IN THE SUPREME COURT OF FLORIDA
(Before A Referee)

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL M. TOBIN,

Respondent.
_____/

The Florida Bar File
No. 93-70,033 (11F)

Supreme Court Case
No. 84,203

Appeal from Recommendation of Referee

INITIAL BRIEF OF RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Respondent, MICHAEL M. TOBIN, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. The Florida Bar
   (complainant)

2. Pamela Pride-Chavies, Esquire
   (bar counsel)

3. H.T. Maloney, Esquire
   (trial counsel and appellate counsel for respondent)

4. Michael M. Tobin
   (respondent)

TABLE OF CONTENTS

PREFACE

In this Brief, the Complainant, **THE FLORIDA BAR**, will be referred to as **THE FLORIDA BAR.**

1. The Respondent, **MICHAEL M. TOBIN**, will be referred to as **TOBIN.**

Michael Tobin, the Respondent in this action, represented Plane Adds, Inc. in the proceedings which gave rise to this matter.

2. **PLANE ADDS, INC**. will be referred to as **PLANE ADDS.**

Plane Adds, Inc., the Plaintiff in the underlying action, was a Florida corporation d/b/a Kitty Hawke, which operated a flying school and other related aircraft activities.

3. **JAMES PHILLIPS** will be referred to as **PHILLIPS.**

James Phillips was President and sole stock holder of Plane Adds, Inc.

4. **AVEMCO INSURANCE COMPANY** will be referred to as **AVEMCO.**

Avemco Insurance Company was the company that issued a policy insuring Plane Adds, Inc. for an aircraft that it was operating. The coverage dispute between Plane Adds, Inc. and Avemco Insurance Company centered around proper cancellation notice.

5. **CECILE HATFIELD** will be referred to as **HATFIELD.**

HATFIELD represented AVEMCO INSURANCE COMPANY in opposition to the claim of PLANE ADDS, INC. After the above action was resolved against AVEMCO, she undertook representation of BETTERS against the estate of the claimants, who were killed in the crash. (A.1). Her original representation on behalf of AVEMCO was for the denial of coverage. She was, at one time, trial counsel for PIPER AIRCRAFT CORP. (A. 2 - 4). She represented BETTERS in his Bar complaint against TOBIN. (A. 5). She stated in open court that she was going to file a Bar action against TOBIN. (A. 6, 7). She testified in the Bar proceeding that she had an ex-parte conversation with Judge Price, (A. 8) which appears to conflict with her prior court representations both orally (A. 9, 10) and in writing. (A. 12, 13). Her later recollection also did not conform to the Court's earliest recollection. (A. 15 - 16).

6. **DOUGLAS BETTERS** will be referred to as **BETTERS**.

BETTERS was the owner or lessor of the aircraft, which was the subject matter of the basic suit. He failed to timely respond in an entirely independent lawsuit to an action filed against him by PIPER for his failure to make payments on the destroyed aircraft. BETTERS, through his friendship with PHILLIPS, was recommended to contact TOBIN concerning the PIPER suit against him. TOBIN advised BETTERS of a potential conflict of interest, but stated he would contact counsel for PIPER and see if they would abate the PIPER vs. BETTERS proceedings until after the proceedings on coverage were concluded. (A. 17). At that time, AVEMCO was appealing the ruling against it. PIPER refused to abate and, because there was a possibility that before TOBIN could successfully communicate with BETTERS a default would be taken against BETTERS, TOBIN filed an answer on BETTERS' behalf. TOBIN advised BETTERS to get counsel to continue the representation because of the potential conflict (A. 19) and TOBIN gave notice of his intent to withdraw and did then withdraw. When TOBIN opposed BETTERS intervention in the AVEMCO - PLANE ADDS action, BETTERS filed a Bar complaint alleging conflict of interest and stated TOBIN withdrew two weeks before trial, forcing him to settle with PIPER. The evidence proved this to be false. (A. 19 - 21).

7. **PIPER ACCEPTANCE CORP**. will be referred to as **PIPER**.

