

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

**BOARD OF PROFESSIONAL
RESPONSIBILITY OF THE
SUPREME COURT OF TENNESSEE**

Petitioner,

v.

CHARLES EDWARD DANIEL

Respondent.

ENTERED

MAY 16 2017

HOWARD G. HOGAN

1387-116

No. 192070-3 ✓

BOPR DOCKET NO. 2014-2315-2-AJ


NOTICE OF ENTRY

JUDGMENT

This case came to be heard on April 10, 2017, on Petitioners' Writ of Certiorari from the recommendation of the Hearing Panel in Board of Professional Responsibility Docket Number 2014-2315-2-AJ. The Court has read the record and pre-trial briefs, and heard oral argument from the parties.

Based upon the record and argument, the Court affirms the Hearing Panel's recommendation to suspend the Respondent for a period of three (3) years, with all three (3) years to be served on probation. Attached herewith are the Court's Findings of Fact and Conclusions of Law that are incorporated herein.

IT IS SO ORDERED, this 16, day of May, 2017.



Telford Forgety, Jr., Chancellor

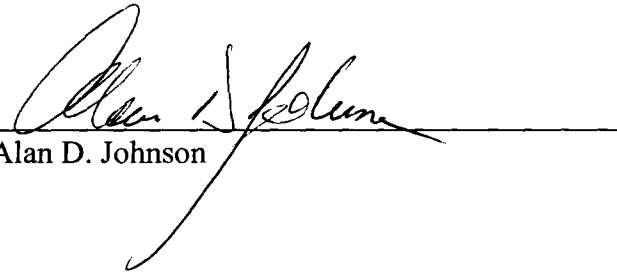
SUBMITTED FOR ENTRY:



Alan D. Johnson, BPR #10505
Disciplinary Counsel - Litigation
10 Cadillac Drive, Suite 220
Brentwood, Tennessee 37027
(615) 361-7500

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Judgment* has been forwarded to counsel for Charles Edward Daniel, by First Class U. S. Mail addressed to H. Doug Nichol, Esq., Nichol and Associates, 6759 Baum Drive, Knoxville, TN 37919, on this 17th day of May, 2017.


Alan D. Johnson

CERTIFICATE

I, Howard G. Hogan hereby certify that I have mailed a true and accurate copy of the foregoing Judgment, to all parties or their attorney of record who have not approved same by placing same in the U. S. Mail, postage prepaid this 17th day of May, 2017


Howard G. Hogan
Clerk & Master, Chancery Court

By 
Sandy Johnson
Deputy Clerk

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IN THE CHANCERY COURT
FOR KNOX COUNTY, TENNESSEE

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME
COURT OF TENNESSEE,

PLAINTIFF,

VS

BOPR DOCKET # 2014-2315-2-AJ

CHARLES EDWARD DANIEL,

DEFENDANT.

COURT'S RULING

HONORABLE TELFORD FORGETY, JR., PRESIDING


AS HEARD ON APRIL 10, 2017

APPEARANCES:

FOR PLAINTIFF: ALAN D. JOHNSON, ESQ.

FOR DEFENDANT: H. DOUGLAS NICHOL, ESQ.

Barringer Court Reporting
P.O. Box 8035, Gray, TN - 423-477-7844

 ORIGINAL

1 COURT'S RULING

2
3 THE COURT: Very well. Thank you very much.
4 I, like I say I appreciate very much your, your work
5 briefs laying out in a very concise fashion what, on
6 what happened and what the issues are. I studied up
7 on this thing as best I could today or yesterday and
8 had listened to your, to your arguments here. I'm
9 going to go ahead and decide this thing from, from
10 the bench as we, as we sit here now, so accordingly
11 this will be the Court's findings of fact and
12 conclusions of law.

