

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court Case No. 76,797

Complaint,

The Florida Bar File No.
89-52,623 (17D)

v.

BARBARA L. WOLF,

Respondent,

_____ /

FILED
SID J. WHITE

JAN 16 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as referee to preside in the above disciplinary action by order of this Court dated December 18, 1990. By order dated June 20, 1991, the Court granted a sixty (60) day extension of time within which to conduct the trial and file the report of referee.

Due to prior commitments of the referee, the length and complexity of the record, and the necessity that the referee undergo a cataract operation since the trial, the referee has been unable until now to complete his review of the record and file this report.

Since the conclusion of the trial the attorney for the Florida Bar filed a Motion to Reopen the Bar's Rebuttal. The referee is of the opinion that the motion fails to allege sufficient grounds for reopening the Bar's rebuttal, and the same is denied.

The pleadings, transcripts of hearings and all other papers filed with the undersigned, which are forwarded to the Court with this report, constitute the entire record in this case.

Respondent appeared in person and by F. Lee Bailey, Esquire. The bar was represented by David M. Barnovitz, assistant staff counsel.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH
THE RESPONDENT IS CHARGED:

The parties entered into a stipulation which was confirmed by my order dated July 9, 1991. Pursuant to the stipulation, the bar withdrew and discontinued for all purposes, with prejudice, Counts VII through XV of its complaint. The bar also withdrew paragraph 19 of its complaint encompassed within its Count I. Respondent admitted to each and every factual allegation set forth in Counts I through V of the bar's complaint. As a result of the parties' stipulation, I find as follows with respect to each of the first five (5) counts alleged in the bar's complaint:

AS TO ALL COUNTS

1. At all times hereinafter mentioned respondent was and is a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

AS TO COUNT I

2. On December 16, 1982, respondent was appointed by the Circuit Court, Seventeenth Judicial Circuit, Broward County, Florida, in case number 82-3869, personal representative of the estate of John Francis Holbrook, deceased.

3. Respondent duly qualified to act as personal representative and letters of administration were issued to her on December 16, 1982.

4. Respondent thereafter acted as personal representative, attorney and accountant in the administration of decedent's estate.

5. Respondent made the following payments from decedent's estate to herself which payments were reported in her January 16, 1985 final accounting filed with and rendered to the probate court:

<u>DATE</u>	<u>ESTATE CK. NO.</u>	<u>ACCOUNTING FEE</u>	<u>ATTORNEY FEE</u>
02/14/83	107		\$ 2,000.00
03/07/83	115		\$ 3,000.00
03/22/83	117		\$ 500.00
05/06/83	126	\$ 500.00	
09/06/83	149		\$ 1000.00
11/03/83	159	\$ 500.00	
11/21/83	164	\$ 1,000.00	
11/30/83	165		\$ 1,000.00
04/28/84	200	\$ 500.00	
06/06/84	203	\$ 400.00	
07/02/84	204		\$ 400.00
<u>TOTAL</u>		\$ 2,900.00	\$ 7,900.00

6. In her January 16, 1985 petition seeing her discharge as personal representative and other relief, respondent represented as follows:

6. Petitioner has paid or proposes to pay compensation to the personal representative in the amount of \$0.00, to the attorney in the amount of \$7,900.00, to the accountant in the sum of \$2,900.00, to appraisers in the amount of \$260.00 and to other agents employed by the personal representative in the sum of \$0.00.

7. In her final accounting, respondent represented under Schedule B, "Cash Disbursement", as follows:

<u>CHECK NO.</u>	<u>PAYEES</u>	<u>AMOUNT</u>	<u>DATE</u>	<u>PURPOSE</u>
205		Void		
206		Void		

8. In her final accounting, respondent, at the conclusion of her accounting, subscribed her name to the following declaration:

Under penalties of perjury, I declare that I have read and examined the foregoing accounting and that the facts and figures set forth therein are true to the best of my knowledge and belief, and that it is a true return of all moneys received and paid paid out by me as personal representative of the Estate of John Francis Holbrook, deceased from July 19 (sic) through January 16, 1985.

9. On My 2, 1985, the probate court issued an order discharging respondent as personal representative and releasing the surety on her bond on the basis of respondent's final accounting and the report of distribution filed by respondent which report was predicated upon such final accounting.

