IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

THE FLORIDA BAR,

Complainant,

vs.

CLIFFORD B. WENTWORTH,

Respondent

Supreme Court Case No.: 65,415

TFB Case No.: 17D82F74

RESPONDENT'S BRIEF IN SUPPORT OF REQUEST FOR REVIEW OF REFEREE'S REPORT

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CITATIONS

STATEMENT OF THE CASE

Complainant filed its complaint herein against respondent on June 5, 1984. The complaint was based upon respondent's plea of guilty on August 30, 1984 to a single count of the federal RICO statute Title 18, United States Code Sections 1961, 1962 (D) and 1963.

Requests for Admissions were filed by complainant on June 5, 1984.

Complainant filed a request for the appointment of a Referee by letter to this court dated June 5, 1984. This court appointed a Referee in this cause by order dated June 19, 1984.

Respondent filed his Request to Maintain Confidentiality and Request For Extension of Time to respond to the Requests for Admissions by letter dated August 2, 1984. Respondent files formal motion requesting confidentiality and extension of time on August 10, 1984.

Referee entered an order of August 23, 1984 denying respondent's motion for confidentiality and granting respondent 20 days within which to respond to the requests for admissions.

Respondent filed his response to the requests for admissions on September 14, 1984.

Complainant filed a Motion For Judgment on the Pleadings dated the 18th day of September 1984 and a notice of hearing setting the motion for judgment on the pleadings for hearing before the Referee at 1:00 October 5, 1984.

Respondent filed his Motion for Continuance and Affidavit in

Opposition to Motion For Judgment on the Pleadings.

The Referee granted a continuance for one week scheduling the return date for October 12, 1984. Notification of this continuance was transmitted to Attorney Gary E. Southworth by telephone on October 5, 1984 and by mailgram dispatched to respondent and Attorney Southworth the same date.

Referee received a mailgram from Attorney Southworth informing Referee that Southworth was not certain he could communicate with respondent prior to October 12, 1984.

Hearing is held on October 12, 1984 at which time Referee grants the motion of complainant for judgment on the pleadings. Respondent did not appear at this hearing.

Referee files his report on November 1, 1984 finding in favor of complainant on all issues.

Respondent files his verified Motion for Rehearing on November 14, 1984 followed by a Request for Review of Referee's Report.

STATEMENT OF THE FACTS

This request for review is brought pursuant to the Florida Bar Intergration Rule, Article XI, Rule 11.09 and other applicable rules of this court. Review is sought of that certain Referee's Report entered in this matter on the 1st day of November 1984.

This action arises out of a complaint filed by the Florida Bar against respondent with the Supreme Court of Florida on June 5, 1984. Respondent is a member of the Florida Bar and on August 30, 1983 entered a plea of guilty to a single felony count in the United States District Court for the Northern District of Florida giving rise to the complaint filed by the Florida Bar herein.

On August 10, 1984 respondent filed a Motion to Maintain Confidentiality and a Motion For Extension of Time WIthin which To File Responses to Requests For Admissions. Ths motion is specifically filed pro se.

In the August 10, 1984 motion respondent advises the Referee that respondent desires to submit evidence in this proceeding which will mitigate the consequences of his plea to the single count of the federal RICO statute which is the subject of the complaint against respondent in this proceeding. (Paragraph 1 of Motion)

In the August 10, 1984 motion respondent furthur advises the Referee that respondent is enrolled in a secret program of the United States Department of Justice and because of this the mail of respondent has been delayed and as a result respondent did not receive notice of these proceedings until on or about July 27, 1984 (Paragraph 2 of Motion).

Respondent requested confidentiality in this matter so that he would be enabled to present all this evidence to the Referee without fear of violating the security of respondent and his family and court orders requiring him not to disclose certain information pertaining to ongoing investigations before federal grand juries in which respondent was a witness. This evidence includes documents from the United States Department of Justice and from the Florida Department of Law Enforcement and other governmental agencies which show amoung other things that respondent and his family were being threatened with physical violence at times relevant to these proceedings. (Paragraph 3 of Motion).

Subsequent to the denial of the motion to maintain confidentiality respondent suggested an in camera inspection of this documentary evidence to determine whether such evidence was relevant to this cause as to any of the issues before this court in this action. (Paragraph 10 of Affidavit in Opposition to Motion For Judgment on the pleading, hereinafter called "Affidavit").

Respondent subsequent to entering his plea of guilty to the single federal felony agreed to cooperate with the United States government and state agencies. Respondent thereafter was admitted to the federal witness protection program along with his wife and minor child. As a result of said status respondent is often prevented from communicating with anyone including his attorney so as not to breach his security and the security of his family and so as to not breach security in connection with the various investigations in which respondent is participitating. (Paragraph 11 of Affidavit).

