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

REPLY BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PREFACE

1. The Respondent will refer to **THE FLORIDA BAR** as **BAR.**

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

3. The **HONORABLE JOSEPH PRICE** will be referred to as **PRICE.**

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

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

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

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

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

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

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

11. Index references are to numbers on original appendex filed with original brief.

TABLE OF CITATIONS

CASES **PAGE**

STATUTES

SUMMARY OF ARGUMENT

In reading the Initial Brief of the Respondent, MICHAEL TOBIN, and the Answer Brief of THE FLORIDA BAR, it is obvious that the two parties are not arguing the same points. The BAR starts off by saying "The Admissions which were deemed admitted conclusively establish that the Respondent sought an ex parte order without informing the Court of all the material facts in violation of Rule 4-3.3(d)." If it is conclusively determined for all purposes, including the aggravating and mitigating circumstances, then there was no reason to have a hearing before the Referee.

If, however, during the hearing before the Referee, the Referee was obligated to consider the evidence presented in mitigation or aggravation, then, and in that event, the Referee should not ignore the reality of the facts as they existed, not as untruthfully phrased in the untimely answered Request for Admissions. It is submitted that the membership of The Florida Bar would be appalled that those persons representing the members of The Florida Bar are interested in a "gotcha" approach. Hopefully, if the integrated bar is to fulfill its function, the goal sought and the procedure utilized will be directed towards providing discipline to those who should be disciplined and protecting and being the champion of those in need of protection or consideration. The adversarial procedure utilized in bar proceedings should not terminate in an inequitable or unfounded result. TOBIN is not unaware of the effects of his failure to answer the Request for Admissions in this proceeding, but believes the circumstances are different than those in The Florida Bar v. Dubrow, 636 So.2d 1287 (Fla. 1994). In the present case, the BAR included pure conclusions of law in its Request for Admissions. Requests "S" and "T" contain the same and are at the heart of the basis for

the disciplinary proceeding. These conclusions were not applications of law to fact as permissible under Salazar v. Valle, 360 So.2d 132 (Fla. 3rd DCA 1978) and Pandol v. Brothers, Inc. v. NCNB National Bank of Florida, 450 So.2d 592 (Fla. 4th DCA 1984).

Simply stated, it is the Respondent's position that despite the procedurally established facts and "legal conclusion", which resulted from the Referee's striking of TOBIN's untimely Answers to the Request for Admissions, the facts established during the aggravating and mitigating proceedings and the record itself, unequivocally show there was no violation of the disciplinary rules as charged, or at least the circumstances would make it unequitable to claim such a violation.

The situation is similar to, although not completely analogistic with a person who, after being found guilty of murder, elicits facts during allocution proceedings that show the supposedly guilty party was in fact not guilty. "Would a Court then simply say "Well, I see he is clearly not guilty, but I am going to execute him anyway." Another example would be where Request for Admissions in a civil suit mistakenly indicated that the amount of the promissory note was one million dollars and the Request for Admissions was not answered. At the time of the foreclosure proceedings the tendered promissory note showed in fact that the indebtedness as evidenced by the original promissory note was one hundred thousand dollars. Would the Court enter a foreclosure in the amount of one-million dollars and possibly grant a deficiency on that amount?

ARGUMENT

POINT I

I. PROCEEDING EX PARTE TO OBTAIN AN ORDER DIRECTING THE CLERK OF THE COURT OT DISBURSE FUNDS DEPOSITED IN THE COURT REGISTRY WITHOUT FULLY INFORMING THE JUDGE OF ALL THE MATERIAL FACTS CONSTITUTES A BASIS FOR DISCIPLINE.

(As rephrased by BAR)

The BAR rephrased the Points involved on the appeal and then argue as if the facts contained within the Points on Appeal were conclusively true. When the BAR uses the words "ex parte" and the phrase "without fulling informing the Judge" as being uncontradictable ultimate statements of fact, it then concludes no circumstances are relevant in disputing this position.

The first determination must be whether or not, under the circumstances as they existed, where, without any restriction, money is placed into the registry of the court in satisfaction of a judgment, it is necessary to give notice to the party who deposited the funds of the intention to seek an order withdrawing the same. The BAR first states that Request for Admission "O" conclusively determines that Mr. Shapiro, when furthering his employment on behalf of TOBIN, made a false representation to PRICE. The evidentiary facts elicited before the Referee and in the record decry such statement. The only evidence before the Referee, which would give support to this allegation, was the testimony of HATFIELD given during the mitigation and aggravation proceeding hearing. (A- 8). As pointed out in TOBIN'S initial brief, this conflicted with previous testimony of HATFIELD, whose testimony, hearsay at best, was not the testimony of any other witness. (A- 9,

