IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KENNETH T. LANGE,

Respondent.

Supreme Court Case
No.88,694

The Florida Bar File
No. 94-71,557(11L)

On Petition for Review

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

For the purpose of this Answer Brief, The Florida Bar will be referred to as either The Florida Bar or the Bar. Respondent will be referred to as the respondent.

Reference to the transcript of the final hearing before the referee will be referred to as TR. and followed by the appropriate page number(s).

STATEMENT OF THE CASE

Following a probable cause finding by Grievance Committee 'L" of the Eleventh Judicial Circuit, The Florida Bar filed a complaint against respondent, Kenneth T. Lange, on August 8, 1996. The matter was ultimately referred to the Honorable Margarita Esquiroz, Referee, on August 28, 1996. These disciplinary proceedings proceeded to final hearing before Judge Esquiroz on February 10, 1997.

At the time of final hearing, the Bar filed a Motion to Seal Record. The basis of that motion was the fact that the disciplinary proceedings were predicated upon a sealed federal court order and documents referenced therein which had been furnished to the Bar by the federal court, but remained sealed for all other purposes. On May 8, 1997, the Referee entered an order sealing the record before her. On that same date, the referee also entered an order denying a motion by the respondent requesting the referee to rule on whether or not the attorney-client privilege was invoked by Carlos Vasquez or his attorney.

A Report of Referee was issued on May 8, 1997. The referee found the respondent guilty of violating Rule 4-1.6(a) (A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless

the client consents after disclosure to the client) of the Rules of Professional Conduct. The referee recommended that respondent receive an admonishment for minor misconduct.

STATEMENT OF THE FACTS

The Florida Bar's complaint in this cause alleges misconduct on the part of respondent, Kenneth T. Lange, in connection with the matter of United States of America v. Keith Biggins, Case No. TCR 93-04028, in the United States District Court for the Northern District of Florida, Tallahassee Division. Respondent was retained to represent the defendant, Biggins, in that multi-defendant drug conspiracy case in August, 1993. (TR. 28). Prior to becoming involved in Biggins' defense in that particular case, respondent had represented another client by the name of Carlos Vasquez. (TR.32). Trial in the Biggins case was scheduled for March 1, 1994.

As evidenced by The Florida Bar Exhibits 3 and 4, (Appendix A and B), respondent had filed motions in August and in September, 1993, seeking to have the government disclose the names of its witnesses, as well as particular evidentiary requests with regard to those witnesses. As clearly reflected in the body of both those motions, they contain disclosures by respondent of murders alleged to have been committed by Vasquez.

On the day preceding the scheduled trial date, the government furnished respondent with a witness list setting forth the government's witnesses. Listed among those witnesses was

respondent's former client, Carlos Vasquez. (TR. 31). Following his receipt of the government's witness list, respondent filed a motion entitled Motion to Notice Actual Potential Conflict of Interest Between the Undersigned and Government's Now-Listed Cooperating Witness Carlos Vasquez, TFB Ex. 2. (Appendix C). Said motion was filed on the same day the case was scheduled for trial, to-wit: March 1, 1994.

In that motion, respondent discloses, in detail, privileged attorney client communications made to him by Vasquez which, according to respondent's own words, were made to him while Vasquez was his client, was seeking legal advice from him, and were made with an expectation of privacy. (Appendix C, p.2). The disclosures pertain to the murders previously disclosed by respondent in his August and September, 1993 motions and allegedly confessed to him in 1991. (TR. 33).

Respondent's motion continues on to state that until such time as he was served with the government's witness list, any conflict of interest between himself and Vasquez "was at best, potential and speculative, i.e., if the Government didn't actually call Carlos Vasquez as a trial witness, there would be no conflict". (Appendix C, p. 3). However, having been furnished with a witness list containing Vasquez' name,

respondent's contention was that there would be an "actual conflict". Respondent's motion continues on to state that if, in fact, Vasquez did testify against Biggins, "one of the best independent witnesses for the accused to rebut Carlos Vasquez' trial testimony would be the undersigned". (Appendix C, p. 4). By way of relief, the motion requests the court to inquire of the government as to its true intentions with regard to its calling the witness Vasquez.

