

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

IN RE: PETITION FOR

RESIGNATION BY

ARTHUR G. MCDONNELL, Petitioner.

Supreme Court Case
No. 65,868

FILED

SID J. WHITE

JAN 10 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

RESPONSE TO PETITION FOR LEAVE TO
AMEND PETITIONER'S RESIGNATION FROM
THE FLORIDA BAR PENDING DISCIPLINARY PROCEEDINGS

COMES NOW THE FLORIDA BAR, by and through undersigned Bar Counsel,
and files this its response to Petition For Leave to Amend Petitioner's
Resignation and states as follows:

1. The instant Petition should be denied because it was not timely filed.
2. Petitioner's claim that attorney Frank E. Freeman had a continuing obligation to amend or seek to withdraw the original resignation petition is belied by attorney Freeman's affidavit which is attached hereto and incorporated herein as Exhibit one (1).
3. Petitioner should well know, as a practicing attorney with many years of experience, that the discharge of an attorney normally serves to end that attorney's duty of representation to a client.
4. Assuming arguendo that Petitioner had a justified expectation that attorney Freeman was to take some action on his behalf, that expectation ceased to be justified when Petitioner discharged Freeman.
5. It is not credible that Petitioner continued to foster a belief that some action was to be taken on his behalf by Freeman after he terminated Freeman's services and Freeman returned his papers to him.
6. During the pendency of the original resignation petition (September 18, 1984 to November 21, 1984), Petitioner certainly had the ability to communicate with this Court to either confirm that a withdrawal or amendment of said petition had been submitted on his behalf or to make that request in an appropriate and timely fashion.

7. A review of the chronology of events and documentation related thereto, as hereinafter set forth in this response, should convince this Court beyond peradventure that the instant Petition is not only not timely filed but filed for the purpose of further delaying, impeding, and otherwise frustrating the processing of numerous disciplinary cases pending against Petitioner.

8. Said review should also establish that Petitioner has omitted material facts from the instant Petition as part of a deliberate attempt to mislead this Court.

9. Petitioner did not submit his resignation in a vacuum. The original resignation petition references that he had three (3) separate disciplinary proceedings pending against him at referee level which had been assigned Supreme Court Case Nos. 64,272, 64,468 and 64,847.

10. A hearing had been conducted by the Referee on May 18, 1984 and the Petitioner failed to appear at said hearing.

11. Subsequent to said hearing but prior to submitting his report to this Court, the Referee was able to contact Petitioner through Petitioner's father.

12. As a result of the aforesaid contact, a three-way telephone conference call was held between the Referee, Petitioner, and Bar Counsel.

13. The Referee determined that he would hold his report to the Court in abeyance and allow Petitioner the opportunity to appear before him on July 25, 1984 or to submit a written memorandum on or before that date. Petitioner was instructed by the Referee to notify Bar Counsel by July 13, 1984 whether Petitioner would be presenting his defense in person or submitting a written memorandum.

14. Petitioner advised, by mailgram dated July 13, 1984, that he would not be appearing in person but elected to file a written response. A copy of said mailgram is attached hereto and incorporated herein as Exhibit two (2).

15. Petitioner was the subject of an outstanding arrest warrant in Collier County, Florida at the time the aforesaid mailgram was sent.

16. Subsequent to the sending of the mailgram but prior to the scheduled hearing date of July 25, 1984, Petitioner was arrested in Dade County, Florida and returned to Collier County, Florida.

17. Petitioner then caused to be delivered to both the Referee and Bar Counsel, on July 25, 1984, a Response and letter. Copies of said Response and letter are attached hereto and incorporated herein as Exhibit three (3). The originals of these documents are in the possession of the Referee.

18. Petitioner raised the possibility of resignation on page three (3) of the aforesaid letter without any inducement from Bar Counsel.

19. A three-way telephone conference between the Referee, Petitioner, and Bar Counsel was held on July 27, 1984 which served as a status conference.

20. Attached hereto and incorporated herein as Exhibit four (4) are relevant portions of the transcript of the aforesaid proceedings which are referenced below.

