

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

IN THE MATTER OF AN APPLICATION FOR
REINSTATEMENT OF A RESIGNED MEMBER
OF THE STATE BAR OF ARIZONA,

J. BERT VARGAS,
Bar No. 012009

Applicant.

PDJ-2012-9076

REPORT AND RECOMMENDATION

FILED JANUARY 16, 2014

Background and Procedural History

This matter originally came before a hearing panel on November 20, 2012. On the day of hearing, the Panel expressed concern regarding application of Rule 32(c)(11), which requires that a resigned member be reinstated in the same manner as those members summarily suspended and therefore, required Mr. Vargas to re-take and pass the Arizona bar examination, including the MPRE and the Arizona law course. By Order of the PDJ filed on November 21, 2012, the matter was stayed to allow Mr. Vargas to apply and re-take the bar examination.

On October 18, 2013, Mr. Vargas moved to lift the stay and requested a status conference. The stay was lifted on October 24, 2013; a telephonic status conference was held on October 28, 2013, and the matter was again set for hearing.

On December 17, 2013, the Hearing Panel ("Panel") composed of public member, Ben Click, attorney member, Clarence E. Matherson, Jr., and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("PDJ") held a one day hearing

pursuant to Supreme Court Rule 65(b)(1), Ariz. R. Sup. Ct. Stephen P. Little appeared on behalf of the State Bar of Arizona ("State Bar") and Nancy A. Greenlee appeared on behalf of Mr. Vargas. The witness exclusionary Rule was invoked. The Panel considered the testimony, the admitted exhibits, the parties' Joint Prehearing Statement, and evaluated the testimony and credibility of the witnesses including Mr. Vargas.¹

The State Bar did not oppose reinstatement. The Panel now issues the following "Report and Recommendation," pursuant to Rule 65(b)(3), Ariz. R. Sup. Ct, recommending that Mr. Vargas' application for reinstatement to the active practice of law be approved.

Mr. Vargas was admitted to practice law in Arizona on May 21, 1988. He voluntarily resigned from the practice of law in good standing effective June 30, 2006, pursuant to Rule 32(c)(11)(a), Ariz. R. Sup. Ct. [Stipulated Exhibit 1.] There are no prior disciplinary matters involved in this reinstatement. Mr. Vargas's Application for Reinstatement was filed on August 10, 2012. An Initial Case Management Conference was held on August 29, 2012. After securing counsel, Mr. Vargas supplemented his Application for Reinstatement on October 9, 2012. [Stipulated Exhibit 4, Bates 280.] The parties' Joint Prehearing Statement was filed on October 26, 2012.

I. FINDINGS OF FACT

1. Mr. Vargas was first admitted to the practice of law in Arizona on May 21, 1988. [Joint Prehearing Statement; Testimony of Vargas.]

¹ Consideration was given to the testimony of S. Jonathon Young, Esq. and Ms. Pat Bissell.

2. Mr. Vargas was also admitted to the practice of law in Hawai'i in 1985. [Joint Prehearing Statement; Testimony of Vargas.]

3. Upon recommendation of the Board of Governors of the State Bar of Arizona, Mr. Vargas' resignation in good standing from the practice of law in Arizona became effective by Order of the Supreme Court of Arizona dated June 30, 2006. [Joint Prehearing Statement; Stipulated Exhibit 4, Bates 288 - 290.]

4. Mr. Vargas has explained that he resigned from the practice in 2006 in order to pursue employment that allowed him greater flexibility so that he would be able to assist and attend to the needs of his father, who resides in California, and his mother (currently residing in Arizona) who began experiencing significant health issues beginning in late 2005. [Joint Prehearing Statement; Stipulated Exhibit 4, Bates 283.]