The court immediately called a hearing on respondent's motion. As the transcript of that hearing reflects, there was an issue surrounding and testimony taken as to when respondent first actually became aware that Vasquez would be called to testify against his client, Biggins. Respondent gave sworn testimony. In the course of that testimony, he adopted the motion filed earlier that day as a sworn motion. He also adopted as sworn testimony all information provided by him to the court during the course of the subject hearing. (Appendix D, p. 25). He also again disclosed communications between himself and Vasquez which the Bar maintains were confidential and privileged attorney-client communications.

The following exchange occurred between respondent and the Honorable William Stafford:

THE COURT: Has Vasquez, in effect, waived the attorney-client privilege, if -- if the matters that you claim that you might be called upon to testify about were matters confided to you in that relationship?

MR. LANGE: It -- it was. As I pointed out, there has been -- there has been no waiver, but -- but what Vasquez and I -- Mr. Vasquez and I talked about early on when he came to -- he came to tell me about seeking legal advice the end of 1990 when he confided in me that he and --

MR. WHITE: Judge.

MR. LANGE: I'm sorry. I'm in the middle of an explanation. I will not explain it if Your Honor doesn't want me to. Does Your Honor want me to explain it?

THE COURT: Well --

MR. LANGE: I will do it at side bar. I'm trying to explain what's in the motion.

THE COURT: I guess I was asking, you said Vasquez has not, in effect, waived this on his own?

MR. LANGE: Well, what I put in the motion was, Judge, apart from the facts that are self-evident, about the murders, the alleged murders, what he told me, but what I'm -- what I'm saying is I advised Mr. Vasquez at that time that it could well be that since there were no pending charges -- he was advised -- he wasn't seeking my legal advice in an attorney-client capacity, he felt subjectively and objectively --

THE COURT: That's what you have in the motion.

MR. LANGE: I understand that, but what I'm saying to Your Honor is, you asked if I advised him, and I'm saying to you that I did advise him that this could be an exception to the attorney-client privilege under the

client fraud doctrine, which -- which is something he has not been charged yet, as I understand that doctrine, something that he **has** not been charged with and he is seeking **legal** advice on. So I said I wasn't sure, it could -- it could be a problem in the future. So that's all I can say about it, Judge, about that.

(Appendix D, p. 7-8).

The following exchange occurred between respondent **and** Charles White, assistant United States attorney:

Q. What made him a client from just somebody off the street?

A. Because he retained me, because he wanted to seek legal advice on -- you know, just talked to me about what had happened.

Q. But you just told me he wasn't retained like a client?

A. No. No. He paid. He paid money.

(Appendix D, p. 28).

Clearly, as evidenced by respondent's own testimony and his own statements as set forth in his motion of March 1, 1994, Vasquez did not waive attorney-client privilege, made any alleged confessions during the course of their attorney-client relationship, in the course of seeking legal advice, and with the expectation of privacy.

It was respondent's position both before the referee and in Biggins criminal case that Vasquez' disclosures to him fell

within the crime fraud exception to the attorney-client privilege.

Note the following examination of respondent by Charles White, assistant United States attorney:

> Q. When was the last time?
>
> A. It would have been -- it would have been right around the time that his Honor granted the motion to withdraw on Terence Williams -- on Terence Williams' half brother. I told Car -- as I put in the motion, I told Carlos Vasquez, so that would have been roughly Octoberish of 1990 -- '91, and I told Carlos Vasquez, this was still while he was still a fugitive on the indictment before His Honor, I told him that ultimately I had to resolve the attorney-client, the crime -- what I thought was a crime, fraud exception to attorney-client, against him if I was ever asked, that I didn't feel that part -- that -- that --- that -- that -- the murder, what he told me about what he and Reggie Biggins did in murdering these two guys in Carol City in December -- February -- December of --
>
> Q. I remember the facts.
>
> A. Well, you asked me a question. I'm giving you an answer.
>
> Q. To the extent we are hearing privileged things now, I would rather you not --
>
> A. Well, I put it in the motion. I don't think it's privileged. I already told you I think it's crime fraud exception, so I don't think it is privileged, I don't think that's privileged, that's why I put it in the motion, that's why I'm testifying. If I thought it was privileged without exception, I wouldn't be telling you. Simple as that.
>
> Q. So you knew all of this about Carlos Vasquez?