Piper Acceptance Corp. was the corporation that financed the aircraft for BETTERS. BETTERS attempted to sell the aircraft to PLANE ADDS, but PIPER refused to acknowledge such sale unless it was paid off, and therefore a lease agreement was entered into between BETTERS and PLANE ADDS. PIPER was allowed to intervene some 22 months after final judgement. BETTERS' motion to intervene was denied on basically the same claimed interest four months earlier. (A. 22 - 25). An agent of PIPER, during her sworn deposition, stated that PIPER had obtained a single interest policy on the aircraft prior to its destruction, which would have completely obviated PIPER'S claim except for whatever premium was paid. This was also stated by David McDonald, co-counsel with HATFIELD, in its Memorandum of Law to the Court while representing AVEMCO in the basic suit. (30,31)

8. **ANDREW SAPIRO** will be referred to as **SAPIRO.**

Andrew Sapiro was an employee of the law firm in which TOBIN was a partner and the person who, pursuant to TOBIN'S instructions, drafted the Motion to Withdraw the funds from the Court Registry, delivered the same to the Court and obtained an Order authorizing withdrawal.

9. **PAMELA PRIDE-CHAVIES** will be referred to as **CHAVIES.**

Pamela Pride-Chavies was Bar counsel both in the present action and the action which was instituted by BETTERS that resulted in a minor misconduct resolution.

TABLE OF CITATIONS

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Statement of the Case was contained in the Report of the Referee, which was substantially as follows:

That the Complaint was served upon the Respondent by Certified Mail on August 8, 1994. A review of the file revealed that the Respondent never filed an answer to that Complaint. On November 2, 1994, 55 days after service, the Respondent had not filed a response to the Request for Admissions. On December 27, 1994, The Florida Bar filed a Motion for an Order deeming the matters admitted. On January 13, 1995, based upon the Respondent's failure to file a response, an Order was enforced deeming the matters contained in the Request for Admissions as admitted. On January 19, 1995, 78 days after service, the Respondent filed his Response to the Request for Admissions. On April 5, 1995, a hearing was scheduled on the Florida Bar's Motion to Strike the Respondent's Response. That on April 5, 1995, the Respondent filed a Motion to Accept Delayed Filing of Response to Request for Admissions. On April 11, 1995, an Order was entered granting The Florida Bar's Motion to Strike the Responses to Request for Admissions filed by the Respondent.

A hearing was held before the Referee on April 24, 1995, and the Referee entered his report on the 26th day of May, 1995.

On the 19th of July, 1995, the matter was submitted to the Board of Governors, and at an ex-parte review no action was taken concerning the Referee's recommendation. By ex-parte, it is meant that counsel for the Respondent was present and requested to be allowed to appear before the reviewing Sub-Committee, which request was denied, even though counsel for The Bar was allowed

to attend.

As an aside, it was reported that the Sub-Committee was advised that they had no discretion except to accept the findings and recommendations of the Referee. It is not known whether this Representation was made to the Sub-Committee, but if so, it means that the Board of Governors' review is a meaningless action.

The Referee, in his report, made findings of fact which track specifically the thirty-seven (37) requests for admissions propounded by The Florida Bar.

Based upon the above, the Referee made the following recommendations:

> "I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of the Rules of Professional Conduct:
>
> 1. Rule 4-3.3(d) for failing in an ex parte proceedings to inform the tribunal of all material facts known to him that would enable the tribunal to make an informed decision.
>
> 2. Rule 4-3.4(c) for knowingly disobeying an obligation under the rules of the tribunal.
>
> I recommend that the Respondent be found not guilty of violating Rule 4-1.5(c) of the Rules of Professional Conduct."

STATEMENT OF THE FACTS

This disciplinary action was allegedly commenced as a result of a newspaper article in the Miami Herald and not as a result of the complaint of any parties to the litigation. (A. 37, 38). It is important to note however, that a contemporaneous proceeding was filed by the Bar on the complaint of BETTERS, who stated he was represented by "HATFIELD" (A.5) and HATFIELD, herself, stated in open court she was going to contact the Bar. (A. 6,7)

> TOBIN . . . If you look back at my letters and if any Court wants to look back at my records or as counsel suggested if the Bar Association looks back at my records, I will stand on what I've done and I would never make a threat --
>
> MS. HATFIELD: I did not threaten. I made a statement for the record. I am going to the Bar.
>
> MR. TOBIN: May I finish what I'm saying? I would never suggest in front of a Court a threat to the Bar Association --
>
> MS. HATFIELD: I'm going to the Bar Association.
>
> MR. TOBIN: -- as appropriate argument nor voice on the record such a threat.
>
> MS. HATFIELD: I really believe what you did was improper.
>
> MR. TOBIN: You do it, you don't threaten.
>
> MS. HATFIELD: I'm not threatening. I'm making a statement.

