

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

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

THOMAS A. CIFELLI,
Bar No. 013794

Applicant.

PDJ-2012-9018

REPORT and RECOMMENDATION

On June 14, 2012, the Hearing Panel ("Panel") composed of Mark E. Salem, a public member from Maricopa County, Richard L. Brooks, an attorney member from Maricopa County, 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. Roberta Tepper appeared on behalf of the State Bar of Arizona ("State Bar") and Joel L. Gildar appeared on behalf of Applicant. The Panel considered the testimony, the admitted exhibits, the parties' Joint Pre-hearing statement, and evaluated the credibility of the witnesses. At the conclusion of the hearing, the State Bar recommended reinstatement. The Panel now issues the following "Report and Recommendation," pursuant to Rule 65(b)(3), Ariz.R.Sup.Ct, recommending reinstatement and probation.

Background

Applicant was admitted to practice law in Arizona on November 26, 1991. On November 1, 2007, Applicant was suspended from the practice of law for two years retroactive to January 9, 2007 and ordered to participate in two years of

probation with the Member Assistance Program (MAP) if reinstated. This suspension was a result of his criminal conviction in 2006 for two felony counts of Aggravated DUI which violated ER 8.4(b), Ariz.R.Sup.Ct. Applicant was incarcerated for 4 months by ADOC and then placed on two years of criminal probation, which was successfully completed (early release).

Applicant was also summarily suspended on February 22, 2008 for failure to comply with mandatory continuing legal education requirements (MCLE) mandated by Rule 45, Ariz.R.Sup.Ct.¹ Applicant submitted evidence of various CLE credits to cure this deficiency. [Exhibit 23]

Applicant's initial and unsuccessful Application for Reinstatement was filed in April 2010, but was dismissed by Supreme Court by Order filed May 25, 2011. Overall, the Court determined that Applicant failed to establish that he was qualified for reinstatement and failed to establish by clear and convincing evidence his rehabilitation. Although Applicant presented testimony and letters from individuals in support of his rehabilitation and fitness to practice, no formal assessment or independent medical exam of Applicant's physical and mental health was performed. The Court determined that the testimony and letters alone were not enough to meet Applicant's burden of proof of clear and convincing evidence. Further, Applicant at that time, failed to demonstrate that he had overcome the weaknesses that led to his misconduct in accordance with *Matter of Arrotta*, 208 Ariz. 609, 96 P.3d 213 (2004). In addition, the court gave little weight to the unfounded statements of Dr. Mark Rudderman, because he had performed no

¹ Rule 45(a)(1) requires that active members shall complete 15 hours in each educational year (June 1 – June 30). Rule 45(a)(2) requires that 3 hours must be in the area of professional responsibility.

medical assessment and was also a business associate of Applicant. Although the Court dismissed the Application for Reinstatement, the Court nonetheless waived the provisions of Rule 65(a)(4), "*Successive Applications*"), and gave Applicant leave to file for reinstatement in less than one year , if he showed that he had first secured an assessment supporting a finding of rehabilitation. Applicant thereafter, filed his second Application on March 5, 2012. On March 5, 2012, Applicant also filed a Motion to Expedite, Narrow the Issues in Controversy, Waive New Investigative Fee, and Admit Prior Reinstatement Hearing Evidence, which was denied. See ICMC Order filed March 21, 2012.

I. FINDINGS OF FACT

1. Applicant was first admitted to the practice of law in Arizona on November 26, 1991. [Joint Pre-hearing Statement]

2. By Supreme Court order filed on November 1, 2007, in File Number SB-07-0154-D, Applicant was suspended from the practice of law for a period of two years retroactive to January 9, 2007. [Exhibit 17]

3. Applicant's suspension was a result of his violation of Rule 42, Ariz. R. Sup. Ct., specifically ER 8.4(b), based on his criminal conviction on March 3, 2006, on two felony counts of Aggravated Driving Under the Influence. [Joint Pre-Hearing Statement]

4. On April 3, 2006 Applicant was sentenced to four months in the Arizona Department of Corrections for each felony count, to run concurrently, plus two years probation. [Joint Pre-Hearing Statement]

