

SEP 13 2006

**IN THE CHANCERY COURT OF SHELBY COUNTY
THIRTIETH JUDICIAL DISTRICT OF TENNESSEE
AT MEMPHIS**

EDWARD INMAN CURRY, III,
Petitioner,

v.

No. CH-04-2127-3

**BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE,**
Respondent.

JUDGMENT

In this cause, the petitioner Edward Inman Curry III (Curry) appeals the judgment of a Hearing Panel (Panel) which found Curry guilty of misconduct in violation of Tennessee Supreme Court Rule 8, Disciplinary Rule (DR) 9-102(A)(2) and DR 1-102(A)(1)(5), and (6) and suspended Curry from the practice of law for a period of six (6) months.

For the reasons stated in this opinion, the Court finds that Curry did not violate DR 9-102(A)(2) and dismisses that portion of the complaint of misconduct; affirms the finding of misconduct regarding the violations of DR 1-102(A)(1)(5), and (6); and reduces the judgment of suspension for six (6) months to a reprimand.

BACKGROUND

On October 22, 2002, the Board of Professional Responsibility of the Supreme Court of Tennessee (Board) filed a petition for discipline against Curry. The petition alleged Curry was guilty of professional misconduct in that he fraudulently converted funds that belonged to his client and that he endorsed settlement checks without any authority to do so.

A Hearing Panel heard this matter on July 19, 2004. The Panel, in its judgment filed August 22, 2004, found Curry guilty of misconduct in violation of DR 9-102(A)(2) and DR 1-102(A)(5) and (6) and ordered a suspension from the practice of law for six (6) months. A copy of the Judgment of the Hearing Panel is attached to this opinion as Exhibit A and is incorporated herein verbatim.

Curry timely appealed the Panel's decision to this Court. On June 13, 2006, this Court heard the matter on the record of the proceeding before the Panel and the testimony of Curry and other witnesses.

BOARD'S MOTION *IN LIMINE*

At the June 13, 2006 hearing, the Board objected to the testimony of Attorney Bruce Smith who was offered as a Respondent's expert witness regarding ethics. The Court took the objection under advisement and allowed the witness to testify. The basis for the Board's objection was the witness was not timely disclosed within the

discovery deadlines established by the Court. After due consideration, the motion *in limine* to exclude Mr. Smith's testimony is granted.

FINDING OF FACTS

The finding of facts contained in this Judgment of the Hearing Panel (Ex A) are adopted by this Court. These factual issues were highly contested and credible evidence was presented by both parties, but the Court finds the evidence does not preponderate against the Panel's finding of facts.

CONCLUSIONS OF LAW

Tennessee Supreme Court Rule 8, Disciplinary Rule 9-102(A)(2), in effect at the time, provided, in part:

All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable insured depository institutions maintained in the state in which the law office is situated.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. (*emphasis added*)

Tennessee Supreme Court Rule 8, Disciplinary Rule 1-102 states as follows:

DR1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) ...

(3) ...

(4) ...

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

After a July 19, 2004 hearing, the Panel found Curry received the settlement funds by checks dated May 23, 2001, endorsed the checks, withdrew his fee and deposited the balance into his trust account. Curry notified his client of the transition and the client objected in a letter dated July 26, 2001. The Panel found that "By withdrawing funds representing his "fee" and converting those funds to his personal use, and by failing to replace those funds in his escrow account once it became clear that his fee was in dispute, Curry violated this disciplinary rule, [9-102(A)(2)] as well as DR 1-102(A)(1) and (6)." (Exhibit A, Page 4)

DR 9-102(A)(2) clearly states that it is improper for an attorney to withdraw funds once the right to withdraw is disputed by the client. This Disciplinary Rule does not require the attorney to replace funds already withdrawn before a fee dispute arose,

although it would be the better practice to do so. The Board's interpretation of Curry's ethical obligation is not in accord with the plain language of the Disciplinary Rule.

Therefore, the Court reverses the Panel's judgment finding Curry guilty of violating DR 9-102(A)(2) for not replacing withdrawn funds after a fee dispute occurred.

The Court affirms the Panel's judgment that Curry violated DR 1-102(A)(5) and (6) in that he endorsed the settlement checks without authority.