21. During the course of the aforesaid conference call, Petitioner requested Bar Counsel prepare a resignation letter and Bar Counsel responded that he would prepare the appropriate petition only if Petitioner made a decision to permanently resign (see page sixteen (16), line six (6) through page seventeen (17), line fifteen (15) of the transcript).

22. During the course of the aforesaid conference call, Petitioner requested time to consult with an attorney (see page seventeen (17), line sixteen (16) of the transcript) and the Referee agreed to this request with the cautionary note that he was preparing his findings for submission to the Court (see page seventeen (17), line nineteen (19) through page eighteen (18), line five (5) of the transcript).

23. During the course of the aforesaid conference call, Petitioner broached the subject of what impact the disciplinary proceedings would have on the criminal charges pending against him and Bar Counsel responded that that would be speculative in nature but that the applicable rule pertaining to resignations did not require any admission of wrongdoing (see page twenty-

one (21) , line two (2) through page twenty-two (22) , line twenty-three (23) of the transcript) . Bar Counsel never represented to Petitioner that a resignation would help resolve pending problems with the state and always advised Petitioner that he had no control over the pending criminal matters .

24. Subsequent to the aforementioned three-way conference call, Petitioner submitted a motion to the referee wherein he stated that it was his intent to resign from The Florida Bar . A copy of said motion is attached hereto and incorporated herein as Exhibit five (5) .

25. Pursuant to Petitioner's request, Bar Counsel immediately prepared a proposed resignation petition and transmitted same to Petitioner on or about August 8, 1984. A copy of the letter of transmittal is attached hereto and incorporated herein as Exhibit six (6) .

26. Bar Counsel consistently informed Petitioner , during all discussions pertaining to the resignation option, that The Florida Bar would vigorously oppose any resignation petition unless it expressly stated that it was permanent in nature .

27. The resignation petition was not immediately forthcoming and Bar Counsel was informed that Petitioner was consulting with an attorney .

28. Executed copies of the resignation petition were received by Bar Counsel on or about September 7, 1984.

29. The petition had an added paragraph nineteen (19) which was both typed and handwritten on different copies received by Bar Counsel .

30. Bar Counsel submitted the typed version of the modified Petition to the Court but herewith submits the page with the original handwritten change which is attached hereto and incorporated herein as Exhibit seven (7) .

31. Bar Counsel, out of an abundance of caution, also obtained a letter of authorization from Petitioner to submit the original resignation petition to the Court. The original of said letter was submitted to the Court when the original resignation petition was filed and a copy of same is attached hereto and incorporated herein as Exhibit eight (8) .

32. In summary, Petitioner was the subject of disciplinary proceedings and could not appear before the Referee because of pending criminal charges and an outstanding arrest warrant (see Exhibit two (2)); Petitioner initially raised the possibility of resignation in his own pleadings (see Exhibit three (3)); Petitioner raised the issue of what impact the disciplinary proceedings would have on pending criminal matters and was given time to consult an attorney by the Referee (see Exhibit four (4)); Petitioner expressed his intent to resign in his own pleadings (see Exhibit five (5)); Bar Counsel only agreed to a stay of disciplinary proceedings at referee level upon condition that the resignation be permanent in nature and in proper format (see Exhibit six (6)); Petitioner or his authorized agent added an additional paragraph to the proposed resignation which clearly revealed his intent and desire to terminate disciplinary proceedings without opposition from The Florida Bar (see Exhibit seven (7)); and Petitioner expressly authorized submission of the revised petition and made reference to the revision by letter to Bar Counsel (see Exhibit eight (8)) .

33. The foregoing factual rendition with supporting documentary evidence should establish to this Court's satisfaction that Petitioner was not induced to submit his resignation by false representations and that he voluntarily , knowingly and intelligently submitted the original resignation petition .

34. Should the Court determine that it will consider the instant Petition on the merits, it is the position of The Florida Bar that said Petition should be denied and that Petitioner should be given the choice of either agreeing to permanent resignation or disbarment or having the pending cases remanded to the Referee for further proceedings .

