

FILE NO. C5-01-1871

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action
against JOSEPH ANTHONY WENTZELL,
an Attorney at Law of the
State of Minnesota.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION
FOR DISCIPLINE**

COPY

The above-entitled matter came before the Undersigned Referee, acting on assignment by the Minnesota Supreme Court, on February 28 and March 1, 2002.

Timothy M. Burke appeared on behalf of the Director of the Office of Lawyers Professional Responsibility (Director).

The Respondent appeared personally, and through his attorney, Richard J. Harden, Esq.

Upon all of the files and records herein and upon the evidence adduced at said hearing, the Referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in the State of Minnesota on October 18, 1985. Respondent currently practices in St. Anthony, Minnesota. (R. test.)

2. In or about December 1996 Lawrence and Carol Hurre, husband and wife, and Timothy Hurre, their son, retained Respondent to represent them to resolve issues with their creditors (R. answer). Lawrence and Carol on the one hand, and Timothy on the other, had substantially intertwined farming operations (R. test.). Respondent's firm opened two client files, one for representation on Lawrence and Carol's workout, and one for representation on Timothy's workout (R. answer).

3. In November 1997 a check on Lawrence and Carol's account in the amount of \$17,600 was paid to Respondent's firm (R. answer; Exh. 1a). The payment was credited to the workout matter on behalf of Lawrence and Carol and was in payment for services already rendered before the check was issued (Exh. 35, pp. 1-2, & 32; R. test.).

4. On or about January 1, 1998, Respondent's firm opened two new client matters regarding the Hurrles. One was in the name of Lawrence and Carol for a Chapter 11 bankruptcy proceeding on their behalf; the other was in the name of Timothy for a Chapter 11 bankruptcy proceeding on his behalf. (R. answer; Exh. 35, p. 4.)

5. Among Lawrence and Carol's assets at this time was an undivided one-third interest in certain real estate lots (R. answer; R. test.).

6. On or about January 12, 1998, Lawrence and Carol transferred to Respondent their undivided one-third interest in nine real estate lots, together with a tract of real estate described by metes and bounds as payment for legal services (Exh. 1; R. test.)(Deed dated January 8, 1998 acknowledged January 12, 1998).

7. Other than a deed Lawrence and Carol signed quit-claiming their interest in the real estate lots to Respondent (Exh. 1), and a certificate of real estate value, there was no retainer agreement or other contemporaneous documentation containing the terms of the transaction (R. test). There was no contemporaneous documentation setting forth, and Lawrence and Carol did not understand, whether respondent was receiving these real estate lots as consideration for legal work respondent had performed, was to perform, or both (R. test.; Exh. 30, pp. 185, 186 & 190). Other than by signing the Deed, Lawrence and Carol did not consent in writing to the terms of the transactions (R. test.).

8. On or about January 13, 1998, Respondent filed (1) a Chapter 11 Bankruptcy Petition on behalf of Lawrence and Carol and (2) a separate Chapter 11 Bankruptcy Petition on behalf of Timothy (Exhs. 2 & 4)(Petition dated January 12, 1998, file stamped January 13, 1998).

9. At this time, the Hurrles owed Respondent's firm more than \$12,000 in attorney's fees for services rendered previously that were unrelated to the bankruptcy (Exh. 35, p. 35; R.

test.). The quit claim deed Respondent's firm drafted stated that the consideration for the transaction was less than \$500 (Exh. 1).

10. 11 U.S.C. § 327(a) requires an attorney who desires to represent a Chapter 11 debtor to file with the bankruptcy court an employment application. Federal Rule of Bankruptcy Procedure 2014(a) requires an attorney seeking such authorization to submit an application "accompanied by a verified statement . . . setting forth the person's connection with the debtors, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee." 11 U.S.C. § 327(a) requires the bankruptcy court to authorize the attorney to act as counsel for a Chapter 11 debtor. (Exhs. 37, 38.)

11. Respondent did not file an application to be authorized as counsel for either of the Hurrles' bankruptcy estates until more than one month after Respondent filed the Chapter 11 Bankruptcy Petitions (R. test.).

