SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 64,944

CITY OF NORTH MIAMI, a municipal corporation of the State of Florida, and TOBIAS SIMON, as City Attorney for the City of North Miami; MAYOR HOWARD NEU, JAMES DEVANEY, JOHN HAGERTY, ROBERT LIPPELMAN, and DIANE BRANNEN as member of the City Council of the City of North Miami,

Petitioners,

vs.

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder Newspapers, Inc., a Florida corporation,

Respondents.

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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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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND THE FACTS 2

ARGUMENT

I. THE FLORIDA EVIDENCE CODE PROVIDES THAT PETITIONERS' COMMUNICATIONS WITH THEIR LEGAL COUNSEL ARE PRIVILEGED FROM COMPULSORY DISCLOSURE UNDER CHAPTER 119. 5

A. Introduction 5

B. The Evidence Code really does supersede Chapter 119 24

C. Chapter 119 exempts from its coverage documents made confidential by laws passed subsequent to the passage of Chapter 119 26

D. The public did not waive Petitioners' attorney-client privilege 28

E. The non-passage of other legislative amendments or proposed amendments to Chapter 119 are totally irrelevant 29

II. EVEN ASIDE FROM THE FLORIDA EVIDENCE CODE, CHAPTER 119 CANNOT COMPEL DISCLOSURE OF PETITIONERS' CONFIDENTIAL DISCUSSIONS WITH THEIR ATTORNEY, AS A MATTER OF DUE PROCESS, THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, FREEDOM OF SPEECH, AND THE SUPREME COURT'S EXCLUSIVE JURISDICTION OVER THE BAR 30

III. THE DISTRICT COURT ALSO ERRED IN REFUSING TO RECOGNIZE THE APPLICABILITY OF SECTION 624.308 FLORIDA STATUTES (1983) TO THIS PROCEEDING 46

CONCLUSION 48

CERTIFICATE OF SERVICE 49

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TABLE OF CITATIONS

Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977)......39,41

Abrams v. United States, 250 U.S. 616, 624 (1919).............37,38

Askew v. Schuster, 331 So.2d 297 (Fla. 1976).................. 9,16

Azar v. Graham, 194 So.2d 684 (Fla. 3rd DCA 1967)............. 15

Baeza v. Pan American/National Airlines,
392 So.2d 920 (Fla. 3rd DCA 1980)............................. 15

Barber v. Municipal Court, 598 P.2d 818 (Cal. 1979)........... 32

Bi-Metalic Investment Co. v. State Board of Equalization,
239 U.S. 441 (1959)... 8

Blank v. United States, 385 U.S. 26 (1966).................... 33

Bridges v. California, 314 U.S. 252 (1941).................... 44

Brotherhood of Railroad Trainmen v. Virginia State Bar,
377 U.S. 1, 6, 84 S.Ct. 1113, 1116, 12 L.Ed.2d 89 (1964)...... 40

Cable-Vision, Inc. v. Freeman, 324 So.2d 149
(Fla. 3rd DCA 1975)... 15

Carson v. Miller, 370 So.2d 10 (Fla. 1978).................... 10

Case v. Andrews, 602 P.2d 623 (Kan. 1979)..................... 32

Chaffee v. Miami Transfer Company, Inc.,
288 So.2d 209 (Fla. 1974)..................................... 9

City of Jacksonville v. Bowden,
64 So.2d 769 (Fla. 1914)...................................... 7

City of Tampa v. Titan Southeast Construction Corp.,
535 F.Supp. 163 (M.D. Fla. 1982)..........................23,26,27

Craig v. Harney, 331 U.S. 367 (1947).......................... 44

Dees v. Scott, 349 So.2d 475 (Fla. 1st DCA 1977).............. 18

Department of Legal Affairs v. Rogers,
329 So.2d 257 (Fla. 1976)..................................... 16

SIMON, SCHINDLER & HURST, P.A., 1492 SOUTH MIAMI AVENUE, MIAMI, FLORIDA • TELEPHONE (305) 358-8611

Dionise v. Keyes Company, 319 So.2d 614 (Fla. 3rd DCA 1979)... 18

Dreher v. Sieloff, 636 F.2d 1141 (7th Cir. 1980).............. 32

Durden v. American Hospital Supply Corp.,
375 So.2d 1096 (Fla. 3rd DCA 1979)............................ 13

Ferguson v. Skrupa, 372 U.S. 726 (1963)....................... 7

First National Bank of Boston v. Belotti,
435 U.S. 765 (1978)..41-43

Florida Department of Health v. Gross,
421 So.2d 44, 45 (Fla. 3rd DCA 1982).......................... 16

Gradsky v. United States, 376 F.2d 993 (5th Cir. 1967)........ 33

Henrico Professional Firefighters v. Board of Supervisors,
649 F.2d 237 (4th Cir. 1981).................................. 40

Heredia v. Allstate Insurance Company,
358 So.2d 1353 (Fla. 1978)..................................10,11

Herrin v. Abbe, 46 So. 183 (Fla. 1908)........................ 20

Hialeah, Inc. v. B&G Horse Transportation, Inc.
368 So.2d 930 (Fla. 3rd DCA 1979)............................. 16

Hoffa v. United States, 385 U.S. 693 (1966)................... 33

In Interest of J.F., 384 So.2d 713 (Fla. 3rd DCA 1980)........ 13

In Re Apportionment Law, 263 So.2d 767 (Fla. 1972)............ 6

In Re Sepe, 421 So.2d 27, 28 (Fla. 3rd DCA 1982).............. 15

Jimani Corp. v. S.L.T. Warehouse Co.,
409 So.2d 496 (Fla. 1st DCA 1982)............................. 17

Johnson v. State, 27 So.2d 276 (Fla. 1946).................... 26

Kahn v. Shevin, 416 U.S. 351 (1974)........................... 7

Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981).............. 39

Landmark Communications Inc. v. Virginia,
98 S.Ct. 1535 (1978)..43,44

Larrabee v. Capeletti Brothers, Inc., 158 So.2d 540 (Fla. 3rd DCA 1963)............................ 13

Lee v. Gulf Oil Corp., 4 So.2d 868 (Fla. 1941)................ 15

Liberty Mutual Insurance Company v. Flitman, 234 So.2d 390 (Fla. 3rd DCA 1970)............................ 18

Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167, 97 S.Ct. 421 L.Ed. 2d 276 (1976).. 40

McClelland v. State, 240 A.2d 769 (MD Ct. App. 1968).......... 33

Mills v. Alabama, 384 U.S. 214 (1966)......................... 42

Mobley v. State, 409 So.2d 1031 (Fla. 1982)................... 17

NAACP v. Button, 371 U.S. 415, 428, 83 S.Ct. 421, 50 L.Ed 2d 405 (1963).. 40

Newcomb v. Brennen, 558 F.2d 825 (7th Cir. 1977).............. 39

Oldham v. Rooks, 361 So.2d 140 (Fla. 1978).................... 9

Pedersen v. Green, 105 So.2d 1 (Fla. 1958).................... 10

Pennekamp v. Florida, 328 U.S. 331 (1946)..................... 44

Pepper v. Pepper, 63 So.2d 93 (Fla. 1953)..................... 7

Pickering v. Board of Education, 391 U.S. 563 (1968).......... 40

Pounce v. State, 353 So.2d 640 (Fla. 1977).................... 17

Pred v. Board of Public Instruction of Dade County, Florida, 415 F.2d 851 (5th Cir. 1969)......................... 38

Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir. 1963)............................ 21

Reino v. State, 352 So.2d 853 (Fla. 1977)..................... 9

Roberts v. Jardine, 366 So.2d 124 (Fla. 2nd DCA 1979)......... 18

Robinson v. Reed, 566 F.2d 911 (5th Cir. 1978)................ 39

Sagert v. State Department of Labor, 418 So.2d 1229, 1230 (Fla. 3rd DCA 1982)...................... 14

SIMON, SCHINDLER & HURST, P.A., 1492 SOUTH MIAMI AVENUE, MIAMI, FLORIDA • TELEPHONE (305) 358-8611

Sailboat Apartment Corp. v. Chase Manhattan Mortgage
363 So.2d 564, 568 (Fla. 3rd DCA 1978)........................13,16

St. Petersburg Bank & Trust Co. v. Hamm,
414 So.2d 1071 (Fla. 1982).................................... 11

Seaboard Airlines R. Co. v. Timmons,
61 So.2d 426, 428 (Fla. 1952)................................. 21

Sepler v. State, 191 So.2d 588 (Fla. 3rd DCA 1966)............ 18

Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962)... 26

Sharon v. State, 156 So.2d 677 (Fla. 3rd DCA 1963)............ 13

Smith v. Arkansas State Highway Emp.,
99 S.Ct. 1826 (1979).. 41

S.R.G. Corp. v. Department of Revenue,
365 So.2d 687 (Fla. 1978)..................................... 11

