

(1) Confidences or secrets with the consent of the client . . . but only after full disclosure to them.

(d) A lawyer shall reveal:

(1) Confidences or secrets when required by law. . . .

It is obvious that in promulgating the Code of Professional Responsibility the Supreme Court gave recognition to statutory exceptions in the same way that the legislature acknowledged constitutional exceptions when it enacted the Sunshine Law. And, as was observed earlier, the enactment of §286.011, F. S., constituted a legislative consent to the disclosure of confidential information possessed by an attorney by virtue of his relationship with a client that is a public body within the meaning of the Sunshine Law. Public bodies are also on notice of the fact that the Sunshine Law constitutes the type of legal requirement which, under the Code of Professional Responsibility, relieves an attorney of the ethical duty to maintain the confidences of his clients. It appears, therefore, that the Code of Professional Responsibility does not constitute a constitutional exception to the applicability of the Sunshine Law as it does not create for attorneys any impediment to full compliance with the letter and spirit of the Sunshine Law.

I have not overlooked the following statement from the *Bassett* opinion, which was made in reference to the school board's right to privately instruct its negotiator:

It might be noted that in a case like the present where the negotiator is an *attorney* that certainly he is entitled to consult with the Board on matters regarding preliminary advices.

The issue of the attorney-client privilege as it relates to the Sunshine Law was not squarely before the court in *Bassett* and it was apparently not a determinative factor in the decision. Furthermore, it is not clear whether the court intended the quoted comment to extend beyond the fact situation therein or whether its reference to "a case like the present" was intended to limit its scope to labor negotiations. In any case, particularly in light of the Supreme Court's consistently broad interpretation of the Sunshine Law, *see City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971), and *Board of Public Instruction v. Doran*, *supra*, I am not prepared to seize upon the cited statement in *Bassett* as an excuse to engraft a broad new exception onto the law.

I am aware of no other exception, constitutional or otherwise, which would relieve you of the duty to comply with the requirements of the Sunshine Law in the situation described in your question. In both *Berns* and *Doran*, *supra*, the Supreme Court refused to judicially amend the Sunshine Law by creating exceptions to its provisions. I, no less than the court, must refrain from reading into the Sunshine Law exceptions not intended by the legislature. Accordingly, until such time as this matter is legislatively or judicially clarified, your question must be answered in the negative.

073-57—March 13, 1973

CRIMINAL LAW

VIOLATION OF STATE STATUTE ALSO VIOLATION OF MUNICIPAL ORDINANCE

To: Charles A. Hall, City Attorney, New Smyrna Beach

Prepared by: Reeves Bowen, Assistant Attorney General.

QUESTION:

When a municipal ordinance provides that the violation, within the municipality, of any state statute constituting a misdemeanor shall be a violation of such ordinance, may the municipal court of such municipality try a person charged with the possession of five grams or less of cannabis (marijuana)?

SUMMARY:

If a municipality has adopted an ordinance making it a violation thereof to commit a misdemeanor under state statute within the municipality, its municipal court may try a person for the possession of not more than five grams of cannabis (marijuana) if such person has not been convicted of any violation of Ch. 404, F. S. 1971, prior to such possession.

However, a conviction for such possession in a municipal court would bar a subsequent prosecution in the circuit court if the defendant's possession turned out to be a felony because he actually had possession of more than five grams of cannabis (marijuana) or he had previously been convicted of violating some provision of Ch. 404. Therefore, care should be taken to insure that no person is tried in a municipal court for the possession of cannabis (marijuana) if his possession constitutes a felony.

Section 404.15(1), F. S. 1971, provides:

404.15 Penalties.— Any person who violates any of the provisions of this chapter shall be punished as follows:

(1) For a first conviction he shall be guilty of a felony of the third degree, punishable as provided in §§775.082, 775.083, and 775.084; except that if the first offense is the possession or delivery without consideration of not more than five grams of cannabis, he shall be guilty of a misdemeanor of the first degree, punishable as provided in §§775.082 and 775.083.

Therefore, if a municipality has adopted an ordinance making it a violation of such ordinance to commit an offense within such municipality which is a misdemeanor under a state statute, the municipal court of such municipality may try a person for the possession of not more than five grams of cannabis (marijuana) if such person had not been convicted of a violation of Ch. 404, F. S. 1971, before having such possession.

However, care should be taken to insure that a defendant is not so prosecuted in the municipal court if he is actually guilty of a felony by reason of having possessed more than five grams of cannabis (marijuana) or having been previously convicted of a violation of Ch. 404. This is so because the possession of not more than five grams, as a first offender, is a lesser offense included within the felony of possession of more than five grams and because a conviction of such lesser included offense would bar a subsequent prosecution in the circuit court for the felony [Southworth v. State, 125 So. 345 (Fla. 1929)]. This principle of law applies even where the conviction of the lesser included offense is had in a municipal court [Waller v. Florida, 397 U.S. 387 (1970)].