IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, vs. KENNETH T. LANGE, Respondent. _____/	Supreme Court Case No. 87,537 The Florida Bar File Nos. 95-70,892(11L) 95-70,921(11L)

On Petition for Review

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

For the purposes of this Answer Brief, The Florida Bar will be referred to as either The Florida Bar, the Bar, or Complainant. Kenneth T. Lange will be referred to as the Respondent or Lange. Other persons will be referred to by their respective surnames.

References to the transcript of proceedings before the Referee will be denoted as TR and page number. References to the Report of Referee will be noted as RR and page number.

An index to appendix can be found at the conclusion of this brief.

STATEMENT OF THE CASE

Following a finding of probable cause by Grievance Committee "L" of the Eleventh Judicial Circuit, The Florida Bar filed its complaint against respondent on March 8, 1996. On March 20, 1996, the Honorable Moie J.L. Tendrich was appointed to serve as referee in these proceedings. Final hearing was held on May 13, 1996. The Report of Referee recommending a public reprimand was entered on May 23, 1996. (Appendix H)

Respondent filed a Notice of Appeal to Supreme Court of Report of Referee dated May 30, 1996. On June 14, 1996, Bar counsel wrote the Honorable Sid J. White, Clerk, with a copy of said letter to respondent, advising that the Report of Referee in this cause had been considered by the Executive Committee of the Board of Governors and that the Bar would not be filing a petition for review in this matter. On July 11, 1996, The Florida Bar filed its Motion to Dismiss Respondent's Notice of Appeal. The Bar's motion was predicated upon respondent's failure to file his appellate brief within thirty days of his notice of appeal. On that same date, respondent filed a Motion to Withdraw Notice of Appeal. Shortly afterwards, respondent filed a second motion whereby he sought to withdraw his previously filed Motion to Withdraw Notice of Appeal and requested an extension of time within which to file his initial

brief on appeal. On July 18, 1996, this Honorable Court entered an order dismissing respondent's Notice of Appeal and reprimanding him for professional misconduct. On July 19, 1996, respondent filed a Motion for Rehearing which was granted by order dated October 22, 1996.

On November 15, 1996, respondent filed his Initial Brief. On December 2, 1996, The Florida Bar filed a Motion to Strike Respondent's Initial Brief on Appeal and Motion to Toll Time. The Motion to Toll Time was granted on December 4, 1996. The Motion to Strike was granted on December 27, 1996 and respondent was given fifteen days within which to file a brief that conformed to the Rules of Appellate Procedure. Respondent subsequently timely filed a brief.

STATEMENT OF THE FACTS

(AS TO COUNT I)

In 1994, respondent was appointed as a special public defender to represent one Rickey Bernard Roberts on a charge of first degree murder. (TR. 25). At the conclusion of a jury trial, a guilty verdict was returned and the defendant was subsequently sentenced to the death penalty. (TR. 28). Another special public defender was appointed for the purpose of appeal, said appeal resulting in the defendant's conviction and sentence being affirmed. (TR. 28).

Subsequently, the Office of Capital Collateral Representative became involved in the Roberts case and petitioned for federal habeas corpus relief on Roberts' behalf. Respondent testified that he was contacted by counsel for the Office of Capital Collateral Representative, who sought his assistance in their attempt to go forward with the habeas petition. (TR. 29). Respondent stated that he was asked to search his memory and, in hindsight, consider whether there was anything he would have done differently with regard to his representation of Roberts. (TR. 29). In response, he indicated that he would have requested a second person be appointed to assist in the death penalty phase of the case. (TR. 31). He also brought up the issue of the jury view of the crime scene. (TR. 33). It is from that issue that Count I of these

disciplinary proceedings arose.

On March 31, 1992, a hearing was held before the Honorable James Lawrence King in the matter of Rickey Bernard Roberts v. Richard L. Dugger, Case No. 91-571-Civ-King, in the United States District Court for the Southern District of Florida. The purpose of said hearing was to consider Roberts' habeas petition. The respondent, Kenneth T. Lange, was called as a witness in those proceedings. (Appendix A). Portions of his testimony were as follows:

> BY MR. DUNN:
>
> Q. There came a point in time where the case was given to the jury and they went into deliberations. Did the jury at a certain point in their deliberations ask a question? Do you recall that?
>
> A. Yes, after may 14 or so hours after the deliberations had started it looked like it might be a hung jury coming and the jury returned a question that they wanted to go out -- if this is what you are referring to -- they wanted to go out to he alleged crime scene for a jury viewing of the scene.
>
> (Appendix A)