13 This matter comes to the Court as a review
14 of the findings of the hearing panel of the Board of
15 Professional Responsibility on certiorari, that is,
16 from a decision of the hearing panel of the Board of
17 Professional Responsibility. It involves a, a
18 disciplinary proceeding filed against the Respondent,
19 the Defendant I'll call him, Charles Edward Daniel,
20 an attorney of course before the Bar of the State of
21 Tennessee. It arises out of some partnership
22 dealings between Mr. Daniel and his former partners,
23 Mr. Pemberton, Mr. Scott, Ms. Scott now Ms., Ms.
24 Pemberton because Mr. Pemberton, the man that Mr.
25 Daniel originally formed a partnership with, they

1 took in some new attorneys, Mr. Scott and Ms. Scoot,
2 and Mr. Pemberton married Ms. Scott, which is beside
3 the point here, but that just, just, those are the
4 other partners to the partnership. It appears that
5 the partnership was formed in 2002, between Mr.
6 Daniel and Mr. Pemberton. Unfortunately at that, at
7 the time the partnership was formed there was no
8 written partnership agreement. That left open for
9 discussion, open for misunderstanding, open for proof
10 as to what actually was the partner, the partner's
11 agreement with respect to the critical thing of well,
12 okay, you, Mr. Pemberton, you had some cases ongoing
13 before the partnership was formed when you were an
14 associate or a partner over at Lewis, King and Krieg.
15 What do we do about, what does this new partnership
16 do about fees that were partially earned at the time,
17 on, on a particular case, that were partially earned
18 at the time you were part of Lewis, King and Krieg,
19 and then fees earned on the same case that were, that
20 were earned after the formation of the partnership.
21 It turns out that the Board found with respect to
22 that that, that the partners agreed that, that those
23 fees would be split upon the basis of, of fees that,
24 that relate to work that was done, done while Mr.
25 Pemberton was at Lewis, King and Krieg goes to Lewis,

1 King and Krieg. Anything else that, that, that was
2 earned after the partnership was formed comes to the
3 partnership and we the partners in the new
4 partnership, Daniel and Pemberton, or rather
5 Pemberton was the name of the partnership, the new
6 partnership, will be divided among the partners in
7 the new partnership. No problem with that. Nobody,
8 the problem arise then, okay, what about, what about
9 fees and actually monies advanced by Mr. Daniel to
10 the new partnership. There was a disagreement, there
11 was a disagreement between the partners, Mr.
12 Pemberton and Mr. Daniel, as to what the parties'
13 agreement was with respect to fees earned on cases
14 that existed prior to the formation of the new
15 partnership. The fees earned on cases that were Mr.
16 Daniel's individual cases before the partnership was
17 formed. Disagreement but ultimately the Board found
18 that the agreement was that as to one case, Reagan v.
19 Phoenix Corporation, Mr. Daniel was to keep all the
20 fees and that was his case before the partnership was
21 formed. That he was to keep all the fees that were
22 generated from that regardless of whether they were
23 earned before the formation of the partnership or
24 after, he was to keep all the fees. Nobody takes
25 issues with that. The Board found, though it was

1 disputed, the Board found that, that as to the rest
2 of the fees that related to cases that Mr. Daniel had
3 before the partnership was formed in 2002, they were
4 to be divided. Now that is to say Mr. Daniel was to
5 keep the, the, Daniel was to split the fees. That is
6 he was to, he was to keep the, the fees that related
7 to work that he had done prior to the formation of
8 the partnership but the rest of it, fees that related
9 to, to work done after the partnership was formed,
10 they were to go to the partnership. In other words
11 the same thing with respect to Mr. Daniel on all the
12 cases other than Reagan v. Phoenix, as the agreement
13 was with Mr. Pemberton.

14 And there's another factor here that, that
15 in the early years of the partnership Mr. Daniel
16 fronted, advanced, loaned the partnership operating
17 funds out of his own pocket. Funds for the day to
18 day operation of a partnership. No question he did
19 that. Nobody takes issue with the fact that he did
20 that. And nobody takes issue with the fact that he
21 was entitled to be reimbursed for the amount of, of
22 funds that he, he advanced or loaned to, to the
23 partnership. As I touched upon earlier the rub comes
24 in just how much was that? He was entitled to
25 reimburse himself for something. Just how much was