In approximately April, 1988, TOBIN filed a lawsuit on behalf of PLANE ADDS to establish insurance coverage on an airplane which had been involved in a crash resulting in the destruction of the airplane and the death of two (2) individuals. The insurance company, AVEMCO was the insuring company.

The lower court, on the basis of improper cancellation notice, entered a judgment determining that there was coverage, which judgment was appealed by AVEMCO. The Fourth District Court of Appeal, in AVEMCO v. PLANE ADDS, INC., 555 So.2d 865 (4th DCA 1989), affirmed said judgment on December 20, 1989. The insurance policy upon which the suit was based listed BETTERS and PIPER as loss payees. (A. 39). Neither BETTERS or PIPER moved to intervene, filed a claim of lien nor were they interpleaded during the proceeding.

On February 9, 1990 the Defendant, AVEMCO, pursuant to its Motion to Deposit Judgment Proceeds into Court Registry, deposited the sum of $48,215 into the Court Registry to satisfy the Final Judgment entered against it in the pending action. (A. 40). This Motion was granted and an unrestricted Order was entered. (A. 44,45). At this time, the only parties to the action were PLANE ADDS and AVEMCO. On or about February 20, 1990, BETTERS moved to intervene on the basis that some of the proceeds in the Court Registry belonged to him. (A.46 - 49). This Motion for Intervention was denied by the trial judge based upon the existing law as espoused in Maryland Casualty Company v. Hanson Dredging, Inc., 393 So. 2d 595 (4th DCA 1981). (A. 50 - 53). Prior to the attempt to intervene, PLANE ADDS, through TOBIN, had moved and had obtained an Order allowing it to withdraw $15,792.00 of the $48,215.00, which undisputedly was the amount owed to PLANE ADDS, without consideration of any claims by BETTERS and PIPER.

Subsequent to the denial of BETTERS' Motion to Intervene, TOBIN, on behalf of PLANE ADDS, obtained an ex parte Order from the Court directing the Clerk of the Court to pay the remaining $32,423 to PLANE ADDS, the only party in the lawsuit entitled to receive the funds.

On the 3rd or 4th of April, TOBIN was given telephone notice from HATFIELD that she was going to contact the Court on an emergency basis concerning the withdrawal of funds. TOBIN had

in his possession the check from the Clerk of the Court of Broward County, made payable to PLANE ADDS, which was withdrawn on April 2nd. Because of the telephone call, TOBIN did not know whether or not he should deliver the check to his client under those circumstances and called The Florida Bar Hot-Line to obtain an opinion on how to proceed. The Hot-Line, according to TOBIN'S testimony, told him that he had an ethical duty to deliver the check to his client (A.54 - 56).

On the 6th of June, 1990, four days after the funds were withdrawn, Judge Price entered an Order directing PLANE ADDS and its attorneys to return the $32,423.00 to the Court Registry. In the Order, prepared by HATFIELD, HATFIELD specifically stated that AVEMCO deposited the funds to satisfy the judgment against it. The said HATFIELD also included in the Order the following statement:

> These funds rightfully and legally belong to the lienholder, Piper Acceptance Corporation, pursuant to the insurance policy, and in satisfaction of the final judgment. Douglas Betters has assigned his rights to the proceeds of the insurance policy to Piper Acceptance Corp. to the extent necessary to satisfy their settlement agreement.

Nowhere in the record or proceedings was there ever a determination of entitlement as to whom the remaining funds should be paid.

As of April 2, 1990, PLANE ADDS was the only party in the pending lawsuit entitled to the $32,423.00, although it was always admitted that there may have been claims to these funds, either by PIPER or BETTERS, on properly establishing the same. No restrictions were contained in the Order allowing AVEMCO to deposit the funds into the Court Registry. (A. 44, 45).

Although AVEMCO claimed the remaining funds belonged to PIPER, there was a question as to whether or not PIPER had already been paid. PIPERS' agent, in sworn testimony, stated that on the date of cancellation was to be affected, she contacted PIPERS' own single interest carrier and

added the aircraft to PIPERS' coverage. This fact was also affirmatively contained in AVEMCO'S Memorandum of Law filed with the Court. (A. 26 - 36).

