IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 88,694

vs.

KENNETH T. LANGE,

Respondent.
/

ON APPEAL FROM THE REFEREE'S
REPORT AND RECOMMENDATION

BRIEF FOR THE RESPONDENT

KEN LANGE, ESQ.
Respondent/
Attorney For Respondent
4770 Biscayne Blvd., Suite 1470
Miami, Fl. 33137
(305) 438-1122
Fla. Bar No. 258271

THE FLORIDA BAR v. KENNETH T. LANGE CASE NO. 88,694

CERTIFICATE OF INTERESTED PERSONS

Respondent, and undersigned counsel, hereby certifies that the following is a complete list of persons and entitites who have an interest in the outcome of this case.

Ken Lange, Esq.

Arlene K. Sankel
Assigned Bar Counsel

John A. Boggs
Director Of Lawyer Regulation
The Florida Bar

Referee Margarita Esquiroz

KEN LANGE,. ESQ.
Respondent/
Attorney for Respondent

STATEMENT REGARDING ORAL ARGUMENT

Ken Lange, Esq., the Respondent and counsel, respectfully suggests that although the facts and legal arguments appear to be adequately presented in the brief, Court file documents and the trial hearing transcript of February 10, 1997(all before the Court), Respondent would certainly be pleased to personally appear for oral argument to answer any questions regarding any subject relevant to this inquiry and that such a personal appearance may aid this Court's decisional process.

STATEMENT OF JURISDICTION

The Court has direct appellate jurisdiction from the referee's Order of Report and Recommendation.

STANDARD OF REVIEW

This Court has stated "The referee's findings of fact are entitled to a presumption of correctness when, they are supported by competent substantial evidence. Florida-Bar v. MacMillan, 600 So.2d 457, 459(Fla. 1992). Absent a showing that such findings are clearly erroneous or lacking in evidentiary support, they will not be disturbed by this Court. Id."

"Substantial" evidence has been defined as being "Forceful enough to compel reasonable minds to reach a conclusion, the same conclusion." Calvin v. State, 912 S.W. 2d 932(Ark. 1996).

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STATEMENT OF THE ISSUE

1. Whether the Referee's Order of Report and Recommendation for an admonishment for minor misconduct was supported by competent, substantial evidence found by any reasonable reading of the evidentiary, sworn testimonial trial record, along with Complainant and Respondent's exhibits introduced, in the evidentiary hearing February 10, 1997. Were the confidential communications disclosed by the Respondent protected by the attorney-client privilege, or, as Respondent contends, not so protected, falling under the "Crime-Fraud" exception to that privilege.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below.

The Florida Bar filed a petition alleging the Respondent

violated the attorney-client privilege of former client Carlos Vasquez. Respondent answered, contending there was no such improper disclosure, as the disclosures at issue were not covered or protected by the attorney-client privilege, but were exceptions under the "Crime-Fraud" Doctrine. (R. T. 11-28). The Respondent, under oath and in great detail, testified before the Referee as to the at-issue communications with Carlos Vasquez and exactly why Respondent's disclosures during a case in the Northern District of Florida, Tallahassee Division(U.S.A. v. Keith Biggins, et al.), Judge William Stafford, fell outide the attorney-client privilege and squarely within the Crime-Fraud exception to that privilege. (R. T. 28-104).

Despite the Referee indicating she was "wavering back and forth" (R. T. 90, line 16) on the issue of whether an ethical violation existed, she ultimately concluded one did exist, recommending an Admonishment of the Respondent.(R. T. 104).

2. Statement of the Facts.

(T. R. 11-104)

The Respondent was retained to represent Keith Biggins in a very large, mega-historical conspiracy, numerous defendants, involving the shipment of enormous quantities of crack cocaine from Miami to Tallahassee. (Judge William Stafford/Northern District of Florida, Tallahassee Division. Case No. TCR 93-04028-WS). The case was specially-set to commence trial before Judge Stafford on March 1, 1994. On the day preceeding(February 28th), the Respondent received for the first time from the assigned federal prosecutor his Witness List, listing among others a person by the name of Carlos Vasquez. Vasquez had been for a time, on an unrelated drug case prior-in-time to the representation

of Keith Biggins here, a client of Respondent's.