35. Review of the pending disciplinary matters against Petitioner establishes that they are very serious by virtue of the nature of the alleged misconduct and the cumulative nature of the misconduct. Three (3) separate complaints encompassing twelve (12) separate findings of probable cause had been assigned

to a Referee. In addition, the original resignation petition also referenced four (4) other grievance committee proceedings and pending criminal proceedings against Petitioner.

36. The Florida Bar had, in fact, requested at the May 18, 1984 hearing before the Referee a disciplinary sanction of disbarment for twenty (20) years.

37. This Court has been faced with similar circumstances in the past where disciplinary proceedings have been pending at referee level and an attempt to resign for the minimum allowable period of three (3) years was made. The Court denied such an application and subsequently approved a petition for permanent resignation. The Florida Bar v. Thompson, 419 So.2d 1056 (Fla.1982).

38. The totality of the circumstances as hereinabove stated and the nature of the pending charges should result in the outright denial of Petitioner's attempt to convert his permanent resignation to a three (3) year resignation without further argument but The Florida Bar would be prepared to further argue this point should the Court require more exhaustive argument.

39. The Florida Bar is constrained to comment on the inherent differences between disbarment, which is the disciplinary sanction it sought before the referee, and resignation with the possibility of readmission that is now being sought by Petitioner.

40. While both disbarment and resignation with leave to reapply impose a three-year minimum time period in which an attorney is prohibited from practicing law, there are significant differences between the two. The primary difference is that to gain readmission a disbarred attorney must comply with the rules and regulations governing admission to The Florida Bar. This would include passing a bar examination as well as undergoing a rigorous character investigation conducted by the Board of Bar Examiners. See article XI, Rule 11.10 (5) of the Integration Rule of The Florida Bar. A resigned attorney, however, may reapply by petition to the Board of Governors after three (3) years and

payment of costs . See article XI, Rule 11.08 (5) & (6) of the Integration Rule of The Florida Bar . Thus, readmission following disbarment is a substantially more difficult procedure than in resignation .

41. In addition, the public perceives disbarment as a form of professional censure and not a "slap on the wrist." Allowing an unethical attorney to resign with the possibility of readmission may be perceived by the public as permitting the attorney to "escape" censure by allowing him to take what may be viewed as a three-year leave of absence from the practice of law. Such a perception would especially apply in the instant matter since a Referee has considered the cases assigned to him and was in the process of preparing his report for submission to the Court .

42. Finally, the "resignation route" may come to be used by attorneys involved in disbarment offenses as a "last resort" in that these attorneys may seek to systematically thwart the disciplinary processes, as Petitioner has done in the instant proceeding, and then when faced with the final day of reckoning submit a petition to resign with leave to reapply, pleading personal hardship and throwing themselves on the mercy of this Court but conveniently omitting any mention of the great public harm they have done .

43. Based upon the foregoing, it is The Florida Bar's position that the granting of the instant Petition will adversely affect the public interest and purity of the courts as well as hinder the administration of justice and the confidence of the public in the legal profession .

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court deny Petitioner's Petition For Leave to Amend Petitioner's Resignation From The Florida Bar Pending Disciplinary Proceedings as not timely filed or in the alternative, if the amended petition is accepted and considered on the merits, that it be denied and that the Court enter an order whereby Petitioner is allowed to reinstate his previously accepted permanent resignation or consent to disbarment, and if he fails to do either within a specified period of time, remand, as appropriate, all pending disciplinary proceedings to the Referee or grievance

committee for whatever further proceedings they deem appropriate.

Respectfully submitted,

Richard B. Liss

RICHARD B. LISS

Bar Counsel

The Florida Bar

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Leave to Amend Petitioner's Resignation from The Florida Bar Pending Disciplinary Proceedings has been sent by U.S. Mail to Arthur G. McDonnell, Petitioner, at his last known address c/o Barbara McDonnell, 537 5th Avenue, South, Naples, Florida 33940; and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226 on this 8th day of JANUARY, 1985.

Richard B. Liss

RICHARD B. LISS