IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee and Cross-Appellant,

v.

BARBARA L. WOLF,

Respondent-Appellant.
_____/

Supreme Court Case No. 46,797

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

BAR'S ANSWER BRIEF AND INITIAL BRIEF UPON CROSS-PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS i

TABLE OF CASES AND CITATIONS ii

COUNTERSTATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 16

ARGUMENT I 17

I. APPELLANT HAS ESTABLISHED NO MITIGATION TO REBUT THE PRESUMPTION OF DISBARMENT ARISING FROM HER THEFT OF CLIENTS' FUNDS,

ARGUMENT II 28

11. THE REFEREE ERRED IN DISMISSING COUNT IV OF THE BAR'S COMPLAINT AND IN DISMISSING VARIOUS VIOLATIONS CHARGED BY THE BAR IN COUNTS 11, III AND V OF ITS COMPLAINT.

ARGUMENT III 31

III. APPELLANT'S MISAPPROPRIATIONS, MISREPRESENTATIONS TO THE COURT AND OTHERS AND HER LACK OF CANDOR BEFORE THE REFEREE MANDATE HER DISBARMENT.

CONCLUSION 33

CERTIFICATE OF SERVICE 33

TABLE OF CASES AND CITATIONS

CASES	PAGE(S)
The Florida Bar v. Anderson, 594 So.2d 302 (Fla. 1992)	22
The Florida Bar v. Graham, No. 77,150 (Fla. June 11, 1992)	22
The Florida Bar v. MacMillan, No. 76,563 (Fla. May 21, 1992)	17, 18
The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991)	27
The Florida Bar v. Salnik, No. 75,932 (Fla. April 2, 1992)	22
The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989)	17, 18
The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991)	22
The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986)	27

DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL CONDUCT

1-102(A)(4)	28, 29, 30
1-102(A)(6)	29, 30
7-102(A)(3)	28
7-102(A)(5)	28

FLA. BAR INTEGB. RULES, ARTICLE XI

11.02(3)(a)	28, 29, 30
11.02(4)	28, 29, 30

FLORIDA JURISPRUDENCE 2d

55 Fla. Jur 2d Trial, Sections 47 and 48	27

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

Standard 4.11	32
Standard 6.11	17, 32

COUNTERSTATEMENT OF FACTS

While appellant, in her statement of facts and of the case has, with two (2) notable exceptions, accurately stated the background of this disciplinary proceeding, she has not presented any of the facts pertaining to the specific conduct engaged in by her forming the predicate for the referee's findings and recommendations. The bar must, accordingly, present the following counterstatement which will address the specific facts adduced at the hearing underlying the bar's cross-petition for review and which will establish the referenced exceptions to the accuracy of appellant's statement.

In December, 1982, appellant was appointed by the Circuit Court, Seventeenth Judicial Circuit, Broward County, Florida, personal representative of the estate of John Francis Holbrook, deceased. Appellant thereafter acted as personal representative, attorney and accountant in the administration of decedent's estate (see paragraphs 1 through 4 of the bar's complaint, all stipulated to by appellant).

Appellant 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.

DATE	ESTATE CK. NO.	ACCOUNTING FEE	ATTORNEY FEE
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		$ 1,000.00
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
TOTAL		$ 2,900.00	$ 7,900.00

(See paragraph 5 of the bar's complaint stipulated to by appellant).

By her final accounting (bar's Exhibit 1 in evidence), appellant specifically enumerated fees she had taken from the estate for services rendered as an accountant and as an attorney. In a simple estate in which decedent left assets valued at $137,000.00, appellant had paid herself $10,800.00 in accounting and legal fees as appears above. In her petition seeking discharge as personal representative, appellant represented to the court that she had taken and proposed to take, as fees, precisely what her account reflected; no more and no less. (See paragraph 6 of the bar's complaint and the petition, itself, received as the bar's Exhibit 2 in evidence, both stipulated to by appellant).

