

LOMAP), and pay costs of these proceedings including costs incurred by the Disciplinary Clerk's office.¹ The Commission further recommends that the requirement to re-take the bar examination as provided in Rule 64(c) be waived. The terms of probation are as follows:

Terms of Probation²

1. Within 30 days of the date of reinstatement Applicant shall contact the LOMAP director and enter into a therapeutic contract under the terms and conditions set forth in the Tender of Admissions and Agreement for Discipline by Consent filed by the parties on November 18, 1999 in the underlying discipline matter and referenced the final Judgment and Order filed on November 3, 2000.³ The therapeutic contract shall also include the recommendations made by Hal Nevitt, Member Assistance Director in his Report dated April 15, 2009.⁴ The period of probation shall be effective the date of the Order of Reinstatement.

2. If during the term of probation, Applicant returns to private practice, within 30 days of the date of reinstatement, Respondent shall contact the LOMAP director and submit to a LOMAP audit. Applicant shall comply with the recommendations of the LOMAP director or designee to insure that his office procedures are adequate to allow him to comply with his responsibilities under the Rules of Professional Conduct. The period of probation shall be effective the date of the Order of Reinstatement.

¹ A copy of the Hearing Officer's Report is attached as Exhibit A.

² The terms and conditions are modified to comport with *In re Miranda*, SB-09-0047-D (2009), and are blended with the terms set forth in the Hearing Officer's Report in this reinstatement matter and the Agreement for Discipline by Consent in the underlying discipline matter. Terms Three and Four are standard probation terms.

³ See *Matter of Toledo*, SB-00-0079-D (2000).

⁴ See State Bar Exhibit 1.

1 The Hearing Officer found and the Disciplinary Commission agrees that Applicant
2 has met his burden of proof pursuant to Rule 65(b)(2), that he has been rehabilitated, is in
3 compliance with all orders relating to his suspension and is competent, fit to practice law,
4 and current on legal developments.

5 With regard to the Rule 64(c) requirement for re-taking the bar examination, the
6 Hearing Officer found, and the Commission agrees, that Applicant has continued to stay
7 current on developments in the law in Arizona by working as a paralegal/law clerk since his
8 suspension in 2000. In that position, Applicant prepared cases for deposition and trial,
9 drafted motions and pleadings, met with clients and attended hearings, all under the
10 supervision of his employer. Applicant read the Arizona Advance Reports on a regular
11 basis, attended CLE courses and remained current on his CLE requirements, and engaged in
12 self-study. On these facts, the Hearing Officer found, and the Commission agrees, that
13 Applicant has provided sufficient evidence regarding his competency to practice law in
14 Arizona, and, therefore, the Commission recommends that the bar examination requirement
15 be waived.
16

17 RESPECTFULLY SUBMITTED this 18th day of August 2009.

18
19
20 Jeffrey Messing
21 Jeffrey Messing, Chair
22 Disciplinary Commission

23 Original filed with the Disciplinary Clerk
24 this 18th day of August 2009.

25 Copy of the foregoing mailed
26 this 19th day of August 2009, to:

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EXHIBIT

A

FILED

JUN 26 2009

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY E. Loga

**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA,

GUSTAVO TOLEDO,
Bar No. 012000

Applicant.

No. 09-6000

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 9J,
Mark S. Sifferman)

PROCEDURAL HISTORY

By an Order entered November 8, 2000, the Arizona Supreme Court suspended Gustavo Toledo for three (3) years, retroactive to September 1, 1997. Mr. Toledo filed an Application for Reinstatement on February 18, 2009. *Application for Reinstatement* (hereinafter "Application").

A hearing on the Application was conducted on May 11, 2009. Mr. Toledo appeared personally and with counsel, John C. Lemaster. The State Bar of Arizona appeared through its counsel, Steven Little. At this hearing, exhibits and testimony were submitted. *Transcript of May 11, 2009 Hearing* (hereafter "*Transcript*"). The State Bar does not oppose reinstatement, but believes, a point Applicant concedes, some terms of probation are required. *Transcript*, page 5, line 17 – page 6, line 15. The State Bar does not agree with Applicant's request that the requirement of

1 successful completion of the Bar examination be waived. *Id.*; page 65, line 21 - page
2 66, line 21.

