

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

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

TIMOTHY COCCHIA,
Bar No. 018286,

Applicant.

PDJ-2013-9048

REPORT AND RECOMMENDATION

FILED OCTOBER 7, 2013

On September 12, 2013, the Hearing Panel ("Panel") composed of public member, Howard M. Weiske, attorney member, Glen S. Thomas, 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. David L. Sandweiss appeared on behalf of the State Bar of Arizona ("State Bar") and Ralph W. Adams appeared on behalf of Mr. Cocchia. The witness exclusionary Rule was not invoked, per agreement of the parties. The Panel considered the admitted exhibits, the parties' Joint Prehearing Statement, pre-hearing memorandum and evaluated the testimony and credibility of the witnesses including Mr. Cocchia.¹

The State Bar did not oppose reinstatement, but recommended nine hours of continuing legal education ("CLE") in the areas of business, employment and tax law as well as a practice monitor. The Panel now issues the following "Report and

¹ Consideration was given to the testimony of Dena Foos, James P. McErlean, Mike Roberson, and Lonnie Schaffroth.

Recommendation,” pursuant to Rule 65(b)(3), Ariz. R. Sup. Ct, recommending reinstatement without conditions.

I. FINDINGS OF FACT

Mr. Cocchia was admitted to practice law in Arizona on October 18, 1997. [Joint Prehearing Statement, p1, ¶ 1.] By Order of the Board of Governors of the State Bar of Arizona, Mr. Cocchia was administratively suspended from the practice of law in Arizona, effective May 30, 2008, as he did not take the required CLE to maintain his license to practice law. Mr. Cocchia has no prior disciplinary history. He has not applied for reinstatement prior to this matter. His application, filed May 29, 2013, for reinstatement meets all of the requirements of Rule 65(a), Ariz. R. Sup. Ct.

During the period of suspension, Mr. Cocchia worked as a Consultative Sales Executive for CXT Software, from April 2012 to present. From July 2005 to February 2012 he worked as a Sales, Marketing Systems and Special Projects Manager, and Vice President of Quality Assurance, for IntelliQuick Delivery, Inc. In both positions Mr. Cocchia was heavily involved in sales, specifically, creation and organization of job descriptions, establishing standard operating procedures, management of 300 independent contractors, compliance with laws and regulations related to independent contractors, and drafting contracts related to all aspects of the businesses for review by legal counsel. [Joint Prehearing Statement, p. 2.]

Mr. Cocchia maintained a single address during the entire period of his suspension. [Joint Prehearing Statement, p. 3.]

Mr. Cocchia has not been a party to any criminal proceedings and there have been no charges of fraud made or claimed against him during the period of

suspension. Mr. Cocchia was the subject of four civil traffic violations in the state of Arizona, all matters having been timely resolved. [Id.]

Prior to his suspension, Mr. Cocchia worked for his father's courier business, Canyon State Courier (1998-2005). [Application for Reinstatement, pp. 2-3.] His last position was as President of the company. [Id.] Just after Mr. Cocchia left the company it closed and filed for bankruptcy protection. [Testimony of Mr. Cocchia, Sept. 12, 2013.]

When his father was running the company, two accountants were hired to assist with the filing of the taxes. However those individuals did no profit and loss statements or other analysis critical to determining the profitability of the practices of the company. His father ultimately hired a Chief Financial Officer (CFO) but still did no fiscal reporting. Shortly before Mr. Cocchia was named president, his father hired a new financial officer when the prior one died of cancer. That person also served as controller. [Testimony of Mr. Cocchia.]

While his father ran the business he built by "feel," Mr. Cocchia, when named president, required the CFO to do profit and loss statements. The CFO served as accountant and was responsible for assuring the company regularly paid its taxes, including the employee portion of its taxes and withholding. In his position as president of the company, Mr. Cocchia signed an accurate IRS quarterly report which reported the business' portion of employee taxes to be paid.

The CFO did file the report, but did not pay the taxes. He never informed management, including Mr. Cocchia, of his failure to do so. Further, the accounting performed by this officer was inaccurate, leading management to conclude it was operating at a profit. It was not. This led to a debt of approximately \$98,000.

[Testimony of Mr. Cocchia and Application for Reinstatement, p. 3.] Under federal law, by signing the tax report, Mr. Cocchia was jointly and severally liable for that IRS debt. [Testimony of Mr. Cocchia.]

In addition, due to his involvement in the family business and his prior positions with the business, Mr. Cocchia was named in the business' bankruptcy proceedings, but never personally filed bankruptcy. [Id.] As a result Mr. Cocchia had several debts related to the business he was also personally held liable for. He became clear of the IRS debt in 2011. As to the remaining debts, he has either charged them off per agreement with the creditors, or resolved them satisfactorily in other ways. One of the debts did result in a proceeding in justice court (Discover card), which was also resolved. At the time of the hearing before this Panel, Mr. Cocchia had satisfied all of the outstanding debts or incorporated them into his personal debt by obtaining a second mortgage on his home. [Testimony of Mr. Cocchia.]

