BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF AN APPLICATION FOR REINSTATEMENT OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA,	No. 10-6000
THOMAS A. CIFELLI, Bar No. 013794 APPLICANT.	**DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on December 11, 2010, pursuant to Rules 64 and 65, Ariz.R.Sup.Ct., for review of the Hearing Officer's Report filed May 28, 2010, recommending that reinstatement be denied but that Applicant be allowed to reapply for reinstatement in less than one year if he obtains an independent assessment.

Applicant did not file an objection to the Hearing Officer's Report and did not request oral argument. However, on June 9, 2010, Applicant filed an Emergency Post-Hearing Motion to Reconsider and Amend Rule 65(b)(3) Hearing Officer Report Prior to Commission Review. The State Bar filed its Response on June 16, 2010, urging the Hearing Officer to deny the Motion. On June 17, 2010, the Hearing Officer denied Applicant's Motion having again concluded that applicant failed to establish rehabilitation.

Pursuant to Rule 65(b)(4), Ariz.R.Sup.Ct, the Commission requested oral argument. Applicant and counsel for the State Bar were present. The State Bar opposes the reinstatement.

Applicant argues that the Supreme Court has held that a medical assessment is not needed for reinstatement and because of financial considerations, he has been unable to obtain one. Applicant further argues that no weight has been given to the evidence provided in support of his rehabilitation. Applicant asserts that he is rehabilitated, having participated in Alcohol Anonymous ("AA") meetings while incarcerated and having completed his criminal probation requirements, which included urinalysis testing and an interlocking device on his vehicle. Applicant also argues that testimony from Dr. Mark Rudderham, Medical Director for *Online Wellness Community* was offered in support of his rehabilitation efforts.

The State Bar argues that Applicant has failed to meet his burden of proof for reinstatement and urges the Commission to adopt the Hearing Officer's recommendation.

Decision

Having found no facts clearly erroneous, the eight members[1] of the Commission by a majority of five[2] recommend adopting and incorporating by reference the Hearing Officer's findings of fact, conclusions of law, and recommendation that Applicant Thomas A. Cifelli be denied reinstatement to the practice of law and be required to pay costs of these proceedings including any costs incurred by the Disciplinary Clerk's office.[3] The Commission further adopts the Hearing Officer's Recommendation that should Applicant seek an independent medical examination ("IME"), he be allowed to reapply for reinstatement in less than one year. *See* Rule 65(a)(4).[4]

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[1] Commissioner Belleau did not participate in these proceedings.
[2] Commissioners Houle, Katzenberg and Todd were opposed. *See* dissenting opinion below.
[3] A copy of the Hearing Officer's Report is attached as Exhibit A.
[4] Rule 65(a)(4) *Successive Application* provides that "No application for reinstatement shall be filed within one year following the denial of a request for reinstatement."

Background

Applicant was admitted to practice law in Arizona on October 26, 1991. He was suspended for two years retroactive to January 9, 2007[5] and given two years of probation,[6] for violating ER 8.4(b) (committing a criminal act that reflects adversely a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects). Specific terms of probation were to be decided at the time of reinstatement and costs in the amount of $1,271.05 were also imposed. Although Applicant obtained a discharge of the judgment for costs in his bankruptcy proceeding, he ultimately paid those costs because the Hearing Officer advised that his failure to do so might be relevant in determining rehabilitation. *See* Hearing Officer's Report, p. 7 ¶ 45.

Applicant's underlying misconduct arose from his felony conviction on March 3, 2006, for two counts of Aggravated DUI. Applicant was sentenced to four months in the Arizona Department of Corrections and two years of probation, which he successfully completed. Applicant did not participate in the underlying discipline proceedings and filed his Application for Reinstatement on January 14, 2010. Amended Applications were filed on February 19, 2010, March 8, 2010 and April 14, 2010. Applicant failed to file the required Affidavit from the Client Security Fund Administrator with his Applications pursuant to Rule 65(3)(B), however, staff was able to verify that no funds are due.

Discussion of Decision

The Commission' standard of review is set forth in Rule 58(b) Ariz.R.Sup.Ct. In reviewing findings of fact, the Commission applies a clearly erroneous standard. Pursuant

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[5] The effective date of Applicant's interim suspension in File SB-06-0143-D (2007).