Respondent's testimony continued:

> BY MR. DUNN:
>
> Q. Yes, tell us what you talked to Mr. Roberts about? Tell us what you told Mr. Roberts about the jury view.
>
> A. I did not tell him that I believed that he had a right to be present.
>
> I did not tell him that he -- that I felt that he had the right to have the Judge present at

the jury view. I did not tell him that he had I felt a certain input that he could give in recreating the jury view so that it would be as accurate as possible to what the alleged crime scene supposedly was at the time. And I had a reason for that.

Q. What was your reason?

A. The reason was that at the time in the State of Florida for a capital case there was no ability to get excess attorneys fees above the statutory maximum of $3500, no ability at all, could not get one penny more than $3500.

They have since changed that and recognized that all capital cases are considered more extraordinary than usual so they lifted the cap automatically in any capital case. Then you can bill up to whatever your reasonable hours were. But at the time $3500 was the maximum.

Again I was fairly new into the defense practice. This case had taken an enormous amount of time to try to prepare, just the guilt and innocence phase, forgetting the death phase, possible death phase but just the guilt and innocence phase, had taken an enormous amount of time. I had exceeded that $3500 gap long ago in terms of my work on the case.

If you honestly want to know what I was thinking at that moment, I was thinking 14 hours into the case it was a likely hung jury, the last thing that I wanted was a hung jury because I would have to retry the case for free because there was no provision at the time to exceed the $3500 --

THE COURT: What does this have to do with whether or not you told your client that he had a right to be present at the jury view and that he had a right to insist that the jury and judge be present at the jury view if and indeed he did under existing Florida law.

What bearing does any of this have on that. In other words, you waived your client's right to be present at the jury view. You said that you had a tactical reason for doing that.

What is your tactical reason.

THE WITNESS: I was explaining that. It was a personal reason.

You asked me why, and I was explaining that because of the money situation I didn't want a hung jury so that I wouldn't have to retry the case.

(TR. 7-10; Appendix A).

Respondent's testimony continued as follows:

THE COURT: Fine. I'm sure you did. What did you decide? Why did you decide that it was not helpful for him to be there.

THE WITNESS: Well Judge, I can only explain it the way I want to explain it. If your Honor doesn't want --.

THE COURT: So you based it on financial reasons that you decided it was not helpful for him to be present.

Is that what you are telling the Court under oath?

THE WITNESS: I am under oath, Judge; that's right.

THE COURT: I am asking you because obviously this is an important question.

Did you decide based purely on a financial matter personal to you that you would not insist -- that you would waive your client's right to be present at the view?

THE WITNESS: You want to know what was my principal motivation.

THE COURT: I asked you if that was your motivation.

THE WITNESS: That was my principal motivation.

THE COURT: You had no other consideration?

You didn't consider anything about whether or

not it would be helpful to him or not; is that right?

THE WITNESS: I frankly didn't give that any real consideration.

THE COURT: If you had given it any consideration, if you had to make the same decision today, do you think it would be helpful to a client if he is standing there while the jury looked at the scene.

THE WITNESS: If I had to make that same decision today, I would have objected to the jury view. I would have objected to any recreation of the scene and I would have wanted a hung jury knowing that's the way it look like.

A hung jury in this case would have been almost as good as a win because then the State would have had to decide whether to retry him.

(TR. 10-12; Appendix A)

The dialogue between Judge King and respondent continued as follows:

THE COURT: What would your advice be, to go or not to go?

THE WITNESS: My advice would be that I think that he should be there so the jury doesn't minimize the importance of that and does not think that it is as important as any other part of the trial.

THE COURT: Okay, fine. So you would generally under those circumstances advise a client to be present.

THE WITNESS: In any circumstances.

THE COURT: Why did you not advise this man to be present?

THE WITNESS: Because I didn't want to get into explaining to him about this because I was afraid that for some reason he would object to the jury view and we

> would get to the into this business and somehow there would be a problem so that the hung jury would occur.
>
> I mean I didn't want to have any conversation with him on this issue because I really didn't want a hung jury and I felt this was the best way to get a verdict of some kind to avoid a retrial.
>
> THE COURT: Even if it would be guilty of first degree murder.
>
> THE WITNESS: Well, I assumed it was going to be a lesser offense.
>
> (TR. 12-13; Appendix A).