On March 1, 1994, as a factual basis for a motion for continuance/motion to recuse Respondent from further representation of Keith Biggins, Respondent set forth certain facts minimally-necessary to explain the need for the motion(and why it was so late in coming), as well as the efforts(considerable) on the part of the Respondent to avoid this last-minute in-Court crisis by several detailed motions to compel Discovery regarding Carlos Vasquez during the several months leading up to trial. Immediately, on March 1, 1994, the Court held an evidentiary hearing on this motion, and the Respondent testified under oath. The bulk of this hearing concerned itself with whether the Respondent could continue to represent Keith Biggins and the trial could proceed as scheduled or would have to be continued. Although Judge Stafford ultimately "suggests" his conclusion 2½ months later, in an Order dated May 19, 1994, that the Respondent violated attorney-client privilege/that "Crime-Fraud" Doctrine-exception did not apply, Judge Stafford noted "the court is cognizant of the fact that the issue/this issue was not the focus of the court's March 1, 1994 hearing." Stipulated Petitioner's Exhibit, the Sealed Order dated May 19, 1994, p. 6, note 3.

The first opportunity the Respondent had to address this issue of potential violation of Carlos Vasquez' attorney-client privilege, following release of Judge Stafford's "suggestion" on this point in his Sealed Order of May 19, 1994, the Respondent's first in-depth, detailed opportunity to address this specific allegation, was in a letter of response written to assigned Bar counsel Arlene Sankel. The very first communication by the Bar to the Respondent regarding this issue was in a letter dated July 28, 1994 from Bar counsel Arlene Sankel,

seeking Respondent's position on Judge Stafford's May 19th Order. The same day as receiving Ms. Sankel's letter-request, on August 1, 1994(2½ years before trial in this matter), the Respondent, in detail, responded with all facts pertinent to the issue of the disclosures and why they fell within "Crime-Fraud" exception to attorney-client privilege.(R. Defense Composite Exhibit 1 at Trial, February 10, 1997): These facts are:

...That during the representation of Carlos Vasquez on the unrelated, prior drug case, Vasquez came to Respondent's office actively seeking advice on the best **way** to cover-up what Vasquez stated was his role in the murder of as he put it "2 other dealers" which had recently-occured in Miami. Vasquez stated that he and Reggie Biggins(coincidently, Keith Biggins' cousin) had both murdered 2 men in Miami, dumping their bodies. Although both murders were apparantly being investigated according to Vasquez, Vasquez claimed that he was not a suspect. Vasquez, specifically, was seeking the Respondent's legal advice as to how best to approach the cover-up of the bodies so as to not become a suspect. Immediately, while still conducting the office conference, the Respondent informed Vasquez he should not be telling Respondent this, as the information would not be covered by the attorney-client privilege, as Vasquez was not seeking legal advice for a current, known legal problem but was instead seeking out Respondent's help in trying to cover up the murder, and Vasquez' complicity in it. (Although according to Vasquez an investigation was on-going, the bodies themselves had not yet been discovered). Respondent informed Vasquez up-front at that office meeting that what Vasquez was asking Respondent to do would amount to Respondent becoming a coconspirator with Vasquez and Reggie Biggins

in the murders, as well as involving Respondent as an Accessory After the Fact to the murders; in a Misprison of a Felony and an Obstruction of Justice. Angrily, Respondent kicked Vasquez out of the office and told him Respondent would immediately cease representing Vasquez in the pending drug case. Subsequently, Respondent withdrew from representing Carlos Vasquez, citing unspecified "irreconcilable conflict." (Vasquez was later convicted of his role as a major coconspirator in this drug case and sentenced to 30 years imprisonment).