A. Knew all of what?

Q. All of these secrets, as his lawyer.

A. I knew some of his criminal information that he told me over 20 or so conversations in a year.

(Appendix D, p. 32-33).

Respondent's position before the referee was that the crime fraud exception to attorney-client privilege came into play because respondent had sought'his assistance in the cover up of two murders which allegedly had already occurred, but for which Vasquez had never been charged. Respondent testified that Vasquez believed an investigation was ongoing, but he was not implicated and wanted respondent's assistance on "how to keep these bodies buried". (TR. 36 - 37). However, respondent gave no such testimony before the presiding judge in the criminal case, nor did he put forth such a contention in any of the motions he filed in those proceedings. In fact, the first time respondent takes that position is in response to and in defense of the Bar's disciplinary proceedings.

During final hearing before the referee, respondent replied as follows to inquiry by Bar counsel:

MS. SANKEL: Mr. Lange, at the time that this conversation occurred between yourself and Mr. Vasquez, the crime of murder had already been committed several months before, isn't that true?

MR. LANGE: That's what Vasquez said.

MS. SANKEL: In fact, you told us that Mr. Vasquez indicated to you that the bodies were already buried. That's what you stated earlier.

MR. LANGE: That's what Vasquez **said.**

MS. SANKEL: At the time that this conversation took place, Mr. Vasquez **was** your client, isn't that true?

MR. LANGE: In drug cases, not in any homicide cases. In unrelated drug cases.

MS. SANKEL: He had previously conferred with you over approximately **a year's** period of time in the attorney-client relationship, is that correct?

MR. LANGE: In unrelated drug cases.

MS. SANKEL: You keep saying unrelated drug **cases,** but in your motion that you filed on March 1st with the court, you stated in paragraph 2:

> "The reason the undersigned knows about the aforementioned incident with certainty is that at the time, Carlos Vasquez was the undersigned's retained client."

MR. LANGE: Yes, in unrelated drug cases. He came to me to talk about other things. Other things meaning getting me involved in covering up the discovery of those two dead bodies.

MS. SANKEL: So your testimony today is that Mr. Vasquez was **actually** seeking you out to be an accomplice --

MR. LANGE: Yes.

MS. SANKEL: In covering up the crime of murder, the two bodies which had been buried for months previous, is that true?

MR. LANGE: That's not just my testimony today. It goes back to what I said in the March lst, 1994 hearing and since March lst, 1994.

MS. SANKEL: Your testimony not only today, but continuously since March 1st of 1994?

MR. LANGE: That he sought my active assistance in covering up the murder and the discovery of the two bodies that he said he killed.

MS. SANKEL: And yet prior to March lst, 1994, you never sought out law enforcement or the court's assistance in making any disclosure of these communications, which you tell us now and you have ben saying since March 1st of 1994 are in fact not privileged?

MR. LANGE: I did not become an active agent for the Government or the police against Vasquez, that's true, I did not.

Interestingly enough, not only did respondent fail to testify before the federal criminal court as to Vasquez' alleged specific attempts to engage respondent in his criminal conduct, a subject testified to at some length before the referee, but he failed to report that conduct to any agency. Furthermore, respondent's testimony before the referee was that Vasquez thought whatever he told respondent would be confidential. (TR. 37). In fact, respondent kept this information confidential from 1991 through 1994, when he disclosed it for the first time in connection with his representation of Biggins. (TR. P. 38).

At the conclusion of the March 1, 1994 hearing, respondent was disqualified from further representation of Biggins.

