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, **RICHARD B. JOHNSON,** **Bar No. 002118** Applicant.	PDJ 2012-9029 **REPORT AND RECOMENDATION**

On July 16, 2012, the Hearing Panel ("Panel") composed of Robert M. Gallo, a public member from Pinal County, Ralph J. Wexler, an attorney member from Maricopa County, and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("PDJ") held a one day hearing pursuant to Supreme Court Rule 65(b)(1), Ariz.R.Sup.Ct. Hunter F. Perlmeter appeared on behalf of the State Bar of Arizona ("State Bar") and J. Scott Rhodes appeared on behalf of the Applicant. The Panel considered the testimony, admitted exhibits, the parties' Joint Prehearing Statement, Applicant's Separate Prehearing Memorandum, and evaluated the credibility of the witnesses.[1] The witness rule was invoked. At the conclusion of the hearing, the State Bar stated that it opposed the 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.

[1] Consideration was given to the testimony of Richard B. Johnson, Kenny Evans, Paul J. McGoldrick, Esq., Bishop Kenneth J. Wanat, Judith L. Lyon, Ph.D., and Marc D. Pulsifer, Esq.

I. PROCEDURAL HISTORY AND BACKGROUND

Applicant filed his Application for Reinstatement on March 27, 2012. He concurrently filed a motion to seal exhibits 12 and 13, which was granted. *See* PDJ Order filed April 4, 2012. On April 18, 2012, an initial case management conference was held. On June 15, 2012, Applicant filed a First Amendment and Supplement to Application and an additional motion to seal Exhibit 20, which was also granted by Order of the PDJ filed on June 26, 2012. On July 2, 2012, a final reinstatement case management conference was held. As pointed out above, the hearing was conducted on July 16, 2012. Thereafter, pursuant to Rule 65, the State Bar filed its Statement of Costs and Expenses on August 1, 2012, and the Office of the PDJ filed its Statement of Costs and Expenses on August 2, 2012.

The underlying misconduct in Count One followed the loss by Mr. Johnson of a deceased client's original will prepared by Mr. Johnson and left in his safekeeping. To expedite the resolution of the problem caused by the misplacing of the will, Mr. Johnson recreated the will, and backdated it. He also directed the deceased client's daughter to sign her father's name to the recreated will. Mr. Johnson then notarized the signature of the daughter as being that of the father. He submitted this fraudulent will as the original to the court in violation of ERs 1.2(d) (counsel or assist client to engage in criminal or fraudulent activity), 3.3, 3.4(b), 8.4(c) and 8.4(d).

In Count Two, Mr. Johnson, while acting as the attorney for the estate, improperly bought a house from that estate. He failed to advise his client to seek independent counsel concerning that business transaction. He also failed to have a written fee agreement with his client. In addition Mr. Johnson failed in his billing

practices after the client's death while administering her estate and trust. These were violations of ERs 1.5 (fees) and 1.8 (conflict of interest/current clients).

The conduct in both counts occurred in 2006. The Hearing Officer gave considerable weight in mitigation to his finding that there was no selfish or dishonest motive present.

II. PREFATORY FINDINGS OF FACT

1. Mr. Johnson was first admitted to the practice of law in Arizona on April 6, 1968. [Joint Prehearing Statement]

2. By Supreme Court order filed on September 3, 2008 in File No., SB-08-0090-D, Mr. Johnson was suspended from the practice of law for a period of six (6) months and one (1) day. The effective date of the suspension was October 3, 2008. [Joint Prehearing Statement]

3. On October 15, 2008, Mr. Johnson timely adhered to the requirements of Rule 72, Ariz.R.Sup.Ct. [Joint Prehearing Statement]

4. Mr. Johnson's suspension was a result of his violation of Rule 42, Ariz. R. Sup. Ct., ERs 1.2(d), 3.3, 3.4(b) and 8.4(c) & (d) in Count One; and his violation of Rule 42, Ariz. R. Sup. Ct., ERs 1.5 and 1.8 in Count Two. [Joint Prehearing Statement]

5. The factual basis for Mr. Johnson's suspension was set forth in the Tender of Admissions and Agreement for Discipline by Consent; Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent; Hearing Officer's Report; Disciplinary Commission Report, Amended Disciplinary Commission Report and Arizona Supreme Court Judgment and Order. [Joint Prehearing Statement]