At the evidentiary hearing before Judge Stafford March 1, 1994, Respondent answered both the Court's and Government counsel's questions to the extent necessary to satisfy the questions. Government counsel was obviously upset about Respondent's revelations regarding Vasquez, now one of the Government's proposed feature witnesses at trial, and Respondent's declaration that Respondent would offer himself as a proposed defense witness for Keith Biggins, an impeachment witness in the defense case, once Carlos Vasquez testified at trial, regarding Vasquez' attempted murder-coverup.(Assuming future defense counsel could convince the Court of the admissibility of this proposed collateral crimes 404(b) evidence). The Court granted Keith Biggins, based on the aforementioned, a trial continuance and granted Respondent's motion to withdraw as Biggins' counsel. (It should be noted that at no time up until and including this date/June 25, 1997, has Carlos Vasquez or his retained attorney Larry Handfield ever invoked attorney-client privilege regarding this murder/conspiracy cover-up conversation detailed above between Vasquez and Respondent. Nor have Vasquez or Handfield ever disputed the slightest fact alleged by Respondent in this regard. The complaint about the disclosure came from Gbvernment counsel and

Judge Stafford, neither of whom represented or represent Carlos Vasquez).

The real issue for Bar Counsel Arlene Sankel has nothing to do with the issue of this Complaint, but, rather, with as yet uncharged separate ethical complain tregarding the undersigned's alleged failure to report Vasquez' murders/coverup to police. Ms. Sankel disclosed what her real issue was in this matter, in the following questions to the Respondent during the February 10, 1997 trial. Beginning at page 52, line 23, "Mr. Lange: That he sought my active assistance in covering up the murder and the discovery of the two bodies he said he killed. (Page 53). 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 been 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.

(Continuing p. 53, at line 11)

"Ms. Sankel: You are aware, aren't you, that under Rule 4-1.6(A), "A lawyer shall reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime. Mr. Lange: If you want to file another Bar complaint saying that I did something else wrong, then do that. But as far as what we are here on this -- I answered your question. I did not pick up the phone and call the police and say, "This guy confessed to me and wanted me to participate in covering up the buried bodies of two murder victim-s. I did not do that. If there is another Bar complaint coming, do it, but that has nothing to do with this. The request of

the client was Crime Fraud Exception to attorney/client. "

3. Statement of the Law.

In determing whether the attorney-client privilege has attached, the Court must examine the circumstances from the perspective of the client. United States v. Schaltenbrand, 930 F.2d 1554, 1562(11th Cir.), cert. denied, 502 U.S. 1005(1991). Since no one can assert the attorney-client privilege but the person holding the privilege, i.e. the client himself, and since Carlos Vasquez(or through his attorney Larry Handfield) has never asserted such a privilege, the Court is completely without information as to what Carlos Vasquez' "perspective" would be on the aforementioned factual disclosures by counsel. However, Vasquez' complete silence on this issue over the last 39-plus months(from March 1, 1994-Present), circumstantially provides strong evidence of non-objection. However, with or without objection, it would be unreasonable for Carlos Vasquez to believe his communications with Respondent attempting to actively solicit Respondent's assistance in the cover-up of a double homicide, that these communications would be protected by attorney-client privilege.

To invoke the Crime-Fraud exception successfully, the party attempting to invoke it "has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality... and that there is some relationship between the communications and the illegality." United States v. Laurins, 857 F.2d 529, 540(9th Cir. 1988).

To trigger the Crime-Fraud exception, the moving party must establish that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the

scheme. In Re Sealed **Case**, 754 F.2d 395, 399 (D.C. Cir. 1985). The movant need not come forward with proof sufficient to establish the essential elements of a crime or fraud beyond a reasonable doubt, but it is not sufficient for the movant merely to allege that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney.

For the Crime-Fraud exception to apply, "the attorney need not himself be aware of the illegality involved; it is enough that the communication furthered, or was intended by the client to further, that illegality." United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1991); see also United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) ("the crime or fraud exception applies even when the attorney is completely unaware that this advice is sought in furtherance of such an improper purpose.") Since the attorney-client privilege exists for the benefit of the client, not the attorney, it is the client's knowledge and intentions that are of paramount concern to the application of the Crime-Fraud exception; the attorney need know nothing about the client's ongoing or planned illicit activity for the exception to apply. Even if the Respondent were completely in the dark about the details of Carlos Vasquez' ongoing illegal activity (such was not the case), that would be completely irrelevant in determining whether the communications were made "in furtherance" of Vasquez' criminal activity.