12. 11 U.S.C. §§ 328-31 requires bankruptcy court approval of all attorneys' fees and expenses for which debtor's counsel seeks payment. These statutes also require bankruptcy court approval before debtor's counsel receives any payments from the debtor's estate for attorneys' fees or expenses. 11 U.S.C. § 328(c) allows the bankruptcy court to deny compensation to debtor's counsel if at any time during counsel's employment pursuant to 11 U.S.C. § 327 counsel "is not a disinterested person." Similarly, 11 U.S.C. § 327(a) provides that a lawyer may not act as counsel for a Chapter 11 debtor if he is not a "disinterested" person to the debtor's estate. A lawyer is not a "disinterested person" if, among other things, he either holds a mortgage on real estate owned by the debtor or is a creditor of the debtor. *Pierce v. Aetna Life Ins. Co.*, 809 F.2d 1356, 1362-63 (8th Cir. 1987). (Exhs. 37, 40 & 41.)

13. Federal Rule of Bankruptcy Procedure 2017 allows the bankruptcy court to examine the debtor's transactions with counsel to determine whether any payment in any way related to the case was excessive (Exh. 39).

14. At no time did Respondent request or receive bankruptcy court approval for any of his attorneys' fees or expenses in connection with either of the Hurrles' Chapter 11

bankruptcy proceedings. At no time did Respondent request or receive bankruptcy court approval to receive any payments, cash or otherwise, for fees or expenses in connection with either of the Hurrles' Chapter 11 bankruptcy proceedings. (R. test.)

15. 11 U.S.C. § 329(a) "requires an attorney representing a Chapter 11 debtor to file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." (Exh. 37.)

16. Together with the Chapter 11 Bankruptcy Petition in Lawrence and Carol's case, Respondent signed and filed a Statement of Compensation by Attorney for Debtors (R. answer; Exh. 5). This document is a statement of the debtor's attorney for charges or compensation related to the filing of the bankruptcy case and to representation during the case (Exh. 30, p. 176 (R. testifying)). In this Statement of Compensation, Respondent stated that he had not received any compensation from Lawrence and Carol for the bankruptcy (Exh. 5). This statement was false or misleading. In addition, Respondent failed to disclose that less than one week before the Petition was filed, Respondent had received Lawrence and Carol's interest in nine real estate lots and a tract of real estate.

17. Respondent prepared schedules and statements of financial affairs that he filed with Lawrence and Carol's bankruptcy petition (Exhs. 4 & 35, p. 36; R. test.). The schedules did not list the real estate lots as an asset (Exh. 4, p. 7; R. test.). The statement of financial affairs requested a list of all property transferred outside the ordinary course of business within one year before the bankruptcy was filed (Exh. 4, p. 23). Respondent stated, "None" (Exh. 4, p. 23). This answer was false. Respondent also failed to list his firm as a creditor of Larry and Carol even though they owed his firm more than \$12,000 and failed to disclose the \$17,600 payment to his firm (Exhs. 4, p. 16, & 35, p. 32; R. test.).

18. Together with the Chapter 11 Bankruptcy Petition in Timothy's case, Respondent signed and filed a Statement of Compensation by Attorney for Debtor (R. answer; Exh. 3). Respondent stated that Timothy had paid \$17,500 toward attorneys' fees for the bankruptcy

(Exh. 3). The Statement of Compensation was false or misleading. The Statement of Compensation suggested that the \$17,500 payment was made for services to be rendered in connection with the bankruptcy (Fagg test.; Exh. 30, p. 152 (R. testifying)). However, Respondent had received a \$17,600 payment for services rendered prior to its receipt, had received the payment from Carol, and had applied the payment to Lawrence and Carol's account (Exhs. 1a & 35, p. 32; R. test.).

19. On or about February 17, 1998, a joint meeting of creditors (Section 341 meeting) was conducted in connection with the two Hurtle bankruptcy proceedings (R. answer; Exh. 7). During examination by a creditor's counsel of Carol about land that Lawrence and Carol had transferred to Lawrence's brother, it was disclosed that Lawrence and Carol had transferred real estate to Respondent shortly before the bankruptcy petitions were filed (Exh. 7, p. 110; Fagg test.; Cutler test.). Respondent stated:

I took, like, four lots as a retainer, and so I'm holding it in trust. I took it and titled it in my law firms [sic] name as a retainer for this, so there is, like 12 lots to be developed.

* * *

So that's what I took as a retainer to go forward in the lawsuit.

