IN THE SUPREME COURT OF FLORIDA

Case No. 64,944

CITY OF NORTH MIAMI, et al.,

Petitioners,

vs.

MIAMI HERALD PUBLISHING COMPANY, et al.,

Respondents.
_____/

BRIEF OF AMICUS CURIAE METROPOLITAN DADE COUNTY

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By

James A. Jurkowski
Assistant County Attorney

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INTRODUCTION

Metropolitan Dade County files this Brief as an amicus curiae, after obtaining written consent of all parties, pursuant to Fla.R.App.P. 9.370. All emphsis in quotations is supplied, unless otherwise noted.

ARGUMENT

SECTION 90.502, FLA.STAT., WHICH DEEMS CONFIDENTIAL ALL COMMUNICATIONS BETWEEN PUBLIC ENTITIES AND OFFICERS AND THEIR ATTORNEYS, THEREBY EXEMPTS FROM PUBLIC DISCLOSURE ALL SUCH WRITTEN COMMUNICATIONS.

A. By enacting the attorney-client privilege in the evidence code, the Legislature necessarily protected against the compulsory disclosure of attorney-client communications outside the courtroom, because without such protection, the privilege against admission in evidence in a judicial proceeding would be nullified.

The question before this Honorable Court is purely and simply one of statutory construction: Does §90.502, Fla.Stat. (1983) constitute an exception to the Public Records Act within the meaning of §119.07(3)(a)? That latter statute provides:

> All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provisions of subsection (1) [requiring custodian of public records to permit inspection].

Its meaning is clear: If the Legislature deems an otherwise public record confidential, that record is not subject to disclosure. In §90.502, Fla.Stat. (1983), the Legislature has deemed confidential all such communications between public entities and officers and their respective attorneys. Despite the plain language and meaning of both statutes, the Third District Court of Appeal has ruled that §90.502 does not exempt confidential communications between governmental entities and their attorneys.[1] We respectfully

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[1] We refer to the client as a governmental entity only as a shorthand reference to the various classes of "clients" represented by governmental attorneys, and in no way disagree with Petitioner's argument that the "clients" are in fact the members of the governing body, as well as other officers or employees of the county. See, e.g., Code of Metropolitan Dade County, §2-13 ("There shall be a county attorney appointed by (cont'd)

submit that the lower court improperly construed the statutes, and reached an improper and illogical result.[2/]

Before beginning our analysis, we note parenthetically that the decision sought to be reviewed quoted a portion of §119.01(1), Fla.Stat., purporting to declare a state policy that "all state, county, county and municipal records shall be open at all times..." (emphasis in lower tribunal). Any significance which might be attached to this language is quickly dispelled in light of the existence of well over two hundred (200) separate and distinct statutory exemptions to the Public Records Act. These range from information relating to juvenile deliquency proceedings, §39.12(4), Fla.Stat., to information relating to watermelon marketing, §573.826(2), Fla.Stat. See J.Smith, Florida Open Government Laws Manual, at 69-105 (1984). A conclusion that the Legislature included attorney-client communications within this less than exclusive list of exceptions should therefore not be especially astounding or shocking. Indeed, the Florida Open Government Law Manual,

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1/ (cont'd)

the county commission."); Id., §2-14 ("The county attorney shall serve as legal advisor to the county commission, manager, department heads, county boards, and county officers."); §125.15, Fla.Stat. (1983) ("The county commissioners shall sue and be sued in the name of the county of which they are commissioners").

2/ Although we do not argue the point at length, we agree with Petitioner's insistence that the lower court also erred in refusing to apply §624.311, Fla.Stat. (Supp. 1982). That refusal is contrary to the well-settled doctrine that an appellate court should apply the law prevailing at the time of appellate disposition. Goodfriend v. Druck, 289 So.2d 710 (Fla. 1974); see Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980) (statute exempting certain records from Ch.119 applied, even though passed subsequent to request for records).

published by the Florida Press Association, concedes that §90.502 constitutes an exception to the Public Records Act. Manual at 71. See also 5 C. Ehrhardt & M. Ladd, Florida Practice §502.2 (Supp. 1983).

Nor is it necessary for the Legislature to expressly state, in a statute deeming certain records confidential and therefore exempt from §119.07(1), that the statute does constitute an exception. The parties to this appeal argued over this fact below, but the language of §119.07(3)(a) is clear: both public records provided by statute to be confidential are exempt, as are pubic records which are expressly prohibited from being inspected by the public. See Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979).

