IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,426

APPLICATION TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW DECISION OF DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

STEVE EDELSTEIN, et al.,
"PETITIONERS"

v.

MIRIAM DONNER and ARTHUR J. MORBURGER,
"RESPONDENTS"

"RESPONDENTS" MIRIAM DONNER'S and ARTHUR J. MORBURGER'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Arthur J. Morburger and Miriam Donner will be referred to collectively in this brief as "Relators," (as they appeared in the trial court) and Fowler, White,Burnett, Hurley, Banick & Strickroot, PA, and Michael J. Murphy, Steve Edelstein, and the City of Miami will be referred to collectively as "Respondents" (as they appeared in the trial court).* The law firm of Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A. will be referred to as "Fowler," the City of Miami will be referred to as the "City," and the remaining parties will be individually referred to by their last names. Special note should be taken that, because the trial court clerk supplemented this record several times, portions of the paginated record are out of chronological order. Accordingly, the records predating January 12, 1982 and an assortment of records docketed on or before November 22, 1982, all bound under a single cover, are hereinafter designated as "(R1:1-215)" and all other records are designated as "R2: ," except that the May 20, 1983 hearing transcript is separately designated as "(T:1-100)."

COUNTERSTATEMENT OF THE CASE AND OF THE FACTS

This counterstatement is authorized under Fla. R. App. P. 9.210 (c) because of Relators' contention that Respondents' perfunctory statement of the case and of the facts is grossly deficient, as hereinafter noted. That statement is grossly deficient because it omits reference to most of the relevant portions of this over 800 page record, cross-references only a few pages of that record, misstates the record, impermissibly editoralizes on that record, and cites Respondents' bare allegations in their trial court pleadings as fact.

For example, Respondents' so-called statement of the case and of the facts oversimplifies the Third District's earlier mandate in Donner v.

* These designations should not be confused with the parties' designation on appeal. Relators are for example referred to as "Respondents" in Murphy's Initial Brief and in the amicus brief.

Edelstein, 415 So. 2d 830 (Fla. 3rd DCA 1982)(Edelstein I) by asserting that the Third District simply required Respondents to "reply in writing" to the Petition. In fact, that mandate specifically held that Respondents are public agencies, that the requested records are public and required the issuance of an order to show cause and required that any claim of exemption from the right of public access to the requested public records must be set out in response to that order to show cause in the form of an "affirmative defense" and mandated that the judicial determination of any such claim must be with reference to "specific" records. Respondents' so-called statement also neglected to point out that Respondents did not seek review of that appellate decision. In like manner, Respondents' statement of the case and of the facts is silent as to what written response to the order to show cause was filed, what affirmative defense, if any, was included in that response, what facts, if any, were alleged in any such affirmative defense, what proof, if any, was presented in regard to any such affirmative defense, or indeed what reply was filed to the response traversing those putative affirmative defenses.

Respondents' statement also attempts to recast the Third District's second opinion, on motion for order in accordance with the mandate, in Donner v. Edelstein, 423 So. 2d 367 (Fla. 3rd DCA 1982). Respondents incorrectly assert that Edelstein II mandated an in camera inspection of records claimed to be "privileged" without reference to any specific claim of privilege. To the contrary, Edelstein II authorizes and directs an in camera inspection of only those records claimed by Respondents to be prvileged as attorney-client confidential communications. (The opinion refers to "the privilege (singular) asserted" and only to the "attorney-client privilege)." Edelstein II did not authorize the lower court to

consider any claim of work-product privilege. Respondents neglected to point out that the trial court held that Edelstein II foreclosed consideration of any asserted work-product privilege (R2:129) and that this portion of the trial court's judgment was affirmed by the Third District in its May 8, 1984 opinion citing Edelstein II. Respondents omitted any reference to the fact that they failed to seek review of Edelstein II and that in their Appellants' Main Brief filed in the Third District (and in their instant Main Brief) they offered no argument in opposition to the trial court's interpretation of Edelstein II.

Even with regard to the ensuing in camera inspection that did take place in the trial court, none of the relevant details relating to the ex parte contacts on the merits between Respondents and Judge Korvick, relating to the secret February 18, 1983 meeting between Respondents and Judge Korvick as partof this in camera inspection process, or relating to the ex parte submissions to Judge Korvick of various proposed forms of order, one of which was signed by the Judge as her "Final Order" at that secret meeting (T:27-32, 24, 39-41, 43, 47, 49, 73, 75; R2: 425-426; R2: 13-14) are mentioned anywhere in Murphy's alleged statement of the case and of the facts.

Respondents also fail to note the record of "waiver" of privilege substantiated by exhibits whose authenticity was stipulated to and attached to Respondents' own pleadings. The record of "fraud" is similarly ignored in Respondents' statement.

Respondents' further suggestion that this action is "under the guise of" a demand for access to public records but is in reality a form of "discovery"

is a blatent misstatement* and editorialization not permitted to be included in a statement of the case and of the facts under Fla. R. App. P. 9.210.

At page 4 of their Main Brief, Respondents assert that they "filed their notice of appeal as to the portion of the order denying the claim of work-product. (R:97)." The cited "R:97" is a Notice of Appeal not purported to be executed in behalf of the City or Edelstein. Nor did the City or Edelstein file any separate notice of appeal or joinder in appeal within the prescribed 30 days or 10 days thereafter.

So extensive are the errors and omissions in Murphy's attempted statement of the case and of the facts that, in order to economize the Court's time, Relators have instead prepared the ensuing counterstatement.

Dade Circuit Court Case No. 81-369 EX was first instituted by (Relator) Donner with the filing of a "motion" (R1:10)** for entry of an order compelling the City and Murphy to allow access to certain records more particularly described in the ensuing paragraphs.

Relators Donner and Morburger thereafter filed in that same action a Petition for Writ of Mandamus (R1: 11-33) naming as Respondents Assistant City of Miami Attorney Edelstein, Murphy, Fowler, and the City.

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* In Wait v. Florida Power & Light, 372 So. 2d 420 (Fla. 1979), the Supreme Court of Florida had expressly held that a public records demand cannot be "equated" with pretrial discovery procedures, regardless of any other pending civil litigation. Therefore, Murphy's editorialization that the instant public records demand is a disguised form of discovery is at odds with Wait. This effort to characterize the public records demand as a disguised form of discovery carries over into Respondents' argument in lines 5 to 7 on page 27 of their brief. See also News-Press Pub. Co., Inc. v. Gadd, 388 So. 2d 276 (Fla 2d. DCA 1980) holding that the motive behind a public records demand is irrelevant.

** That motion contained several typographical errors. Most conspicuous was the erroneous "style" (R1: 1) designating the parties as"Miriam Donner, plaintiff" and "Vernon Hetherington, et al., defendants" whereas the text of the motion sought relief against Murphy and the City. This erroneous style was corrected in the succeeding Petition and was not carried forward into the styles of the orders thereafter entered (R1: 11).

The Petition alleged the following facts:

1. In 1976 Donner as plaintiff had instituted suit in Dade Circuit Case No. 76-8301, against Vernon Hetherington, the City, et al., as defendants. (See Donner v. Hetherington, 370 So. 2d 1225 (Fla. 3d DCA 1979), Donner v. Hetherington, 376 So. 2d 404 (Fla. 3d DCA 1979, Donner v. Hetherington, 399 So. 2d 1011 (Fla. 3d DCA 1981)) (paragraph 1 of petition).

2. Certain records relating to that 1976 suit and to the claims pending in that suit were made and received in connection with the transaction of the official business of the City Attorney and his assistants and of the City (para 2).

3. The custody of those records were entrusted to Edelstein, an assistant City Attorney (para 3).

4. The City's defense counsel in that suit was Fowler. Murphy, an attorney, was an associate of said law firm (para 4).

5. In the course of and in connection with the representation of defendant City in the said litigation, said law firm made and received certain records (para 4).

6. Murphy is custodian of Fowler's said records (para 5).

7. In Case No. 76-8301, an order had been entered denying plaintiff access to the City's public records other than through "normal discovery means" (para 6).

8. On October 23, 1981, there was heard in Case No. 76-8301, plaintiff's motion to vacate that order (para 6).

9. At that hearing, attorney Murphy announced to the Court:

> " The Wait case* is a Supreme Court case that dealt with one public entity, as the one Defendant, and it was specifically for the production of those documents, and they claimed a privilege.

*Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).

" We're not claiming a privilege. Your Honor, we are claiming if you want them, go through me, not behind my back to the exclusion of my other clients, plain and simple.

Your Honor entered an order to that effect. They're here trying to set this aside on the Wait case. I'm not trying to hideanything. They can have anything they want."

" I just want to continue doing it through me, as opposed to behind my back to the exclusion of my other clients, plain and simple" (para 6).

See excerpted transcript of hearing attached to Petition (Rl: 27-29)

10. Pursuant to Murphy's quoted representations, the Court set aside its previous order and entered an order directing only that plaintiff Donner's co-counsel Morburger afford to Murphy advance notice before communicating with the City records custodians in quest of public records (para 7).

11. Pursuant to that order and Murphy's quoted representations, notice was given to Murphy on October 28, 1981, by telephone and in writing in advance of communicating with records custodian Edelstein in quests of the afore-mentioned records in Edelstein's custody. A copy of the written notice was attached to the Petition, marked Exhibit "A" (Rl: 21) (para 8). The form of that notice was a letter addressed to Murphy and Edelstein. In that letter, reference is made to the aforementioned order of the Court requiring "advance notice" and it is explained that the letter is intended to serve as advance notice of (Relators) Donner's and Morburger's demand for access to the public records of the office of the City of Miami Attorney relating to the pending claims and litigation of Donner against the City. In that letter Edelstein is identified as the custodian of those records. The letter confirmed that the demand was made pursuant to the Public Records Law, Chapter 119 of the Laws of Florida.

