BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA	)	No. 10-6000
THOMAS A. CIFELLI, Bar No. 013794	)	HEARING OFFICER REPORT
Applicant	)	

PROCEDURAL HISTORY

1. On January 14, 2010, Applicant Thomas A. Cifelli (hereafter "Applicant") filed his Application to Reinstate after he had been previously suspended retroactive to January 9, 2007. After the initial case management conference on February 11, 2010, Applicant filed a second application to reinstate on February 19, 2010. On April 14, 2010, Applicant filed his third form of application entitled "[Amended Motion] Second Amendment to Application to Reinstate." On April 15, 2010, a hearing was held. The parties submitted post-hearing memoranda on the issue of rehabilitation.

FINDINGS OF FACT

2. Applicant was first admitted to the practice of law in Arizona on November 26, 1991.[1]

3. By Supreme Court order filed on November 1, 2007, in file number SB-07-0154-D/No. 06-1428, Applicant was suspended from the practice of law for two years retroactive to January 9, 2007. The disciplinary case number was 06-1428. Exhibit 9.

4. .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 convictions on March 3, 2006, for two felony counts of Aggravated Driving Under the Influence. Exhibit 11, Hearing Officer Report in 06-1428, filed May 25, 2007.

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1 Fact paragraphs 1 through 11 are taken from the stipulated facts by the parties in the Joint Pre-Hearing Statement filed April 6, 2010. Paragraph 11 was amended by agreement of the parties. Paragraph 7 was amended based on the amended Application filed by Applicant on April 14, 2010.

5. On April 3, 2006, Applicant was sentenced to four months in the Arizona Department of Corrections for each felony count, to run concurrently, plus 2 years probation.

6. On January 14, 2010, Applicant filed his Application to Reinstate with the Supreme Court of Arizona, pursuant to Rules 64 and 65, Ariz. R. Sup. Ct.

7. Applicant filed an Amended Application to Reinstate on March 8, 2010. On April 14, 2010, the day before the hearing, Applicant filed his third amended application, titled [Amended Motion] Second Amendment to Application to Reinstate.

8. In the prior disciplinary proceeding, pursuant to an Order of the Supreme Court in SB-07-0154-D/No. 06-1428 (2007), filed December 6, 2007, the State Bar was granted judgment against Applicant for the costs and expenses in that matter in the amount of $1271.05 plus interest until paid.

9. Applicant did not pay that judgment.

10. Applicant obtained a discharge of the judgment in a bankruptcy proceeding.

11. Applicant was summarily suspended effective February 22, 2008, for failure to complete mandatory continuing legal education hours for the 2005 -- 2006 CLE year.

12. Applicant submitted his affidavit of compliance on March 22, 2010 with State Bar staff member Caroline DeLooper of the MCLE division to have his summary suspension above terminated, and was reinstated on April 6, 2010 from the summary suspension only related to MCLE. Exhibit S.

13. In the prior disciplinary proceeding, 06 -1428, the State Bar had transmitted to the Supreme Court a certified copy of Appellant's DUI sentencing order filed April 4, 2006. Applicant filed a motion to stay the automatic interim suspension, and a Motion to Retire Law License Without Disciplinary Action. The Supreme Court denied the motion to stay and Motion to Retire Law License Without Disciplinary Action. Exhibit 11.

14. In the prior disciplinary proceeding, on March 6, 2007, after Applicant did not respond to the State Bar complaint, default was entered against him. Applicant did not appear at the aggravation/mitigation hearing. Exhibit 11.

15. Applicant's prior ethical violation included facts that: (1) on December 9, 2004, Applicant crossed over the double yellow median; and (2) Applicant's blood alcohol content (BAC) registered .151. Exhibit 11.

16. In the prior proceeding in No. 06-1428, the Applicant had an aggravation factor of pattern of misconduct involving a misdemeanor DUI two months earlier on October 7, 2004, and subsequent conviction on August16, 2005. Other aggravation factors were: bad faith obstruction by failing to respond to the proceeding;

illegal conduct, and extensive experience in the practice of law (15 years). Mitigation factors were: no prior disciplinary record; and the imposition of other penalties (incarceration).

