

JUL 10 1998

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 7th day of July, 1998, the following order was made and entered:

Lawyer Disciplinary Board, Complainant

vs.) No. 24326

Francis M. Curnutte, III, an active member
of The West Virginia State Bar, Respondent

On a former day, to-wit, June 3, 1998, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, pursuant to Rule 3.32(c) of the Rules of Lawyer Disciplinary Procedure, by Thomas L. Sweeney, its chairperson, and presented to the Court its written recommended disposition recommending that the charges filed on the 2nd day of September, 1997, against the respondent, Francis M. Curnutte, III, an active member of The West Virginia State Bar, in the above-captioned proceeding, be dismissed.

Thereafter, on the 12th day of June, 1998, came the Office of Disciplinary Counsel, by Sherri D. Goodman, Chief Disciplinary Counsel, pursuant to Rule 3.32(c) of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the recommendation of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. It is therefore ordered that the charges filed in this case be, and they hereby are, dismissed.

Service of a copy of this order upon all parties shall constitute sufficient notice of the contents.

BEFORE THE LAWYER DISCIPLINARY BOARD
HEARING PANEL

JUN 13 1998

RECEIVED

IN RE: FRANCIS M. CURNUTTE, III, a member of
The West Virginia State Bar

I.D. No. 95-02-172
Sup. Ct. No. 24326

ORDER

The Respondent has filed a Motion for Summary Judgment in the above-styled Statement of Charges on the basis that Rule 2.14 of the Rules of Disciplinary Procedure bars the charges in said Statement of Charges.

The Subcommittee has reviewed the Motion, as well as all pleadings and documents filed in connection therewith, and after consultation of all three subcommittee members, makes the following findings:

1. The provisions of Rule 2.14 of the Rules of Lawyer Disciplinary Procedure adopted July 1, 1994, bars disciplinary action based on complaints filed more than two years after the existence of the violation became know or should have become known.

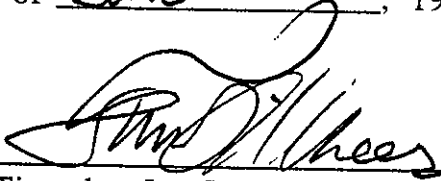
2. The two year limitation period under 2.14 begins to run when a complainant knows, or in the exercise of reasonable diligence should know of the existence of a violation of the Rules of Professional Conduct; and this subcommittee is of the opinion that the West Virginia

Supreme Court of Appeals did not provide for an exception to Rule 2.14 due ^{to} a complainant's incarceration.

3. The evidence is clear, convincing and undisputed that all alleged misconduct of the Respondent was known, or reasonably should have been known, by the complainant, Jamal A. Azeez, on March 23, 1993, more than two years before the filing of the complaint.

Based upon all of the above, the subcommittee is of the opinion that the Statement of Charges, I.D. No. 95-02-172, Supreme Court No. 24326, should be, and is hereby ordered dismissed.

ENTERED this 1st day of June, 1998.



Timothy L. Sweeney
Subcommittee Chairperson

**BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA**

Re: FRANCIS M. CURNUTTE, III, an active member of
The West Virginia State Bar

I.D. No.: 95-02-172
Bar No.: 0905

STATEMENT OF CHARGES

YOU ARE HEREBY notified that a Hearing Panel Subcommittee of the Lawyer Disciplinary Board will hold a hearing pursuant to Rules 3.3 through 3.16 of the Rules of Disciplinary Procedure, upon the following charges against you:

1. Francis M. Curnutte, III is a lawyer practicing in Kanawha County, Charleston, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on May 20, 1980.

2. The Complainant, Jamal A. Azeez, was convicted of second degree sexual assault in 1987. Mr. Azeez was sentenced on September 14, 1987 in open Court, but the formal order was entered into the Clerk's Office on September 23, 1987.

3. Mr. Azeez's bond had been revoked upon his conviction. While incarcerated, he hired Respondent to represent him on appeal.

4. Respondent was successful in having Mr. Azeez released on a \$25,000.00 appeal bond on November 5, 1987, which permitted Mr. Azeez to remain out on bond until resolution of his appeal. The petition needed to be filed within eight months of the sentencing order.

5. On May 24, 1988, Respondent filed a Petition for Appeal. The Supreme Court refused the appeal on July 20, 1988, with one Judge dissenting. No grounds for the rejection were cited.

6. A *capias* was issued seven days later, because Mr. Azeez failed to report to serve his sentence.

7. According to Respondent, before he learned that the first petition for appeal had been denied, Mr. Azeez called him and informed him of the fate of the petition. Mr. Azeez asked what they would do now, and Respondent informed him that he needed to start serving his sentence. Mr. Azeez hung up.

