litigation. Petitioners specify the cases they intended to discuss with the city attorney. Petitioners would then appoint a "watchdog" committee of citizens and officials,to monitor the entire discussion,[1] and representatives of the State Attorney and the press would be invited to attend, provided they did not disclose the discussions until the cases were resolved. The public and private "watchdogs" would be sworn to report any deviation from the publicly-set agenda to the public, the press and the State Attorney. Finally, the city clerk would be required to tape-record the entire discussion, and release the tapes as soon as the litigation under discussion was terminated. The only restriction on the public character of the proposed discussion was they it not be broadcast or accessible to the City's adversaries in the litigation under discussion.

Under the Resolution, therefore, the City sought to actually achieve the public interest in open government while accommodating it with the equally important public interest in

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1. The members of the "watchdog" committee were to consist of members of five citizen advisory boards, the State Attorney or her designee, representatives of the press, the city manager and the city clerk.

effective government and effective legal representation, by providing that all matters discussed at the conference would be transcribed and made unconditionally public upon termination of the litigation, and in the interim, the committee of public and private "watchdogs" would observe all the discussions to ensure that the meeting was limited to general litigation discourse and that no government action was secretly taken.

Accordingly, the City's proposal was not to conduct a secret meeting but the very opposite -- to permit an attorney and a client to have frank and open discourse about pending litigation, as publicly as possible, without encroaching upon the attorney's ethical obligations and without harming the City's position in litigation. Thus Mr. Simon stated in his letter of November 23, 1981 to Janet Reno:

> "The City of North Miami is not blindly pushing ahead on this matter. We recognize the countervailing interests and the City is in the process of adopting guidelines which will include the public establishment of an agenda; an invitation to a citizen's committee and others to attend the restricted meetings and to report any deviation from the publicly-adopted agenda. The only condition is that if the agenda is followed, the City's confidences will not be transmitted to the City's adversaries."

The purpose of the City's proposal, as shown by the Resolution and the parties' Joint Pre-trial Stipulation, was to permit frank and uninhibited attorney-client discourse about the strengths and weaknesses of each side's position, the attorney's strategy in

litigation, and possible settlement opportunities[2] -- in short to permit wide-open, uninhibited discussion of litigation, in a regulated and monitored forum which absolutely precluded secret government action. Through such discussions Petitioners could learn what the city attorney was doing, and Mr. Simon could honor his obligations as a lawyer to keep his clients informed of their position in litigation and of his efforts on their behalf.

Petitioners have consistently disavowed that litigation could be settled at the proposed meeting, or take any other formal or official government action.[3] Petitioners stipulated below that the proposed discussion was exclusively for the purpose of general discourse -- for sharing of information and views. Petitioners stipulated below and reiterate to this Court that it would be absolutely illegal for them to do or take any official act or formal action during their discussions with the city attorney, that nothing said at the meeting would be binding on the city council or anyone else, that nothing said at the

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2. Thus the parties stipulated below that the proposed discussions would concern the City's liability, and strengths and weaknesses of pending cases and the evaluation of potential settlement ranges. (Joint Stipulation, paragraph 9.)

3. Indeed, the parties stipulated below to the mechanism North Miami must use for settling litigation. Such litigation may be settled on authority of the city manager where liability does not exceed $5,000; a risk management committee must settle cases where the liability is between $5,000 and $10,000 (the committee consisting of a member of the city council, the city attorney, the city manager, and the director of risk management); for cases exceeding $10,000 liability, the city council must itself approve the settlement. Petitioners have stipulated that such official and formal action must in all instances be made in the sunshine.

meeting would be an official act of the government or have any formal, official, or binding effect of any sort whatsoever.[4]

The trial court ruled that the proposed discussions would not violate the Sunshine Law because they were merely discussions and not official acts or formal action under Sec. 286.011. The trial court held that a traditional case conference between a city attorney and his clients, in the absence of any official action on the cases being discussed, did not fall within the Sunshine Law. Quoting from Bassett, the Court characterized such pure discourse as:

> "... merely preliminary discussions that do not result in action taken. The exchange of ideas and possibilities between the City Council and the City Attorney and the general conceptualization of settlement parameters does not constitute an official act or a formal action..."

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4. Petitioners reiterate this only because Respondents attempted to confuse the Third District by obliquely implying that the purely discoursive character of the meeting was an unresolved "issue." Actually, from the very beginning the City asserted the purely informational nature of the proposed discussions, and that was the premise upon which the entire controversy was argued and litigated. All the pleadings show that Respondents' position was that mere discourse was prohibited and that was the issue tried and decided by the trial court. (See for example the City's Affirmative Defenses asserting the non-official, non-formal and purely discoursive character of the discussions.) Respondent never even alleged that Petitioners would take any formal government action at the meeting, and the trial court specifically held in its final order that the proposed meeting would solely involve preliminary discussion and the exchange of ideas and possibilities, a finding which was not disturbed by the Third District. Finally, since the proposed discussion was to be recorded and publicly-monitored at all times, Petitioners' stipulation that no government action would be taken is impossible to evade or cicumvent. The purely discoursive character of the proposed meeting is thus a factual predicate to this appeal.

The trial court further held that such attorney-client discourse was "necessary and essential to any party litigant, including a municipality" and noted that:

> "The evident harm in permitting the municipality's adversaries in the process of frank discussion between the city attorney and the client constitutes the "intensity of the sun rays under the statute", which could cause a damaging case of "sunburn" to the City of North Miami and its citizens."

Finally, the trial court also held that the procedure devised by the city council, through its many guarantees of public scrutiny, effectively safeguarded the values and interest underlying the Sunshine Law -- "effectively protects the public's right to information as well as the municipality's right to effective legal representation."

The Third District reversed, ruling that this Court in Doran and Berns had defined even general attorney-client discourse about pending litigation an "official act" under the Sunshine Law.

That is the factual and legal basis of this appeal.

THE ISSUE ON APPEAL

The issue in this case is whether this Court was correct in its line of cases holding that the Sunshine Law encompasses all discourse by public officials concerning matters of public policy, even in the absence of government action (formal, official or otherwise), including otherwise confidential and privileged attorney-client discourse, or whether it was correct in its line of cases holding that the Sunshine Law only encompasses meetings of government officials at which formal or official government action is taken.

SUMMARY OF ARGUMENT

Petitioners submit this Court was correct in Bassett, supra, Oxidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla 1977), and Tolar v. School Board of Liberty County, 398 So.2d 427 (Fla. 1981), when it applied the actual language of the Sunshine Law and held it did not encompass preliminary and general discussion and discourse among public officials in the absense of formal or official action. On its face, the Sunshine Law applies only to meetings between public officials at which official acts or formal action is taken. Petitioners submit the legislature had a very precise reason for writing the law that way, and general attorney-client discourse about pending litigation was never intended to be encompassed by the terms "official acts, formal action." Indeed, assuming Doran and Berns and subsidiary cases were not overruled by Bassett, Mayo and Tolar, the Court should

take this opportunity to rule that such general discourse, especially attorney-client discourse about pending litigation, is not encompassed by the Sunshine Law so long as Petitioners do not take formal or official action (for example by settling a lawsuit) except in full public view.