Applicant's Area of Practice

17. Applicant testified and presented evidence that in the years before his 2007 suspension, he had largely limited his practice of law in favor of business development. Applicant's father, John Cifelli testified that in the months or years before suspension, Applicant was not practicing law much and instead concentrated on a start up business, DynaTech. Transcript of Hearing ("T/H") 39; 15-21.

18. Applicant in his deposition described his legal work history as not having that much income from the practice of law, because it was not necessary. Before suspension, Applicant was making his living doing investment banking and related business development which was really his passion. Exhibit 20, page 64:21- 25.

Applicant's Witnesses

John Cifelli

19. Applicant presented the testimony of his father, John Cifelli, Craig Meier, and Dr. Mark Rudderham in support of his character, fitness to practice, rehabilitation, and competence. Applicant also presented letters from other individuals in support of the same traits.[2]

20. John Cifelli, age 86, and an Illinois lawyer for approximately 60 years, testified for his son. John Cifelli believed it was the combination of Applicant's acrimonious divorce proceedings and his son's after hours work for Dynatech Media in 2004 that caused his son's drinking and that caused his son to go "haywire." T/H 33:17-24. Against his father's advice, Applicant as the cofounder of Dyna Tech Media "was running to all the bars trying sell the unit you were trying to put out." T/H 36:4-13.

21. John Cifelli testified he did not offer his son help with any alcohol issues. Instead, he told his son that he was a "big boy" and that he should learn to handle the problem himself. T/H 40:25-41:5.

22. John Cifelli also testified that his son was rehabilitated, did not pose a current risk to the public and possessed above average or much above average character, ethics and competency. T/H 34:6-35:12.

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[2] The letters/emails were from Richard Oxford, Craig Meier (witness), Kerry Dunne, Gary Held and Scott Hiland. Exhibits U through Z, respectively.

Craig Meier

23. Craig Meier testified that he was a long time friend who worked with Applicant from 2008 to mid- 2009 launching Anti-Aging Today, a business venture that preceded the current online business called Online Wellness Community. Craig Meier also had seen short sale documents that Applicant prepared for real estate transactions. He was comfortable with the character and legal competency of Applicant. T/H 117:1-14. In his reference letter, Craig Meier wrote that after prison, Applicant "shifted his focus from drinking and the bar scene to healthy lifestyles encompassed by the wellness community." Exhibit V.

Dr. Mark Rudderham

24. Applicant called Dr. Mark Rudderham to testify to Applicant's rehabilitation as well as his legal competency. Dr. Rudderham is a naturopathic physician. T/H 61: 16-21. This Hearing Officer initially found Dr. Rudderham to be an expert witness in the belief that his naturopathic knowledge or training could assist this Hearing Officer as the trier of fact. T/H: 69:5-10.

25. Dr. Rudderham has known Applicant for six months because Applicant invited Dr. Rudderham to serve as the medical director for Online Wellness Community, the business venture founded by Applicant. T/H 69:16-18; T/H 71:13-72:1. Dr Rudderham's agreement for compensation from Online Wellness Community is to receive stock in the business, and to later receive monetary compensation for hours worked and a bonus of stock. T/H: 7-18. Dr. Rudderham stated that based upon his business relationship with and observations of Applicant, he would trust Applicant with legal work for himself and his family. T/H:79:2-4.

26. Regarding Applicant's rehabilitation, Dr. Rudderham testified that in most cases when people get through a period of stress, such as marital discord, the symptoms of high stress pass as well. T/H 76:9-15.

27. Dr. Rudderham performed no formal assessment of Applicant's physical or mental health. He performed no formal assessment to determine whether or not Applicant has a substance abuse issue. T/H 83:1-24.

28. Dr. Rudderham acknowledged that counseling with or without AA programs and 12 Step programs helps some people who have alcohol issues. T/H86:15- 87-10.