Respondent and his family have been the victims of numerous threats of violence both prior to and since his indictment. That intimidation in part precluded respondent from cooperating with the government in the first instance thereby possibley preventing his original indictment in the first instance. (Paragraph 12 of Affidavit)

Respondent does not admit each and every allegation of the complaint filed herein. (Paragraph 3 of Affidavit)

Respondent claims that there are genuine issues of material fact in this cause which precluded the entry of any judgment on the pleadings including whether there existed at material times hereto mitigating factors and circumstances concerning the conduct of respondent which led to his single plea to one count of the statute which is the subject of these proceedings. Respondent advised the Referee of his intention to raise these factual issues and listed certain of these factual issues in his affidavit filed herein. (Paragraph 5 of Affidavit and Affidavit in general)

Since his conviction respondent's case has been reviewed by the United States Parole Commission at which time respondent was represented by a United States Justice Department Attorney who submitted evidence on behalf of respondent tending to greatly mitigate the acts of respondent leading up to the original indictment all of which was considered by the United States Parole Commission and on August 16, 1984 the United States Parole commission issued its Notice of Action granting parole to respondent and stated in said notice of action the following:

"After review of all relevant factors and information presented, a decision below the guidelines appears warranted because your offense involved the following mitigating factors: Numerous threats were made against your life and the lives of your wife and child. The following circumstances are present: You have cooperated with the federal authorities in an extraordinary manner." (Para 12 of Affidavit)

Respondent represented to the Referee that he intended to present the same evidence that was presented to the United States Parole Commission that led to this favorable decision to the Referee and to this honorable court.(Para 13 of Affidavit)

Respondent prayed for the indulgence of this court and the patience of the complainant to permit this evidence to be presented so as to balance the needs of respondent to protect his life and the life of his family and the integrity of the investigations in which respondent is participating against the ability of respondent to defend himself in this proceeding. (Paragraph 13 Affidavit).

Respondent was greeted with the Motion for Judgment on the Pleadings before his request to the Referee was even considered and was notified of a hearing on the motion some 17 days later despite complainant being fully aware of the plight of respondent.

Respondent never communicated personally with the Referee as he did not think this to be proper. However respondent did contact counsel for the Florida Bar prior to the October 5, hearing and discuss with him the nature of the time and notification problems of respondent and asked for the continuance of the hearing set for October 5, 1984. During this telephone conversation counsel declined to agree to continue the hearing on the motion for judgment on the pleadings. Respondent points out this fact

since the Referee's Report notes that respondent made no attempt to communicate with him. (Page 2 of Referee's Report)

Respondent telephoned the offices of the attorney for complainant in this cause on September 28, 1984 to request a postponement of the hearing set in this matter for October 5, 1984 at 1:00 on the grounds that respondent did not receive said motion and notice of hearing until the evening of September 27, 1984,and then only second handed from Gary E. Southworth, Esquire and to advise the attorney for complainant that respondent needed more time to arrange for appearances at said hearing. This call was made at approximately 1:40 but the attorney for complainant was out to lunch. A message was left with his office requesting agreement to a continuance. The following day respondent actually spoke by telephone with the attorney relating the above facts but said attorney declined in any way to accomodate respondent with a request to the Referee for a continuance. (Paragraph 20 of Affidavit)

Gary E. Southworth, Esquire never filed any appearance in this proceeding. Counsel for complainant and the Referee were advised that Mr. Southworth was only acting as "co-counsel" (a poor choice of words) for respondent in this matter as a matter of professional courtesy and mainly to assure that respondent received his correspondence as quiclky as possible. (Affidavit paragraph 21)

Respondent had no knowledge or notice of the hearing of

October 12, 1984. Respondent was on an emergency bedside furlough with his wife and child from October 5, 1984 at a secret location and did not return to his unit until October 12, 1984 the day of the hearing. (Motion for Rehearing)

Respondent is a federal inmate in custody of the Department of Justice. However at times he is on writ to locations not known to prison officals themselves but know only to United States Marshals. Therefore respondent may not receive his mail for long periods depending on the length of the writ. Mail is not normally forwarded when respondent is on writ.

Respondent requested 45 days notice of hearing to assure he could arrange for his attandance at said hearings. (Motion For Continuance.)

There was no notice of any evidentiary hearing given to the knowledge of respondent. There was no notice of trial.

Costs were assesed against respondent in the amount of $728.50 including $186.00 in photocopies.

ISSUES

I

WHETHER THE REFEREE ERRED IN GRANTING COMPLAINANTS MOTION FOR JUDGMENT ON THE PLEADINGS?

II

WHETHER THERE EXISTED MATERIAL ISSUES OF FACT PRECLUDING THE ISSUANCE OF A JUDGMENT ON THE PLEADINGS?

III

WHETHER RESPONDENT WAS GIVEN DUE PROCESS?

