IN THE SUPREME COURT OF FLORIDA

CITY OF NORTH MIAMI, et al

Petitioners

vs.

CASE NO. 64,944

MIAMI HERALD PUBLISHING COMPANY, et al

Respondents

_____/

CERTIFIED QUESTION
FROM THE THIRD DISTRICT
COURT OF APPEAL OF FLORIDA

BRIEF OF AMICUS CURIAE

FLORIDA LEAGUE OF CITIES

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases	Page

CITY CHARTER

INTRODUCTION

The Petitioners, City of North Miami, Tobias Simon, as City Attorney for the City of North Miami; Mayor Howard Neu, James Devaney, John Hagerty, Robert Lippelman, and Diane Brannen as members of the City Council of the City of North Miami, were Respondents in the trial court and Appellees in the District Court of the Appeal. The Respondent, the Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., a Florida Corporation, were Petitioners in the trial court and Appellants in the District Court of Appeal. The Florida League of Cities is an amicus curiae, pursuant to motion filed with this Court, and represents the interests of the Cities of the State of Florida. In this brief the "Petitioners" and "Respondents" will be referred to as they stand before this Court and the Florida League of Cities, Inc. will be referred to as the "League".

STATEMENT OF CASE AND FACTS

The instant case is before the Court on a Certified Question from the Third District Court of Appeal. The amicus "League" will address legal issues and policies raised by the certified question rather than addressing the particular facts of the case sub judice.

QUESTION CERTIFIED

DOES THE LAWYER-CLIENT PRIVILEGE SECTION OF THE EVIDENCE CODE EXEMPT FROM DISCLOSURE REQUIREMENTS OF THE PUBLIC RECORDS ACT WRITTEN COMMUNICATIONS BETWEEN A LAWYER AND HIS PUBLIC ENTITY CLIENT?

ARGUMENT

DOES THE LAWYER-CLIENT PRIVILEGE SECTION OF THE FLORIDA EVIDENCE CODE EXEMPT FROM THE DISCLOSURE REQUIREMENTS OF THE PUBLIC RECORDS ACT WRITTEN COMMUNICATIONS BETWEEN A LAWYER AND HIS PUBLIC ENTITY CLIENT?

A. Section 90.502, Fla. Stat., "Lawyer-Client Privilege" Creates A Statutory Exemption To Chapter 119 "The Florida Public Records Act" Which Protects Written Communications Between A Lawyer And His Public Entity Client From Public Disclosure.

Section 119.07, Florida Statutes (1983) which was originally enacted in 1967, requires that "every person who has custody of public records shall permit the records to be inspected by any person desiring to do so ..." Subsequent to the enactment of Sec. 119.07 (hereinafter referred to as the "Public Records Law" the Legislature enacted § 90.502.

The Legislature may create exemptions to the "Open Government Laws" (Sunshine Law sec. 286.011, Fla. Stat., and Public Records Law, Chapter 119, Fla. Stat.) by either general or special law. Sec. 119.07(3) Fla. Stat., 1983); Wait v. Florida Power and Light Company, 372 So.2d 420 (Fla. 1979). Tribune Company v. School Board of Hillsborough County, 367 So.2d 627 (Fla. 1979); City of Tampa v. Titan Southeast Construction Co., 535 F.Supp. 163 (M. Dist. Fla. 1982). The statutory language which creates the exemption need not specifically refer to the existing statute which it effects. City of Williston v. Roadlander, 425 So.2d 1175 (Fla. 1st DCA 1983). Rather, the exempting statute must only demonstrate that it is intended to control the behavior specified therein. Marston v. Gainesville Sun Publishing Company, 341 So.2d 783 (Fla. 1st DCA 1976); Tribune Company, supra.

> It is not for us to pass upon the wisdom of this legislative exception. Rather we are obliged to read the provisions of

> the general law together with the subsequent special act and harmonize them if possible, and if there is an unresolvable conflict between the provisions, the latter special act as a more specific expression of the legislative will, will be given effect. Tribune Company v. School Board of Hillsborough County, supra at p. 629.

