

FILE NO. _____

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.

**PETITION FOR
DISCIPLINARY ACTION**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

At the direction of a Lawyers Professional Responsibility Board Panel, the Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition.

The above-named attorney, hereinafter respondent, was admitted to practice law in Minnesota on October 18, 1985. Respondent currently practices law in St. Anthony, Minnesota.

Respondent has committed the following unprofessional conduct warranting public discipline:

COUNT ONE

Hurrle Matter

1. In or about December 1996 Lawrence and Carol Hurrle, husband and wife, and Timothy Hurrle, their son, retained respondent to represent them to resolve issues with their creditors. Lawrence and Carol on the one hand, and Timothy on the other, had separate but substantially intertwined farming operations. Respondent's firm opened two client files, one for representation on Lawrence and Carol's workout, and one for representation on Timothy's workout.

2. In December 1997 a check on Lawrence and Carol's account in the amount of \$17,600 was paid to respondent's firm. 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.

3. 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.

4. Among Lawrence and Carol's assets at this time was an undivided one-third interest in certain real estate lots.

5. On or about January 8, 1998, Lawrence and Carol transferred to respondent their undivided one-third interest in at least eight of these real estate lots as payment for legal services.

6. Other than a deed Lawrence and Carol signed quit-claiming their interest in the real estate lots to respondent, there was no retainer agreement or other contemporaneous documentation containing the terms of the transaction. There was no contemporaneous documentation setting forth whether respondent was receiving these real estate lots as consideration for legal work respondent had performed, was to perform, or both. Lawrence and Carol did not consent in a separate writing to the terms of the transactions.

7. On or about January 12, 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. At this time, the Hurrles owed respondent's firm more than \$10,000 in attorney's fees for services previously rendered.

8. 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.

9. 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.

10. 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).

11. 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.

12. 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.

13. 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.”

14. Together with the Chapter 11 Bankruptcy Petition in Timothy’s case, respondent signed and filed a Statement of Compensation by Attorney for Debtor. Respondent stated that Timothy had paid respondent \$800 for filing fees and \$17,600 toward attorneys’ fees for the bankruptcy. The Statement of Compensation was false or misleading. The Statement of Compensation suggested that the \$17,600 payment was made for services to be rendered in connection with the bankruptcy. However, respondent had received the \$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.

15. 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. Respondent stated that he had not received any compensation from Lawrence and Carol for the bankruptcy. This statement was false or misleading. In addition to distribution of the fees received from Lawrence and Carol (*see* ¶¶ 2 & 14, above), respondent failed to disclose that less than one week before the Petition was filed, respondent had received Lawrence and Carol’s interest in eight real estate lots (¶ 5, above).

16. Respondent prepared schedules and statements of financial affairs that he filed with Lawrence and Carol’s bankruptcy petition. The schedules did not list the real estate lots as an asset. 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. Respondent stated, “None.” This answer was false.

17. On or about February 17, 1998, a joint meeting of creditors (Section 341 meeting) was conducted in connection with the two Hurre bankruptcy proceedings. During examination by a creditor’s counsel of Carol about land that Lawrence and Carol had transferred to Lawrence’s brother, it was disclosed for the first time that

Lawrence and Carol had transferred real estate to respondent shortly before the bankruptcy petitions were filed. 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.

(Italics added.) Respondent's statement that title was taken in the law firm's name was false. Respondent had taken title in his own name. Additionally, respondent had taken title to at least eight (8), not four (4), lots.

18. On February 17, 1998, the United States Trustee ("Trustee") received from respondent an application to be approved as debtors' counsel, together with supporting papers, in both of the Hurrles' bankruptcy proceedings. The Trustee reviewed the documents and handed them back to respondent because the Trustee had determined to object to any application by respondent to be employed as debtors' counsel. One of the supporting papers was an Affidavit of Joseph A. Wentzell dated February 17, 1998. 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]."

19. 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. Pursuant to the Pierce decision, he would thereby have been disqualified from representing Lawrence and Carol. In addition, respondent would not have been able to transfer the lots without bankruptcy court approval.