Although mention was made by the court of other instances where special counsel was appointed to do cross-examination of a specific witness, it was determined that such could not be the case in the instant matter. That decision appears to have been as a result of respondent's disclosures. (Appendix D, p. 42-43).

On May 19, 1994, Judge Stafford entered a sealed order in the criminal case against Biggins, TFB Ex. 7. (Appendix E). That order concludes that respondent may have violated both the attorney-client privilege and his ethical responsibility to keep the confidences of his former client Vasquez. (Appendix E, p. 6). While noting that respondent had raised the crime fraud exception to the prohibition against disclosure of attorney-client privileged communications, the court concluded that nothing in the record suggested on going criminal activity by Vasquez when he was alleged to have confided his actions to respondent, a necessary element for the exception to come into play. Additionally, the order states that the evidence indicated that as early as August, 1993, both respondent and the government were aware of a potential conflict of interest. (Appendix E, p. 4).

At the conclusion of the evidentiary hearing before the referee, the respondent was found guilty of violating Rule 4-

1.6(a) (A lawyer shall not reveal information relating to representation of a client except a stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client) of the Rules of Professional Conduct.

SUMMARY OF THE ARGUMENT

A referee's findings of fact are presumed correct and will not be overturned unless there is insufficient evidence in the record to support those conclusions. If there is competent evidentiary support in the record for the referee's findings, this Honorable Court will not substitute its own judgment for that of the referee. The party seeking to prove that the referee's findings are erroneous has the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.

The referee found the respondent guilty of violating Rule 4-1.6 (a) of the Rules of Professional Conduct. The evidence before the referee was both clear and convincing that respondent had divulged privileged attorney-client communications in violation on his ethical obligations. Respondent's own testimony before the federal criminal court in which the disclosures were made clearly established that there had been no waiver by the client and that the communications were made during the attorney-client relationship. Furthermore, despite respondent's contention that his disclosures fell within the crime fraud exception to the attorney-client privilege, he provided no evidence in support of his contention to the criminal court. To the contrary, it was

not until faced with disciplinary charges that respondent offered purported information which, he argued, brought his disclosures more clearly within the exception to the rule. Regardless, it was the referee's conclusion that respondent violated the rule prohibiting the disclosure of confidential communication between attorney and client.

As a result of his misconduct, the referee recommended that respondent receive an admonishment for minor misconduct. The Bar appeals that recommendation and respectfully urges imposition of a more severe sanction including a period of suspension.

ARGUMENT

I. THE **RECORD BEFORE THE REFEREE WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF** GUILT AS TO RULE **4-1.6(A)** OF THE RULES OF PROFESSIONAL CONDUCT.

A referee's findings of fact and recommendations carry a presumption of correctness. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). Endowed with this presumption of correctness, the report of referee will be upheld unless shown to be clearly erroneous or lacking in competent substantial evidence. The Florida Bar v. Winderman, 614 So.2d 484 (Fla. 1993); The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991). Where a party contends that the referee's findings of fact and conclusions as to guilt are erroneous, that party must demonstrate that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions made, The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994). In the absence of such a showing, the referee's findings will be upheld. The Florida Far v. McKenzie, 442 So.2d 934 (Fla. 1984). In the instant case, the referee's findings of fact are supported by competent and substantial evidence and respondent has failed to satisfy his burden.

Rule 4-1.6(a) of the Rules of Professional Conduct states as

follows:

(a) Consent **Required to Reveal Information. A** lawyer shall not reveal information relating to representation of a client, except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonable believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonable believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, **a** lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

The record before the referee establishes by clear and convincing evidence that the respondent's disclosures of privileged communications made to him by Vasquez were in violation of the above rule. While respondent does contend that the disclosure falls within the crime fraud exception to the rule, he does not content that it falls within any exception to the rule listed above.

Respondent breached both Rule 4-1.6(a) and the confidentiality of the attorney-client relationship on several occasions. His first such breach occurred in August, 1993, when he filed a motion in the Biggins case which contained information pertaining to Vasquez' alleged involvement in two murders. Although the motion does not state the manner in which respondent came into possession of this information, it nonetheless was, according to respondent's own testimony, provided to him by Vasquez during the course of their attorney-client relationship. (Appendix A). In September, 1993, respondent filed a second motion on behalf of Biggins which divulged essentially the same privileged information set forth in the August motion. (Appendix B).