The Court should recede from Doran and Berns and clarify the law as urged above because the present jurisprudence is muddy and contradictory; because the Court's language in Doran and Berns is extremely vague and overbroad; because Doran and Berns have converted legislation designed to complement the American political system into an attack on the political system; because Doran and Berns have chilled communication and discourse in the very place it is most needed; because Doran and Berns have undermined local government, deprived Petitioners and other citizens of due process of law, and engendered widespread cynicism in government; because Doran and Berns have had the perverse effect of actually increasing government secrecy; because Doran and Berns have impaired effective government by disrupting the channels of communication; because Doran and Berns have disrupted the attorney-client relationship and placed attorneys in the impossible situation of either circumventing the law or violating the most sacred values of their profession; because Doran and Berns had made these Petitioners into second-class litigants; and most importantly, this Court should recede from Doran and Berns because they are neither well-reasoned nor compatible with the language and purpose of the Sunshine Law.

ARGUMENT

THE SPECIFIC LANGUAGE AND THE SPECIFIC LEGISLATIVE INTENT OF THE SUNSHINE LAW ENCOMPASSES ONLY MEETINGS AMONG GOVERNMENT OFFICIALS AT WHICH OFFICIAL OR FORMAL GOVERNMENT ACTION IS TAKEN, AND NOT MERE INFORMATIONAL DISCOURSE OF THE TYPE AT ISSUE HERE.

A. Introduction

Legislators are presumed to understand the conduct and institutions they propose to regulate through legislation. The same cannot be said of courts, which are not supposed to legislate at all. Judges are appointed for their reasoning abilities and sense of justice, not for their knowledge of how the world operates or "ought" to operate. This is an especially important principle in a democracy, considering the inherent tension between our system of government and the isolation of judges from popular will.

This Court has heard many Sunshine Law disputes and may assume it is quite familiar with what the law provides. The line of appellate decisions surrounding Doran and Berns, however, suggest that assumption may not be well founded, and Petitioners urge we begin by reflecting on what the law written by the Legislature actually states:

> "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." 286.011, Fla. Stat. (1981) (Emphasis supplied.)[5]

Many laws contrived by our State Legislature are flimsy and haphazard affairs -- as this Court once commented, they often give the appearance of town drunks which must be dusted off and made presentable by judicial reconstruction. It is Petitioners' central argument that the Sunshine Law is decidedly not one of these, but rather a precise, carefully-crafted and finely-tuned statute which meant exactly what it said and had very good reasons for saying it that way. Because it was so finely tuned, Petitioners will argue, each word and clause of the statute reflected profound legislative conviction about how government should operate, as well as deep practical judgments about the nature of government in our free and open political system. No doubt this Court was well-intentioned in Doran and Berns when it held that the Sunshine Law made all informal discussion a formal act of government, but Petitioners ask this Court to remember that to be an effective partisan of open government and the public's right to know, one must first be a partisan of the truth.

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5. Carefully and accurately parsed, the Sunshine Law thus states: **"All government meetings at which official acts or formal action are to be taken must be open to the public."** That, Petitioners submit, is precisely what the Sunshine Law says -- no more and no less.

B. What the Sunshine Law says and the reason it says it that way.

The Florida Legislature specifically intended the Sunshine Law to apply to official government actions and not mere discourse, informational exchanges, advice from lawyers and other staff, preliminary negotiation and discussion, or background briefings. Not only is that obvious from the plain language of the statute, but that's the only language which makes sense.

In adopting the Sunshine Law, the Legislature realized that all official and formal government actions reflect the ebb and flow of hundreds and thousands of infinitely varied behind-the-scenes "preliminary" human interactions and discourse; a turbulent stream of human political activity so vast and intricate and subtle as to be ultimately inexplicable. Good government requires the unimpaired flow of information and opinions to decision-makers, and the essence of the "American experiment" is unregulated and uninhibited political interaction and discourse. What distinguishes our society and our form of government is, first, the unstructured and non-bureaucratic way in which government operates, and second, the principle that all citizens be afforded the opportunity to express their views and attempt to influence government policy. The very freedom and lack of inhibition which characterizes our political process and gives it strength, can also result in vertigo for decision-makers and perhaps drown out the voices of some citizens or intimidate others from speaking. And this was the raison d'etre of the Sunshine Law, to complement rather than inhibit our free and

uninhibited political tradition by providing that after all the maneuvering is complete, after all the (pseudo-confidential) wheeling-and-dealing comes to a head, after everyone is through debating and pleading and caterwauling and negotiating, and the government actually proposes to exercise its authority as a government and act (i.e. to take a formal action or an official act), there must be a freeze-action point of relative order where all citizens have the opportunity to make themselves heard and demand explanations from their representatives. The Sunshine Law was intended to ensure that decision-makers have considered all the various facts and opinions and have not grossly miscalculated, and to secure a degree of procedural fairness to all citizens and minority interests, precisely because American politics is and must remain free and unregulated rather than fair and bureaucratic, uninhibited rather than orderly, robust rather than reasonable. Just as the remedy for bad speech is more speech rather than less (i.e. censorship), the Legislature's remedy for the intense uninhibited turbulance of the American political process is more politics rather than less, more speech and negotiation rather than inhibitions and constraints on the political process itself. The Legislature, itself a free-wheeling political institution, obviously did not seek to strangle our political system by stating that the "entire decision-making process" was to be choked-off and restricted to fortnightly official meetings. See Bassett at 426-427, observing that the Founding Fathers themselves scrupulously maintained the

secrecy of their preliminary negotiations and discourse because it promoted free and candid debate.

Accordingly, the intent of the Sunshine Law was to provide that before the government acts, before the government reaches out as a government and modifies the world, it must hesistate in a relatively formal setting, to listen to the public's opinions and explain itself if explanations are demanded. The Legislature stated its intent very clearly:

> "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." 286.011 Fla. Stat. (1981). (Emphasis added.)

The legislature never intended to rip the heart out of American politics and government. The Sunshine Law was written by clear-sighted, practical men and women, elected officials ("politicians") themselves, who had a very precise purpose in mind and described their purpose very precisely in the Law. They did not write the Sunshine Law as a vague, Messianic call for "open government" or the "public's right to know." Such rhetoric -- that is, language which impresses the eye and ear but has no concrete meaning -- tends to disarm analysis and pre-judge the issue and significantly is not to be found in the statute. Nor did the legislature inject into the Sunshine Law vague concepts of the "decision-making process" or of discourse "foreseeably

related" to formal and official action. They said the government may take official and formal action only in public. Petitioners submit that the words in Sec. 286.011 are crystal clear to anyone who desires to actually comprehend and apply the Legislative intent.

In Doran this Court noted that prior to the enactment of Sec. 286.011, municipal boards were prohibited from conducting private meetings of any kind, because Sec. 165.22 applied to "all meetings" whether they were formal or informal, and whether or not an official act or formal action was being taken. In this Court's decision in Turk v. Richard, 47 So.2d 543 (Fla. 1950), Sec. 165.22 was limited by a judicial amendment to meetings at which "formal" and "binding" action was taken by the government. Although the courts frequently state that the Florida Legislature must be presumed to know the law, and thus to know this Court's amendment of Sec. 165.22 when it enacted Sec. 286.011, the obvious and logical implication seems to have been overlooked -- indeed inverted. When the Florida Legislature expressly inserted into the Sunshine Law the limitation that it apply only to meetings at which official acts or formal ("binding") action is taken, it must have intended to confirm and ratify this Court's gloss in Turk. Had it wished to repudiate Turk and have the new law apply to all meetings, including those merely involving discourse without formal action, it would hardly have reinserted into the new law virtually the precise terms this Court used in Turk. Yet in a tour de force of illogic, this

Court in Doran reached the contrary conclusion -- that by inserting the specific statement that the Sunshine Law applied to meetings at which official and formal action is taken the Legislature intended to repudiate Turk and encompass any gathering where officials discuss "some matter on which foreseeable action will be taken." See Doran, 224 So.2d at 698, followed in Berns, 245 So.2d at 41, and also Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974).