With the requirements for exemption from §119.07(1) in mind, we proceed to a construction of §90.502. We first remind this Honorable Court that the question certified to it is not one of first impression in this state. In City of Tampa v. Titan Southeast Construction Corp., 535 F.Supp. 163 (M.D. Fla. 1982), the court held that written communication between the city and its attorney were exempt from Public Records disclosure by operation of the Florida Evidence Code.[3/] The court examined the scope and meaning of §90.502, in the context of both the entire Evidence Code and Public Records Act. It concluded:

3/ We recognize, of course, that City of Tampa, because it is a federal case construing state statutes, is persuasive, but not controlling, authority. See Bell v. State, 289 So.2d 388 (Fla. 1973). We point out, however, that City of Tampa has been cited with approval in Hillsborough County Aviation Authority v. Azzarelli Construction Company, Inc., 436 So.2d 153 (Fla. 2d DCA 1983).

> [T]he 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.

Id. at 166. As shall be seen, the language and meaning of §§90.502 and 119.07(3)(a) fully support the court's thorough analysis in City of Tampa.

In codifying the attorney-client privilege, it is quite clear that the Legislature did not intend to change the traditional and well-settled rules applicable thereto. Mobley v. State, 409 So.2d 1031 (Fla. 1982). An intent to radically change well-established legal principles will not be ascribed to the Legislature, unless the language of a statute cannot be given its apparent meaning and purpose without upsetting a common-law rule. Akins v. Bethea, 160 Fla. 99, 30 So.2d 638 (1948). The purpose of the privilege, as it has evolved over the past several centuries, is to promote full freedom of consultation with legal advisors. 8 J. Wigmore, Evidence §2291 (McNaughton Rev. 1961). A client cannot seek, and cannot hope to obtain, competent legal advice, if the client's communications with counsel are subject to unrestricted disclosure.

In the context of the above purpose, we next examine the scope of §90.502, independent of its relation to the Public Records Act. The privilege may be claimed by any client, defined to include:

> any person, public officer, corporation, association, or other 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.

§90.502(1)(b). Thus, the privilege is clearly available to governmental clients and their attorneys. See City of Tampa at 165. Both the Miami Herald and the court below agree with that premise, despite their contrary view as to its applicability to public records disclosure. A contrary position would render entirely meaningless the above inclusion of governmental entities and persons within the meaning of "client" and would violate the rule of statutory construction that meaning and effect be given to each and every provision of a statute. Wilensky v. Fields, 267 So.2d 1 (Fla. 1972).

Both the Herald and the Third District attempt to assure governmental clients that even if documents, otherwise privileged within the meaning of §90.502, were disclosed pursuant to a Chapter 119 request, they would nonetheless be inadmissible at trial, unless the privilege were otherwise waived. See Miami Herald Publishing Co. v. City of North Miami, __ So.2d __ (Fla. 3d DCA, Case No. 83-688, Feb.14, 1984) (§90.502 ensures that privileged communications of a public entity will not be admitted into evidence); Initial Brief of Appellant at 29, Id. ("[E]ven if a party obtained records [under Chapter 119] which contained privileged communications, the material would not be admissible in a judicial proceeding unless the privilege was otherwise waived."). That position totally ignores the well-established rule of evidence that there is no evidentiary privilege with respect to once

confidential communications which have later been disclosed to persons outside the attorney-client sphere. The rule is well-recognized in this State. Savino v. Luciano, 92 So.2d 817 (Fla. 1957); Hamilton v. Hamilton Steel Corp., 409 So.2d 1111 (Fla. 4th DCA 1982). In Savino, this Honorable Court stated:

> [A]s in all confidential and privileged communications, '[t]he justification for the privilege lies not in the fact of communication, but in the interest of the persons concerned that the subject matter should not become public.' When a party himself ceases to treat a matter as confidential, it loses its confidential character (citations omitted).

Id. at 819. And §90.507 expressly provides:

> A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he... voluntarily discloses... the communication... .

Thus, the release of confidential documents pursuant to a public records request would forever remove the privilege. This construction, because it directly contradicts the express inclusion of governmental clients within the scope of the privilege, therefore must be avoided. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977).

It is equally clear that the privilege extends well beyond oral testimony in court. A written instrument which itself is a communication between an attorney and his or her client, and which owes its existence to an effort to transmit information, is privileged. Vann v. State, 85 So.2d 133 (Fla. 1956); Seaboard Air Line R.Co. v. Timmons, 61 So.2d 426 (Fla. 1952); Keir v. State, 152 Fla. 389, 11 So.2d 886 (1943); see also 81 Am.Jur.2d

Witnesses (1976) and cases cited therein. Similarly, the privilege protects against disclosure not only at the time of trial, but also prior thereto. See, e.g., Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977) (held error to allow deposition of psychiatrists when information revealed by deponents was privileged). The privilege protects in like fashion against disclosure of facts revealed to an attorney in a consultation entirely inrelated to any pending or anticipated litigation. 81 Am.Jur.2d Witnesses §197 (1976).