1 it and did he in fact go beyond the amount that he
2 was entitled to be reimbursed for and take
3 partnership money to himself. That was the real
4 issue. The, but Mr. Pemberton, the other founding
5 partner, takes the position that look, by 2005, 2006
6 Mr. Daniel had reimbursed himself for all he was due
7 to reimburse himself. He used the term we were all
8 square by then. The partners were all square by
9 then. Mr. Daniel, in this proceeding, has, and does
10 take the position that, now, look, look, I don't, I
11 don't think so. I didn't think so then and I don't
12 think so now. I think there were other funds. After
13 2005, 2006, there were other funds that I was due to
14 reimburse myself for and I did that to the tune of
15 \$673,000.00 and some odd dollars, between 2006 and
16 2009. So there it was and is the basis of the, of
17 the dispute here and the basis of the, of the
18 disciplinary complaint.

19 Another thing I would mention is that there
20 was a partnership dissolution proceeding instituted
21 in the Chancery Court of Knox County where this very
22 issue and others I presume, were brought to the
23 courts. That partnership dissolution agreement was
24 resolved through mediation in 2011 to the
25 satisfaction of all parties. The problem with

1 respect to the disciplinary matter is of course the
2 fact that, that individual parties settle a dispute
3 between themselves to their satisfaction does not
4 mean that the, that the Board is, pardon me,
5 precluded from bringing disciplinary, entertaining
6 disciplinary proceedings against the, a party or
7 parties to the, to the civil dispute. That's what
8 happened here. Actually the, the evidence here
9 indicates that, that apparently, counsel, correct me
10 if I'm wrong. The first information the Board
11 received relative to this matter involving Mr. Daniel
12 was in 2010. It was before the partnership
13 dissolution proceeding was resolved, that having been
14 accomplished in 2011. In any event the, the
15 disciplinary proceeding, what I'm getting at, the
16 disciplinary proceeding was still hanging out there
17 after the, the resolution of the civil proceeding the
18 partnership disciplinary proceeding was still hanging
19 out there. The disciplinary proceeding was resolved
20 by a hearing in front of a hearing panel in 2014.
21 Now as...

22 MR. NICHOL: It was 2016.

23 THE COURT: Was it '16, '16? Okay.

24 MR. NICHOL: Yes.

25 THE COURT Excuse me. In 2016. The hearing

1 panel made its findings and, which were extensive.
2 They, they made some forty-five, as the Court
3 remembers, forty-five, no, actually it was more than
4 that. Some sixty actually, specific findings of, of,
5 of fact, one through, through sixty. But nobody
6 here, neither the Board nor Mr. Daniel really has
7 taken exception to the findings of fact made by the
8 Board with one perhaps exception which I'll talk
9 about a little bit later. So the facts as found by
10 the hearing panel are not really in dispute before
11 this Court. Rather what is before this Court for
12 consideration is, well, given the facts as the
13 hearing panel found them, what was the, what was the
14 appropriate discipline to be imposed? The Board
15 takes the view that, that the appropriate discipline
16 when you consider the, what the Board found with
17 respect to, to Mr. Daniel's conduct, then you, you
18 take into consideration, which they found violation
19 of, of the 8.4 of the Rules of Professional
20 Responsibility of Tennessee and then when the Board
21 says when you take that finding, which again is not
22 really disputed by either party here, and you further
23 take the, the ABA standards which are applicable to,
24 to the ABA standards as to the type of discipline to
25 be imposed that the discipline that should have been

1 meted out was disbarment under Section 5.11 of the
2 ABA standards rather than suspension and placement on
3 probation. Now that's the Board's viewpoint. From
4 the standpoint of, of Mr. Daniel, he says among other
5 things, he says, look, Judge, it's not exactly that
6 clear-cut nor that simple because the, the 8.4 of the
7 Rules of Professional Conduct and Section 5.11 of the
8 ABA standards involve criminal intent. This is Mr.
9 Daniel's viewpoint. Criminal intent, and here the
10 hearing panel specifically found that Mr. Daniel took
11 this money all right, and, and the hearing panel
12 found that he intended to permanently deprive his
13 partners all right, but, but that does not equate to
14 criminal intent. In effect Mr. Daniel argued, he
15 said, well, I took the money all right, there's not
16 question about that. You've got the checks there in
17 the record. I took the money all right. But I took
18 the money and I, I meant for my partners not to get
19 it all right, but my intent was not to steal the
20 money. My intent was to pay myself back and perhaps
21 I was just wrong in the amount, but still yet there
22 was no criminal intent. It was money that I thought
23 I was entitled to pay myself back for. And so Mr.
24 Daniel takes the position that, look, that takes me
25 out of, of, of Section 5.11 of the ABA Standards