The Sunshine Law was not intended to inhibit political action and discourse, not even "secret" political discourse, only to prevent secret government, which is a very different thing. See Berns, supra, 245 So.2d at 41:

> "The Legislature did not intend to muzzle law makers and administrative boards to an unreasonable degree. It would be contrary to reason and violate the right of free speech to construe the law to prohibit any discussion whatsoever by public officials between meetings. The practice of discussion politics and government is part of our American heritage enjoyed by public officials and private citizens. The evil of closed-door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit. (Id at 41.)

Officials must never be allowed to exercise the government's power (the public's power) in secret. That it the plain meaning and purpose of the Sunshine Law and it is a very fine purpose too. But that does not mean that government officials should not be allowed to conduct private discussions, and government simply cannot operate without frank (typically private and confidential) discourse.

The Sunshine Law was adopted by the Legislature precisely because unofficial discourse is the heart of American politics and government. The Law was designed to complement rather than undermine our system of government. Because this Court (apparently) did not understand how government works, in Doran and Berns it converted the Sunshine Law from a shield against secret government into a gag on the discourse which makes government work.

C. Doran and Berns misconstrued the law:

The Court judicially amended the Sunshine Law in Doran and Berns, holding that the Sunshine Law was designed to censor and restrict and make bureaucratic the entire process of political discourse on the vague theory that such discourse was "related" and "preliminary" to government action, and a part of a bureaucratic "decision-making process." Petitioners submit that when this Court held that the Sunshine Law encompassed all discussions "preliminary to" formal and official government action, it not only misconstrued the plain language of the statute, but created a jurisprudence so impractical and far-fetched that it is illusory.

In Doran, Berns, Gradison and Wolfson v. State 344 So.2d 611 (Fla. 1977), this Court essentially defined the terms "official acts" and "formal action" to encompass pure speech and discourse, even when purely informational and even in the complete absence of any government action whatsoever, much less

formal or official government action. This had the effect of rendering the statutory terms "official" and "formal" "acts" and "actions" meaningless. Respondents' briefs to the Third District below provide an excellent description of just how completely those decisions distorted the Legislature's language. Doran held that mere talk (in other words, politics), without any government action of any kind (formal, official or otherwise), was encompassed by the Sunshine Law; Berns held that all discourse, "relating to" any matter on which "foreseeable action" will (may?) be taken is encompassed by the Sunshine Law; Gradison held that the Sunshine Law encompassed "the collective inquiry and discussion stages" if "related to" any matter on which "foreseeable action" will (may?) be taken. These decisions and a number of subsidiary decisions advanced a concept which is easy to state although it is utterly impossible to apply, and that is that the Sunshine Law encompasses and applies to the entire political process of American government from preliminary negotiation to final act. The problem with this concept, aside from the fact that it perfectly contradicts the language in the statute, is that there is no principled way on earth to distinguish any part of the political process from any other part unless one draws the distinction which the Legislature drew in the statutes, between official government action and everything else. For in a non-bureaucratic society, everything and anything preceeds a government action, and any and all discourse is foreseeably "related to" government action.

Unlike judicial and other bureaucratic decisions, which are explicable by what preceeded them (i.e. laws, prior decisions, "preliminary" proceedings, pleadings, depositions, correspondence, oral arguments, etc.), governmental actions permit no such cause-and-effect analysis, not even in principle. Government decisions reflect an indeterminent number of extemporaneous communications and exchanges arising through a network of unregulated and usually private interactions, interest groups, business and political alliances, congregations, letters and calls, coalitions, dinner meetings, associations, sidewalk confrontations, angelic impulses to "do right," perceptions of constituent interests or political expediency, moral precepts, family pressures, etc. ad nauseum. Like other historical events, official government actions are merely the tip of a political iceberg so vast and intricate that no one can even explain it, much less regulate it, nor would it be desirable to do so.[6] This Court's announcement that the "entire decision-making process" must be conducted at a public meeting has a pleasant ring to it,

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6. Intrinsic to American politics is day and night "confidential" bargaining, behind-the-scenes maneuvering, confidential compromising and brokering, secret negotiation, private coaxing, etc. It is a serious error to consider such unregulated discourse an unseemly side effect of our free and open political system, for it is the very soul and life of our government. American government isn't a bureaucracy and American politicians aren't professional bureaucrats. The ineradicable essence of American government is unregulated, uninhibited, unpublicized, unmonitered discourse. If one misconceives of American government as a bureaucratic "decision-making process" (like a court or administrative agency) and tries to channel politics into a formalized "procedure" all one accomplishs is to drive politics and government into secrecy and duplicity.

but it is really a grandiose illusion which has only caused the host of problems discussed below.

Doran and Berns and Gradison, et al., clearly render Petitioners' proposed meeting illegal, but Doran and Berns and Gradison et al, render the entire lush political landscape illegal. One of the giveaways is the repeated use of the term "will" in the key phrase, that the Sunshine Law encompasses any discussion related to any matter on which "foreseeable action will be taken." In real time, that is to say present time where Petitioners and other people live and interact politically (to be distinguished from the purely historical, "looking-backwards" time where judges operate), seldom if ever can anyone know what discourse is ("will be"?) "preliminary" or "related" to what official government action which may later occur. And even less is a cause-and-effect relationship "foreseeable" in the political realm where, by definition, political discourse occurs because no one knows the future and all are trying to influence what it will become.[7]

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7. It is not even clear from this Court's language whether the Court meant "preliminary" in the sense of a cause-and-effect relationship or merely a temporal relationship; it is not even clear from this Court's language whether discourse must occur at a public meeting solely if it preceeds formal government action, or whether to be encompassed by law it must also be causally connected to the government action, as suggested by the term "related to". This hardly matters since foreseeability in either sense is impossible, but if the Court wished to denote a causal relationship, then one must ask in what sense can we speak of a causal link between discourse and a future government act, which is distinguishable in principle from every other act and word which has ever occurred or been uttered? This problem is raised most accurately by the Williams decision, discussed immediately below. Williams flatly held that everything Petitioners say, hear

(Continued next page)

This brief is foreseeably preliminary to a final decision by this Court.[8] Undersigned counsel can at least reasonably "foresee" that this brief will be followed by some decision by this Court. However, it is complete folly to attempt to build a jurisprudence on the assumption that citizens are capable of foreseeing which of their sporadic political discussions are (will be? -- even the tenses are confused) "preliminary to" (in either sense) a future government action. These logical and analytical problems would not have arisen had the Sunshine Law been consistently applied in accordance with its language, which merely states that meetings of government boards must be public when official acts or formal actions are taken. As shown below, these analytical problems have led to a host of constitutional and other problems and resulted in a "jurisprudence" in utter disarray.