12. On the same date, October 28, 1981, after notifying Murphy, Relators hand-delivered to Respondent Edelstein another copy of that letter

and orally demanded that Edelstein afford access to those public records for inspection and copying pursuant to Chapter 119 (para 9).

13. Edelstein threw the letter back and slammed the door to his office. He instructed a secretary in his office that she was not to speak to Relators and that Relators are not welcome in that office (para 10).

14. Edelstein never afforded to Relators access to those requested records. Relators have been otherwise unable to gain access thereto (para 11).

15. By letter dated October 30, 1981, Relators addressed to Respondent Murphy, a letter, copy of which is attached (Rl: 23-24) to the Petition, marked Exhibit "B": (para 12).

16. In that letter is related the course of events in regard to Relators' efforts to secure the records in Edelstein's custody (Rl: 23-24). In addition, in that letter, Relators demanded access to the records, relating to the Donner claim and litigation, in the custody of Murphy. The letter referred to those records as "public" and demanded access within 48 hours of receipt of the letter for purposes of inspection and copying (Rl: 24). That letter was dispatched pursuant to Murphy's above-quote representation that Relators could secure anything they want so long as they proceed through the City's defense counsel (Rl: 28).

17. Murphy's response to Relators' letter was in the form of a letter dated November 3, 1981, copy of which was attached to the Petition marked Exhibit "C": (Rl: 25) (para 13).

18. Murphy's letter conceded that he had received advance notice from Relators prior to their visit to the office of Edelstein but disputed Relators' contention that, prior to that visit, he had also been served with advance written notice (exhibit "A" to the Petition). Murphy did concede that he

eventually did receive that written notice. (R1: 25-26).

In his November 3, 1981letter, Murphy asserted that neither Edelstein's nor Murphy's custodial records would be produced without "Court Order" and "appeal," that those records would be produced in behalf of their "clients" (the City, insurer Appalachian, and arresting city police officer Hetherington)*

"... when 'donkey's fly,' but no sooner." (R1:25).

19. Respondent Murphy continued to deny access to those records and Relators were otherwise unable to gain access thereto (para 14).

20. Respondents Edelstein and Murphy have a clear legal duty to afford to Relators access to those records (para 16).

21. Relators are willing to inspect and examine those records at a reasonable time and under reasonable conditions and to pay prescribed fees for any requested certified copies. (R1: 15) (para 15)

The Petition requested priority over other pending cases pursuant to the Public Records Law, § 119.11, Fla. Stat. (1975), asked that the Court enter an order directing Respondents to show cause why the relief requested by Relators should not be granted, and asked that a writ of mandamus be issued directing Murphy and Edelstein to afford to Relators access to the requested records for purposes of inspection and copying in accordance with the procedures set out in the Public Records Law. (R1: 15)

There accompanied the Petition the jurisdictional statement (R1: 11) and legal argument (R1: 15).

Without hearing, Circuit Judge Maria Korvick denied the "motion" and dismissed the "Petition" on the stated ground that Relators had failed to allege a prima facie basis for relief (R1: 34). Relators appealed this

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* See recitation of parties represented by Fowler and Murphy in Donner v. Hetherington, 399 So. 2d 1011 (Fla. 3rd DCA 1981)

order to the Third District and secured a reversal in Donner v. Edelstein, 415 So. 2d 830 (Fla. 3d DCA 1982) (Edelstein I). The opinion of reversal and mandate directed the trial court to issue an order to show cause, and held that

> "The records, as described in the petition, quite clearly fall within the definition of public records as broadly defined in Section 119.011 Florida Statutes (1981); . . . The records sought are those of an agency as defined in Section 119.011 (2) . . . . (1) any claim of exemption, or nondisclosure, is in the nature of an affirmative defense which must be raised in response to the issuance of an order to show cause why the relief sought should not be granted; (2) in any event, exemption could only be determined by reference to specific records, § 119.07 (2) (a), Fla. Stat. (1981), none of which were before the trial court..."

Respondents did not seek review of this decision.

By order dated July 21, 1982 (R2: 137), the trial court did purport to adopt as its judgment the said appellate opinion and mandate and by order dated July 20, 1982 (R2: 138) the lower court did issue an Order To Show Cause, within 20 days, why the relief sought should not be granted. On August 10, 1982, Respondents Fowler and the City filed (and hand delivered to Morburger only) (R2: 224-227) their Response To the Order To Show Cause, (R2: 139). (No Response was filed in behalf of Murphy or Edelstein) and no response was served upon Donner (R2: 224). Fowler's and the City's response admitted the "factual recitations in the Petition," admitted that Relators' demands for public records were "declined," alleged that the "Main Action" (Case No. 76-8301) is a "claim for false arrest wherein Donner alleges that she was wrongfully arrested by Hetherington "and that that action remains pending (R2: 140-1 paragraphs 11, 12, 16 and 17 of Response). The balance of the numbered paragraphs of the Response merely quoted excerpts from the exhibits attached to the Petition and expressly conceded that in his November 3 letter Murphy purported to deny access to

the records of the City, Appalachian and Hetherington (para 18, 19 and 20 of Response). The remaining pages of the Response were devoted to argument that the records are allegedly exempt from public inspection, "privileged pursuant to § 90.502, Fla. Stat." (R2: 141), and allegedly Edelstein, Murphy, and Fowler have a "work product privilege" (R2: 149-150) and that Fowler and Murphy represent not only the City but also City police officerHetherington and the City's insurer Appalachian Insurance Company, and that their files are "comingled" (R2: 147). Attached to the Response as an Exhibit was the admitted transcript of the October 23, 1981 hearing in Case No. 76-8301, (R2: 189), the same October 28, 1981, October 30, 1981, and November 3, 1981 letters that were attached to the Petition (R2: 166-171),and the various appellate opinions in Case No. 76-8301 (R2: 159-160). Relators moved for default and for peremptory writ (R2: 209-254) on the grounds that Donner had never been served with the Response, that the Response had been served upon Morburger after the prescribed 20 days and that the Response failed to comport with the appellate mandate requiring any claim of privilege (a) to be in the form of an "affirmative defense"and (b) to be supported with "references" to "specific records" or with any factual allegations. Those motions were heard on August 30, 1982 and were denied (R2: 96, 396, 398) and the lower court ruled that the Response in behalf of Fowler and the City should be treated as also a Response in behalf of Murphy and Edelstein (R2: 397).

On September 8, 1982, Relators filed their "Motion To Strike" and "Reply To Response To Order To Show Cause" (R2: 276). Relators pointed out at page 4 (R2: 279) of their Reply that the October 23, 1981 hearing in case no 76-8301 (transcript of which was attached to the Response (R2: 189)) was the continuation of a hearing that commenced on October 22,

1981 (copy of which transcript (R2: 301) was attached to the Reply). Also attached as an exhibit to the Reply was a copy of the order entered on October 26, 1981 after the October 22-23 hearing (R2: 317).

At pages 4-5 of the October 22 transcript (R2: 304-305) is recorded Morburger's argument in support of Donner's motion to set aside the September 24 order, limiting Donner to "discovery means" and prohibiting her from contacting the City's employees to gain access to public records; the following exchange took place on the record:

> "Mr. Morburger: ... The Court held in Wait that we are not restricted to using discovery means...
>
> The Court: What do you want besides discovery means?
>
> Mr. Morburger: I want to have free access to public records...
>
> "* * *
>
> Mr. Morburger: "The Florida Supreme Court went so far as to hold even that there is no work product or attorney/client privilege applicable to public records." (R2: 304-305)

The Reply alleges at page 23 and 24 (R2: 298-299) that it is to this argument that Murphy responded at page 45 of the October 23, 1981 transcript, as follows:

> "We're not claiming a privilege, Your Honor...They can have anything they want...I just want them to continue doing it through me, as opposed to behind my back to the exclusion of my other clients, plain and simple." (R2: 192-193).

The Reply further alleges that the October 26, 1981 order (attached to the Reply) (R2: 317) granted Donner's motion to set aside the September 24 order and incorporated Murphy's requirement that the request for public records by Morburger (as Donner's co-counsel) be channeled through Murphy by giving Murphy advance notice of Morburger's contacts with the public records custodians (R2: 299). The Reply alleges that this course of events constitutes a waiver of all privileges (R2: 299-300).

At pages 21-22 of the Reply (R2: 296-297) it is pleaded that in Case No. 76-8301, the City perpetrated a fraud upon Donner by concealing and falsely certifying the extent of insurance coverage applicable to the claim. Attached as exhibits are:

(a) "Response To Request For Production" dated July 21, 1978, filed in Case No. 76-8301 by the City (falsely) certifying that the only applicable policy is the ($100,000 limits) policy of Appalachian Insurance Company, copy of which is attached to the City's said Response (R2: 318). This response was signed and served by the Fowler law firm.

(b) Answers To Interrogatories (propounded to the defendant in Case No. 76-8301) dated May 25, 1977 (falsely) stating under oath in answer to interrogatory No. 5c, that the only applicable policy was the said Appalachian policy. These answers were served by the Fowler law firm (R2: 330, 331);

(c) The Columbia Casualty Company liability policy naming as insured the City's police department and personnel covering false arrest claims for the policy period 2/10/75 to 2/10/76* and affording coverage of 50% of $900,000 per person (R2: 334).

The Reply alleges that Donner discovered this concealed Columbia policy only through her independent public records investigation in 1980 and that this fraud could not be shielded by any claim of privilege.

