10-15

IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,593

THE FLORIDA BAR,

Complainant/Appellant,

vs.

STANLEY P. COHEN,

Respondent/Appellee.

ANSWER BRIEF OF RESPONDENT/APPELLEE STANLEY P. COHEN

GENE REIBMAN, ESQUIRE
Attorney for Respondent
600 Northeast Third Avenue
Fort Lauderdale, FL 33304
Broward: (305) 467-8715
Dade: (305) 945-5979
Florida Bar No.:289140

TABLE OF CONTENTS

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

TABLE OF CITATIONS

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

STATUTES AND RULES OF COURT

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

PRELIMINARY STATEMENT

The Florida Bar, Claimant/Appellant, will be called **"The Bar" or "Bar."**

Stanley P. Cohen, Respondent/Appellee will be called **"Respondent"** or **"Cohen."**

The symbol **"T.R."** will be used to designate the transcript of the final hearing and the symbol **"R.R."** will be used to designate the report of the referee.

NATURE OF THE CASE AND FACTS

This proceeding is before this court on a petition for review by the Florida Bar pursuant to Rule 3-7.7(c)(1) of the Rules of Discipline. The Florida Bar challenges in this proceeding a report of referee **Marvin H. Gillman** that: (1) found that **Cohen** had pled guilty in the State of Maine to the crime of arson, a felony criminal act and was sentenced to a one year term of imprisonment and a fine of $1,260.00 payable to the Maine Attorney General's Office for the benefit of the Waldoboro Fire Department; (2) recommended that **Cohen** be found guilty of violating Cannon 1 of the Code of Professional Responsibility and Disciplinary Rule 1-102(3) and (4) in effect before January 1, 1987; and, (3) recommended that **Cohen** be suspended from the practice of law for twelve (12) months and thereafter until rehabilitation is proven by passing the Florida portion of the Florida Bar Examination and the ethics

portion of the Florida Bar Examination.[1] (R.R. 1, 2). Costs were assessed against **Cohen** in the sum of $699.35.

Cohen and his wife **Arlene Winslow Cohen** testified at the disciplinary hearing. The Florida Bar presented no witnesses.

Cohen is a member of the Bars of the States of Florida, Maine and Massachusetts. **Cohen** was actively practicing law in Florida from December, 1980, until his 1986 indictment. Neither Massachusetts nor Maine have attempted to discipline **Cohen** for this incident. **Cohen**, a practicing attorney since 1969, has no history of professional discipline. (T.R. 8,9).

The State of Maine indicted **Cohen** and his wife in August of 1986 for the January, 1981, arson of their home in Waldoboro. (T.R. 8). On the eve of trial, **Cohen** accepted the State's offer to plead guilty in exchange for the dropping of the charges against his wife (T.R. 18, 21). At the time, **Cohen** and his wife had a one-year old breast fed baby girl (T.R. 9). **Cohen** explained to the referee that he pled guilty "in the interest of my family and my wife." (T.R. 9). **Cohen** stated:

> In the interest of my family and my wife, who the State agreed to dismiss charges against, and my baby -- the pressures against all of us, as well as the always possible outcome a guilt finding on both of us and both of us doing time, I had no choice but to plead guilty with a protestation of innocence. (T.R. 9).

---

[1] The Florida Bar has no objection to the retroactivity of the penalty to the date of **Cohen's** suspension, September 21, 1989. (T.R. 34).

Cohen has maintained his innocence throughout the proceeding before the referee.

> I am innocent of the charge. I would have certainly gone to trial if I hadn't been married and didn't have a child one year old and based on the fact that my wife was indicted also. It was a small town. My brother was an attorney in the town. I had no choice but to plea. (T.R. 18).

The sole evidence against **Cohen** and his wife in the criminal case was the uncorroborated testimony of Vacadelli, a convicted felon who was serving time for armed robbery. (T.R. 8). For his testimony against **Cohen**, Vacadelli, in jail for over two years at the time of **Cohen's** indictment, (T.R. 32), received immunity in the arson case and his armed robbery sentence was commuted. Vacadelli was a former client whom **Cohen** had represented in a divorce case. (T.R. 31).