(Exh. 7, p. 111-12.) Respondent's statement that title was taken in the law firm's name was false. Respondent had taken title in his own name (Exh. 1). Additionally, Respondent had taken title to nine (9), not four (4), lots plus a tract of real estate (Exh. 1).

20. On February 17, 1998, Sarah J. Fagg (Fagg), Attorney-Advisor to the United States Trustee ("Trustee") received from Respondent an application to be approved as debtors' counsel, together with supporting papers, in both of the Hurtles' bankruptcy proceedings (Exhs. 8 & 8a; Fagg test.). She reviewed the documents, made a copy of the cover sheet, and handed them back to Respondent because she had determined to object to any application by Respondent to be employed as debtors' counsel (Fagg test.). One of the supporting papers was an Affidavit of Joseph A. Wentzell dated February 17, 1998 (Exh. 8). In that affidavit Respondent stated, "That the retainer received prior to the commencement of this [bankruptcy] action was real estate

residential lots which are being held in [Respondent's name] pending further order of this [Bankruptcy Court]." (Exh. 8.)

21. The testimony as to what the Attorney-Advisor usually does with an application to be approved as debtors' counsel is disputed. The applications are normally filed within a day or two of the bankruptcy petition. In this case, they were not delivered until February 17. Fagg testified that because she was going to object, she returned the documents to Respondent, with an indication that he would have to file the appropriate motion. Clinton Cutler, one of Respondent's witnesses, indicated that the Attorney-Advisor would normally accept these documents and forward them, with her recommendation. Fagg apparently forgot that she had received these documents and advised the Bankruptcy Court on several occasions that no application had been filed. During a deposition for this proceeding, she apparently found the cover sheet and testified that she had, in fact, received the documents. Until she acknowledged hand delivery of the documents, Respondent maintained that they had been mailed.

22. If Respondent's statements at the February 17 meeting and in his affidavit dated February 17 that he was holding the lots in trust were accurate, then he would have had an equitable mortgage on the property (Miller test.). Pursuant to the *Pierce* decision, he would thereby have been disqualified from representing Lawrence and Carol (Exhs. 40 & 41; Miller test.). In addition, Respondent would not have been able to transfer the lots without bankruptcy court approval.

23. Respondent's statements in his affidavit dated February 17 and at the February 17 meeting, that he was holding title to the lots pending further bankruptcy court order, were deceitful. Shortly thereafter, Respondent signed a purchase agreement to sell his interest in one of the lots to Wrightway Construction. (Exh. 9; R. test.)

24. By two letters dated February 18, 1998, the Trustee requested Respondent to provide information about the real estate transferred to Respondent and to explain why the real estate was not disclosed on the bankruptcy schedules (Exhs. 10, p. 2, & 11, p. 1). Respondent failed to provide this requested information (Fagg test.).

25. On or about March 10, 1998, Respondent delivered to the Trustee on behalf of Lawrence and Carol amended schedules and an amended statement of financial affairs which Respondent had prepared (Exhs. 14 & 15; Fagg test.; R. test.). The amended statement of financial affairs stated that Lawrence and Carol had paid respondent \$17,600 in November 1997 (Exh. 15, p. 2). The amended schedules still did not list the real estate as an asset for Larry and Carol (Exh. 23f, p. 7). The amended statement of financial affairs again falsely stated that no transfer of property occurred outside the ordinary course of business within the year before the bankruptcy, because it failed to disclose the real estate transfer from Larry and Carol to Respondent despite the specific question about such transfers (Exh. 15, p. 4).

26. Also on or about March 10, 1998, Respondent delivered to the Trustee amended schedules and an amended statement of financial affairs on behalf of Timothy which Respondent had prepared (Exhs. 12 & 13; R. test.). The amended statement of financial affairs again falsely stated that Respondent had received a \$17,600 payment in November 1997 from Timothy (Exh. 13, p. 1).

27. On or about March 25, 1998, the sale of Respondent's interest in one of the lots to Wrightway Construction closed (Exh. 16). After the sale, Respondent retained his interest in the other lots. (R. test.)

28. Because Respondent had legal title to the property (Exh. 1), the sale proceeds belonged to Respondent. Respondent let the Hurrles keep Respondent's proceeds (R. test.).

29. Respondent never requested and never received bankruptcy court approval for the sale of the lot or for the distribution of the proceeds to the debtors (R. test.).