3 **PROCEDURAL FRAMEWORK**

4 On an Application for Reinstatement, a suspended attorney must establish
5 possession of moral qualifications and knowledge of the law required for admission
6 to practice law in Arizona. *Supreme Court Rule 64(a)*. In addition, unless the Rule
7 64(e)(2)(A) applies, the applicant must demonstrate rehabilitation. *Supreme Court*
8 *Rule 64(e)*. The burden of proof by clear and convincing evidence rests on the
9 applicant. *Supreme Court Rule 65(b)(2)*.

10 In evaluating an application for reinstatement, four factors are considered: (1)
11 the applicant's character and standing prior to suspension, (2) the nature and
12 character of the charge for which applicant was disciplined, (3) applicant's conduct
13 subsequent to the imposition of discipline, and (4) the time which has elapsed
14 between the order of suspension and the application for reinstatement. *In re Arrotta*,
15 208 Ariz. 509, 512, 96 P.3d 213, 216, ¶ 13 (2004). Proof of rehabilitation necessarily
16 requires the Applicant to first establish what weaknesses caused the underlying
17 misconduct and then demonstrate that those weaknesses have been overcome.
18 *Matter of Arrotta*, supra.

19 **FINDINGS OF FACT**

20 Based on the evidence presented, the Hearing Officer makes the following
21 Findings of Fact.

- 22 1. Mr. Toledo was admitted to the State Bar of Arizona in 1988.
23 *Transcript*, page 8, line 2 - page 9, line 19.
- 24 2. In April 1997, Applicant was arrested for driving while under the
25 influence of intoxicating liquor. This event caused Mr. Toledo to begin realizing that
he had an alcohol problem. Mr. Toledo ceased taking new cases, returned unused

1 portions of retainers, and attempted to complete cases by August 1997. In short, Mr.
2 Toledo decided he would no longer practice law. *Transcript*, page 10, line 12 - page
3 11, line 18.

4 3. In light of Applicant's alcohol abuse, it is not surprising that a multi-
5 count Complaint was filed by the State Bar. See *Complaint* in 95-0829, et. al. While
6 a number of Ethical Rules were violated, Applicant's overriding errors were failure
7 to provide competent representation, failure to act with reasonable diligence and
8 failure to communicate. See *Hearing Officer Report* in 95-0829, et. al.; *Transcript*,
9 page 10, line 12 - page 11, line 18.

10 4. Applicant did not contest the Complaint and consented to discipline.
11 See "Tender of Admissions and Agreement for Discipline by Consent" filed
12 November 11, 1999 in 95-0829, et. al. (hereafter "*Tender*"). Mr. Toledo agreed to
13 the imposition of a three (3) suspension with a one year term of probation, plus
14 payment of costs and expenses. Three aggravating factors were found. A number of
15 mitigating factors also were found, namely absence of a prior disciplinary record,
16 absence of a dishonest or selfish motive, personal or emotional problems, full
17 disclosure and cooperation in the disciplinary process, mental disability or chemical
18 dependency, and remorse. *Tender; Transcript*, page 12, lines 1 - 25; page 50, line 6
19 - page 51, line 25.

20 5. The Disciplinary Commission accepted the Tender. *Disciplinary*
21 *Commission Report*, filed August 4, 2000. The Commission found an additional
22 mitigating circumstance: good faith efforts at restitution. *Id.*, page 4, lines 18 - page
23 5, line 2. The additional mitigating circumstance existed as Applicant sold his home
24 in order to make refunds to his clients. *Transcript*, page 12, lines 15 - 25; page 45,
25 lines 5 - 10. Because of these actions by Applicant, there was no need for restitution.
Id. The Disciplinary Commission approved the suspension because of the

1 “significant mitigating factors and limited aggravating factors.” *Disciplinary*
2 *Commission Report*, page 5, lines 3 – 7.