6. Mr. Johnson became eligible for reinstatement on April 4, 2009. [Joint Prehearing Statement]

7. On March 27, 2012, Mr. Johnson filed his Application for Reinstatement with the Disciplinary Clerk. [Joint Prehearing Statement]

8. The State Bar of Arizona conducted an independent investigation of the facts and documentation submitted with the Application, which investigation revealed no material errors, omissions, or misrepresentations. [Joint Prehearing Statement]

9. Pursuant to the Supreme Court order in SB-08-0090-D, filed on September 3, 2008, the State Bar was granted judgment against Mr. Johnson for the costs and expenses of the disciplinary proceedings in that matter in the amount of $952.00. [Joint Prehearing Statement]

10. All sums owing to the State Bar of Arizona resulting from the discipline imposed in State Bar files no. 06-1667 *et al.*, were paid in full. [Joint Prehearing Statement]

11. No claims were filed or paid with the Client Protection Fund (the "Fund") involving Mr. Johnson and, therefore, he has no outstanding obligations to the Fund. [Joint Prehearing Statement]

12. Mr. Johnson has paid the filing fee and advanced the State Bar's investigation fee associated with the Application, as required by Rule 65(a)(3)(A). [Joint Prehearing Statement]

13. There have been no criminal charges filed against Mr. Johnson during the period of suspension. [Application]

14. Other than the underlying misconduct, Mr. Johnson has no other disciplinary offenses. [Application]

15. On October 2, 2008, the Dept. of Treasury revoked Mr. Johnson license to practice before the IRS based on the underlying misconduct. [Hearing Testimony]

16. Mr. Johnson has obtained 8 hours of continuing legal education during his period of suspension. [Hearing Exhibit 6]

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

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)). It is in that sense 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.

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. A lawyer such as Mr. Johnson, who has been suspended for more than six months, must also meet the more stringent Rule 65 requirements.

Compliance with the Rules and Orders, Competence and Fitness to Practice

The parties have stipulated that Mr. Johnson has met the more technical burdens of proof regarding compliance, fitness to practice and competence. *See* Applicant's Separate Prehearing Memorandum. There are no allegations that Applicant engaged in the unauthorized practice of law during his period of suspension. They assert that the only remaining focus of this hearing is on Applicant's moral qualifications and rehabilitation. We agree.

This stipulation, which this hearing panel accepts, establishes that Mr. Johnson has met by clear and convincing evidence, compliance, fitness to practice and legal competence. We therefore limit our analysis and comments to the remaining twin issues of rehabilitation and exemplary moral qualifications.

Rehabilitation Generally

An applicant must identify why they stepped out of the bright light of ethical behavior and instead chose to walk in the shadows. That applicant must also convince us why we should believe they will not return to such murky darkness. "The lawyer requesting reinstatement shall have the burden of demonstrating by clear and convincing evidence the lawyer's rehabilitation..." Supreme Court Rule 65(b)(2). Before moral character is fully considered a hearing panel must resolve whether the threshold question of rehabilitation has been successfully answered.

> Specifically, because past serious misconduct may indicate flaws in an applicant's present moral character, the applicant must initially demonstrate complete rehabilitation before we consider other evidence

> of present good moral character. *In re King*, 212 Ariz. at 563, 136 P.3d at 882 (2006)

An applicant is obliged to prove, by clear and convincing evidence, complete rehabilitation from whatever deficits led to the unethical behavior. Failure to do so is fatal to the application.

> If not, our inquiry ends and we will deny the application. If the applicant proves complete rehabilitation, we then decide whether the applicant has otherwise demonstrated present good moral character. *In re King, supra* at 563.

As a result, prior to a complete consideration of the issue of exemplary moral character, the panel must be convinced an applicant has proven rehabilitation.

The burden of proof for rehabilitation typically requires proof of three things. Foundationally rehabilitation requires a demonstration of acceptance of responsibility for the unethical behavior that led to the suspension. An applicant for reinstatement must also convince a panel that there has been a specific identification of the weakness that led to the unlawful conduct. There must also be convincing proof of specifically how the applicant has overcome and will continue to overcome that weakness. *In re Arrotta,* 208 Ariz. at 513, 96 P.3d at 217 (2004). For the hearing panel, "We weigh those factors tending to show rehabilitation against those tending to show a lack thereof" to decide whether Mr. Johnson has met his burden. *In re Hamm,* 211 Ariz. 458, 465, ¶25, 123 P.3d 652, 659 (2005).