At the time of the fire, **Cohen** was living in Florida. Mrs. Cohen was in Maine preparing to move here. (T.R. 29). The Waldoboro house was under contract for sale at the time of the fire, (T.R. 29); the family had rented a home in Florida; and, **Cohen's** brother was a successful practicing attorney in the Waldoboro. **Cohen** had no financial difficulties at the time of the fire. (T.R. 33). At the time of the fire the Cohens owed only between $28,000.00 to $30,000.00 on their mortgage. (T.R. 37). The insurance settlement was $32,000.00. (T.R. 36). The insurer did not seek return of its insurance payment. A restitution action was

neither time-barred at the time of **Cohen's** criminal plea nor at the time of the referee's hearing. (T.R. 29).

Arlene Cohen asserted that she and **Cohen** were innocent of the arson charge. (T.R. 19). Mrs. Cohen stated that the Cohens were the only Jewish family in Waldoboro and affirmed her belief that a generalized prejudice existed in the town against Jews. (T.R. 19). Mrs. Cohen noted that townspeople frequently referred to fires as "Jewish Lightning." (T.R. 19).

> When you would be at the coffee shop and someone would be speaking about something that burned, the first thing was not 'oh my God, those poor people lost their home.' 'ah ha, Jewish lightening has struck.'(T.R. 39).

Mrs. Cohen also stated that it was common in the area to heat with wood and that fires occurred frequently. (T.R. 39).

Mrs. Cohen insisted that their lawyers "felt we had a good case" but, "because of the prejudices as I have previously stated, and the fact that we had much more to lose than this person who brought the allegations against us," recommended acceptance of the State's plea offer. (T.R. 20, 21).

Cohen has not practiced law since the 1986 indictment. (T.R. 9). Since then, **Cohen** has earned his living by purchasing condemned property within the City of Hollywood, Florida, and working with the Community Redevelopment Agency rehabilitating those properties for low income tenants. (T.R. 9, 10). **Cohen** has had difficulty supporting his family and has listed his home for sale to ease his family's financial burden. (T.R. 10).

SUMMARY OF ARGUMENT

The referee's findings of fact are supported by substantial evidence in the record. **Cohen's "Alford"** plea was motivated by the State of Maine's offer to drop the arson case against his wife. **Cohen's** assertion of innocence was apparently credited by the referee.

The referee's recommendation of a one-year suspension should be upheld by this court. A one-year suspension is fair to society, both in terms of protecting the public from unethical conduct and at the same time by not denying the public the services of a qualified lawyer as a result of undue harshness in the penalty. A one-year suspension is fair to Respondent and is sufficient to punish a breach of ethics while encouraging reformation and rehabilitation. A one-year suspension is severe enough to deter others who might be prone to or tempted to become involved in like violations.

ARGUMENT

POINT I

THE REFEREE'S DISCIPLINARY RECOMMENDATION SHOULD BE ADOPTED BY THIS COURT.

A. The referee's findings of fact are supported by substantial evidence in the record.

The referee after hearing the evidence found following facts.

1. **Cohen** was a member of the Maine, Massachusetts and Florida bars.

2. **Cohen** had no prior record of professional discipline.

3. **Cohen** entered an **"Alford"** plea to the charges.

4. At the time of the referee's hearing **Cohen** was married with a two year old child.

5. **Cohen** was indicted in 1986 for the 1981 arson. The indictment was based upon the uncorroborated evidence provided by a former civil client of **Cohen's** who was an uncharged co-conspirator in the arson plot. The informant was at the time serving a term of imprisonment for an armed robbery that was later commuted by the Governor of Maine at the request of the Maine Attorney General in exchange for his services against **Cohen.**[2]

6. **Cohen's** casualty insurer never attempted to recover paid fire insurance benefits. The statute of limitations for recovery of those benefits had not run as of the time of both **Cohen's** plea in the Maine criminal proceeding and **Cohen's** Florida disciplinary hearing before the referee.

7. **Cohen** worked in Maine as a paralegal while on incarcerated work release.

The referee's findings of fact are supported by substantial evidence in the record and must be accepted by the court.

> ...this Court does not sit in bar discipline hearings as a finder of fact. We have delegated this responsibility to the referees and, based upon well-established principles of law, have determined that the referees' findings will be upheld unless they are without

---

[2] The Fourth District Court of Appeal has noted that an informant's "invaluable stake" in his "own freedom" is an "'enormous incentive'" "'color his testimony.'" **Hunter v. State,** 531 So.2d 239, 240 (Fla. 4th DCA 1988).