[6] In File No. 06-1428, the Hearing Officer recommended two years of probation upon reinstatement with terms and conditions to be determined at the time of reinstatement. Because the underlying matter involved alcohol abuse, the Commission added the requirement for a MAP assessment.

to Rule 64(a), a suspended lawyer "*must show by clear and convincing evidence that the lawyer has been rehabilitated* and possess the moral qualifications and knowledge of the law required to admission to practice law in this state in the first instance." Ariz. Sup. Ct. R. 64(a) (emphasis added). Case law has also established that in reinstatement matters, an applicant must show, among other things, that he has identified the weaknesses that caused the original misconduct and has overcome those weaknesses. *See In re Arrotta*, 208 Ariz. 509, 96 P.3d 213 (2004). *Arrotta* also establishes that neither the severity of the original sanction, nor the passage of time passed establishes rehabilitation or an Applicant's fitness for reinstatement. An Applicant must demonstrate by clear and convincing evidence, that he has been rehabilitated, that he is competent, and that he poses no further threat to members of the public. *Id.*, at 512 (quoting *In re Robbins*, 172 Ariz. At 256, 836 P.2d at 966 (1992).

At the hearing, Applicant presented testimony and letters from individuals to support his claims of rehabilitation, fitness to practice and competence. However, no formal assessment or IME of Applicant's physical and mental health or substance abuse was performed. The Hearing Officer found the witness testimony and character letters the Applicant did present were insufficient to meet his burden of proof regarding rehabilitation. Specifically, the Hearing Officer gave no weight to the testimony of Applicant's business associate Dr. Mark Rudderham, a naturopathic physician, based on his admitted bias and failure to perform any assessment of any kind. *See* Hearing Officer's Report, pp. 9-10. The Commission carefully reviewed the record and concluded that there was substantial evidence to support the Hearing Officer's findings and they were not clearly erroneous.

Applicant testified that he went through a stressful divorce in 2003 which caused him great stress and led to the impairment of his personal and professional judgment. Applicant

testified that during that time, he experienced depression, loneliness, fear and anger. Applicant's divorce was final in 2007. Applicant testified that since his release from prison in 2006, he has not received and does not intend to seek any professional counseling or treatment. Applicant believes he has benefited greatly from nutritional protocols and IV therapy and considers himself an expert in handling and processing stress. *Id.*, p. 5 ¶ 35-36.

Applicant maintains that he has been sober since his incarceration in 2006 and presented the testimony of his father and business associates to confirm his sobriety. What Applicant failed to present, however, was any evidence to support his self-evaluation regarding his current ability to cope with stresses in the future to avoid re-offending. Hal Nevitt, Director of MAP testified at the reinstatement hearing as an expert witness on substance abuse disorders. Mr. Nevitt stated that a DUI history and term of probation requiring an interlock device, such as Applicant has, would be indicative of an alcohol abuse issue and an assessment would be needed to determine if a substance abuse disorder is present. Mr. Nevitt also explained that although Applicant's abstention from alcohol since 2006 would be one factor to consider in determining his rehabilitation, more information would be needed to reach a conclusion. *Id.*, at pp. 7-8.

We agree with the dissent that professional treatment and testimony is not required in every case to establish rehabilitation, *Arrotta* 208 Ariz. at 514, 96 P.3d at 218, but here, Applicant sought to ignore his burden of proof and substitute his own belief for any competent evidence of rehabilitation. The unfortunate truth is that lawyers are often subject to great stress. The record, including Applicant's own testimony, establishes that when he was subject to great stress in the past, he experienced depression, loneliness and anger, and resorted to an abuse of alcohol to deal with those emotions. He has now been sober for four

years, but that, in and of itself, does not mean that he has developed better ways of dealing with extreme stress, if and when, it should again occur in his life.

The record is devoid of any evidence that Applicant has established coping mechanisms, a safety network or any other mechanisms to protect the public should he again be subject to experience stressful situations. The Hearing Officer carefully evaluated Applicant's testimony and evidence, including the credibility of the friends and business associates who testified on his behalf. Based on that evaluation, the Hearing Officer concluded Applicant failed to carry his burden of establishing rehabilitation by clear and convincing evidence. That finding was not clearly erroneous.

Conclusion

The Hearing Officer found that Applicant failed to establish rehabilitation by clear and convincing evidence and therefore, failed to meet his burden of proof pursuant to Rule 65(b)(2). The Commission agrees and therefore, adopts the Hearing Officer's recommendation to deny reinstatement.

RESPECTFULLY SUBMITTED this 5 day of January 2011.

Jeffrey Messing, Member
Disciplinary Commission

Commissioners Houle, Katzenberg and Todd respectfully dissent.

Because in our view the record clearly and convincingly demonstrates that Applicant Thomas A. Cifelli has established his rehabilitation, we respectfully dissent from the majority's recommendation that Cifelli not be readmitted to the practice of law in Arizona.