IV

WHETHER UNDER ALL OF THE ATTENDANT FACTS AND CIRCUMSTANCES OF THIS CASE RESPONDENT WAS FARILY NOTIFIED OF THE OCTOBER 12, 1984 HEARING?

V

WHETHER RESPONDENT WAS ENTITLED TO A TRIAL OF THIS CASE BEFORE THE REFEREE?

VI

WHETHER THE AFFIDAVIT OF RESPONDENT IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS RAISED GENUINE ISSUES OF MATERIAL FACT SO AS TO PRECLUDE ENTRY OF JUDGMENT ON THE PLEADINGS?

VII

WHETHER RESPONDENT WAS GIVEN SUFFICIENT NOTICE OF THE HEARING OF OCTOBER 12, 1984 AND THE NATURE OF SAID HEARING AND WHETHER SAID HEARING WAS ACTUALLY A TRIAL ON THE MERITS?

ARGUMENT

The Referee erred in granting the motion of complainant for judgment on the pleadings.

The affidavit of respondent in opposition to the motion for judgment on the pleadings sets forth verified facts and raises factual issues of material matters precluding entry of a judgment on the pleadings at a summary hearing.

The Rules of Civil Procedure apply except as otherwise provided in the Intergration Rule. Fla Bar Integr. Rule, Article XI, Rule 11.06(3)(A) &(B). If there exists material issues of fact a judgment on the pleadings should not be granted.

Pleadings may be informal in disciplinary matters. Fla. Bar Integr. Rule, Article XI, Rule 11.06(5). Respondent contends that the information contained in the pleadings filed herein clearly demonstrated the intention of respondent to defend himself in these proceedings and to present evidence in the conduct of his defense. Essentially respondent was seeking a trial on the merits of the case. Respondent was and is seeking a trial at which he might present evidence on the issues. Respondent was denied this opportunity and was therefor deprived of due process. Due process demands a trial where issues of fact are to be determined

Respondent advised the Referee of special circumstances that existed with regard to the type of evidence the respondent wished to offer and the sensitive nature of the status of the respondent. Respondent first requested confidentiality which was denied. Respondent then suggested an in camera inspection of the evidence which suggestion was ignored and the case was tried and decided without the

benefit of the evidence and without allowing respondent a fair opportunity to appear and defend himself in the proceeding.

Under normal circumstances in a non-jury trial the case would be set for trial under the rules of civil procedure. A pretrial order would be entered. An opportunity for discovery would be permitted and reasonable time would be afforded the litigants. None of these normal amenities were afforded respondent in this case. No consideration was given to the fact that the respondent is a federal inmate with communication problems all as pointed out in the pleadings and affidavits of respondent. Respondent in fact did not know of the hearing of October 12, 1984.

There would seem to be no particular urgency attendant to this proceeding. Respondent entered his plea of guilty on August 30, 1983. Respondent was under the mandatory suspension for at least three years as provided for in the intergration rules. The Florida Bar v. Wentworth, No. 64,233 (Fla. Septembet 26, 1983)

Complainant did not proceed in this matter until June 5, 1984. Yet the requests for reasonable notice of these proceedings and a reasonable time to prepare for trial and even the trial itself were denied respondent by the entry of the judgment on the pleadings by the Referee.

If the conviction of a felony automatically resulted in disbarment then there would be no need for Rule 11.07 which provides for alternatives. It may well be that when the facts are examined in this case this honorable court may agree that the mandatory suspension provided for at 11.07(4) may be sufficient discipline in this particular instance. Things are not always necessarily as they

appear. Upon hearing and considering all of the evidence in this case the Referee and ultimately this court may determine that there existed mitigating circumstances that warrant something less than disbarment in this matter.

Respondent is only asking at this time that he be afforded the benefit of the rules and procedures provided for in disciplinary cases administered in a fair and just manner.

This request for review is limited to the issues of whether the Referee correctly entered a judgment on the pleadings and whether respondent was afforded due process and notice of these proceedings.

However had this case gone to trial respondent intended to introduce evidence as to the nature of the federal RICO statute under which respondent was convicted. Respondent intended to demonstrate that this statue is under constitutional attack at this time. A RICO conviction can be based on an infinite number of factual situations. It is a catch all vehicle type statute. No common law crime is comparable to the RICO law. It does not necessarily imply dishonesty or moral corruption. It is a law that is very easily violated in the course of everyday activities under the right circumstances. The law was only written in 1970 and most lawyers never heard of it until the late 70s. Conviction could be for a series of income tax violations or other patterns of activity that might not necessarily imply a lack of morales or honesty. Even under existing federal parole procedures a RICO conviction is a legal chameleon that is rated differently depending on the nature of the underlying acts and each case is considered

on its merits by the parole commission where a RICO violation is involved.

