

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

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

THOMAS A. CIFELLI,
Bar No. 013794,

Applicant.

PDJ-2012-9018

REPORT AND RECOMMENDATION

FILED AUGUST 7, 2013

On July 8, 2013, the Hearing Panel ("Panel") composed of public member Mark Salem, attorney member Richard Brooks, 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, on Applicant Thomas A. Cifelli's Motion to Lift Stay and Approve this Supplemental Application to Reinstate. Roberta Tepper appeared on behalf of the State Bar of Arizona ("State Bar") and Applicant Thomas A. Cifelli appeared pro per. The Panel considered the testimony of Mr. Cifelli, the supplemental exhibits filed previously (June 15, 2012), and the supplemental disclosure of Mr. Cifelli's 2012 Federal and Arizona tax returns attached to an email dated July 09, 2013.

At the conclusion of the hearing, the State Bar opposed reinstatement. The Panel now issues the following "Report and Recommendation," pursuant to Rule 65(b)(3), Ariz. R. Sup. Ct., recommending that reinstatement be denied.

Background

1. On June 14, 2012, the Panel held a one-day hearing pursuant to Rule 65(b)(1), Ariz. R. Sup. Ct., on Mr. Cifelli's Application for Reinstatement.

2. On July 9, 2012, the Panel filed its Report and Recommendation with the Arizona Supreme Court, recommending reinstatement and probation.

3. On September 26, 2012, the Supreme Court filed an Order remanding the matter for the Panel's consideration of the requirements of Rule 64(c) Ariz. R. Sup. Ct., requiring an applicant for reinstatement who has been suspended for a period of five (5) years to "apply for admission and pass the bar examination as required." The Supreme Court further requested that the Panel consider the supplemental exhibits filed by Mr. Cifelli on June 15, 2012, - one day after the conclusion of the hearing on the original Application for Reinstatement.

4. On October 3, 2012, the Office of the Presiding Disciplinary Judge filed an order requiring Mr. Cifelli to submit his position, in writing, on the issue on remand. Applicant filed a Motion and Response to Remand Order on October 15, 2012, stating the supplemental exhibits did not raise any new factual issues, requesting a waiver of the requirements of Rule 64(c), Ariz. R. Sup. Ct., or in the alternative, vacating the retroactive date of suspension so that Rule 64(c) would not apply. The State Bar filed its position on the remanded issue on October 25, 2012, stating it did not object to the additional exhibits and did not object to a waiver of Rule 64(c).

5. On November 15, 2012, the Panel held a hearing and determined to stay the matter for up to one year to allow the Mr. Cifelli time to apply for the February 2013 bar examination, to allow the State Bar an opportunity to update the investigation related to reinstatement once bar result were released and to set for hearing. The Panel further incorporated the late supplemental exhibits filed by Mr. Cifelli.

6. On May 15, 2013, Mr. Cifelli filed a Motion to Lift Stay and Approve Supplemental Application to Reinstate. Mr. Cifelli included proof of passing the February 2013 Arizona bar examination. He further sought waiver of the requirement to sit for and pass the MPRE exam and that he complete the course or Arizona law. On May 22, 2013, the State Bar filed its response arguing that Mr. Cifelli failed to demonstrate good cause for waiver of the MPRE and course of Arizona law requirement.

7. On June 7, 2013, the Office of the Presiding Disciplinary Judge issued an order lifting the stay. The State Bar was ordered to complete its supplemental investigation and the matter was set for hearing on July 8, 2013.

I. FINDING OF FACT

1. Mr. Cifelli was admitted to the practice of law on November 26, 1991.

2. On November 1, 2007, he was suspended from the practice of law for two years, retroactive to January 9, 2007, and ordered to participate in two years of probation with the Member Assistance Program (MAP) if reinstated.

3. Mr. Cifelli's suspension was a result of his criminal conviction in 2006 for two felony counts of Aggravated DUI which violated ER 8.4(b), Ariz. R. Sup. Ct. He was incarcerated for four (4) months by the Arizona Department of Corrections and then placed on two years of criminal probation, which was successfully completed.

4. Mr. Cifelli was also summarily suspended on February 22, 2008, for failure to comply with mandatory continuing legal education requirements (MCLE) pursuant to Rule 45, Ariz. R. Sup. Ct.