1 because there was no criminal intent. Maybe I wound
2 up being wrong about the amount that I was entitled
3 to reimburse myself but by the way remember that
4 everybody agrees that, that I was entitled to
5 reimburse myself for some money. Everybody agrees to
6 that and everybody did and there is, go back to the,
7 you know, the problem here that there was never any
8 written partnership agreement and they had a dispute
9 about, they had a dispute about this matter just
10 exactly what was he entitled to reimburse himself for
11 and that dispute really was not resolved until the
12 hearing panel made its decision. Each side had its
13 own view about that. The hearing panel resolved it,
14 resolved it against Mr. Daniel, but it wasn't
15 resolved. At least for purposes, I don't know what
16 happened in the civil proceeding in the Chancery
17 Court of Knox County with, with respect to that but
18 as far as this matter is concerned that issue was not
19 resolved until the hearing panel rendered its, its
20 judgment. In any event the hearing panel wound up
21 deciding that the discipline to be imposed was not
22 disbarment, but was that Mr. Daniel would be
23 suspended for three years and the three year
24 suspension could be served on probation. That is
25 what the Board takes issues with here now saying all

1 things considered the hearing panel on the record
2 here, the hearing panel should have imposed
3 disbarment, not a mere suspension with, with, with
4 probation. What is implicated before this Court is
5 okay, look, what's the, what's the standard of review
6 before this Court, because this case comes to this
7 Court on certiorari, on a petition for certiorari
8 from, from the Board the, the standard, it was a
9 well-known standard. It's, it's a standard that,
10 that applies to all kinds of things. It's a standard
11 that applies to why this Court doesn't get many
12 uniform administrative procedures and ACT cases.
13 They get a lot of in Nashville, of course. This
14 Court doesn't, doesn't get a lot of them but, but a
15 similar standard applies for, for example in a, in an
16 unemployment insurance, unemployment benefits claim.
17 Anyway the, the standard and there are only a couple
18 of, a couple of elements that, that are implicated
19 here. Just one second. The standard found in
20 Tennessee Supreme Court Rule 9, Section 1.3, the 2016
21 version, by the way, which is the version that is
22 applicable here. "The review shall be on the
23 transcript and be evident before the hearing panel
24 and its findings and judgment." To skip a little,
25 "The Court may affirm the decision of the panel or

1 remand the case for further proceedings. The Court
2 may reverse or modify the decision if, if, and may
3 reverse or modify if the rights of the petitioner
4 have been prejudiced because the panel's findings,
5 inferences, conclusions or decisions are, number one,
6 in violation of constitution or statutory provision."
7 That's not alleged here. "Number two, in excess of
8 the panel's jurisdiction." That's not argued here.
9 "Number three, made upon unlawful procedure." That's
10 not argued here. The last two are the ones that are
11 implicated here. "Number four, arbitrary or
12 capricious and characterized by abuse of discretion
13 or clearly unwarranted exercise of discretion," or
14 "Number five, unsupported by evidence which is both
15 substantial and material in light of the entire
16 record." And everybody agrees upon, on this that
17 generally in looking at factual matters that this
18 Court may not substitute its judgment for the, the
19 lower panel, the inferior panel. That this Court
20 could look at it and say, well, you know, if that
21 would have been me I would have, I would have decided
22 something else. That's beside the point. Even if
23 this Court believes that the underlying panel, the
24 underlying authority was wrong in what it did the
25 question is is there substantial and material