It is critical that any applicant identify the weakness or character flaw that caused the decision to engage in unethical misconduct. Without such identification an applicant is likely not able to successfully explain the applicant's inability to ethically meet the challenge or temptation that led to the misconduct. It is not enough to identify the fruit of one's actions. An accurate identification of the flaw is

significant for determining the appropriate remedy. An applicant must decisively convince a panel that there will not be a relapse into wrongdoing. It is the root cause of the unethical conduct that must be identified and overcome demonstrably to assure that the bitter fruit of misconduct will not return.

That there must be clear and convincing proof of these elements of rehabilitation is unambiguous. *See* Rule 65. Rehabilitation requires more than a sustained time of keeping out of trouble. As has been pointed out by our Supreme Court, many people have low self-esteem, experience employment disappointments, suffer financial strain, or as submitted in this case, struggled with their faith or had a loved one die and yet do not resort to unethical behavior. Specifically why an individual lacked appropriate skill to cope with whatever issue was existent during the time of the unethical behavior is central in measuring whether one has overcome that weakness. Otherwise,

> Merely showing that [an individual] is now living and doing those things he...should have done throughout life, although necessary to prove rehabilitation, is not sufficient to meet the applicant's burden. *In re J.J.T.,* 761 So. 2d 1094, 1096 (Fla. 2000) (citation omitted). In addition, he must bring forth clear and convincing evidence showing the positive actions he has taken to overcome the weaknesses that led to his disbarment. *In re Arrotta supra* at 515.

Moral Character Generally

If these elements of rehabilitation are clearly and convincingly established, proof of moral character is fully considered. Our Supreme Court outlined in *In re Application of Lazcano,* 223 Ariz. 280, 281, 222 P.3d 896, 897 (2010) what is required for admission to practice law in Arizona in the first instance and therefore for applicants, such as Mr. Johnson, whose reapplication request also falls under Supreme Court Rule 65.

> Generally, applicants for admission to the Arizona Bar must demonstrate that they possess good moral character. Ariz. R. Sup. Ct. 34; *Hamm*, 211 Ariz. at 462 ¶ 12, 123 P.3d at 656. We examine past misconduct to see what it reveals about an applicant's present moral character. *Hamm*, 211 Ariz. at 463, ¶ 17, 123 P.3d at 657. Among other factors, we consider the seriousness of the conduct, the lapse of time since the conduct, and evidence of rehabilitation. Ariz. R. Sup. Ct. 36(b)(4). The Committee on Character and Fitness makes recommendations to this Court on admission, but we independently determine whether the applicant has satisfactorily demonstrated good moral character. *Hamm*, 211 Ariz. at 462, 123 P.3d at 656. The central component of our assessment is, at all times, protection of the public. *In re Arrotta*, 208 Ariz. 509, 512 ¶¶ 11-12, 96 P.3d 213, 216 (2004).

The Court further stated,

> The good moral character required for admission to the Bar "is something more than an absence of bad character"; it requires that the applicant has acted as a person "of upright character ordinarily would, should, or does." *In re Walker*, 112 Ariz. 134, 138, 539 P.2d 891, 895 (1975) (quoting *In re Farmer*, 191 N.C. 235, 131 S.E. 661, 663 (N.C. 1926)). Because law is a self-regulating profession, we require attorneys to demonstrate exemplary moral character.
> *Lazcano supra* at 283-284.

Once the threshold requirement of rehabilitation is proven, persuading the hearing panel of existent exemplary moral character requires more than talk. It is the walk we typically focus upon. Among others, at a minimum, the factors which *Lazcano* reminds us to weigh are: 1) we are required to measure the seriousness of the conduct that brought the suspension for the twin purposes of good character and for rehabilitation; 2) we consider the lapse of time since the misconduct; 3) we examine past misconduct to see what it reveals about an applicant's present moral character;4) we recognize good moral character is something more than an absence of bad character; and 5) we require exemplary moral character be demonstrated.