After the Court had granted PLANE ADDS' Motion for Withdrawal of Funds, the Court entertained a Motion to Vacate that Order, and by separate Order dated June 5, 1990, required the Plaintiff, PLANE ADDS, and its attorneys, return the $32,423.00 to the Registry of the Court. At a subsequent date, pursuant to a motion of AVEMCO, a hearing was held as to why PLANE ADDS and its attorneys should not be held in contempt of court for failing to return the funds, and at that time Judge Price, after learning that TOBIN never received any part of the $32,423.00 and that the check payable to the P.A. in this amount was delivered to PLANE ADDS, entered an Order on December 21, 1990, refusing to hold TOBIN in contempt.(A. 57).

Some eleven (11) months later, in November, 1991, after Judge Price retired from the bench, AVEMCO, through HATFIELD, again moved to have TOBIN held responsible for the return of the funds he never received in a proceeding before Judge Price's successor, Judge Grossman. Judge Grossman, after being informed that Judge Price denied the Motion to hold TOBIN in contempt, issued his own Order requiring TOBIN, individually, to be responsible for returning the monies to the Court. (A. 58). On April 1, 1992, Judge Grossman allowed TOBIN to deposit $38,179.19, which represented the amount to be returned, plus interest, as a form of supersedeas pending an appeal of his order to return funds. (A. 59).

The Fourth District Court of Appeal, in a per curium opinion, affirmed Judge Grossman's Order. After the appeal had become final, AVEMCO and PIPER moved for, and were paid, the entire amount that was withdrawn from the Registry, plus interest. Not only did TOBIN comply with the Order to return the funds from his own pocket, but he paid substantial fees in the

proceedings before Judge Price, Judge Grossman and in the appellate court. Neither PIPER, or BETTERS ever moved to recover the funds from PLANE ADDS or PHILLIPS, or move to have the Court enforce its contempt order against PHILLIPS.

POINTS ON APPEAL

POINT I

PROCEEDING EX-PARTE TO OBTAIN AN ORDER DIRECTING THE CLERK OF THE COURT TO DISBURSE FUNDS DEPOSITED IN THE COURT REGISTRY TO THE ONLY PARTY IN THE CASE ENTITLED TO THOSE FUNDS DOES NOT CONSTITUTE GROUNDS FOR SUSPENSION.

POINT II

AN ATTORNEY SHOULD NOT BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF 45 DAYS ON THE BASIS OF KNOWINGLY DISOBEYING AN OBLIGATION UNDER THE RULES OF A TRIBUNAL WHEN IN FACT THERE WAS NO SUCH DISOBEDIENCE.

SUMMARY OF ARGUMENT

The Respondent should not be suspended for something he did not do based on his failure to timely respond to Requests for Admissions.

If The Florida Bar wishes to bring an action against Respondent for failure to act with reasonable diligence in responding to the Bar complaint and Request for Admissions, the Respondent, as he did before the Referee, must plead guilty. However, it is entirely inappropriate for The Florida Bar to propound Request for Admissions, no matter how innocently done, which contain false facts and then rely on the failure to respond to the same as grounds for discipline. In making a determination as to the recommended discipline, the Referee must consider whether or not the Respondent actually did what he was accused of doing. No consideration of the aggravating or mitigating circumstances can be meaningly evaluated or applied if the premise for the discipline does not exist. Therefore, the Referee erred as a matter of law when he failed to consider the truthfulness of what was contained in the Request for Admissions. In addition, the Referee erred as a matter of law in accepting as true Request for Admissions which included conclusions of law.

ARGUMENT

POINT I

PROCEEDING EX-PARTE TO OBTAIN AN ORDER DIRECTING THE CLERK OF THE COURT TO DISBURSE FUNDS DEPOSITED IN THE COURT REGISTRY TO THE ONLY PARTY IN THE CASE ENTITLED TO THOSE FUNDS DOES NOT CONSTITUTE GROUNDS FOR SUSPENSION.

The Referee's first recommendation found on page 8 of his report (A. 67) is

> "1. Rule 4-3.3(d) for failing in an exparte proceedings to inform the tribunal of all material facts known to him that would enable the tribunal to make an informed decision."

This finding must be based on either the Request for Admissions itemized below or on the evidence submitted during the Referee's proceedings. If there were no ex-parte proceedings, where the attorney actually met the Judge, then the failure to inform is a meaningless statement.

The Referee's report of May 26, 1995 (A.60 - 70) recites on pages 4 and 5 the following findings of fact, which were adopted directly from the Request for Admissions:

> O. That in furtherance of the request made on April 2, 1990, Sapiro participated in an ex-parte meeting with Judge Price, and represented to the Court that the motion for the release of the remaining funds was unopposed.
>
> P. That based upon Sapiro's representation that the motion to withdraw the remaining funds were unopposed, the Court ordered the release to Sapiro of the remaining $32,423 held in the Court Registry.