To hold, as did the court below, that the privilege applies only to admissibility of evidence runs contrary not only to the above-cited law, but also to the Evidence Code itself. Section 90.501 states that not only may a client refuse to be a witness regarding any privileged matter, but he or she may also refuse to disclose any matter, refuse to produce any object or writing, and may prevent anyone else from being a witness, from disclosing any matter, or from producing any object or writing. Had the Legislature intended the privilege to apply only to testimony at trial, much of the above language would be unnecessary. Such a construction of §90.501 is completely contrary to the maximum "ut res magis valeat quam pereat" (significance and effect must be accorded to every word, phrase, sentence and part of a statute). See Wilensky.

In light of all of the above, it is manifestly illogical and inconsistent to conclude that the Legislature intended for communications between public attorneys and their clients to be subject to forced disclosure to the whole

world outside the courtroom while remaining privileged from admission in evidence in a judicial proceeding. As was stated by the court in City of Tampa v. Titan Southeast Construction Corporation, 535 F.Supp. 163 (M.D. Fla. 1982):

> If accepted, the defendant's argument [that the Evidence Code only applies to ongoing lawsuits and has no effect on public records requests] would mean that a litigant involved in a lawsuit with a municipal organization would not have access to attorney-client documents in the course of that proceeding, but that he could bypass this privilege against disclosure by initiating an independent lawsuit pursuant to the Public Records Act. The defendant's interpretation would render meaningless the lawyer-client privilege that the Legislature created 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. Sharer v. Hotel Corporation of America, 144 So.2d 813, 817 (Fla. 1962) (footnote omitted).

Id. at 166. The law favors a rational, sensible construction of statutes and avoids interpretations which produce unreasonable or absurd results or render a statutory provision meaningless. State v. Webb, 398 So.2d 820 (Fla. 1981); Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981). A construction which renders a statute unfair or harsh must also be avoided. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla. 1950). To allow litigants (or potential litigants) to circumvent the long-standing protection of the attorney client privilege is nothing if not harsh and unfair. The lower court's flawed view of the pertinent statutes create such a burden to be shouldered by governments and their officers and employees so as to prevent them from defending themselves.[4/]

[4/] The lower court's conclusion also, in all probability, results in an invasion of the federal constitutional right to privacy. See Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) (state legislature cannot authorize by Chapter 119 an unconstitutional invasion of privacy).

B. Where the plain and clear language of §90.502 provides for confidential communications between government clients and their lawyers, and where §119.07(3)(a) provides that all such confidential communications are exempt from public disclosure, this Court must not speculate further on the meaning of the statutes.

It is clear from the foregoing that the lower court's inquiry into the scope and meaning of §90.502 was flawed, and led to an erroneous conclusion. It is also clear that the entire inquiry was misdirected away from the real issue to be addressed. Such an examination would be pertinent only if Chapter 119 made it so. To the contrary, there is no requirement in the Public Records Act, nor in any cases construing it, that a statutory exception thereto make explicit or implicit reference to the Act. Section 119.07(3) requires only that the records be confidential. Therefore, the only issue presented is whether §90.502 is a general law which provides that documents containing attorney-client communications are confidential. Section 90.502 clearly makes such documents confidential. Nothing in the Public Records Act requires that a statutory exception say anything more. It is completely immaterial that, in addition to deeming the communications confidential, the Evidence Code also excludes them from introduction at trial.

It is a fundamental rule of statutory construction that unambiguous language is to be accorded its plain meaning. Carson v. Miller, 370 So.2d 10 (Fla. 1978). If the language of a statute is clear, a court must not speculate on the intent of the Legislature; there is no room for construction, and no need for interpretation. Overman v. State Board of Control, 71 So.2d 262 (Fla. 1954). The word "confidential" has a long-standing,

well-known meaning, of which the Legislature, in passing Chapter 119, must be presumed to have had knowledge. Thayer v. State, 335 So.2d 815 (Fla. 1976). One aspect of "confidential" is the nature of the relationship and communications between attorney and client.[5/] There is absolutely no indication that the Legislature intended "confidential", as used in Chapter 119, to have anything less than that commonly accepted, every day meaning. Thus, all records which have been deemed confidential are exempt from Chapter 119, regardless of the purpose for that designation. There is no requirement in the Public Records Act that the designation be made expressly or even implicitly for the purpose of creating an exemption to Chapter 119. The Legislature has recognized that any confidential communications are, by their very nature, not appropriate for public disclosure. So long as the language of the statute is clear, and not entirely unreasonable or illogical in its operation, the court has no power to go outside the statute to specualte on different meanings. Tropical Coach Lines, Inc. v. Carter, 121 so.2d 779 (Fla. 1960).