<u>The Evidence Submitted Leading to the Misconduct of Mr. Johnson</u>

There are overarching events leading to the misconduct of Mr. Johnson. Sixteen years earlier in 1990, Mr. Johnson's wife of 27 years died from cancer. He testified that the stress of her precedent four years of illness, the medical expenses, her death, the demands of being a father to 6 children and a reduced income took a toll on his practice. It caused him to question his relationship with God. He stated he started to rely on his own instincts to survive. He lost his passion for practicing law and over time began a gradual process of straying from activity in his Church and started to question some of his Christian principles and core values. He became sloppy and too casual in his decisions and began a progression away from his establish pattern of strict honesty and self discipline. Applicant acknowledged his misconduct. He was eligible to file for reinstatement on April 4, 2009 but elected to delay his application for reinstatement in order to complete his process of rehabilitation and atone for his misconduct.

Count One. Applicant testified that he has done much soul searching as to the factors leading to this misconduct. He concluded that he made 1) a lapse in his decision making process. Applicant stated he was 2) extremely busy at the time the misconduct occurred and was embarrassed that he lost the original will. He believes 3) his desire to assist the client caused him to rationalize his actions because he felt no harm occurred. In addition, in retrospect, he testified he should have obtained a fee agreement with the client but had a long standing relationship with the client.

Mr. Johnson states he has identified his weakness as having 1) deviated from previous core beliefs that guided him and helped distinguish from right and wrong. He testified that overall, 2) his moral compass failed him and 3) his actions were

wrong under all standards of conduct and rules and his Christian faith. He stated, 4) he somehow allowed himself to rationalize the improper act if the end result did not harm the client. He acknowledges his fraudulent actions brought disrespect on the court and his profession.

The stated factors that led to his misconduct.

1) A lapse in his decision making process;
2) He was extremely busy at the time and was embarrassed; and
3) His desire to assist the client caused him to rationalize his actions.

His stated identification of his weakness that enabled the misconduct.

1) He deviated from previous core beliefs.
2) His moral compass failed him;
3) His actions were wrong under all standards of conduct and rules; and
4) He allowed himself to rationalize the improper actions.

Applicant swore the suspension was a "wake-up" call and it caused him to re-establish his priorities and reset his moral compass. Mr. Johnson also testified his weakness was his willingness to rationalize his actions by justifying the substitution of the fabricated will and by reasoning that his actions were acceptable because no one was harmed. Applicant believes he now recognizes the error in his thought process and has reconfirmed his belief that rules of conduct are sacrosanct and that such misconduct can never be rationalized.

Count Two. Regarding this misconduct, Mr. Johnson testified he allowed his friendships and relationships to compromise the ethical requirements. He believes he became too casual in his professional dealings with the client. He allowed his personal negative feelings toward a legitimate beneficiary to cloud his judgment and ignored that beneficiary's rights. Mr. Johnson swore that he will not permit himself to engage in business transactions with clients in the future in any manner.

The stated factors that led to his misconduct.

1) He allowed his friendships and relationships to cause compromise;

2) He became too casual in his professional dealings with clients; and
3) He allowed negative feelings to cloud his judgment.

It was troubling that the ethical violation of purchasing an asset in the manner he did from the estate of which he was the attorney, was not the first time he had acted unethically in this manner. He testified he has improperly purchased assets from three separate estates he represented. He also testified he knew at the time he made these purchases that he was doing so in violation of clear ethical rules. The concerns for this panel were multiple as a result. The hearing officer in the underlying case found there was no selfish or dishonest motive present based on one such improper sale, not multiple. Such a pattern is troublesome.

The Steps Taken During The Lapse Of Time Since the Misconduct

A factor for this panel is the lapse of time since the misconduct. We assume that also includes what was done during that lapse of time. Mr. Johnson recognizing that he was not ready to return to the profession invested his time in community service. He initially confided in the prior Bishop, Rodney Ross regarding his suspension but the specific details of the suspension were not discussed with Bishop Ross until much later. Mr. Johnson stated he believes that core values and character must be achieved through self discipline, adherence to a strong moral creed, and charitable service. He further testified that he has acted upon those principals during the three years of rehabilitation and is now prepared to fulfill the obligations of strict honesty and trust [espoused in the scriptures and his Christian faith] to his profession, clients and the public.