In her account (bar's Exhibit 1 in evidence), appellant, under Schedule B, "Cash Disbursements" represented to the court that estate checks numbers 205 and 206 had been voided. As a matter of fact, that representation to the court was false. Appellant had issued estate check number 205 payable to "Barbara Wolf Trust" in the sum of $3,500.00 on July 19, 1984. (See paragraph 11 of the bar's complaint and the actual check received as the bar's Exhibit 5 in evidence). Appellant's client trust account bank statement shows that the $3,500.00 Holbrook estate check was deposited on July 19, 1984. (See appellant's client trust fund account bank statement for July, 1984 received as the bar's Exhibit 6 in evidence).* The same exhibit (bar's 6) shows that on the very day the $3,500.00 Holbrook check was deposited to appellant's client trust fund, she withdrew the entire amount. Her master ledger sheet for her client trust account shows the disbursement

* Not recalling that the July, 1984 client trust account bank statement was already admitted in evidence as Exhibit 6, the bar introduced the identical statement which was received as the bar's Exhibit 15.

of the $3,500.00 to her operating account with the notation "close Holbrook." (See the bar's Exhibit 6 received in evidence). Appellant admits that she then spent the $3,500.00 for purposes having nothing to do with the Holbrook estate. (See paragraph 13 of the bar's complaint stipulated to by appellant).

Holbrook estate check number 206, which appellant represented to the court as "void", was actually issued by respondent in the sum of $10,000.00 payable to "Barbara Wolf Trust" with the notation thereon "close est-transfer funds." (See the actual Holbrook estate check received in evidence as the bar's Exhibit 7). The $10,000.00 was deposited to appellant's client trust account on July 9, 1984. (See appellant's July, 1984 bank statement for her client trust account received in evidence as the bar's Exhibit 6). As reflected on Exhibit 6, on the same date that she deposited the $10,000.00 to her client trust account, she withdrew $9,000.00 thereof by a check payable to her operating account bearing the notation "in payment for LT #6." (See the $9,000.00 check received in evidence as the bar's Exhibit 8). Appellant proceeded to spend the $9,000.00 for purposes having nothing to do with the Holbrook estate. (See paragraph 16 of the bar's complaint stipulated to by appellant).

The $1,000.00 that remained in appellant's client trust fund from the $10,000.00 was applied to purposes having nothing to do with the Holbrook estate. (See paragraph 16 of the bar's complaint stipulated to by appellant.)

Respondent received an IRS refund in the Holbrook estate in the sum of $400.00 which she deposited, not in the Holbrook estate account, but directly to her client trust account. She proceeded to spend the $400.00 for purposes having nothing to do with the Holbrook estate.

(See paragraph 17 and 18 of the bar's complaint stipulated to by appellant).

Notwithstanding that appellant had siphoned off $13,900.00 from the Holbrook estate ($400.00 IRS refund plus $3,500.00 check number 205 and $10,000.00 check number 206), applied $12,500.00 for her own use and purposes and had applied the remaining $1,400.00 to other purposes having nothing to do with the Holbrook estate, appellant nonetheless represented to the probate court and to the Holbrook beneficiaries, under penalty of perjury, that her final account constituted a true return. (See paragraph 8 of the bar's complaint stipulated to by appellant).

Appellant offered no explanation regarding why she diverted the IRS refund *from* the Holbrook estate, depositing the same to her client trust account and expending the fund for non-Holbrook purposes. Her explanation for taking the $3,500.00 check number 205 was that she was entitled to additional attorney's fees. She offered no explanation to justify why she would be entitled to any additional fees having already taken $10,800.00 in the subject $137,000.00 estate. Most significantly, she offered no explanation as to why, having specifically listed on her account the dates, estate check numbers and amounts of the six (6) attorney's fees and five (5) accountant's fees, she had previously taken, the last such attorney's fee having been taken on July 2, 1984, she would not simply have listed the $3,500.00 as an additional fee rather than listing the check as "VOID." She offered no explanation as to why, if she felt entitled to an additional $3,500.00 fee, she did not request it in her petition seeking discharge.