Subsequently, on March 1, 1994, respondent filed his Motion to Notice Actual Potential Conflict of Interest Between the

Undersigned and Government's Now-Listed Cooperating Witness Carlos Vasquez. (Appendix C). Like its predecessors, this motion sets forth in detail privileged communications regarding two murders which respondent states were made to him by Vasquez during the course of their attorney-client relationship. In paragraph two (2) of the motion, respondent unequivocally states that the reason respondent knows with certainty of these crimes is that "Carlos Vasquez was the undersigned's retained client" and 'In seeking legal advice, Carlos Vasquez informed the undersigned about the particulars of these murders". (Appendix C, p. 2).

Immediately following respondent's filing of the above referenced motion, a hearing was held. At that hearing, respondent gave sworn testimony and again repeated the confidential communication between himself and Vasquez. Additionally, respondent testified that Vasquez had not waived the attorney-client privilege.

The transcript discloses the following exchange between respondent and the Honorable William Stafford:

> THE COURT: Has Vasquez, in effect, waived the attorney-client privilege, if -- if the matters that you claim that you might be called upon to testify about were matters confided to you in that relationship?

MR. LANGE: It -- it was. As I pointed out, there has been -- there has been no waiver, but -- but what Vasquez and I -- Mr. Vasquez and I talked about early on when he came to -- he came to tell me about seeking legal advice the end of 1990 when he confided in me that he and --

MR. WHITE: Judge.

MR. LANGE: I'm sorry. I'm in the middle of an explanation. I will not explain it if Your Honor doesn't want me to. Does Your Honor want me to explain it?

THE COURT: Well --

MR. LANGE: I will do it at side bar. I'm trying to explain what's in the motion.

THE COURT: I guess I was asking, you said Vasquez has not, in effect, waived this on his own?

MR. LANGE: Well, what I put in the motion was, Judge, apart from the facts that are self-evident, about the murders, the alleged murders, what he told me, but what I'm -- what I'm saying is I advised Mr. Vasquez at that time that it could well be that since there were no pending charges -- he was advised -- he wasn't seeking my legal advice in an attorney-client capacity, he felt subjectively and objectively --

THE COURT: That's what you have in the motion.

MR. LANGE: I understand that, but what I'm saying to Your Honor is, you asked if I advised him, and I'm saying to you that I did advise him that this could be an exception to the attorney-client privilege under the client fraud doctrine, which -- which is something he has not been charged yet, as I understand that doctrine, something that he has not been charged with and he is seeking legal advice on. So I said I wasn't sure, it could -- it could be a problem in the future. So that's all I can say about it, Judge, about that.

(Appendix D, p. 7-8).

The following exchange occurred between respondent and Charles White, assistant United States attorney:

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> A. No. No. He paid. He paid money.

(Appendix D, p.28).

The following exchange occurred between respondent and Charles White, assistant United States attorney:

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> Q. I remember the facts.

A. Well, you asked me a question. I'm giving you an answer.

Q. To the extent we are hearing privileged things now, I would rather you not --

A. Well, I put it in the motion. I don't think it's privileged. I already told you I think it's crime fraud exception, so I don't think it is privileged, I don't think that's privileged, that's why I put it in the motion, that's why I'm testifying. If I thought it was privileged without exception, I wouldn't be telling you. Simple as that.

Q. So you knew all of this about Carlos Vasquez?

A. Knew all of what?

Q. All of these secrets, as his lawyer.

A. I knew some of his criminal information that he told me over 20 or so conversations in a year.

(Appendix D, p. 32-33).

As clearly evidenced by respondent's own testimony, Vasquez did not waive attorney-client privilege. Moreover, any communications which were made were done so during the course of the attorney-client relationship, in the course of Vasquez' seeking legal advice, and with the expectation of privacy.