5. Although these current proceedings are not based upon reinstatement from disciplinary proceedings, Mr. Vargas's prior disciplinary history is set forth as follows:

- a. On May 2, 1997 in File Nos. 91-2211 and 93-0507, a one year suspension and two years probation was imposed for violating of ERs 1.15, 1.15(a), 1.15(b), 3.4(b), 8.1, 8.4(a), 8.4(b), and 8.4(c), Ariz. R. Sup. Ct.
- b. Effective November 26, 1997, the Supreme Court of Hawai'i, in ODC No. 97-109-5303, imposed a reciprocal suspension for one year and one day effective November 26, 1997.
- c. On April 12, 1999 in File No. 96-0930, censure and one year probation was imposed for violating ERs 1.1, 1.3, 1.16, and 8.4(d),

Ariz. R. Sup. Ct. [Joint Prehearing Statement; Stipulated Exhibit 4, Bates 229-274.]

6. On or about October 6, 1998, Mr. Vargas applied for reinstatement from the one-year suspension entered by the Supreme Court in SB-97-0021-D. Applicant was reinstated to the practice of law in Arizona effective June 18, 1999. [Joint Prehearing Statement; Stipulated Exhibit 4, Bates 292-296]

7. Mr. Vargas has not applied for reinstatement from his June 30, 2006, resignation prior to this matter. [Joint Prehearing Statement]

8. Mr. Vargas has not reinstated from the one year and one day reciprocal suspension in Hawai'i. [Joint Prehearing Statement]

9. During his period of resignation, Mr. Vargas has worked as a business consultant for clients in the medical field. [Joint Prehearing Statement; Testimony of Vargas.]

10. Mr. Vargas' responsibilities as a consultant primarily involved assisting the clients who wanted to expand their businesses while also reducing their tax liabilities. Mr. Vargas assisted the clients with the operation of the businesses, including setting up business accounts to be maintained by the clients separately from the personal accounts; worked with the clients' realtors, attorneys and accountants; conferred with suppliers on the clients' behalf in order to purchase bulk supplies; assisted one client with the purchase of a commercial real estate building; and assisted another client with the consolidation and restructuring of the client's business assets and liabilities. [Joint Prehearing Statement]

11. Between 2006 and 2010, Mr. Vargas owned four rental properties that produced rental income. Due to the economic downturn, by the end of 2011, all four rental properties had been foreclosed upon. [Joint Prehearing Statement]

12. There is litigation pending resulting from the foreclosure of these properties, related to homeowner association dues arrearages as listed below in paragraph 16(c). Mr. Vargas is representing himself in this litigation. The parties are continuing to discuss settlement of the litigation and Mr. Vargas believes that there is a reasonable likelihood of settlement. [Joint Prehearing Statement]

13. Mr. Vargas also raised and sold horses during the resignation period. [Joint Prehearing Statement]

14. Mr. Vargas owns a home in Tucson, which he leases as an income property. [Joint Prehearing Statement]

15. Since 2010, Mr. Vargas has resided with a long-time friend in Patagonia, Arizona. [Joint Prehearing Statement]

16. Mr. Vargas has not been a party to any criminal action during the period of resignation. [Joint Prehearing Statement]

17. Mr. Vargas has been a party to the following listed traffic/parking citations during the period of resignation:

- a. 01/06/07: Pima County Consolidated Justice Courts, Case No. TR07-003362; No Contest
- b. 04/05/08: Pima County Consolidated Justice Courts, Case No. TR08-013739; Dismissed/NTSI
- c. 05/09/08: Pima County Consolidated Justice Courts, Case No. TR08-017863; No Contest
- d. 12/01/11: Pima County Consolidated Justice Courts, Case No. TR11-053209; Pled Responsible [Joint Prehearing Statement]

18. Mr. Vargas has been a party to the following listed civil actions during the period of resignation:

- a. 7/01/08: *Vargas v. Raio*, Pima County Consolidated Justice Courts, Case No. CV08-018018A-FD; Judgment for Plaintiff
- b. 9/16/10 (Answer filing date): *Merlino v. Vargas*, Pima County Consolidated Justice Courts, Case No. CV10-024714C-SC; Dismissed with Prejudice
- c. 8/27/11 (Answer filing dates): *The Meadows HOA v. Vargas*, Pima County Consolidated Justice Courts, Case Nos. CV11-002850B-RB, CV11-002851B-RB, CV11-002853B-RB, and CV11-002854B-RB; Transmitted to Pima County Superior Court, C20120147, C20120173, C20120160, and C20120152.
- d. 5/01/12 (settlement date): *Vargas et al. v. Miller*, Pima County Superior Court, C20115281; Settlement by Defendant [Joint Prehearing Statement]