> support in the evidence. **The Florida Bar v. Bajoczky**, 558 So.2d 1022, 1023 (Fla. 1990).[3]

The Bar attempts an end run around this "well established" rule of deference by attempting to distance this case from this Court's holding in **The Florida Bar v. Pavlick**, 504 So. 2d 1231 (Fla. 1987) by suggesting to the Court that the record is without "evidence establishing Respondent's innocence of the underlying criminal charge." **(Initial Brief of The Florida Bar at p. 7).** The determination or judgment of guilt was in **Pavlick**[4], as it is here, "conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules." **Rules Regulating The Florida Bar 3-7.2 (b) & (h)(2).** **Pavlick** does not, and here the referee did not, permit the retrial of the criminal charges. 504 So.2d 1233. What **Pavlick** does require as a matter of due process, and what **Cohen** apparently established to the satisfaction of the referee who saw and heard **Cohen** and his wife, and who had some personal familiarity with the locality,[5] was "mitigation evidence of the circumstances surrounding an 'Alford' plea." **The Florida**

---

[3] **See also, State v. Dawson**, 111 So.2d 427, 430 (Fla. 1959):

> "... the evidence was before a referee who heard all of the witnesses and he was charged with the responsibility of evaluating their credibility and the weight of the evidence."

[4] 504 So.2d at 1233-1234.

[5] T.R. 25

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

Bar v. Pavlick, supra., 504 So. 2d at 1234.[6]

In his presentation of mitigation evidence, **Cohen** did in fact assert his innocence. **Cohen** flatly stated: "I am innocent of the charge." (T.R. 18). Mrs. Cohen stated: "I know that my husband is innocent, as I am innocent." (T.R. 19).

In disciplinary cases hearsay is admissable "and the referee is not barred by technical rules of evidence." **The Florida Bar v. Vannier,** 498 So. 2d 896, 898 (Fla. 1986); **The Florida Bar v. Weed,** 559 So.2d 1094 (Fla. 1990); **State v. Dawson, supra.,** 111 So.2d at 431 (1959). The Bar had an opportunity to produce a broad range of evidence, if there was any, to counter the Cohens' assertions of innocence, and cannot now complain of any lack of a record reflecting an assertion of innocence.

The Bar, citing **The Florida Bar v. Isis,** 552 So.2d 912, 913 (Fla. 1989), suggests that more evidence of innocence than that coming from **Cohen's** own mouth is necessary to meet **Pavlick's** "present claim of innocence" requirement. In **Pavlick**, the Bar notes, a polygraph result supported Pavlick and there was a stream of letters asserting innocence written by Pavlick to the sentencing judge. **(Initial Brief of The Florida Bar at p. 7,8).**

---

[6] "Going behind the conviction in this situation clearly does not involve a 'trial de novo.' Consistent with his 'Alford' plea respondent presented his version of the underlying case and his reasons for the plea. The imposition of discipline without affording the accused an opportunity to explain under these circumstances would violate due process." **The Florida Bar v. Pavlick, supra.,** 504 So. 2d at 1234.

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

The Bar's argument goes wide of the mark. A lie detector result is hardly a litmus test of truth.[7] If it were, there would be little need for referees or for the courts. And, there is no qualitative difference between Pavlick's letters to the sentencing judge and **Cohen's** oral assertion of innocence made to the referee. The most important point is that the referee saw and heard **Cohen** and accepted **Cohen's** explanation.

North Carolina v. Alford, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970) recognizes that "[a]n individual accused of crime may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime" Reasons, as the Court noted, '"other than the fact he is guilty may induce a defendant to so plead . . . .. "' **North Carolina v. Alford, supra.**, 400 U.S. at 34, 91 S. Ct. at 165, quoting **State v. Kaufman**, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879). "Guilt, or the degree of guilt, is at times uncertain and elusive." **McCoy v. United States**, 363 F.2d 306, 308 (D.C. Cir. 1966). In **Pavlick**, the **"Alford"** plea was made because Pavlick's "interests and those

---

[7] "The Courts of this state have repeatedly held that factors contributing to the results of a polygraph test-the skill of the operator, the emotional state of the person tested, the fallibility of the machine,and the lack of a specific quantitative relationship between physiological and emotional states-are such that the polygraph cannot be recognized as a sufficiently reliable or valid instrument to warrant its use in judicial proceedings...." **Davis v. State**, 520 So. 2d 572, 573-574 (Fla. 1988).

of his family (his wife and three little children) required the entry of a plea to avoid the stress of further proceedings and the risk of greater punishment." 504 So.2d 1233. Apparently, this Court had little difficulty accepting Pavlick's justification for his guilty plea as a mitigating factor.