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and think is an official act and, ipso facto, illegal unless occurring at a public meeting. If this were true, then perhaps at every public official's investiture, a small electronic implant should be inserted into his brain, to transmit all he hears, says and thinks directly to the Herald's typesetters. Only then would the public would really know the entire "decision-making process."

8. Even here, however, the notion of foreseeability is akward, since if litigants could foresee how courts would decide a controversy, they wouldn't bother litigating. Even in law, which is nothing but a set of pre-established rules and principles, there is very little foreseeability, and the situation in an open political system, where there are few rules and fewer principles, is much more unpredictable.

D. The courts' Sunshine Law decision are muddied and contradictory.

As shown above, this Court has at times held that the concept of "official acts, formal action" encompasses pure discourse, political negotiating and preliminary decisions and other informal inaction. Following this Court's decisions in Doran and Berns, this Court and the District Courts have at times even stated that thinking itself is a "step in the decision-making process" and therefore "a necessary preliminary to formal action," and therefore an "official act" which can only occur at a public meeting. See Times Publishing Co. v. Williams, 222 So.2d 470 (Fla. 2nd DCA 1969). This is true and logical but conclusory since the issue is whether "necessary preliminaries" must occur at a public meeting or just official government actions, and since the first alternative is diametrically contrary to the actual language of the statute, it requires linguistic slight-of-hand by the courts to conceal the obvious fact that "formal act" is being defined to mean "informal talk" and "official action" to mean "unofficial inaction." What confuses matters even more is that not all judges have been willing to engage in such verbal gymnastics. An entirely contradictory line of cases has developed from this Court's decision in Bassett, in which this Court specifically held that the Sunshine Law meant what it said: Formal and official action by the government must be taken at a public meeting and preliminary unofficial and informal inaction ("discourse") does not.

Whenever convenient to do so, Bassett is "distinguished" because it discussed a "constitutional exemption" to the Sunshine Law, but the decision was actually based on the Court's recognition of the crucial distinction between mere discourse and official government action.[9] In Bassett this Court held that preliminary discussions could occur in private because the Sunshine Law only applied to the ultimate debate and formal action and not to the preliminary negotiations and discourse. In Bassett this Court stated that full publicity need not be given to each step in the discussion process "so long as the ultimate debate and decisions are public and the 'official acts' and 'formal actions' specified by the statute are taken in open public meetings." In Bassett this Court held that the statute was satisfied so long as the official act and the formal action is taken at an open public meeting. Indeed, in Bassett this Court overruled Doran and Berns, for the appellants in Bassett argued that the Court's prior decisions compelled public meetings not only for formal acts but also for "acts" of deliberating and discussion occurring prior to and "leading up to" formal action, and this Court unequivocally rejected that argument:

> "... A careful re-reading of our opinions and the Act fail to support the foregoing contention... Preliminary discussions may never result in any action taken. There may be numerous informal exchanges of ideas and

9. Moreover, as shown below, the constitutional exemptions which apply to the discourse sub judice is at least as direct as the constitutional exemption which, the Court stated in Bassett, "quite possibly" applied to that discourse.

> possibilities, either among members or with others (at the coke machine, in a foyer, etc.) when there is no relationship at all to any meeting at which any foreseeable action is contemplated. Such things germinate gradually and often without really knowing whether any action or meeting will grow out of the exhanges or thinking. Id at 427.

Indeed, in Bassett this Court even went on to state what Petitioners state here, that every formal action

> "... emanates from thoughts and creations of the mind and exchanges with others. These are perhaps 'deliberations' in a sense, but hardly demanded to be brought forward in the spoken word at a public meeting. To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government. Id at 428.

Even more remarkable, this Court in Bassett directly contradicted its (previous) ruling in Doran and Berns that preliminary discussions between an attorney and a client must occur at a public meeting, by stating that an attorney is "certainly" entitled to consult privately with his clients "on matters regarding preliminary advices."

Many decisions have followed and reaffirmed Bassett, just as many have followed Doran and Berns. See for example Mitchel v. School Board of Leon County, 335 So.2d 354 (Fla. 1st DCA 1976), in which the court rejected the application of the Sunshine Law to a meeting between members of a school board and the board's attorney because the law "was never intended to become a millstone around the neck of the public's representatives when being sued by a private party, nor should it be construed to discourage representatives of the people from

seeking legal advise." Accord, Bigelow v. Howze, 291 So.2d 645 (Fla. 2nd DCA 1974); Killearn Properties, Inc. v. Tallahassee, 366 So.2d 172 (Fla. 1st DCA 1979), in which the court ruled that not "each and every discussion among city commissioners need be made in the sunshine" so long as all formal action of the commission is taken in a public meeting. See also Florida Parole & Probation Commission v. Thomas, 364 So.2d 480, 481-482 (Fla. 1st DCA 1978), holding that litigation decisions did not trigger the public meeting requirement of the Sunshine Law, and that it would make effective legal representation impossible if an attorney's advice to his public clients had to be given at a public meeting. "Neither the letter nor the spirit of the Sunshine Law requires such an extreme and impractical result," the court stated.

Moreover, in Oxidental Chemical Co. v. Mayo, 351 So.2d 336 (Fla 1977), and Tolar v. School Board of Liberty County, 398 So.2d 427 (Fla. 1981), this Court reaffirmed Bassett and again stated that the statute applied only to official acts and formal actions and not to preliminary discourse between local officials and their staff. In Mayo this Court stated that the Sunshine Law did not require commissioners to obtain information and advice in public, and that "the law is satisfied if the commissioners reached a mutual decision... when they met together in public for their formal action. They were unquestionably free to alter their views... until their votes were recorded at the end of their public meeting." And in Tolar, this Court stated again

that public officials may have mere discussions at a private meeting because "the Sunshine Law is satisfied if the commission has reached a mutual decision... when they met together in public for their 'formal action'." Id at 428-429.

Accordingly, Petitioners' proposed discussion with their attorney would be clearly illegal under Doran and Berns and just as clearly legal under Bassett, Mayo and Tolar, since it is undisputed that nothing said at the proposed attorney-client discussions would be binding and therefore Petitioners will be "unquestionably free to alter their views" until such time as they are required to take formal action with respect to the litigation being discussed (assuming formal action is ever required, which it may not be). These two lines of cases are quite impossible to reconcile in any principled fashion. This can be demonstrated simply by comparing the language in Williams, which followed this Court's holding in Doran:

> "Every thought... of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the Legislature intended to effect by the enactment of the statute before us... Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes and official act, an indispensible prerequisite to formal action within the meaning of the act. Williams supra at 473.

with this Court's own language in Bassett:

> "Every action emanates from thoughts and creations of the mind and exchanges with others. These are perhaps 'deliberations' in a sense, but hardly demanded to be brought

> forward in the spoken word at a public meeting. To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government." Bassett supra at 428.

Not surprisingly, the inconsistencies in this Court's opinions has perplexed everyone and has resulted in the complete absence of any settled expectations with regard to the Sunshine Law, in other words, in the absence of law itself.