19. With regard to the cases listed above in finding of fact 17(a) and (b), those matters were landlord tenant disputes related to Mr. Vargas' prior rental properties. Those lawsuits were resolved. The case listed in finding of fact 17(d) has been resolved by way of settlement in favor of Mr. Vargas. As indicated above, Mr. Vargas is continuing to discuss settlement of the consolidated lawsuits listed in finding of fact 17(c). [Joint Prehearing Statement]

20. Mr. Vargas has taken the following continuing legal education courses since his June 2006 resignation:

- a. 9/24/12: Representing Criminal Aliens: What are the Problems?
- b. 9/25/12: 2012 Ethical Trends Today!
- c. 10/2/12: Brave New World – iPad Your Practice
- d. 10/3/12: Going Paperless? How Do You Get There from Here?

e. 10/25/12: State Bar of Arizona Course on Professionalism [Joint Prehearing Statement]

21. There has been no procedure or inquiry concerning Applicant's standing as a member of any profession or organization or holder of any license or office which involved the reprimand, removal, suspension, revocation of license or discipline of the Applicant. [Joint Prehearing Statement]

22. There have been no charges of fraud made or claimed against Mr. Vargas during the period of rehabilitation, formal or informal. [Joint Prehearing Statement]

23. Mr. Vargas has not engaged in the unauthorized practice of law during the period following his resignation. [Joint Prehearing Statement]

24. Mr. Vargas received proof of passing the Arizona bar examination October 11, 2013. [Exhibit 4, Bates SBA 000035]

25. Mr. Vargas successfully completed the Arizona law course on November 19, 2013. [Stipulated Exhibit 4, Bates 325; Testimony of Vargas.]

26. Mr. Vargas has not yet taken the MPRE. [Testimony of Mr. Vargas.]

27. If reinstated, Mr. Vargas would like to return to federal practice and apply for overflow contracts from the prosecutors' office. [Testimony of Mr. Vargas.]

II. ANALYSIS UNDER RULE 65(B)(2), ARIZ.R.SUP.CT.

The Supreme Court of Arizona has established the following rules for the practice of law: Rule 32(c)(11)(C), Ariz. R. Sup. Ct., provides:

Resigned persons in good standing may be reinstated to membership in the same manner as members **summarily suspended** under Rule 62 of these rules.

Reinstatement of resigned persons shall be governed by the procedures set forth in Rule 64(f), Ariz. R. Sup. Ct.

Rule 64(f)(1)(B), imposes the more stringent reinstatement requirements of Rule 65, if the Applicant has been out of the practice of law for more than *two years*. In addition, Rule 64(c), *Additional Requirements* provides that “if the applicant has been suspended for a period of five years at the time the application is filed...the applicant shall be required to apply for admission and *pass the bar examination as required....*”. Rule 34(j), *Completion of Course on Arizona Law*, further requires that before being admitted to the practice of law in Arizona, applicants for admission must complete the course on Arizona law. Lastly, Rule 35(b)(6), (7) and (8), *Examination Subject; Grading* requires proof of a successful passing score of 85 or greater on the MPRE.

Under Rule 65(b)(2), an Applicant applying for reinstatement must prove by clear and convincing evidence rehabilitation, compliance with all discipline orders and rules, fitness to practice, and competence. An applicant must also satisfy the criteria as set forth in *Matter of Arrotta*, 208 Ariz. 509, 96 P.3d 213 (2004), which held that four factors are considered for reinstatement: the applicant’s character and standing prior to disbarment (resignation in this matter), the nature and character of charge for which disciplined (not applicable), the applicant’s conduct subsequent to the imposition of discipline (also not applicable), and the time which has elapsed between the order of suspension (resignation here) and the application for reinstatement. In order to demonstrate rehabilitation, an applicant must identify the weaknesses that led to the underlying misconduct and affirmatively show that they have overcome those weaknesses. *Id.*