10. In truth and in fact, the final accounting filed by respondent does not constitute a true return of all monies received and paid out by respondent as personal representative during the period embraced by the accounting, viz., July 19, 1982 through January 16, 1985.

11. Estate check number 205 represented by respondent as "void" as recited in paragraph 7 of the complaint in this cause, was in fact, issued by respondent on or about July 18, 1984 in the sum of \$3,500.00 payable to "Barbara Wolf Trust" and deposited the same date in the Barbara L. Wolf Professional Association Trust Account 1478006731 (hereinafter called "client trust account")* maintained by respondent at Barnett Bank.

12. On or about July 18, 1984, respondent issued her client trust account check number 809 in the sum of \$3,500.00 payable to herself which check respondent deposited to her operating account the same date.

13. Respondent thereafter expended the \$3,500.00 from her operating account applying the same to purposes having no connection or nexus to decedent's estate.

14. Estate check number 206 represented by respondent as "void" as recited in paragraph 7 of the complaint in this cause, was in fact, issued by respondent on or about July 10, 1984 in the sum of \$10,000.00 payable to "Barbara Wolf Trust" and deposited the same date in respondent's client trust account.

15. On or about July 10, 1984, respondent issued her client trust account check number 806 in the sum of \$9,000.00 payable to herself and deposited the same on the same date to her operating account.

*All references in this count and in subsequent counts to "client trust account" refer to account #1478006731.

16. Respondent thereafter expended the \$9,000.00 from her operating account and the balance of estate fund in the sum of \$1,000.00 remaining in her client trust account to purposes having no connection or nexus to decedent's estate.

17. On or about October 22, 1984, respondent deposited to her client trust account the sum of \$400.00 representing an **I.R.S.** refund to decedent's estate.

18. Respondent thereafter expended the \$400.00 from her client account to purposes having no connection or nexus to decedent's estate.

19. Respondent was aware of the facts recited in paragraphs 11 through 18, inclusive of these findings when she prepared and filed her accounting.

AS TO COUNT II

20. On or about February 13, 1984, respondent received and deposited to her client trust account the sum of \$5,000.00 which sum was entrusted to respondent for the specific purpose of application to the purchase of certain property, the transaction designated by respondent as "Nassr/Klingerman".

21. By June 30, 1984, respondent had issued checks from her client trust account, the **total** of which exceeded her client trust account balance to the extent of \$918.22, with no expenditure or disbursement having any connection or nexus to the Nassr/Klingerman transaction.

22. On July 6, 1984, respondent received and deposited to her client trust account **for** the specific purpose of application to the Nassr/Klingerman transaction the sum of \$66,503.26.

23. On or about July 12, 1984, respondent received and deposited to her client trust account **for** the specific purpose of application to the Nassr/Klingerman transaction the sum of \$2,994.40.

24. During July, 1984, respondent disbursed a total of \$71,199.29 on account for the Nassr/Klingerman transaction, or, \$1,701.63 more than the amount held by respondent in her client trust account **for** the specific purpose of application to the Nassr/Klingerman transaction.

AS TO COUNT III

25. On November 6, 1984, respondent received and deposited to her client trust account the sum of \$80,426.82 for the specific purpose of application to a transaction designated by respondent as "Speck/Woods/Kraft/Olive", hereinafter called "SWKO".

26. On November 6 and November 7, 1984, respondent issued the following checks from her client trust account in connection with SWKO:

<u>DATE</u>	<u>CHECK NO.</u>	<u>PAYEE</u>	<u>AMOUNT</u>
11/06/84	986	Barnett Bank	\$ 24,819.89
11/06/84	987	Barnett Bank	\$ 5,577.07
11/06/84	988	John Aurelius	\$ 250.00
11/06/84	990	Properties By the Sea	\$ 1,000.00
11/06/84	991	Nancy E. Kraft	\$ 50.00
11/07/84	1000	Broward County	\$ 349.00
11/07/84	1001	Wimer	\$ 48,228.61
<u>TOTAL</u>			\$ 80,274.82

27. On November 29, 1984, when check number 1001 in the sum of \$48,228.61 was presented for payment, it was dishonored due to insufficient funds in respondent's client trust account which, on that date, had a balance of \$41,780.14, or, a shortage in respondent's client trust account liability in the SWKO transaction to the extent of \$6,448.47.