Respondent testified before the referee in the Bar proceedings that his overriding concern was to try to obtain a second degree murder verdict which, based on the facts, he would have considered a victory for the defendant and that he didn't believe a hung jury would be in his client's best interest. (TR. 37-40). This testimony is in total contrast with respondent's earlier testimony before Judge King wherein he stated, under oath, that his principal motivation was financial concerns personal to him. (TR. 11, 53). Respondent's testimony before the referee regarding his failure to advise his client regarding his right to be present at a jury view of the crime scene remained consistent with his earlier testimony before Judge King. (TR. 55; Appendix A).

On June 5, 1992, Judge King denied Roberts' petition for habeas corpus relief. (Appendix B). In his opinion, Judge King addressed respondent's testimony concerning his motivations with

regard to the jury viewing of the crime scene. Although Judge King found the testimony to be unworthy of belief and concluded that respondent was willing to say anything to help his client, he concluded that in any event, the decision to waive the defendant's presence was the correct one. (Appendix B, p. 1118). On appeal to the United States Court of Appeals for the Eleventh Circuit, the District Court's denial of the habeas petition was affirmed. (Appendix C).

As reflected in the transcript of the proceedings before the referee, this matter was referred to The Florida Bar by Chief Judge Tjoflat of the Eleventh Circuit Court of Appeals. (TR. 15, 54). In his correspondence to the Bar, Chief Judge Tjoflat observes that either the respondent testified truthfully before Judge King or he did not. (Appendix D). In either event, the possibility of a disciplinary rule violation exists. Upon consideration of this matter by a grievance committee, a finding of probable cause resulted as to Rule 4-1.4(b) (A lawyer shall explain a matter to the extent reasonable necessary to permit the client to make informed decisions regarding the representation); Rule 4-1.7(b) (A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities

to another client or to a third person or by the lawyer's own interest); Rule 4-2.1 (In representing a client, a lawyer shall exercise independent professional judgment and render candid advice...); and Rule 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice...) of the Rules of Professional Conduct.

(AS TO COUNT II)

In 1992, respondent began advertising his legal services in the Southern Bell Yellow Pages. (TR. 19). The advertisement contained the following statements "All Federal & State Courts in 50 States" and "When the Best is Simply Essential". (Appendix E).

On February 24, 1992, respondent was notified by the Standing Committee on Advertising that his above referenced ad contained possible rule violations. (Appendix F). In particular, he was advised that attorney advertisements are prohibited from containing self-laudatory statements or statements characterizing the quality of the lawyer's services and are further prohibited from containing material misrepresentations of fact or law. The two particular portions of his ad set forth above were clearly referenced as being potentially problematic. On April 8, 1992, advertising counsel responded to interim communication from respondent stating that the advertising committee had voted to sustain its earlier disposition

regarding respondent's ad for the reasons set forth in its earlier correspondence. (Appendix G).

Respondent's testimony before the referee indicated that he understood the committee's correspondence to state that his advertisement was possibly in violation of the rules on attorney advertising, but that he disagreed with their assessment. (TR. 20-22). In any event, respondent's testimony before the referee indicated that he was not admitted to practice in the state courts of all fifty (50) states, nor was he admitted to practice in all federal courts, although he argued that the commerce clause of the United States Constitution would prevent him from being denied admission to any court. (TR. 23, 46).

After hearing the testimony and considering the evidence as to Count II, the referee found respondent guilty of the following rule violations: Rule 4-7.1(a) (A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services...) and Rule 4-7.2(j) (A lawyer shall not make statements that are merely self laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communications...) of the Rules of Professional Conduct.

SUMMARY OF ARGUMENT

The findings of fact made by the referee are neither clearly

erroneous nor lacking in evidentiary support and are fully supported by the record. Moreover, a referee's findings of fact enjoy a presumption of correctness and will be upheld unless that presumption is overcome by a showing that the findings lack competent substantial supporting evidence or are clearly erroneous. The respondent has failed to satisfy his burden and has not been able to overcome the presumption of correctness.

The referee sits in the unique position of being able to observe the witness directly and to render judgment as to issues of credibility. Those judgments, as reflected by the Report of Referee, are supported by the evidence, although contrary to respondent’s position.