Such meeting never occurred nor were such representations ever made. The first expression of such occurrence was in "O" and "P" of The Florida Bar's Request for Admissions. This assertion by The Florida Bar could have come only from one source, that being HATFIELD, who, in an irregular circumstance, later testified to the same. (A. 8). The irregular circumstance was that in the

disciplinary proceeding HATFIELD appeared by phone and, although no one was present at the place HATFIELD was located to identify her or swear her in, the Court Reporter at the Bar office was to supposedly administer an oath to a person she could not see or did not know. What in fact happened, after objections to the procedure, was that the Court forgot to have her sworn in.

For the first time in all of the proceedings, HATFIELD alleged that a positive misrepresentation was made to Judge Price at an ex-parte meeting with Judge Price.

The first chronological statement of what happened was included in an Order signed by Judge Price but authored by HATFIELD.

> **JUDGE PRICE**: Sure. I was not the author of that order, although I did sign it. I just said I was not the author of that order and I was not the author of a good portion of the order. I signed it as a circuit judge and I am sure I read it over and had no problem in signing it, which I did. Ms. Hatfield in all probability was the author. I do not know. [Emphasis supplied]

Order Directing Plaintiff Plane Adds, Inc. and its Attorneys to Return Funds to Court Registry provides, in relevant part:

> .....
>
> "8. That by presenting the Motion and Order to release the funds without a hearing, Plaintiff's attorneys impliedly represented to the Court that the Defendant had no opposition to the Motion and Order." (A. 12) [Emphasis supplied]
>
> .....

At a hearing on June 14, 1990, Judge Price stated:

> .....
>
> "I saw an order come through here and I assumed that the matter had been concluded and settled and I signed the order and I think perhaps I may have been remiss in not making more of an inquiry." (A. 16) [Emphasis supplied]
>
> .....

At a hearing on April 6, 1990, HATFIELD made the following representation to Judge Price:

> .....
>
> MS. HATFIELD: What happened was the order was signed

> before I ever received the motion. The motion was filed, the order was signed the same day. I got the motion the next day. I called your secretary immediately and said, "Don't let the Judge sign the order until we have had a chance to file an opposition to this motion and get a hearing date." And she said, "Whoa, it's already been signed."....
> (A. 9, 10)
>
> .....

It would appear that the recollection of HATFIELD in drawing the order of April 7th and her statement to the Court on April 6, 1990 contained a better recollection of what occurred. She certainly would not have used the words in the April 7th Order that there was an implied representation, if in fact she knew there was an ex-parte meeting where an actual misrepresentation was made. Furthermore, the Judge would not assume if someone had talked directly to him.

SAPIRO did deliver a Motion and Order to the Court's office on April 2, 1990, pursuant to the directions of TOBIN. However, no one testified that he met with the Judge or made any misrepresentations.

The question to be answered is whether or not, pursuant to the Florida Rules of Civil Procedure or Local Court Rules, it is necessary for a party to give notice to the opposing party for application for the withdrawal of funds from a Court Registry when the opposing party has deposited the same in the Court Registry in satisfaction of its judgment?

Section 55.141, Florida. Statutes, (1993), does not address this issue. It simply states in sub-section (2)

> [U]pon request therefor, shall pay over to the person entitled, or to his order, the full amount of the payment so received, less his fees for issuing execution on such judgment or decree, if any has been issued, and less his fees for receiving into and paying out of the registry of the court such payment, together with the fees of the clerk for receiving into and paying such money out of the registry of the court.

The unusual circumstance in this case was that there were other claiming entities to those

funds but they were not parties to the action, and the one who had moved to intervene had his motion denied.

The other party (PIPER), who had not moved to intervene, had, through its authorized agent in sworn testimony, stated that it had obtained insurance which would have satisfied the underlying obligation. In addition, PIPER had admitted that it had obtained a judgment in another action against another party for the same funds it was claiming in this proceeding and had moved for execution on the same. Under these circumstances, it is believed that there was no necessity of providing notice and that the funds should have been delivered to PLANE ADDS, the judgement holder, upon ex-parte application. TOBIN'S position, as expressed at the hearing of the 6th of April, 1990, cogently summarizes what occurred and his basis for his action:

> **THE COURT**: All I'm saying, at this point as a practical matter, the money has already been released. It has already gone. So, a few more days is not that vital and if it's necessary --
>
> **MR. TOBIN**: Your Honor, this is not a petition to intervene or for interpleader.
>
> **THE COURT**: I understand.
>
> **MR. TOBIN**: This is her attempt to hide what she has done.
>
> **THE COURT**: You're technically the only party I think probably technically in this suit. And there has been no motion to intervene that has been granted. It is true that Ms. Hatfield came forward and, in effect, put the money in this registry of the Court.
>
> **MS. HATFIELD**: To prevent exactly what's happening.
>
> **THE COURT**: That you claimed you have a judgment you had a right to have satisfied and --
>
> **MR. TOBIN**: Absolutely. I can tell you I told Ms. Hatfield when you denied it and I sent a letter to counsel. I gave them terms of

> settlement prior to your Honor's ruling on the question of intervention and said we can settle on this basis, that basis and another basis, but, fellows, don't reach into my pocket and take my money away from my client so you can get more money because of a deal you worked out between Mr. Betters and Piper.
>
> Prior to that order coming in we had an offer on the table as to how to divide the funds which I indicated was rejected at that time. And they knew of this. They all knew of this. Ms. Hatfield knew what our position was when your Honor denied the intervention that those funds belonged to us and I would submit, your Honor, it's improper for counsel to suggest that I'm doing anything improper. She had full knowledge that's exactly what we were going to do based upon the motion to intervene with Mr. Betters and the denial of the motion.
>
> And what she's done here is simply filed another motion in another style to say, "Judge, why don't you intervene in this case and, in effect, give Betters or Piper whatever relief they want."
>
> I think she's got no standing to do that when she put the funds in the Registry of the Court. This is not an interpleader action by putting in the Registry put in on behalf of the Defendant for the plaintiff to withdraw because it stops interest running at that time. That money becomes ours and we don't earn the interest on the money while it sits in the Registry of the Court.
>
> That sat there for two months. We negotiated and sent letters. When your Honor entered the order denying the motion to intervene we proceeded and if she said she didn't know that's what we were going to do, Judge, then there is a tooth fairy." (A.71 - 73)

It is believed that the question before this Court is whether or not it is necessary to give notice to opposing counsel when one seeks to remove funds, which were deposited by opposing counsel's client to satisfy a judgement, and when, further, there are other parties claiming interests in the funds who have not been interpled, have not filed a lien, did not move to intervene, and their motions to intervene were denied.

ARGUMENT

POINT II

AN ATTORNEY SHOULD NOT BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF 45 DAYS ON THE BASIS OF KNOWINGLY DISOBEYING AN OBLIGATION UNDER THE RULES OF A TRIBUNAL WHEN IN FACT THERE WAS NO SUCH DISOBEDIENCE.

Since there was specificity in the Referee's report as to what obligation under the rules of a tribunal TOBIN knowingly disobeyed, it must be assumed that the Referee was considering sub-paragraphs (q), (s), (t), (y), (bb), (ff), (gg), (hh), or (kk). Q, S, and T are as follows:

> Q. That prior to April 2, 1990, the Respondent had not contacted Avemco to discuss the release of the remaining $32,423.00 from the Court Registry, nor confirmed whether Sapiro had contacted Avemco prior to the hearing before Judge Price on April 2, 1990. (A. 64)
>
> S. That at the time the $32,423.00 in funds were withdrawn from the Court Registry, the Respondent was aware that by law, he was required to serve proper notice of hearing upon the opposing party within a reasonable time before the hearing in accordance with the Florida Rules of Civil Procedure. (A. 64)
>
> T. That the Respondent was also aware on April 2, 1990, that a proposed order of judgments must be furnished to opposing counsel prior to its submission to the Court, in accordance with the Local Rules of Court, Rule 8. (A. 64)

If there was no need to give notice as argued under Point I, then Q, S and T are immaterial and then the Referee's "knowingly disobeying an obligation under the rules of the tribunal" would not constitute a breach of the Rules of Professional Responsibility.

It must now be assumed that the Court was directing its determination of violation, 4-3.4(c), at the failure to return the funds to the Court Registry. It must be assumed that TOBIN should be

accorded the same rights in a judicial proceeding as any other citizen of the State of Florida. When Judge Price, in his Order of December 21, 1990 (A. 57) refused to hold TOBIN in contempt, he stated he did so because TOBIN didn't receive the money. This would, in most men's minds, indicate that the return of the funds should be from the person receiving the funds, not the attorney.