Admirably, during the period of suspension, Applicant donated funds and volunteered many hours of community service to various committees and charitable

organizations.[2] These unquestionably demonstrate "positive actions" as briefly discussed in *Arrotta*. An applicant "must bring forth clear and convincing evidence showing the positive actions he has taken to overcome the weaknesses" that enabled the unethical actions to occur. *Arrotta supra* at 515. However the greater weight of such evidence goes to demonstrating good character. It is but one part of the required persuasion. We do not discount such laudable efforts and encourage them. For Mr. Johnson we give it the substantial weight it is due.

Community Service Generally

Community service itself has value. However, it cannot alone constitute an overriding persuasion for good character and rehabilitation. To so conclude would risk reducing community service to a ceremonial exercise. If reduced to a mere "box to check," such service becomes watered down to meaningless self serving platitudes. A question may then arise of whether one does community service because of good character or because of a desire to be reinstated.

Generally speaking, having the means to invest time in community and give funds to charitable causes *alone* is not reason to find rehabilitation or conclusively establish good character. Does such an applicant have better character than the applicant working two jobs to survive and feed a family? Such plight may preclude such an applicant from giving or involving himself in community in more meaningful ways. There is perspective and we must always balance such evidence. This panel

[2] Mr. Johnson was active with the Chaparral Pines homeowners' association; 2008-2010, Board of Directors of the Chaparral Pines Community; ad hoc committee authorized by Board of Directors of the Humane Society of Central Arizona; 2010 citizens planning committee (lead for Funding committee); 2010 Board member for Board of Directors of Mogollon Health Alliance currently serving as Treasurer; counselor to the Bishop at his Church; Institutional Head of Boy Scout Troop 5174; and volunteer for AARP tax aid program.

has giving that evidence its proper weight for Mr. Johnson. His substantial contributions go a long way towards proving his good character.

As stated above, there is inherent and important value in community service. At the same time, community service offers the added benefit of relationship building and the forging of human bonds that contribute to our sensibility and accountability to one another. Multiple witnesses testified on behalf of Mr. Johnson, not merely because of his community service, but rather because of those human bonds that were forged during their joint efforts. We find Mr. Johnson did his community service for the best of reasons and they demonstrate his good character.

In addition, Mr. Johnson and his current wife are active in their Church. He stated he reads scriptures and prays regularly. He participates in sacred ceremonies, interviews regularly with his Bishop and Church leaders, and serves in a leadership position that compels him to be an example and teacher of Christian principles to others. Applicant's character witnesses testified consistent with their written statements in support of his reinstatement. [*See* Hearing Exhibits 1-5] All of these actions aid his application.

Testimony of Kenny Evans

Mr. Evans testified that he has been the Mayor of Payson, Arizona for 4 years. He has known Mr. and Mrs. Johnson for about 4 years as a result of various volunteer activities and significant fundraising events in the community. Mr. Evans stated that he became generally aware of Applicant's suspension when Mr. Johnson asked him to write a character letter on his behalf in February 2012. [Exhibit 1].

Mr. Evans stated that Mr. Johnson serves when asked and also voluntarily steps forward when there is a need. Mr. Johnson has been active as President of his home owners association (Chaparral Pines) and instrumental in securing water rights for Payson. Mayor Evans is also aware that he also volunteered and assisted with fundraising with the Humane Society, the Gracie Lee Haught Foundation, and helped raise money for a dialysis center.

Mr. Johnson is also on the board of directors for the Mogollon Health Alliance which promotes womens' health issues and is currently the Treasurer. The Alliance has assets in excess of 20 million dollars. He has helped with budgeting issues, provided guidance on legal issues including when to obtain representation, and helped in the attempt to bring a four year university to Payson. Mr. Evans testified that Mr. Johnson's leadership skills, his understanding of the law in general and of bankruptcy issues has been very helpful. Mr. Evans further stated that Applicant has continually exceeded his expectations and is an asset to the community.

Mr. Evans did not know Mr. Johnson prior to his suspension but learned of the particulars of the misconduct within the last 48 hours. If he had heard about Applicant's misconduct from a third party instead of from Applicant directly, Mr. Evans stated he may have felt differently. Mr. Evans stated that he finds Mr. Johnson to be trustworthy and advised that Mr. Johnson disclosed his suspension to other board members (elect) of the Mogollon Health Alliance. In closing, Mr. Evans testified that he supports Applicant's reinstatement.

