

MAR 25 2008

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY [Signature]

File No. 06-1317

HEARING OFFICER'S REPORT

RESPONDENT.

PROCEDURAL HISTORY

4. In or about November of 2005, James Perry ("Mr. Perry") contacted Respondent by phone about structuring a company to operate a national chain of medical spas ("Scivana").
5. Respondent began meeting with Mr. Perry in developing the structure of the company.
6. Respondent and Mr. Perry discussed whether Respondent should have an executive position with, or partial equity ownership of, the company he was helping form for Mr. Perry.
7. On or about January 9, 2006, Respondent met with Mr. Perry and Stephen Cummings ("Mr. Cummings") Mr. Perry's existing attorney. At this meeting, Respondent presented the work he had conducted in the case so far, including a state-by-state analysis and the legal structure he had developed.
8. Respondent presented a written letter to Mr. Cummings that contained an ER 1.8 advisories/disclaimer with the space for the signature of Mr. Perry to indicate that he had been advised of the requirements of ER 1.8.
9. The letter also contained a section entitled "Scivana Medical Ownership Agreement." That section indicated that Respondent would be entitled to a 10% ownership interest in Scivana, in addition to any salary he may earn as an employee of Scivana. This section also had a space for the signature of Mr. Perry.
10. Neither Mr. Perry nor Mr. Cummings ever signed either section of the letter.
11. Respondent continued to work on the case, developing a legal structure for Scivana compliant with each state's laws.
12. On or about January 17, 2006, Respondent filed the Articles of Organization for Scivana with the Arizona Corporation Commission

13. In the Articles of Organization, as Organizer, Respondent listed himself as Statutory Agent for Scivana.
14. Respondent, as Organizer, also listed himself as the Manager for Scivana in the Articles of Organization.
15. In the Articles of Organization, Respondent listed Mr. Perry as a Member of Scivana.
16. On or about January 19, 2006, Respondent presented Mr. Perry with a Nondisclosure Agreement ("NDA") he had drafted for Mr. Perry's girlfriend, Joan Von Pantz ("Ms. Von Pantz"), to sign.
17. The NDA identified Respondent as "owner" of Scivana. The NDA also included the text, "Owner owns the rights to Scivana."
18. In his response to the State Bar, Respondent claims that this identification of himself as owner was a "ruse" to trick Ms. Von Pantz into believing that the NDA was Respondent's idea and not Mr. Perry's idea, so that she would not become angry with Mr. Perry.
19. On or about February 8, 2006, Mr. Perry informed Respondent that he did not have as much funding for the company as previously believed
20. On or about February 13, 2006, Respondent sent a letter to Mr. Cummings informing him that the Respondent would no longer represent Mr. Perry regarding Scivana.
21. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent made a false statement of material fact or law to a third person, and/or engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

CONCLUSIONS OF LAW

22. Respondent's conduct as described in this count violated Rule 42, Ariz.R.Sup.Ct., specifically ERs. 4.1 and 8.4(c), when he lied to Ms. Von Pantz about ownership of Scivana.
23. The State Bar dismissed allegations that Respondent violated ERs 1.8 and 8.4(a). As the case progressed and further information was presented to the State Bar, it became apparent to the State Bar that Respondent and Mr. Perry were continually negotiating the terms of whether or not Respondent would acquire an ownership interest in Scivana, and the actual business transaction had yet to take place. The State Bar concluded that there is not currently clear and convincing evidence of a violation of ERs 1.8 or 8.4(a).
24. While Respondent was paid for his representation, the amounts paid are not the subject of the Complaint, and therefore restitution is not appropriate in this case.

ABA STANDARDS

25. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; (4) the existence of aggravating and mitigating factors.

The Duty Violated:

26. The most serious violation implicated in this case is Respondent's engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent's conduct, in violation of ERs 4.1 and 8.4(c) implicates *Standard* 5.13. *Standard* 5.13 provides that "reprimand (censure) is generally appropriate when a lawyer knowingly engages in any

other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law."

27. The presumptive sanction in this matter appears to be censure.

The Lawyer's Mental State:

28. The lawyer's mental state in this matter is "knowing."

The Actual or Potential Injury:

29. The information provided to the undersigned Hearing Officer indicates that there was no actual injury. There was the potential for injury to Ms. Von Pantz in that she could have had a misunderstanding of the ownership of Scivana directly due to the misrepresentation of Respondent.

Aggravating and Mitigating Factors:

Aggravating Factors:

30. The parties submit, and this Hearing Officer concurs, that the following aggravating factors should be considered:

Standard 9.22(a), Prior disciplinary offense. Respondent received a 60 day suspension for violation of ER 1.8 on January 19, 2002.

Standard 9.22(i), Substantial experience in the practice of law. Respondent was admitted to the practice of law on December 3, 1985

Mitigating Factors:

31. *Standard 9.32(e)*, Cooperative attitude toward the proceedings. While Respondent initially denied any ethical violations, he nonetheless was fully compliant with the State Bar's investigation and provided all requested materials in a timely manner.

PROPORTIONALITY REVIEW

32. The Supreme Court has held that one of the goals of discipline is to achieve proportionality when imposing discipline, and yet the discipline in each situation must be tailored to fit the individual facts of the case. *In re Wines*, 135 Ariz. 203, 660 P 2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).
33. In *In re Romero*, SB 07-09959-D (2007), Romero was given a Censure with one year of probation and MAP/TAEPP/EEP for failing to properly safeguard client funds and then making a misstatement to the medical provider lien-holder about the status of the case. Romero violated ERs 1.3, 1.15, 4.1, 8.4(c), and Rules 43 and 44.
34. In *In re Finander*, SB 05-0157-D (2006), Finander was given a Censure, two years of probation and LOMAP/MAP/EEP for bringing a special action before the Court of Appeals without a good-faith basis. Respondent then made a false statement to the tribunal and/or failed to correct a false statement of fact. Finander violated ERs 3.1, 3.3, 4.1, 4.4, and 8.4(c) & (d).
35. In *In re Harrington*, SB 01-0058-D (2001), Harrington was given a Censure for procuring or offering for filing in a public office a document he knew to be false for lack of a genuine signature. Harrington violated ERs 3.4(b), 4.1 and 8.4(b), (c) & (d), as well as Rule 41.
36. The parties submit that based upon the specific facts of this case, and comparing them to the proportionality cases, a Censure with costs is an appropriate sanction in this matter.

RECOMMENDATION

- 37 The purpose of lawyer discipline is not to punish the lawyer, but rather to protect the public, the profession and the administration of justice, as well as preserve the Bar's integrity and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315, (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).
- 38 The Hearing Officer has considered the facts of this case, the duty violated, the aggravating and mitigating factors as well as proportionality cases, and agrees that the stipulated discipline in this case is appropriate. It is recommended that Respondent receive a Censure and pay all costs of these proceedings.

DATED this 25th day of March, 2008.

Hon. H. Jeffrey Coker
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 25th day of March, 2008.

Copy of the foregoing mailed
this 25th day of March, 2008, to:

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by *ASB*