The foregoing testimony by respondent also reflects his position that any communication divulged by him fell within the crime fraud exception to the attorney-client privilege.

In pertinent part, Florida Statute 90.502, entitled Lawyer-

client privilege, provides as follows:

(1) For purposes of this section:

(a) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(b) A 'client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.

(c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

(3) The privilege may be claimed by:

(a) The client;

(portion omitted)

(e) The lawyer, but only on behalf of the client. The lawyer's's authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no lawyer-client privilege under this section when:

(a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

It was respondent's position before the referee that the crime fraud exception to attorney-client privilege came into play because respondent had sought his assistance in the cover up of two murders which allegedly had already occurred, but for which Vasquez had never been charged. Respondent testified in the Bar proceedings that Vasquez believed an investigation was ongoing, but that he has was not implicated and wanted respondent's assistance on "how to keep these bodies buried". (TR. 36-37). Interestingly enough, however, examination of the transcript of the hearing before Judge Stafford (Appendix D) discloses no such testimony by respondent, nor is that position reflected in any of respondent's motions in the criminal case. In fact, the first time we hear that respondent was asked to actively participate in a crime ("how to keep these bodies buried") is when respondent takes that position in the disciplinary proceedings. Prior to that time, the record indicates that respondent's position was that the alleged fact that Vasquez had confessed the commission of two murders to him was sufficient to bring the information within the crime fraud exception. Prior to his response to the Bar and his testimony before the referee, nowhere is there any statement, discussion, nor testimony by respondent indicating he was asked to assist in the cover up of bodies which he had

earlier testified had already been buried for months. As reflected in the transcript of the final hearing, this issue was raised before the referee and considered by her. (TR. 80-82, 93-95).

In Schetter v. Schetter, 239 So.2d 51 (Fla. 4th DCA, 1970), the court stated that if a communication is made in confidence of the relationship and under circumstances in which it may be presumed it will remain in confidence, the attorney-client privilege arises and may be waived only by the client. Respondent testified under oath and unequivocally that Vasquez did not waive the privilege. His testimony further indicated that the communications at issue were made by Vasquez during the attorney-client relationship and presumably with the idea that same were confidential as the result of their professional relationship. Clearly, once the confidential communications are made from client to attorney, the privilege arises and remains unless specifically waived by the client. The client need not assert the privilege in order for it to arise or exist.

In Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA, 1992), the court held that an attorney may not be compelled to disclose a client's identity if to do so would expose the client to prosecution for criminal acts already committed and for which the

client had consulted the attorney. The facts in this particular case involved an attorney who had been contacted by a client wishing to return stolen property, Prosecutors wished to have the attorney identify the client, but were precluded from doing so by the appellate court. A similar finding was reached years earlier in Anderson v. State, 297 So.2d 871 (Fla. 2nd DCA, 1974).

As evidenced by Judge Stafford's sealed order of May 19, 1994 in the criminal case, it was his Honor's conclusion that respondent may have violated both the attorney-client privilege and his ethical obligation to preserve the confidences of his former client Vasquez. (TFB EX. 7). Specifically, the court noted and addressed respondent's contention with regard to the crime fraud exception and concluded that the record contained no evidence of ongoing criminal activity by Vasquez at the time of the alleged communication. In the absence of the element of ongoing activity, the exception does not come into play. In accordance with The Florida Bar v. Rood, 620 So.2d 1252 (Fla. 1993), both the order and the transcript of the proceedings resulting in the entry of the order, were submitted to the referee in the disciplinary proceedings. As set forth in Rood, referees are authorized to consider any evidence, such as the trial transcript or judgment from the civil proceeding, that they

may deem relevant in resolving the factual question.

In the matter sub judice, the evidence clearly reflects that any crime alleged to have been confessed to respondent by Vasquez was done so subsequent to the conclusion of the act. Furthermore, it was confessed during the course of the attorney-client relationship and with an expectation of privacy. The crime fraud exception to attorney-client privilege does not apply in the instant matter and the record before the referee contains competent and substantial evidence to support the referee's findings of facts and recommendation of guilt.