Mr. Cocchia has not been subject to any other proceedings or inquiries as a member of any other professional organization or in relation to any other professional licenses. At the time of the September 12, 2013, hearing before this Panel, Mr. Cocchia had completed 31.25 hours of CLE credit and took the course on Arizona law on May 22, 2013. [Application for Reinstatement, p. 11; Ex. 4, Bates 19-26; Ex. 25, 223-229.] During the period of suspension Mr. Cocchia also stayed current on laws, regulations, and information related to independent contractors, Human Resources legal issues, and contract law through various other professional associations and conferences related to the courier business. [Testimony of Mr. Cocchia.]

At the time Mr. Cocchia was administratively suspended he was also struggling to pay off and settle the debts resulting from the closure of the family courier business. He testified that at the time he was trying to fulfill all of the business debts without filing personal bankruptcy. [Testimony of Mr. Cocchia.] In his words, it was important that he managed those debts and not avoid them through bankruptcy and that he made the “hard” choice to resolve or pay those debts rather than pay for CLE credits. [Id.] Even though his father was jointly and severally liable for many of those debts, Mr. Cocchia refused to put his father in the position of covering all the debts alone, just as he refused to file for bankruptcy. [Id.] Although Mr. Cocchia did not pay all of the debts in full, negotiating settlement of some debts with the various credits, he did not shirk the obligations through bankruptcy.

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

In matters of discipline, when attorneys have been suspended or disbarred for unethical behavior, the standard for readmission to the Bar can, in a practical sense, be more difficult than initial admission and with good cause. An individual seeking readmission has the weight of their unethical behavior added to the balancing of the scales. There is a resultant greater burden of proving rehabilitation and good moral character. Regardless of whether a person is an initial applicant or one applying for readmission, the more egregious the past, the greater becomes the practical burden of proof. “Moreover, the more serious the misconduct that led to disbarment, the more difficult is the applicant's task in showing rehabilitation.” *In re Arrotta*, 208 Ariz. 509, 512, 96 P.3d 213, 216 (2004) (citing *In re Robbins*, 172 Ariz. 255, 256, 836 P.2d 965, 966 (1992)). In that sense

it is not unlike a sliding fee scale in that the more egregious the conduct, the more that must be laid on the evidentiary table to demonstrate rehabilitation and good moral character.

However, the converse is also true. When the applicant has not violated the Arizona Rules of Professional Conduct, there is typically little required to demonstrate rehabilitation. Any individual is free to choose to maintain a law license or to surrender it voluntarily, including by intentional inaction as Mr. Cocchia did.

The general standard for readmission is set forth within Supreme Court Rule 64(a). In order to be reinstated to the active practice of law, a lawyer must show by clear and convincing evidence that the lawyer has been rehabilitated and possesses the moral qualifications and knowledge of the law required for admission to practice law in this state in the first instance. Notwithstanding that there has been no violation of the ethical rules by Mr. Cocchia, when an applicant has been suspended for more than six months, that applicant must also meet the more stringent Rule 65 requirements.

Generally a lawyer seeking reinstatement must prove by clear and convincing evidence rehabilitation, compliance with all applicable discipline orders and rules, fitness to practice, and competence. Rule 65(b)(2), Ariz. R. Sup. Ct. The Supreme Court of Arizona has held that the following factors also are considered in matters of 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. *Matter of Arrotta*, 208 Ariz. 609, 96 P.3d 213 (2004). It is apparent when there is no charge for which one was disciplined; there may be little to no need for rehabilitation.

Typically, an applicant for reinstatement must show rehabilitation by clear and convincing evidence as well as having overcome his or her disability. *In re Johnson*, 298 P.3d 904 (2013). While an applicant need not pull back the “multiple layers of causation or psychoanalysis,” the “applicant must clearly and convincingly prove rehabilitation by specifically identifying the causal weakness leading to each count and explaining how the weakness has been overcome.” *In re Johnson supra at 13*. Here there were no counts leveled against Mr. Cocchia.

Mr. Cocchia testified that his suspension resulted from a choice he made during a particularly difficult financial time. Although Mr. Cocchia was a licensed attorney during the time he worked for Canyon State Courier, he testified he was not the company’s attorney and that he was not actively practicing law. Rather he worked in various aspects of sales and management for the business. He admitted that although his legal training allowed him to rough draft initial contracts, understand various aspects of independent contractor law, sales contracts, and other legal aspects of the courier business, he did not act as legal counsel for Canyon State Courier. [Testimony of Mr. Cocchia.]

Mr. Cocchia testified that in hindsight he may have made a different choice regarding obtaining the mandatory CLE credits required to maintain his license. However, he believed at the time the choice he made was the right one in light of the other obligations he faced. As such, in response to the query of the State Bar, he identified that the absence of foresight was the weakness that led to his

suspension. We are disinclined to find such a choice as a weakness or a disability for which more than negligible rehabilitation need be technically proven. In his unique circumstances, the weighing of difficult alternatives in order to make a decision is not a weakness requiring rehabilitation in our view. Notwithstanding, if we error in that analysis we prefer to make clear that such lack of complete foresight in the possibility of later re-desiring to practice law again was his weakness and one from which Mr. Cocchia has been rehabilitated through reflection.