More recently, *In re Johnson*, 231 Ariz. 556, 298 P.3d 904 (2013), we are reminded that an attorney need not establish what was or might have been the underlying cause of the identified weakness that led to the misconduct. An “applicant however, must clearly and convincingly prove rehabilitation by specifically identifying the causal weakness leading to each count and explaining how the weakness has been overcome.” *Id.*

Here, because no underlying discipline is involved, Mr. Vargas’ burden regarding rehabilitation is somewhat lesser than the standards set forth in *Arrotta*, 208 Ariz. 509, 96 P.3d 213; *Johnson*, 231 Ariz. 556, 298 P.3d 904. In this matter, the Panel is more focused on Mr. Vargas’ competence, fitness to practice, and if the public will be protected if he is reinstated.

At the time Mr. Vargas resigned, there was no requirement to submit to formal reinstatement proceedings. Although his resignation was a personal choice and driven by the need to care for his parents, in hindsight, Mr. Vargas acknowledges he should have researched the ramifications of resignation more fully and considered other options such as transferring to an inactive membership status.

Rehabilitation

Mr. Vargas testified that in 2006, he contacted the State Bar regarding his desire to voluntarily cease the practice of law. He submitted the required resignation form but admits he did not adequately research all of his options and relied on information he received from staff at the State Bar. He resigned in good standing and at the time, there were no formal reinstatement requirements. He had no clients when he resigned as his last representation occurred in 2005. His

parents are being care for at this time by other family members so Mr. Vargas now has greater flexibility and feels he is ready to re-enter the practice of law. He has established a support system of well respected attorney that are accessible to him for guidance.

Compliance with Disciplinary Rules and Orders

Because this is not a discipline matter, there are no prior disciplinary orders imposed. There have been no allegations involving the unauthorized practice of law during the period of resignation. Mr. Vargas paid his application and investigation fee in this reinstatement matter. [Stipulated Exhibit 4, Bates 30-31]. He does not owe any funds to the Client Protection Fund. On January 3, 2013, the State Bar filed its Statements of Costs and Expenses incurred as a result of the application for reinstatement. The Statement of Costs reflects a balance owed of \$67.00, which pursuant to Rule 65(a)(3)(A), Ariz. R. Sup.Ct., shall be paid *prior* to the Court's consideration of this matter.

Competence

Mr. Vargas in part, demonstrated his competence to the Panel by successfully passing the July 2013 Arizona bar examination. He successfully completed the Arizona law course required for admission on November 19, 2013 and testified that he will take the next scheduled MPRE, in March or April.² Mr. Vargas further completed over 30 hours of Continuing Legal Education during the period of resignation. [Application for Reinstatement; Stipulated Ex. 2, Bates 2-6; Stipulated Exhibit 4, Bates 335-343.]

² The next schedule MRPE Examination is March 29, 2014. See ncbex.org.

Mr. Vargas also testified during his period of resignation, he maintained his competence in the law by reviewing case law and engaging in discussions with other Arizona attorneys regarding current changes in the law including federal criminal law. He also attended federal jury trials and reviewed motions and plea agreements filed in those matters. [Stipulated Exhibit 3, Bates 07-26; Testimony of Mr. Vargas.]

Fitness to Practice

Income/Debts

During the period of resignation r. Vargas worked primarily as a business consultant. He provided guidance to Dr. Geoffrey Hillard on reducing his tax liability until 2007, when Dr. Hillard passed away. In 2007, he was approached by an oral surgeon (Dr. Charles Loschiavo) to assist him in developing ways to expand his practice and reduce his tax liability. He also assisted with bulk purchasing. Mr. Vargas testified that consulting position concluded last month. [Stipulated Exhibit 4, Bates 285; Testimony of Vargas]