On September 13, 1982, Judge Korvick held a final hearing (R1: 158-198). At that hearing, Relators and Respondents stipulated (R1: 162-164) to the authenticity of the exhibits (R2: 301-347) attached to Relators' Reply. Respondents offered no sworn testimony or documentary evidence. After

* This period included date of Donner's false arrest, April 10, 1975.

hearing argument, the trial Court denied Relators' Motion To Strike each of the claims of privilege,discharged its rule to show cause and dismissed the action with prejudice by order dated September 17, 1982 (R2: 399). In its order the trial court stated,

> "This Order applies only to those matters that are subject to the attorney-client privilege. The Court additionally finds that there was no waiver." (R2: 400)

On September 23, 1982 Relators moved in the Third District for an order in accordance with mandate, complaining that the September 17 judgment deviated from the prior opinion and mandate of reversal. In Donner v. Edelstein, 423 So. 2d 367 (Fla. 3d DCA 1982)(Edelstein II), on October 5, 1982, the Third District granted that motion, held that the judgment deviated from the mandate, that Respondents could not be permitted to unilaterally determine which public records were exempt under any putative claim of attorney-client prinvilege, and ordered the lower court to conduct an in camera inspection of all requested records claimed to be privileged as attorney-client confidential communications and to seal only those records for review. Respondents did not seek review of this decision.

On November 16, 1982, Respondents filed a "Notice of Availability" of "certain records" such as pleadings, deposition transcripts, hearing transcripts, and trial transcripts in Case No. 76-8301 (R1: 199). On November 18, 1982, Relators moved in the trial court for an order to set aside the September 17, 1982 judgment (as required by the October 5 mandate), then to enter a written order directing Respondents to produce to Relators immediately all records not claimed to be privileged as attorney-client confidential communications and to produce to the trial court for in camera inspection those records claimed to be so privileged (R2: 409).

Without ruling on Relators' November 18 motion, the trial court held a hearing on November 22, 1982 at which Murphy purported to produce to the Court all the requested records (R2: 33) but was not placed under oath. Judge Korvick refused to hear Relators' objections (R2: 37). Murphy produced four boxes, one box allegedly containing attorney-client communications, a second box was "mixed," allegedly containing some attorney-client communications and some "work-product" and pleadings, box three allegedly contained pleadings and transcripts, and box four allegedly contained copies of the records claimed to be privileged (as attorney-client communications and work product) (R2: 33-36). Judge Korvick objected that the October 5 mandate directed an in camera inspection only as to those records claimed to be privileged as attorney-client communications and not as work product (R2: 34-35). Judge Korvick promised to rule by "next Monday at 3:00 o'clock" (R2: 37).

Some four months later, on February 4, 1983, Relators filed in the Third District their second motion for order in accordance with mandate alleging Judge Korvick's continuing failure to set aside her judgment or rule on the in camera inspection and complaining of Respondent Edelstein's continuing failure to produce any records for in camera inspection.

On February 11, 1983, the Third District granted that motion, set aside the September 17, 1982 judgment, and set a February 18, 1983 deadline for the lower court to complete its in camera inspection, Donner v. Edelstein, 429 So. 2d 12 (Fla. 3d DCA 1983) (Edelstein III). Meantime, on February 7, 1983, Edelstein filed a "Notice of Filing" asserting that the requested records in his custody are merely duplicates of those of Murphy (R2: 463).*

* In Respondents' Main Brief filed in the Supreme Court at page 3 is footnoted without any cross-reference to the record the suggestion that Edelstein is no longer employed by the City. If so, whoever is the successor custodian would automatically be a party herein.

Relators filed on February 14, 1983, their "Response and Objections" (R2: 42) pointing out that Edelstein's "Notice" was belated and that it failed to designate any materials claimed to be privileged. Relators also pointed out that Murphy's bare claim of privilege was unsupported by any competent evidence (R2: 422).

Then on February 17, 1983 Assistant City Attorney Carter delivered to Judge Korvick a "Notice Of Intention To Rely" upon the never before cited § 624.311 (3), Fla. Stat., (as grounds for exempting work product from public inspection) and on that date "mailed" a copy of that Notice to Relators (R2: 465), (T:74, 88). Within a day or two before February 18, 1983, Carter also delivered to Judge Korvick several drafts of a proposed order, one referring to the newly cited § 624.311 (3) and others not referring to that statute; none of the said proposed orders were supplied to Relators (R2: 52-53) (T: 65-67). On the day of the deadline set by the Third District, on February 18, 1983, Carter, Murphy, and Judge Korvick met in her Chambers (T: 27-32). No court reporter was present (T: 32). No advance or other notice of the meeting was given to Relators (T: 32). Neither Murphy nor Carter were placed under oath (T: 49). At that meeting, the boxes of records produced by Murphy on November 22, 1982 were strewn about the Chambers (T: 39-41). Judge Korvick inquired of Murphy whether certain persons whose names appeared in or as parties to correspondence (included in the records that were produced) were "clients" and Murphy answered these questions (T: 24). Murphy discussed the identity of certain persons as adjusters for his insurer client and of Wake Hall Services as his purported additional client (T: 47).

Apparently names of these adjusters and of Wake Hall Services appeared in these sealed records (T: 47).* Murphy read to the Judge certain allegedly hard-to-read handwriting in those records (R: 49-50). Judge Korvick asked Carter for an "explanation" of the various proposed orders that she had submitted to the Judge and specifically pointed out to the Judge her form of order referring to § 624.311 (3) (T: 73, 75).

Judge Korvick instructed Carter and Murphy to reassort the records (so as to include in Box A attorney-client records and drafts and notes and in Box B work product) (T: 43). At that secret meeting, in the presence of Carter and Murphy, Judge Korvick signed that one of Carter's proposed orders referring to and relying upon § 624.311 (3) (T: 73) (R: 425-26). While that order was titled as a "final order," no judgment had been entered; instead, the order purported to seal in Box A alleged attorney-client records and notes and drafts as exempt and in Box B alleged work product as exempt (R2: 425-426). No index of the records included in those sealed boxes ever has been supplied to Relators.

The facts of the secret, February 18 meeting came to light only after Relators moved to recuse Judge Korvick on February 28, 1983 (R2: 428-448). In that motion, Relators recited certain suspicious aspects of the February 18 order and of the surrounding circumstances that led Relators to believe that there were ex parte contacts on the merits between Respondents and the Judge and supported that motion (as required by statute) by the affidavits of several citizens of the county (R2: 430-448).

At the February 28 hearing, Judge Korvick admitted discussing with

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* Wake Hall Services had never been named in any prior pleading or even in any prior oral argument as the client of Murphy or Fowler or in any other regard. Nor were the names of any insurance adjustors ever mentioned or revealed prior to that secret meeting.

Murphy and Carter the identities of parties to correspondence as clients of Murphy and Fowler and admitted enlisting Murphy and Carter to decipher certain allegedly hard-to-read handwriting in those records (R2: 13). The Judge also admitted signing the order submitted to her by Carter (R2: 14). Nevertheless, Judge Korvick denied the motion for recusal and instead purported to recuse herself on her own motion (R2: 15-16). Judge Korvick announced she would prepare and sign the standard form of order of recusal (R2: 16). No further ruling was announced by the recused Judge at that hearing.

On March 7, 1983 Relators moved for rehearing of the February 18 order (R2: 467). Also on that date, Judge Korvick's order of recusal was entered (R2: 491). Instead of the standard form, Judge Korvick's order of recusal purported to reserve jurisdiction to enter a final judgment upon her February 18 order (R2: 491). Then, on March 8, now-recused Judge Korvick purported to enter a Final Judgment denying the petition for writ of mandamus (R2: 128).

After entry of this so-called "judgment," Relators again moved for rehearing on March 10 (on the grounds set out in the not-yet-ruled-upon March 7 motion for rehearing) and moved to set aside the purported reservation of jurisdiction and the "judgment" as a nullity (R2: 492).

The case was then transferred from the Appeals Division of Circuit Court to the General Jurisdiction Division of Circuit Court and was assigned a new case number, 83-9287 (R2: 1).

On May 20, 1983, successor Judge Smith held an evidentiary hearing on Relators' claims (in their pending motions) that Respondents engaged Judge Korvick in ex parte contacts on the merits (R2: 40 (T:1-100). At that hearing, Relators examined Murphy and Carter under oath and

elicited from them the admissions cross-referenced to the record and summarized, supra, in regard to their ex parte contacts and secret meeting with Judge Korvick.

After that evidentiary hearing, Relators supplemented their motions for rehearing etc by summarizing Respondents' admissions concerning ex parte contacts in their Supplemental Memorandum on Ex Parte Contacts (R2: 48-61).

On June 17, 1983, Judge Smith denied Relator's jurisdictional motions but granted in part Relators' motion for rehearing (R2: 129). The Court issued a peremptory writ of mandamus directing Respondents to produce for inspection and copying the records in Box A (work product). As grounds for the writ, (a) the order stated that the Third District's October 5, 1982 appellate mandate precluded any exemption of work product, (b) the order found that Respondents' discussions with Judge Korvick about § 624.311 (3) (upon which that Judge based her exemption of work product) was ex parte and deprived Relators of any opportunity to respond, and (c) that order held that in any event work product is not exempt from public records inspection (R2: 129-130)(A:2)

On June 27, 1983, Relators moved for rehearing of the June 17 order (R2: 90) and two days later, on June 29, 1983, Respondent Fowler and Murphy appealed (R2: 97). Edelstein and the City failed to file or join in any notice of appeal. Relators then moved for an extension of time to cross-appeal until 10 days after their motion for rehearing is disposed of and that motion was granted and jurisdiction was relinquished to the lower court for this purpose. The lower court proceeded to enter an order on August 4, 1983 in part granting Relators' second motion for rehearing (R2: 103). In that order, the lower court ordered Respondents to make available to Relators forthwith those records not claimed to be exempt drafts and notes

so that at a later hearing the Court could determine whether any claim of privilege otherwise exempted any of those records. Relators then filed an objection to the delegation to Murphy of successor Judge Smith's own mandated responsibility to examine those records and to sort them out herself (R2: 113). Relators also filed their third motion for rehearing (R2: 106).