3 6. By an Order entered November 8, 2000, the Arizona Supreme Court
4 formally suspended Mr. Toledo for three (3) years, retroactive to September 1, 1997,
5 and imposed the terms of probation set forth in the Tender. Because of the
6 retroactive effect of the Supreme Court’s Order, Mr. Toledo’s suspension expired
7 prior to the Supreme Court’s Order being entered.

8 7. Nine months before the filing of the Complaint by the State Bar, Mr.
9 Toledo enrolled in a six-month residential program with the Salvation Army Adult
10 Rehabilitation Center (“ARC”). The intensity and difficulty of the ARC program are
11 well-described in the record. *Transcript*, page 13, line 1 – page 16, line 22; page 52,
12 line 5 – page 53, line 25; *Hearing Exhibit 1*, pages 1 to 2.

13 8. Mr. Toledo successfully completed and graduated from ARC on March
14 10, 1999. *Transcript*, page 16, lines 23 – page 17, line 1; *Hearing Exhibit 1*, pages 1
15 to 2.

16 9. After successfully completing the ARC residential program, Mr.
17 Toledo adopted a completely new lifestyle, one that focused on health and did not
18 involve alcohol. Applicant began engaging in new hobbies and activities. Other than
19 one relapse in 1999, which Applicant dealt with quickly and firmly, Applicant has
20 lived an alcohol-free life. Mr. Toledo has continued to attend Alcoholics
21 Anonymous meetings and, in August 2008, received his 10-year “chip” in
22 recognition of ten years of sobriety. *Transcript*, page 16, lines 23 – page 21, line 25;
23 page 31, line 19 – page 32, line 24; *Hearing Exhibit 1*, pages 1 to 3.

24 10. After graduating from ARC, Mr. Toledo helped run and subsequently
25 became the facilitator of the weekly “After Care Program” at the Salvation Army
Adult Rehabilitation Center. *Transcript*, page 16, lines 23 – page 21, line 25, page

1 33, line 4 – page 35, line 11; *Hearing Exhibit 1*, pages 1 to 3. Mr. Toledo's
2 involvement in the ARC After Care Program is compelling evidence of his
3 rehabilitation.

4 11. Mr. Toledo was evaluated by Hal Nevitt, the MAP Director of the State
5 Bar. As part of the evaluation, Mr. Toledo underwent a urine drug screen which
6 produced a negative result. Mr. Nevitt diagnosed Mr. Toledo with alcohol
7 dependency in full sustained remission. *Hearing Exhibit 1; Transcript*, page 26, line
8 6 – page 29, line 2.

9 12. Mr. Nevitt recommends that Mr. Toledo remain abstinent from all
10 mood-altering substances, attend two AA meetings per week, obtain a program
11 sponsor, be assigned a peer support monitor, meet with the MAP Director on a
12 quarterly basis, and participate in random urine alcohol screens. *Hearing Exhibit 1*.

13 13. Applicant agrees to comply with Mr. Nevitt's recommendations.
14 *Transcript*, page 26, line 6 – page 29, line 2.

15 14. Mr. Toledo is current on all financial obligations. *Application*, page 5;
16 *Transcript*, page 41, line 7 – page 42, line 12.

17 15. Mr. Toledo owes no money to the Client Protection Fund of the State
18 Bar of Arizona. *Affidavit of Karen Weigand*.

19 16. Mr. Toledo has paid all sums owing to the State Bar or Disciplinary
20 Clerk on account of prior disciplinary proceedings. *Affidavit of Sandra E. Montoya*.

21 17. During the period of suspension, Mr. Toledo was not arrested or
22 prosecuted for any crime. *Transcript*, page 42, lines 13 - page 43, line 5.

23 18. Mr. Toledo has no civil judgments against him. *Application*, page 3,
24 lines 22 - 23.