5. Mr. Cifelli's first attempt at reinstatement was denied by Supreme Court Order on May 25, 2011. The Court determined Mr. Cifelli failed to establish that he was qualified for reinstatement and failed to establish by clear and convincing evidence his rehabilitation.

6. Mr. Cifelli's second attempt at reinstatement resulted in the Panel's recommendation that he be reinstated with two (2) years of probation. The State Bar also recommended reinstatement.

7. At the June 14, 2012, reinstatement hearing Mr. Cifelli provided evidence of his completion of various CLE credits to cure his MCLE deficiency and establish his competence. During the July 8, 2013 hearing; however, Mr. Cifelli failed to provide any supplemental evidence demonstrating he completed any CLE credits during the previous eleven (11) months, or any other evidence that supported good cause justifying waiver of the MPRE exam requirement.

8. Mr. Cifelli passed the February 2013 Arizona bar examination and has completed the course on Arizona law. He is scheduled to sit for the August 17, 2013 MPRE exam, although he argues that he should not be required to sit for that exam.

9. During the June 2012 hearing Applicant provided evidence of his having performed legal research and writing and having authored several articles on the captive insurance industry demonstrating his efforts to keep abreast of the law and demonstrating his competence. At the July 8, 2013 hearing, by contrast, Applicant provided no supplemental evidence of any work or effort on his part to keep abreast of the law in the intervening eleven (11) months.

10. At both the June 2012 and July 2013 hearing Applicant failed to provide his tax returns. At the June 2012 hearing, however, the Panel informed Mr. Cifelli that he was required to provide his tax returns as part of an application for reinstatement. He was, nonetheless, allowed to supplement the record with tax returns on June 15, 2012 – the day after the reinstatement hearing.

11. By the time of the July 8, 2013 hearing, however, Mr. Cifelli had still failed to supplement the record with his 2012 tax returns. He indicated at the July 2013 hearing he had provided those tax returns to the State Bar, but only just before the hearing began. Further, Mr. Cifelli failed to file those supplemental documents with the clerk of the Office of the Presiding Disciplinary Judge, bring a copy for the Panel, or otherwise submit that documentation per the rule of procedure governing the reinstatement process. As before, the day after the hearing, July 9, 2013, Mr. Cifelli provided the Panel with that supplemental material – this time, however, via email.

12. Mr. Cifelli also failed to meet his duty to continue to supplement the record by failing to notify the State Bar that he was no longer employed. During the July 8, 2013 hearing, he revealed that his contractual employment with his former employer, Artex, ended June 20, 2013. Mr. Cifelli's testimony vacillated as to when he last performed work for Artex, and the Panel finds his answers were disappointingly evasive. He testified he was not currently working, but simply negotiating with a competitor of Artex. He testified he provided independent contractor services for Artex, and would do so for the competitor as well unless he is reinstated to the Arizona Bar, as his suspension is an impediment to his ability to be a full-time employee with either company.

13. Mr. Cifelli obviously did not prepare for the July 8, 2013 hearing. He did not have any materials from the voluminous reinstatement file. When questioned by a Panel member as to whether he had read case law cited by the State Bar in its response to his motion to waive the remaining Rule 64(c) requirements, Mr. Cifelli testified that he had not. When the Panel referred him to the State Bar's response, he testified that he had not brought his file containing the response with him.

14. Following the July 8, 2013 hearing, Mr. Cifelli attempted to supplement his testimony via an email to the Panel and State Bar dated July 9, 2013. Notwithstanding the information contained in that email, the Panel still finds that there is a cause for concern as to Mr. Cifelli's fitness to practice law.

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

A lawyer seeking reinstatement must prove, as a matter of law, by clear and convincing evidence their rehabilitation, compliance with all applicable discipline orders and rules, fitness to practice law, and competence. See Rule 65(b)(2), Ariz. R. Sup. Ct.

The Supreme Court of Arizona has also held that the following factors also should be considered in determining the propriety 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). Additionally, 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*.

Rehabilitation

Mr. Cifelli presented no supplemental information regarding his continued or sustained rehabilitation from the alcohol abuse that led to his criminal conviction and suspension from the practice of law. Mr. Cifelli, in his 2012 Application for Reinstatement, presented evidence of his weaknesses and acknowledged the errors in judgment he made which led to criminal and disciplinary action. The evidence of rehabilitation presented by Mr. Cifelli at the June 2012 hearing on his reinstatement application clearly and convincingly demonstrated his rehabilitation.

