IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellant, v. STANLEY P. COHEN, Respondent-Appellee.	Supreme Court Case No. 74,593 The Florida Bar File No. 90-50,434 (17E)

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Complainant-Appellant, will be referred to as "the Bar" or "The Florida Bar". Stanley P. Cohen, Respondent-Appellee, will be referred to as "Respondent". The symbol "TR" will be used to designate the transcript of the final hearing and the symbol "RR" will be used to designate the Report of Referee.

STATEMENT OF THE CASE AND OF THE FACTS

In January of 1981, the Respondent caused a fire to be set to his home in Waldoboro, Maine, in order to collect fire loss insurance proceeds. He was indicted in August of 1986 (The Florida Bar's Exhibit 2 in Evidence) and convicted in April of 1989 upon his plea of guilty to a violation of Maine's Felony Arson Statute (The Florida Bar's Exhibit 1 in Evidence). The Respondent collected between $32,000.00 to $40,000.00 from his fire insurance company. (TR at 36). He was sentenced to a one (1) year term of incarceration and was further directed to make restitution to the Waldoboro Fire Department (The Florida Bar's Exhibit 1 in Evidence).

The Respondent was automatically suspended from The Florida Bar pursuant to Rule 3-7.2(e), Rules of Discipline in The Florida Bar v. Cohen, No. 74,549 (Fla. August 24, 1989).

As The Florida Bar regarded the felony suspension as an inadequate sanction, the Bar instituted this proceeding to seek the Respondent's disbarment.

The Referee found the Respondent guilty of violating Disciplinary Rules 1-102(A)(3) [A lawyer shall not engage in illegal conduct.] and 1-102(A)(4) [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.] of the Code of Professional Responsibility. (RR at 1). The Referee recommended that the Respondent be suspended for a period of twelve (12) months retroactive to September 21, 1989, the effective date of the Respondent's automatic felony suspension and as a condition of reinstatement the Referee has

recommended that the Respondent successfully complete the Florida law and ethics portions of The Florida Bar exam. (RR at 3).

The Respondent's defense and the Referee's sanction recommendations were predicated upon the fact that the Respondent's conviction was based upon an Alford plea. While explaining the numerous ramifications of being convicted after a trial, the Respondent failed to offer any independent evidence to establish his innocence of the criminal charge in question. The only other witness that testified on the Respondent's behalf was his wife, Arlene Winslow Cohen, against whom similar charges of arson were dropped as a part of the Respondent's plea bargain.

The Board of Governors of The Florida Bar at its July 1990 meeting directed Bar counsel to petition for review and seek the disbarment of the Respondent for his felonious conduct.

SUMMARY OF ARGUMENT

In The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), this Court determined that theft of client funds creates a presumption of disbarment and that said presumption can only be rebutted by various acts of mitigation and restitution. It is respectfully submitted that arson, and the collection of insurance proceeds thereby, constitutes an equally serious offense that merits the same sanction. By his willful destruction of property in order to secure insurance proceeds, the Respondent not only defrauded and stole from his fire insurance carrier but he increased the cost of fire loss insurance to the public at large, who must, by its premium payments, make up for such fraudulent acts.

A naked assertion of innocence, based upon an Alford plea, should not serve to mitigate against disbarment. Absent substantial and credible proof with regard to the facts underlying and leading up to the charge which the Respondent stands convicted, the presumption of guilt and consequent disbarment sanction should remain inviolate.

ARGUMENT

I. AN ATTORNEY WHO COMMITS ARSON AND COLLECTS FIRE INSURANCE PROCEEDS MUST BE DISBARRED.

In the Bar's view, the only issues for determination upon this appeal are whether or not felony arson should be considered a "minor felony" and whether competent evidence was presented to support a finding of innocence of the underlying criminal charge. Such tests were prescribed in The Florida Bar v. Isis, 552 So.2d 912 (Fla. 1989) where, in disbarring the respondent, the court observed:

> Thus, this case is distinguishable from The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987), in which we held that a minor felony conviction entered pursuant to an Alford plea will not necessarily result in disbarment if there is evidence and a referee's finding supporting innocence.

The Bar respectfully submits that neither part of the Isis test has been established in the case at Bar.

This Court in The Florida Bar v. Pavlick held that a respondent attorney in a disciplinary proceeding predicated on a felony conviction may offer in mitigation his reasons for entering into an Alford[1] plea as well as his version of the underlying felony. Pavlick at 1234. In

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[1] In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court held that a criminal defendant 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." In essence, a defendant may plead guilty but still protest that he is innocent of the charges.