On August 16, 1983, pursuant to Judge Smith's August 4 order, Murphy extracted from Box A records that he labeled as "drafts" and "notes" and with regard to which he now concedes that there is no exempting privilege (R2: 124). The separate envelope of so-called drafts and notes is designated in the record as envelope no. 1.

Murphy's concession that the drafts and notes are not exempt prompted Judge Smith to rule that no further hearing would be required under her August 4 order (R2: 450-460, August 18, 1983 hearing transcript). Judge Smith also overruled Relators' objections as to the delegation to Murphy of the task of segregating drafts and notes and denied Relators' third motion for rehearing (R2: 125). At that hearing, Judge Smith also stated that she had not rexamined the records sealed in Boxes A and B by Judge Korvick (R: 452-453).

The so-called drafts and notes in envelope no. 1 consist instead of pleadings, letters from and to Donner and Morburger, and "doodles."

On August 22, 1983 Relators' filed their notice of cross-appeal in the original case no. 83-1504 and filed a new notice of appeal designated as case no. 83-2005 (R2: 126-127).

In the course of the appeal in the Third District, Fowler and Murphy filed an Appellants' Main Brief (adopted by Edelstein and the City). That brief abandoned any reliance upon § 624.311 (3), Fla. Stat. upon which Judge Korvick's aforementioned ex parte order exempting work product had been based. That brief also omitted any argument challenging the correctness of

Trial Judge Smith's determinations (R2: 129) that Judge Korvick's exemption of work product was at odds with the mandate in Edelstein II (A:4a). This latter omission and the effect of this omission as a waiver of any challenge to this aspect of the trial court judgment were fully discussed and relied upon by Relators in Argument A at pages 7-12 on their Answer Brief in the court below (A:5). For the first time in their Reply Brief in the court below, Fowler and Murphy sought to inject into the appeal argument on the merits of that aspect of Judge Smith's judgment.

On May 8, 1984, the Third District disallowed all of Respondents' claims of exemption. That opinion affirmed that portion of Judge Smith's judgment disallowing any work product exemption and cited in support of that affirmance several cases including Edelstein II. (R2:506-507)

That opinion additionally reversed the lower court judgment in so far as it purported to exempt attorney-client confidential communications and certified this latter issue as one of great public importance. * (R2:505, 507)

The Third District awarded to Relators an appellate attorney fee of $1500 (A:6).

Respondents moved to stay the mandate and on May 29 , 1984 the Third District entered an order staying the mandate only if Respondents file a notice to invoke discretionary review in proper form and timely. Although a so-called "notice" was filed, there is now pending in this Court Relator Donner's motion to strike that notice and dismiss the proceedings on the stated ground that the notice was jurisdictionally defective (not signed and otherwise not in proper form). No other notice to invoke discretionary jurisdiction was filed.

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*That May 8, 1984 opinion is Edelstein v. Donner, So. 2d (Fla. 3rd DCA 1984) cited herein as Edelstein IV. (R2:506-507)

ARGUMENT

I. THE THIRD DISTRICT CORRECTLY HELD THAT RELATORS ARE ENTITLED TO ACCESS TO BOX A RECORDS, CLAIMED TO BE ATTORNEY-CLIENT CONFIDENTIAL COMMUNICATIONS.

The Third District properly reversed the trial court exemption from public inspection of Box A records labelled by Judge Korvick as attorney-client confidential communications.

Preliminarily, it should be noted that, in so holding, the Third District found it unnecessary to review or rule upon Judge Korvick's categorization of Box A records as attorney-client confidential communications and accordingly Relators continue to challenge and disavow the accuracy of that categorization.

In the trial court record and Relators' briefs filed in the Third District are perfected a multitude of grounds and arguments supporting the Third District's opinion of reversal. While the Third District found it necessary only to invoke oneof those grounds, it is appropriate to bring to the Court's attention all of these grounds; intermediate appellate court decision under review is clothed with a presumption of correctness and if the decision can be sustained upon some basis, regardless of whether that is the basis assigned in the lower court decision, it should be affirmed, 5 BC.J.S. Appeal & Error, §§ 1813, 1815 and 1817, pp. 149, 150, and 152.

The numerous grounds sustaining that decision are summarized as follows and are discussed in this brief sequentially.

(1) Respondents failed to allege in the Response (R2: 139) to the Order to Show Cause any particular facts supporting any such claim of privilege;

(2) Respondents failed to adduce any evidence in support of any such claim;

(3) There were admitted improper ex parte contacts and secret meetings

between Respondents and Judge Korvick as part of the in camera inspection process out of which the exemption of records derived;

(4) Respondents failed to "assert" any such claim timely, or in good faith;

(5) Murphy waived any such claim in open court at a hearing, transcript of which was stipulated to;

(6) Respondents' fraudulent course of conduct in regard to the subject matter of the requested records, documentation of which were stipulated to, abrogated any such claim;

(7) The requested records were public records;

(8) No claim of attorney-client privilege under the Florida Evidence Code may be asserted in regard to a public record demand;

(9) Most requested public records claimed to be confidential did in any event predate the Evidence code with no reasonable expectancy of confidentiality;

(10) No other statutory or constitutional provision limits Relators' right of access to these records.

A. Respondents Failed To Plead Any Particular Facts in Support Of The Claim of Attorney-Client Communication Privilege

Donner v. Edelstein, 415 So. 2d 830 (Fla. 3d DCA 1982) mandated that

> "...any claim of exemption, or nondisclosure, is in the nature of an affirmative defense which must be raised in response to the issuance of an order to show cause why the relief sought should not be granted;"

The Response (R2: 139) to the order to show cause that was thereafter issued alluded to a "claim of exemption or nondisclosure" (i.e. the claimed attorney-client confidential communication privilege under § 90.502, Fla. Stat.) but failed to set out any "affirmative defense" or any plea of particular facts that might be construed as an affirmative defense.

On the basis of this deficiency in Respondents' pleadings, Relators filed their "alternative" motions for peremptory writ (R2: 209, 219) (denied in the trial court (R2: 396).

In Bal Harbour Village v. State ex rel. Giblin, 299 So. 2d 611 (Fla. 3d DCA 1974), the Third District quoted with approval the opinion of the lower court in regard to the strict rules of pleading applicable to a response or "return" to an order to show cause or "alternative writ of mandamus." The quoted lower court opinion stated, in part,

> "A return to an Alternative Writ of Mandamus, to be sufficient, must state all the facts relied upon by the Respondent with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return; and its statements cannot be supplemented by inference or intendment."

That opinion also specifically rejected as insufficient "general denials" and "allegations of ultimate conclusions of fact" and cited a number of pertinent Florida Supreme Court decisions.

Particular emphasis was placed upon Burr v. Seaboard Airline Ry. Co., 92 Fla. 61, 109 So. 656 (1926) rejecting as insufficient the bare allegation (in a return to an alternative writ) that a shipment was "interstate."

To this quoted lower court opinion the Third District added at page 615 of its own opinion that the return failed to "specify with any particularity" the facts:

> "The law places a specific burden upon the municipality to come forward with exact facts upon which it refused to perform the act required by the alternative writ. Such facts are peculiarly within the knowledge of the municipal officials."

Especially pertinent is this quoted reasoning in the case at bar where the facts relating to any putative claims of attorney-client confidential communication privilege are "peculiarly" within the knowledge of Respondents. Moreover, § 90.502, Fla. Stat., defining the parameters of that privilege,

sets out a multiplicity of conditions that the "proponent" of the privilege must plead and prove. For example, such proponent must establish that

(a) the communication was between lawyer and client, § 90.502 (1) (c);

(b) the communication was not intended to be disclosed to third persons other than certain exempted individuals, § 90.502 (1) (c);

(c) the communication was in fact kept "confidential;"

(d) the services of the lawyer were not sought or obtained to facilitate what the client knew to be a crime or fraud, § 90.502 (4) (a).

Nowhere in the instant Response to the Order To Show Cause are there any factual allegations as to any of the foregoing conditions (a) - (d). Respondents' bare allegation (R2: 141) that (unspecified) requested records are privileged under § 90.502 is closely analogous to the bare inadequate reference to the term "interstate" in Burr, supra. See also Dr. Ing. H.C.F. Porsche v. Superior Court, 177 Cal. Reptr. 155, 123 Cal. App. 3d 755, 758, footnote 2 (Cal 3d DCA 1981) treating a similar response consisting only of legal conclusions and argument as a nullity.

B. Respondents' Failure To Adduce Any Evidence Of Privilege Precluded Any Finding That Records Were Privileged.

Already noted in Argument A above are the multiple factual requirements or conditions that must be satisfied under § 90.502 in order to establish a claim of privilege. In this regard, the Respondents, as proponents of the claim of privilege, were assigned the burden ofproof or persuasion and failed to meet this burden. That this burden was theirs is reflected in the Third District's mandate of June 22, 1982 imposing upon the Respondents the burden of establishing their claim as "an affirmative defense." See Baro v. Southeast First Nat. Bank, 363 so. 2d 397 (Fla. 3d DCA 1978). In Weil v. Investment/Indicators, Research & Management, 647 F. 2d 18, 25 (9th Cir.1981),

it was held that the proponent of the privilege has the burden to prove all elements of the privilege.(even that the privilege was never waived). And in International Paper Company v. Fibreboard Corporation, 63 F.R.D. 88, 93-94 (DC Del. 1974), it was held that

> "It is incumbent on one asserting the privilege to make a proper showing that each of the criteria...existed...Such a showing is usually by affidavit in which the documents are adequately listed and described showing (a) the identity...of the person...interviewed or supplying the information, (b) the place, approximate date, and manner of recording or otherwise preparing the instrument, (c) the names of the person or persons (other than stenographical or clerical assistants) participating in the interview and preparation of the document, and (d) the name and corporate position, if any, of each person to whom the contents of the document have heretofore been communicated..."
>
> "A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality...An improperly asserted claim of privilege is no claim of privilege at all."
>
> "Nor will submitting a batch of documents to the court in camera provide an adequate or suitable substitute."