5/ See, e.g., Black's Law Dictionary, 349 (4th ed. 1968):

> Confidential communications. There are certain classes of communications, passing between persons who stand in a confidential or fiduciary relation to each other (or who, on account of their relative situation, are under a special duty of secrecy and fidelity), which the law will not permit to be divulged, or allow them to be inquired into in a court of justice, for the sake of public policy and the good order of society. Examples of such privileged relations are those of husband and wife and attorney and client.

It must therefore not be presumed to be mere coincidence that the very same term "confidential" was chosen by the Legislature to describe certain protected communication between a public entity or officer and counsel. In fact, where the Legislature uses identical words or phrases in different statutory provisions, a reviewing court should assume that they were intended to mean the same thing. Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1958). The Legislature could simply have termed the attorney-client communication "privileged," for example, if it had wanted to use a term more closely and exclusively associated with the law of evidence. It did not. Rather, it chose to make them "confidential." That it additionally made such "confidential" communications privileged from use as evidence is entirely immaterial to the issue sub judice. Similarly, the Legislature could have simply required that only those communications which "are prohibited from being inspected by the public" are exempt from Chapter 119. §119.07(3)(a). It did not. Rather, it chose to exempt also those records "provided by law to be confidential." Id.[6/] The restrictions placed by the

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6/ The foregoing analysis, and supporting rule of law, highlight the fallacy inherent in the lower court's belief that subsequent failures to pass more explicit exceptions to Chapter 119 are evidence of a legislative intent that the Evidence Code does not exempt attorney-client communications. Not only is such an interpretation completely unsupported by any accepted rule of statutory construction, but it ignores the at least equally

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Legislature on the use of those "confidential" records under the rules of evidence in no way changes their confidential status, and therefore is completely irrelevant to the case sub judice. Thus, the question certified to this Honorable Court, despite the weighty ramifications of its answer for the practice of law and for the administration of government, has a deceptively simple answer: Because §90.502 makes communications between governmental clients and their respective attorneys confidential, those communications are exempt from the requirements of Chapter 119. The plain and clear meaning of the statutes' language is sufficient to give proper guidance to this Honorable Court. Any further inquiry would intrude upon the Legislature's power and go beyond the express language of the statutes.

6/ (cont'd)

possible theory that the failures were caused by a majority belief that §90.502 did, in fact, exempt the records at issue. The later theory is also supported by the Legislature's election not to amend the Evidence Code in light of court decisions such as City of Tampa and Aldredge v. Turlington, 378 So.2d 125 (Fla. 1st DCA 1980), holding that §90.502, in fact, was an exception to Chapter 110. Johnson v. State, 91 So.2d 185 (Fla. 1956); White v. Johnson, 59 So.2d 532 (Fla. 1952).

CONCLUSION

Confidential communications, including those referred to in §90.502, are exempt from disclosure under Chapter 119. Although the inquiry of this Court need go no further, it is also clear that to conclude otherwise, as did the lower court, would render meaningless the entire privilege, including the right to prevent disclosure at trial. The lower court's conclusion is contrary to well-established rules of statutory construction. The lower court's conclusion in depriving governmental clients of competent legal advice, is unnecessarily harsh. The lower court's conclusion in effectively providing different rules for discovery for private parties as compared to governmental litigants, is patently unfair. All of the above results are to be avoided, according to well-established law. They can be, but only if this Honorable Court answers the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE METROPOLITAN DADE COUNTY was mailed on this 16th day of April, 1984, to JAMES R. WOLF, Esquire, General Counsel, Florida League of Cities, Inc., Post Office Box 1757, 201 West Park Avenue, Tallahassee, FL 32302; THOMAS M. PFLAUM, Esquire, Simon Schindler & Hurst, P.A., 1492 South Miami Avenue, Miami, FL 33130; PARKER D. THOMSON, Esquire, and SUSAN H. APRILL, Esquire, Thomson Zeder Bohrer Werth Adorno & Razook, 1000 Southeast Bank Building, Miami, FL 33131; RICHARD J. OVELMAN, Esquire, Miami Herald Publishing Company, One Herald Plaza, Miami, FL 33101.

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