State v. Barquet, 262 So.2d 431 (Fla. 1972)................... 7

State v. Board of Public Instruction,
113 So.2d 368, (Fla. 1959).................................... 26

State v. Cormier, 375 So.2d 852 (Fla. 1979)................... 10

State v. Dinsmore, 308 So.2d 32 (Fla. 1975)................... 16

State v. Matera, 401 So.2d 1361 (Fla. 3rd DCA 1981)........... 17

State v. Sandini, 395 So.2d 1178, 1180-81
(Fla. 4th DCA 1981)... 18

Stein v. Biscayne Kennel Club, Inc. 199 So. 364 (1949)........ 15

James Talcott, Inc. v. Bank of Miami Beach,
143 So.2d 651 (Fla. 3rd DCA 1962)............................. 16

Thayer v. State, 335 So.2d 815 (Fla. 1976).................... 16

Tribune Company v. School Board of Hillsborough County,
367 So.2d 627 (Fla. 1979)..................................... 9,25

Tropical Coachline Inc. v. Carter, 121 So.2d 779 (Fla. 1960).. 10

Upjohn Company v. United States, 449 U.S. 383 (1981).......... 21

SIMON, SCHINDLER & HURST, P.A., 1492 SOUTH MIAMI AVENUE, MIAMI, FLORIDA • TELEPHONE (305) 358-8611

United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980)......... 33

United States v. Levy, 577 F.2d 200 (3rd Cir 1978)............ 33

United States v. Valencia, 541 F.2d 618 (6th Cir. 1976)....... 33

United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970).......... 34

Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980)............ 39

Weatherford v. Bursey, 429 U.S. 545 (1977).................... 33

Wetmore v. Brennan, 378 So.2d 79 (Fla. 3rd DCA 1979).......... 16

Young, Stern & Tannenbaum, P.A. v. Smith,
416 So.2d 4 (Fla. 3rd DCA 1982)..............................17,18

OTHER AUTHORITIES CITED

58 Am. Jur. "Witnesses", Sec. 462............................ 20

The Miami Herald, Editorial 3/16/84 "Madison's Legacy"........ 46

Florida Statutes

11.2421... 28

23.129.. 27

39.411.. 28

90.102...7,23,24

90.103...5,7,23,24

90.502.............................3,5-9,17,20-25,27,28,30,35

90.5055... 22

119.073...5,24-28

192.015... 28

286.011... 25

<u>Florida Statutes</u> Cont.

350.121 27

381.3812 28

624.308 46,48

624.311 4,28,46-48

Misc.: 11.26, 15.07, 23.129, 39.12, 39.411, 63.163, 112.324, 192.105, 213.053, 240.237, 240.323, 350.121, 377.701, 381.3812, 384.10, 396.112, 403.73, 742.09, 905.17, 905.24, 905.26, 905.27, 905.28, 943.058, 959.225...... 25

SIMON, SCHINDLER & HURST, P.A., 1492 SOUTH MIAMI AVENUE, MIAMI, FLORIDA • TELEPHONE (305) 358-8611

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Respondents.

PRELIMINARY STATEMENT

This case is before the Court because the Third District certified it as one of great public importance. Also before the Court on the same basis is Howard Neu, et al. v. Miami Herald and State of Florida, etc., Case No. 64,151 ("Howard Neu"). The two cases are interrelated -- the central parties are the same in both, and in terms of fundamental principles they are practically indistinguishable. Both involve the right of Petitioners to speak in confidence to their attorney. The only distinction is that Howard Neu involves oral attorney-client discourse (under the

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Sunshine Law and Chapter 90), while this case involves written attorney-client discourse (under the Public Records Law and Chapter 90). This is a distinction without a difference, however, for Chapters 119 and 289 are to be construed consistently whenever possible, and even more importantly there is no rational basis for distinguishing oral from written attorney-client communications under Chapter 90. Such a distinction would only lead to more confusion in a field too confused as it is. If the Evidence Code protects against compulsory disclosure of Petitioners' confidential attorney-client communications (as the law itself provides) then it makes no difference whether the communications are oral or written. The converse of that proposition is of course equally true.

Therefore, even though the two cases are not to be formally consolidated, Petitioners urge this Court to consider and resolve them in a consistent manner, preferably in a single opinion. Petitioners will hazard the guess that opposing counsel supports this request as well.

STATEMENT OF THE CASE AND THE FACTS

This is, or ought to be, an almost purely legal dispute, and the only material facts are the following, which are more specifically described in the materials contained in Petitioners' appendix:

The Herald requested Tobias Simon, whose firm had been retained as legal counsel for Petitioners, to turn over for inspection a number of his litigation files. Mr. Simon agreed, but with the important reservation that he would not disclose correspondence between his clients and himself or his attorneys, because he asserted such correspondence was confidential and protected by the attorney-client privilege. The Herald filed a mandamous action to compel disclosure of the correspondence. The circuit court ruled in Mr. Simon's favor. The Herald appealed to the Third District. The panel which heard the case remanded with instructions that the trial judge should review _in camera_ the correspondence before ruling that the statutory privilege applied. An _in camera_ inspection was conducted and the circuit court again ruled in Mr. Simon's favor, holding that 34 of the documents were confidential attorney-client communications and therefore privileged under Section 90.502 from compulsory exposure under Chapter 119. The Herald again appealed to the Third District and the matter was heard by a second, different panel, which held that the statutory attorney-client privilege was not a privilege against disclosure at all, but only a privilege against the admissibility of attorney-client communications into evidence in judicial proceedings. The issue was certified to this Court.

In _Howard Neu_ the Herald objected to Petitioners' similarly compressed statement of the case and the facts, preferring to present the Court with an entire history of the controversy, including certain matters which Petitioners felt were

de hors the record or merely rhetorical, and designed to be provocative. Undersigned counsel believes that the above two-paragraph statement contains every fact bearing on the jurisprudential issue before this Court. To forestall any debate on that point, however, undersigned counsel has in the accompanying Appendix provided the Court with each of the parties' statements of the case and the facts to the Third District.

In addition to the principal issue above described, Petitioners have also maintained throughout the proceedings that, even aside from Chapter 90, they have a right to protect the confidentiality of their settlement correspondence pursuant to Section 624.311(3) Fla. Stat. (1983), and their legal consultations generally under the Due Process, Sixth Amendment and Free Speech guarantees of the United States Constitution, as well as the State constitutional provision granting this Court exclusive jurisdiction over the conduct of attorneys. So far, no court has given much credence to the latter arguments, with the exception of the Third District's vague acknowledgement of Section 624.311(3). But Petitioners do not join in that consensus and so must ask this Court's indulgence in considering these arguments once again.

A R G U M E N T

I

THE FLORIDA EVIDENCE CODE PROVIDES THAT PETITIONERS' COMMUNICATIONS WITH THEIR LEGAL COUNSEL ARE PRIVILEGED FROM COMPULSORY DISCLOSURE UNDER CHAPTER 119.

A. Introduction

It is difficult to know where to begin to argue a proposition so elementary and obvious as the one Petitioners must argue here, which is that Chapter 90 should be "construed" to mean exactly what it says. Chapter 119 was adopted in 1965. Everyone knows what it says -- for our purposes here it says that all City files are open to inspection by the Miami Herald. It also says that documents legally denominated "confidential" are exempt from that compulsory disclosure requirement. (Section 119.07(3)(a).) Over ten years later, in the late 1970s, the Legislature with this Court's blessing adopted the Florida Evidence Code and said that it

> shall replace and supersede existing statutory or commonlaw in conflict with its provisions. (Sec. 90.102)

and said that it applied to

> criminal proceedings, civil actions and all other proceedings pending or brought after October 1, 1981. (Sec. 90.103).

The Legislature then proceeded to promulgate a statutory attorney-client privilege, found at Section 90.502, which expressly and specifically and unconditionally and unequivocally and unambiguously states that City officials -- in other words Petitioners -- are to be treated just like everyone else in the

State of Florida for purposes of the privilege. (Section 90.502(1)(b).) Section 90.502 also says (expressly, specifically unconditionally, etc.) says that a communication between an attorney and a client (including these Petitioners) is confidential when it is not intended to be disclosed to third persons. (Sec. 90.502(1)(c).) Section 90.502 then says (expressly, etc.) that if the attorney-client communication is confidential, meaning it was not intended to be disclosed to third parties, then Petitioners and all other clients have the right

> to refuse to disclose and to prevent any other person from disclosing

the contents of the communication. (Sec. 90.502(2).) The Legislature then went on to list five specific exemptions to the privilege against disclosure. Not one of the exemptions is relevant to this case.