Despite this ruling, eleven months later, after Judge Price had retired, AVEMCO, through HATFIELD, was successful in getting the successor judge to enter a new order (A. 58). During the proceedings in front of Judge Grossman, TOBIN sought, through counsel, the right to deposit the funds and anticipated interest in the Registry of the Court pending the outcome of his appeal in the Forth District. Pursuant to court authorization, This was done. After the Fourth District Court of Appeal affirmed Judge Grossman's rulings, the funds were withdrawn by PIPER without there ever being a determination that PIPER was factually entitled to the funds.

The Referee, in his statements at the end of the proceedings, made the following comments:

> **THE COURT**: The Court has heard the testimony of the witnesses by affidavit and also a lot of testimony, but it has not had an opportunity to review all the exhibits.
>
> It is apparent, and as counsel for Mr. Tobin has stated, that an attorney must represent his client to the fullest. An attorney also has to play by the rules. We do have certain rules set forth relating to the Florida Bar. It is important that each of you as attorneys follow the rules. We have those rules and there is no reason to not follow them.
>
> We have a situation here where a judgement has been entered in favor of Mr. Tobin. The complaint is that after numerous appeals, the judgment was finally appealed and funds were deposited in the registry of the court in February of 1990, by the attorney for the defendant in that case, Ms. Hatfield. It appears that there was no response filed by Mr. Tobin on behalf of his client at that time and the funds sat there in February, March and also the beginning of April. During that period of time certain funds were withdrawn, $15,000 fee, but the balance still remained there and the remainder, because I have seen up

> to this point, probably anticipating some sort of claim being filed against those funds by either Mr. Betters or by Piper Air Corporation.
>
> Mr. Betters did file a motion to intervene, which was subsequently denied by Judge Price. And thereafter, the clock started ticking and things started happening in this particular case.
>
> We have a situation where Mr. Tobin advised myself today as the referee, that he believed that Mr. Betters did not have a course of action in this case and after his ability to intervene was denied by the Judge, he felt there was no necessity of notifying the attorney for the defendant, so one of his associates, with his full consent went to Judge Price and obtained an ex-parte order to release the funds.
>
> Thereafter, and I think notice should have been sent to opposing counsel because for the last two months those funds were sitting there and they were sitting there based upon that attorney's motion to put the funds there, the funds had been sitting there, notice should have been sent, but it was not. (A. 74 - 76)

If this was the Referee's thinking, then it makes no sense. The funds were not taken for two months until after the Motion for Intervention was denied. The fact that they were sitting for two months has no bearing on the necessity or non-necessity of notice. It only shows that TOBIN waited until the Court ruled on BETTERS Motion to Intervene.

The Referee continued:

> Why this matter becomes more complicated and complex is that two days later or a short time thereafter, with Mr. Tobin having the funds in his hands in the form of a check made payable to his client -- and he has an obligation to give the funds diligently to his client -- but when he has them in his possession a light goes on and he decides to call the Florida bar. An attorney also needs to be aware that when a light goes on, something is not right.
>
> Ms. Hatfield is calling Mr. Tobin's office and advises him that she is going to be setting down a motion concerning the release of the funds to Mr. Tobin, for Mr. Tobin's client
>
> There is not doubt that the funds were given to Mr. Tobin. Mr. Tobin

then advised the Court. He called up the Florida Bar with some people present to get their opinion on what to do. However, Mr. Tobin has been practicing for a long time in this County and when you are placed on notice that an attorney has filed a motion -- while we all have a right to exercise a diligent effort to give the funds to our client, we also have an obligation that when the red light goes on that says there is a problem with this thing, you do not unilaterally react and do what you think you want to do for the benefit of your client, specially when you know there is a probability of a problem arising for whatever reason.

After the Florida Bar had notified Mr. Tobin per phone call -- I have no doubt that he did make the phone call -- he decided to give those funds over to his client. At that point in time he was placed on notice. There was still someone intervening or someone else who was still claiming -- and I know by Mr. Maloney's testimony or closing statement -- there is no doubt in Mr. Tobin's mind that something should have been done by either Piper Air or someone else on someone's behalf.

If you sit down and you look, I am not blaming Mr. Tobin for the conduct of others in not taking the appropriate action. However, when you are placed on notice that you should not be doing something and you still disburse the funds, with that you are really violating your duty as an attorney to take the proper procedure. If you are placed in a certain ball park, you must play by the rules. Those are the rules we have. You cannot take it upon yourself to do what you thing might be right for your client. You had to follow the determination made by the Court previously.