The Crime-Fraud exception does not even require the attorney to participate, even unwittingly, in the client's criminal activity. A communication can be "in furtherance of" the client's criminal conduct

even if the attorney ddes nothing after the communication to assist the client's commission of a crime, and even though the communication to the attorney turns out not to be helpful(and perhaps even to hinder) the client's commission of a crime. Moreover, inasmuch as the movant need not establish, for purposes of Crime-Fraud exception, that the crimes succeeded, see In re Grand Jury Subpeona Duces Tecum(Marc Rich & co. A.G.), 731 F.2d 1032, 1039(2d Cir. 1984)..., the movant is not required to prove that the communications with Carlos Vasquez and the Respondent in fact helped commit the crimes.

Certainly, the communications detailed above between Carlos Vasquez and Respondent demonstrate clearly there is a reasonable cause that communications between counsel and client were in furtherance of and closely related to alleged crimes; that the Respondent has established a prima facie case that the legal advice being sought by Carlos Vasquez from the Respondent was sought in furtherance of and wqs sufficiently related to ongoing crimes. The Crime-Fraud exception to attorney-client privilege is good Public Policy and applies to communications "in furtherance of intended, or present, continuing illegality." Hodge & Zweig, supra, 548 F.2d at 1355.

In Upjohn Co. v. United States, 449 U.S. 383, 389(citing (1981) 8 J. WIGMORE, EVIDENCE Section 2290(J. McNaughton rev. ed. 1961), the U.S. Supreme Court described the purpose of the attorney-client privilege as follows:

> "To encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound Legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

Id.

To establish the existence of the attorney-client privilege, there must first be a communication. Second, this communication must be between the client and his attorney or the attorney's subordinates. Third, the communication must be made in confidence. Finally(fourth), the communication must be made for the "purpose of seeking, obtaining, or providing legal assistance for the client." EDNA S. EPSTEIN & MICHAEL M. MARTIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 14(2d ed. 1989)(citing RESTATEMENT, THE LAW GOVERNING LAWYERS Section 118(Tentative Draft No. 1(1988))).

Concerning the fourth or final prong mentioned above, this is a balancing test that Professor Wigmore thought any privilege should satisfy in order to be recognized. 8 J. WIGMORE, supra, at Section 2285. His whole balancing test is as follows:

> (1) The communications must originate in a confidence that they will not be disclosed,
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Id.(Emphasis supplied). Professor Wigmore's test has been extremely influential on modern courts, which have adopted his approach of only considering "systemic harms" under this final or fourth prong of the balancing test. Thus, the injury to the parties in court does not matter; the benefit of encouraging the communications is weighed in the abstract against the costs imposed on the truth-seeking process. Developments in the Law-- Privileged Communications, 98 HARV. L. REV. 1450, 1473(1985).(Emphasis supplied).

CONCLUSION

The referee abused her discretion in deciding this case, her decision being based on neither competent nor substantial evidence of wrongdoing. Her decision is not entitled to a presumption of correctness by this Court.

The Respondent has been a member in completely good standing with the Florida Bar for the last 19½ years. The Respondent has tolled long, hard and honorably first for 5 years as an Assistant State Attorney in the Dade County State Attorney's Office(leaving that Office in the top trial level of the Major Crimes Division), and for the last 14½ years, practicing exclusively in the area of criminal defense.

After 19½ years of service, the Respondent should not have his record marred by this admonishment.

Respectfully submitted,

LAW OFFICES OF KEN LANGE
4770 Biscayne Blvd., Suite 1470
Miami, Fl. 33137
(305) 438-1122
Fla. Bar No. 258271

By; _____
KEN LANGE

CERTIFICATE-! OF SERVICE

I hereby certify the original of this Initial Brief On The Merits, pages 1-12, and 7 copies was mailed to the Clerk of court, The Florida Supreme Court, 500 South Duval Street, Tallahassee, Fl. 32399-1927; a copy mailed to assigned Bar counsel Arlene K. Sankel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Fl. 33131; and a copy mailed to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl. 32399-2300, all occuring June 25, 1997.

KEN LANGE