Similarly, **Cohen's** entered his **"Alford"** plea to shield his wife and his infant child from the "roll-of-the-dice" element of litigation that experienced lawyers deal with daily.Unfortunately, the litigant in the right does not automatically win his case. Even the best cases with the best lawyers lose. **Cohen** cannot be faulted for shielding his family from the risk of a random, haphazard erroneous outcome that is always present in all litigation.

The Bar both mischaracterizes and belittles **Cohen's** motivation. The Bar states:

> While it is true that Respondent explained the extremely unpleasant ramifications that would have befallen him if convicted after trial, it is submitted that such apply to all family men facing criminal prosecution . . . .. **(Initial Brief of the Florida Bar at p. 8.)**

Cohen's resolve to protect his wife and child from the rigors of litigation as well as from the risk of a freakish outcome deserves a less grudging analysis. **Cohen's** interest in the preservation of his family is hardly without weight. For example, in another context the United States Supreme Court spoke of familial interests as follows.

> Long ago ... the Court characterized marriage 'as **the most important relation in life,** 'and as' the foundation of the family and society

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

> without which there would be neither civilization nor progress' .... the Court recognized that the right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause and . . . marriage was described as 'fundamental to the very existence and survival of the race.' **Zablocki v. Redhail**, 434 U.S. 374, 384, 96 S.Ct. 673, 680, 54 L. Ed. 2d 618 (1978) (Emphasis added, citations omitted).

It may be simple from a distance, as the Bar does, to disparage **Cohen**. An attorney, one might say, should always be aware the consequences of his acts and, being subject to a higher standard of conduct, should never complain when those consequences occur. One wonders, though, how others would react to the State's plea offer. Some surely would aggressively shield loved ones from even remote threats. Others more sanguine might let events unfold without intervention. This case is here because **Cohen**, with his wife as the prize, refused to roll the dice.

Last, the Bar argues that even if **Cohen** established adequate mitigation, **Cohen's** plea to a "major" felony justifies disbarment. **Cohen** agrees that arson is a serious offense. But, in context, **Cohen** was sentenced to only one year of imprisonment, was permitted to work as a paralegal on work release and, importantly, the charges against his wife were dropped. While **Cohen** does not denigrate seriousness of the **charge**, the **outcome** of the criminal process surely casts some doubt on the strength of the prosecution's case.

In summary, the referee's findings were supported by evidence in the record. **Cohen** presented a more than adequate case of

mitigation. **Cohen** pled guilty to a charge based upon evidence provided by an informant incarcerated for a violent crime who was rewarded for his accusation with a grant of immunity in the arson case and the commutation of his sentence for armed robbery. **Cohen's** plea was motivated by concern for his wife and child. **Cohen** was willing to go to jail to insure that his wife would not. The Bar had an adequate opportunity to present any evidence it had to rebut **Cohen's** assertion of innocence. Nothing in this record suggests that the informant was unavailable to the Bar. The Bar was silent and cannot now complain.

B. The court has a "somewhat broader" scope of review of the referee's disciplinary recommendation.

This Court has rejected the proposition that disbarment is automatic when an attorney is convicted of a felony. Each case of attorney discipline is judged on its own merits. **The Florida Bar v. Jahn**, 509 So. 2d 285, 286 (Fla. 1987). **The Florida Bar v. Corbin**, 540 So.2d 105 (Fla. 1989). Disbarment is an "extreme sanction" to be imposed **"only** 'in those rare cases where rehabilitation is highly improbable.'" **The Florida Bar v. Rosen**, 495 So.2d 180, 181-182 (Fla. 1986) (Emphasis added).