Testimony of Bishop Kenneth J. Wanat

Bishop Wanat testified that he is self employed and until July 15, 2012 was Bishop of the Mogollon ward of the Church of Latter Day Saints. He stated he has known Mr. Johnson for approximately two and one half (2½) years. Mr. Johnson serves in a leadership position as counsel to the Bishop. He gave a summary of what those duties entail. He became generally aware of Mr. Johnson's prior misconduct when he was asked to provide a character letter in February 2012. [Exhibit 3]

Bishop Wanat testified that Applicant is now a devout member of the Church and as a result he finds his integrity to be beyond reproach. In the past, Applicant was less active in the Church but has reconnected and can now enter the "holy temple." Bishop Wanat stated that Mr. Johnson has re-engaged with his faith and has engaged in the process of repentance for his wrongdoings. He has gone through a period of reflection and soul searching.

Bishop Wanat stated that he still would have recommended Mr. Johnson to a Bishop's counsel position if he had known the details of the suspension sooner. Bishop Wanat stated that the new Bishop wants Mr. Johnson to continue as counsel but he does not know if the new Bishop is aware of the prior misconduct.

Testimony of Judith Lyons, Ph.D.

Ms. Lyons testified that she has known Mr. Johnson for approximately three years through the LDS Church, the Chaparral Pines Home Owners Association and in bringing a university to Payson. She stated she became aware of the specific details of his prior misconduct about two weeks ago. [Exhibit 4]. Ms. Lyons stated

that she was aware that he has been recently elevated to first counsel to the Bishop but she is not sure if other members are aware of the details of his misconduct.

She further stated her opinion of Mr. Johnson has not changed based on the information he shared about his suspension and overall, supports his application.

Testimony of Paul McGoldrick, Esq.

Mr. McGoldrick testified he defended Mr. Johnson through his malpractice carrier in the probate matter related to the underlying discipline. [Exhibit 2]. Mr. McGoldrick stated he found him to be honest and forthright in his dealings with him. He observed that Mr. Johnson was accepting of his shortcomings and impropriety and wanted his clients to be made whole. Mr. Goldrich stated that Mr. Johnson appears to be a good guy and does not find him a danger to the public. Instead he finds him to be an asset to the profession and supports his reinstatement.

Testimony of Mark Pulsifer, Esq.

Mr. Pulsifer testified that Mr. Johnson is his former father-in-law and he has known him for 20 years. [Exhibit 5]. He worked for him when he graduated from law school and Mr. Johnson was a mentor to him. Mr. Pulsifer stated that the underlying misconduct seemed out of character for Mr. Johnson as he found him to be honest and a good and decent lawyer who cared about his clients. He is aware that he has some health issues and lost his first wife to cancer. He also was aware Mr. Johnson made some bad financial investments but handled those issues with stoic optimism. He used to tell him that the "law was a very jealous mistress." He has acknowledged that the conduct was wrong and since the suspension, he finds Mr. Johnson to be more contrite, introspective, and has had a change in character.

The suspension coincided about the same time Mr. Pulsifer was going through a divorce from Mr. Johnson's step-daughter. Mr. Pulsifer stated he supports his reinstatement.

As seemingly impressive as his testimony was, there was a noted inconsistency. He testified the misconduct was out of character for Mr. Johnson yet also testified there was a change in character. We believe these inconsistencies in part demonstrate the inability to identify the weakness that caused the misconduct.

IV. DISCUSSION

While this Panel acknowledges and applauds Applicant's many valuable contributions to his community in Payson over the last four years, that, in and of itself, is insufficient to establish rehabilitation. Mr. Johnson's counsel correctly noted that the standards, as set forth in *Arrotta*, do not require psychiatric counseling to demonstrate rehabilitation. Under the circumstances this application presents, they do, however, require something more than the Applicant's own word to be persuasive. That he personally, through introspection and reflection, identified the weaknesses that produced the misconduct and took the necessary steps to overcome those weaknesses with self-regulated discipline tells us little of the cause of that weakness or even what that weakness is. That he is now living and doing those things he should have done through his life is not sufficient. Although Mr. Johnson testified that he did seek the counsel of his wife, we note that she was not called as a witness and we do not know what that counsel was.