There is really no more of substance to be said in this brief. The Third District opinion removed language from Chapter 90, it disregarded language within Chapter 90, it added language to Chapter 90 which does not appear in the statute, and to suit its taste it changed the entire meaning of the attorney-client privilege. Its construction of Chapter 90 violated all the pertinent rules of statutory construction which have been enunciated by this Court and reiterated by the District Courts, including the Third District itself.

In In Re Apportionment Law, 263 So.2d 767 (Fla. 1972), this Court observed:

> Hence, this Court, in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of government... The propriety and wisdom of legislation are exclusively matters for legislative determination.

In City of Jacksonville v. Bowden, 64 So.2d 769 (Fla. 1914), this Court stated: "courts have no veto power and do not assume to regulate State policy." See also Kahn v. Shevin, 416 U.S. 351 (1974), stating that courts may not substitute their social beliefs for the judgment of the legislature which is elected to pass the laws. To the same effect, see Ferguson v. Skrupa, 372 U.S. 726 (1963); Pepper v. Pepper, 63 So.2d 93 (Fla. 1953); State v. Barquet, 262 So.2d 431 (Fla. 1972).

For the remainder of this brief, undersigned counsel will belabor the obvious, reiterating over and over again from every possible angle what is apparent on the face of Chapter 90. The proper resolution of the "issue" in this case has already been decided, by the governmental entity constitutionally empowered to decide it -- the Florida Legislature. Sections 90.102, 90.103 and 90.502 mean exactly what they say they mean and the Third District erred grievously in ignoring their plain meaning. A statutory privilege against disclosure of confidential communications with one's attorney does not and cannot mean that the confidential and privileged communications must be disclosed upon demand to any person who asks to see them. "Confidential" and "privileged" from "disclosure" are not words which signify

"open to all upon request." Not even such a mighty authority as Black's Law Dictionary can alter the fact that the decision below is utterly incompatible with the law.

Nothing could be more glaringly obvious, as a matter of language and logic and principles of statutory construction, than Petitioners' legal right under Chapter 90 to conduct confidential discourse with their attorney and to prevent disclosure of that discourse to curious outsiders, including the publishers of the Miami Herald. That is the plain meaning of the words in the statute. The Evidence Code does not say, or even hint, that its language is not to be believed or that what the Legislature really meant to say (or really "should have said") was that attorney-client discourse was to be broadcast to the entire world at the request of any curious bystander.

Judges are vested with the extraordinary power in our democracy to command obedience based solely on their claim to impartiality. The Florida "open government" laws are good laws but still small laws of recent vintage -- the United States has existed for centuries with the most open government on earth without depending on such statutes.[1] However sacred Chapter 119 may momentarily appear to some, it would be folly to convert it into a totem if, in so doing, we were to undermine the language and the law and the

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[1]As Justice Holmes remarked in Bi-Metalic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1959), the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole."

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judiciary's claim to impartiality.

The opinion below is in conflict with so many decisions by this Court on the proper rules of statutory construction that it is difficult even to know where to begin. See Tribune Company v. School Board of Hillsborough County, 367 So.2d 627 (Fla. 1979), holding that a subsequent law governing teacher disciplinary proceedings superseded the Sunshine Law because it was a subsequent and more specific expression of legislative will, both of which are true of Section 90.502 vis-a-vis Chapter 119, and because it was not for the courts to "pass upon the wisdom" of legislative exceptions to the open government laws; Askew v. Schuster, 331 So.2d 297 (Fla. 1976), (courts "cannot substitute their judgment for that of the Legislature."); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978) holding that a later statute controls over a prior one because an implied repeal occurs when a subsequent law is repugnant to the first; here there is not merely an implied repugnancy and repeal -- although there is that too -- but even an express repugnancy and express repeal. See also Chaffee v. Miami Transfer Company, Inc., 288 So.2d 209 (Fla. 1974) (holding that courts may not add words or limitations to a statute not placed there by the Legislature; here the court took an express privilege against disclosure to third parties and added the limitation that the privilege was only against disclosure to a judge); Reino v. State, 352 So.2d 853 (Fla. 1977) (reversing a judgment below on the grounds that when the words of a law are clear and unequivocal, legislative intent is to be gleaned from

the words without applying any other rules of statutory construction); Tropical Coachline Inc. v. Carter, 121 So.2d 779 (Fla. 1960) (to the same effect); Pedersen v. Green, 105 So.2d 1 (Fla. 1958) (words used by the Legislature are to be construed in their "plain and ordinary sense"); Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958) (The Florida Legislature is presumed to know the meaning of words and how the language works.); Carson v. Miller, 370 So.2d 10 (Fla. 1978) ("we have consistently held that unambiguous statutory language must be construed according to its plain meaning"); State v. Cormier, 375 So.2d 852 (Fla. 1979), stating it is a basic axiom of statutory construction that words of common usage, when appearing in a statute, (i.e. "confidential," and "privileged" against "disclosure"), "should be construed in their plain and ordinary sense"; Thayer v. State, 335 So.2d 815 (Fla. 1976) (A similar situation in which this Court held that the Florida courts are required to determine the meaning of legislation from its words; a statute is to be construed and applied "in the form enacted"; the Legislature is assumed to know the meaning of words; when a law states what it applies to, it excludes that which is not mentioned).

In Heredia v. Allstate Insurance Company, 358 So.2d 1353 (Fla. 1978), this Court quashed a Third District decision because the Third District had improperly rewritten the clear language of the statute: "It is neither the function nor the prerogative of the courts to speculate on the construction more or less

reasonable, when the language itself conveys an unequivocal meaning." In the face of the Legislature's use of plain words, this Court stated, judges are not "free to replace one term with the other in order to provide what they perceive to be a preferred connotation." This Court added that

> Notwithstanding that the plain meaning of a term used by the Legislature may not artfully harmonize one provision of a law with others ... or may not fully carry out a court-perceived intent as to the statute's operations, an adjustment is appropriately made by legislation and not judicial redrafting. Respect for the separation of governmental powers requires no less." Id at 1355.

See also S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978) (to the same effect); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982):

> The second district's inability to "believe that the Legislature could have intended for its statute to be read in such a way..." is insufficient to overcome the plain meaning of the statutory language... Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the Act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. Id at 1073

Chapter 90 unambiguously states that Petitioners have the right to maintain the confidential nature of their attorney-client communications, and to resist and prevent disclosure of those "confidential" communications to third parties. That is really what Chapter 90 says, and it minces no words saying it. The Third

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District decision literally turns that legislation on its head, in the process denigrating the Language and the Law. When courts lose their sense of respect for what words mean, then they risk breaking the bonds which secure us to society, for all social bonds are founded on language -- language is indeed the source of Law itself. The people of Florida chose among themselves some to serve as lawmakers -- they were chosen to write the social contract. Others were chosen as judges, not to sit in judgment of the written law (as this Court has stated over and over again), but rather to apply the law to specific controversies. It is as clear as day itself what our lawmakers wrote in Chapter 90 -- that Petitioners' discourse with their attorney is confidential and privileged from disclosure. Our lawmakers wrote this without equivocation -- Petitioners are entitled to speak confidentially with their attorney and no one can force them to disclose their discourse. That law superseded all prior laws, including Chapters 119 and 289, and applies to all proceedings. A conversation or a letter cannot be at once "confidential" and also accessible upon demand to the entire population of the earth, printed verbatim on the front page of the Miami Herald, and broadcast on television and radio. If everyone can hear and read what Petitioners say to their attorney, why have a law saying their words are "confidential" and can't be disclosed to "third persons"? The words in the law were sapped of their essential meanings as applied by the Third District. Words in our language have defined meanings, at least within a reasonable range; they cannot mean

whatever we choose them to mean -- sometimes one thing and sometimes the very opposite -- in service to the speaker's secret agenda.

It is therefore hardly surprising that the decision below is in direct and irreconcilable conflict with the established rules of statutory construction stated in this Court's decisions, only a small sample of which are cited above. The decision is equally incompatible with everything the Third District has said on the issue. See Durden v. American Hospital Supply Corp., 375 So.2d 1096, (Fla. 3rd DCA 1979) ("A controlling principle of law with respect to statutory construction is that the words in a statute must be construed in their plain and ordinary sense", citing this Court for the proposition tht appellate courts are "not authorized to engage in semantic niceties or speculations," nor to interpret a law based on what the judges might think that the Legislature intended or should have intended); In Interest of J.F., 384 So.2d 713 (Fla. 3rd DCA 1980); Sailboat Apartment Corp. v. Chase Manhattan Mortgage, 363 So.2d 564, 568 (Fla. 3rd DCA 1978) stating that the Legislature is "presumed to know the meaning of words... and the court will give the generally accepted construction" to the words used; Larrabee v. Capeletti Brothers, Inc., 158 So.2d 540 (Fla. 3rd DCA 1963), stating that the first principle of statutory construction is the conclusive presumption that the Legislature has a working knowledge of the English language. See also Sharon v. State, 156 So.2d 677 (Fla. 3rd DCA 1963) citing the "universal rule that statutes must be so

construed as to avoid absurd results." See Sagert v. State Department of Labor, 418 So.2d 1229, 1230, (Fla. 3rd DCA 1982), refusing to interpret a state law "to achieve an illogical or absurd result." To portray the problem graphically:

1965 law: All government documents must be disclosed to the Herald except those denominated by law as confidential.