Section 90.502, Fla. Stat. (1983) was enacted after the Public Records Law and is directly related to the specific conduct of legal communication between an attorney and his client, the "governmental body", as opposed to the broad provisions of the Public Records law which regulates all records of the governmental bodies. The latter and more specific pronouncement of the Legislature, § 90.502, Fla. Stat., (1983), must control, especially in light of the specific legislative intent expressed in Sec. 90.102, Fla. Stat. (1983), that, "This chapter shall replace and supersede existing statutory or common law in conflict with its provisions". See City of Tampa, supra.

The language of the statute itself specifically includes public entities.

> A "client" is any person, public officer, corporation, association, organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer. Sec. 90.502(1)(b), Fla. Stat. (1983) (emphasis supplied).

The attorney-client privilege extended to both public and private agencies at common law. Connecticut Mutual Life Insurance v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955). Had the Legislature intended to make a drastic change from common law and exclude municipalities, a public corporation (entity), from the protections afforded by the attorney-client relationship, it would have specifically done so. In fact the definition of client in the statute evinces a strong intent by the Legislature to preserve the attorney-client relationship for public entities. Sec. 90.502(1)(b), Fla. Stat., (1983).

Indeed, the attorney-client privilege established by Sec. 90.502, Fla. Stat. (1983), has been held to apply to public agencies and public officials as well as private entities.

> Instead the Wait decision stands for the proposition that it is up to the legislature to define by statute, the privilege to which a public entity is entitled. The legislature did just that when it passed the Evidence Code and recognized "public" entities as "clients" that have a privilege to refuse to disclose and to prevent any other person from disclosing lawyer-client communications. Fla. Stat. § 90.502. City of Tampa v. Titan Southeast Construction Corporation, 535 F.Supp. 163, 166 (M. Dist. Fla. 1982).

See also, Aldredge v. Turlington, Case No. 79-1023 (2nd Cir. Leon County 1979) affd. 378 So.2d 125 (Fla. 1st DCA 1980) cert denied 383 So.2d 1189 (Fla. 1980).

In the case sub judice the Third District Court of Appeal recognized that public entities were clients within the meaning of Sec. 90.502(1)(b), but held that the privilege was only an evidentiary privilege that did not extend to prevent general disclosure.

> Although public entities are included in the definition of the term "client" in the lawyer-client privilege section of the Evidence Code, see § 90.502(1)(b), Fla. Stat. (1981) this is merely to ensure that the privileged communications will not be admitted into evidence in judicial proceedings. The Miami Herald Publishing Company v. City of North Miami, __So.2d__ (Fla. 3rd DCA Case No. 83-688 February 14, 1984).

The opinion of the District Court is in error for two fundamental reasons. The first reason being that the clear statutory language of § 90.502, Fla. Stat. (1983) deals with disclosure of information rather than admissability. The opinion also ignores the intent behind the creation of the privilege which is to promote free discussion between an attorney and his client.

Sec. 90.502(2), Fla. Stat. (1983) reads:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing the contents of confidential communications when such other person learned of the communication because they were made in rendition of legal services. (emphasis supplied).

Disclosure means:

> To bring into view by uncovering; to expose; to make known; to lay bare; to reveal to knowledge; to free from secrecy or ignorance or make known. Black's Law Dictionary, Special Deluxe 5th Edition (1979).

or,

> 1. to open up 2. to expose to view. Webster's Seventh New Collegiate Dictionary (1972)

The Webster's Dictionary says that the synonym of disclose is to reveal.

The plain language of the statute is that a client has a right to refuse to reveal or expose to public view confidential communications with his attorney. Had the Legislature wished to only address admissability they would have done so.[1]

The language of the statute is clear and unambiguous. In interpreting the statute the court should follow the plain meaning of the statutory language. See City of Tampa v. Thatcher Glass Company, __So.2d__ (Fla. Case No. 64,415, February 1, 1984) 9 FLW 61; Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). Under the plain statutory language the limited interpretation of the attorney-client privilege is clearly erroneous.

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

> The attorney-client privilege is the oldest of the privileges for confidential communication known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the

[1] Sec. 90.402 - 90.410; Sec. 90.801-90.806 Fla. Stat. (1983) among other sections in the Evidence Code specifically deal with admissability.