11. WHETHER THE REFEREE ERRED IN RECOMMENDING THAT RESPONDENT RECEIVE AN ADMONISHMENT FOR MINOR MISCONDUCT.

At the conclusion of the trial in this cause, the referee concluded that respondent **had** violated Rule 4-1.6(a) of the Rules of Professional Conduct and recommended that he receive an admonishment for minor misconduct. The Bar recommended that respondent receive a ninety day suspension. The Bar appeals the referee's recommendation as to the disciplinary sanction to be imposed.

The scope of this Court's review is broader when reviewing recommendations of discipline than when reviewing findings of fact. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). The reason being that this Court has ultimate authority for ordering appropriate disciplinary sanctions. The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994).

Florida Standards for Imposing Lawyer Sanctions, Section 4.22, provides that suspension is appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client. In the instant case, the disclosures made by respondent both related to the representation of a client and were not lawfully permitted to

be made. The potential for injury to the client clearly existed as evidenced by the court's sealing of the order referencing the disclosure and the prohibition against any of the parties discussion of the matters contained in the order. (Appendix E). Section 4.24 of the Sanctions provides that admonishment is appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client. This sanction is not applicable to the instant facts as respondent's disclosure of privileged communications was not negligent, but deliberate. Moreover, the disclosure had the potential for client injury.

Case law regarding discipline in fact situations similar to the present one is scant. In The Florida Bar v. Brennan, 377 So. 2d 1181 (Fla. 1979), the respondent was publicly reprimanded as the result of having revealed client confidences to his client's detriment, along with other misconduct. The Brennan case was the subject of a conditional guilty plea and consent judgment. In The Florida Bar v. Niles, 644 So. 2d 504 (Fla. 1994), the respondent was suspended for a period of one year having been found guilty of numerous charges of professional misconduct, included among them revealing client information without his

client's consent.

As reflected in the Report of Referee, a recommendation of a public reprimand is presently pending against respondent in The Florida Bar v. Kenneth T. Lange, Supreme Court Case No. 87,537. That earlier case is the subject of an appeal by respondent and is currently pending before this Honorable Court.

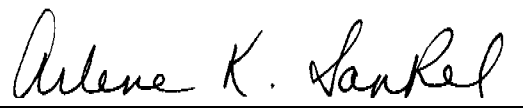
As stated in the referee's report:

> The attorney-client privilege assures clients that when they seek assistance from a lawyer their communications with the lawyer are protected and privileged and cannot be divulged by the lawyer without that privilege being violated. The courts must protect the attorney-client privilege or the image of the legal profession and public confidence in the judicial system will be undermined.
>
> (Appendix F, p. 3-4).

Lawyer discipline must satisfy a three-fold purpose. It must be fair to society, fair to the **attorney, and yet** severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Pahuleg, 233 So. 2d 130 (Fla. 1970). In light of the foregoing, this Honorable Court is respectfully urged to impose a disciplinary sanction consisting of a ninety day suspension.

CONCLUSION

Unless shown to be clearly erroneous or lacking in evidentiary support, a referee's findings of fact and recommendations are presumed to be correct and should be upheld. The record is replete with competent substantial evidence in support of the referee's findings of fact and recommendations as to guilt. However, in consideration of the particular misconduct involved, the facts surrounding it, and the applicable sanctions and case law, the referee's recommendation of an admonishment should be overturned in favor or a ninety day suspension.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing The Florida Bar's Answer Brief was sent via Airborne Express, airbill number 3369986620, to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was sent via certified mail, return receipt requested (Z 447 108 979) to Kenneth T. Lange, Respondent, at his record Bar address of 1111 Kane Concourse, Suite 506, Miami, Florida 33154, and via certified mail, return receipt requested (Z 447 108 980) to Kenneth T. Lange, Respondent, at 4770 Biscayne Boulevard, Suite 1470, Miami, Florida 33137, and via regular mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 15th day of July, 1997.

Arlene K. Sankel

ARLENE K. SANKEL, Bar Counsel