30. On or about March 30, 1998, and in connection with each bankruptcy proceeding, Respondent filed a notice of hearing and motion by debtors for leave to retain counsel, together with an affidavit of himself. In each of his affidavits, Respondent stated that he had no interest adverse to the bankruptcy estate and that he was to be paid \$150 per hour for his services. (Exhs. 17, 18 & 19.)

31. Respondent's motion papers and affidavits were false or misleading. Respondent's motion papers and supporting documents, including his March 27, 1998, affidavit

failed to disclose that when the bankruptcies were filed the Hurrles owed Respondent's firm more than \$12,000 for services rendered before the filings, failed to disclose the real estate transfer to Respondent from Lawrence and Carol immediately before the bankruptcy, failed to disclose that the real estate transfer was payment for attorneys' fees, failed to disclose that less than one week earlier and while the bankruptcy proceedings were pending, Respondent had sold his interest in one of the lots, and failed to disclose that Respondent's proceeds from the sale would go to the debtors (Exhs. 17, 18 & 19).

32. On or about April 2, 1998, an Affidavit of Thomas E. Brever was filed in support of Respondent's motion (Exh. 22). In his affidavit, Mr. Brever stated that he was the managing partner of Respondent's law firm and "upon information and belief, that one parcel of said real estate has been sold, subsequent to the filing of the petitions but that no proceeds of said sale have been received by [Respondent's law firm]." (Exh. 22.) This was the first disclosure of Respondent's sale of his interest in the real estate lot (Fagg test.).

33. On April 8, 1998, the United States Trustee filed with the bankruptcy court documents opposing Respondent's request to be approved as counsel for the Hurrles. The trustee objected because, among other things, Respondent failed to make adequate disclosure of his connections to the Hurrles' bankruptcy estates and Respondent held an interest adverse to the bankruptcy estates. (Exhs. 23-26.)

34. On or about April 13, 1998, Respondent filed a second affidavit he had signed in support of his motion to be approved as counsel (Exh. 28). In that affidavit, Respondent stated:

Prepetition [respondent's] law firm also received interests in *two* lots as payment for services rendered prepetition. They were taken in the name of Joseph A. Wentzell. The value of these lots were \$6,000 net *to the law firm* after expenses of sale. *The law firm owned one-third interest* in the lots and Frances Hurre owned the other two-thirds interest in the lots.

* * *

Undeveloped lots were taken by the law firm for payment of fees. Two lots, as noted above, were received to secure for payment of prepetition obligations and the rest of the lots were received for post-petition fees. In addition, the Hurrles transferred undeveloped land. Said properties for post-petition services being held in trust by [respondent's] firm.

(Italics added.) Respondent's statements that the value of the two lots to the law firm was \$6,000 and that the law firm owned a one-third interest in the lots were false. Respondent personally, not his firm, owned the one-third interest (Exh. 1). Respondent, not the firm, was to receive the proceeds (Exh. 1), and Respondent let the Hurrles have Respondent's proceeds. Respondent's statement that the law firm received two of the real estate lots as payment for services rendered prepetition was inconsistent with his statements at the February 17 Section 341 meeting and in his affidavit dated February 17 in which he stated that his interest in all of the lots would be held pending an order from the bankruptcy court because it was all a retainer for services to be rendered in the bankruptcy (Exh. 8, p. 4, ¶5; Exh. 7, pp. 111-12).

35. On April 13 and 14, 1998, a hearing on the motions for Respondent to be approved as counsel for the Hurrles' bankruptcy estates was conducted (Exhs. 30 & 31). Respondent testified under oath. The judge asked Respondent, "So the two lots that you took for services that had been rendered in the past though you want to keep those?" Respondent answered, "Well, I'd like to." (Exh. 30, p. 58.) Respondent's answer was misleading. Respondent failed to disclose that he had already sold one of those lots and had told the Hurrles they would keep his proceeds.

36. Respondent also testified that he took a one-third interest in two of the lots as compensation for pre-petition bankruptcy-related services, which he could dispose of without court order "because I own them" (Exh. 30, pp. 160-61). This testimony was inconsistent with his statements at the February 17 Section 341 meeting and in his affidavit dated February 17 that he was holding his interest in all the lots in trust pending bankruptcy court order (Exh. 7, pp. 111-12; Exh. 8, p. 4, ¶5). It was also inconsistent with his testimony before the undersigned that Lawrence and Carol, and not Respondent, were entitled to the proceeds. Moreover, the value of Respondent's interest in those two lots was approximately \$10,800 (Exh. 30, pp. 164-65). The value of Respondent's pre-petition bankruptcy-related services was \$1,875 (Exh. 35, pp. 33-36).