The Panel at this time, however, finds it troubling that Mr. Cifelli did not present any supplementary evidence as to his continued rehabilitation. The Panel is particularly concerned with the fact that he emphasized in June 2012 that one of the major stressors leading to his abuse of alcohol and his errors in judgment were the result of financial difficulties. Mr. Cifelli indicated at the July 8, 2013 hearing that he was no longer employed and that his 2012 tax returns had finally led to his overcoming net operating losses that were a result of the personal matters that created his financial difficulties in 2007 and 2008.

Compliance with Disciplinary Rules and Orders

At the June 2012 hearing on Mr. Cifelli’s application for reinstatement the following was established:

1. He had paid all costs in the underlying disciplinary matter. (Applicant's Exhibit 1, Affidavit of Sandra Montoya)

2. No funds are due to the Client Protection Fund. (Applicant's Exhibit 2, Affidavit of Karen Weigand)

3. There were no allegations of the unauthorized practice of law during the period of suspension. There were no allegations of drug or alcohol abuse or convictions involving drug or alcohol related offenses.

4. Mr. Cifelli had paid the filing and application fee totaling \$1,100.00. (Applicant's Exhibit 1).

No evidence was presented at the July 8, 2013, hearing to contradict these earlier findings of fact. Pursuant to Supreme Court Order remanding the Panel's original report and recommendation of reinstatement for compliance with Rule 64(c), Ariz. R. Sup. The panel finds that Ct. Mr. Cifelli:

a. Presented evidence that he had taken and passed the Arizona bar examination.

b. Testified that he had completed the course on Arizona law, and the Disciplinary Clerk verified his testimony.

c. Testified he was registered for the August 17, 2013 MPRE exam, although he is seeking waiver of that requirement.

Additional Findings

A. Compliance with disciplinary rules.

The Panel finds Mr. Cifelli failed to meet his continued duty to supplement his application and to notify the State Bar of material facts necessary for the State Bar's supplemental investigation on his application for reinstatement. The Panel

further finds Mr. Cifelli failed to follow basic procedural rules regarding filing of supplemental exhibits just as he failed to do so during the time his Application for Reinstatement was originally filed and heard. Mr. Cifelli also appeared before the Panel completely unprepared at the July 8, 2013 hearing on **his** motion to lift the stay and approve his application for reinstatement.

B. Competence

Mr. Cifelli was not charged with any competence-related violations in the underlying disciplinary matter. The Panel's 2012 Report and Recommendation did find Mr. Cifelli demonstrated competence due to his work from the time his suspension commenced until June 2012, as a legal assistant and business consultant and having obtained 23.5 hours of continuing legal education credit for the 2007-2008 reporting period and 8.5 hours for the 2009-2010 reporting period (curing the issue that led to his summary suspension). (Applicant's Exhibit 23)

The Panel notes, however, Mr. Cifelli did not present any supplemental information at the July 8, 2013 hearing demonstrating that he has worked in any capacity that allowed him to maintain his legal research and writing skills, or that he obtained any continuing education credits or otherwise stayed abreast of the law. Mr. Cifelli's did present evidence that he passed the February 2013 bar examination, and completed of the course on Arizona law. He testified he is scheduled to sit for the MPRE exam on August 17, 2013.

C. Fitness to Practice

The matter of Mr. Cifelli's reinstatement has been before the Office of the Presiding Disciplinary Judge and this Panel for well over a year. This Panel, in June 2012, made it clear to Mr. Cifelli that Rules 64 and 65, Ariz. R. Sup. Ct., guide the

process for what an applicant must demonstrate for reinstatement. The Panel further reminded Mr. Cifelli of his ongoing duty to supplement the record. Those admonitions ultimately led to Mr. Cifelli filing supplemental exhibits the day after the June 2012 hearing. This Panel has incorporated those exhibits into the record. While knowing specific requirements to support his application for reinstatement, however, Mr. Cifelli again appeared before this Panel without having supplemented the record. Although he provided supplemental exhibits to his application for reinstatement to the State Bar, he did not file those with the court. He did not even bring those supplemental exhibits with him to the hearing or bring copies for the Panel. The ability to read, understand and follow court rules – substantive and procedural – are unquestionably the duty of any attorney admitted to the practice of law. Mr. Cifelli, unfortunately, has engaged in a continued practice of not adhering to the basic procedures of the reinstatement process. His failings persist despite his own testimony that reinstatement is necessary for him to secure a full-time position with Artex or the competitor company he alleges he is negotiating with.¹

The Panel is deeply troubled by Mr. Cifelli's inability to demonstrate basic lawyering skills, and finds he has not demonstrated by clear and convincing evidence his fitness to practice, even if he passes the MPRE exam.

