

IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,

In Re:

Supreme Court Case
No. 73,754

HERMAN COHEN, Petitioner
(Petition for Reinstatement)

The Florida Bar
Case No. 89-71,161(11H-MRE)

THE FLORIDA BAR'S
ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as the "Bar." Herman Cohen, the petitioner, will be referred to as "Cohen" or "Petitioner."

Abbreviations utilized in this Brief are as follows: "T" refers to the transcript of the hearing held on July 19, 1989, before the Honorable Joseph E. Price, the Referee. The "T" will be followed by page numbers, i.e.; "T.5" refers to page 5 of the transcript.

"(RR)" refers to the Report of Referee.

"Appendix Ex." refers to exhibits contained in the appendix.

STATEMENT OF THE CASE

On October 10, 1988, Cohen was suspended from practicing law for ninety-one days, effective November 21, 1988. The Florida Bar v. Cohen, 534 So.2d 392 (Fla. 1988). Appendix Ex. I. A Petition for Reinstatement was filed on February 24, 1989, and Joseph E. Price, a judge of the Seventeenth Judicial Circuit Court, was appointed referee in this matter on March 7, 1989.

The final hearing concerning the petition was held on July 19, 1989, and the Report of Referee was mailed to this court on August 23, 1989. On October 6, 1989, Cohen mailed a Petition for Review to the Supreme Court, and he mailed his Initial Brief to the Court on December 14, 1989.

On January 2, 1990, the Bar was granted an extension of time to and including January 23, 1990 to serve its brief.

STATEMENT OF THE FACTS

Cohen was suspended from practicing law for ninety-one days, with proof of rehabilitation being required before being reinstated. The Florida Bar v. Cohen, 534 So.2d. 392 (Fla. 1988). Appendix Ex. I. During the period of suspension, Cohen attended a deposition and negotiated with attorney, Judith K. Lamet, concerning the settlement of a pending case. (RR par.II, Appendix Ex. II.), T.102-137. At that time, attorney Lamet was under the impression that Cohen was a member of The Florida Bar in good standing. T.102-137. (RR par. 11, D. Appendix Ex. II.) In addition, Cohen failed to notify his clients that he had been suspended. T.86.

Although Cohen was not authorized to practice law, a sign stating, "HERMAN COHEN, ATTORNEY AT LAW" was not removed from the building wherein his office was located. T.96, 151, and 152.

Based upon the foregoing facts, and considering Cohen's prior misconduct, the Referee recommended that Cohen's Petition for Reinstatement be denied. (RR, Appendix Ex. II.)

SUMMARY OF THE ARGUMENT

The referee recommended that Cohen's Petition for Reinstatement be denied. The burden is upon the party seeking review to demonstrate that the report of referee is erroneous, unlawful, or unjustified. Cohen has failed to meet that burden.

In reinstatement proceedings, the burden is upon the person seeking reinstatement to prove his fitness to resume the practice of law. The petitioner must establish that he conducted himself so as to justify the restored confidence of the public generally, the restored confidence of his professional contemporaries, and the restored confidence of the Supreme Court. Cohen has failed to prove his fitness to resume the practice of law.

The petitioner's past misconduct, plus his failure to strictly comply with the disciplinary orders, and his violations during the period of suspension, make him unfit to resume the practice of law at this time.

ARGUMENT

I

PETITIONER'S MISCONDUCT DURING THE PENDENCY
OF HIS SUSPENSION, AND HIS PRIOR DISCIPLINARY
RECORD, AND PRIOR BAD BEHAVIOR, PROVE HE IS
UNFIT TO RESUME THE PRACTICE OF LAW.