Based upon the Court's finding on the response to the request for admissions, the court has found guilt in this matter". (A. 76 - 78)

The above statements of the Referee again make no sense if they are directed towards the findings of the Referee. When "the light goes on" the notice requirements, if any, already passed. TOBIN was not found guilty of wrongfully delivering the proceeds obtained from the Clerk of the Court to the rightful judgment holder.

The Referee then made the statement:

"I am going to recommend that Mr. Tobin be suspended. I can say that when I first read all the proceedings and everything in this case, I was contemplating a ninety-day period. However, based upon the testimony of Judge Price's, who came before me today where he basically was saying this is a tragedy of this whole situation, I think that had Mr. Tobin come before him in the setting of proper notice of counsel, sitting down to talk and saying, Judge, those funds are being held and you denied any party to intervene in this case. I want you to release those funds to my client. I believe Judge Price would have released the funds. And I think Judge Price, based upon the testimony before me today, would have properly done it.

The reason this thing has blown out of proportion, that blew up like it did, was because for whatever reason, Mr. Tobin was trying to protect the interest of his client and feeling frustrated that the funds were sitting there for so long. By trying to short circuit the system, Mr. Tobin placed himself in a position where I feel that based upon everything, I am going to recommend that a suspension of 45 days be submitted to the Supreme Court.

And again, it amazes me that had the proper procedure been followed, I think this case would have been closed down on April 2nd, or 3rd, or 4th as long as proper notice was filed with defense counsel." (A. 79, 80)

The fact that Judge Price thought the situation was a tragedy, and that Judge Price would have released the funds, had nothing to do with the charges against TOBIN. It seems that the Referee based his 45 day suspension on TOBIN'S attempt to "short circuit the system".

Again, there was no evidence at all that TOBIN knowingly disobeyed the rules of a tribunal. He paid the money from his own pockets, pursuant to Court Order.

What the evidence did show, and what appears to have been the precipitating cause of this entire proceeding, was expressed by Judge Price in his testimony before the Referee as follows:

By Ms. Chavies:

Q. Judge, with regards to your order that allowed the release of those original $32,000, that order, you did reverse your order and required that those funds be placed back into the court registry?

A. Yes.

Q. That was based upon the improper removal of the funds?

A. I am not positive. I certainly would not want to be influenced by anything other than what was entirely legally correct and proper.

In retrospect, looking back over, I am sure now I would like to feel that is exactly what I thought was correct. I am not positive if I was influenced by Ms. Hatfield's problem, which I thought at the moment was.

Q. I do not want you to get into speculations of what the motive was. Ms. Hatfield is not here.

MR. MALONEY: It was not the motive of Ms. Hatfield, but the motive of the judge.

THE COURT: Any redirect examination?

Judge Price further testified:

By Mr. Maloney:

Q. Were you concerned in getting the money back because Ms. Hatfield might be sued for malpractice?

A. Yes.

Q. There were no other parties other than Avemco and Plane Adds in the lawsuit; is that correct?

A. My impression is this, that this litigation came over here from over in the West Coast, where there apparently had been an attempt to start it. It came from there over to our circuit. I was not at all sure, in retrospect, whether anybody but Mr. Tobin's client had an interest in the money. By the time we had gotten to the point I signed

the order allowing the funds to be removed. This was not an appeal bond. And I am not sure what was then pending or that anybody else had a claim for the money. And I did not see any reason not to go ahead and sign an order for it.

Ms. Hatfield came in and she was quite concerned. I do not mean I was influenced by Ms. Hatfield. She brought it to the Court's attention. She was greatly concerned and I am not certain if the concern for her may not have affected my thinking, although I was never going to do anything other than what was legally correct.

MR. MALONEY: I have nothing further. (A. 81 - 83)

CONCLUSION

When AVEMCO chose to stop the running of interest and satisfy the judgement against it, without impleading parties that it alleged were entitled to some of the Judgement proceeds, it did so at its own peril and the funds so deposited were the property of the judgement holder to be released pursuant to Section 55.141(2), Florida Statutes (1993).

After being released of the obligation to return the funds to the registry of the court by Judge Price, TOBIN did return, from his own pocket, the funds in compliance with Judge Grossman's Order.

It is respectfully submitted that no Rules of Professional Conduct were violated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy hereof has been furnished to PAMELA PRIDE-CHAVIES, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by H.T. Maloney, Esquire, this 27th day of October, 1995

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