IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 67,195

CITY OF ORLANDO,

Petitioner,

vs

ROLAND E. DESJARDINES, et ux., et al.,

Respondents.

_____/

PETITIONER'S REPLY BRIEF

STEVEN F. LENGAUER of
Pitts, Eubanks, Hannah
Hilyard & Marsee, P.A.
Post Office Box 20154
Orlando, FL 32814
(305)425-4251

Attorneys for Petitioner

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Respondent overlooks the fact that §119.07(3)(o) is a remedial change in an existing statute and does not fall within the constitutional prohibition against retrospective application. Cases cited by the Respondent in brief in support of its position arguing prospective application are distinguishable because they involve substantial changes in or repeal of statutes. The only changes in the Public Records Act by §119.07(3)(o) are remedial in natute. The legislative history supports this remedial application.

There is a conflict between the Florida Bar Code of Professional Responsibility and the Public Records Act. By providing written material and information to his governmental client, the attorney places himself in violation of the DR's since, as presently interpreted by the Florida courts, the Public Records Act requires his written communications be produced to opposing counsel.

The proper method for requesting communications and documents under the Public Records Act is not a mere technicality which should be ignored.

ARGUMENT

ISSUE I

THE FIFTH DISTRICT COUNT OF APPEAL'S DECISION RENDERED JUNE 3, 1985 IN REFUSING TO RETROSPECTIVELY APPLY FLORIDA STATUTE §119.07(3)(o) (1984) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF CITY OF NORTH MIAMI VS. MIAMI HERALD PUBLISHING CO., 468 So.2d 218 (Fla. 1985) AND OTHER CASES.

Respondent argues that Petitioner misconstrues this court's decision in City of North Miami vs. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985) as conflicting with the District Court's opinion in the case sub judice. Respondent's argument lacks support for its proposition. Respondent correctly points out that the issue in City of North Miami was whether the attorney/client privilege embodied in Fla. Stat. §90.502 exempted communications between lawyers and governmental clients from disclosure under the Public Records Act, but Respondent incorrectly states that this Court ruled that it did not. This Court ruled that whatever merit the argument had was negated by the passage of Fla. Stat. §119.07(3)(o) (1984) which provided a temporary exemption from public disclosure for attorney and governmental client communications during the pendency of the litigation. Respondent, through a rather nebulous argument, contends there is no conflict because the record in City of North Miami did not contain the specific communications, while in the case sub judice, the specific communications are identified.

This Court in City of North Miami did retrospectively apply §119.07(3)(o) to attorney/governmental client communications. If the Court felt that §119.07(3)(o) applied only to documents created after October 1, 1984, as the district court below determined, this Court would have remanded with specific instrucitons to apply subsection (o) prospectively to documents created after October 1, 1984. No such limitation was imposed and this Court properly instructed the lower court to determine the application of subsection (o) to all of the communications, regardless of the date of their creation. The decision of the district court is in conflict with this Court's decision in City of North Miami since the district court refused to retrospectively apply §119.07(3)(o).

Respondent points out the rule of construction that a law is presumed to operate prospectively unless there is a clear legislative expression to the contrary. (Respondent's brief at 8). Respondent overlooks the fact that §119.07(3)(o) is a remedial change in an existing statute. A remedial or procedural statute does not fall within the constitutional prohibition against retrospective application. Village of El Portal v City of Miami Shores, 362 So.2d 275, 278 (Fla. 1978); City of Lakeland v Cantinella, 129 So.2d 133, 136 (Fla. 1961). The cases cited by Respondent in brief are distinguishable from the issue sub judice. Those cases involved substantial changes in or repeal of statutes, changes in statute of limitations, amendments to the Florida Constitution, or retroactive application of a newly created statute.

In the case sub judice, Section 119.07(3)(o) is a remedial change in Chapter 119 and is not a substantive change in or repeal of a statute. Section 119.07(3)(o) deals strictly with a matter of procedure. This court recognized the procedural nature of §119.07(3)(o) when it stated that subsection (o) provides: ... "for temporary exemption from public disclosure of government agency, attorney prepared, litigation files during pendency of litigation." City of North Miami, 468 So.2d at 219. The only thing regulated by subsection (o) is the timing of the disclosure which is obviously a matter of procedure. This Court has retrospectively applied remedial changes in existing statutes. See, e.g. Village of El Portal, supra,; Summerlin v Tramill, 290 So.2d 53 (Fla. 1973); Tel Service Co. v General Capital Corp., 227 So.2d 667 (Fla. 1979).