Pavlick the attorney entered an Alford plea and was convicted for being an accessory after the fact to a misprision of a felony. Id. at 1232. The facts of the Pavlick case reveal that Pavlick heard or knew through a secondary source that one or two of his clients had falsely testified before a grand jury about the source for the client(s)' drug smuggling activities. Id. Mr. Pavlick's crime was that he failed to report this knowledge to the proper authorities. Id. at 1232-1233.

It was the benign and passive nature of the charge which the Bar assumes led to the court's characterization of Pavlick's crime as a "minor felony". Isis at 913. No such benignity or passivity exists with regard to the commission of arson and the processing of a fire loss insurance claim where, as an actor in the event, the Respondent willfully destroyed property and collected the insurance proceeds therefrom. Such crime not only victimizes the perpetrator's carrier but renders the public at large responsible for ever increasing premiums to compensate for such fraudulent claims. In an analogous situation, Justice Ehrlich noted that a:

> Respondent knowingly and willfully failed to file income tax returns for more than two decades. He violated those very laws he has sworn to uphold and preserve. In so doing, he purloined from the United States government and ultimately all other United States citizens $412,220.82 in tax revenues over the twenty-two year period.

The Florida Bar v. Lord, 433 So.2d 983, 987 (Fla. 1983) (Ehrlich, J., concurring in part and dissenting in part.)

In Maine, where the arson occurred, the legislature has classified the Respondent's crime as a class A crime. ME. REV. STAT. ANN. tit. 17A §802(3) (1989). The Maine legislature has categorized all crimes,

except murder, into class A through class E crimes. ME. REV. STAT. ANN. tit. 17A §4 (1989). Class A crimes are punishable by prison sentences in excess of ten (10) years and fines of $5,000.00 or more. ME. REV. STAT. ANN. tit. 17A §4-A(3) (1989). All other crimes, except murder, have lesser sanctions than class A crimes. Id. Therefore, in Maine the Respondent's actions are taken as a very grave and serious matter.

As evidenced above, the felony of arson coupled with the insurance fraud incident thereto constitutes a serious or major felony warranting the strictest of sanctions.[2] It is respectfully submitted that the "minor felony" test enunciated in Isis, supra, has not and cannot be met.

It is further respectfully submitted that the record is devoid of evidence establishing Respondent's innocence of the underlying criminal charge.[3] In Pavlick, supra, the respondent produced the results of a polygraph test, which established his innocence, explaining that he had offered to be tested by the prosecuting authorities, but this offer was refused. Mr. Pavlick further produced evidence demonstrating that following his plea he continued to protest his innocence and dispute the underlying facts of the offense through letters to the United States

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[2] In The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), this Court adopted a presumption of disbarment in cases involving theft of client funds. It is respectfully contended that such a presumption should be adopted in felony cases due to the grievous ethical defalcations that occur as a direct result of the felonious conduct.

[3] At this juncture, it is important to note that the Respondent's conviction is conclusive proof of guilt of those criminal charges in a Bar disciplinary proceeding. The Florida Bar v. Onett, 504 So.2d 388, 390 (Fla. 1987) cert. denied 484 U.S. 850 (1987).

District Judge who sentenced him. Pavlick at 1233. In the instant proceeding, however, no such evidence was presented. While it is true that the 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 and should not be considered as mitigation. See The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989) (Ehrlich, C.J. dissenting.)

The Respondent alleged that the State's case was predicated upon the uncorroborated testimony of a convicted felon whose sentence was commuted due to that person's cooperation with the State's prosecution of the Respondent. He further stated that his reason for entering a plea was that despite a weak or non-existent case against him an insidious, provincial anti-Semitism so permeated the venue, that he was placed in such great jeopardy as to mandate his plea. If the State of Maine's case was so tainted and weak, then it is respectfully submitted that the Respondent's plea is as consistent with his being guilty as his being innocent. If the Respondent's allegations of provincial anti-Semitism are dignified, then it is submitted that Maine's populace and criminal justice system will thereby stand indicted. Certainly, the Respondent had available to him change of venue applications and all other due process guarantees afforded to him under the constitutions of Maine and of the United States of America.

CONCLUSION

The Respondent has failed to demonstrate that he has met the two pronged Isis test by establishing that arson with the concurrent fraudulent collection of insurance proceeds is a "minor felony" and by demonstrating his innocence of the criminal charge. Therefore, based upon all of the foregoing reasons and citations of authority, it is clear that the Referee's recommendation of a twelve (12) month suspension is too lenient and that the Respondent should be disbarred and directed to pay the Bar's costs in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar was furnished to Stanley P. Cohen, Respondent-Appellee, at 1324 Harrison Street, Hollywood, FL 33019, by regular mail on this 15th day of August, 1990.

KEVIN P. TYNAN