Based on the evidence and testimony produced at trial and the referee's resulting findings of fact, the referee correctly determined that respondent's actions constituted a violation of the Rules of Professional Conduct.

POINT ON APPEAL

I

WHETHER THE FINDINGS OF FACT MADE BY THE REFEREE ARE NEITHER CLEARLY ERRONEOUS NOR LACKING IN EVIDENTIARY SUPPORT AND ARE FULLY SUPPORTED BY THE RECORD BEFORE THE REFEREE. (Restated)

ARGUMENT

I. THE FINDINGS OF FACT MADE BY THE REFEREE ARE NEITHER CLEARLY ERRONEOUS NOR LACKING IN EVIDENTIARY SUPPORT AND ARE FULLY SUPPORTED BY THE RECORD BEFORE THE REFEREE. (Restated)

The burden of proof before this Court is upon the Respondent who has petitioned for review of the Referee's Report. The Florida Bar v. McLure, 575 So. 2d 176 (Fla. 1991). The Report is, of course, presumed to be correct and will be upheld unless clearly erroneous or lacking competent substantial evidence. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993); The Florida Bar v. Smiley, 622 So. 2d 465 (Fla. 1993). Respondent has failed to meet his burden of proof and has failed to overcome the presumption of correctness.

Respondent's contention, as set forth in his brief, appears to be that the findings and recommendations of the Referee are either clearly erroneous or lacking in evidentiary support. Review of the referee's findings of fact and recommendations reveal that they are, in fact, fully supported by the record.

As set forth in the Bar's Statement of Facts, respondent testified at length before Judge King in the Federal District Court habeas proceedings. In addition to portions of that testimony being read into the record before the referee, the entire transcript of respondent's testimony was accepted into evidence by

the referee. (Appendix A). The entire thrust of that sworn testimony clearly reflected respondent's self interest when confronted with the issue of advising his client with regard to a jury viewing of the crime scene. Respondent clearly and absolutely testified, under oath, that he did not advise Rickey Roberts of his right to be present or to have the judge present at the viewing. He did not advise his client with regard to any rights he may have had in recreating the alleged crime scene. Most important, respondent offered an explanation for his reasons in not so advising his client. The reason was financial. Respondent was concerned that if a hung jury resulted, the case would have to be retried with no additional fee to him. (TR. 7-10). By his own admission, respondent was faced with a conflict of interest which he resolved by putting his own financial interests first. His testimony in this regard was neither imprecise nor confusing. Respondent's contention that same is not a reason for disciplinary action is simply wrong.

Similarly, respondent's contention that his testimony before Judge King was limited in scope and that only his testimony before the referee developed the issue at hand is ludicrous. One has only to examine the transcripts of both hearings to reach a conclusion to the contrary. The evidence of misconduct by the respondent was

abundant.

The Report of Referee sets forth a portion of Judge King's opinion resulting from the hearing on Roberts' habeas motion. (Appendix H). Included in that excerpt is Judge King's disbelief of respondent's testimony. Having noted same, the referee specifically found that respondent had violated the Rules of Professional Conduct whether he testified truthfully before Judge King or untruthfully. (Appendix H, p.3-4).

With regard to Count II of the complaint, the record is replete with evidence to support the referee's findings that respondent's Yellow Pages advertisement was in violation of the rules governing attorney advertising. Having considered the testimony and evidence presented, as well as argument of counsel, the referee concluded that the ad was both self laudatory and misleading. (Appendix H, p. 4-5).

Respondent's contention that the phrase "When the Best is Simply Essential" has nothing to do with self promotion was simply not acceptable to the referee as evidenced by his findings. Clearly, the referee considered respondent's weak attempts of explanation and discounted same.

Similarly, respondent would have us believe that by use of the phrase "All Federal and State Courts in 50 States", he did not mean

to imply that he was licensed in all state and federal courts and that such an interpretation would not be a fair reading of his ad. The fact is that respondent testified he was not a member of all state and federal bars and yet his ad implies that he is. (TR. 23). Furthermore, respondent admitted that he had been advised about potential problems with his ad, but did not agree with the advertising committee's assessment of his ad. (TR. 22). Apparently, respondent chose to proceed at his own risk. Both respondent's testimony and the correspondence from the advertising department were part of the record before the referee and considered by him prior to the rendering of his report.