In that technical sense, there is other evidence that Mr. Cocchia has satisfactorily demonstrated his rehabilitation. He obtained 31.5 hours of CLE before the date of the hearing before this Panel and took the course on Arizona law. A number of those CLE credits were related to his continued work in the courier industry, including the topic of independent contractors and employment law. He testified that he understood the requirement of obtaining CLE credits and that he was financially able to pay for those credits.

He also testified that through the second mortgage on his home taken to cover some of the debts discussed above, he has resolved all of the competing debt obligations that led to his failure to obtain the required CLE credits to maintain his license. He further testified that he is now married and his wife's income contributes to his ability to pay for the required CLEs. As such, Mr. Cocchia has proven he is aware of how he landed in a position of being suspended and that he has the ability to avoid that problem in the future.

Compliance with Disciplinary Rules and Orders

Mr. Cocchia is fully compliant with all past disciplinary orders imposed as a result of his suspension. There were no allegations involving the unauthorized practice of law during the period of suspension. Mr. Cocchia does not owe any funds to the Client Protection Fund. However, the State Bar filed its Statement of Costs and Expenses incurred as a result of the application for reinstatement and Mr. Cocchia owes the State Bar \$51.60. Pursuant to Rule 65(a)(3)(A), Ariz. R. Sup. Ct., a lawyer seeking reinstatement shall be required to cure the monetary deficiency before the application is reviewed by the Court.

Competence and Fitness to Practice

This matter involves an administrative suspension; as such, the only issue relating to competence is his ability to stay current in his knowledge of the law. Mr. Cocchia obtained 31.5 hours of CLE credit as of the time of the hearing before this Panel. He also completed the course on Arizona law. In addition, he testified that he has maintained involvement in other associations related to the courier business and through those associations has attended conferences where relevant topics were part of the programming. As such, Mr. Cocchia has demonstrated his competence.

The Hearing Panel finds that Mr. Cocchia has demonstrated a laudable level of integrity which is coupled by our finding of competence and fitness to practice law. Mr. Cocchia did not avoid his financial obligation through bankruptcy. He declined to view himself as a victim and instead made every effort to assist his father in meeting the debts he never knowingly or intentionally became jointly and severally liable for upon the closing of the family business. During his suspension,

Mr. Cocchia continued to work for other courier businesses and gained the admiration and respect of colleagues. [Testimony of James McErlean, Sept. 12, 2013.] He further has the support and respect of other professionals in his life as evidenced by his character witnesses. [Testimony of Mike Roberson and Lonnie Schaffroth, Sept. 12, 2013.]

III. DISCUSSION OF DECISION

We do not discount nor ignore the individual conduct leading up to or occurring after an administrative suspension. We are aware that such conduct may call into question a person's fitness to practice. We are aware that after a lengthy suspension, such as that of Mr. Cocchia, that the more detailed reinstatement requirements set forth in Rule 65 must be followed. Weaknesses may be identified in that detailed application evaluation for which an applicant must be required to show rehabilitation even in an administrative suspension. Like people, all applications are unique and treated accordingly.

We carefully reviewed the record. The Panel is impressed with the efforts of Mr. Cocchia. They underscore his desire and we find he has met the requirements necessary to return his license to practice law in the State of Arizona. Mr. Cocchia presented to the Panel as a person with a high level of integrity that cares greatly about doing the right thing when faced with obstacles and hard times. We believe he will be a credit to the profession through his strength of character and willful intent to be an over-comer rather than overcome by his life's circumstances.

Although the State Bar recommended reinstatement with the conditions of a practice mentor and that Mr. Cocchia obtain nine extra hours of CLE related to employment law, the Panel finds no basis for such conditions. The Panel has no

hesitation in recommending Mr. Cocchia for reinstatement without any conditions or probation.

IV. CONCLUSION

While it is true that ethics focuses on what one ought to do, attorney discipline is primarily based on the Arizona Rules of Professional Conduct; not philosophy. While these may have commonalities, it is unreasonable to expect or require perfection from an applicant in every decision in life. Here we find the life choices of Mr. Cocchia violated no aspect of the Rules or the case law that guides us in interpreting and applying those rules. At the same time we find the responses of Mr. Cocchia to the circumstances brought by his imperfect decisions met the requirements of the rules and standard of conduct required by the preamble to those rules. Mr. Cocchia conducted himself honorably. The Panel recommends reinstatement.

DATED this 7th day of October, 2013.

/s/ William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

CONCURRING

/s/ Howard M. Weiske

Howard M. Weiske, Volunteer Public Member

/s/ Glen S. Thomas

Glen S. Thomas, Volunteer Attorney Member

Original filed with the Disciplinary Clerk
this 7th day of October, 2013.

COPY of the foregoing mailed/emailed this
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