Over a quarter of a century ago, in 1983, Cifelli was first licensed as an attorney in Illinois. He was admitted to practice law in Arizona, after passing the Bar Examination, on November 26, 1991. After about 20 years of marriage and three children, Cifelli and his wife began an acrimonious divorce in March 2003. In October 2004, Cifelli was cited for DUI. The officer advised him that if his blood sample tested at a .08 or higher alcohol concentration, his driver's license would be suspended. *State v. Cifelli*, 214 Ariz. 524, ¶ 20, 155 P.3d 363 (App. 2007). At the time, Cifelli was changing addresses with some frequency. Because he gave the officer an incorrect address and had not advised the DMV of his current address, he did not receive the Notice that his license had been suspended effective November 22, 2004. *Id., see also* A.R.S. § 28-1385(G) (2006) (allowing the DMV to administratively suspend a driver's license based on blood alcohol results). On December 9, 2004, he was again cited for DUI. *Cifelli*, at ¶ 2. Because his license had been suspended, he was charged with aggravated DUI (two counts—under the influence and over the .08 BAC limit) and convicted after a bench trial in March 2006 where the only issue was whether he "should have known" that his license was suspended. *Id.* at ¶¶ 1, 3. Cifelli was sentenced to four months in the Arizona Department of Corrections followed by two years probation. (H.O. Rep. at ¶ 5.)

As a result of the December aggravated DUI convictions, following a default disciplinary proceeding, this Court suspended Cifelli from the practice of law for two years, retroactive to January 9, 2007, the date of his interim suspension. *See* ER 8.4(b) (committed a criminal act that reflects adversely on the lawyer's fitness). Cifelli self reported his convictions to the Bar in July 2006. (Resp. Exh. B.) Pursuant to the suspension order, upon reinstatement Cifelli will be placed on two years of MAP probation.

In evaluating an application for reinstatement, this Court balances four factors. *In the Matter of Arrotta*, 208 Ariz. 509, ¶ 13, 96 P.3d 213 (2004)[7]. This Court considers:

> (1) the applicant's character and standing prior to the disbarment; (2) the nature and character of the charge for which he was disbarred, (3) his conduct subsequent to the disbarment, and (4) the time that has elapsed between the disbarment and the application for reinstatement.

Id. (quoting *In re Robbins*, 172 Ariz. 255, 256, 836 P.2d 965, 966 (1992) in turn quoting *In re Spriggs*, 90 Ariz. 387, 833 n.1, 368 P.2d 456, 457 n.1 (1962)) (adding numbers). This Court does "not apply these factors mechanically." *Arrotta*, at ¶ 14. The ultimate test is whether the applicant has shown rehabilitation by clear and convincing evidence "that he has identified just what weaknesses caused the misconduct and then demonstrate that he has overcome those weaknesses." *Id.* at ¶17.

Turning first to the four factors, Cifelli's character and standing prior to the disbarment, according to the record, was unblemished. There is no suggestion that he had any prior discipline matters in Illinois or Arizona. The letters and testimony in support of his application depict a competent attorney of good character. (Resp. Exh. N.) Although he did not, for the most part, have a traditional law practice and had largely limited his practice to business development, investment banking and other non-traditional legal business type activities, that should not diminish the fact that his prior record was positive. Prior to his

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[7] The Court reinstated Arrotta on September 28, 2005 (Case No. 03-6005). Arrotta had been disbarred for using his legal practice in a fraudulent scheme and to bribe a public official resulting in legal fees of over $1.1 million. *Arrotta*, at ¶¶ 5-6. Additionally, although a detailed proportionality analysis is rarely beneficial, where a sanction is so blatantly disproportionate, disproportionality should be considered. Here, Cifelli received a 2-year suspension for his aggravated DUI compared to the relatively brief suspensions for multiple ethical violations over a period of years that directly affected clients in a recent high profile case. *In the Matter of Jeffrey Philips*, SB-10-0036-D (filed 12-16-2010). Cifelli has served his sanction; he is simply attempting to be readmitted.

aggravated DUI, Cifelli had, in fact, been a licensed certified public accountant, license securities representative, license real estate broker and a license insurance broker. (Tr. 4/15/10, at 98.) These licenses all indicate good character. Additionally, he was active in various charities. (*Id.* at 99-102.)

Driving under the influence is a serious public safety concern. While serious, Cifelli's offenses were certainly not as serious as Arrotta's multiple offenses over a period of years, nor as serious as Jeffrey Phillips' prior and current ethical violations. Unlike Arrotta's crimes, and Phillips' ethical violations, Cifelli's offenses did not directly involve the practice of law. Unlike *Matter of Coker* File No. 10-6004 where Respondent had a serious substance abuse problem and had additional ethical violations affecting his clients, the record in this case does not reveal that Cifelli had any prior problem with alcohol. Neither the Hearing Officer nor the Commission questioned Respondent's readmission in *Matter of Coker* File No. 10-6004 after a year's suspension. Here, Cifelli exercised poor judgment drank and then drove, when he should have known that his license was suspended.

