



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**In the Matters of: JEFFREY PHILLIPS and ROBERT ARENTZ
No. SB-10-0036-D**

PARTIES:

Petitioner: Jeffrey Phillips (Robert Arentz is not participating in this part of the case.)

Respondent: The State Bar of Arizona.

FACTS:

Jeffrey Phillips is the founder and leader of the law firm Phillips & Associates, a “consumer law firm” that focuses on a high volume of cases in clearly defined areas of practice for which fixed fees are charged. The firm’s clients and their families and friends are/were largely unsophisticated. During the time that the activities in this case took place, Phillips was responsible for setting policy, billing, accounting, and intake procedures for all divisions of the firm, and he had managerial responsibility and authority for the entire firm of 250 people, 38 of whom were lawyers.

In 2002, Phillips was censured (or reprimanded) for ethical violations relating to the firm’s practices and placed on probation for two years. Conditions of the probation required Phillips to cause the firm to disclose fees and obtain express client approval of retention of the firm, clearly disclose employees as non-attorneys, ensure that non-lawyer employees did not give legal advice, use standardized intake forms and fee agreements, use a standardized intake manual given to each intake employee, be responsible along with other supervisory personnel for compliance by all employees with applicable ethical rules, comply with certain requirements for accepting payment of fees in a form other than cash, base bonuses paid to intake personnel on other than exclusively the number of clients retaining the firm or the amounts of money received from those clients (criteria provided in writing to personnel), provide ethics training to administrative staff and ethics continuing legal education to attorneys, submit to potential random “testing” for compliance by the State Bar, utilize a “Schwartz” and Ethical Rule (ER) 1.5 fee review process, provide timely (15 days) written accountings as requested, make provisions for ensuring client testimonials used in advertising include an acknowledgment in writing by the client that s/he did not receive monetary benefit for the appearance, and develop a system in which Phillips is promptly advised of all client complaints against the firm or its attorneys and keep files of the complaints and his responses.

After eleven days of hearing on the allegations of misconduct involved in this case, the hearing officer wrote a 126-page report resolving twenty-two counts. He found Phillips had not properly performed his ethical duties to supervise and manage lawyers and non-lawyers at the firm, in violation of the ethical rules, ERs 5.1(a) and 5.3(a). He found a total of eight violations

of those ERs. In two counts, the hearing officer found that missed bankruptcy hearings demonstrated Phillips's failure to "make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that subordinate counsel would be able to comply with the professional obligations of the lawyer." In six other counts, the hearing officer found the evidence supported violations of Phillips's duty to supervise/manage lawyers and non-lawyers involving high pressure tactics used to sign and retain clients, a failure to provide consultation with an attorney experienced in the area of law pertinent to the client's situation before finalizing representation, awards of bonuses based on the number of clients signed and retained, and difficulty in obtaining an accounting or refunds. He also found Phillips had committed one violation of ER 7.1 by writing advertising aired by Phillips & Associates that was materially misleading to a viewer. He found as to the other counts that no ethical violation was established, or that an employee may have committed a violation of an ethical duty for which no supervisory/managerial violation by Phillips was established.

The hearing officer found the best practices for consumer law firms to follow were difficult to assess within the construct of the American Bar Association *Standards*, which are generally used to determine the proper discipline once ethical violations are proven. He reviewed Standards 7.1, explaining what conduct would justify disbarment, and 7.2, explaining what conduct would justify a suspension from practice, and recommended that Phillips be suspended for six months and one day, a discipline that requires the sanctioned lawyer to comply with formal reinstatement procedures before being restored to practice.

Both Phillips and the State Bar appealed the hearing officer's recommendation to the Disciplinary Commission. Phillips argued for a reversal of the findings of violations, or at least for a decision that the violations were only negligent, justifying only a censure. The State Bar argued the hearing officer erred in finding the conduct did not cause actual or potential serious injury, and, once the proper finding is made, disbarment or a lengthy suspension (two years) is the presumptive and appropriate sanction.

The Disciplinary Commission, by a majority of 6-2, also wrote a lengthy report and recommended that the Supreme Court accept the hearing officer's findings of fact, conclusions of law, and recommended discipline because it found no finding of fact clearly erroneous and no legal error. The two Commission members who wrote separately said they would recommend a ninety day suspension for Phillips because the majority's recommendation did not discipline him for his individual actions, but for the law firm's actions. They believed it would not sufficiently inform other private or public managerial attorneys of, or deter them from, conduct that potentially could be subject to sanctions.

The Supreme Court granted review "on issue 2 [of Phillips's Petition for Review] and as to whether the discipline recommended is appropriate." Both Phillips and the State Bar filed supplemental briefs.

ISSUE:

"2. ERs 5.1 and 5.3 do not impose vicarious liability on law firm managers or supervisors for the conduct of others. *Did the Commission err by applying an*

improper vicarious liability standard in finding that Respondents violated ERs 5.1 and 5.3 based solely on the violation of firm policies by others?

ETHICAL RULE PROVISIONS:

ER 5.1 provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

ER 5.3 provides:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer....

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