Applicant's testimony that he is rehabilitated and that he should be reinstated.

29. Applicant stated that it is important for him to be reinstated so he could serve as general counsel to Applicant's emerging technology company. He considers the market opportunity to be great for himself and his business Online Wellness Community and for other companies. T/H 94 18-22.

30. Applicant also stated that the highly litigated dissolution of his marriage which Applicant initiated in 2003, impaired his personal and professional judgment. T/H 102:13-103:2 He stated that he suffered depression, loneliness, fear, and anger due to the dissolution proceedings. T/H 104:25-105-2.

31. Applicant stated that in late 2004, when he received his DUIs, it was a "perfect storm" for disaster. At the time, he was co-founder, general counsel, CFO, and vice-president of business development for his company Dyna Tech Media. He would go out at night after work "chasing business" at nightclubs, bars, and fine restaurants for Dyna Tech. T/H 123:3-124:5. Those pressures and stresses and those from his marriage dissolution proceedings created the perfect storm that affected his poor judgment in committing the DUIs.

32. Applicant testified that by 2007 he had processed his divorce and accepted his mistakes. Bankruptcy was unavoidable. Applicant assured this Hearing Officer and State Bar Counsel that there is no risk that he will ever commit DUI violations again. T/H 125:1-18.

33. After conviction, Applicant completed the requirements of his probation including urinalysis testing, a MADD class, and a straight thinking course in prison. He was released early from probation. T/H 130:2-17. Exhibits J, K and M.

34. Applicant testified that his felony DUI was based upon his driving on a suspended license. He stated that he did not know he was driving on a suspended license and that his appellate court decision basically held him to some unique standard: "I think Exhibit 5 of bar counsel's exhibits shows that I did not know I was driving on a suspended license when I got the DUI that was categorized as a felony. It basically held me to some unique standard because all my professional training saying [sic] I should have known." T/H 127: 16-23. ;Exhibit 5.

35. Applicant testified that he has benefited greatly from the science involving nutritional protocols including intravenous (IV) therapy. It is part of his life now and he is going to be one of the advocates and spokespeople to take it global through his company. T/H140:19-141:17.

36. Applicant stated that after release from prison in July, 2006, he did not do any voluntary counseling. T/H 166:12-167:21. He did not participate in any paid counseling to help deal with stress should it arise. He stated: "As far as going and paying for somebody to say, help teach me more about handling stress, when I become an expert in handling and processing stress, I would say that's correct." T/H 168:4-9.

37. Applicant does not intend to use future professional alcohol treatment: "But as far as official drug and alcohol treatment center type employees, no, I have not sought that out and don't plan to." T/H 168:21-23.

38. Applicant testified that before his stressful situation in late 2004, and before his filing for divorce in 2003, he was a wine aficionado. First with his wife, and later with his girlfriend, Applicant would go out weekly and have wine at restaurants. T/H 188:1-189:9.

39. Applicant testified that the last time he drank any type of alcohol was just before he went into prison for his DUIs in 2006. T/H 185:20-186:14.

Applicant's income and child support

40. Applicant testified that while on suspension to the present, with about two exceptions, he has been largely unemployed. He has lived off and depleted his retirement accounts and savings during the three year period of his suspension. T/H 152: 15-20. The first exception was that he earned about $9000 for consulting in the fall of 2009. T/H 152:7-13; [Amended Motion] Second Amendment to Application to Reinstate, page 3, Para. 4.e. ii, filed April 14, 2010. The second exception was that since his deposition of March 2, 2010, he has recently earned income of $7000 in start-up funding fees from his business Online Wellness Community. Some of the income went to pay child support. T/H 153: 17-24; [Amended Motion] Second Amendment to Application to Reinstate, page 3, Para. 4. e.iii, filed April 14, 2010. Applicant explained that he was largely unemployed during the period of suspension because the predecessor company of Online Wellness Community called Anti-Aging Today, founded in 2007 had failed. [Amended Motion] Second Amendment to Application to Reinstate, page 2, Para 4. d., filed April 14, 2010.