III. DISCUSSION OF DECISION

The Panel is unconvinced that Mr. Cifelli has demonstrated his competence and fitness to practice law in the State of Arizona. Mr. Cifelli presented no evidence to the Panel as to his continued or sustained rehabilitation. His only evidence of

¹ The issue of whether Mr. Cifelli's negotiation with Artex's competitor may conflict with ER 1.8 or 1.9 is not before this Panel.

competence was his passing the February 2013 Arizona bar examination and completion of the course on Arizona law. Mr. Cifelli's conduct at the July 8, 2013 hearing, his lack of preparedness, and his inability to comply with the applicable rules of procedure cause the Panel to have serious concern as to his fitness to practice law. Mr. Cifelli failed to put forth even the least amount of effort to meet the requirements for reinstatement, and has only complied with some of the requirements of Rule 64(c), Ariz. R. Sup. Ct., out of sheer necessity.

Mr. Cifelli's testimony, coupled with his failure to timely meet his duty to supplement the record, calls into issue his overall credibility. The Panel declines to disregard his repeated inability to timely supplement the record and to fully disclose information material to reinstatement, and his failure to adhere to the rules of procedure governing the reinstatement proceedings. In short, the Panel, based upon the entire record, finds it difficult to balance Mr. Cifelli's assertions that he is now fit to practice law and adhere to the duties that most guide ethical and competent practicing attorneys.

Previously a hearing panel in another case issued a stay pending the result of the MPRE exam of another applicant because there was an otherwise minimal meeting of the requirements. Here we find regardless of the result of the exam that Mr. Cifelli has not met his burden.

For all the foregoing reasons, the Panel agrees with the State Bar's recommendation that reinstatement be denied.

IV. CONCLUSION

The Panel now recommends that reinstatement be denied.

DATED this 7th day of August, 2013.

/s/ William J. O'Neil

**THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE**

CONCURRING

/s/ Mark Salem

Mark Salem, Volunteer Public Member

/s/ Richard L. Brooks

Richard L. Brooks, Volunteer Attorney Member

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

COPY of the foregoing mailed/emailed this
7th day of August 2013, to:

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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,

THOMAS A. CIFELLI,
Bar No. 013794,

Applicant.

PDJ-2012-9018
SB-12-0031-R

**ORDER OF REINSTATEMENT
PURSUANT TO RULE 65**

FILED: MAY 6, 2014

Applicant **THOMAS A. CIFELLI, Bar No. 013794**, has established to the satisfaction of the Supreme Court of Arizona and the Presiding Disciplinary Judge¹ that he is qualified for reinstatement to the active practice of law; now, therefore, pursuant to Rule 65 of the Rules of the Supreme Court,

IT IS ORDERED that **THOMAS A. CIFELLI**, be and hereby is reinstated as a member of the State Bar of Arizona effective this date.

IT IS FURTHER ORDERED that **THOMAS A. CIFELLI** is hereby placed on probation for two (2) years, under the terms and conditions as listed below:

¹ As required by the Supreme Court Order in SB-12-0031-R, Mr. Cifelli has filed proof of his passing score on the Multistate Professional Responsibility Exam with the Presiding Disciplinary Judge (PDJ) on Monday, May 6, 2014. In that same Order, the Court authorized the PDJ to issue the order of reinstatement upon the filing of sufficient proof of a score of 85 or greater, subject to stated probationary terms.

Terms of Probation

1. Within thirty days of this date, Mr. Cifelli shall contact the State Bar's Member Assistance Program (MAP) and submit to an assessment. Mr. Cifelli shall thereafter enter into a MAP contract based on the recommendations made by the MAP director or designee. Mr. Cifelli shall comply with all the terms of the MAP contract which are hereby incorporated into this order of reinstatement by this reference. Mr. Cifelli shall be responsible and promptly pay any costs associated with MAP.

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

DATED this 6TH day of May, 2014.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

COPIES of the foregoing mailed/emailed
this 6th day of May, 2014, to:

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