APPROPRIATE SANCTION

The Tennessee Supreme Court has adopted the *American Bar Association Standards for Imposing Lawyer Sanctions* (1992) for determining the appropriate sanctions for lawyer misconduct. *Board of Professional Resp. v Maddox*, 148 SW3d 37, 40 (Tenn. 2004.) In imposing sanctions for attorney misconduct, the Court should consider: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. (*ABA Standards* § 3.0)

Section 5.13 of the *ABA Standards* provides that a reprimand is generally appropriate when a lawyer knowingly engages in any other (than criminal) conduct that involves dishonest, fraud, deceit, or his representation and that adversely reflects on the lawyer's fitness to practice law.

Section 7.3 of the *ABA Standards* states a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the

profession and causes injury or potential injury to a client, the public, or the legal system.

After misconduct is established, the Court is required to consider aggravating and mitigating circumstances in accordance with the *ABA Standards* § 9.0. The Panel did not articulate any aggravating circumstances other than "The violations are serious. They cannot go unpunished." (Ex A, page 5) This Court agrees that the misuse and misappropriation of client's funds is a serious violation. *Milligan v Board of Professional Resp.*, 166 SW3d 673 (Tenn. 2005), but this Court has determined that Curry neither misused or misappropriated client's funds in violation of DR 9-102(A)(2). The Panel did find mitigating factors of (a) absence of a prior disciplinary record; (b) personal or emotional problems; (g) character or reputation, and stated the violations were "wholly out of character." (EX A, page 5).

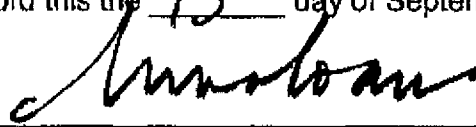
The Court finds Curry is guilty of misconduct in accordance with DR 1-102(1)(5) and (6) by indorsing the settlement checks without authority. In consideration of the entire record in this case, the Court finds a reprimand to be the appropriate sanction.



W. MICHAEL MALOAN, CHANCELLOR
SITTING BY DESIGNATION

CERTIFICATE OF SERVICE

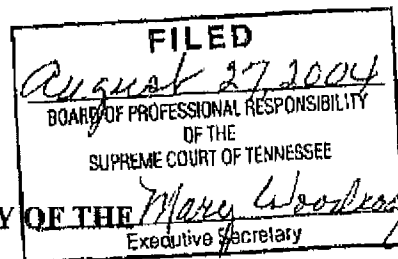
In accordance with Rule 58, Tennessee Rules of Civil Procedure, a copy of this order has been mailed to all counsel of record this the 13 day of September, 2006.



W. MICHAEL MALOAN, CHANCELLOR
SITTING BY DESIGNATION

Exhibit A

IN DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE



IN RE: EDWARD I. CURRY, III, BOPR #10938

Respondent, An Attorney Licensed
to Practice Law in Tennessee
(Shelby County)

Docket No. 2002-1344-9-JJ

JUDGMENT OF THE HEARING PANEL

This cause came to be heard on the 19th day of July, 2004, before the Hearing Panel of Gregory M. Duckett, Panel Chair, Eugene J. Podesta, Jr., and Edward L. Stanton, III, all duly appointed and authorized by the Board of Professional Responsibility of the Supreme Court of Tennessee and based upon the testimony and exhibits presented at that hearing, the Hearing Panel finds as follows:

FINDINGS OF FACT

1. Respondent, Edward I. Curry, III ("Curry") and C. I. Jones ("Jones"), initially met to discuss the possibility of Curry representing Jones in his ongoing ecclesiastical dispute in January of 1999 at the Hotel Provencial in New Orleans, Louisiana. Jones, the sitting Episcopal Bishop of Montana, had been charged with sexual misconduct, and the Episcopal Church sought his removal from that office.
2. Following his meeting with Jones, Curry returned to Memphis and discussed with his pastor whether it would be appropriate for him, as a practicing Episcopalian, to undertake a representation adverse to the Episcopal Church.
3. Curry agreed to accept the representation of Jones and authored a letter which bears the date of February 4, 1999. In that letter, Curry set out his fee arrangement as being an

hourly fee of \$185.00 per hour plus expenses. The letter provides that in the event of any recovery, Curry was entitled to one-third of the recovery as a credit against his hourly fees due. [Exhibit 2].