Additionally, from 2006 – 2011, Mr. Vargas stated he lived off of his savings and the income generated from his 4 rental properties. Mr. Vargas also raised and sold horses during this period and was the primary caregiver for his elderly and ill parents who lived in California until 2011. His father experienced a heart attack in 2006 and his mother has suffered from dementia since approximately 2005. [Testimony of Vargas.] Mr. Vargas' mother subsequently required full time care in a nursing home and his father currently lives with relatives. Since February of 2012, Mr. Vargas' mother, who was declared an incapacitated adult, has been living

with his sister, who has been appointed her guardian. [Stipulated Exhibit 4, Bates 283]

Mr. Vargas currently leases his former residence at 4326 E. River Road, Tucson, AZ and now resides in Patagonia, AZ. He also cares for his elderly Aunt who lives in Patagonia. [Stipulated Exhibit 4, Bates 035-38.] Mr. Vargas is not currently employed but still receives the rental income from his former residence in Tucson. He is actively involved in raising and selling horses and also sells jewelry to supplement his income. [Testimony of Vargas.]

Mr. Vargas provided copies of his federal and state tax returns for years 2005 through 2012. [Stipulated Exhibit 4, Bates 73-204; Bates 315-324; Bates 326-334.] He provided a monthly income summary and list of financial obligations. [Stipulated Exhibit 4, Bates 285; Bates 36.] Mr. Vargas testified he is current in his financial obligations except for his car payment, which is 30 days past due.

Civil or Criminal Actions

During the period of resignation there were civil actions related to Mr. Vargas' four rental properties (which have since been foreclosed on). The civil cases are now resolved (two settled and one dismissed) with the exception of a suit against Mr. Vargas for HOA fees related to the rental properties. [Joint Prehearing Statement; Stipulated Exhibit 4, Bates 039-71.] Mr. Vargas is representing himself in this matter and is actively working on a settlement. He advised that a hearing was held in April 2003 and that an adverse ruling was issued against him in the amount of \$11,000 for attorneys fees. Mr. Vargas testified that no judgment has been entered in the matter to date. [Joint Prehearing Statement; Testimony of Vargas.]

Character and Reputation

Stephen Jon Young, a certified criminal law specialist in Arizona, testified as to Mr. Vargas character and reputation. He stated he met Mr. Vargas in 1992 when they were suite mates at the county attorneys office. He found Mr. Vargas to be knowledgeable in the law and of good character. In 1999, Mr. Young stated he served as Mr. Vargas' Law Office Management Assistance Program ("LOMAP") monitor and Mr. Vargas was compliant with the terms and conditions imposed by LOMP. Mr. Young advised that he lost touch with Mr. Vargas for a period of time after 2001, but that they reconnected in 2007, and on several occasions, have discussed recent changes in federal law. Mr. Young fully supports Mr. Vargas' reinstatement.

Ms. Bat Bissell testified she met Mr. Vargas in 1998 when he was a U.S. Attorney and would come to the clerk's office for filings. They became social acquaintances because of their mutual love of horses. She stated she saw Mr. Vargas on a regular basis (at least once a month) and their friendship continues to this day. Ms. Bissel stated that Mr. Vargas is helpful, thoughtful, trustworthy and she would recommend him as an attorney to others.

III. CONCLUSION AND RECOMMENDATION

The Panel determined that Mr. Vargas has demonstrated by clear and convincing evidence of rehabilitation, compliance with all discipline orders and rules, fitness to practice, and competence and has satisfied the applicable criteria set for in *Arrotta*.

The Panel therefore, recommends reinstatement contingent upon the passing of the MPRE with a score of 85 or greater and the payment of costs of these proceedings pursuant to Rule 65, Ariz. R. Sup. Ct.

Mr. Vargas shall supplement the record with results of his MPRE Examination and pay the outstanding balance due of \$67.00 prior to the matter being considered by the court.

DATED this 16th day of January, 2014.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

CONCURRING

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Ben Click, Volunteer Public Member

Clarence E. Matherson, Jr.

Clarence E. Matherson, Jr., Volunteer Attorney Member

Original filed with the Disciplinary Clerk
this 16th day of January, 2014.

COPY of the foregoing mailed/emailed this
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