The sorry state of Sunshine Law jurisprudence is highlighted in Berns and by the attempt of other courts to "reconcile" the caselaw by injecting the sub-concept of "remoteness" to the "relationship" concept, thereby only adding to the confusion. See Bennett v. Warden, 333 So.2d 97 (Fla. 2nd DCA 1976) and Krause v. Reno, 336 So.2d 1244 (Fla. 3rd DCA 1979), suggesting that all discourse must occur at a public meeting unless it is "remotely" related to a future formal government action. This is like trying to solve an inscrutable enigma by referring to Alice in Wonderland. Nor is that the worst of it, for Gradison ennunciated a third, wholly different, concept of the Sunshine Law -- as encompassing only "preliminary" discourse which "crystallizes" policies just short of "ceremonial acceptance." Berns itself contains at least three, and perhaps four, contradictory rationales: (1) That all attorney-client discourse was encompassed by the Sunshine Law as part of the "decision-making process;" (2) that the Sunshine Law prohibited secret meetings (meetings held "at a time and place to avoid

being seen or heard by the public"[10]) to transact or agree to transact public business in a certain way, which on reflection is not the same as the statement in #1 above, and; (3) that "closed door operation of government" is what the Sunshine Law targeted, which contradicts both of the statements above and indeed is exactly what Petitioners are contending here. As if this were not confusing enough, the Court then added:

> "The Legislature did not intend to muzzle law makers and administrative boards to an unreasonable degree. It would be contrary to reason and violate the right of free speech to construe the law to prohibit any discussion whatsoever by public officials between meetings. The practice of discussion politics and government is part of our American heritage enjoyed by public officials and private citizens..." (Id at 41)

At that point it is no longer even clear whether Berns supports Petitioners' position or opposes it. Petitioners are asserting the very thing which Berns asserted -- that the Sunshine Law was aimed at closed-door operation of government, which can only occur via formal and official government actions, and not mere discussion of government-related issues. To say the least,

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10. If that's the purpose of the Sunshine Law, then the law doesn't apply to the meeting sub judice since Petitioners are trying to meet openly rather than secretely.

therefore, the application of Berns to this case is therefore somewhat unclear.[11]

E. The Court should repudiate Doran and Berns because they have chilled necessary and desirable discourse and forced it to become furtive, contrary to the very purpose of the law.

Doran and Berns ennunciated splendid abstractions about the "decision-making process," and splendid rhetoric about the importance of open government, but they evaporated the actual language of the statute. Doran and Berns created a jurisprudence founded on an hallucination -- that open government can be encouraged by limiting it to formal public meetings. Doran and Berns actually promoted far more secrecy in government than all the devious public officials in the state, by forcing necessary, indeed absolutely essential, American political discourse to become furtive, and by mandating that city attorneys, city managers, other staff personnel and the telephone company become

11. To add insult to injury, in Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260, 264 (Fla. 1973), this Court accused public officials of trying to "read exceptions" into the Sunshine Law and "deviously circumvent" the "plain provisions" of the statute. Considering the state of the jurisprudence, these are rather remarkable assertions. Moreover, devious circumvention of this Court's rulings is necessary if our form of government is to survive. Political maneuvering and negotiations which once occurred openly now are furtive and secret, and conducted by duplicitous means, because this Court (on occasion) forgot its institutional limitations and presumed to speak for the Legislature on a matter it (apparently) knew nothing about. This Court is responsible for making duplicity and circumvention of the law a job requirement for local officials, and rather than rail against the officials, the Court should again re-read Doran and Berns and the statute, as it did in Bassett.

secret conduits of all communication among elected officials. Because of Doran and Berns, city attorneys are required by law to conduct case discussions with their clients in complete secrecy, through sequential telephone calls and individual conferences. (See Florida Parole & Probation Commission v. Thomas, 364 So.2d 480 (Fla. 1st DCA 1978); Mitchel v. School Board of Leon County, 335 So.2d 354 (Fla. 1st DCA 1976); Attorney General Opinion 071-32.) Doran and Berns and subsequent decisions were truly a Pyrrhic victory for advocates of open government. This is not even an "open secret," it is not a secret at all. Yet the problems of widespread circumvention of the law, caused by careless judicial tinkering with the statute, is not publicly discussed due to the intimidating power of the mass media.[12] Apparently only Tobias Simon felt offended by such duplicity and widespread lack of confidence in the self-correcting capability of the judicial system, and so only Tobias Simon had the audacity to point out what everyone knows, that the emperor has no clothes. While Mr. Simon and Petitioners thus sought to bring

12. Petitioners cannot resist pointing out that the Attorney General and the State Attorney obviously do not conduct all their discussions of official policy, much less legal strategy, at public meetings -- indeed, they secretely discussed strategy in this very case with the Herald. The Attorney General may feel compelled to toe the media line, but the Attorney General and his assistants every day conduct completely secret talks with their government clients, while Governor Graham, despite his rhetorical commitment to open government, would no more carry on legal strategy conferences with his lawyers at a cabinet meeting than he would walk on the moon. Everyone knows these things, but no one says them; thus the cynicism and corrupting effects of the Court's (mis)construction of the law taints even the proceedings before it.

the reality of the attorney-client case conference into the sunshine, Respondents continue to argue in favor of an empty myth rather than its expression in reality through Mr. Simon's effort. Everything the Sunshine Law stands for, every policy and interest it was intended to serve, would be promoted by Petitioners' proposed meeting. Secret government would be an absolute impossibility under the City's guidelines, and secret government is guaranteed if such meeting cannot occur openly. Obviously Respondents' care more for the rhetoric of open government then open government itself.

Doran and Berns, et al., have thus made a mockery of the law and thwarted the very policies the Sunshine Law was seeking to implement. Mr. Simon's proposal would guarantee infinitely more public awareness of attorney-client communications than presently occurs because of Doran and Berns, et al. Petitioners therefore urge this Court to reject the vague generalities and rhetoric of Doran and Berns and confirm once and for all that the Sunshine Law applies, as it states, to meetings at which official acts and formal actions are taken. Period.

F. The very purpose of our constitutional guarantee of freedom of speech is undermined by Doran and Berns.

Doran and Berns judicially amended the Sunshine Law to read:

> "All discussions of public matters among members of any board or commission or between such members and their legal advisors, however unofficial and informational, must be conducted at public meetings."

This is fine as purely abstract ideology, especially if one mistakenly views elected officials as suspect and somewhat unclean, rather than a citizen's highest calling. But the Court overlooked what the Legislature was obviously aware of, that all government discourse cannot occur at public meetings and that non-public discourse among public officials should bloom whenever and wherever it can, in the direct sunlight or in the shade -- not solely before the Kleiglights of the mass media.

Whatever differences may exist about the purpose of the First Amendment, it is generally agreed that the amendment was designed to protect free and open discourse about government affairs, including the manner in which government should be operated. See Mills v. Alabama, 384 U.S. 214 (1966). petitioners agree they have no First Amendment "right" to exercise the public's power in secret, but they are citizens too and like any other citizen, the First Amendment protects their right simply to listen and express opinions (and think) anywhere they like, absent a compelling state reason for restricting them. By construing the Sunshine Law to prohibit policy makers and their advisors from discussing anything about public affairs except at a narrow, structured forum, this Court has impaired speech and discourse which should, if anything, be encouraged. Petitioners submit that this Court erred in Doran and Berns in construing the Sunshine Law to prohibit pure speech, without even having a realistic expectation that by such a severe sacrifice of the breathing space needed for frank communication and discourse,

the public's "right to know" has even been promoted. Our society demands leaders who can make intelligent decisions and who are well informed. Reason and intelligence does not flourish in a society where for policy-makers merely to discuss public policy is prohibited as an Offense Against State Order. The Sunshine Law should never have been carelessly extended into a mandate for stupidity in government.