1978 law: 1. All attorney-client communications are confidential and not subject to disclosure to the Herald.
2. This law applies to public documents and government communications.
3. This law supersedes the prior law.
4. There is no exception to this law for government documents and communications.
5. This law protects against disclosure to third parties of confidential communications between public officials and their attorney.
6. We really mean it.

1984 court decision:
"Because we know the legislature didn't mean what it said in 1978, and because even if it did we don't agree with that policy, ergo:

1. All public documents have to be disclosed to the Herald.
2. The 1978 law does not ensure the confidentiality of attorney-client communications from curious third parties.
3. The confidential communications must be disclosed to anyone wishing to see them.
4. The 1978 law is superseded by the 1965 law.
5. The 1978 law doesn't exist.
6. L'etat c'est moi.

The Legislature wrote with infinite clarity of words and purpose that Petitioners were to be treated the same as every other client in the State of Florida, and that they had the privilege to refuse to disclose and to prevent disclosure of their

confidential communications with their attorney. Obviously the Third District did not approve of that legislative policy and so rewrote the law to mean the very opposite of the words used, namely that Petitioners are different from all other citizens, had no right to conduct confidential discourse with their attorney, and were required to disclose their attorney-client communications to anyone wishing to see or hear them, for any reason or no reason at all. In effect, the Third District went through Chapter 90 with a red marker, inserting new words and limitations which do not appear in the law and erasing or disregarding words and entire sections it did not choose to acknowledge. Yet see Stein v. Biscayne Kennel Club, Inc., 199 So. 364 (Fla. 1940); Lee v. Gulf Oil Corp., 4 So.2d 868 (Fla. 1941); Baeza v. Pan American/National Airlines, 392 So.2d 920 (Fla. 3rd DCA 1980); Azar v. Graham, 194 So.2d 684 (Fla. 3rd DCA 1967), all for the proposition that when a statute lists certain matters either to be included or excluded from its reach, the rule "expressio unius est exclusio alterius" is applied to exclude any other matters or exemptions not listed. The panel's motion that Petitioners' privilege against disclosure of "confidential" discussions means compulsory disclosure and hence no confidentiality, finds no support in the statute at all, and is contrary to basic principles of statutory construction. See also In Re Sepe, 421 So.2d 27, 28 (Fla. 3rd DCA 1982), stating that it is a "well-settled rule of statutory construction that the last expression of the legislative will is the law...the last in point of time prevails."; Cable-Vision, Inc. v. Freeman, 324 So.2d

149 (Fla. 3rd DCA 1975), citing the "well-recognized proposition of law" that any inconsistency between two statutes is to be resolved in favor of "the last expression of the legislative will." See also Askew v. Schuster, 331 So.2d 297, 300 (Fla. 1976). And see Florida Department of Health v. Gross, 421 So.2d 44, 45 (Fla. 3rd DCA 1982): "...a statute dealing specifically with a particular subject [i.e. attorney-client communications involving government officials] takes precedence over another statute governing the same and other subjects in general terms [i.e. all communications involving government officials]." See also Department of Legal Affairs v. Rogers, 329 So.2d 257 (Fla. 1976); State v. Dinsmore, 308 So.2d 32 (Fla. 1975); Wetmore v. Brennan, 378 So.2d 79 (Fla. 3rd DCA 1979) holding that when two statutes applied to a particular matter, one generally and one specifically, the specific law governed over the general law.

See also James Talcott, Inc. v. Bank of Miami Beach, 143 So.2d 651 (Fla. 3rd DCA 1962); Sailboat Apartment Corp, supra: "To determine the legislative intent, the court must look to the plain language of the statute which is to be taken, construed and applied in the form enacted... the Legislature is presumed to know the meaning of words..."; Hialeah, Inc. v. B & G Horse Transportation, Inc., 368 So.2d 930 (Fla. 3rd DCA 1979) holding that when the words of a statute are clear, there is no excuse for judicial interpretation and that the courts may not add words of limitations to a law which were not placed there by the Legislature. Id at 933. There is not a single word in Section

90.502 limiting it to a privilege against admissibility into evidence. On the contrary, it says that a:

> public officer or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services... has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications. Section 90.502(1) and (2). (Emphasis supplied.)

Even more incredibly, the Third District's ruling that the attorney-client privilege of confidentiality provides no protection against disclosure to the world of the "confidential" communications, but only protects against the admission into evidence of the communications, is contrary to this Court's prior decisions on that very issue. It is even contrary to the Third District's own decisions on that very issue. See Mobley v. State, 409 So.2d 1031 (Fla. 1982) (holding that if a client discloses confidential attorney-client communications to a third party, then he has waived the privilege); Pounce v. State, 353 So.2d 640 (Fla. 1977), posing the question whether the attorney-client privilege bars a party from deposing an attorney, and answering the question "yes." (The Court specifically ruled that the privilege applies both to disclosure of confidential materials as well as their use at trial. Id at 642); Jimani Corp. v. S.L.T. Warehouse Co., 409 So.2d 496 (Fla. 1st DCA 1982) (affirming that the attorney-client privilege prohibited inquiry into correspondence between an attorney and his client); State v. Matera, 401 So.2d 1361 (Fla. 3rd DCA 1981); Young, Stern & Tannenbaum, P.A. v. Smith, 416 So.2d

4 (Fla. 3rd DCA 1982), stating that communications which actually fall under the attorney-client privilege are protected from discovery (i.e. "disclosure"), not merely protected from "admissibility into evidence"; Sepler v. State, 191 So.2d 588 (Fla. 3rd DCA 1966) (noting that the attorney-client privilege protects against disclosure, i.e. the revealing of confidential communictions); Liberty Mutual Insurance Company v. Flitman, 234 So.2d 390 (Fla. 3rd DCA 1970), a case concerning the disclosure of attorney-client confidential information in a deposition, not the "admissibility" of such evidence at trial. The court said a party was not permitted to elicit and discover the privileged communications. Note also State v. Sandini, 395 So.2d 1178, 1180-81 (Fla. 4th DCA 1981) (specifically holding that an attorney cannot be required to testify against his client nor be required to disclose information against his client's interest: The attorney-client privilege is not only an evidentiary "exclusionary rule" but "also precludes the State from compelling the disclosure of privileged information at any stage of the proceeding."); Dees v. Scott, 349 So.2d 475 (Fla. 1st DCA 1977); Roberts v. Jardine, 366 So.2d 124 (Fla. 2nd DCA 1979); and Dionise v. Keyes Company, 319 So.2d 614 (Fla. 3rd DCA 1975), the latter case quoting this Court for the proposition that "the confidential relationship of attorney and client is a sacred one, and one that is indispensible to the administration of justice." Id at 616. These decisions only make sense, after all, since the basic reason for a privilege to have confidential talks with one's attorney has nothing to do

with admissibility of evidence. If the strategy and information of the client and attorney are disclosed to the other side, there is no privilege worth speaking of. To limit the privilege to inadmissibility will destroy the privilege entirely -- it is an absurd and devastating notion of what such privileges are and why they exist.

It is difficult to understand how the Third District could think that an attorney-client privilege could exist if limited solely to the inadmissibility of supposedly "privileged" and "confidential" discourse. The loss of confidentiality, i.e. the disclosure of attorney-client statutory discussions to an opposing party or even their publication in the Miami Herald would completely undermine the foundation of the attorney-client relationship. The attorney-client privilege would have very little meaning if it were interpreted to permit any curious bystander to read the supposedly privileged and confidential communications. It simply does no good to pretend that people have a privilege to engage in confidential communications with their attorney, under a statute which tells them they can resist and prohibit disclosure of those communications, but then to add soto voce in the fine print of a judicial gloss, that all their communications are open to full public inspection, indeed publication to the world, but "not to worry" because the communications will not be used against them in court. An individual relying on the confidentiality of his communications with his attorney will understandably feel bamboozled if, after

the State Legislature granted him a privilege against disclosure for communications which the State Legislature denominated as confidential, the State courts then altered that legislation to provide that his most confidential discussions must be exposed to the entire world. For if this Court affirms the Third District decision, then Section 90.502 will not even prevent mandatory disclosure of attorney-client communications in normal discovery proceedings, in that discovery is not at all dependent on admissibility into evidence. There is no way to describe such an outcome other than wholesale judicial nullification of legislation.