Mr. Johnson testified that while reluctant to bring his faith and religion into the proceeding he does rely heavily on his recommitment to his religion to "give him the discipline, strength and motivation to avoid his earlier weakness and resulting

misconduct." In this case Bishop Ross, whom he started the process with and "confessed" his sins to, was not called as a witness. Bishop Wanat who was called, limited his testimony as a character witness and did not give any testimony as to Mr. Johnson's process of identifying his weaknesses or his process and plan for overcoming them. In fact, Bishop Wanat testified that he was unaware of the specific violations until he was asked to write a letter on Applicant's behalf in early 2012. Mr. Johnson testified that re-attaining the status of "Temple Recommend" and then "Counselor" were key ingredients in his rehabilitation.

The Panel heard testimony that Applicant was a "good guy" and did good deeds prior to 2006, yet that was not sufficient to prevent him from violating Rule 42, Ariz. R. Sup. Ct., ERs 1.2(d), 3.3, 3.4(b) and 8.4(c) & (d) in Count One; and Rule 42, Ariz. R. Sup. Ct., ERs 1.5 and 1.8 in Count Two. In addition, although not part of the original bar charge, a number of additional violations dating back to 2000 came to light during testimony that do go to Applicant's pattern and practice or predilection for violating the Rules of Professional Conduct.

We are left with the question "why"? Why did he leave the commitment that kept him moral? What was the cause? Becoming active in his Church and doing good deeds may well have met the standards of repentance according to the tenets of his faith, penance does not equal rehabilitation under the standards as set forth in Rule 65 and *Arrotta*. The "why" of rehabilitation and the "what" are the barriers in place to prevent a return to such misconduct in times of difficult circumstance are blanks we decline to fill in with speculation.

We do not dismiss the importance of faith or religion in our analysis of applicant's rehabilitation. Clearly faith has a demonstrable history of being a

bulwark that can safeguard an individual from committing unethical conduct. Many faiths outline sound principles to maintain integrity. It is not enough to think upon such things. Mr. Johnson did think about what he was doing, knew it was unethical and did it anyway on multiple occasions. It is in the doing that we are measured. If we fall short ethically, the burden in readmission is more than the recognition of the ethical error or the return to the roots of one's faith regardless how valuable those roots may be.

We require the identification of what caused the fall and what is in place to assure the fall will not be repeated. A non-specific, broadly stated repentance, as valuable as it may be, is not persuasive. It offers no insight for the panel of why there was an ethical plummet, let alone an assurance that such a plunge will not occur again in times of trouble. There is no explanation offered of why the moral baby was also thrown out with the religious bathwater.

Regardless of one's faith or absence of it, there is decency and truth and trying to stay there by adherence to the ethical principles of our rules. Notwithstanding one's view on religious faith issues, in the broadest sense it is a lack of moral strength that causes one to stumble ethically. In the legal profession we are bound by a need for greater moral guidance than those who do not serve in the legal profession. In the absence of temptation innocence is easily gained and demonstrated. Reality breaks in with a return to the profession as temptations return and abound.

As Mr. Johnson's past has demonstrated, life is not easy. Challenges do arise. There is no requirement they give fair warning of their arrival. They are made more difficult when they are unexpected. Life's circumstances are not

required to be simple. They may be complex. When the waves of life's circumstances wash over an attorney there is no requirement to always overcome them. However, an attorney cannot be ethically overcome.

Mr. Johnson was suspended not only because he broke certain ethical rules but because he *knew* he was breaking clear ethical rules. He testified he knew he was breaking them at the time of his actions and did so without flinching. Why was he willing to rationalize what he claimed to be his client's best interest at the expense of being unethical? If his rationalizations permitted his self-proclaimed illusion of doing well to supplant reality, then he must identify why. These are fractures that are fundamental and serious. It is perhaps only through good fortune in the midst of bad actions that Mr. Johnson was not prosecuted for knowingly falsely notarizing the will. A misdemeanor conviction for such fraudulent actions is a serious crime by our rules and would have raised a legal presumption disqualifying him for reinstatement. *See* Supreme Court Rule 64(b). He is very fortunate his actions did not result in such a high hurdle for him. The point is these ethical violations are serious. Serious violations require greater evidence than we have been presented with.