Respondent did argue that the commerce clause of the Constitution prohibits an attorney from being denied the right to represent a client in a jurisdiction where he is not a member of the bar. Concluding, therefore, that his ad was not misleading. The Bar submitted a memorandum of law to the referee on this issue. The Bar pointed out that respondent's argument was unequivocally rejected in Leis v. Flynt, 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 717 (1979), wherein it was stated that:

> There is no right of federal origin that permits such lawyers to appear in state courts without meeting that State's bar admission requirements. This court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice

> altogether or on a case-by-case basis. **See *Norfolk & Western R. Co. v. Beatty*, 423 U.S. 1009, 96 S.Ct. 439, 46 L.Ed.2d 381 (1975), summarily aff'g 400 F.Supp. 234 (SD Ill.); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034, 94 S.Ct. 533, 38 L.Ed.2d 327 (1973), summarily aff'g 359 F. Supp. 549 (ED Va.). Cf. *Hicks v. Miranda*, 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223 (1975). These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another.**

Furthermore, there is no unrestricted right to appear in Federal Courts. The rule regarding guest appearances in Federal Courts is summarized in 7 Am. Jur. 2D Attorneys at Law § 23:

> **There are no uniform rules or statutes regarding appearances pro hac vice in the United States District Court, and when an issue has arisen as to an attorney's appearance pro hac vice, the courts in some cases have held it to be a matter of privilege while in other cases it has been held to be a right which could not be denied as an exercise of discretion except for cause.[8]**

Accordingly, there is no support for respondent's contention regarding admissibility to foreign bars.

Respondent argues that the findings of fact made by the referee are not supported by the evidence or are clearly erroneous. The aforesaid examination of the referee's findings in light of the testimony and evidence presented clearly establish that the referee's findings are neither erroneous, unjustified, nor unlawful and furthermore, are well supported by the record in this cause. The referee was able to directly evaluate the witness and the evidence and his findings are entitled to a presumption of

correctness. The Florida Bar v. Saxon, 379 So. 2d 1281, 1283 (Fla. 1980). Respondent has failed to carry his burden of showing that the referee's findings were clearly erroneous or lacking in evidentiary support as required by The Florida Bar v. Carter, 410 So. 2d 920, 922 (Fla. 1991).

Having found respondent guilty of all rule violations alleged by the Bar, the referee recommended that respondent receive a public reprimand. A review of applicable case law indicates that such a sanction is appropriate.

In The Florida Bar v. Herrick, 571 So. 2d 1303 (Fla. 1991), this Honorable Court held that violation of rules governing attorney advertising warranted a public reprimand. In The Florida Bar v. Kramer, 593 So. 2d 1040 (Fla. 1992), the respondent received a public reprimand following a guilty finding as to violations of conflict of interest rules.

The Florida Bar's evidence clearly and convincingly proved Respondent's guilt and the Referee's findings and recommendations should be affirmed by this Honorable Court.

CONCLUSION

The Referee's findings of fact are entitled to a presumption of correctness. Review of the record of these proceedings provides an evidentiary basis upon which the referee's findings are predicated. The findings are neither erroneous nor unjustified and in fact, are clearly supported by the evidence and testimony. Moreover, the findings of fact support a finding of guilt as to Respondent's violation of Rules 4-1.4(b), 4-1.7(b), 4-2.1, 4-8.4(d), 4-7.1(a), and 4-7.2(j) of the Rules of Professional Conduct. Accordingly, the sanction of public reprimand is appropriate and the Referee's recommendation should be affirmed.

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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 3369987821, 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 (P 092 779 515) to Kenneth T. Lange, Respondent, **1111 Kane Concourse, Suite 506, Miami, Florida 33154,** and via regular mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this _____ day of January, 1997.

ARLENE K. SANKEL, Bar Counsel

INDEX TO APPENDIX

A. Transcript of proceedings of March 31, 1992 in

Roberts v. Dugger, Case No. 91-571-Civ-King.

B. Opinion in Roberts v. Singletary, 794 F. Supp 1106 (SD Fla, 1992).

C. Opinion in Roberts v. Singletary, 29 F. Rep. 3d 1474 (11th Cir., 1994).

D. Letter dated January 21, 1995 from Chief Judge Tjoflat to The Florida Bar.

E. Advertisement.

F. Letter dated February 24, 1992 from The Florida Bar to respondent.

G. Letter dated April 8, 1992 from The Florida Bar to respondent.

H. Report of Referee.