The attorney-client privilege is founded on the principle that persons seeking legal aid and counsel should be free to communicate with their legal advisor without fear of disclosure or the consequence of such disclosure to third parties.[2] See cases above, and see generally 58 Am Jur "Witnesses" Section 462; Herrin v. Abbe, 46 So. 183 (Fla. 1908). Of what value would such a privilege be if the very communications which are supposedly privileged and confidential are subject to compulsory disclosure to any curious citizen?. As this Court once stated, "The confidential relationship of attorney and client is a sacred one, and one that is indispensible to the administration of justice.

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[2]This entire argument is irrelevant. The Legislature already decided that the attorney-client privilege was a privilege against disclosure, not admissibility, and that decision was consistent with every court decision on the question as well.

It cannot so lightly be brushed aside." See Seaboard Airline R. Co. v. Timmons, 61 So.2d 426, 428 (Fla. 1952). See also Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 319, (7th Cir. 1963), referring to the attorney-client privilege as "deep rooted" and not to be subject to "examination and publication." Confidential communications between attorneys and clients would obviously grind to a halt, and the attorney-client privilege become a bad joke, if an opposing counsel or curious bystander were capable of reading or listening to all supposedly privileged and supposedly confidential communications, and it is completely immaterial in that context that an opposing counsel might be unable to introduce the priviledged communications into evidence. See Upjohn Company v. United States, 449 U.S. 383 (1981), regarding the purpose of the attorney-client privilege.

Thus the Third District opinion is directly contrary to the actual words used by the Legislature, it is contrary to all the pertinent rules of statutory construction, and it is also contrary to the established caselaw construing the attorney-client privilege to be, as Sec. 90.502 specifically states, a privilege against disclosure, not merely a privilege against admissibility. In addition, the Third District's decision is completely

illogical.[3] Given the fact that the attorney-client privilege is but one of six similar privileges described in Sections 90.502 through 90.5055, and given the fact that each of these privileges is described in the same broad terms (i.e. they all say they are privileges from disclosure to third parties), then logically each must now be merely a privilege against admissibility of evidence and not what they actually say they are -- privileges against disclosure to third parties. Hence what a mental patient tells his therapist, or a rape victim tells her counselor, or a wife tells her husband, or a penitent tells his priest, or a client tells his accountant, are all equally subject to compulsory disclosure to any curious adversary or third party. Nor can this dilemma be resolved by saying that a curious third party may only compel disclosure of government-related communications under Chapters 119 or 289 and thus the "evidentiary" limitation created by the Third District applies only to attorney-client and accountant-client communictions under Sections 90.502 and 90.5055(1)(b). For "disclosure" includes normal discovery in all litigation and Chapter 90 expressly states that Petitioners are no

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[3]Again, undersigned counsel can only note the paradox that if these arguments are even necessary at this point, then they are also pointless. The Legislature decided this "issue" already, and did it so clearly that the "issue" is a non-issue. If that doesn't take care of the Third District decision, then considerations of logic and public policy won't either, for at that point we are in the realm of ideology, not law.

different from anyone else with respect to such disclosure. Thus logically the Third District's notion that the Evidence Code privileges are only evidentiary privileges must apply equally to all the privileges, for there is no logical basis for distinguishing between them, and it is no help at all to try to resolve the difficulty by stating that Petitioners are not like everyone else when Chapter 90 says the exact opposite. The Herald in their litigation can just as easily ask Petitioners what they tell their priests as what they tell their lawyers, and so can anyone else.

Therefore, there is no way to elude Sections 90.102, 90.103 and 90.502, assuming that eluding the law were the objective. See City of Tampa v. Titan Southeast Construction Corp., 535 F.Supp. 163 (M.D. Fla. 1982), a copy of which is attached in Petitioners' appendix. Indeed, note Section 90.507 and 90.508, which were ignored by the Third District (along with Sec. 90.102, 90.103 and 90.502, et al.), which even further confirm that Petitioners' privilege is to resist and prevent disclosure of their confidential discussions with their attorney or accountant, not merely to prevent the introduction into evidence of such discourse.

There are only so many ways one can say the same thing over and over again in distinct ways. The Court understandably is impatient. But when faced with the situation in which the Legislature has plainly said "X=1" -- has said "X=1" three or five times very plainly so that any seventh grader can understand it --

and then an appellate court declares that "X=2" is the law, one has no alternative but to point to the statute and say, "but, look, it does say X=1, whether you look at it from the right, or you look at it from the left, or you look at it while standing on your head." Chapter 90 still says Petitioners' discourse with their attorney is confidential and not to be disclosed, no matter how you look at it. Of course it is sophmoric to tell seven Supreme Court Justices what they can read for themselves, and it is exactly for this reason that undersigned counsel would have preferred to file a one-line brief stating: "The Third District opinion is patently wrong -- please read Sections 90.102, 90.103 and 90.502." But more cautious minds have prevailed, and so undersigned counsel will now proceed to pedantically anticipate arguments the Herald will assert in its Answer, even though no argument on earth can change what Chapter 90 actually says.

B. The Evidence Code really does supersede Chapter 119.

Section 90.502 supersedes Chapter 119. It says so and it does so as well. The attorney-client privilege does not have to be in Chapter 119 for that to be the case. The Herald has contended that exemptions to the Public Records Law may be created only by exemptions in Section 119.07(2); since the Legislature did not amend Chapter 119 itself, the Herald will argue, the attorney-client privilege simply does not exist. However the argument is phrased, it is clever nonsense because the attorney-client privilege does exist -- it is right there in black and

white in Section 90.502, and it both expressly and actually supersedes Section 119.072. Moreover, the Herald must concede that not all the exemptions to Chapter 119 appear <u>within</u> 119, or even <u>refer</u> to Chapter 119. Indeed, most do not -- there are probably well over 20 Florida statutes which exempt records from Chapter 119 which do not refer to Chapter 119, much less are referred to <u>in</u> Chapter 119. Most do not even use the word "confidential," which is the magic term used by Chapter 119 to encompass other exemptions <u>not</u> contained within Chapter 119 and which, not coincidentally, is the very term used in Section 90.502. See for example Sections 11.26(1)(a), 15.07, 23.129, 39.12, 39.411, 63.162, 112.324, 192.105, 213.053, 240.237, 240.323, 350.121, 377.701(4), 381.3812, 384.10, 396.112, 403.73, 742.09, 905.17, 905.24, 905.26, 905.27, 905.28, 943.058, 959.225, all authorizing nondisclosure of government records or information which otherwise would have to be disclosed under Chapter 119 or 286.

In <u>Tribune Company v. School Board of Hillsborough County</u>, 367 So.2d 627 (Fla. 1979), this Court concluded that a law which neither referred to nor specifically amended Chapter 286 nevertheless constituted an exemption to the Sunshine Law. That was the Court's ruling for a reason which is rather pertinent to this case, namely that the subsequent statute was the "later legislative expression" and for that reason was a valid exemption of Sec. 286.011. As this Court stated, if there is conflict between two laws, then the provisions of the latter law must be

given effect. 267 So.2d at 629. Equally, Chapter 90 is the most recent pronouncement of the Legislature regarding these particular communications, and the Court should give credence to that latter pronouncement of Legislative intent. See especially City of Tampa v. Titan Southeast Construction Corp., 535 F.Supp. 163 (M.D. Fla. 1982) applying that principle to this precise controversy. Cases for this proposition are legion, and many have been cited above, but see also Johnson v. State, 27 So.2d 276 (Fla. 1946); State v. Board of Public Instruction, 113 So.2d 368 (Fla. 1959); Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962), all for the proposition that one of the most basic tenants of statutory construction is that the last expression of the Legislative will is the law and should be given effect as such.

C. Chapter 119 exempts from its coverage documents made confidential by laws passed subsequent to the passage of Chapter 119.