Respondent, relying on Orange County v Florida Land Co., 450 So.2d 341 (Fla. 5th DCA), rev. denied, 458 So.2d 273 (Fla. 1984), argues that §119.07(3)(o) cannot be given retroactive application because it impairs the substantive right of access to public records. Orange County did not consider remedial or retrospective application of §119.07(3)(o). As pointed out above, §119.07(3)(o) is remedial in nature and deals strictly with the matter of procedure, not substantive law. The only thing regulated by subsection (o) is the timing of the disclosure. This is obviously a matter of procedure, not substantive law. The district court below did not consider whether §119.07(3)(o) was remedial. The district court dismissed Petitioner's argument by holding that access to public

records was a matter of substantive law. 469 So.2d at 833, citing Orange County, 450 So.2d at 343. In Orange County, the Fifth District, in relying on Hillsborough County Aviation Authority v Azzarelli Construction Co., Inc., 436 So.2d 153 (Fla. 2d DCA 1983), dismissed a similar argument as presented to the Second District Court of Appeals and held that Florida Rule of Civil Procedure 1.280(b)(2) did not take precedent over the Public Records Act even though it contained a work produce privilege. 450 So.2d at 343. Both district courts held that access to public records is a matter of substance which takes precedent over a rule of civil procedure. The issue in Orange County and Hillsborough Aviation involved an interpretation of a conflict between a rule of procedure adopted by the Florida Supreme Court and a statute created by the Florida Legislature. This issue is not present in the case sub judice because §119.07(3)(o) is a statutory, remedial and procedural change and not a judicially created rule of procedure. By amending §119.07, the Florida Legislature sought to provide a remedial or procedural change in the Public Records Act. Statutes are remedial if they give a remedy or abridge some defect. Dotty v State, 197 So.2d 315, 318 (Fla. 4th DCA 1976).

Respondent, in recognizing that the general rule is that a decision on a case on appeal should be made in accordance with the law in effect at the time of the decision, incorrectly states that the rule is not applicable when a substantive right is altered and cites Henley v Sanford Auto Auction, Inc.,

364 So.2d 467 (Fla. 1978) in support of his argument. This Court recognized in Henley that the disposition of a case should be made in accord with the law in effect at the time of the court's decision. 364 So.2d at 468.

Finally, Respondent argues that this Court should not examine the legislative history of §119.07(3)(o) because it affects a substqntive right. Respondent fails to recognize the importance of the legislative history of §119.07(3)(o) (1984). The legislative history, found in the tapes of the committee hearings, clearly shows that §119.07(3)(o) is a remedial or procedural statute. It was the intent of the legislature to remedy the application of Chapter 119 in view of the interpretation of Chapter 119 by the Florida appellate courts. The affect of the amendment is to remedy a misinterpretation of the law concerning the attorney/client privilege while not denying total access to the records which are not privileged under the exception. The legislative history makes it clear that the legislature in fact believed preexisting Florida statutes created a permanent exception to the Public Records Act. As a result of the knowledge discerned in the hearings, the legislature enacted §119.07 (3)(o) to remedy what it felt was earlier misinterpretations of the existing law. The result was a remedial or procedural change in Chapter 119. This remedial change should be given prospective or retroactive application.

The decision of the Fifth District Court of Appeals incorrectly denies the retrospective application of §119.07 (3)(o). The district court's decision is in direct conflict

with this court's decision in City of North Miami, supra.

ISSUE II

CHAPTER 119, Fla. Stat. (1983) SHOULD BE INTERPRETED TO AVOID CONFLICTS WITH THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-101 AND ETHICAL CONSIDERATIONS 7.7 AND 7.8.

Respondent argues that there is no conflict between Florida Bar Code of Professional Responsibility Disciplinary Rule 7.101 and Ethical Considerations 7.7 and 7.8 and the Public Records Act. The Respondent's spurious, self-serving argument is incongruous. Respondent admits that the Petitioner's counsel is prejudiced by the Public Records Act as applied by the district court below, but explains this is a necessary incident of a democratic government. Respondent argues that municipal corporations are created to serve their citizens and that municipal corporations are owned by every resident in the city. Respondent suggests, through circuitous reasoning, that counsel for the city therefore represents the Respondent and has an ethical duty to provide to the Respondent communications between counsel and its client, the City of Orlando. Respondent ignores the fact that he, as a private litigant, sues the City of Orlando in its corporate capacity and not as a citizen of the City of Orlando seeking some grievance against the city for the benefit of all its citizens or to obtain some document for the citizens of Orlando. Respondent seeks the communications between the City of Orlando and its counsel for his personal gain and personal advantage and not for the benefit of the public or for his

fellow citizens of Orlando. There is certainly nothing in the record to indicate that Respondent, as a fellow citizen of Orlando, would provide communications between him and his attorney for the benefit of her fellow citizens. Respondent argues that the Petitioner has an obligation to provide all information that it gathers to its beneficiaries, the citizens of Orlando. The only beneficiary of the communications between the City of Orlando and its counsel would be the Respondent and not the citizens of Orlando. It was precisely for these reasons that the Florida Legislature amended Chapter 119 to provide a limited exception to the Public Records Act.