It is a fundamental policy of this nation that free speech be encouraged; our own State Constitution provides that every person may speak and publish his sentiments on all subjects. The whole reason for having the First Amendment is that no one knows the truth and that only through uninhibited discussion and debate can the government make reasonable and wise decisions. There can be no free market-place of ideas if the very swirl and diversity of the open market place is considered too unregulated, and the only place to shop for ideas is a sanitized and insipid suburban mall. It is a mystery why this Court in Doran and Berns would deliberately set out to disregard the distinction wisely drawn by the Legislature and traditional to First Amendment analysis, between conduct and speech: When public officials presume to use the power of government to modify

the world, i.e. when they engage in acts[13] having formal and official significance as an exercise of the public's sovereign power, then it is right and proper that they do so before the sovereign people, but when they seek only to enter the (allegedly) free market of ideas, to shop for advice and ideas, they should be permitted to do so without judicially-imposed inhibition or regulation. This the Court itself acknowledged in Bassett and even in Berns. Petitioners submit that the proposed discussions sub judice, between policy makers and their legal advisor, goes to the core value of free speech in this country, and numerous decisions have held that citizens do not lose their First Amendment rights merely because they are elected to office. See Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1978); Ritter v. United States Fidelity and Guarantee Co., 573 F.2d 539, (8th Cir. 1978); Santos v. Miami Region, United States Customs, 642 F.2d 31 (1st Cir. 1981) and other cases cited to the Third District below, all for the proposition that the state cannot impose unreasonable restrictions on free speech as a condition of public office. See also Bond v. Floyd, 385 U.S. 116 (1966), in which the Supreme Court struck down a state effort to restrict an official from speaking and held that the State's interest in regulating the

13. Petitioners acknowledge that some speech may constitute official (verbal) acts, for example when Petitioners state their "ayes" and "nays" or officialy direct the city attorney to accept a settlement offer. These (verbal) acts are official and legal only if taken at a public meeting.

conduct of its officials "gives it no interest in limiting the legislators' capacity to discuss their views on local or national policies."

G. This Court should repudiate Doran and Berns because the law created by those decisions is extremely unfair.

As argued at length above, the caselaw surrounding Doran and Berns is, in Petitioners' view, inherently and intrinsically vague and, in addition, impossible to reconcile in any principled fashion with the caselaw following Bassett. This has promoted grave uncertainty and confusion which has not only chilled desirable discourse, but it has also deprived the "targets" of the Sunshine Law of due process of law. No government official can now determine when a court, with the advange of hindsight, may rule that something he said (or heard or thought) was "related to" an official government action which -- as it happens -- later occurred. Nor can anyone tell if what they say is part of a "decision-making process" when a decision has not yet even been made (i.e. when alternative policies are being discussed) and, as far as anyone can tell, may never be made at all. Moreover, because the entire analysis in Doran and Berns is so fundamentally uncertain, other courts (like the Second District in Williams) have announced that the officials' every thought and word is illegal unless it occurs at a public

meeting.[14] Unless one is a Delphic oracle, this fundamental vagueness and overbreadth is extremely unfair, especially considering the criminal penalties which attach to Sunshine Law violations and the First Amendment component of the "conduct" being penalized. In essence, this Court has created a toothsome and slightly demented jurisprudence which growls that the very essence of Petitioners' role (pure political discourse) may or may not be a crime but no one, they least of all, can determine which because the legality or illegality of their speech will depend on the fortuity of a future event (an official government act) which, if it occurs, a court may decide, ad hoc and ex post facto, was in some utterly vague fashion "related to" their prior discourse. No where else in our legal system would such "law" be tolerated. As a matter of due process, a law is void on its face if it is so vague that persons of common intelligence must guess at its meaning and differ as to its application, and Petitioners submit that even with uncommon intelligence the meaning and practical application of Doran and Berns is a complete mystery.

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14. Moreover, the ideologues in the media have capitalized on this uncertainty and further intimidated public officials from their normal and proper political activities. No official can survive if the local newspaper portrays him as a "violator" of the Sunshine Law, since to an elected official that is more or less equivalent to being branded a child molester. Thus public officials literally flee in panic if they happen to enter a restaurant and see a fellow official having a meal. (This is despite the fact that the Herald writes flowery editorials approving of Senator Kennedy's private dinner with Jerry Falwell, describing it as a mark of our national heritage.)

H. Doran and Berns have deprived Petitioners of effective legal counsel.

Petitioners' due process rights are violated in another way when the Sunshine Law is applied to case discussions with their legal advisor. Whether or not municipal corporations have Fourteenth Amendment rights -- and there is some doubt on this question, see Murphy v. Escambia County, 358 So.2d 903 (Fla. 1st DCA 1978) -- Petitioners are plainly entitled to effective legal representation when they are sued, or are investigated or prosecuted by the State Attorney or Ethics Commission or Governor. Petitioners are individuals and are often personally subject to criminal, civil and administrative liability, as indeed they are under the Sunshine Law itself. Myriad local, state and federal laws subject Petitioners to civil, criminal and administrative penalties for their conduct as city officials. These laws include county and state ethics laws, conflict of interest laws, laws governing campaign practices, "Hatch Act" practices, financial disclosure, civil rights, and so on ad infinitum. Recent federal decisions have even held that members of the city council enjoy no absolute immunity for allegedly slanderous statements, even if made at a city council meeting concerning a matter of major public policy. Consequently, Petitioners are as much in need of effective legal advise and counsel as any other citizen, and the right to effective legal representation in both civil and criminal cases is an element of due process of law. State v. Wright, 375 So.2d 297 (Fla. 2nd DCA 1979). and The Fourteenth Amendment obviously entitles a person

who is in personal legal jeopardy to have effective legal assistance, and effective legal assistance has always been understood to include confidential legal assistance. As will be shown below, Petitioners have no legal representation at all, much less effective legal representation, if the only place they can talk to their own lawyer is in front of the very people who are attacking them.

One element of attorney-client consultation is the discussion of legal strategy. An attorney representing a city council without being able to communicte freely with his clients cannot properly prepare cases, since legal strategy cannot be developed without communication with the client, and such communication cannot occur in front of the opposition. Whether we like it or not, legal strategy often makes the difference in legal outcome. As a practical matter, if Petitioners' legal strategies are revealed to their adversaries prior to trial, then Petitioners will go to trial with their pants down and the adversary is likely to win.