The United States District Court decision in Titan specifically addressed this very issue in a well-reasoned and objective opinion. The court noted that Section 119.073(a) exempts from disclosure public records which are "presently provided by law" to be confidential or which are "prohibited by law" from being inspected by the public. The Court began the analysis by noting that the specific inclusion of public officials and entities within the definition of "client" clearly indicated a legislative intent to extend the privilege to city governments and officials, thus exempting their communications from mandatory

disclosure under the Public Records Act. Since the Evidence Code thus superseded Chapter 119, the only plausible issue the Court could discern was whether the Legislature in Chapter 119 intended to limit subsequent exemptions to laws "presently" on the books in 1975 (when Chapter 119 was initially adopted) or whether it intended to include subsequently-enacted laws such as Chapter 90. Titan, supra, 535 F.Supp. at 165. The court noted that the term "presently" does not appear in the second clause of subsection 3(a). That omission, the court held, was itself significant, in that under the attorney-client privilege the attorney was indeed "prohibited by law" from disclosing documents encompassed by Section 90.502. Even more significant was the fact that after Section 119.073(a) was adopted, the Legislature proceeded to pass dozens of laws exempting specific types of documents from Chapter 119, some of which even made specific reference to Chapter 119 (for example Sections 23.129 and 350.121). Logically, the Legislature must have had intended to permit itself to adopt subsequent (post-1975) exemptions to Chapter 119, since otherwise it would not have adopted dozens of exemptions all of which would be nullities if "presently" meant "1975":

> "It is a well-established rule of statutory construction that the Legislature is presumed to know the law when it enacts a statute. Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806, 809 (Fla. 1964). This presumption, coupled with the specific references to Chapter 119 in some recently enacted statutes, leads to the conclusion that the Legislature intended to create

exemptions to the Public Records Act, even after 1975, without specifically amending that Act."

The court held that it logically followed that Chapter 90 was also intended to create an exemption to the Public Records Act, in the same fashion as Sections 39.411(3), 192.015(1), 381.3812(3), 624.311(8) and numerous other post-1975 statutes creating exemptions from Chapter 119.[4]

D. The public did not waive Petitioners' attorney-client privilege.

The Miami Herald has at times asserted that Section 90.502 did not really create an exemption to Chapter 119 because the public waived its attorney-client privilege through the legislative enactment of Chapter 119. It is impossible to tell whether the Herald is serious in this argument. It is certainly hard to take it seriously when the Florida Legislature has unequivocally stated the exact opposite, namely that it was enacting into law the attorney-client privilege and specifically extending it to Petitioners. Section 90.502 Fla. Stat. (1983) is

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[4]There is of course another reason why statutes adopted after July 1, 1975 are exemptions from Chapter 119, even if the term "presently" were construed to mean "presently at the time of enactment of this law." The reason is that due to the Biannual reinactment of all Florida statutes, pursuant to Section 11.2421, the phrase "presently provided by law" in Section 119.073(a) means presently as of the latest reinactment of Chapter 119, thus encompassing Section 90.502.

a definitive recognition by the people of the State, acting through their Legislature, of the necessity of providing protection for their public representatives to communicate confidentally with their attorneys.

E. The non-passage of other legislative amendments or proposed amendments to Chapter 119 are totally irrelevant.

The Herald has also argued, and may do so again, that the Florida Legislature "really didn't mean" for the Evidence Code to exempt public records from disclosure and that is proved by the non-passage (or veto by the governor) of other bills placing an attorney-client privilege within Chapter 119. This is a non sequitur, of course, for Chapter 90 specifically exempted Petitioners' attorney-client communications from Chapter 119, and so the failure to pass other such legislation proves either nothing or that the Legislature realized that the privilege was already secure under the Evidence Code and that no further legislation was required. Nor of course does Governor Graham's veto of other legislation signify anything, except perhaps the knowledge that such legislation was unnecessary, in light of the fact that he did not veto Chapter 90, and Chapter 90 expressly grants Petitioner a privilege against mandatory disclosure of their confidential attorney-client communications.

II.

EVEN ASIDE FROM THE FLORIDA EVIDENCE CODE, CHAPTER 119 CANNOT COMPEL DISCLOSURE OF PETITIONERS' CONFIDENTIAL DISCUSSIONS WITH THEIR ATTORNEY, AS A MATTER OF DUE PROCESS, THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, FREEDOM OF SPEECH, AND THE SUPREME COURT'S EXCLUSIVE JURISDICTION OVER THE BAR.

All that follows, like everything which has preceeded it since page 7 of this brief, is unnecessary in light of Section 90.502. Section 90.502 resolves the constitutional question as far as the precise form of communication which is at issue here. If Section 90.502 were nullified or repealed, the Court would have to recreate it for the reasons stated below. First, it is necessary to clarify one issue which the Herald has muddied. Undersigned counsel, like Tobias Simon before him, is not an attorney for the "people of North Miami," but for the members of the North Miami City Council. A city attorney does not represent the public and is not a "public" attorney. The members of the City Council, who are indeed personally named in these lawsuits with the Miami Herald and Janet Reno, are the city attorney's clients. They hire their attorney, they fire their attorney, within ethical limits they tell their attorney what to do and what not to do, and it is they who the city attorney represents in court. (Indeed, Section 90.502(1)(b) itself defines the "client" as the public officials who "consult" with an attorney to obtain legal services.) Suffice to state that the members of the North Miami City Council have not "waived" their attorney-client privilege.

Similarly, it is quite irrelevant to argue that "cities" have Due Process or other constitutional rights. Petitioners certainly have constitutional rights, and it is they who are often personally liable for acts which they may believe were official, but which others claim are _ultra viris_. A perfect example of that liability is this very litigation, particularly the _Howard Neu_ litigation in which the State attorney has already threatened in her brief to _criminally prosecute_ Petitioners individually for communicating with their attorney. In that the members of the City Council are thus obviously subject to personal liability (including jail) as a result of their actions or inactions as members of the City Council, they are plainly as much entitled to the protection of the United States Constitution as anyone else. When members of the City Council need to communicate with the city attorney, the context of their need may often be one in which the clients individually face personal liability for some alleged wrong arising out of dozens of local, state and federal laws governing local officials. This Court has only to review Florida and Federal statutes to find _dozens_ of statutes threatening criminal sanctions for the individual Petitioners' conduct as members of the City Council, i.e., financial disclosure laws, "Hatch Act" laws, election and campaign laws, laws governing gifts, laws governing public employees, conflict of interest voting, Sunshine and Public Records laws and so on.

It is in _this_ context (which is not hypothetical but rather the context in _these_ very cases) in which one must consider

whether it is a violation of the client's Due Process rights to be deprived of any means for legally communicating with his attorney except in front of the very authorities seeking to imprison him. This issue has been discussed at some length in Petitioners' briefs in Howard Neu: When the members of the North Miami City Council can be imprisoned or otherwise punished -- not the "City," not the "public", but Petitioners as individual human beings -- yet have no legal means to speak to their attorney except in front of the very persons who seek to prosecute them (either directly in front of them or indirectly via the Herald) then clearly they have been deprived of the effective assistance of legal counsel and due process of law.

An element of fundamental fairness under the Due Process clause and the guarantee of access of courts under the Fifth, Sixth and Fourteenth Amendments, is the right to effective assistance of counsel. This right applies in all criminal proceedings, and in many administrative and civil proceedings as well, and includes the right of private communication with one's attorney. See Dreher v. Sieloff, 636 F.2d 1141 (7th Cir. 1980), holding that the opportunity to communicate privately with an attorney is an important element of the Fourteenth Amendment. See also Case v. Andrews, 602 P.2d 623 (Kan. 1979), holding that the right to counsel includes the right to maintain the confidentiality of attorney-client discussions and to exclude State access to such communications. See Barber v. Municipal Court, 598 P.2d 818 (Cal. 1979), in which the State listened to

attorney-client conferences, and the court reversed a conviction and held that the right to counsel is a "fundamental constitutional right" under the Sixth Amendment, and includes effective and meaningful assistance of counsel in preparing a defense, and included the right to maintain "confidentiality and privacy" in attorney-client communications. Id at 822. The Court specifically held that under the United States Constitution there is a "right to communicate in absolute privacy with one's attorney." To the same effect, see McClelland v. State, 240 A.2d 769 (MD Ct. App. 1968), holding it an essential ingredient of the Sixth Amendment that an attorney and his client be able to prepare and consult "without intrusion upon their confidential relationship" by the State. The court relied in part on the United States Supreme Court decision in Hoffa v. United States, 385 U.S. 693 (1966) and Gradsky v. United States, 376 F.2d 993 (5th Cir. 1967). To the same effect see Blank v. United States, 385 U.S. 26 (1966); United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980); Weatherford v. Bursey, 429 U.S. 545 (1977) (in which the Supreme Court agreed that if the State is aided in its case by information it gained as a result of intruding into the confidential discourse between an attorney and his client, that would require reversal of any resulting conviction); United States v. Levy, 577 F.2d 200 (3rd Cir. 1978) (holding that the State cannot invade the attorney-client relationship and thereby gain knowledge of the defense strategy); United States v. Valencia, 541 F.2d 618 (6th Cir. 1976), holding that the State may not

constitutionally intrude upon confidential attorney-client discourse; United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970), holding that it is "well settled" that an intrusion by the government upon the confidential relationship between a defendant and his attorney is a violation of the Sixth Amendment right to counsel.