5. Applicant was summarily suspended effective February 22, 2008, for failure to complete mandatory continuing legal education hours for the 2005–2006 CLE year. [Joint Pre-Hearing Statement]

6. On January 14, 2010, Applicant filed an Application to Reinstate with the Supreme Court of Arizona, pursuant to Rules 64 and 65, Ariz. R. Sup. Ct. [Joint Pre-Hearing Statement]

7. On April 15, 2010, a hearing on the application was held before Hearing Officer Louis A. Araneta and he filed his Report on May 28, 2010. [Exhibit 2]

8. After oral argument on December 11, 2010, before the Disciplinary Commission of the Supreme Court of Arizona, the Commission adopted the Hearing Officer's recommendation that Applicant's reinstatement be denied.

9. By Order dated May 25, 2011, the Supreme Court of Arizona denied Applicant's Application. [Joint Pre-Hearing Statement]

10. On March 5, 2012, Applicant filed a Second Application to Reinstate with the Presiding Disciplinary Judge of the Supreme Court of Arizona. [Joint Pre-Hearing Statement]

11. Dr. Joel Glassman, Ph.D, P.C., issued a Psychological Evaluation of Applicant dated February 20, 2012, and is qualified to render an expert opinion regarding Mr. Cifelli's mental health and rehabilitation. [Exhibit 4]

12. There is no allegation that Applicant violated any ethical rules during the period of his suspension. The State Bar has not received a disciplinary charge from clients or former clients regarding Mr. Cifelli's representation. [Joint Pre-Hearing Statement]

13. Applicant has fully paid all of his assessments and fees as required by the State Bar. [Exhibit 1]

14. Applicant has been fully cooperative with the State Bar in regard to his current reinstatement application. [Joint Pre-Hearing Statement]

15. The State Bar has no evidence that applicant has engaged in the unauthorized practice of law during the term of his suspension. [Joint Pre-Hearing Statement]

16. The State Bar does not have evidence to indicate that Mr. Cifelli has been charged with or convicted of any drug or alcohol related offenses during the period of his suspension. [Joint Pre-Hearing Statement]

17. The State Bar's investigation did not reveal evidence that Mr. Cifelli has abused drugs or alcohol during the period of his suspension. [Joint Pre-Hearing Statement]

18. On March 5, 2012, Disciplinary Clerk, Laura Hopkins issued a Receipt of Payment for \$1,100.00 paid by Applicant for reinstatement fee and investigative fee. [Exhibit 3]

19. On March 12, 2012, Karen Weigand, Client Protection Fund Administrator, issued an Affidavit that no claims have been filed against Applicant. [Exhibit 2]

20. On May 7, 2012, Sandra Montoya, State Bar of Arizona, issued an Affidavit that Applicant paid all fees and costs assessed from Applicant's prior unsuccessful reinstatement hearing. [Exhibit 1]

21. On June 15, 2012, Applicant filed additional exhibits in support of his reinstatement, which included his prior application, W-2s and 1099s, tax returns

from the period of suspension 2007 – 2011, and a complete copy of the hearing transcript in the initial application which resulted in dismissal.

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

Pursuant to Rule 65(b(2), a lawyer seeking reinstatement must prove by clear and convincing evidence their rehabilitation, compliance with all applicable discipline orders and rules, fitness to practice, and competence. Applicant bears the burden of proof that he has met the criteria for reinstatement.

In *Matter of Arrotta*, 208 Ariz. 609, 96 P.3d 213 (2004), the court held that the following four factors are to be considered for reinstatement: 1) the applicant's character and standing prior to disbarment (suspension in this matter), 2) the nature and character of charge for which disciplined, 3) the applicant's conduct subsequent to the imposition of discipline, and 4) the time which has elapsed between the order of suspension and the application for reinstatement. *In re Robbins*, 172 Ariz. 255, 256, 836 P.2d 965, 966 (1992) (citing *Application of Spriggs*, 90 Ariz. 387, 388 n. 1, 368 P.2d 456, 457 n. 1 (1962)). *Robbins* further held that when considering an application for reinstatement, the court's first concern is protecting the public.