1 evidence to support what they did and if so the Court
2 has got to leave it alone even if the Court thinks I
3 would have, had it have been me I would have done
4 something else because that would simply be this
5 Court substituting its judgment for that, for that of
6 the hearing panel. In this case it, it comes down,
7 and the Board argues that, look, Judge, if you, in
8 this case if you look at the, what the Board found
9 Mr. Daniel did, which is not disputed in this record,
10 and if you apply the ABA Standards back to a point I
11 made earlier then the discipline that the hearing
12 panel should have imposed is disbarment. And once
13 again on the other side of the coin Mr. Daniel argues
14 that, look, Judge, it may go, Mr. Daniel hasn't used
15 these words, look, Judge, it may have been that
16 disbarment could have been appropriate. It may have
17 been. But the hearing panel didn't do it. It also,
18 Mr. Daniel argues, look, it may have been that
19 disbarment was appropriate or that suspension and he
20 argues that suspension and probation was appropriate
21 and that the, the hearing panel had the authority to
22 choose between the two and they chose suspension and
23 probation and in effect Mr. Daniel argues that, look,
24 Judge, you cannot in a certiorari case substitute
25 your judgment for that of the hearing panel. It

1 might have gone the other way but it didn't, and in
2 effect that's what Mr. Daniel argued. It goes a
3 little bit, a little bit further than that. On the
4 part of the, the Board, the Board says look, we, we
5 know that there is some discretion vested in the
6 hearing panel. For example you've got aggravating
7 factors, mitigating factors and the Court by the way,
8 the hearing panel by the way found five mitigating
9 factors and three aggravating factors here. There
10 are an additional three aggravating factors which the
11 Board argues here should have been found, but were
12 not. And the Board argues that, look, it may have
13 been that when you, when the hearing panel applied
14 the aggravating factors and mitigating factors that
15 it could have departed downwardly from the, what it
16 refers to as the baseline discipline indicated by
17 the, the ABA Standard 5.11, which is disbarment. The
18 Board concedes it, you know, it may have been if the
19 hearing panel had specifically explained you know, if
20 we apply this mitigating factor, that mitigating
21 factor, the other mitigating factor and we weigh it
22 off up against the aggravating factors that we find
23 that it's appropriate to, to depart downwardly. So
24 the Board concedes that, or the Board of Professional
25 Responsibility concedes its hearing panel might have

1 done that, but they say, look, they didn't do that.
2 And in the absence of an explanation of how you, you
3 justify a downward departure from Section 5.11, the
4 ABA Standards which requires disbarment, in the
5 absence of an explanation of that then the
6 appropriate discipline was disbarment.

7 Looking at it again and, and going back to
8 what's the standard of review by this Court, this
9 Court cannot substitute its judgment. The question
10 is does the, does the, the record before this Court
11 indicate that, that the decision of the hearing panel
12 was arbitrary and capricious? Or not supported by
13 substantial and material evidence in, in looking at
14 the entire record and considering what the hearing
15 panel did, can I come to the, come to the conclusion
16 that the hearing panel acted arbitrarily and
17 capriciously or in a manner that was not supportive?
18 By substantial and material evidence the, the answer
19 to the question is no, I cannot come to that, I
20 cannot come to that conclusion. It seems to me that
21 if you, if you take the Board's contention at face
22 value that the, the hearing panel, and it's not
23 entirely clear to me that the, that the hearing panel
24 found criminal intent. Mr. Johnson, on behalf of the
25 Board says, look, if you take what they did find

1 that's tantamount to a finding of criminal intent.
2 He makes a good argument about that. The other side
3 of the, the coin, Mr. Nichols says, yeah, they found
4 that, that Mr. Daniel intended to permanently deprive
5 the other partners all right, but they also found
6 that, that he did that because he was, he felt
7 honestly that he was entitled to reimburse himself
8 and keep the money. And so that does not equate
9 apparently. There's that dispute in the findings by
10 the way of the hearing panel, but even if you took
11 the Board's side of it straightforward and said,
12 okay, look, I agree that the hearing panel found
13 things that equate to criminal intent, then you move
14 on. Well, could, could the hearing panel have, could
15 the hearing panel have decided, even though we find
16 criminal intent we think the, the mitigating factors
17 are such that we ought to downwardly depart from the
18 baseline discipline of disbarment and the answer to
19 that question for this Court is yes, given the record
20 here that they, they could have reasonably, even
21 whether I might have found that or I might have
22 agreed with that at the time, which is beside the
23 point, was there evidence in the record, substantial
24 and material evidence in the record from which the
25 Court, the hearing panel could have found that it was