To the same effect is Canadian Javelin, LTD v. S.E.C., 501 F. Supp. 898 (DC Dist. Col. 1980) decided upon the federal Freedom of Information Act and holding at page 902 that no attorney-client privilege could be adjudicated absent some "pleading" or "affidavit" verifying "confidentiality" both "at the time of the communication and subsequent to it." See also Mobley v. State, 409 So. 2d 1031, 1038 (Fla. 1982).

The foregoing federal cases have reached the same result as Surrette v. Galiardo, 323 So. 2d 53 (Fla. 4th DCA 1975) and Hospital Corporation of America v. Dixon, 330 So. 2d 737 (Fla. 1st DCA 1976). Even in the context of ordinary pretrial discovery, it was held in Surrette that

> "...the burden of establishing that the particular document is privileged and precluded from discovery rests on the party asserting that privilege (unless it appears from the face of the document sought to be produced that it is privileged)."

And in Dixon, supra, Surrette was cited in support of the holding that the

proponent of a claim of privilege must support his claim with evidence. Both of these cases deal with a claimed work product privilege, but their language and reasoning apply with equal force to a claim of attorney-cleint confidential communication privilege.

This issue was addressed in the context of pretrial discovery in Eastern Air Lines v. Gellert, 431 So. 2d 329, 333 (Fla. 3d DCA 1983). In the last paragraph of that opinion, it is suggested that the burden rests upon the proponent of the attorney-client communication privilege (the "petitioners" therein)

> "...to show that the parties to the call were within the relationship of attorney and client and that the communication was privileged."

The public policy favoring disclosure of public records as expressed in § 119.01, Fla. Stat., has no counterpart in the context of pretrial discovery. Therefore, if the proponent of privilege in pretrial discovery has the burden of proof (as suggested by Gellert I and the other foregoing cases), then a fortiori in the context of public records the proponent of privilege must also have a burden of proof at least as strict.*

Neither was there any evidence presented by Respondents at the September 13, 1982 final hearing or at any hearing before entry of the so-called

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* Gellert I, supra, suggests an in camera inspection of records claimed to be privileged as work product in the pretrial discovery context but it is noteworthy that even in that context the Third District did not purport to absolve the proponent of that claim of work-product privilege from his burden of proof in regard to that claim of privilege (as discussed in Surrette and Dixon, supra). Note also that Gellert I held that the identities of parties to communications claimed to be privileged under § 90.502 are not privileged. Not even had the trial court disclosed to Relators the identities of parties to communications included among the sealed records in the case at bar.

February 18, 1983 "final order" or of the March 8, 1983 so-called "Final Judgment" nor did Respondents ever submit any affidavit (in lieu of evidence) on the issue of privilege. All that Respondents provided was the "batch" of records subjected to in camera inspection. Presumably those records cannot prove on their face whether they are privileged. It is precisely because of these deficiencies in Respondents' proof that Judge Korvick apparently saw fit to confer secretly with Murphy and Carter about those records on February 18, 1983. Relators were not afforded any notice of this February 18 meeting, there was no court reporter present, and neither Murphy nor Carter were placed under oath at that meeting; the said meeting could not be viewed as filling the gap in Respondents' proof.*

The record of ex parte contacts on the merits between Respondents and then presiding Judge Korvick on, and immediately prior to, February 18, 1983 is summarized in the prefatory counter-statement of facts.

That these contacts were on the "merits" is exemplified by three admitted facts.

(a) Judge Korvick consulted Murphy and Carter as to whether the persons to whom Fowler had addressed letters included in those records were "clients." (T:24, 47)

(b) Murphy attempted to decipher for Judge Korvick certain supposedly hard-to-read handwriting in those records (T: 49-50)

(c) Carter discussed with Judge Korvick various forms of proposed orders submitted ex parte. (T: 73, 75)

As previously noted, Respondents had omitted any proof as to whether the persons named in the records as addressees (or addressors or authors) were

* Leon Shaffer Golnick Advertising v. Cedar, 423 So. 2d 1015 (Fla. 4th DCA 1982), disallows an attorney's unsworn representation of fact as proof of the fact.

"clients." Such information is of course essential to the merits of any claim of attorney-"client" communication privilege.

Murphy admitted that he represented ex parte to Judge Korvick that certain persons were adjustors employed by his "client" Appalachian Insurance Company and that Wake Hill or Wake Hall Services is the alter ego of that "client" for billing purposes (T:47).* Carter's admitted discussions with Judge Korvick about the ex parte proposed orders and about the ex parte citation of § 624.311 (3) also tainted the entire in camera inspection process.

In Wisdom v. Stegall, 70 So. 2d 43 (Miss. 1954) it was held that an ex parte contact on the merits as to a factual issue is a denial of constitutional due process rights and "must be presumed" to be prejudicial. The Florida Supreme Court has also roundly condemned such contacts in The Florida Bar v. Le Fave, 409 So. 2d 1025 (Fla. 1982); In re Dekle, 308 So. 2d 5 (Fla. 1975); The Florida Bar v. Mason, 334 So. 2d 1 (Fla. 1976); Canon 3(A)(4) and 7-104 (A) (1) of the Code of Professional Responsibility.

Nothing in any of the Third District's appellate mandates in the case at bar ever authorized, or suggested the propriety of, any such ex parte contacts, Edelstein II.

Specifically with regard to in camera inspection of records, it was held in Yeager v. Drug Enforcement Administration, 678 F. 2d 315 (CA DC 1982) that only where the national security is threatened ought the government be permitted to submit ex parte affidavits to the Court, that such affidavits

> "...distort the traditional adversary nature of our legal system's form of dispute resolution."

Such ex parte or in camera affidavits were there said to be proper

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* Nowhere in the record is there any evidence or pleading setting out the names of adjustors or confirming that Wake Hill or Wake Hall is a client.

"...only where absolutely necessary...only in cases involving the national security and even then only when the government's public filings adequately explained why the secrecy concerns were greater than in most (Freedom of Information Act) cases."

Nothing in the "public" filings in this record reflects any threat to national security that would justify any "in camera" affidavits. Nor were Murphy's and Carter's ex parte contacts with Judge Korvick under oath or in the form of a public or ex parte affidavit, or otherwise preserved for scrutiny on appeal as part of the record (except as Relators may have succeeded in piercing the veil of secrecy by cross-examination of Murphy and Carter at the May 20, 1983 evidential hearing on ex parte contacts (T:1-100)). An affidavit could easily have been framed referring to specific records by index number, setting out facts relating to the elements of privilege without disclosure of contents.

The resulting February 18, 1983 and March 8, 1983 so-called orders were fatally tainted by these ex parte contacts. Successor Judge Smith recognized this ex parte taint in paragraph 2 of her June 17, 1983 order unsealing Box B (work product R2:130 paragraph 2 (b)) but, by Judge Smith's own admission, she did not re-examine Judge Korvick's ruling as to Box A (R2: 452) except to the extent of delegating to Murphy the task of extracting therefrom so-called non-exempt drafts and notes (R2: 103).

In summary, this record reflects Respondents' abject failure to satisfy their burden of persuasion to adduce evidence of their claimed privilege.

C. Respondents' Failure To "Assert" Any Claim Of Privilege In Their Letter Declining The Demand For Access To Those Records And Respondents' Failure To Segregate Records Claimed To Be Privileged Fore-closed Any Belated Claim of Privilege.

Murphy's November 3 letter, attached as Exhibit C to the Petition (R1: 25) and incorporated into the Response to the Order To Show Cause (R2: 171), is conspicuously silent as to any claim of privilege. Murphy simply declines Relators' demand for access to those requested public

records in that letter. The Public Records Law contemplates that such a claim of privilege must be selectively "asserted" as part of the process of responding to the demand for access. That is the import of § 119.07 (2) (a), Fla. Stat. (1981):

> "Any person who has custody of public records and who asserts that an exemption provided in subsection (3) or in general or special law applies to a particular record shall delete or excise from the record only that portion of the record for which an exemption is asserted and shall produce for inspection and examination the remainder of such record." (Emphasis supplied).

While this quoted statute requires no incantation of "magic words," it does contemplate some affirmative compliance, some sort of words disclosing a claim of exemption and the nature of that claimed exemption.

This interpretation not only comports with the letter of the quoted statutory provision, but also with the policy of liberal construction in favor of the public right of access as expressed in § 119.01, Fla. Stat.

> "...statute enacted for the public benefit should be construed liberally in favor of the public..." City of Miami Beach v. Berns, 254 So. 2d 38 (Fla. 1971).

So defiant of the requirements of § 119.07 (2) (a) were Respondents that

(a) in their November 3, 1981 letter, not only did they fail to assert any claim of privilege, but also they promised compliance only "when donkeys fly,"

(b) only after Relators filed suit did Respondents assert any claim of privilege and that belated assertion of privilege purported to encompass all of the requested records without any "deletion," "exclusion" or "segregation;"

(c) after two appellate mandates, in November, 1982, Respondents for the first time filed a "Notice of Availability" (R1: 199) purporting

to agree to the disclosure of a few of the requested records now conceded not to be privileged;

(d) then, after a third appellate mandate and two motions for rehearing, Respondent was finally constrained by order of the lower court (R2: 103) to revisit Box A and "miraculously" discover (over 100 pages of) records in that Box A not claimed to be exempt (R2: 124). Even a cursory review of these records extracted from Box A (now contained in Envelope No. 1) confirms that Respondents' claim of exemption was in bad faith;

(e) None of the remaining documents in Box A (or for that matter in Box B) ever were "deleted," excised," or other-wise edited to segregate any portion of text claimed to be privileged (as contemplated by § 119.07 (2)(a)).