1. Misconduct During Pendency of Suspension:

Effective November 21, 1988, Cohen was not authorized to practice law. The Florida Bar v. Cohen, 534 So.2d 392 (Fla. 1988), Appendix Ex. I. Despite this, during the time that Cohen was not permitted to practice law, he attended a deposition and negotiated with attorney Judith Lamet, concerning the settlement of a pending case. During these negotiations, attorney Lamet was led to believe Cohen was a member of The Florida Bar in good standing. T.102-137. (RR, Appendix Ex. II.) According to The Florida Bar In Re: Timson, 301 So.2d 448 (Fla. 1974), a criterion for reinstatement is the strict compliance with the previous disciplinary order. Cohen's actions, as described above, were in violation of the previous disciplinary order. The Florida Bar v. Cohen, Supra, Appendix Ex. I. In addition, when Cohen failed to remove the sign "HERMAN COHEN, ATTORNEY AT LAW", from his building (T.96, 151, and 152), he violated the aforementioned criterion concerning strict compliance with the previous disciplinary order. According to Rule 3-5.1 (h), Rules of Discipline, Cohen was required to notify his clients of his suspension. Unfortunately, Cohen violated this rule, as he did not properly notify his clients of the suspension. T.86.

2. **Prior Disciplinary Record:**

During March, 1983, Cohen was given a private reprimand. Bar Composite Ex. 2 and T.86. During 1976, Cohen received a public reprimand for conflicts of interests and neglect of a legal matter. The Florida Bar, In Re: Herman Cohen, 331 So.2d. 306 (Fla. 1976).

During 1988, Cohen was suspended for ninety-one days. The Florida Bar v. Cohen, 534 So.2d. 392 (Fla. 1988). Appendix Ex.I.

3. **Prior Bad Behavior:**

In addition to the aforementioned prior disciplinary record, Cohen displayed bad behavior in the following instances:

In The Florida Bar v. Cohen, 534 So.2d. 392, Supra, This Court refers to Cohen v. New Sunrise Investment Corp., No. 76-16246 (Fla. 11th Cir. Ct., April 9, 1986) and states:

The Eleventh Judicial Circuit held that Cohen had transferred real property fraudulently, and ordered the conveyance to be set aside. Appendix Ex. I.

In Garcia v. Munne and Cohen, Case No. 78,7743 (Fla 11th Cir. Ct., March 25, 1984), Bar Composite Exhibit 1, Cohen was found to have knowingly, intentionally, falsely, and fraudulently made certain statements. (RR, Appendix Ex. 11.) On page 4 of Petitioner's Petition for Review, Cohen states that the Garcia v. Munne and Cohen, Supra, was reversed as to Cohen. Attached to the Petition for Review is a copy of the order concerning the reversal.

Please note that the decision states, in part:

The final judgment against Cohen is reversed and remanded for a new trial because it was error to disqualify him from representing himself. ***** In all respects, the judgment appealed from is affirmed.

(Underscoring supplied for emphasis)

It is the Bar's position that the reversal does not change the view of the Circuit Court, concerning Cohen's fraudulent behavior.

During 1977, a Circuit Court judge found Cohen in contempt of court and referred to his lack of candor. Bar Composite Exhibit 5.

The Bar respectfully submits that the Petitioner's prior disciplinary record, and his prior bad behavior, should be considered when considering a lawyer's fitness to be reinstated.

In Petition of Wolf, 257 So.2d. 547, 548 (Fla. 1972), this court stated:

The Referee may properly consider the prior disciplinary record of one seeking to be reinstated to The Florida Bar, including the number, similarity and gravity of his offense.

In Petition of Rubin, 323 So.3d 257, 258 (Fla. 1975), the Court stated:

It is proper for the Referee to accept evidence of prior disciplinary proceedings, among other things, for the purpose of comparing prior and current conduct...

The Bar contends that Cohen's above-described misconduct during the pendency of his suspension, his prior disciplinary record, and his prior bad behavior, show that he is unfit, at this time, to resume the practice of law.

II

PETITIONER DID NOT COMPLY WITH THE CRITERIA FOR REINSTATEMENT.