The Court has suggested that it reviews disciplinary recommendations in a "somewhat broader" fashion than referee's factual determinations. **The Florida Bar v. Ingles**, 471 So. 2d 38, 41 (1985); **The Florida Bar v. Langston**, 540 So. 2d 118 (Fla. 1989). In applying this "broader standard" of review this Court most recently measured a referee's disciplinary recommendation

against the purposes of attorney discipline articulated by the Court in **The Florida Bar v. Lord**, 433 So. 2d 983, 986 (Fla. 1983). **The Florida Bar v. Anderson**, 538 So. 2d 852, 854 (Fla. 1989).

> Discipline . . .must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public of the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second the judgment must be fair to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, **the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.** **The Florida Bar v. Lord, supra.,** 433 So. 2d at 986. (Emphasis in original).

The discipline fashioned by the referee is sufficient to fairly accomplish the three goals articulated in **Lord** and ought to be upheld by the court. **See, The Florida Bar v. Vannier, supra.,** 498 So. 2d at 898 (Fla. 1986) ["A referee's findings of fact and **recommendations** come to us with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record."] (Emphasis added).

1. Cohen's one year suspension is fair to society, both in terms of protecting the public from unethical conduct and at the same time by not denying the public of the services of a qualified lawyer as a result of undue harshness in imposing penalty.

As **Cohen** has stressed repeatedly in this presentation, the referee credited **Cohen's** explanation for the **"Alford"** plea. The Bar points to nothing in **Cohen's** background other than the

"Alford" plea itself to justify its demand for the most serious of punishments. There is nothing in this record suggesting present immorality, turpitude, or the absence of rehabilitative possibility. Moreover, none of **Cohen's** clients were damaged by the crime. **The Florida Bar v. Schiller**, 537 So.2d 992 (Fla. 1989). While the Bar can surely argue that **Cohen** went to prison for arson, **Cohen** persuasively established before the referee that his plea was motivated by a desire to protect and preserve his family. Under these circumstances, disbarment adds nothing to these tragic events, unless there is something to be found in the idea of retribution for retribution's sake, a principle that this court has soundly rejected.

2. A one year suspension is fair to the respondent being sufficient to punish a breach of ethics while encouraging reformation and rehabilitation.

Much of what was just said could be repeated here. At bottom, **Cohen** has been amply punished. He has not practiced law since 1986; he has been disgraced in his home town; he has been disgraced before his peers at the Bar; he will be forever be branded a felon whether or not this court opts to disbar him; and, he has gone to prison. **Cohen** now is before this Court begging for the opportunity to earn a living for the family that he has sacrificed his freedom and career for. **Cohen's** post-incarceration activity shows rehabilitation. He is eking out a living rehabilitating property for low income citizens. Given all this, **Cohen** can fairly assert that increased punishment will result only in increased hardship, with no incremental benefit to the Bar, to

the public or to **Cohen.**

3. A one year suspension is severe enough to deter others who might be prone to or tempted to become involved in like violations.

Obviously, deterrence is always served by harshness. It is equally obvious that if each case is to be reviewed on its individual merits, the deterrence factor must on occasion defer to other more pertinent considerations, particularly where, as here, it is not apparent that any incremental gain will be realized from additional punishment.

CONCLUSION

Stanley P. Cohen respectfully prays that the Court adopt the referee's recommendation that **Cohen** be suspended from the practice of law for one year retroactive to the date of his suspension.

None of the interests identified by this court to measure whether further discipline is appropriate are served by the imposition of any sanction harsher than that recommended by the referee. **Cohen** has presented ample evidence in mitigation of his plea establishing that he was innocent of the crime and that he entered his plea based upon considerations unrelated to guilt. **Cohen** has presented satisfactory proof of his rehabilitation. The Bar has presented no evidence to the contrary and relies solely on the face value of **Cohen's** plea. The Bar's argument is contrary to this Court's policy of individualized discipline based upon the merits of each case.

CERTIFICATE OF SERVICE

LAW OFFICE OF GENE REIBMAN, 600 N. E. 3RD AVENUE, FORT LAUDERDALE, FLORIDA 33304 • BROWARD: (305) 467-8715 • DADE: (305) 945-5979

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, to: KEVIN P. TYNAN, ESQ., 5900 North Andrews Ave., Fort Lauderdale, Florida 33309, this 20th day of September, 1990.

GENE REIBMAN, ESQUIRE
Attorney for Respondent
600 Northeast Third Avenue
Fort Lauderdale, FL 33304
Broward: (305) 467-8715
Dade: (305) 945-5979
Florida Bar No.:289140

\5896\abrief