Respondent argues that the Petitioner has a duty to disclose all matters pursuant to the Sunshine Law, §286.01, Fla. Stat.(1983). Respondent's vague reference to the Sunshine Law is inapplicable here. This Court has distinguished the actions of commissions and meetings of boards from acts of governmental executive officers. See, Neu v Miami Herald Publishing Co., 462 So. 821, 826 (Fla. 1985) (Overton, concurring opinion). The communications sought by the Respondent are not involved in any official acts taken by a political subdivision body but are rather communications between counsel and governmental officers.

As pointed out in Petitioner's initial brief, as presently interpreted by the Florida courts, the Public Records Act, requires that written communications between a governmental client and its attorney be produced. By providing written material and information to his governmental client, the attorney

subjects his client to production of sensitive and confidential material and places himself in violation of DR 7.101(A)(3). From a public policy standpoint, the Public Records Act should be interpreted by this Court in a manner which does not require attorneys to violate the Code of Professional Responsibility. Retrospective application of §119.07(3)(o) eliminates this conflict.

ISSUE III

THE REQUEST TO PRODUCE WAS IMPROPERLY MADE UNDER §119.021, FLA STAT. (1983)

Respondent argues that he has complied with the requirements of the Public Records Act by serving the request for the communications and documents upon the Division of Risk Management in care of Attorney Steven F. Lengauer, attorney of record for the Petitioner. Respondent argues that he should not be penalized for some alleged technicality. Respondent's argument suggests that Rules of Civil Procedure and requirements under duly enacted statutes are mere technicalities which should be ignored.

Respondent cites the court to State Department of Highway Safety v Kropff, 445 So.2d 1068 (Fla. 3rd DCA 1984) in support of his argument. Kropff involved a notice to produce under Fla.R.Civ.P. 1.310(b)(6) to bring to a deposition certain statements and investigative reports relating to the Florida Highway Patrol's investigation of the Plaintiff, Kropff. The notice also stated that it was pursuant to the Public Records Act. The district court specifically declined to address the procedure used by Kropff while the case was in its present posture. The district court noted that the Rules of Civil Procedure and the Public Records Act did not contemplate the hybrid procedure used by Kropff and stated "We do not equate the acquisition of public documents under Chapter 119 with the rights of discovery afforded a litigant by judicially-created rules of procedure ...," Kropff, 445

So.2d at 1069-70 n. 1, quoting Wait v Florida Power & Light Co., 372 So.2d 420, 425 (Fla. 1979).

Kropff does not support Respondent's position. The Respondent has failed to follow the requirements of the Public Records Act for inspection of public records by failing to serve the proper custodian of public records. The request for production should be quashed because it is not directed to the proper legal custodian of the record as required by Chapter 119, Fla. Stat. (1983).

CONCLUSION

Fla. Stat. §119.07(3)(o) (1984) was enacted as a remedial measure in response to appellate court decisions which failed to give effect to the attorney/client privilege. The statute is procedural on its face since the ultimate effect of subsection (o)is merely to delay the disclosure of attorney/client confidences. Fla. Stat. §119.07(3)(o) (1984) does not permanently prevent disclosure of governmental attorney/client documents - it merely affects the timing and procedure for obtaining these records. In order to prevent unfair prejudice to governmental litigants, a privilege is given to attorney/client documents until completion of the litigation. The legislative history behind Fla. Stat. §119.07(3)(o) clearly establishes its remedial and procedural nature. Subsection (o) should be applied retroactively.

Furthermore the Respondent has failed to address his public records request to the proper legal custodian as required by Fla. Stat. §119.021 (1983). This court should interpret the Public Records Act in a manner which promotes compliance with the attorney's obligation under the Code of Professional Responsibility to keep his client informed about litigation matters. The "Chinese choice" between keeping a client in the dark or prejudicing litigation strategies should be eliminated. Subsection (o) should be applied retroactively by this court. This court should reverse and remand with intstructions to prevent disclosure of attorney/client documents.

CERTIFICATE OF SERVICE

I HRERBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief has been furnished, by regular mail, this 25th day of March, 1986 to WILLIAM FERNANDEZ, ESQ., 1309 E. Robinson St., Orlando, FL 32801 and ROBERT MIXON, ESQ., Post Office Box 6086-C, Orlando, FL 32853.

STEVEN F. LENGAUER of
Pitts, Eubanks, Hannah, Hilyard
& Marsee, P.A.
Post Office Box 20154
Orlando, FL 32814
(305) 425-4251

Attorneys for Petitioner