The BAR attempts to state that the Respondent argued that the client he represented was the only party in the case who was entitled to receive the funds. The BAR further says that this involved a factual question which was not an issue in the proceeding before the Referee. In fact, the record clearly indicated that same and it would be impossible for the Referee to ignore the circumstances under which TOBIN proceeded. The BAR further points out that AVEMCO never received notice of the hearing or did not see the proposed order. This is true. The BAR says that AVEMCO then objected to the disbursement. The objection was after the fact, and AVEMCO never put any restrictions upon the disbursal of the funds when it deposited the same. The BAR states that it is irrelevant in hindsight to determine whether or not anybody else had a financial interest in the proceeds. This is totally absurd in that if no one had any interest in the funds other than TOBIN'S client, then there was no necessity for notice. The BAR next takes the position that TOBIN is challenging the accuracy of some of the admissions. This is true. The facts elicited during the aggravation and mitigation proceeding show the facts as stated by the BAR were untrue. Should the Referee ignore such incongruently and inconsistency or must this be considered? The question before the Court is whether or not an attorney should be disciplined based upon untrue facts which were contained in unanswered Request for Admissions promulgated by the BAR. It is TOBIN'S position that this should not be done. It is TOBIN's position, now and before, that if the Court deems that TOBIN should be disciplined, it should be for his neglect in responding to the pleadings filed by the BAR. In that event, the lack of response should be the basis of such discipline, not as requested by the BAR, for false representations to the Court and failure to obey Court orders.

On the top of page 13, the BAR states the following:

> Furthermore, unless a matter may be heard ex parte, notice must be

> given. F.R.C.P. 1.090(d). F.S. 55.141 regarding funds in the court registry contains no provision for ex parte hearings. Therefore, it is clear that the ex parte conduct is improper."

This is another classic example of begging the question. Rule 1.090(d) of the Florida Rules of Civil Procedure states that when something may not be heard on an ex parte basis it is necessary to serve a copy of the written motion a reasonable time before the time specified for the hearing. What the Court must determine here is whether or not the request for an order directing the Court to release funds paid into the registry can be heard on an ex party basis. The BAR in the same statement quoted above states that Florida Statute 55.141 does not provide for ex parte hearings. This is quite true. TOBIN'S position is that if notice was required that the statute would read . . ."upon request therefore (and after giving notice to the person depositing the funds) shall pay over to the person entitled or to his order the full amount of payment so received, ...". It is a more logical interpretation that the omission of notice requirement indicates that the same can be done ex parte.

TOBIN has no quarrel with any of the cases cited by the BAR, but simply states that all of the same are totally irrelevant to the situation presently before the Court.

ARGUMENT

POINT II

II. IT IS ERROR TO SUSPEND AN ATTORNEY FOR REPEATED FAILURE TO COMPLY WITH COURT ORDERS, AGGRAVATING FACTORS, AND AN ADDITIONAL VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT.

(As rephrased by the BAR)

The BAR again starts out with the Request for Admissions and cites paragraphs X, Y,. AA, BB, GG, HH. The BAR then equivocates on what actually happened to TOBIN'S payment of $32,423.00. There is no question as to the fact that TOBIN paid the total $32,432.00, plus every penny of interest, back to the Court out of his own pocket. This, even though he did not receive one red cent of the monies, which were taken from the registry in the name of the client and given to the client. PRICE entered an order requiring the return of the funds by both the attorneys and the client, but at a subsequent date refused to hold TOBIN in contempt when it was determined that TOBIN never received any of the funds; rather they went directly to his client.

After PRICE left the bench, HATFIELD, with a new judge, GROSSMAN, who was assigned to the case, instituted proceedings to have TOBIN held in contempt. Eventually, GROSSMAN entered an order requiring TOBIN to return the funds but allowed TOBIN to place the funds into the registry of the court as a condition precedent to allowing him to proceed on an appeal before

enforcing a contempt citation. At the end of the appeal, the monies and all the interest was paid from TOBIN'S deposited funds. The order was in the form of a supersedeas and required TOBIN to place not only the $32,432.00 plus interest, but the additional amount that would be required under a supersedeas bond. The irony in this situation is that on the one hand, AVEMCO and its lawyer had the right to contest its liability for the payment under the insurance policy, to appeal the ruling of the lower court when it was ruled against them, and then to take advantage of the statute by absolving itself from liability and further interest by paying the monies into the registry of the court. On the other hand, the same AVEMCO and HATFIELD with righteous indignation, claimed foul when the successful Plaintiff obtained the release of the funds paid into the registry of the court and said that other people claiming an interest in these funds should not have to proceed legally the way TOBIN'S client had to proceed in order to establish their right, if any.

The BAR cites The Florida Bar v. Reed, 299 So.2d 583 (Fla. 1974) stating that suspension is appropriate in those cases in which the attorney's conduct is flagrant, not so heinous as to warrant disbarment, but is too serious for mere reprimand or probation. As the Referee pointed out, if TOBIN had given notice to AVEMCO, PRICE probably would have given the funds to TOBIN'S client and no problem would exist. It may have been the better part of discretion to have given notice to AVEMCO and let them have the opportunity to vent their claim of the unfairness in releasing funds which they had deposited without restriction, but that is not the question before the Court. The cases again cited by the BAR are in the opinion of TOBIN irrelevant to the issues and circumstance as they exist in the present case.

CONCLUSION

It is respectfully submitted that despite the unanswered Request for Admissions the facts as shown in the record and in the testimony elicited during the hearing on aggravating and mitigating factors conclusively show that no violation of the Rules of Professional Conduct occurred and that the Referee recommendation should be rejected.

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 21st day of December, 1995

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