41. Regarding child support, Applicant denied that he was in arrears for payment at the time of his hearing, but acknowledged that at the time of his deposition two months earlier, he may have been two months behind in child support. Applicant also acknowledged that he was currently in Superior Court litigating against a claim of child support arrearage against his ex-wife. T/H 154:8-155:9.

Applicant's late payment of past disciplinary expenses and costs.

42. In its Judgment and Order filed November 1, 2007, the Supreme Court assessed the costs and expenses of the disciplinary proceeding in No.06-1428 against Applicant. Exhibit 9.

43. In his first Application to Reinstate, Applicant took the position that this prior Order assessing disciplinary costs and expenses had been discharged by his bankruptcy and that such Order was not exempt from discharge. Application to Reinstate, page 2, Para. 7d and 7e filed February 19, 2010; Exhibits D and E; T/H 164:14-17.

44. The State Bar filed its written statement responding to Applicant's position that the prior order for him to pay disciplinary costs and expenses had been discharged in bankruptcy. The State Bar stated that while it reserved the right to object to Applicant's reinstatement on other grounds, it would not oppose Applicant's reinstatement application based solely on

his bankruptcy discharge of the assessed costs and expenses. Notice of State Bar's Position on Bankruptcy Discharge, dated April 6, 2010.

45. At the Pre-hearing Conference of April 8, 20010, this Hearing Officer informed Applicant that at the forthcoming hearing, Rule 65(b) 2 Ariz. R. Sup. Ct. would require him to demonstrate by clear and convincing evidence not only rehabilitation and the other criteria but also "compliance with all applicable discipline orders and rules." This Hearing Officer also informed him that while the prior order might be legally dischargeable, Applicant's decision to not comply with the order could be relevant as a factor in considering his rehabilitation. On or about April 12, 2010, Applicant paid the costs and expenses and obtained the affidavit of full payment. Exhibit T; T/H 220:17-23.

State Bar Witness Hal Nevitt

46. Hal Nevitt, the State Bar Director of the Member Assistance Program testified as an expert witness on substance abuse disorder. T/H 192:13-195:12.

47. Mr. Nevitt testified that an assessment could help him determine if someone has a substance-abuse disorder. The use of standardized testing instruments provides information on whether a person has a high or low probability of having a substance dependence disorder. He then follows up the assessment with a clinical face to face interview. T/H 195:15-196:7.

48. Mr. Nesbitt testified that distinguishing between substance dependence versus substance abuse is an initial question that gets addressed. The assessment will help determine the level of care necessary for effective treatment and/or resolution of the issue. T/H 198:1-5; 199:9-25.

49. Mr. Nevitt recognized that alcohol abuse is at a lower level of care than alcohol dependence. T/H 200:8-9. He stated there are people who abuse alcohol and abstain from alcohol for long periods of time and that the duration of time varies from person to person. T/H 201:4-23. He testified that the period of time a person is able to abstain from alcohol depends upon various psychosocial stressors, including family disruption and interpersonal and occupational stressors. T/H 202:4-9. Generally, absent some kind of support to handle the stressors, a person with unresolved issues has a greater tendency to return to the abuse of the substance. T/H 202:25-203:7.

50. Mr. Nevitt testified that the fact that a person has an interlock device on their vehicle qualifies them as someone who has abused or does abuse alcohol. T/H206:20-23. He also testified that a person with a DUI history would also qualify; meaning that there is or was an alcohol abuse issue .T/H 209:3-16.

51. Mr. Nevitt stated that if a person with a DUI history had not consumed any alcohol since 2006, that would be one factor as evidence of rehabilitation, but Mr. Nevitt would need to gather more information about the person. T/H 210:1-18.

RECOMMENDATION

52. For the reasons stated below, this Hearing Officer finds that Applicant has not demonstrated his rehabilitation by clear and convincing evidence. This Hearing Officer recommends that the application for reinstatement be denied.