Respondent intended to introduce the transcript of his parole hearing before the United States Parole Commission held in August 1984 and possibly call as a witnesses justice department attorneys to give evidence on behalf of respondent. The United States Parole Commission after considereing the evidence produced by respondent at this hearing issued a favorable order and paroled respondent.

Respondent intended to introduce the transcript of the hearing at which respondent pleaded guilty to the offense for the purpose of demonstrating that respondent did not admit the indictment in its entirety and in fact specifically denied the two importations referred to in the report of the referee issued in this case which in fact respondent had nothing to do with. This is a perfect example of why the evidence should have been considered before disbarment was recommended.

Respondent furthur intended to demonstrate that the acts which led to his conviction were confined mainly to normal attorney client activities. Acts which would not have been illegal standing alone. For example the purchasing of real property that was later used for illegal purposes and the investment of monies that were generated by illegal activities that respondent had no advance knowledge or participation.

The evidence at trial would have shown that respondent indeed failed to extricate himself from this situation in a timely manner. However there would have also been evidence to demonstrate that there were factors that greatly mitigated the failure of the respondent to extricate himself from the situation including the

threats of violence upon his life and the life of his family which are documented events.

Respondent furthur intended to introduce evidence demonstrating that he has been rehabilitated and has repuidated his former wrongs and misconduct. Respondent has admitted his wrongs. He has demonstrated his rehabilitation by cooperating with law enforcement agencies of the United States of America and the State of Florida.

Respondent intended to introduce evidence that most of his legal problems resulted from misplaced loyalities to clients to whom he felt a responsibility not to advise authorities of their illegal conduct when called upon to do so thereby rightly incurring the rath of the government.

Respondent intended to introduce evidence to demonstrate that after graduating from law school he spent four years in active service with the United States Army including a tour of duty in the Republic of Vietnam. That his legal experience for the four years following his discharge from the army was with a civil defense firm representing for the most part corporate clients. That in fact respondent had very little 'real world' or 'street' experience prior to his involvment in the activities which resulted in his conviction and was 'naive' when it came to dealing with certain types of clients. This would certainly not excuse the respondent for his mistakes but might serve to mitigate his actions taken in light of all the evidence to be presented in the proceeding.

Respondent views this proceeding as a proceeding to determine whether respondent is a fit person to practice law and to determine the discipline to be imposed upon the respondent under all the facts and circumstances of this particular case.

Respondent believes that he is and will be in the future a good and competent lawyer. Even good lawyers make mistakes.

Furthurmore respondent intended to introduce evidence to mitigate his one prior disciplinary action in the form a sworn depostion or depositions of witnesses as to the actual facts surrounding the matter of Prato for which respondent was suspended from practice for two years. The Florida Bar v. Wentworth, Case Number 64,279. The evidence will show that in fact respondent was only partly responsible for the failure to perfect service in the Prato matter and had in fact employed other counsel to handle this matter on his behalf and fully expected that service was being perfected and that the matter was being properly handled.

The respondent intended to introduce his prior record as an attorney as a positive fact to be considered by this court in making the final decision as to the future of respondent as a lawyer in the State of Florida.

Respondent intended to introduce character evidence from members of the community and members of the bar bearing on the fitness of respondent to practice law in the future.

Respondent will be released from custody not later than October 7, 1985 and most likely sooner. In the meantime respondent can make arrangements to be permitted to appear in court or to arrange for appearances in this proceeding. However more than

seven days notice will be required if respondent is to have a fair chance to present his case.

Respondent has been deprived of this opportunity to present this evidence by the summary ruling of the Referee in this case.

Respondent did not recieve fair notice of the hearing.

Even if, arguendo, respondent did recieve notice of the hearing the affidavit in oppositon to the motion for judgment on the pleadings created sufficient issues of fact so as to preclude the entry of a judgment at a summary hearing.

For the reasons stated herein this court should request the Referee to conduct a hearing in this case and allow the respondent a fair opportunity to present his case.

CONCLUSION

The Referee erred in granting the motion for judgment on the pleadings in this particular case. For the reasons stated herein this case should be remanded to a Referee for a hearing or trial so that the respondent may have the opportunity to fairly present his case and so this court may have the benefit of the factual information pertaining to the conviction of respondent in this case in order to determine the appropriate discipline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that THE ORIGINAL Respondent's Brief in Support of Request For Review of Referee's Report was mailed to Honorable Sid J. White, Clerk, Supreme Court of Florida, Tallahassee, Floirda 32301 for filing with the court; David M. Barnovitz, Esquire, Bar Counsel, The Florida Bar, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304; John T. Berry, Staff Counsel, The Florida Bar, Tallahasee, Florida 32301-8226; John F. Harkness, Jr. Esquire, Tallahassee, Florida 32301-8226, Executive Director, The Florida Bar and to Honorable Edmund W. Newbold, Circuit Judge, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130 as the Referee in this cause this 28 day of November 1984.

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