4. Jones denies receipt of the February 4, 1999 letter and claims that Curry agreed to represent him for a fee of \$1.00, plus expenses. [Jones Dep., p. 8].

5. Jones's office personnel testified that they never received nor opened the February 4, 1999 letter. [Hagen Dep., p. 11; Hunger Dep., p. 8]. However, Bishop Jones's practice was that mail marked "confidential" was not opened by his staff. [Exhibit 64].

6. During the course of Curry's representation of him, Jones made repeated references to his obligation to pay legal fees in connection with his ecclesiastical trial, and the burden and hardships this fee obligation imposed. [Trial Exhibits 2, 3, 4, 5, 33, 47, 49, 61, 63 and 64]. However, most of these writings were directed at efforts to collect fees from other sources, i.e. the National Episcopal Church or the Church Insurance Company.

7. Prior to the trial in Jones's ecclesiastical dispute, a settlement was reached. As a result of this settlement, Jones agreed to resign as the Episcopal Bishop of Montana. Two checks were issued by the Episcopal Diocese of Montana in return. The first check was issued on March 19, 2001 in the amount of \$118,859.00. The check was made payable to "Union Central Life and Edward I. Curry, III." The parties contemplated the purchase of an annuity for Jones from Union Central Life.

8. Upon receipt of this check, Curry contacted Steve Valerius with Union Central Life in Cincinnati, Ohio. Mr. Valerius testified that at no time during this conversation or otherwise did he authorize Curry to sign his name to the check or to otherwise endorse the check on behalf of Union Central Life. Curry testified that since Valerius stated to him that he was

unaware of the transaction which resulted in the issuance of the check and since he was unaware of any interest Union Central had in the funds, Curry assumed he was free to negotiate the check.

9. Curry withdrew one-third of the amount of this check as his "fee" and deposited the balance in his trust account. No accounting or explanation was provided to Jones.

10. The balance of the settlement proceeds was forwarded by the Episcopal Diocese of Montana by check dated May 23, 2001. This check was made payable to "Union Central Life and Edward Curry, III" in the amount of \$54,978.91. Without further communication with any representative of Union Central Life, Curry endorsed and negotiated the check. Again, he withdrew one-third from the proceeds for his "fee." The balance was deposited into his trust account.

11. On July 26, 2001, Curry sent to Jones a fee bill which, for the first time, reflected that he had applied \$57,945.97 of the settlement proceeds to his outstanding attorney's fees.

12. By letter bearing the same date, Jones wrote to Curry setting out his expectation that all the settlement proceeds, less three advances Jones had previously received, be used to fund the contemplated, but as yet unpurchased, annuity.

13. Regardless of what Curry may have understood his fee arrangement to be prior to receipt of Jones's July 26, 2001 letter, upon receipt of that letter, he understood that Jones claimed to be entitled to all of the settlement proceeds, including those funds Curry had applied to attorney's fees and deposited in his personal account.

CONCLUSIONS OF LAW

14. The parties spent much effort to establish precisely what was the agreement between Curry and Jones regarding attorney's fees. Curry testified that he personally prepared and mailed the February 4, 1999 letter which reflects his understanding that he was due a fee based upon a \$185.00 per hour rate. The Panel notes that there is a rebuttable presumption that

this letter was received in due course. *Warmath v. Payne*, 3 S.W.3d 487 (Tenn. Ct. App. 1999). Jones denies receipt of this letter and relies upon an earlier January 1999 meeting in New Orleans during which he claims Curry orally agreed to represent him for \$1.00.

15. The Panel need not resolve the issue of the mysterious February 4th letter to reach its conclusions. Whatever Curry's understanding was prior to receipt of Jones's July 26th letter, upon receipt of that letter it was clear that Jones claimed entitlement to all the settlement proceeds. At that time, Curry had withdrawn \$57,945.97 and converted those funds to his personal use. Even assuming he believed there was no dispute as to the funds when he converted them to his own use, as of July 26, 2001, he knew differently. Those funds were never replaced in Curry's trust account.