53. Rule 65(b)(2), Ariz. R. Sup.Ct., requires Applicant to meet his burden of proof "of demonstrating by clear and convincing evidence, the lawyer's rehabilitation, compliance with all applicable discipline orders and rules, fitness to practice, and competence."

54. Although the decision in *In re Arrotta*, 208 Ariz. 509,96 P.3d 213 (2004) deals with reinstatement after disbarment, its analysis applies to Applicant's case because Rule 65 applies to reinstatement after suspension and after disbarment.

55. Applicant was suspended for two years, retroactive to January 9, 2007 and waited until his third year to apply for reinstatement. His suspension was based on his criminal felony DUI conduct. His prior discipline proceedings involved the finding that his criminal conduct violations posed a substantial risk of potential injury to the public.

56. This Hearing Officer agrees with Applicant that his DUI offenses are less severe than the malfeasance committed by the lawyer in *Arrotta* involving mail fraud, bribery and fraudulent schemes and artifices. However, Applicant still bears the burden of proof to demonstrate rehabilitation by clear and convincing evidence. Applicant's reliance on *In re Lazcano*, 222 P.3d 896 (2010) is misplaced because in that case the applicant was ineligible to present evidence of rehabilitation where he had not yet completed his court ordered probation.[3]

57. In making the Findings of Fact, this Hearing Officer has considered: Applicant's character and standing prior to suspension; the nature and character of the charge for which he was suspended; his conduct subsequent to suspension; and the time that has elapsed between suspension and application for reinstatement. *Arrotta,* 208 Ariz. at 512, 96 P.3d at 216.

58. This Hearing Officer also has reviewed the individual circumstances of Applicant's case because the concept of rehabilitation will vary depending on the facts of each given case.

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[3] In his post hearing memorandum filed April 26, 2010 Applicant refers to alcohol abuse articles that were never admitted as evidence. Those references as part of his memorandum argument are not considered.

Rehabilitation ultimately is demonstrated by a course of conduct that allows this Hearing Officer to conclude there is little likelihood that after rehabilitation is completed and Applicant is reinstated to the practice of law, he will engage in unprofessional conduct. *In re Brown*, 166 W. Va. 226, 234, 273 S.E. 2d 567, 571 (1980) cited by *Arrotta,* 208 Ariz. at 513, 96 P.3d at217.

59. Applicant's suspension was based on the central purposes of lawyer discipline. Those purposes are: (1) not to punish the lawyer but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182,187, 859 P. 2d 1315, 1320 (1993): (2) in addition to the public, to protect the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.1297 (1985); and (3) to instill public confidence in the Bar's integrity. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

60. Applicant provided testimony and e-mail letters of reference from individuals stating his good character, rehabilitation, fitness to practice, and competency. While helpful and important, these statements without more, are insufficient to meet Applicant's burden of proof. As stated in *Arotta,* "the bottom line must always be whether the applicant has affirmatively shown that he has overcome those weaknesses that produced his earlier misconduct' i.e., whether he has been rehabilitated." (quoting *In re Krogh,* 93 Wash.2d 504,610 P.2d 13, 1321 (1980)).

61. To show rehabilitation from the misconduct that posed a substantial risk of potential injury to the public, a lawyer seeking reinstatement must establish by clear and convincing evidence: (1) that he has identified what weaknesses caused the misconduct; and (2) demonstrate that he has overcome those weaknesses. *Arrotta*, 208 Ariz. at 513, 96 P. 3d at 217. Here, Applicant satisfied the first prong when he identified the stressors of his bitter divorce, and his onerous business development efforts that caused his depression, anger, and loneliness and that those stressors led to his poor judgment in committing the DUI felonies.