AS TO COUNT IV

28. On October 1, 1984, the balance in respondent's client trust account was the sum of \$1,576.52.

29. During the period from October 1, 1984, through October 15, 1984, in addition to the balance of \$1,576.52, as aforesaid, respondent received from certain land trusts sums totaling \$24,736.01, which sums she deposited to her client trust account.

30. On October 15, 1984, respondent issued her client trust account check 930 in the sum of \$7,151.54 payable to the John Watkins Trust identifying such payment as pertaining to "Settlement of Claypool," a transaction having no connection or nexus to the land trusts underlying the \$24,736.01 receipts in paragraph 29 of these findings.

AS TO COUNT V

31. On or about July 16, 1980, respondent opened an interest bearing trust account (Barnett Bank Account #6482601551) designated as "Wolf and Melvin, P.A. in trust for Joseph Nemetz."

32. On March 31, 1984, the balance in such escrow account was \$3,323.56.

33. On August 27, 1984, respondent withdrew \$3,300.00 from the Nemetz trust account and deposited the same to her non-interest bearing client trust account, which, prior to such deposit, had a balance in the sum of \$938.42.

34. Respondent thereafter issued the following checks from her client trust account:

<u>DATE PAID</u>	<u>CHECK NO.</u>	<u>PAYEE</u>	<u>AMOUNT</u>
08/27/84	845	Barbara Wolf	\$ 800.00
08/28/84	820	Atlantic Federal	\$ 486.00
08/28/84	839	Chase Federal	\$ 590.00
08/28/84	829	Atlantic Federal	\$ 728.00
08/28/84	825	Atlantic Federal	\$ 886.00
<u>TOTAL</u>			\$3,490.00

35. None of the five (5) payments comprising the \$3,490.00 as enumerated in paragraph 34 of these findings had any connection or nexus to the Nemetz transaction.

36. Respondent restored the \$3,300.00, without interest, to the Nemetz trust account on July 10, 1986 from a trust account maintained by respondent at Sun Bank, account #4176515584.

37. Respondent thereafter never deposited to the nemetz trust account any additional sums representing interest for the period from August 27, 1984 through July 10, 1986.

III. RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

As the violations respondent committed occurred prior to January 1, 1987, reference herein will be made to the Fla. Bar Integr. Rule and to the Code of Professional Responsibility. I recommend that the respondent be found guilty of the violations set forth in Counts I, II, III and V of the Complaint.

I find that Count IV of the complaint has not been proven by clear and convincing evidence. Therefore, I recommend that respondent be found not guilty of Count IV of the Complaint.

AS TO COUNT I OF THE BAR'S COMPLAINT

1. By filing her final accounting and thereby representing to the probate court, the parties interest in decedent's estate and to the world that the receipts and disbursements itemized therein constituted a true return of all monies received and paid out by respondent when in truth and in fact, respondent knew that the accounting did not itemize all monies received and paid out as specifically enumerated hereinabove, respondent violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3) (a) which provides that he commission by an attorney of any act contrary to honesty, justice or good morals constitutes a cause for discipline. Such conduct also constituted violations of Disciplinary Rule 1-102(A) (4) of the Code of Professional Responsibility which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Such conduct also constitutes violations of Disciplinary Rules 7-102(A) (3), and (A) (5) of the Code of Professional Responsibility which provide, respectively, that in her representation of a client a lawyer shall not conceal or knowingly fail to disclose that which by law she is required to reveal, and shall not knowingly make a false statement of law or fact.

2. By misappropriating estate funds as specified in paragraphs 11 through 18, inclusive of my findings of fact, respondent, in addition to violating each and every rule recited in the preceding paragraph herein, violated Fla. Bar Integr. Rule, article XI, Rule 11.02(4) which provides that money entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose.

AS TO COUNT II OF THE BAR'S COMPLAINT

3. By being entrusted with \$5,000.00 for the specific purpose of application for the entrustment, respondent violated Fla. Bar Integr. Rule, article XI, Rule 11.02(4) which provides that an attorney must apply funds entrusted to her for a specific purpose only to the purpose of the entrustment.