Appellant's explanation for taking the $10,000.00 from the Holbrook estate account and depositing it to her regular client trust account was

that she was concerned that her then husband would somehow take the money. There was no explanation offered as to how her ex-husband would be able to negotiate an estate check. Most importantly, appellant was unable to offer any explanation as to why she did not open another estate account rather than commingling the estate's money in her client trust fund. Appellant, though taking $9,000.00 from the $10,000.00 Holbrook funds and diverting it to her operating account where it was expended for her own purposes, insisted to her counsel upon direct examination and to bar counsel upon cross examination, that her taking of the $9,000.00 was not from the Holbrook funds, but from Land Trust 6 Funds (124, 192).** Appellant had to concede, however, that she personally made all deposits to her client trust account during July, 1984 and knew that there were no Land Trust 6 funds in her client trust fund on July 9, 1984 when she took the $9,000.00 (195, 228, 229). She had to concede that the first date that she received funds from Land Trust 6 was July 30, 1984 (228, 229). She conceded that the July, 1984 bank statement from her client trust account (bar's Exhibit 6) reflects her first receipts from Land Trust 6 on July 30, 1984. She identified the actual deposit constituting the first receipts from Land Trust 6. (See July 30, 1984 deposit received in evidence as the bar's Exhibit 20). She had to concede that on July 9, 1984, the day she diverted the $10,000.00 Holbrook check to her client trust account and the day that she withdrew therefrom $9,000.00 to her own account, there were no funds other than the Holbrook $10,000.00 deposit to cover her $9,000.00 taking (195).

** All page references are to transcript of final hearing.

Respondent attempted to convince the referee, by way of mitigation, that she had fully and completely restituted the $13,900.00 she had siphoned from the Holbrook estate. Her explanation was twofold. Firstly, she suggested, upon direct examination, that she had restituted the estate completely prior to filing her final account (178). Secondly, she testified and produced a summary purporting to show that she had poured approximately $76,000.00 from her own funds into her client trust account which was applied to the full restitution for all of her clients' shortages. The evidence established that appellant's explanation was not supported by the facts.

During her direct examination, appellant suggested to the referee that by the time she had filed her final account in the Holbrook estate, she had completely repaid to the estate all of the funds that she had taken (178). As a matter of fact, appellant filed her final account with the probate court on February 7, 1985. She expressly conceded this upon cross examination (230). When appellant's account (bar's Exhibit 1) is examined, it discloses at page 4 thereof that appellant had final distributions to make totalling $15,542.78. As can clearly be seen from the January and February, 1985 Holbrook estate account bank statements which were received into evidence as appellant's Exhibits 1 and 2, as of February 7, 1985, when appellant filed her account, she had paid only $5,651.92 of the $15,542.78 she owed and had an estate account balance on that day of $1,530.99 for a shortage of $8,359.87.

Even when she subsequently deposited sufficient sums into the estate account to make up the shortage, she used funds diverted from other clients to make up the difference. For instance, the January, 1985 bank statement for the Holbrook estate (appellant's Exhibit 1 in evidence) reflects a January 21, 1985 deposit in the sum of $1,825.00.

The bar introduced the actual deposit into evidence as its Exhibit 9. The actual deposit shows that the $1,825.00 was made up of cash in the sum of $600.00, a check from "Parco" in the sum of $575.00 and a check from "Withey" in the sum of $650.00. Appellant conceded that the Parco check, signed by an individual named Paris, was a rental check from Land Trust 6 (185). She further conceded that the $650.00 Withey check was a rental check from Land Trust 3 (187). Each check is payable directly to appellant, not to the land trust(s) and not to appellant as trustee,

At the outset of her cross examination, appellant explained how she, in an attempt to effect settlements with all of the various land trust beneficiaries, had compiled accounts which she presented to the beneficiaries purporting to account for her receipts and disbursements of each of the land trusts for which she acted as trustee (174, 175). She agreed that she represented the accounts to the beneficiaries as true and complete and thereby secured the signature of many of such beneficiaries exonerating appellant for her actions as trustee. Her testimony in that regard is quite telling:

> Q. As a matter of fact, when the Bar initially made contact with you back, when, 1985 --
>
> A. Yes.
>
> Q. -- thereabouts with respect to those matters coming to the Bar's attention which culminated in the exhibit that's -- That's your Exhibit Number Five, the Consent Plea for a Public Reprimand, do you recall that at the time you made an attempt to see if you could get all of the various land trust beneficiaries to sign off, so to speak?
>
> **A. *Yes.***
>
> Q. And you did, in fact, make a diligent effort in that regard and got many of the beneficiaries who did not sue you to sign off --
>
> A. Yes.

Q. -- and *go* away?

A. Yes.

Q. And the way you did that was to prepare and present to these beneficiaries accountings for what **you** had done regarding the land trust that these beneficiaries were interested in, isn't that correct?

A. **Yes.**

Q. And the accountings that **you** prepared you would present to these beneficiaries and represent to them that here's what I did while I was **your** manager trustee **and** those that were **so** included actually signed their names and signed off, isn't that correct?

A. **Yes.**

Q. And you represented that those accounts that you presented to these various beneficiaries who exonerated you from any further liability, you represented to them that the accounts that they were being presented with were full, accurate and complete accounts, is that correct?

A. ***Yes*** **(174,175)**

The bar introduced into evidence **a3** its Exhibit 10, the Land Trust **6** accounting that appellant prepared covering the very period that she applied the **$575.00** Paris rent check to the Holbrook estate. **The** account fails to list the check as a receipt nor show application thereof to the estate.

The $650.00 Withey check is another instance of making "restitution" by misappropriation. Withey was a Land Trust 3 rental. There is no mention of the rental check used to restitute the Holbrook estate in the accounting appellant rendered to the Land Trust 3 beneficiaries. The Land Trust 3 account was received in evidence as the bar's Exhibit 11.

The January 28, 1985 deposit by appellant to the Holbrook estate account as shown on the bank statement (appellant's Exhibit 2) was in the sum of $2,607.50. The actual deposit was received in evidence as the bar's Exhibit 13. Included in the deposit is a check payable to appellant in the sum of $1,300.00 issued by Vosatka. Appellant conceded that Vosatka was a Land Trust 5 tenant and that the check represented rent for two (2) months (189, 190). As with Paris and Withey, appellant did not include the $1,300.00 rent receipt in her accounting to the Land Trust 5 beneficiaries, A copy of the Land Trust 5 account rendered by appellant was received in evidence as the bar' Exhibit 12.

In addition to the $1,300.00 Vosatka rent, the January 28, 1985 deposit to the Holbrook estate included a $682.50 check payable to

in her account to Land Trust 4 beneficiaries which account was received in evidence as the bar's Exhibit 14.

The second count of the bar's complaint related to a transaction known as "Nassr/Klingerman." Appellant identified *this* transaction as a real estate sale and purchase. As *seen from* the bar's complaint, admitted to by appellant by stipulation, appellant received $5,000.00 entrusted to her for the Nassr transaction in February, 1984 (see paragraph 23 of the bar's complaint stipulated to by appellant). She diverted that $5,000.00 to purposes having nothing to do with the Nassr transaction and by June, 1984, had not only fully expended the $5,000.00, but had created, in addition to that shortage, an overdraft in her general client trust to the extent of $918.22. (See paragraph 24 of the bar's complaint stipulated to by appellant). Thus, by June,

1984, appellant had diverted $5,918.22 from the express purposes for which the sums had been entrusted to her.