37. Respondent also testified that the \$17,500 payment listed on Respondent's statement of compensation by attorney for debtor reflected the value of two (2) of the lots Respondent received from Larry and Carol (Exh. 30, p. 178). This was inconsistent with

testimony Respondent gave at that hearing (Exh. 30, pp. 151-52) and before the Undersigned that the \$17,600 payment was for services rendered before Respondent received the payment.

38. During that hearing, the attorney for the unsecured creditors committee in Timothy's bankruptcy stated, "I think there is no question based upon what Mr. Wentzell described here that he was trying to do indirectly what he couldn't do directly" and that "the errors in this case are rather glaring, especially in light of what is relatively settled case law" (Exh. 30, p. 69.)

39. At the conclusion of the hearing, the judge denied Respondent's applications to be employed as counsel in either proceeding (Exh. 31, p. 16). The judge found substantial and credible evidence existed that:

a. Respondent intentionally mischaracterized the pre-petition payment of \$17,500 from the debtors to himself in the Statement of Compensation so that parties reviewing the transaction would be misled into thinking the transfer was not preferential.

b. Respondent transferred the title of real estate from the debtors to himself shortly before the bankruptcy petitions were filed and intentionally concealed that transfer from the bankruptcy court by not disclosing the transfer in the Statement of Compensation, in the schedules or in the employment applications.

c. The transfer of the title to real estate to respondent from the Hurrles was not appropriate under the Rules of Compensation for Professionals in a bankruptcy proceeding.

(Exh. 31, pp. 16-20.)

40. The court further stated:

We have counsel here who is well grounded in the practice of Bankruptcy Law. It is well settled that not only in this District but in this Circuit what are and what are not appropriate transfers, and what are and what are not appropriate arrangements for compensation during the pendency of the case, and this is not even close. This is not even close. This does not even present the slighted gray area.

(Exh. 31, p. 19.)

41. During the Director's investigation of the matter, respondent stated [through a January 22, 1999, letter from his counsel to the Director], "Respondent suggested the Hurrles transfer the real estate to him as a retainer since they had no cash at the time. Further, he told them that he could not ultimately take the property and dispose of it until his fees were approved by the United States Bankruptcy Court." (Exh. 36, p. 1.) However, Respondent did dispose of one of the lots without bankruptcy court approval (§§26, 27 & 28, above).

42. In that same letter Respondent stated, "Mr. Wentzell took title [to the real estate lots] outright, subject to the Bankruptcy Court's approval of the arrangement." (Exh. 36, pp. 2-3.) However, Respondent never requested nor received bankruptcy court approval of the arrangement (§§26, 27 & 28, above). In addition, this statement is inconsistent with Respondent's conduct in selling one of the lots without bankruptcy court approval and inconsistent with his statements to the bankruptcy court that the property was taken in the law firm's name.

43. Respondent has refused to accept responsibility for the wrongful nature of his misconduct. Respondent offered no evidence or assurance that similar misconduct will be avoided in the future. While Respondent has indicated that his conduct was "stupid inadvertence", he has also attempted to widely spread the blame. His secretary testified that she was overworked and that the bankruptcy computer program did not work properly. Respondent claims sleep apnea and much attention has been directed at the erroneous statement of the Attorney-Advisor for the Trustee.

44. Respondent has substantial experience in the practice of law in general, and bankruptcy law in particular (R. test.).

45. In mitigation, Respondent offered evidence of his lack of prior discipline and his civic and professional activities.

46. Respondent testified that in 1989 he was diagnosed with sleep apnea. Respondent testified that as a result, he occasionally feels exhausted and distracted at work. One of Respondent's partners testified that it was not obvious that sleep apnea had a direct effect on Respondent's preparation of documents (Brever test.). Respondent and others also testified that

Respondent has an active life, including activities at his church and in coaching youth sports, and that on average Respondent works approximately 60 hours per week (R. test.; Brever test.; Morrison test.; Witterschein test.). Respondent did not raise this claim until after he answered the petition for disciplinary action (*cf.*, R. answer, ¶47). Respondent offered no medical evidence, no medical testimony and no medical records to support this claim.