These actions are not explained away by community service despite how laudable and praiseworthy those efforts are. Confession may undoubtedly be good for the soul, but it does not explain why the misconduct was committed. Doing good deeds within the community does not offer assurances that ethical lapses will not be repeated in the future. Clients and Courts rely on the truthfulness of its officers who appear in front of them. Explaining the cause that enabled one to

engage in actions that were ethically twisted is central to meeting the standard of *In Re Arrota*.

We find Mr. Johnson has not proven by clear and convincing evidence that the ethical problems that led to his sanctioned behavior have been rectified. We do not minimize the plight he identified including a series of family problems that began in approximately 1986 when Applicant's first wife was diagnosed with cancer or the loss of passion for the practice of law he described, and his struggle with his faith that led to his becoming less active in his Church. But these are distant events in time. They do not explain his prior overriding desire to obtain the desired results no matter the ethical cost.

Such a means justifies the ends mentality was unethical. Our question is not the reason he made the determination but rather what flaw in his character enabled his fall. That he rationalized there was no harm done and as a result the rules were not applicable, is only an explanation of why he did not think he would be caught. They offer no insight into the root cause of why he chose such a path of conduct. It offers us little comfort that he is depending upon his resolve and self-discipline alone to control such errant behavior.

As a result we cannot recommend that Applicant be reinstated to the practice of law at this time. Mr. Johnson should focus on these issues of rehabilitation outlined above and reapply when he is better able to demonstrate rehabilitation. At the same time we applaud his attorney's excellence in attempting to navigate these shortcomings. If Mr. Johnson wishes reinstatement his counsel can best advise how to address these issues. Others have done so by being willing to submit to regular counseling by a qualified expert with experience in these matters. Others have used

other means of persuasion. It would aid the panel to be provided with verifiable, independent evidence of his rehabilitation. The outlining of the process of identifying and overcoming his weaknesses with his wife and his Bishop would have availed little. We caution that with the seriousness of the misconduct for which he was suspended, coupled with the confession of other similar violations, that whatever means he chooses should not be limited to similar such evidence. To that end we conclude with a cautionary quotation from *In re Arrotta supra* at 515.

> Arrotta points to the letters and testimony supporting his application for readmission, which attest both to his character and standing before disbarment and to his exemplary conduct subsequent to disbarment. A number of those witnesses expressed their opinion that Arrotta has been rehabilitated. For example, Louis Hollingsworth, Arrotta's current employer, wrote that Arrotta "began the rehabilitation process immediately upon being charged with the offense." Similarly, Dr. John B. Aker, former Pastor of Christ Church of Tucson, where Arrotta was an Elder, stated in his letter to the State Bar that Arrotta underwent "instantaneous" rehabilitation. Based on his character and standing prior to and subsequent to his disbarment, the speed with which he confessed his transgressions, and the assertions of other individuals that he "immediately" began rehabilitation or "instantaneously" became rehabilitated, Arrotta argues that he meets the requirements of Rule 64(e).
>
> We do not discount the relevance of Arrotta's evidence. Accepting responsibility for past misdeeds constitutes an important element of rehabilitation. Similarly, we will carefully consider the opinions of those in the community in determining whether rehabilitation has occurred, but neither of these factors can conclusively establish what our cases identify as the showing: clear and convincing evidence that the applicant has overcome the weaknesses that led to his misconduct.

V. CONCLUSION AND RECOMMENDATION

We are reminded that the primary goal in these matters is to protect the public. The Panel finds that Applicant has failed to establish his rehabilitation by clear and convincing evidence. The Panel therefore, unanimously recommends that Applicant's application for reinstatement be denied. The Panel further recommends

that should Applicant obtain clear and convincing evidence of rehabilitation, the requirement set forth in Rule 65(a)(4), *Successive Applications* be waived and Applicant be allowed to reapply for reinstatement in less than one year. Applicant shall further pay any costs associated with these proceedings pursuant to Rule 65(a)(3).

DATED this 20 day of August, 2012.

THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:

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Ralph J. Wexler Volunteer Attorney Member

Robert M. Gallo/mps
Robert M. Gallo Volunteer Public Member

Original filed with the Disciplinary Clerk
this 20 day of August, 2012.

COPY of the foregoing mailed/emailed
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