20. 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. The next day, respondent signed a purchase agreement to sell his interest in one of the lots to Wright-Way Construction.

21. 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. Respondent did not respond to either letter.

22. The sale of respondent's interest in one of the lots to Wright-Way Construction closed on or about March 25, 1998. After the sale, respondent retained his interest in the other lots.

23. Respondent's proceeds from the sale were approximately \$5,400. Respondent told the Hurrles that they could keep respondent's proceeds.

24. 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.

25. On or about March 10, 1998, respondent filed with the Trustee on behalf of Lawrence and Carol amended schedules and an amended statement of financial affairs which respondent had prepared. The amended statement of financial affairs stated that Lawrence and Carol had paid respondent \$17,600 in November 1997. The amended schedules still did not list the real estate as an asset. 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.

26. Also on or about March 10, 1998, respondent filed with the Trustee amended schedules and an amended statement of financial affairs on behalf of Timothy which respondent had prepared. The amended statement of financial affairs again stated that respondent had received a \$17,600 payment in November 1997 from Timothy. This was incorrect.

27. 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.

28. Respondent's motion papers and affidavits were false or misleading. None of respondent's motion papers or supporting documents, including his March 27, 1998, affidavit, disclosed that when the bankruptcies were filed the Hurrles owed respondent's firm more than \$10,000 for services rendered before the filings, the real estate transfer from Lawrence and Carol to respondent, that the real estate transfer was payment for attorneys' fees, that less than six weeks earlier and while the bankruptcy proceedings were pending respondent had sold his interest in one of the lots, or that respondent's proceeds of the sale would go to the debtors.

29. On or about April 2, 1998, an Affidavit of Thomas E. Brever was filed in support of respondent's motion. 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]."

30. 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.

31. On or about April 13, 1998, respondent filed a second affidavit he had signed in support of his motion to be approved as counsel. 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 Hurrle 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 law firm received \$6,000 from the sale of the two lots and that the law firm owned a one-third interest in the lots were false. The Hurrles received the proceeds. Respondent personally, not his firm, owned the one-third interest. 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 (¶ 17, above) in which he stated that his interest in the lots would be held pending an order from the bankruptcy court.

32. 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. 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." 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.

33. Respondent also testified that he hoped to receive the proceeds of that sale "any day." Respondent's statement was misleading. Respondent had already agreed to let the Hurrles keep the sale proceeds.

34. Respondent also testified that he took a one-third interest in two of the lots as compensation for pre-petition services, which he could dispose of without court order. 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.

35. At the April 13 hearing, respondent also testified that he had a telephone conference with Brever while respondent was in Mexico. This statement was false.

36. Also at that hearing, Carol Hurrle testified that the one-third interest in all the lots was transferred to respondent for work on the bankruptcy; *i.e.*, post-petition.

37. At the conclusion of the hearing, the judge denied respondent's applications to be employed as counsel in either proceeding. The judge found substantial and credible evidence existed that:

a. Respondent intentionally mischaracterized the pre-petition payment of \$17,600 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.

38. The Trustee filed a complaint with the Director's Office. 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." However, respondent did dispose of one of the lots without bankruptcy court approval.

39. 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." However, respondent never requested nor received bankruptcy court approval of the arrangement. 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.

40. Respondent's conduct in failing to comply with applicable federal statutes, rules and regulations; representing a bankruptcy debtor when his firm was a creditor of the debtor and when he was claiming to hold real property of the debtor in trust; making false or misleading statements; and failing to disclose material facts violated Rules 1.7(b), 1.8(a), 3.3(a)(1), 3.4(c), 4.1, and 8.4(a), (c) and (d), Minnesota Rules of Professional Conduct.

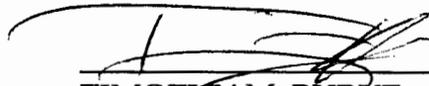
WHEREFORE, the Director respectfully prays for an order of this Court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: October 15, 2001.



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