It is precisely this sort of dilatory, evasive tactic that § 119.07 (2)(a) is designed to avoid. It is precisely this sort of "evasive tactic" that Berns, supra, explicitly condemned. Murphy should not be heard to assert the claim of privilege belatedly and indiscriminately. The trial court should have extended the purview of its peremptory writ to (not only Box B but also) Box A and the Third District correctly reversed this aspect of the trial court judgment.

D. The Evidence And Record Conclusively Establish Respondents' Waiver Of Any Claim of Privilege.

Respondents affirmatively waived any claimed privilege at the October 22-23, 1981 hearing in Case No. 76-8301. As noted in the prefatory counter-statement of facts, the parties stipulated to the

authenticity of the two transcripts of that hearing.*

In Case No. 76-8301, a September 24, 1981 order precluded Relators from gaining access to the Respondents' public records except through "discovery means." This order ran afoul of Wait v. Florida Power & Light Co., 373 So. 2d 420 (Fla. 1979) wherein the Florida Supreme Court held that the pendency of litigation is no excuse for denying access to public records except through "discovery" and that no claim of work product or attorney-client privilege can be asserted with regard to such public records demands.

The September 24, 1981 order restricted Relators as to future demands for access to the public records. Accordingly, Relators moved to set that order aside. The hearing on that motion extended over two days, October 22 and 23, 1981. At the October 22 session, Relator Morburger (as co-counsel for plaintiff Donner) argued to the Court that plaintiff Donner is entitled under Wait "to have free access to public records" free of any "discovery" restrictions and that Wait held that there was no "work product" or "attorney-client privilege" applicable to public records (R2: 304-305). At the October 23 session, Respondent Murphy (as attorney for the City, et al.) answered that

> "we're not claiming a privilege...I'm not trying to hide anything. They can have anything they want...

*The October 23, 1981 hearing transcript is attached as an exhibit to the Response to the Order to Show Cause (R2: 198-208). The October 22, 1981 hearing transcript is attached as an exhibit to the Reply to the Response (R2: 301). Its authenticity was stipulated to by all parties at the September 13, 1981 hearing (R1: 162-164).

I just want to continue doing it through me, as opposed to behind my back..." (R2: 192-193).*

Based on this representation, while the Court set aside its September 24, 1981 order, the Court was persuaded to include in its resulting October 26, 1981 order a provision requiring Morburger to provide Murphy with advance notice of future public records demands (R2: 317). (To this same effect see also allegations of paragraph 7 of the Petition (R1: 13) that Murphy's said representations persuaded the Court to include in its October 26 order the advance notice requirement; Respondents admitted the allegations of said paragraph 7 to be true in paragraph 11 (R2: 140) of Response To Order To Show Cause). Respondents thereby waived any claim of privilege.

§ 90.507, Fla. Stat. disallows any claim of § 90.502 (or other) privilege where the records have been disclosed or consented to be disclosed, as in the case at bar. Fla. R. Jud. Admin. 2.060 (2) specifically provides that

> "In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client and any...act by the attorney in the proceeding shall be accepted as the act of...the client."

Thus Murphy's act of consenting to disclosure in the course of proceedings in Case No. 76-8301 was the act of his clients. Specifically, with regard

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* In the Response to the Order to Show Cause, it is erroneously argued that Murphy's above-quoted waiver applied only to records already requested before October 23, 1981. This misinterpretation overlooks the fact that Donner's motion to set aside the September 24, 1981 order that was argued on October 22-23 and Morburger's argument in support of that motion focused, not on some particular item of discovery, but rather upon the adverse affect of that September 24 order on all future discovery of public records and Murphy's responsive argument particularly insisted upon prior notice of all future public records demands. Murphy's quoted statement that Donner could have anything she wants so long as she continues doing it through Murphy, explicitly recognizes that Murphy's remarks are directed at future public records demands.

to the attorney-client privilege, a waiver by the attorney in the course of his representation of a client in legal proceedings has been held to be binding on the client, 8 Wigmore, Evidence § 2325, p. 633 (McNaughton rev. 1961). See waiver of attorney-client privilege by attorney in open court in Hamilton v. Hamilton Steel Corp., 409 So. 2d 1111 (Fla. 4th DCA 1982). The Third District has recently reaffirmed the proposition that

"once a waiver of privilege has occurred, it cannot be recanted"

Eastern Air Lines v. Gellert, 9 FLW 315 (Fla. 3d DCA 1984).

Not merely did Murphy's conduct constitute a "waiver;" it also partook of an "estoppel" because Murphy was thereby successful in persuading the court to add the aforementioned advance notice condition to its October 26 order. In Grauer v. Occidental Life Ins. Co. of Cal.,363 So. 2d 583 (Fla. 1st DCA 1978), it was held that a party who successfully maintains a position in one suit may not adopt an inconsistent position in another suit. The Court observed that the doctrine of estoppel is applicable even if the party's "success" falls short of a favorable final judgment in the first of the two suits. Another analogous estoppel was recognized in Lee v. A. Duda & Son, Inc., 310 So. 2d 391 (Fla. 2nd DCA 1975). Plaintiff in that case had initially accepted "advance notice" as a valid condition upon access, but thereafter objected to the condition. The Second District observed that in the interim defendant had changed its position in reliance upon plaintiff's "acceptance" and that plaintiff was thereby estopped from objecting. As applied to the facts of the case at bar, the City's actions induced the inclusion of the notice requirement in the order and shaped the procedures adopted by Relators in pursuing the requested records and resulting litigation.

Absent from this record is any shred of evidence that the waiver was in any way limited or otherwise ineffectual. The instant uncontradicted record of waiver is doubly reinforced by the proposition that the burden of persuasion rests upon Respondents as the proponents of the claim of § 90.502 privilege to prove that the communications were intended to be kept "confidential" and that the alleged privilege was not "waived," Weil v. Investment/Indicators, Research Management, 647 F. 2d 18, 25 (9th Cir. 1981); International Paper Company v. Fibreboard Corporation, 63 F.R.D. 88, 93 (DC Del. 1974). Respondents' failure to present any evidence of any sort in the trial court automatically required a ruling adverse to them on the waiver issue.

While Judge Korvick had held in her September 17, 1982 judgment that there was no waiver (R2: 400), the Third District set that judgment aside in Edelstein III. Judge Korvick's subsequent February 18 and March 8, 1983 orders made no finding on waiver. Only in successor Judge Smith's August 4, 1983 order (R2: 103) does she purport to find without hearing any new evidence that no "statements which may have been made by counsel during the course of these proceedings" constituted a waiver. That finding omitted reference to the waiver in the other proceedings, Case No. 76-8301, as set out above. Moreover, Eastern Air Lines, Inc. v. Gellert, 431 So. 2d 329 (Fla. 3d DCA 1983), cited by the trial court in support of its finding, simply does not militate against the instant fact of waiver. Gellert I cites § 90.507 that specifically defines a consent to disclosure (such as Murphy's consent) as a waiver.

In Gellert I, it was argued only that a response to a request for admission was a waiver simply because the response suggested that the party's attorney be asked about the matter and because the response failed to refer to any claim of attorney-client privilege.

In contrast to Murphy's pronouncements, the response in Gellert I contained no affirmative consent to disclosure or disclaimer of privilege.

E. Prima Facie Proof of Respondents' Fraud In Case No. 76-8301 Vitiated Their Claim of Privilege.

The instant record includes evidence of fraud adduced at the September 13, 1982 hearing; said evidence was in the form of exhibits stipulated to as authentic (R1: 162-164). Those stipulated exhibits were attached to the Reply to the Response To The Order To Show Cause (R2: 301-347). Those exhibits show that in case No. 76-8301 Fowler falsely certified to Donner and to the court in response to Donner's Request For Production that the only insurance policy applicable to the claim was a $100,000 limit Appalachian policy (R2: 318) and Fowler served Hetherington's correspondingly false sworn answers to interrogatories in regard thereto (R2: 330, 331). In fact, the City and Hetherington were covered on this claim by an additional 50% of $900,000 limit Columbia CasualtyCompany policy (R2: 334). Only by virtue of Relators' independent investigation of the City's public records had Relators uncovered this policy omitted from Fowler's response to request for production and from their answers to interrogatories (R2: 318, 330). In Supreme Lodge K of P of the World v. Kalinski, 163 U.S. 289 (1896), it is aptly stated that a party (such as the City) cannot set up its ignorance as an excuse with regard to the facts of its own business (such as the facts of the City's own insurance coverage). This "prima facie" evidence of fraud is in accordance with the standard most recently recognized by the Third District in Gellert I and as such overcomes any claim of privilege under § 90.502. See § 90.502 (4)(a) disallowing any such

privilege in the presence of fraud. Although this issue was pleaded (R2: 296-297) and proved (as set out above) the trial court failed to make any finding of fact in regard thereto. In the absence of any contradictory evidence (and in view of the fact that in any event Respondents as proponents of the claim of privilege have the burden of persuasion) the instant evidence of fraud requires disclosure of the requested records. See Kneal v. Williams, 158 Fla. 811, 30 So. 2d 284, 287 (1947).