Petitioners hired Tobias Simon as their legal advisor because he was an excellent attorney and knew a great deal about the law and the legal system.[15] Petitioners retained Mr. Simon to provide them with legal advice and representation, not to

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15. It is worth noting that Petitioners are the clients of the city attorney, not the "public" or the municipal corporation. A city attorney is retained by the city council, serves at the pleasure of the city council, and it is the members of the city council who seek his legal advice -- city attorneys do not give legal advice to the public.

provide legal advice and assistance to persons attacking them. The simple truth is that Petitioners cannot obtain effective legal representation if, as this Court apparently held in Doran and Berns, their attorney can only speak to them at a public meeting in front of Petitioners' adversaries. Indeed, as shown below, an attorney cannot frankly counsel his client in front of the client's adversaries, and thus the implication of Doran and Berns is that Petitioners are not entitled to legal counsel at all, since if a client cannot communicate with his attorney then he might just as well not have one. (This was indeed recognized in Bassett and even in Williams.)[16]

A lawyer of Mr. Simon's experience and intelligence can advise a client about many things -- legal principles and theories, practical ways to solve disputes without litigation, history, the inclination of individual judges, government ethics, shrewd litigation strategy, judgments about evidence and witnesses, human psychology, and a host of other matters. It would be utterly unethical for Mr. Simon to provide his judgments and knowledge to the very people against whom he was hired to defend Petitioners.

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16. Indeed, the Florida Bar issued an opinion to Mr. Simon stating that the sanctity of confidential discourse with a client -- any client -- is of "fundamental importance" and took precedence over any state law. The Bar informed Mr. Simon that the attorney-client privilege was firmly established as an ethical obligation of the profession "and its maintenance is a fundamental ethical duty of the lawyer."

I. Doran and Berns are contrary to the standards of professional ethics.

Attorneys are members of the judicial branch of government, and the Florida Supreme Court is the sole institution authorized to regulate the practice of law and assure adequate representation of clients by attorneys. See In Re Florida Bar Examiners, 353 So.2d 98 (Fla. 1977); In Re The Florida Bar, 301 So.2d 448, 451 (Fla. 1974); Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1965). This Court has previously stated that the Florida Legislature may not intrude upon the standards of the legal profession. See State Ex Rel Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957). The Florida Legislature has far less authority to prohibit lawyers from properly representing their clients than it had to (very indirectly) impair collective bargaining in Bassett. See Williams, supra at 475-476, stating that the Sunshine Law could not be extended to discussions between an attorney and his public client, because such an extension would force the attorney to violate the rules of ethics which are constitutionally derived. Under such circumstances, the Sunshine Law should not have been construed as it was in Doran and Berns to require attorneys to publicly divulge their clients' confidential information, to prevent attorneys from communicating with their clients, or to require attorneys to cut their clients' throats in public. The Florida Rules of Professional Conduct absolutely prohibit such conduct.

This Court must appreciate that the entire training and conscience of the profession prevents attorneys from "frankly

discussing" their clients' legal position before the clients' adversaries, Sunshine Law or no Sunshine Law. The one thing attorneys have never been permitted to do, and must never do -- probably the most fundamental stricture of the profession -- is to knowingly injure one's client, yet Doran and Berns amended the Sunshine Law to require attorneys to conduct themselves in a manner which everyone knows is utterly unethical and unprofessional. During the course of representing a client, an attorney obviously should not divulge to the adversary weaknesses in the client's position, and he obviously should not make substantive decisions affecting his client's interest without the client's informed judgment.[17] The attorney obviously should not reveal to the client's adversaries such things as how the adversary might improve his legal position, or reveal to the

17. This raises still another constitutional impediment to the Doran and Berns interpretation of the Sunshine Law, and that is that if the Sunshine Law "requires" attorney-client conferences to occur solely at a public meeting, but the attorney's ethics absolutely preclude such discussions, then the attorney is forced to decide all litigation issues without consulting his client, and this violates both the attorney's ethics and the constitutional prohibition against elected officials delegating their authority to unelected administrators. As a practical matter, this is in fact the result. Because elected officials have no practical way to have frank discussions with the city attorney and many do not wish to engage in cynical circumvention of Doran and Berns, they merely rubber-stamp the attorney's recommendations at public meetings, without even understanding the basis for the attorney's conclusions and having been precluded by law from obtaining such information so they could exercise their own judgment on a matter, as they were elected to do. This is contrary to Article VIII, Sec. 2b of the Florida Constitution, which is construed to prohibit such delegation of legislative authority. See City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972) and State v. City of Tallahassee, 130 Fla. 418, 177 So. 719 (Fla. 1938).

adversary possible defects in the City's strategy (or the adversary's strategy), or the client's philosophy toward settlement. In short, an attorney obviously must not do what Doran and Berns apparently compel him to do. The standards of professional conduct are stated in the Code of Professional Responsibility, but even were they not, it would still be fundamental to the profession of law that an attorney not have a frank and open case conference with his client in public. The implication of Doran and Berns is that some attorneys must not honor the most basic of all professional principles; that some attorneys may (indeed should) knowingly cut their client's throat in public so long as their client is "merely" a group of citizens who have made the error of fulfilling the promise of American self government by accepting office as representatives of their community. In other words, what any two-bit corporation or petty criminal is entitled to from his attorney, the ideal citizens of this country are deprived of. For everyone but the ideal citizen, the attorney-client relationship is deemed to be a fundamental confidential relationship involving a greater degree of trust than any other. See In Re Estate of Reid, 138 So.2d 342 (Fla. 3rd DCA 1962); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, (5th Cir. 1971); The Florida Bar v. Brennan, 377 So.2d 1181 (Fla 1979). To everyone except the ideal citizen and the citizens they represent, an attorney owes total loyalty based on a relationship of "sacred trust" considered "indispensible to the administration of justice." See Seaboard Airline R. Co. v.

Timmons, 61 So.2d 426, 428 (Fla. 1952); Radient Burners Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir. 1963). See also Wigmore, Evidence, Sec. 2290-2291 (McNaughten Rev. 1961); McCormick, Evidence, Sec. 175 (2nd Ed. 1975). Thus Petitioners are deprived of due process because they are deprived of anything remotely like effective legal representation.[18]

It would be bad enough if the Legislature had converted ideal citizens and their attorney into second-class litigants and third-rate lawyers, but it is incomprehensible that the Florida Supreme Court would take such an action. See UpJohn Co. v. United States, 499 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981), stating that the attorney-client privilege is one of the oldest privileges known to the law and its very purpose is to allow open and uninhibited discourse between the attorney and the client for the benefit of the entire legal system.

J. Doran and Berns are contrary to express legislative intent.

That the legislature never intended the Sunshine Law to encompass all attorney-client discourse is confirmed by the Legislature's adoption of the attorney-client privilege for Petitioners and other government officials. Chapter 90 specifically creates a statutory attorney-client privilege and expressly applies it to Petitioners and other public boards and commissions. See Sec. 90.502 Fla. Stat. (1982). Moreover, the

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18. And their attorney is too, because it is an obvious violation of due process for a state law to compel attorneys to conduct themselves in a manner which requires their disbarment if they comply.

statute specifically supersedes and repeals all previous statutes in conflict. The Legislature has thus withdrawn confidential attorney-client communications from public scrutiny by codifying the attorney-client privilege and expressly extending it to public clients in response to this Court's decision in Wait v. Florida Power and Light Company, 372 So.2d 420 (Fla. 1979). Section 90.502(2), Fla. Stat. (1981) provides:

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

Section 90.502(1)(b) specifically defines client to include public officers and public entities. Thus the Florida Legislature has repudiated Doran and Berns and expressed the specific legislative intent that the attorney-client privilege apply to Petitioners. Moreover, the Legislature specifically superseded the Sunshine Law with respect to this privilege of confidential attorney-client communication. See Sec. 90.102, Fla. Stat. (1981). As the latest expression of the legislative will, Sec. 90.502 thus amended Section 286.011 to the extent the latter statute (as construed in Doran and Berns) deprived Petitioners and their attorney of the right to have confidential discussions. See Johnson v. State, 27 So.2d 276 (Fla. 1946); Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962); Titan Southeast Construction Co. v. City of Tampa, 535 F.Supp. 163 (M.Dis.Fla. 1982).