To establish rehabilitation, *Arrotta* further held an applicant must identify the weaknesses that lead to the misconduct and affirmatively show that they have overcome those weaknesses.

Rehabilitation

Applicant identified his weakness as stress due to pressure from a highly contentious divorce, child custody issues, and his initiating a new business venture. He acknowledges he made errors in judgment during this stressful period.

Applicant states that future stress may impact him by causing sleep disturbances and increased irritability. He testified that if he experiences a long period of stress in the future, he will seek professional help.

To support his current application for reinstatement, Applicant sought a mental health and substance abuse assessment. Dr. Joel Glassman, Ph.D, P.C, conducted an in-office interview of Applicant on December 20, 2011 and administered the MMPI-2 (a standard personality questionnaire), which revealed no undue stress, major psychiatric disturbance or hidden substance abuse. Dr. Glassman also conducted a follow-up telephone interview with Applicant on February 7, 2012, then provided a psychological evaluation report dated February 20, 2012. (Exhibit 4)

Dr. Glassman testified that that Applicant's divorce was a precipitating factor, and that Applicant's current adjustment falls within the normal range. According to Dr. Glassman, Applicant is not suffering from a stress, mood, or personality disorder that would hinder his ability to practice law or require mandatory follow-up psychiatric or psychological treatment.

Regarding the potential for substance abuse, Dr. Glassman testified that Applicant's former personal stressors, i.e. his divorce and new business venture that were present when he was convicted of DUI, no longer exist. He testified that Applicant did not present with a history of alcohol dependency but instead, simply exercised poor judgment during a short period of extremely high personal stress which contributed to drinking and driving. Dr. Glassman further testified that Applicant's risk for future alcohol abuse is minimal based on the following factors: Applicant is committed to avoid driving if alcohol is consumed; he has adopted a

healthier lifestyle, an ability to recognize signs of stress, and a strong desire to avoid incarceration.

Dr. Glassman stated he found no compelling reason to recommend mandated follow-up mental health services for Applicant. Report, p. 6. Applicant however, was ordered upon reinstatement, to participate in 2 years of probation (MAP). See final J & O filed November 1, 2007. (Exhibit 17)

Applicant testified he voluntarily abstains from drinking alcoholic beverages, although he has had occasional drinks such as wine at Thanksgiving 2010 and two beers when working out of town. Applicant voluntarily submitted to alcohol testing through TASC; all 6 tests (performed December 2011 – January 2012 were negative).

According to Dr. Glassman, Applicant has made significant lifestyle changes since being released from prison, which include regular exercise and proper nutrition. Dr. Glassman testified that those lifestyle changes will better insulate Applicant against the negative effects of stress. When interviewed, Applicant expressed to Dr. Glassman that since his incarceration, he now has a greater appreciation today of the role that mental health professionals play in treating behavioral and stress related conditions. He has had no stress related incidents for eight years, and is now better equipped to recognize stress. Applicant also told Dr. Glassman that he is now open to establishing contact with a mental health professional as a condition to being reinstated. Dr. Glassman stated that Applicant's most pressing current concern relates to financial worries.

Applicant provided character letters from 2006 in further support of his reinstatement and one current letter from his father, who is also an attorney. [See Exhibit 22] Applicant's driver's license has been reinstated without restriction. [Exhibit 7]

Applicant also voluntarily participated in MAP since July 2011 and attends AA meetings on a monthly basis. He testified he now has a support system in place of professional friends and family, including his parents. Applicant stated that he also coaches others regarding stress and his relationship with his three adult children is improving.

Compliance with Disciplinary Rules and Orders

Applicant is compliant with all prior disciplinary orders and rules. Applicant has paid the costs in the underlying discipline matter, the prior unsuccessful reinstatement matter and the current reinstatement matter. Applicant also does not owe any monies to the Client Protection Fund.