8. Mr. Azeez was arrested in Florida and extradited to West Virginia in 1991.

9. Kristen Keller, an Assistant Prosecuting Attorney in Raleigh County, called Respondent to inform him of Mr. Azeez's arrest. She informed him that he would be a witness, since Mr. Azeez was telling the authorities that Respondent had advised him to flee the jurisdiction.

10. On January 5, 1993, the Court held an in-camera hearing in *State v. Azeez*. Mr. Azeez had moved to prevent Respondent from testifying. On page 73 of the transcript, Ms. Keller made a proffer of what Respondent would testify. She stated as follows:

The defendant telephoned Mr. Curnutte. Mr. Curnutte had not yet gotten the notice from the Supreme Court of Appeals that the defendant's appeal was denied. The defendant telephoned Mr. Curnutte, and Mr. Curnutte will testify the defendant was very angry and stated, "What are you going to do now; what are you going to do now, what are you going to do now?" Mr. Curnutte said "Nothing, it's over. You either surrender yourself - you've got to go back to prison - or the police are going to arrest you." The defendant then disappeared.

11. After hearing Respondent testify in-camera on January 5, 1993, the Court took the motion to limit Respondent's testimony under advisement. The Court revisited the issue at a March 12, 1993 hearing.

12. The Court ruled that the telephone conversation between Respondent and Mr. Azeez would not be admissible in the State's case in chief as being privileged. However, if Mr. Azeez testified at the trial about Respondent telling him to flee the jurisdiction or his not communicating with Mr. Azeez, the Court would consider the attorney/client privilege waived by Mr. Azeez. The State could then call Respondent about that telephone conversation during the State's rebuttal.

13. On March 22, 1993, Respondent was called by the State in its case in chief to testify during Mr. Azeez's prosecution for failure to appear. Ms. Keller asked:

Now in July of 1988, about a year after his July of '87 conviction, were you notified by the Circuit Court as to the outcome or their ruling on your petition for appeal?

Respondent answered:

I was notified by the Supreme Court. Ordinarily what happens when you petition for appeal, what you're doing you're asking the Supreme Court to agree to hear your appeal. If they agree to hear the appeal, briefing schedules are set and it's argued before the Court.

If the Court declines to hear your petition, it means that, for whatever reason, they do not think the arguments are meritorious enough to have the full appeal process. Ordinarily the clerk of the Supreme Court will call the attorney and say your petition was either accepted or it was rejected and give you the vote.

In this instance, I believe I was out of town and I did not hear from the clerk. *The first I heard about the rejection of the petition was from Mr. Azeez.*

[Emphasis supplied]

Ms. Keller did not immediately follow-up on that last sentence. She asked:

Now, once petition for appeal is rejected, then, as counsel for Mr. Azeez, can you tell that - or - and as a criminal lawyer, what then is the status of the \$25,000.00 bond?

However, Ms. Keller later asked Respondent the following question:

Now, after you received the information from the defendant that his appeal had been denied, did you have - after that -

14. At this point, Mr. Azeez's attorney asked to approach the bench and complained that Respondent had spontaneously violated the Court's ruling and the attorney/client privilege by informing the jury that Mr. Azeez knew about the denial of the appeal. He also complained that Ms. Keller was reiterating to the jury, in her last question, the fact that Mr. Azeez knew the appeal had been denied. Ms. Keller explained that her question was simply going to be whether Respondent had had any further contact with his client after July of 1988.

15. The Court acknowledged that there was error, but he did not declare a mistrial. The Court stated he was not sure Respondent or Ms. Keller intended to violate the Court's instruction.

16. By informing Ms. Keller of the contents of his conversation with Mr. Azeez prior to a Court ruling on its admissibility, Respondent violated Rule 1.6 of the Rules of Professional Conduct, which provides:

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

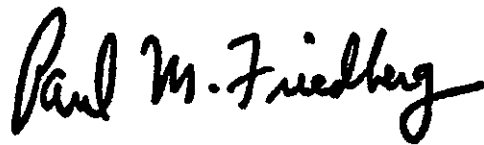
- (1) to prevent the client from committing a criminal act; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

17. By testifying gratuitously that "The first I heard about the rejection of the petition was from Mr. Azeez", after the Court had held this conversation was privileged, Respondent violated Rule 1.6 of the Rules of Professional Conduct as set forth above.

* * *

Pursuant to Rule 2.9(d) of the Rules of Lawyer Disciplinary Procedure, the Investigative Panel has found that probable cause exists to formally charge you with a violation of the Rules of Professional Conduct and has issued this Statement of Charges. As provided by Rules 2.10 through 2.13 of the Rules of Lawyer Disciplinary Procedure, you have the right to file a verified written response to the foregoing charges within 30 days of service of this Statement of Charges by the Supreme Court of Appeals of West Virginia. Failure to file a response shall be deemed an admission of the factual allegations contained herein.

DATED this 15th day of August, 1997.



Paul M. Friedberg, Chairperson
Investigative Panel
Lawyer Disciplinary Board