As also discussed at greater length in Petitioners' Brief in Howard Neu, there is still another Due Process problem in saying that Petitioners cannot speak with their attorney in confidence. Under the Florida Contitution, attorneys are subject to the exclusive jurisdiction of this Court, and pursuant to that jurisdiction are under the duty to protect their clients, to maintain their clients' confidences, and to effectively aid their clients when their clients are in jeopardy. For failing to honor such obligations, an attorney may be disbarred from the practice of law. Certainly undersigned counsel should be disbarred if, after Janet Reno announces to this Court her intent to prosecute his clients, undersigned counsel were to divulge to Ms. Reno statements made to him by his clients which they intended to be confidential, thereby aiding Ms. Reno in her prosecution of his own clients. Yet according to the Herald, if undersigned counsel does not do these things (and worse things as well), then undersigned counsel may himself be criminally prosecuted under Chapter 119 or 286 or both. Accordingly, undersigned counsel's Due Process rights are very much in jeopardy when told by one instrumentality of the State to violate the most sacred

commitments of the profession or be criminally prosecuted, while instructed by another State instrumentality to violate a criminal statute or else be disbarred. And this is only the beginning of the problem. What kind of a legal system affords everyone a right to be represented by an attorney, but then requires some to be represented by attorneys who are simultaneously under orders to represent the opposition? A lawyer cannot be the servant of two masters who are suing each other, and to compel Petitioners to be "represented" by a lawyer who is under orders to divulge their every secret and strategy to the opposition is to deprive Petitioners of legal counsel in any meaningful sense of the term. And since we are speaking here of citizens subject to criminal penalties, such legally-compulsory malpractice constitutes a deprivation of the clients' Fifth, Sixth and Fourteenth Amendment rights.

Fortunately, this is but a hypothetical problem, for the Legislature has solved it by adopting Section 90.502. All that remains is for this Court to recognize that Sec. 90.502 means what it says, and says it for a very good reason.

The First Amendment issue has been discussed at some length in Petitioners' briefs in Howard Neu. Petitioners' argument on this issue has also been dismissed or ignored by every court, and this Court has ignored it for nearly 20 years. The fact remains that even aside from Section 90.502, the Florida Legislature does not have the power, under the United States Constitution to pass laws such as Chapters 119 and 289 stating

that some people may only communicate at times and places approved by the Florida Legislature, when such censorship is not supported by any showing of a compelling justification.

To simplify the issue, imagine the Florida Legislature were to state that certain citizens of the State could only speak to one another about matters of public interest in a certain government-sponsored forum, and if they spoke to each other on public issues at any other time or place they would be jailed.

Petitioners submit that it matters not a whit that the "certain citizens" targeted here by the Legislature happen to be citizens elected to local office. Under the United States Constitution, this Court is not permitted to simply assume that such censorship is proper for "some citizens." If it were enough merely for the Florida Legislature to decide that certain citizens were different for purposes of First Amendment speech, and for this Court to approve such targeting merely because the Court agrees with the censorship policy, then it would follow that the Florida Legislature and this Court could honor or dishonor the First Amendment at will, so long as a majority of the State legislators and Justices happened to agree on a particular censorship policy. But this isn't the law, for if it were enough for the Florida Legislature and Supreme Court to agree it was "a good idea" to censor certain citizens (Republicans, local office-holders, teachers, whatever) then the Florida Legislature and Supreme Court could not just as easily censor the rest. To take an obvious illustration, assuming the constitutionality of

Chapter 119, what prevents a new law providing that Supreme Court Justices will be jailed if they communicate with any judge or any attorney except during formal judicial proceedings? Such a law makes as much "sense" as the law we are concerned with here, at least to undersigned counsel. Both equally would eliminate suspicion of corruption in public office and both equally promote the public's knowledge of government. And why stop there? Why not a law throwing elected officials in jail if they communicate with their constituents or other officials except at specified government forums? And if these laws are also "sensible" and thus ipso facto constitutional, then what prevents a law to handle the other side of such "unregulated communication" by government and judicial personnel, namely a law throwing citizens in jail for communicating with any government or judicial official except at legislatively-specified times and places?

Some State legislators and citizens and members of this Court may be in favor of some of the above laws, and some may be opposed. The merits of each is at least debatable. But under the United States Constitution, it does not matter whether a majority of legislators or justices happen to think one or another form of censorship is a "good policy" (depending on whose ox is being gored) but rather whether the State has objectively established on the record a compelling reason for such censorship. As Justice Holmes stated in his famous dissent in Abrams v. United States, 250 U.S. 616, 624 (1919):

> "Persecution for the expression of opinion seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you can actually express your wishes in law and sweep away all opposition.... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by <u>free trade in ideas</u> -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." 250 U.S. at 630.

Prior to Chapter 90 (which solves the immediate problem for <u>this</u> litigation anyway) this Court never <u>once</u> explained why it gave its imprimatur of approval for a law <u>specifically targeted</u> at the core values of the First Amendment, without ever even requiring the State to demonstrate, with evidence and facts on the record, a compelling need for such heavy-handed censorship backed by criminal sanctions. This Court has never even considered it necessary to <u>state</u> why it is that these citizens can be censored; much less has the Court ever objectively identified a <u>compelling</u> State interest in such censorship. Yet it is firmly established that public officials and employees are as much entitled to the protection of the First Amendment as other citizens, and cannot be required to "waive" this First Amendment right as a condition of holding office. See <u>Pred v. Board of Public Instruction of Dade County Florida</u>, 415 F.2d 851 (5th Cir. 1969), holding that the

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protection of the Constitution extends to public servants; that public servants and employees are as equally entitled as other citizens to comment on matters of public concern, including issues involving their official duties. Id at 855. The court held that public servants and employees were not "second class citizens" with regard to their constitutional rights, and the court rejected the Florida Attorney General's argument that public servants could be told by the State of Florida where and when to speak on public issues -- the court stated that such a restriction on free speech would emasculate the law and sap the Constitution of its vital force. See also Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981); Newcomb v. Brennen, 558 F.2d 825 (7th Cir. 1977), the latter case holding that the right to speak on matters of public concern goes to the core values of the First Amendment, and that if the state wishes to punish people based on the content of their words, the state must establish the need to do so. In Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980), the Fifth Circuit discussed at length the United States Supreme Court decisions concerning the prohibition against the state censoring or punishing speech by public employees and officials, concluding that the state may not engage in censorship of or punishment for speech by government officials or employees without proving a compelling need to do so. To the same effect see Robinson v. Reed, 566 F.2d 911 (5th Cir. 1978), holding that the government may not require an individual to relinquish his First Amendment right as a condition of public office. See Abood v. Detroit Board of Education, 431 U.S. 209 (1977), holding likewise.

In Henrico Professional Firefighters v. Board of Supervisors, 649 F.2d 237 (4th Cir. 1981), the case similarly involved a law purporting to ban certain public discussions except under limited circumstances. The court stated that when governmental action deprives a person or organization of the right to communicate its views, but at the same time allows other persons or organizations to speak, under either the First of the Fourteenth Amendment "the determination that a fundamental interest in speech has been abridged" requires the government "to advance a compelling justification for denying a particular person or entity the opportunity to speak." The Supreme Court has long held, Henrico reiterated, that public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public [institutions] in which they work." See also Pickering v. Board of Education, 391 U.S. 563 (1968). Id at 241.

To the same effect, see Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1, 6, 84 S.Ct. 1113, 1116, 12 L.Ed. 2d 89 (1964); NAACP v. Button, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed. 2d. 405 (1963); Madison Joint School District v. Wisconsin Employment Relations Commission, 429 U.S. 167, 97 S.Ct. 421 50 L.Ed. 2d 376 (1976). As the Fourth Circuit concluded in Henrico, supra, all the Supreme Court's "public forum" decisions support the proposition that regardless of the place where speech is to occur, "government may not discriminate among speakers on

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the basis of their status (i.e. identity) or the content of their speech." Id at 245, 246.

In Abood, supra, the Supreme Court held that public employees were not basically different from private employees and that any differences between them "are not such as to work any greater infringement upon the First Amendment interests of public employees." Id at 1797. The court ruled that the status of public employees cannot be used to muzzle those "who, like any other citizen, might wish to express his views about governmental decisions..." Id at 1797. Since the central purpose of the First Amendment was to protect the free discussion of governmental affairs, the court held, there is no justification for depriving public employees of the right to speak on public affairs. To the same effect, see the United States Supreme Court decision in Smith v. Arkansas State Highway Emp., 99 S.Ct. 1826 (1979) confirming that public employees "surely can associate and speak freely and petition openly" and are protected by the First Amendment from retaliation for doing so.