Fitness to Practice and Competence

Dr. Glassman testified that Applicant is fit to practice and the likelihood that his misconduct will reoccur is minimal. While suspended, Applicant performed legal research and writing and authored several published articles during the period of suspension involving the captive insurance industry. [Exhibit 8]. He is the editor of Captive Experts and keeps abreast of the law.

Applicant also submitted a character and reference letter from his current supervisor, Jeremy Huish, Esq., who testified in support of Applicant's reinstatement. [Exhibit 5]. Mr. Huish testified he is licensed in Arizona and Washington, D. C., and is also a CPA. Mr. Huish stated he met Applicant in

November 2011 at a trade show and hired him to assist with a business insurance consulting firm. Mr. Huish stated that during his employment, Applicant has handled clients and pressure well under stress and is a vital part of the team. Mr. Huish advised that the consulting firm does not give tax or legal advice to clients, but their legal training and knowledge of law is an asset in the captive insurance industry. Mr. Huish stressed that their clients are always encouraged to seek their own, separate counsel for any legal services.

Additional letters that were included in Applicant's prior application in 2010 were also submitted in support of his reinstatement [Exhibit 22]. Applicant stated that if reinstated, he would ultimately like to be employed general counsel for emerging companies.

Regarding MCLE, a lawyer on active status is required to take 15 hours of MCLE per year to demonstrate their continued competence to practice law. Rule 45, Ariz.R.Sup.Ct. Applicant submitted proof of his efforts to obtain MCLE during the period of suspension. [Exhibit 23]. In general, Applicants must cure any MCLE deficiencies prior to being reinstated by the court.

Conclusion and Recommendation

The Panel finds that Applicant has met his burden of proof and established by clear and convincing evidence his rehabilitation and compliance with all disciplinary orders and rules. Applicant has accepted responsibility for exercising poor judgment and for drinking and driving. He has taken the necessary steps to improve his lifestyle and his capacity to handle stress. The testimony provided by Dr. Glassman demonstrates that Applicant has overcome his weaknesses, and moreover, poses no further threat to the public. The evaluation and testimony of

Dr. Glassman was of enormous benefit to the Panel. Without Dr. Glassman's clarifying testimony it is not certain that this Panel would have recommended reinstatement.

Therefore, the Panel recommends that Applicant be reinstated to active practice of law and be placed on probation (MAP) for a period of two years as previously ordered in the underlying discipline matter, File No. 10-6000. Probation shall be effective the date of reinstatement and shall conclude two years thereafter. The terms of probation are as follows:

Terms of Probation

1. Within 30 days of reinstatement, Applicant shall contact the MAP director and schedule an assessment.

2. Applicant shall thereafter, enter into a MAP contract based on the recommendation of MAP director or designee. Applicant shall comply with all recommended terms and pay costs associated with MAP. The MAP recommendations shall be incorporated herein by reference.

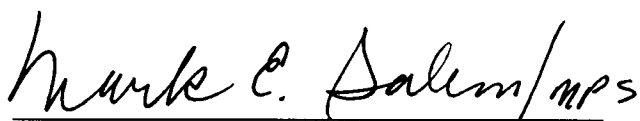
3. The State Bar shall report material violations of the terms of probation pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct., and a hearing may be held within thirty (30) days to determine if the terms of probation have been violated and if an additional sanction should be imposed. The burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

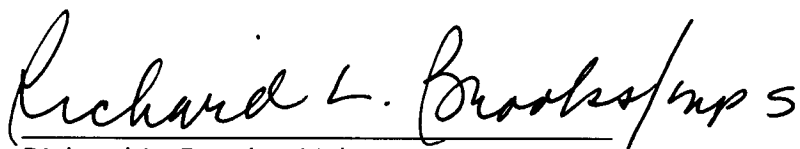
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DATED this 9 day of July, 2012.


THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:


Mark E. Salem, Volunteer Public Member


Richard L. Brooks, Volunteer Attorney Member

Original filed with the Disciplinary Clerk
this 10th day of July, 2012.

COPY of the foregoing mailed and e-mailed this
10th day of July 2012, to:

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