47. The Memorandum attached hereto is incorporated herein by reference.

CONCLUSIONS OF LAW

1. Respondent's failure to comply with applicable federal statutes, rules and regulations; business transactions with his clients; representation of a bankruptcy debtor when his firm was a creditor of the debtor and when he claimed to hold real property of the debtor in trust; misleading statements; and intentional failure to disclose material facts violated Rules 1.7(b), 1.8(a), 3.3(a)(1), 3.4(c), 4.1, and 8.4(c) and (d), Minnesota Rules of Professional Conduct.

2. Respondent's refusal to acknowledge the wrongful nature of his conduct aggravates his misconduct.

3. No mitigation is found in Respondent's claimed sleep apnea. This claim has been evaluated in light of *In re Weyhrich*, 339 N.W.2d 274 (Minn. 1983), and other applicable law.

There is not clear and convincing evidence that:

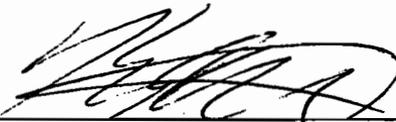
- a. Respondent suffers from a severe medical problem;
- b. Respondent's sleep apnea caused Respondent's misconduct;
- c. That Respondent is recovering from his sleep apnea;
- d. Respondent's treatment has arrested Respondent's misconduct; or
- e. Respondent's misconduct is not apt to recur.

RECOMMENDATION FOR DISCIPLINE

The undersigned recommends:

1. Respondent, Joseph A. Wentzell, be suspended from the practice of law in the State of Minnesota, ineligible to apply for reinstatement for a minimum of six (6) months.
2. That Respondent comply with the requirements of Rule 26, Rules on Lawyers Professional Responsibility (RLPR).
3. That Respondent pay to the Director \$900 in costs, plus disbursements pursuant to Rule 24(a), RLPR.
4. After a minimum of six (6) months has elapsed, Respondent may petition for reinstatement pursuant to Rule 18(a) through (d), RLPR, if he can demonstrate by clear and convincing evidence that:
 - a. He has paid \$900 in costs, plus disbursements, to the Director pursuant to Rule 24, RLPR;
 - b. He has complied with the notice requirements of Rule 26, RLPR;
 - c. He has successfully completed and obtained a passing grade on the multi-state professional responsibility examination pursuant to Rule 18(e), RLPR;
 - d. He has satisfied all continuing legal education requirements pursuant to Rule 18(e), RLPR; and
 - e. He is fit to practice law and that his past misconduct is not likely to recur.

DATED 29 MARCH 2002.



DAVID E. CHRISTENSEN
SUPREME COURT REFEREE

MEMORANDUM

The hearing in the above-entitled matter commenced on February 28, 2002. Testimony was taken over the course of one and three-fourths days. During the hearing, Respondent was

polite and courteous. Witnesses who spoke on his behalf indicated that he had a reputation for being honest, that he kept his word, and that he was dedicated to his clients, although he was not always as concerned with details as he should have been. Had this Referee's findings and recommendation been based solely on the testimony at the hearing, the recommendation would probably have been for a reprimand.

Respondent's titling property in his own name without the benefit of a written retainer agreement and the establishment of a trust for the purpose of accepting title was clearly improper. Had that conduct been the only impropriety, a reprimand might be appropriate. There was, however, submitted to the Referee over 50 exhibits, a number of which were transcripts of proceedings in the Bankruptcy Court. Those exhibits make it clear that Respondent's conduct was much more egregious than improperly titling real estate.

Under the Bankruptcy Code, Respondent had an obligation to place advance payment of his fees in a trust account and then pay those fees only after they had been approved by the Court. The fees in this case were never placed in trust, the Bankruptcy Court was never advised as to the amount of real estate received by Respondent, and was never advised as to the value of such real estate. Respondent contends that his clients never complained about his actions. While that is true, it is also true that his clients benefited by reason of his actions. The losers were the unsecured creditors, who eventually settled their claims for 50 cents on the dollar. Upon payment of that 50 cents on the dollar, the bankruptcy matter was dismissed. Although the unsecured creditors undoubtedly could have initiated an action to recover the value of said lots, no evidence was submitted as to whether or not the cost of such an action would have outweighed the benefit.