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1 appropriate to downwardly depart from, from the
2 baseline of disbarment and the Court concludes that
3 yes, once again, this Court might not have, might not
4 have done it. I don't know what I would have done
5 without having sat on the hearing panel myself and
6 once again the standard before this Court is not, not
7 what I might have done, because that would involve
8 the substitution of this Court's judgment to that of
9 the hearing panel and I'm not authorized to do it.

10 So ultimately the Court concludes that the
11 hearing panel, that there's evidence in the record
12 from which the hearing panel could have determined
13 that the mitigating factors when considered together
14 with the aggravating factors were such that it was
15 justified to depart from, even if and it's not
16 entirely clear to me as I go back, it's not entirely
17 clear to me from the judgment of the hearing panel
18 that they found criminal intent. I refer back to
19 that thing that I've mentioned two or three times.
20 There's, there's something in the findings of the
21 hearing panel for the Board's position. There's
22 something in the findings of the hearing, hearing
23 panel for the, for the respondent's position, so it's
24 not entirely clear to me that they found the, the
25 criminal intent, but even if they did once again

1 there's evidence in the record that, that, to this
2 Court would justify the hearing panel in coming to
3 the conclusion that, whether we should depart
4 downwardly from a discipline and disbarment and
5 impose a suspension of three years to be served on
6 probation. So that will be the judgment of the
7 Court. What else can I do for you?

8 MR. NICHOLS: Nothing further for us, Your
9 Honor. Thank you.

10 THE COURT: Very well. Very well.

11 MR. JOHNSON: Do you need one of us to write
12 this up for you to, I'll just have this...

13 THE COURT: Oh, well, you can have her,
14 incident to what you need to do, but you need to have
15 her type it up and attach it to the, to the judgment.

16 MR. JOHNSON: Okay.

17 THE COURT: These days trial courts, of
18 course in this case it would be appropriate anyway to
19 make specific findings of fact and conclusions of
20 law.

21 MR. JOHNSON: Sure.

22 THE COURT: We, we have to do that these
23 days in every bench trial.

24 MR. JOHNSON: I recall.

25 THE COURT: And since 2009. We didn't used

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to have to, but we've to now. So how do you do that short of, short of the Court going back and, and doing a written findings of fact and conclusions of law, which I do sometimes, but a lot of times I would rather go ahead and make, make my call from the, from the bench and let the court reporter type it up and attach it to the written order and then you've got my findings of fact and conclusions of law rather than me trying to work on them over the next week when I've got a half a dozen cases in between to muddle my mind more than it's ordinarily muddled. All right.

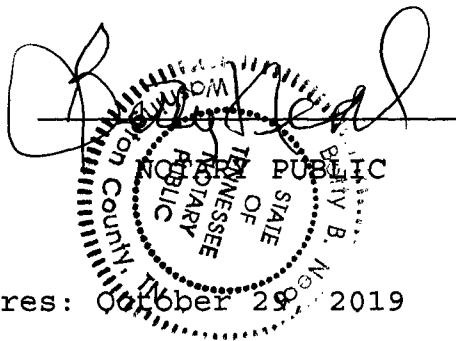
THIS COMPLETES THE COURT'S RULING AS PRESENTED IN THE FOREGOING CASE.

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CERTIFICATE

I, Betty B. Neal, Notary Public, hereby certify that the foregoing is a true and complete transcript of the COURT'S RULING in the matter of BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE V. CHARLES EDWARD DANIEL as heard on April 10, 2017.

WITNESS my hand and official seal at office at Gray, Tennessee, this the 19th of April, 2017.



My commission expires: October 29, 2019

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