> lawyer being fully informed by the client. As we stated last term in Trammel v. United States, 445 U.S. 40, 51, 63 L.Ed.2d 186, 100 S.Ct. 906 (1980): "The lawyer-client privilege rests on the need for the advocate and the counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out". And in Fisher v. United States, 425 U.S. 391, 403, 48 L.Ed.2d 39, 96 S.Ct. 1569 (1976) we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470, 32 L.Ed. 488, 9 S.Ct. 125 (1888) ("privilege is founded upon necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences of apprehension of disclosure") Upjohn Company v. U.S., 449 U.S. 383, 389, 66 L.Ed.2d 584, 591, 101 S.Ct. 677 (1981).

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

> The policy behind the attorney-client privilege is not to promote freedom of consultation with legal advisors through removing the apprehension of compelled disclosure by such advisors. 8 Wigmore Evidence § 2291 (McNaughton Rev. 1961) Anderson v. State, 297 So.2d 871, 872 (Fla. 2nd DCA 1974).

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

The argument that the statutory attorney-client privilege is an evidentiary privilege and is only intended to prevent admission into evidence of privileged communications ignores the very purpose of the attorney-client privilege to allow a candid exchange of information between the attorney and his client.

A client who is aware that any written exchanges between himself and his attorney will be subject to public scrutiny will refrain from making full disclosure, thereby defeating the very reason for establishing an attorney-client privilege. It further presumes that the Legislature was unaware of the existing law of attorney-client privilege and ignores the rule of law that the privilege is waived when the attorney-client communication is revealed to persons not subject to the attorney-client relationship.

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

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

As stated previously, the very reason for the attorney-client privilege is to promote the free exchange of ideas between the attorney and client by allowing private communication (See Upjohn, supra). It must be presumed that the Legislature knew the reasoning, then existing common and statutory law related to attorney-client privilege, the reason for the privilege, and the existence of the Public Records Law at the time the statutory lawyer-client privilege was enacted. See Times Publishing Company v. Williams, 220 So.2d 470, 473 (Fla. 2nd DCA 1969); Collins Investment Company v. Dade County, 164 So.2d 806 (Fla. 1964). Had it wished to limit the privilege or exempt governmental attorneys, the Legislature could have done so.

See Sec. 90.502(4), Fla. Stat., which enumerates exemptions from the lawyer-client privilege. Instead Sec. 90.502(1)(b), specifically includes "consultations" between "public officers" or "public entities" with their attorney for "the purpose of obtaining legal services".

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

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

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

One may argue that the City Attorney's client is the general population of the municipality as a whole for the purposes of Sec. 90.502, Fla. Stat. (1983), but this argument ignores two very basic principles. Those principles include:

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

As previously mentioned the governing body is the elected representatives

of the entire community. The governing body is the entity responsible for making policy decisions and all decisions concerning litigation. Therefore it is the ethical obligation of the attorney to advise his client, the entity in charge of litigation, "the governing body". Times Publishing Company v. Williams, 222 So.2d 474, 475 (Fla. 2nd DCA 1969). 2) A lawyer-client relationship with the public as a whole would be meaningless as there would be no communication which would be confidential.

Sec. 90.502, Fla. Stat. (1983) specifically defines client to include "public entities", thereby presuming that there would be an entity with which the public lawyer could confidentially communicate. If the Legislature had intended the client to be the public as a whole, this section would be rendered meaningless, as the lawyer cannot confidentially communicate with the entire community. As previously stated, it is well settled that a court should never presume that the Legislature intended to enact purposeless and therefore useless legislation. See City of Tampa and Shearer Hotel, supra.

Therefore, Section 90.502, Fla. Stat. (1983) exempts written communications between a lawyer and his public entity client from the disclosure requirements of the Public Records Act.

B. Legislation Which Purports To Require Public Disclosure Of All Written Communication Between An Attorney And His Public Entity Client Interferes With The Procedural Fairness Of Litigation And The Appropriate Conduct For Attorneys Both Of Which Are Matters Strictly Within The Province Of The Judiciary, And Therefore Is Invalid.

Article V, Section 2, of the Florida Constitution prescribes that the Supreme Court shall be responsible for adopting rules of practice and procedure for trial of cases before the courts of this State. See Markert

v. Johnston, 367 So.2d 1003 (Fla. 1978) and Military Park Fire District v. DeMarois, 407 So.2d 1020 (Fla. 4th DCA 1981).