25 19. Since April 2000, Mr. Toledo has been employed as a law clerk at the
Law Offices of David D. White. The work performed by Applicant involved, among

1 other things, legal research and the preparation of pleadings, motions and briefs. Mr.
2 Toledo was invaluable to Mr. White in witness preparation. *Application*, pages 3 and
3 4; *Transcript*, page 22, line 1 - page 24, line 19; page 54, lines 1 - page 60, line 17.

4 20. The uncontroverted evidence of the quality and quantity of work
5 performed by Mr. Toledo for Mr. White establishes that Mr. Toledo is competent to
6 practice law and is current on legal developments. It also is uncontroverted that
7 Applicant has continued to stay abreast of developments in the law, including
8 reviewing advance sheets. Applicant continuously attended CLE with Mr. White.
9 *Transcript*, page 42, lines 9 - 15; page 54, line 1 - page 60, line 17.

10 21. It is uncontroverted that Applicant possesses the moral qualifications
11 and the knowledge of law required to practice law in Arizona.

12 22. Applicant has conclusively shown that the weaknesses which caused
13 the underlying misconduct have been overcome.

14 23. The State Bar conducted an independent investigation of the
15 Application and supports reinstatement with conditions. *Transcript*, page 6, lines 4 -
16 15.

17 24. If reinstated, Applicant more than likely would practice in the area of
18 domestic relations. *Transcript*, page 43, lines 16 - 25. This was Applicant's area of
19 practice prior to suspension. *Transcript*, page 9, line 11 - page 10, line 5.

20 CONCLUSIONS OF LAW

21 Based on the preceding Findings and the complete record, the Hearing Officer
22 makes the following Conclusions:

23 1. Mr. Toledo proved, with clear and convincing evidence, that he is in
24 full compliance with all Orders relating to his suspension and is both competent and
25 fit to practice law.

1 2. Mr. Toledo proved, with clear and convincing evidence, that he has
2 been rehabilitated regarding the conduct that caused his suspension.

3 **BAR EXAMINATION REQUIREMENT**


4 If the period of suspension prior to filing of the reinstatement application is
5 five years or more, Rule 64(c) provides that the applicant must apply for admission
6 and pass the Bar examination. *Supreme Court Rule 64(c)*. The Supreme Court can
7 and has waived this requirement. *Matter of Rich Scott*, SB-03-0019-R (2003);
8 *Matter of Murray*, SB-97-0063-R (1997). Requiring successful completion of
9 the Bar examination for a reinstated attorney rests on the concern that an
10 attorney, long separated from the practice, might have lost the competency to
11 practice. See *Application of Spriggs*, 90 Ariz. 387, 389, 368 P.2d 456, 458
12 (1962); *Application of Cate*, 77 Cal. App. 495, 500 – 501, 242 P. 231, 232 –
13 233 (1926); *Board of Professional Responsibility v. Love*, 256 S.W.2d 644, 655
14 – 656 (Tenn. 2008).

15 It is uncontroverted that Applicant has stayed informed about
16 developments in the law during his suspension through self-study and CLE. It
17 further is uncontroverted that Applicant has the skills to be an effective
18 attorney, especially in the domestic relations area in which Applicant will
19 practice.

20 The State Bar did not contest these facts. The State Bar, however,
21 believes the examination requirement should not be waived because Applicant
22 has “been out for so long.” *Transcript*, page 6, lines 12 – 15. The State Bar
23 suggests that it is significant that the Complaint filed against Applicant
24 involved multiple counts and that Applicant has only worked as a law clerk.
25 *Transcript*, page 66, lines 1 – 17.

1 4. That the requirement of successful completion of the Bar examination
2 be waived.

3 DATED this 23rd day of June 2009.

4
5 
6 Mark S. Sifferman
7 Hearing Officer 9J

8 Original filed this 26th day
9 of June 2009, with:

10 Disciplinary Clerk of the Supreme Court of Arizona

11 Copies of the foregoing mailed this
12 26th day of June 2009, to:

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