The Florida Bar v. Inglis, 471 So.2d. 38, 39 (Fla. 1985), sets forth the criteria for reinstatement, as follows:

The criteria for reinstatement to active membership in the Bar include: (1) strict compliance with the previous disciplinary order; (2) good moral character; (3) demonstrable professional ability; (4) lack of malice toward those involved in bringing about the previous disciplinary proceedings; (5) a strong sense of repentance for the prior misconduct and a genuine intention of proper conduct in the future; and (6) compliance with any conditions imposed such as restitution. The Florida Bar in re Timson, 301 So.2d 448 (Fla. 1974). In re Dawson, 131 So.2d 472 (Fla. 1961). This list is not all-inclusive; it is proper to consider all aspects of the individual with a view to determining the applicant's present fitness to resume the practice of law. The criteria can be summed up as being embodied in two components; (1) good moral character, personal integrity, and general fitness for a position of trust and confidence and (2) professional competence and ability.

The Bar believes that Cohen did not meet the first criterion, as he did violate the previous disciplinary order, as follows:

Cohen attended a deposition and negotiated with a lawyer.

T.102-137. He did not remove the sign from his building, which stated "HERMAN COHAN, ATTORNEY AT LAW," T.96, 151, and 152. He failed to notify his clients of his suspension. T.86.

The Bar submits that Cohen did not comply with the second criterion, "good moral character." Cohen's cumulative misconduct as described in Argument I, above, and in the Report of Referee (Appendix Ex. 11), make it clear that Cohen did not prove good moral conduct. The fifth criterion requires a strong sense of repentance for prior misconduct and a genuine intention of proper conduct in the future. The Referee stated, in Section 11, E of his report:

It is the opinion of this Referee that while the Petitioner was sorry he had been suspended, he showed no genuine sense of remorse or contrition concerning his past misconduct and his failure to strictly comply with this Court's order which suspended him from practicing law.

If Cohen had been truly remorseful, he would not have committed the violations during the time he was suspended.

In view of the above, the Bar contends that Cohen did not meet the criteria for reinstatement to active membership in the bar.

III

**THE PETITIONER FAILED TO SHOW THE REPORT OF
REFEREE WAS ERRONEOUS, UNLAWFUL OR
UNJUSTIFIED.**

The Supreme Court's review of referee's reports in reinstatement proceedings is governed by the same rules and

procedures as are reports submitted in other disciplinary proceedings. The Florida Bar in re Inglis, 471 So.2d. 38, 40, (Fla.1985). At the time of the Inglis, Id., decision, procedures were governed by Florida Bar Integration Rule, article XI, Rule 11.11(8). This rule was changed to Rule 3-7.9(j), Rules of Discipline, which is substantially the same as Rule 11.11(8).

On review of the report of a referee in either type proceeding, "the burden shall be on the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." Article XI, Rule 11.09(3)(e). The Florida Bar v. Inglis, 38, 40, Supra. See rule 3-7.6(c)(5), Rules of Discipline, which is the same as Rule 11.09(3)(e) of the Florida Bar Integration Rule.

In the Inglis case, Supra, at pages 40 and 41, this Court stated: "a referee's findings of fact "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. Id., article XI, Rule 11.06(9)(16). Thus, we must accept the referee's findings of fact unless they are not supported by competent, substantial evidence in the record.... ." In the case at hand, the findings of fact are supported by competent, substantial evidence.

It is the position of The Florida Bar that Cohen did not show that the Report of Referee was erroneous, unlawful or unjustified. Accordingly, the report should be approved.

CONCLUSION

The Petitioner has failed to demonstrate the rehabilitation necessary to be allowed to be reinstated as a member of The Florida Bar in good standing. Although he was suspended for a short period of time, he failed to comply with this Court's suspension order, to wit: he attended a deposition, attempted to negotiate a settlement, failed to notify his clients that he was suspended, and did not remove the sign, "HERMAN COHEN, ATTORNEY AT LAW," from his office building.

In addition, this Court should consider the Petitioner's prior public and private reprimands and his previous acts of misconduct.

After considering all of the facts, it is the Bar's position that Cohen is not presently fit to resume the practice of law. Accordingly, it is recommended that the Report of Referee be approved and Cohen's Petition for Reinstatement be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing The Florida Bar's Answer Brief were mailed by U.S. Mail to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and that true and correct copies were mailed to Martin Cohen, Counsel for Petitioner, 622 Southwest First Street, Miami, Florida 33130, and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 11TH day of January, 1990.



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