The Nassr transaction closed in July, 1984. At that time appellant had received two (2) additional amounts for the Nassr transaction, one (1) in the sum of $66,503.26 and one (1) in the sum of $2,994.40 (see paragraphs 25 and 26 of the bar's complaint stipulated to by appellant). She wrote checks for both precise amounts ($66,503.26 and $2,994.40) and issued them to her client (see the July, 1984 bank statement issued for appellant's general client trust account received as the bar's Exhibit 6 in evidence). Thus, having diverted the first $5,000.00 entrusted to her and having distributed 100% of the additional funds entrusted to her, appellant had no additional Nassr/Klingerman funds left in her account.

With a zero balance on the Nassr/Klingerman transaction, appellant, nonetheless, issued an additional $1,701.63 in the Nassr/Klingerman transaction (see paragraph 27 of the bar's complaint stipulated to by appellant). By definition, such $1,701.63 had to have come from funds having no nexus or connection to the transaction.

Once again, appellant explained that she made full restitution of the $5,918.22 and $1,701.63 shortages from her own fees left in or deposited to her trust accounts, Once again, her explanation was shown to be untruthful.

An examination of the July, 1984 bank statement issued for appellant's general client trust fund is revealing. As discussed in the Holbrook estate matter, when appellant deposited the $10,000.00 Holbrook estate check to her general client trust account, she immediately misappropriated $9,000.00 to herself. The $1,000.00 left in her trust account was needed to make up the Nassr/Klingerman

shortage. The bank statement (bar's Exhibit 6) tells the whole story. On July 5, she had a balance of $318.13, On July 6, she deposited $699.88 from Land Trust rents (208). On July 6, she deposited the above referenced $66,503.36 funds from the Nassr/Klingerman transaction which exact amount she disbursed on July 9. On July 9, she deposited the $10,000.00 funds from Holbrook and immediately misappropriated $9,000.00 to herself. The same date she issued $1,525.00 to Klingerrnan (206, 207). Thus, as of that moment in time, the only funds that she had in her account to cover the Nassr/Klingerman shortage, were the $318.13 account balance as above referenced plus the deposit of Land Trust rents of $699.88 above referenced and the $1,000.00 Holbrook balance which appellant left in the trust account for a total of $2,016.01. If she had not left the $1,000.00 Holbrook balance in the account, her balance would only have been $1,016.01 and the $1,525.00 check issued to Klingerman would have bounced.

Appellant testified that from the outset of her entering private practice on her own, she never, ever, paid any attention to her trust accounts. She explained how she started her practice relying on the bookkeeping skills of a bookkeeper who she shared with another attorney. She admitted that when her first bookkeeper no longer worked for her, she assumed that one of her secretaries had learned the requisite skills to maintain the trust accounts in proper fashion. When she found out that her accounts were a botched mess, after various checks started to bounce, she made absolutely no effort to examine them, hire an accountant to fix the mess or take any remedial action of any type, nature or description (197, 198). Her remedy, as she explained, was to attempt to pour her own monies into her trust

accounts with the hope and expectation that she would thereby stave off disaster.

The "Speck" transaction referenced in Count III of the bar's complaint is uncomplicated. Appellant was entrusted with funds for a specific purpose but did not retain them in trust for the specific entrustment. As a result, when she issued a trust account check in the sum of $48,228.61, it bounced. She had applied $6,448.47 of the Speck funds to some other purpose(s). Once again, appellant urged that she made full restitution from the $76,000.00 that she had deposited to her trust accounts. Once again, the facts demonstrated that such simply was not the truth. When the December, 1984 bank statements issued for appellant's client trust fund (received in evidence as the bar's Exhibit 16 and 17) are examined, it is seen that on November 29, 1984, when appellant's $48,228.61 check was dishonored, her bank balance was $41,760.14. She made up the $6,448.47 shortage by making three (3) deposits, including a $4,025.00 deposit on December 3, 1984 (see bar's Exhibit 17 in evidence). Once again, appellant used rents from land trusts, in part, to make up the deficit. She conceded that the entire $4,025.00 deposit above referenced was made up of land trust rents. She conceded that one such rent, $725.00 from Campbell, was not included in her accounting to the Land Trust 4 beneficiaries despite being a Land Trust 4 tenant. She conceded that another of the rents, $675.00 from Williams was a Land Trust 5 rental but was not accounted for upon her account to the land trust 5 beneficiaries (216, 217).