F. The Requested Records Are Public

As noted in the prefatory counter-statement of facts, Edelstein I established the law of this case to be that the requested records are public and that Respondents are public agencies within the meaning of § 119.011 (2), Fla. Stat. Respondents seek to evade that holding by arguing that Fowler and Murphy represent not only the City but also its insurer Appalachian and arresting City of Miami police officer Hetherington in Case No. 76-8301 and that their records are allegedly "comingled." This same argument was advanced by Respondents in Edelstein IV and rejected by the Third District in its May 8, 1984 opinion. In the course of that appeal, Relators' Reply Brief apprised the Third District (at page 8 of that brief) (A: 4b) that Respondents had presented an identical argument to the Third District in Edelstein I in Respondents' Answer Brief. The relevant portions of that 1982 brief are included in the appendix to the instant brief at A:4 . Relators asked the Third District in Edelstein IV to take judicial notice that this same argument had already been made in a brief included in the Third District's records in this same case. Since Respondents failed to seek review of Edelstein I, they are now barred from reopening that argument.

Moreover, it should be noted that insurer Appalchian is of course a public agency within the meaning of § 119.011 (2) because of its status as insurer for the City "acting in behalf of the city." Appalachian's records in the custody of Fowler and Murphy are therefore also public. Similarly, Hetherington as a City of Miami police officer is a municipal officer and thus a public agency within the meaning of that statute and Hetherington's records in the custody of Fowler and Murphy are therefore also public. Indeed, at page 10 of Respondents' Main Brief, Respondents characterize Hetherington as a "public officer" in regard to his attorney-client relationship with Fowler and Murphy as defined by another statute, § 90.502 (1)(b), Fla. Stat. It would therefore be inconsistent for Respondents to disclaim Hetherington's status as "public officer" in other statutory contexts.

Even without regard to these statutory definitions, the public policy favoring the public's right of access to public records cannot be frustrated by the simple expedient of purporting to "comingle" those records. See Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982), rev. den. mem. 426 So. 2d 27 (Fla. 1983) analogously disapproving a change of custodian as immunizing public records. And see City of Miami Beach v. Berns, supra, condemning "evasive tactics" in the cognate context of the Sunshine Law. If one of Fowler's clients would have wished to preserve the separateness of his records, he could have opted for separate counsel or specifically directed that his communications be segregated from other records. There could be no reasonable expectancy of confidentiality with regard to records comingled into public records. See Mobley v. State, supra.

Precisely these arguments were aired in Edelstein I and finally resolved in favor of Relators.

G. EVIDENCE CODE IS NOT APPLICABLE IN REGARD TO PUBLIC RECORDS DEMAND

The Third District correctly concluded that the Evidence Code in general, and § 90.502, Fla. Stat., in particular do not exempt public records from public inspection. The Third District reached the very same result in Miami Herald Pub. Co. v. City of North Miami 9 FLW 418 (Fla. 3rd DCA 1984) and in State of Fla. v. Kropff, 9 FLW 418 (Fla. 3rd DCA 1984).

Respondents mistakenly suggest that § 90.103 (2), Fla. Stat., extending the Evidence Code to all civil actions and other proceedings pending on or after October 1, 1981, renders the Code applicable to this public records demand. In Miami Herald II, supra, the Third District correctly answered this argument by pointing out that § 90.103 (1), Fla. Stat., specifically restricts the application of the Code only to "evidentiary" proceedings and that a public records demand simply is not a proceeding of that nature. Respondents' brief fails to address this point. Instead they mistakenly suggest that the pendency of the separate Case No. 76-8301 on October 1, 1981 triggers the application of the Evidence Code in this public records demand.

The fallacy in Respondents' suggestion lies in the fact that the public records demand is not a part of Case No. 76-8301. It is distinct from that case. This Court specifically rejected the notion that a public records demand is simply a disguised form of discovery in pending litigation to which the records relate in Wait v Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979). At page 425 of Wait it is stated,

> "...we do not equate the acquisition of public documents under chapter 119 with the right of discovery afforded a litigant by judicially created rules of procedure."

Respondents attack as contrary to law their mistaken interpretation of the opinion of the Third District in Miami Herald II as prohibiting

introduction into evidence of communications privileged under the Evidence Code even though disclosed pursuant to a public records demand. Neither was the Third District called upon to adjudicate this separate evidentiary question nor did the Third District purport to rule upon this question nor can one read any such ruling as implicit in its ruling. Particularly in regard to the attorney-client confidential communication evidentiary privilege in § 90.502, Fla. Stat. it is highly questionable how one could claim any reasonable expectancy of confidentiality with regard to communications included in public records.

Nor does the specific reference in § 90.502 (1)(b) to "public" clients suggest any contrary legislative intent. Respondents mistakenly argue that the Third District's decision renders the application of § 90.502 to public clients meaningless because public records will not be privileged. Respondents overlook the facts that the Third District decision, as previously noted, does not purport to adjudicate the admissibility in evidence of such public record and the decision applies only to that subclass of public clients and public records subject to the Florida Public Records Law. Not included in that subclass but meaningfully incorporated in the scope of § 90.502 are "public" clients who are for example, foreign governments or agencies, the federal government, or its agencies, and other states and their political subdivisions and agencies.

Respondents mistakenly argue that Wait, supra, allegedly predated the Evidence Code. Motion for rehearing in Wait was denied June 21, 1979, so that the Supreme Court mandate issued July 6, 1979 five days after the July 1, 1979 effective date of the Evidence Code.

At the time, the entire Florida legal community including the Supreme Court were keenly aware of this effective date.*

II. RESPONDENTS MAY NOT NOW CHALLENGE THE LOWER COURT'S RULINGS ON WORK PRODUCT

A. RESPONDENTS' FAILURE TO BRIEF ARGUMENT ON LAW OF CASE

Respondents have waived any challenge to the ruling of Trial Judge Smith and of the Third District in regard to the claimed work product exemption, as follows:

(1) In paragraph 2 (a) of the June 17, 1983 order (R2: 129-130) issuingperemptory writ as to work product, Judge Smith ruled that exemption of work product public records in predecessor Judge Korvick's prior Final Order (R2: 425-426) "does not comport with the mandate of the Third District" in its October 5, 1982 order (Edelstein II).

(2) The Third District's May 8, 1984 opinion affirms this portion of Judge Smith's order and also specifically cites Edelstein II;

(3) Neither in Respondents' Initial Brief in the Third District (A:4a) nor in their Initial Brief in this Court did they advance any argument that the claimed exemption of work product comports with the Edelstein II mandate;

* Even if the Evidence Code were applicable to a public records demand as of July 1, 1979, communications predating July 1 between attorney and client included in "public records" would not give rise to any reasonable expectancy of "confidentiality" as required by §90.502 (1)(c). See footnoteto Tober, supra. The demand in the case at bar for public records relating to a 1975 claim and a 1976 case would necessarily call for many pre-Evidence Code records. Respondents' failure to provide any index of records claimed to be privileged and the trial court's refusal to require any such index renders it impossible for Relators to pinpoint which records fall into this category. However, those pre-Evidence Code records that are dated on their face fall within this category.

(4) This omission and its waiver implications were brought to Respondents' attention in the Third District by Relators' Answer Brief (A: 5).*

Under former Fla. App. R. 3.7i,

> "Such assignments of error as are not argued in the briefs will be deemed abandoned and may not be argued orally."

Because the 1977 revision of the appellate rules eliminated the need for assignments of error, all provisions referring to assignments of error in the old rules were revised. The Committee Note accompanying Rule 9.210 states that

> "This rule essentially retains the substance of former Rule 3.7."

While the new rule makes no explicit reference to an "abandonment" of points not briefed as did the old rule, the new rule does require to be included in the "initial" brief

> "Argument with regard to each issue" Fla. R. App. P9.210 (b)(4)

And the Committee Note cautions

> "Abolition of assignments of error requires that counsel be vigilant in specifying for the court the errors committed; that greater attention be given the formulation of questions presented..."

This quoted comment necessarily implies that inclusion of all questions to be argued and reviewed must be briefed and, as under the former rule, this requirement is not merely directory but is rather mandatory.

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* Two of the Respondents, the City and Edelstein, are in any event foreclosed from challenging Judge Smith's June 17, 1983 order on work product because they failed to file within 30 days after rendition of that order any notice of appeal as required by Fla. R. App. P. 9.110 (b) or to file within 10 days thereafter any joinder in the notice of appeal filed by co-Respondents Murphy and Fowler as required by Fla. R. App. P. 9.360 (a).

Rule 3.7i was merely an expression of the general rule of law, announced in 5B CJS Appeal & Error, § 1803 that questions not briefed are deemed "abandoned" and "waived." A further refinement of that rule directly applicable to the instant case is to be found in 5B CJS Appeal & Error, § 1805, that such a waiver extends to an appellant's failure to brief any argument in opposition to the lower court's "conclusion of law." Moreover, 5 CJS Appeal & Error, § 1318 aptly states,

> "The brief should set out...conclusions of law...where error with respect thereto is sought to be reviewed."

Neither did Respondents' Initial Brief present any argument in regard thereto nor did that brief bother to set out JudgeSmith's conclusions of law.

Judge Smith's order and the Third District's affirmance now under review come to this Court clothed with a (rebuttable) presumption of correctness.

> "Appeals come to this court with a presumption the proceedings below were free of error"

Redditt v. State, 84 So. 317, 321 (Fla. 1955)

It was incumbent upon Respondents to come forward in their initial brief with argument showing harmful error in "the proceedings below" and of course in the Third District affirmance and trial court's conclusions of law and findings of fact upon which its order was stated to be based. Especially in this mandamus proceeding, the trial court's careful inclusion in its order of conclusions of law (and findings of fact) was a significant and integral part of its order. In this regard, see State v. Smith, 107 Fla. 134, 144 So. 333, 336 (1932) requiring specific finding of fact in mandamus proceedings and see the extensive trial court opinion quoted and discussed in Bal Harbour Village v. State ex rel. Giblin, 299 So. 2d 611 (Fla. 3d DCA 1974). Compare the proposed form of "Final Order" prepared by Respondents and submitted ex parte to Judge Korvick for her signature and that Judge Korvick did sign and enter

on February 18, 1983 (R2: 425-426) and note Respondents' inclusion in that order of findings of fact and conclusions of law; it is that order that was included by reference in Judge Korvick's "Final Judgment" (R2: 128) that, in turn, was modified or superseded by the order affirmed by the Third District and now under review (R2: 129-130).