Throughout the entire bankruptcy proceeding and this proceeding, Respondent's recollection of what he did or received has continually changed. On at least one occasion it appeared that Respondent was intentionally misleading the Court. During the first hearing, which was called a Section 341 Meeting and took place on February 17, 1998, a partial transcript of which is set forth in Exhibit 7, Carol Hurrle was being questioned for the first time about real estate development land. After determining that she had owned such land and did not own it at the present time, the following occurred (See Page 110, Line 22 through Page 111, Line 24):

MR. CUTLER: You sold it outright?

CAROL HURRLE: Yes.

MR. CUTLER: And who is it sold to?

MR. WENTZELL: What's your brother-in-law's name is what he wants to know.

CAROL HURRLE: Francis and Marilyn Hurrle.

MR. CUTLER: Were you paid cash for that sale?

CAROL HURRLE: No.

MR. CUTLER: Or are you owed some money out of that sale yet?

CAROL HURRLE: No. No.

MR. CUTLER: You sold it for cash?

CAROL HURRLE: No.

MR. CUTLER: How did you get paid for the land?

CAROL HURRLE: Joe can answer that.

MR. WENTZELL: I took, like, four lots as a retainer, and so I'm holding it in trust. I took it and titled it in my law firms name as a retainer for this, so there is, like 12 lots to be developed. It's a two-thirds, one-third. We can show you the partnership agreement. Harry's brother owns two-thirds. Larry owns a third. Is that right? It's one-third, two-thirds. Yes. So there is, like, 12 lots. I took title to four lots. And about what? Eight thousand? Six thousand?

The Referee would also call the Court's attention to the following: Exhibit 1; Exhibit 30, Page 56, Lines 3 – 11; Exhibit 30, Page 57, Lines 17 – 19; Exhibit 30, Page 135, Lines 14 – 22; Exhibit 30, Page 136, Lines 4 – 25; Exhibit 30, Page 159, Line 24 through Page 160, Line 25; and Exhibit 30, Page 165, Line 7 through Page 166, Line 10.

While Respondent contends that his client approved of the real estate transfer, it is clear that she did not understand what was going on. In her testimony, as shown at Exhibit 30, Page 186, Lines 21 – 23, she stated, "This has all been so overwhelming and so confusing for me that I'm just – Joe tells me to do things and I think I do them wrong. I mean, I don't sometimes. I get confused." At Exhibit 30, Page 192, Lines 1 and 2, Respondent's client stated, "He probably told me a lot of things and I'm probably so overwhelmed with everything that I don't remember half of it."

Much was made by the Respondent of the Attorney-Advisor incorrectly advising the bankruptcy judge that the Respondent had failed to file an application for appointment. Although her statements to the bankruptcy judge were incorrect, this Referee believes that the incorrect statements had little impact on the bankruptcy judge. The bankruptcy judge had his own opportunity to question the Respondent. The Respondent's testimony at that hearing was confused and misleading.

Having heard the testimony in this case, and having read all of the exhibits, this Referee can understand the frustration of the bankruptcy judge. The failure to provide requested information, the erroneous information that was provided, the misleading information, and the misleading statements to the Court should not be tolerated.

D.E.C.

CERTIFICATE OF DISTRIBUTION

File No. C5-01-1871

The undersigned hereby acknowledges the distribution of Findings of Fact, Conclusions of Law and Recommendation for Discipline dated March 29, 2002 in the above-entitled matter on this 29th day of March 2002, to the following persons:

MS. SUZIE DEAN
CLERK OF APPELLATE COURTS
305 MINNESOTA JUDICIAL CENTER
25 CONSTITUTION AVENUE
ST. PAUL, MN 55155

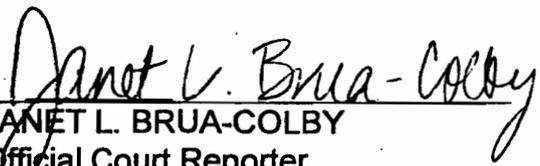
U.S.MAIL

MR. TIMOTHY M. BURKE
SENIOR ASSISTANT DIRECTOR
OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY
25 CONSTITUTION AVENUE, SUITE 105
ST. PAUL, MN 55155-1500

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MR. RICHARD J. HARDIN
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BY: 
JANET L. BRUA-COLBY
Official Court Reporter