16. Supreme Court Rule 8, BR9-102(A)(2), in effect at the time, provided:

All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable insured depository institutions maintained in the state in which the law office is situated.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

By withdrawing funds representing his "fee" and converting those funds to his personal use, and by failing to replace those funds in his escrow account once it became clear that his fee was in dispute, Curry violated this disciplinary rule, as well as DR1-102(A)(1) and (6).

17. Both settlement checks were made payable to both Curry and Union Central Life Insurance Company. In order to negotiate those checks and to collect his "fees," Curry supplied the endorsement of Union Central Life. The Panel finds that he did so without the actual,

apparent or implied authority from Union Central Life Insurance Company. The Panel finds that Curry's conduct in this regard violates DRI-102(A)(5) and (6).

18. The Panel gives weight to the testimony of Reverend Nolan Pipes that Curry is an honest, trustworthy and conscientious person. The Panel also listened with interest to the testimony of both Rex Brasher and Kim Mullins, both lawyers, that Curry is a trustworthy and conscientious practitioner. Reputation and character are appropriate mitigating factors pursuant to Section 9.32 of the ABA Standards for Imposing Lawyer Sanctions. Additionally, the Panel heard testimony from Ms. Mullins regarding family problems Curry was experiencing at all relevant times and that he continues to battle. Personal and emotional problems are also appropriate mitigating factors. *Id.*

19. Mr. Curry's lack of disciplinary history is also noted and considered by the Panel in reaching its decision regarding appropriate discipline.

20. The Hearing Panel believes that the violations for which Curry is found guilty herein were wholly out of character. Yet, those violations have been established by a clear preponderance of the evidence before this Panel. The violations are serious. They cannot go unpunished.

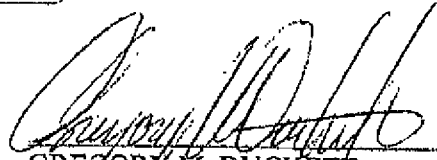
IT IS, THEREFORE, ORDERED by this Hearing Panel:

- (1) That Respondent, Edward I. Curry, III, be suspended from the practice of law for a period of six (6) months;
- (2) That following his period of suspension, the Respondent shall remain on probation for a period of six (6) months, during which Respondent shall comply with the following condition:

- (a) Respondent shall enter into a contract for peer assistance with the Tennessee Lawyers' Assistance Program (TLAP) for the duration of his probationary period. Respondent shall provide disciplinary counsel with a copy of said contract within seven (7) days of its execution;
- (b) Respondent shall comply fully with the requirements of his TLAP contract and with the requirements of any and all treatment or counseling he obtains pursuant to his TLAP contract;
- (c) Respondent shall ensure that disciplinary counsel receives progress reports throughout the period of his probation directly from TLAP every sixty (60) days;
- (d) Respondent shall have a monitor who is Lucian T. Pera, Esquire, of Memphis, Tennessee who is authorized to have access to Respondent's escrow account and client files for the purpose of determining whether Respondent is appropriately use said account. Respondent shall provide Mr. Pera with access to all records and information necessary for Mr. Pera to perform his tasks in this regard. Further, Respondent shall ensure that Mr. Pera as monitor provide bi-monthly progress reports directly to disciplinary counsel regarding his findings throughout Respondent's probationary period. As monitor, Mr. Pera's fiduciary responsibilities in this matter are to the Board and to the Tennessee Supreme Court. Accordingly, said monitor is authorized and directed to report any evidence of possible ethical misconduct to the Board of Professional Responsibility. Respondent shall pay all reasonable attorney's fees and expenses of this monitor, if any.

- (3) Respondent shall pay all costs incurred by the Board of Professional Responsibility in this cause on or before the completion of his probationary period.

THIS 20 day of August, 2004.



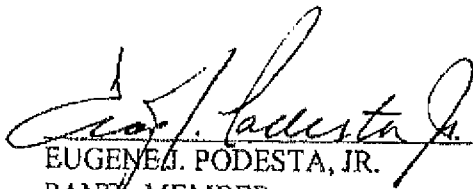
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