Appellants' total disregard of their obligation to present any argument in opposition to Judge Smith's assigned reason for her ruling should be treated as a waiver or abandonment of any challenge to the correctness of that reason.

If Respondents are now treated as having abandoned any challenge to that assigned reason for Judge Smith's order then that reason must be accepted as correct and any attempt now to litigate the work product issue would be in derogation of the "law of the case," Edelstein II, as interpreted by Judge Smith and affirmed by the Third District.

B. RESPONDENTS' FAILURE TO PLEAD OR PROVE PRIVILEGE, MURPHY'S WAIVER OF PRIVILEGE, AND PRIMA FACIE EVIDENCE OF FRAUD.

Already surveyed in Argument I above are the deficiencies in Respondents' pleadings and proof on the issue of privilege.* These arguments apply with equal force to the claimed work product privilege. Moreover, in Argument I D above is discussed Murphy's October 23, 1981 in-court, on-the-record waiver of privilege, extending also to work product. See In re Sealed Case, 676 F. 2d 793, 812 (D.C. Cir. 1982) placing a waiver of work product privilege on the same footing as a waiver of attorney-client privilege. In like manner, Relators' Argument I E above relating to the instant record prima facie evidence of fraud applies with equal force to work product. In Kneale v. Williams, supra, this Court held that services performed by an attorney in furtherance of a fraud are outside the scope of his professional duties and therefore such services would not quality as work product.

* Respondents' failure to "assert" any claim of exemption is noted in Argument IC supra and vitiates any belated assertion of work product privilege.

III. WORK PRODUCT PRIVILEGE DID NOT EXEMPT PUBLIC RECORDS

When the instant public records demand was made and suit filed, there was no work product exemption under the Public Records Law, Ch. 119, Laws of Fla. Wait v. Florida Power & Light, supra, specifically so held as did its progeny: Parsons & Whittemore v. Metro Dade County, 429 So. 2d 343 (Fla. 3d DCA 1983); Hillsborough Cty. Aviation v. Azzarelli Const.,436 So. 2d 153 (Fla. 2d DCA 1983); Miami Herald Pub. Co. v. City of North Miami, 420 So. 2d 653 (Fla. 3d DCA 1982) (Miami Herald I); Tober v. Sanchez, supra. Both Parsons & Whittemore and Miami Herald I, supra, cite Edelstein II in support of their work product decision.

IV. NEITHER § 768.28 NOR ANY DISCIPLINARY RULE NOR ANY CONSTITUTIONAL PROVISION EXEMPTS THE REQUESTED PUBLIC RECORDS FROM INSPECTION

§ 768.28, Fla. stat., upon which Respondents rely, does not purport to exempt public records from inspection. Subsection 5 of that statute purports only to place the State and its political subdivisions on parity in tort claims solely in regard to "liability." When in 1979 Wait was decided, this statute had been on the statute books over four years. Yet, at page 424 of Wait, this Court stated that in order to exempt work product and attorney-client communication public records,

> "...it is up to the legislature, and not this Court, to amend the statute." (Emphasis added)

Specifically in the context of tort claims against state agencies, Tober, supra, addressed Respondents' instant argument that, in such tort litigation,

> "...public agencies are placed at a disadvantage, compared to private persons when faced with potential litigation claims,"

and answered that

> "...the wisdom of such policy resides exclusively within the province of the legislature."

In the context of attorney-client confidential communications relating to tort-

insurance defense litigation, Miami Herald II, supra, quoted and adopted the reasoning of Tober, supra.

The very argument that Respondents now advance, that the instant public records demand is merely a disguised form of discovery was previously rejected at page 425 of Wait:

> "...we do not equate the acquisition of public documents under Chapter 119 with the right of discovery afforded a litigant by judicially created rules of procedure."

The application of the Public Record Law in this case is supported by sound public policy. In addition to the general public policy pronouncements in § 119.01. Fla. Stat., there are a number of specific justifications in this case. It would be reasonable to postulate that public oversight over the City's claim processing and litigation records will ferret out waste, incompetence, and perhaps even corruption, improving the calibre of legal services, reducing fees and costs. Nor is cost saving the only pertinent yardstick. Another legitimate goal of government is fair compensation of claims; public monitoring of such activities is reasonably related to that goal. Particularly in regard to Case No. 76-8301 wherein plaintiff Donner has been subjected to over eight years of litigation, has been forced to take three successful appeals in that case and four such (successful) appellate proceedings in this case sub judice, and is confronted with the Respondents' reply that the requested records will be produced "when donkeys fly," it is time to question the City's bona fides in handling this and all other tort claims. Contrary to Respondents' contention that private litigants will enjoy some fancied unfair advantage, the City itself is graced with special advantages. It has legal and financial resources not typically available to a private person. It may invade the public coffers as it sees fit to outlast a claimant, who oftentimes is one of its

contributing tax payers. Apropos are the remarks of Governor Askew in the Journal of the Florida House of Representatives, October 13, 1977, at 3, explaining his veto of House Bill 1107 that would have exempted attorney-client communications from the Sunshine Law. Recognizing the aforementioned facts of municipal litigation, he added that the realities of modern pre-trial discovery make obsolete any perceived disadvantage the City might suffer.

Government as a party to civil litigation is engaging in a form of "state action" mandating its adherence to due process and equal protection requirements. It is ironic that Respondents seek to evade public scrutiny of their "state action" by translating the public's due process sword into a government shield shrouding its records in secrecy.

City of Miami police officer Hetherington's retention of and surrender of control of this litigation to the City's attorney and the resulting "comingling" of records relegates Hetherington, to no better position than that of the City.

Furthermore, in Times Publishing Company v.Williams, 222 So. 2d 270 (Fla. 4th DCA 1969) it was held that the legislature had the power to waive in behalf of a political subdivision (such as the City) any claim of privilege (as was done in Williams in regard to the Sunshine Law and as in the case at bar in regard to the Public Records Law). Williams, supra, was cited in support of the Fourth District's reasoning in State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1977) and it was the reasoning of Veale that was adopted by the Supreme Court in Wait, supra. Thus, Wait inferentially held that the legislature in enacting the Public Records Law waived any claim of work product or attorney client privilege that the City otherwise might have claimed in regard to public records.

Respondents' reliance upon the due process and equal protection clauses variously included in Article I, § 9, Fla. Const. and in Amendment XIV, U.S. Const. is baseless. Respondents' reliance upon Art. I, § 21 (access to courts) and Art. I. § 22 (right to trial by jury), Fla. Const. is also misplaced because the Public Records Law neither bars the doors to the courthouse nor deprives the City of jury trial as to claims against it.

Nor do Respondents demonstrate any violation of Art. II, § 3, Fla. Const. (separation of powers). Though Respondents strive to support their argument by quoting from Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385 (1947), they fail to quote the Supreme Court at page 393 grounding its work product privilege simply on "public policy," recognizing that this privilege may be overcome by a showing of good cause, or abrogated by "statute." Just such a statute and good cause is Chapter 119. It is not a legislative intrusion into the judicial arena.

Moreover, in regard to the attorney-client privilege, the Florida Supreme Court promulgated Fla. Bar Code Prof. Resp. DR 4-101 (d)(1) specifically authorizing disclosureof a client's confidences "when required by law." Such a "law" is the Public Records Law.*

In Pace v. State, 368 So. 2d 340, 345 (Fla. 1979) this Court upheld legislation directed at lawyers:

> "Simply because certain conduct is subject to professional discipline is no reason why the legislature may not proscribe the conduct."

Respondents mistakenly rely upon In re: Petition For Advisory Opinion Concerning Applicability of Chapter 74-177, 316 So. 2d 4S (Fla. 1975) and In re: Advisory Opinion Concerning the Applicability of Chapter 119 Florida

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* At pages 14-15 of Respondents' Initial Brief are summarized and quoted certain allege correspondence between attorney Toby Simon and Staff Counsel of the Bar. However. this is not cross-referenced to any reference book or legal text for verification. It is in any event of no precedential or persuasive significance.

Statutes, 398 So. 2d 446 (Fla. 1981). The former case concerns only the effect of legislation on the operation of the Florida Bar and its administrative personnel and the latter concerns the Bar's unauthorized practice of law investigative files, neither of which areas of concern are here at issue.

CONCLUSION

For all of the foregoing reasons, this Court should either exercise its discretion by declining to review the decision of the Third District or, if it does choose to exercise jurisdiction to review that decision, this Court should affirm. The herein briefed multiplicity of valid grounds for affirmance preliminary to the certified question warrant affirmance without reaching the question certified. However, if this Court determines to answer the question certified, it should answer in the negative, that attorney-client communication public records are not exempted by the Evidence Code.

Respectfully submitted,
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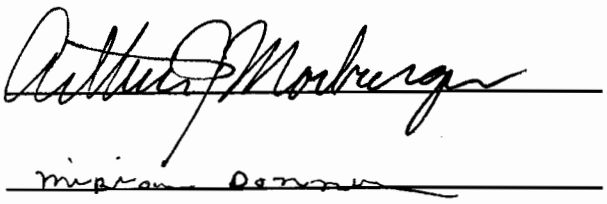

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing brief and accompanying appendix were hand delivered this 10th day of July, 1984 to Michael J. Murphy 25 W. Flagler Street Miami, Fla., to Leon M. Firtel 169 E. Flagler Street Miami, Fla., and to Robert D. Peltz 19 W. Flagler Street Miami, Fla.

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