The next factor concerns Cifelli's behavior subsequent to this suspension. Six years have elapsed since Cifelli's aggravated DUI in December 2004 and the record reveals no information that, in our view, should preclude his reinstatement. Cifelli testified that he has not consumed alcohol since entering prison in 2006. Letters of support confirm this. (Resp. Exh. U through Z.) Following an investigation, the MVD reinstated his driving privileges in 2010. (Resp. Exh. F.) Pursuant to law, for a minimum of 12 additional months his vehicle must have an ignition interlock device. *See* A.R.S. § 28-1383(J)(1) (requiring such device for 12 months after driving privileges are reinstated). At oral argument on his reinstatement, Cifelli indicated, not surprisingly, that he has never failed that test. *See also* Summary

Events Log, Resp. Exh. F attachments. The record is simply void of any indication that after December 2004, Cifelli ever drank and drove. In 2005, prior to his convictions, he completed a 16 hour class sponsored by "the Center for Recovering Families." (Resp. Exh. L.) He served his prison term, April 2006 to July 2006. While in prison, he completed the "Thinking Straight" course. (Resp. Exh. M.) He testified that he went through three months of AA attendance while incarcerated, although that was not required. (Tr. 4/15/10, at 130.) After being released from prison, Cifelli completed the MADD Victim Impact Panel. (Resp. Exh. K.) After more than a year on probation, that included urinalysis, his probation was terminated early in October 2007. (Resp. Exh. J; H.O. Rep. at ¶ 33.) To some extent, after his release he has continued his charitable activities despite his initial inability to drive. (Tr. 4/15/10, at 101.) At oral argument, the State Bar confirmed that it conducted its own independent background investigation of the Applicant and found nothing derogatory.

The fourth factor is the time that has elapsed between the disbarment and Cifelli's application for reinstatement. Six years has elapsed since the conduct that led to his suspension. He waited over a year after his suspension before he applied for readmission on January 14, 2010. He amended his application twice to satisfy what the State Bar and the Hearing Officer determined to be deficiencies, on March 8, 2010 and on April 14, 2010. The State Bar affirmed that Cifelli has paid in full all sums owing the State Bar. (Resp. Exh. T.) Previously, he had discharged in bankruptcy the prior disciplinary fees ($1271.05) owed the State Bar. (Resp. Exh. A and D.) After the Hearing Officer advised Cifelli that if he did not pay the discharged amount (comply with the prior order of this Court) it "could be relevant as a factor in considering rehabilitation." (H.O. Rep. at ¶ 45.) On April 12, 2010, Cifelli paid the amount although apparently he had no legal obligation to do. In February

2008, Cifelli was administratively suspended for failure to complete mandatory continuing legal education hours for the 2005-2006 CLE year. (*Id.* at ¶ 11.) He corrected that deficiency and was reinstated on April 6, 2010 from the administrative suspension. (*Id.* at 12.)

Cifelli met his burden of proving rehabilitation. In our view, the weakness was drinking and then driving. According to this record, for at least four years he has not consumed alcohol. That should be sufficient for a case like this, where the suspension is for conduct that is essentially unrelated to the practice of law.

Cifelli believed his weakness was poor judgment resulting from stress involving his extremely contentious divorce and his efforts to get a business going that involved frequenting bars. His divorce concluded in 2007 and he is no longer pursuing that business. Given the circumstances of this case, his lack of any known problem with alcohol before the DUIs or his law practice, and any problem with either after, that should be sufficient to meet his burden.

The Hearing Officer and the State Bar appear to be concerned that Cifelli's potential weakness is his potential reaction to stress. Both parties agree that this Court does not require an assessment for the substance abuse or dependency in order to be readmitted. *See Arrotta*, at ¶ 22. Nevertheless, the lack of an independent professional assessment appears to be the main barrier to readmission. (H.O. Rep. at ¶¶ 36-37, 50-51, 62-69.) Granted this Court stated in *Arrotta* that "in many instances, a counselor can assist an individual in understanding the reasons for his ethical violations and can help the person acquire tools needed 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." *Arrotta*, at ¶ 22. Here, Cifelli's post-DUI conduct so demonstrates. This is not one of those instances that an independent assessment should be necessary. As the record reflects, since leaving prison, Cifelli has been under severe financial stress, yet there is no evidence that he has turned to alcohol, let alone drive under the influence after his driving privileges were reinstated in February. The record supports his reinstatement.

Original filed with the Disciplinary Clerk
this 5th day of January 2011.

Copy of the foregoing mailed
this 7 day of January 2011, to:

Thomas A. Cifelli
Applicant
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Roberta L. Tepper
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Copy of the hand delivered
this 7 day of January 2011, to:

Hon. Louis A. Araneta
Hearing Officer 6U
1501 West Washington, Suite 104
Phoenix, AZ 85007

by Deanna Fenn

/mps

EXHIBIT A

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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