In First National Bank of Boston v. Belotti, 435 U.S. 765 (1978) a conceptually similar state regulation was at issue. There the state law attempted to regulate certain groups from seeking to influence voting on public issues, and as here violators were subject to fines and imprisonment. The Court declared the state law unconstitutional, after it had been upheld by the Massachusetts courts. The Court held that it was irrelevant whether the specific appellants "have" First Amendment

rights equal to those of other citizens. The Constitution, the court declared, often protects interests broader than those of the parties seeking their vindication. The question, the Court held, was actually whether the state law abridges expression that the First Amendment was meant to protect. As the court noted, the speech restricted by the Massachusetts law, "is at the heart of the First Amendment's protection." Id at 1450.

And in Mills v. Alabama, 384 U.S. 214 (1966), the court stated "There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." In the realm of protected speech, the court declared, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. Id at 1420. Just as in Belotti the Massachusetts legislature had commanded business groups, under penalty of criminal sanctions, not to advocate on public issues except with respect to their business interests, the Florida Legislature has, even more improperly, prohibited certain citizens, under threat of criminal penalties, from merely discussing among each other matters of public importance except in a single government-regulated forum. In both cases the legislature has attempted to suppress speech. In Belotti the state at least contended that its actions were "necessitated by governmental interests of the highest order." Id at 1421. Here, apparently the State need not even allege a compelling interest. Yet in Belotti the Supreme Court reversed the Massachusetts

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courts, because they had failed to subject the state law to "the critical scrutiny demanded under accepted First Amendment and Equal Protection principles." Id at 1421. In both Belotti and the present case, the respective state laws can be defended based on the need to preserve the integrity of the political process, prevent corruption, and sustain the participation of the citizens in government affairs. Id at 1422. These are the asserted policies behind Chapters 119 and 289 and they were also asserted in Belotti, and the Supreme Court rejected those very claims because they were not supported by evidence in the record or specific legislative findings of an imminent threat to the democratic process. In sum, the court held that a restriction "so destructive of the right of public discussion" could not be upheld without the State demonstrating on the record an imminent danger to the public interest. See also Landmark Communications Inc. v. Virginia, 98 S.Ct. 1535 (1978), in which the Supreme Court reversed a Virginia Supreme Court decision upholding a state law maintaining the confidentiality of judicial review of the state judicial review commission. The Supreme Court in Landmark assumed that the State law served a legitimate state interest, but the question was whether the interest was sufficient to justify an encroachment on the First Amendment. As here, the State "offered little more than assertion and conjecture" to support its defense of the statute. Even the alleged "institutional integrity" of courts, the Supreme Court held, was not enough to override the First Amendment. With respect to the "clear and present danger"

test, the Supreme Court stated that it requires the reviewing court to "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." Id at 1543. Deference to a legislative finding is not sufficient, the Supreme Court held, when First Amendment rights are at stake. See Pennekamp v. Florida, 328 U.S. 331 (1946).

As noted in Landmark, supra, were the rule otherwise, the scope of freedom of speech would be subject to legislative definition, and the function of the First Amendment as a check on legislative power would be nullified. Id at 1544. Thus the Supreme Court in Landmark held that it was incumbent upon the state Supreme Court to go beyond the legislative decision and to examine for itself whether the particular utterances censored by the legislature presented such a likely and substantial evil as to justify such censorship. The "working principle" the court held, was that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished, Id at 1544; Bridges v. California, 314 U.S. 252 (1941), and moreover, that a "solidity of evidence" is necessary to make the requisite showing of imminence -- the danger must not be remote or even probable; it must "immediately imperil." See Pennekamp, supra at 347; Craig v. Harney, 331 U.S. 367 (1947).

The Court may well ask, "But what does this have to do with the issue here? Neither Chapter 119 nor Chapter 289

prohibits Petitioners from speaking, not even to each other, but rather only says they must do so publicly. There is no constitutional right to private speech, is there?" The question is a good one, but Petitioners submit that under certain circumstances, to limit speech solely to public speech can have the practical effect of censoring it altogether. This is especially true for attorney-client discourse, but it is also true of other speech as well. If citizens were allowed to speak only when their words were broadcast publicly, they often will be restrained from speaking at all. The concept of "time, place and manner" restraint cannot justify a law limiting speech to a single forum, for some citizens are understandably unwilling to speak publicly at all times on all matters, and they should be afforded the constitutional right to choose their audience and forums, absent a compelling reason for restraining that right.

Moreover, rather than describe an actually compelling State interest in jailing people for speaking where and when they will, this Court has been satisfied to rule in essence that whatever a majority of Florida legislators feel on the subject is ipso facto sufficient. This is not the law and never could be. To put a fine point on the issue, the Court should consider whether, under the United States Constitution, Petitioners or undersigned counsel really can be imprisoned for privately discussing public issues. Traditionally in this nation people are not imprisoned for pure discourse with others, even under extreme circumstances; perhaps they can be imprisoned for planning

assassinations or espionage, but not for merely discussing matters of public policy at a time and place they find convenient, especially when the State submits no evidence whatsoever that the discussions are harmful even in the slightest degree. The Herald knows this is the law -- it even celebrates it; see the Herald's March 16, 1984 editorial "Madison's Legacy,"

> [T]he First Amendment protects the rights of every American to freedom of expression, regardless of the medium... that a principle boldly ennunciated nearly two centuries ago still serves this nation well is a tribute to the genius of those who wrote it. Happy Birthday, James Madison."

Happy birthday, indeed.

III.

THE DISTRICT COURT ALSO ERRED IN REFUSING TO RECOGNIZE THE APPLICABLITY OF SECTION 624.308 FLORIDA STATUTES (1983) TO THIS PROCEEDING.

Effective October 1, 1982, Section 624.311(3) Fla. Stat. provided:

> "The records of insurance claim negotiations of any state agency or political subdivision are confidential and exempt from subsection (2) and the public records law until termination of all litigation and settlement of all claims arising out of the same incident."

From the Third District's decision, it appears that Petitioners may have convinced the Third District that certain of the documents in the files demanded by the Miami Herald were, at

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least, prima facie within the scope of the above statute. Whether or not the Third District was convinced of this, the fact is that a large number of the documents demanded by the Herald are perfectly described by Section 624.311(3) and thus plainly exempt from mandatory disclosure under Chapter 119. The Third District appears to have avoided that result by stating that the statute did not apply to this proceeding because the Herald had requested disclosure before the effective date of the statute. That ruling by the Third District was also erroneous, for the very simple reason that the Herald's request to inspect documents is completely irrelevant to the application of a law. The Herald is not a judicial body nor an agency of the government -- its demand letters may be full of sound and fury but legally they signify nothing. Neither Chapter 119 nor any other state law or constitutional provision designates the Herald an agency of the State with power to decide when and how a statute is to be applied. When a court is confronted by documents made confidential by law as of an effective date prior to the date of the lawsuit before him, that law must govern. Laws are not "prospective" in their application only if one or the other of the parties does not attempt "self help" efforts prior to the effective date of the law. The Third District's theory that the Herald can "vest" itself with legal authority (actually divest itself of a legal impediment) merely by writing a letter in an unprecedented concept. The Herald had no free-floating right to inspect anything until the courts confirm the right, and here the

first time any court upheld the Herald's demand for documents was well over a year after the effective date of Section 624.308. Until that time, not only were the Herald's rights not "vested," they were positively nonexistent.

Moreover, to even speak of Section 624.308 in terms of the Herald's rights, vested or otherwise is to turn the statute on its head. The statute does not secure the Herald's rights, it speaks to the City's rights, and as of October 1, 1982, the law of the State of Florida gave the City the vested right not to disclose records which were subject to the law's provisions. The right "vested" on October 1, 1982, and it was confirmed by the City's refusal to turn over the documents to the Herald both prior to and after the law's effective date.

CONCLUSION

For the foregoing reasons this Court should reverse the Third District's opinion, affirm the Circuit Court decision that the specified documents were privileged under the Florida Evidence Code from compulsory disclosure to the Miami Herald under Chapter 119. In addition, this Court should affirm that all City records reflecting insurance claims against the City and negotiations pertaining thereto are confidential and exempt from Chapter 119 until settlement of the claims and termination of all litigation arising therefrom, pursuant to Section 64.311(3). If for any reason the Court holds that the Florida Evidence Code does not exempt from disclosure Petitioners' confidential attorney-client

communications, then this Court should hold those communications exempt under the United States and Florida Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 26th day of March, 1984 to PARKER D. THOMSON, ESQ. and SUSAN H. APRILL, ESQ., Thomson, Zeder, et al, 1000 Southeast Bank Building, 100 S. Biscayne Blvd., Miami, FL 33131; RICHARD J. OVELMEN, ESQ., The Miami Herald, 1 Herald Plaza, Miami, FL 33101; and JIM WOLF, ESQ, Florida League of Cities, Inc., P.O. Box 1757, Tallahassee, FL 32302.

THOMAS MARTIN PFLAUM, ESQ.

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