4. By applying \$1,701.63 more to the Nassr/Klingerman transaction than she held in her client trust account for application to such transaction she necessarily misapplied other trust funds in the account and thereby committed the same violation as recited in the preceding paragraph.

AS TO COUNT III OF THE BAR'S COMPLAINT

5. By appropriating \$6,448.47 from funds entrusted to her for the exclusive purpose of application the **SWKO** transaction to purposes other than the **SWKO** transaction thereby causing check #1001 to be dishonored for insufficient funds, as aforesaid, respondent violated Fla. Bar Integr. Rule, article XI, Rule 11.02(4) which provides **funds** entrusted to an attorney **for** a specific purpose must be applied exclusively to the purpose of the entrustment.

AS TO COUNT IV OF THE BAR'S COMPLAINT

6. The evidence relating to Count IV of the Bar's complaint was inconclusive. The stipulation that the facts alleged in this count are admitted does not negate the possibility that other funds were deposited in respondent's trust account during the period between October 1, 1984 and October 15, 1984, in an amount sufficient to pay check #930. Respondent testified that her individual ledger sheet did not indicate any shortage in the account, although she did not know what the balance was in the account at that time (Tr 147-149).

AS TO COUNT V OF THE BAR'S COMPLAINT

7. By applying funds entrusted to her **for** a specific purpose to purposes different from those of the entrustment, including payment to respondent and by depriving Nemetz of interest during the period from August 27, 1984 through July 10, 1986, respondent violated Fla. Bar Ingegr. Rule, article XI, Rules 11.02(3) (a) and 11.02(4) which provide respectively that an attorney shall not engage in conduct contrary to **honesty**, justice or good morals and funds entrusted to an attorney for a specific purpose must be held in trust and applied solely and exclusively to the purpose of the entrustment.

TV. DISCUSSION OF AFFIRMATIVE DEFENSES

By the parties" stipulation referred to in my findings of fact, respondent withdrew all affirmative defenses she had alleged in her answer, with prejudice, except for those labeled in her answer as affirmative defenses 1, 4, and 5, and that part of 3 which relates to mitigation. In her first affirmative defense, respondent claims that all of the actions attributed to her and described in the bar"s complain were either authorized or ratified by the client(s) involved. I find absolutely no basis for that defense. The misappropriation and misrepresentations referred to in the bar's Count I relating to the Holbrook estate were concealed from the estate beneficiaries and from the probate court. No one but respondent, herself, authorized or ratified her misappropriation and misrepresentation under penalty of perjury to the beneficiaries and to the court.

Respondent's affirmative defense number 4 alleges that any and all funds which were allegedly misappropriated or spent without specific client approval were replaced and the client made whole prior to any involvement by the Florida. Restitution simply does not constitute a defense to an attorney's misappropriation of funds entrusted to her, so this contention may only be considered in terms of mitigation.

The Referee is of the opinion that respondent's emotional disturbance related to her marital problems was not a sufficient excuse for mishandling her clients funds and that this assertion can only be considered in terms of mitigation.

V. HISTORY OF THE CASE; PERSONAL HISTORY OF RESPONDENT; AND PAST DISCIPLINARY RECORD Bar

Respondent is 48 years of age and has been a member of the Florida Bar since 1977. She has been Board Certified in Taxation since 1984. Prior to 1985 she had never been subject to any Florida Bar disciplinary proceedings or complaints.

In September 1985 as the result of complaints by recipients of dishonored checks drawn on respondents trust account, The Florida Bar branch auditor Charles Ruga was directed to audit respondents professional account records for the period from January 1, 1984 to September 1985. Respondent cooperated with the auditor and promptly provided him with bank statements, cancelled checks, and all of her records relating to her professional accounts.

Between 1982 and 1985 respondent had created several land trusts as tax shelters for various clients who invested in the land trusts, receiving beneficial ownership of partial interests in the residential properties owned by the land trusts in proportion to the amount invested. The investors relied on respondent's assurance that their liability would be limited to the amount of their investments, although under the documents creating the land trusts the investors could be called on for additional contributions to cover losses. It was contemplated that rental income would cover the operating costs of the land trusts including mortgage payments due on the residential properties. Respondent acted as trustee, accountant, property manager, and attorney for the land trusts.