62. However, Applicant failed to meet the second prong of the above requirements, namely that he present evidence that demonstrates that he has overcome those stressors or weaknesses that caused the misconduct. Here, Applicant could have presented evidence from an independent, assessment that he is equipped to meet the next high or multiple stress situation that confronts him and that there is little likelihood he will commit future unprofessional conduct. Applicant chose not to present such evidence.

63. Instead, Applicant presented the unfounded statements of Dr. Rudderham. Dr. Rudderham performed no formal assessment to determine whether or not Applicant has an ongoing alcohol abuse issue. He performed no assessment of Appellants' physical or mental health. Dr. Rudderham is a current business associate of Applicant and cannot be considered unbiased. This Hearing Officer can give no weight to the testimony of Dr. Rudderham.

64. Applicant failed or refused to present information beyond his own opinion and the statements of his father, friends and business associates that he has overcome the weaknesses that led to his misconduct violation.

65. In *Arrotta* the Supreme Court stated that professional treatment and testimony is not always required to gain reinstatement or readmission. However, the Supreme Court recognized that in many instances, a counselor can assist a person to understand the reasons for his ethical violations and can help the person acquire tools to prevent future misconduct: "An applicant who fails to present evidence that he has obtained such assistance, must carry his burden by presenting some other basis to justify a finding of rehabilitation. 208 Ariz. at 514, 96 P. 3d at 218. By presenting no independent evidence that he has acquired tools to prevent future misconduct, Applicant has provided only a basis for speculation as to his rehabilitation.

66. This Hearing Officer finds that Applicant's claim that he lacked the funds to obtain an independent assessment is not supported by the evidence. In the fall of 2009 he earned about $9000. Since January, 2010, Applicant had the funds to pay $85 per month for the interlock ignition device on his vehicle. In April, 2010, he received $7000 in fees on his online business. As the founder of his business, Applicant could have obtained sufficient money to pay for an independent assessment.

67. This Hearing Officer does not doubt that Applicant genuinely believes that he is rehabilitated, but his genuine personal belief is not a substitute for presenting adequate evidence to meet his burden of proof.

68. Applicant's belated payment of his prior assessed costs and expenses satisfied the requirement that he show compliance with all applicable discipline orders and rules under Rule 65(b) (2), Ariz. R. Sup. Ct. When his belated payment is considered together with his refusal to present independent evidence of rehabilitation, it appears that Applicant either does not realize or that he chooses to ignore the importance of satisfying his burden of proof. His ongoing rejection as a "unique standard" by the Court of Appeals of the constructive knowledge imputed to him for having reason to know that his driver's license was suspended also raises the question whether he has deliberately chosen to ignore the need to provide independent evidence of rehabilitation. In *State v. Cifelli*, 214 Ariz. 524, 155 P. 3d 363 (App.2007), the Court of Appeals found that Applicant's constructive knowledge was based on his "deliberate ignorance." Exhibit 5.

69. In *In re Blasnig, 181 Ariz. 356, 890 P.2d 1141 (1995.),* the Supreme Court reinstated a lawyer who had been suspended due to an alcohol problem. There, the lawyer satisfied his burden of proof for rehabilitation by presenting evidence from an independent treatment provider that he was rehabilitated. Unlike the lawyer in Blasnig, Applicant did not present any evidence from an independent assessment or treatment provider that if he again is in a highly stressed situation whether it be the failure of a current or future business, child support

arrearage litigation with his ex-wife, or breakup in a personal relationship, the likelihood of his committing new misconduct based on alcohol abuse is remote.

70. For all of the above reasons, this Hearing Officer recommends that the Application to Reinstate be denied. However, assuming that the Applicant will change his mind and choose to pay for an independent assessment, this Hearing Officer recommends that Applicant be allowed to reapply for reinstatement in less than the one year normally required to wait under Rule 65(a)(4) for successive applications.

Dated this 28th day of May, 2010

Louis A. Araneta

Louis A. Araneta, Hearing Officer 6U

Original filed with the Disciplinary Clerk
this 28th day of May, 2010.

Copies of the foregoing mailed on the
1 day of ~~May~~ June, 2010, to:

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