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

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

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

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

In the instant case the issue concerns the ability of a City Attorney to communicate with his client. An interpretation of the Public Records Law which would interfere with the relationship would result in an unconstitutional legislative intrusion into the constitutional power of the

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

courts to regulate the fair and just procedures of matters before the court and to regulate the conduct and practice of attorneys in trial practice.

This Court has never specifically addressed the limited issue of legislative intrusion into the area of an attorney's ability to communicate with a client during litigation.[3]

The ability of a client to consult with his attorney, especially during litigation, has always been recognized as essential to the fairness of judicial proceedings. Times Publishing Company v. Burke, 375 So.2d 297 (Fla. 2nd DCA 1979).

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

The abrogation of the attorney-client relationship hinders a lawyer's ability to adequately prepare for litigation and competently represent his client in accordance with Canon 6, Ethical Consideration 4-1 and Disciplinary Rule 6-101 of the Code of Professional Responsibility, adopted by this Court in the opinion, In Re The Integration Rule of Florida Bar, 235 So.2d 723 (Fla. 1970). An attorney must be able to adequately ascertain from his

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

client all facts concerning the litigation. An attorney must also be able to openly advise his client of the strengths and weaknesses of the case and his legal conclusions and strategy so that the client may make knowledgeable decisions as to whether to proceed or settle the litigation. These essential aspects of an attorney-client relationship depend upon the attorney-client privilege.

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

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

This Court has recognized the importance of the attorney-client relationship in the maintenance of appropriate trial procedures and regulation of attorney conduct by the adoption of the foregoing ethical consideration and Canon 4 of the Code of Professional Responsibility ("A lawyer should preserve the confidences and secrets of a client"), as well as by punishing those attorneys who violated said Canon. See The Florida Bar v. Brennan, 377 So.2d 1161 (Fla. 1979).

It is clear that the question of procedural fairness of proceedings before the court and the conduct of attorneys is the responsibility of the judiciary. Municipalities have been placed in the position of being litigants in many types of suits. See Sec. 768.28, Fla. Stat. (1981)

"Waiver of Sovereign Immunity" and Monell v. Department of Social Services, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978) which held that they were "persons" under the meaning of the Civil Rights Law and could be sued pursuant to 42 U.S.C. 1983. To argue that municipalities are not entitled to fair administration of the judicial procedure is unfair; to argue that they are not entitled to raise the issue of fairness is ludicrous. See State v. Steele, 348 So.2d 398 (Fla. 3rd DCA 1977).

While this court has previously ruled that exemptions to the Public Records Law should be established by the Legislature in Wait v. Florida Power and Light Company, 372 So.2d 420 (Fla. 1979) to intrude upon this attorney client relationship would result in unfair administration of justice and would unduly restrict an attorney in the proper defense of his client. This Court should therefore reassess its position.

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

Therefore this Court should rule that legislation which would restrict communications between an attorney and his client during pending litigation would be an impermissable intrusion into the judicial branch of government.

The Court should therefore determine that the Public Records Law does not apply to written communications which would be covered by the attorney-client privilege, especially if those communications concern anticipated or pending litigation.

CONCLUSION

BASED upon the cases, authorities and policies citied herein, the amicus curiae, Florida League of Cities, respectfully requests this Honorable Court to answer the certified question in the affirmative and to reverse the decision of the Appellate Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Thomas M. Pflaum, Office of Simon, Schindler & Hurst, P.A., 1492 South Miami Avenue, Miami, Florida 33130, Attorney for Petitioners; Parker D. Thomson, and Susan H. Aprill, Thomson, Zeder, Bohrer, Werth, Adorno & Razook, 1000 Southeast Bank Building, Miami, Florida 33131 and Richard J. Ovelman, Miami Herald Publishing Company, One Herald Plaza, Miami, Florida 33101, Attorneys for Respondent; and James A. Jurkowski, Dade County Courthouse, Sixteenth Floor, Miami, Florida 33130, attorney for Amicus Curiae, Dade County, this 29th day of March, 1984.

Attorney