As a result of the downturn in the South Florida market in the mid-1980's the rental income proved insufficient to cover costs and mortgage payments and at times respondent was required to use her own funds to meet land trust expenses, which she considered as loans to the land trusts. Respondent maintained separate trust bank accounts for the various land trusts until October of 1984 when the land trust accounts were consolidated into respondent's client trust account.

In November 1985 the Florida Bar filed a complaint against respondent charging trust fund violations. The auditor Ruga filed a report on January 31, 1986 which he characterized as partial or interim report. Under date of February 24, 1986, respondent tendered a concise Judgment, requesting that the charges against her be bifurcated; and that she be permitted to plead guilty to the charges against her that were not in controversy; and accepting agreed sanctions consisting of a Public Reprimand and a three year probation period during which time she would employ a certified public accountant to review her trust accounts and certify to the Florida Bar her compliance with the trust accounting requirements mandated by the Integration Rule of the Florida Bar. The tendered Consent Judgment (TFB Ex. No. and Res. Ex. No. 5) was accepted. The Florida Bar v. Wolf, 492 So.2d (Fla.1986). Respondent completed her three year probation, and on December 13, 1989, a representative of the Florida Bar acknowledged receipt of the accountant's final report indicating compliance with the terms of her probation.

Auditor Ruga indicated in the interim report filed January 31, 1986, that he would not do any additional work on the audit unless requested by the Bar's attorney. In the consent judgment respondent admitted violation of trust accounting procedures mandated by the Integration Rule of The Florida Bar, but did not admit to any misapplication of trust funds; although some misapplication of trust funds might be deduced by her admission that she had issued multiple checks which were returned due to insufficient funds.

In paragraph 13 of the Consent Judgment respondent specifically agreed that by accepting the consent judgement The Florida Bar would not be precluded from prosecuting her further for using trust funds for purposes other than the specific purpose for which the funds were entrusted, commingling of personal and trust account funds, and misappropriation of funds. It apparently was contemplated by both respondent and the Bar attorney that further proceedings on the charges disputed by respondent would be deferred while she sought releases from the land trust investors.

Respondent obtained releases from some of the land trust investors based on accountings purporting to show all invoice and expenditures of land trust funds. (TFB Ex. Nos. 10,11,12 and 14). In the releases the investors acknowledged "that when rent receipts were insufficient to pay mortgage expenses loans were borrowed from other sources including Barbara L. Wolf, Land Trustee and other land trusts for payment of such expenses." Some of the land trust investors did not sign releases but sued respondent. The suit was settled by respondent's malpractice insurance carrier in 1988 by payment of \$240,000.00 to the plaintiffs. Respondent testified that she agreed to the settlement because her lawyer, who was furnished by her insurance company, advised that the suit was indefensible because the failure to offer the investors a three day right of rescission violated the Florida securities law and entitled the investors to return of their money (Tr.242-243).

Auditor Ruga testified that he did no further work on the audit after January 31, 1986, until a month or two prior to October 26, 1989, when he completed his report. He testified that the completed audit disclosed the trust account irregularities that are the basis of the present action, and that these irregularities had **not** been established by the interim audit. No sufficient reason was disclosed by the evidence for the delay of more than 3 years between the preliminary and final audit. However the referee is of the opinion that the delay cannot be considered in mitigation because no prejudice to respondent attributable to the delay was disclosed by the evidence. In fact, the delay permitted respondent to present proof of a clean record during her three year probation as a mitigating factor in this proceeding.

IV. AGGRAVATION AND MITIGATION

The following aggravating circumstances have been considered by the referee:

- a. A pattern of misconduct in the handling of clients trust funds. By her own testimony she paid no attention to the balances of her trust accounts even after numerous checks were returned unpaid **for** insufficient funds.
- b. Numerous offenses as indicated by the several counts of which she has been proven guilty.
- c. Lack of candor in her testimony as to the reasons **for** her improper use of trust funds.

The following mitigating circumstances have been considered by the referee:

- a. Respondent had no disciplinary record prior to the 1985 consent judgement which involved the same trust accounts as are involved in this proceeding.
- b. At the time of the misuse of trust funds charged herein respondent expected to replace the funds prior to time for accounting to the owners of the funds which as a reasonable expectation in view of her assets and income.