There is no doubt that such legislative acts do create exemptions to the Sunshine Law. See Tribune Company v. School

Board of Hillsborough County, 367 So.2d 627 (Fla. 1979); Marston v. Gainesville Sun, 341 So.2d 783 (Fla. 1st DCA 1976). (See especially Marston at 785-786.) Moreover, the Sunshine Law and Public Records Act are to be construed consistently whenever possible, and the courts hold that the attorney-client privilege created by Sec. 90.502 is a valid exemption to the Public Records Act. Aldredge v. Turlington, 378 So.2d 125 (Fla. 1st DCA 1980), cert den 383 So.2d 1189 (Fla. 1980), affirming a circuit court decision that attorney-client confidential communications were exempt from public disclosure under Sec. 90.502. Titan is a well-reasoned opinion by the federal court which concluded that the Florida Legislature clearly intended to grant city attorneys and their public clients a privilege from disclosure for their confidential communications.[19] Indeed, see Tribune Company v. School Board of Hillsborough County, 367 So.2d 627 (Fla. 1979), where this Court held a that legislative grant of confidentiality, no different from Sec. 90.502, took precedence over the Sunshine Law.

The attorney-client privilege to have confidential discussions, moreover, can easily be reconciled with the Sunshine Law so long as Doran and Berns are overruled. In that case, the

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19. It would make very little sense for the law to protect confidential attorney-client communications only so long as they are written, i.e. by recognizing Sec. 90.502 as an exemption to Chapter 119 but not to Sec. 286.011. See Marston supra at 785, holding that if records of a proceeding are confidential, then the public cannot view the proceeding either. Such a rule would only deepen the jurisprudential quagmire which already exists in this area, and would also have the effect of merely creating a new legally-mandated method of circumventing the Sunshine Law.

attorney and the client can freely discuss litigation, but the public client cannot take official action on the litigation except in the sunshine. By legislative act Petitioners have been granted the privilege to have confidential discussions with their attorney, and to prevent disclosure of such discussions to anyone else, the same as any other client. Unless this Court recedes from Doran and Berns, Sec. 90.502 will be nullified, for it does no good for the Legislature to tell Petitioners they have an attorney-client privilege only so this Court can say, in judicial "fine print," that "Yes, you have the privilege, but you cannot exercise it because nothing you say is confidential because you can only speak with your attorney in public" If attorney-client discourse can only occur at a public meeting, subject to publication to the world, then that constitutes "a practical prohibition upon professional advise and assistance," Radient Burners Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir. 1963), and Sec. 90.502 is nullified.

Accordingly, this Court should reaffirm Bassett and that portion of Williams which held that an attorney must be permitted to conduct confidential case conferences with his public clients. This can be done by simply acknowledging that Doran and Berns (et al) were wrong, or by recognizing that Doran and Berns were repudiated by the legislature when it adopted Sec. 90.502, or by recognizing that due process compels such a result. At least 23 states recognize that litigation discussions between public officials and their attorneys are exempt from their Sunshine Laws. Many of these states have done so just as

the Florida Legislature did when it adopted Sec. 90.502, and in other states, the courts have exempted such discourse to protect the attorney-client relationship. See for example Sacramento Newspaper Guild v. Sacramento, 69 Cal. Reptr. 480 (Cal. 3rd DCA 1968); Oklahoma Ass'n of Municipal Attorneys v. Oklahoma, 577 P.2d 1310 (OK 1978).

This Court should therefore repudiate Doran and Berns, reconcile the need for attorney-client communication with the Sunshine Law, and thus harmonize Sec. 90.502 and Sec. 286.011. Otherwise, the only recourse for Petitioners and all other public officials and their legal advisors is to continue to conduct totally secret, and thus totally unregulated, conferences on the telephone or by means of sequential individual meetings, which has the significant disadvantage of placing the attorney in the position of being the sole conduit of information between the elected officials, thereby delegating to him powers which belong with the council as a government unit. Under such circumstances, openness in government is being substantially hindered rather than helped, for if secret telephone calls and private closed-door individual meetings are the only legal means of communication, then actual government decision-making will assuredly occur in secret, as in fact is now does.

CONCLUSION

To construe the Sunshine Law as this Court did in Doran and Berns et al., is contrary to the statutory attorney-client privilege, contrary to the due process right of Petitioners to effective legal representation, contrary to the fundamental principles of the First Amendment, contrary to the attorney-client relationship, and contrary to the ethical dictates of the legal profession. As noted above, it is also contrary to our political heritage.

The Court's language in Doran and Berns has also resulted in greater secrecy in government and a hopelessly muddied and confused jurisprudence, which is illustrated by the never-ending stream of Attorney General Opinions pathetically trying to rationalize the distinction between group discussions in the same physical space, which are mostly always illegal under Doran and Berns et al., and sequential discussions from different physical spaces, which are legal (sometimes). Attorney General Opinions ad nauseum hopelessly try to decide how communications are to be conducted on the telephone, answering such questions as whether a city attorney or city manager can call commissioners seriatim, and if so, the extent to which they can relate what other commissioners have said. See e.g. AGO 074-47, 074-273, 075-210, 074-294, 072-16, 071-32. See also Bigelow v. Howze, 291 So.2d 645 (Fla. 2nd DCA 1974); Bennett v. Warden, 333 So.2d 97 (Fla. 2nd DCA 1976). The Attorney General's convoluted attempt to harmonize the disparate jurisprudence and decide how many angels can dance on the head of a pin has occurred because this Court has, on occasion but not always, ignored the plain language

of the statute and vaguely asserted that the "entire decision-making process" must occur in public. The Court's inconsistent approaches to the Sunshine Law, sometimes reasonable and other times inflexibly indifferent to questions of fairness and practicability, has made it impossible for anyone to know what the law is. There is only one principled way out of this house of horrors, and that is to return to the simple and direct language of the statute.

For the many reasons stated above, Petitioners urge this Court to recede from Doran and Berns and state what the Sunshine Law itself states, namely that official governmental acts and formal actions must occur in the sunshine, and everything else in politics and government is not encompassed by the law, or at the very least, that general non-binding and informal attorney-client discourse is not encompassed by the law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 14th day of October, 1983 to Steven M. Kamp, Esq., Paul & Thompson, 1300 Southeast Bank Building, Miami, FL 33131; Thomas K. Petersen, Esq., Chief Assistant State Attorney, 1351 N.W. 12th Street, Miami, FL 33125; Richard J. Ovelmen, Esq., General Counsel, Miami Herald Publishing Co., 1 Herald Plaza, Miami, FL 33131; and Gerry Hammond, Esq., Asst. Attorney General, Dept. of Legal Affairs, The Capitol/Ste. 1603, Tallahassee, FL 32301.

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