The "Claypool" transaction referenced in Count IV of the bar's complaint again constituted an example of appellant's application of funds entrusted to her by one client to make up a shortage to another.

When appellant is credited with the $1,576.52 balance in her account as recited in paragraph 34 of the bar's complaint, then, upon her payment to Claypool in the sum of $7,151.54, $5,575.02 came from land trust funds.

Appellant intimated that the land trust funds she used to apply to other clients' shortages were repayments of loans that she had made to the land trusts. She offered no documentary evidence to establish such loans. In fact, it was appellant, herself, who testified upon direct examination that she was sued by many of the land trust beneficiaries to whom eventually was paid the sum of $240,000.00.

Count V of the bar's complaint, all of which allegations were stipulated to by appellant, pertains to a matter known as the "Nemetz" transaction, where having held $3,323.56 in escrow for Mr. Nemetz, appellant withdrew $3,300.00 from the interest bearing special 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. Appellant thereafter issued the following checks from her client trust account:

DATE PAID	CHECK NO.	PAYEE	AMOUNT
08/27/84	845	Barbara Wolf	$ 800.00
08/28/84	820	Atlantic Federal	$ 486.00
08/28/84	a39	Chase Federal	$ 590.00
08/28/84	829	Atlantic Federal	$ 728.00
08/28/84	a25	Atlantic Federal	$ 886.00
TOTAL			$3,490.00

None of the above referenced five (5) payments comprising the $3,490.00 had any connection or nexus to the Nemetz transaction. When appellant eventually restored the $3,300.00 to the Nemetz trust account she did so without depositing thereto any additional sums representing interest for the period from August 27, 1984 through July

10, 1986, the period that appellant diverted the $3,300.00.

Finally, although appellant testified that she had deposited $76,000.00 of her own funds to her trust accounts, the bar's auditor established that, during the same period, appellant withdrew, to her own, personal uses, the sum of $167,000.00 (280).

In its preamble, the bar made reference to two (2) notable exceptions to appellant's statement of the facts and of the case. One (1) such exception concerns a representation made by appellant at page 5 of her statement that the bar did not reactivate its investigation until 1989 and that the bar's auditor made no further investigation until 1989. That representation is not accurate. The discussion of such inaccuracy necessarily requires an examination of the other exception in appellant's statement. Appellant fails to bring to the Court's attention that the bar, after the case was concluded, presented an application seeking permission to reopen its case for purposes of introducing evidence to rebut appellant's suggestion that the bar was guilty of laches in prosecuting appellant. The application was made and denied by the referee in his report of referee, Upon application for rehearing, the referee adhered to his original decision denying the bar an opportunity to reopen its case for the purpose stated, but expressly permitting the bar to proffer thirty-nine (39) documents marked as the bar's Consolidated Exhibit X which were admitted for the express purpose of establishing a record "should either party hereafter determine to appeal from the undersigned's rulings in the two (2) above referenced applications," (See April 16, 1992 order denying bar's motion for rehearing and granting leave to bar to proffer certain documentation). The thirty-nine (39) documents constituting the bar's proffer are attached hereto as Appendix I. Perhaps the most

significant document in the proffer appears at page 15 thereof which is a September 30, 1986 letter from the appellant to the bar in which she expressly waived any claim of laches or undue delay against the bar for the period that the grievance committee monitored the land trust civil litigation. The documents comprising the bar's proffer clearly establish that after appellant entered into her plea to consent judgment leading to the public reprimand in 1986 for various technical trust account violations which plea reserved to the bar the right to pursue whatever other violations might turn up as a result of a further examination of appellant's trust accounts, appellant, through counsel, requested that the bar hold its investigation in abeyance pending the determination of the land trust litigation referenced hereinabove and in appellant's brief. The documents further establish that upon conclusion of the litigation wherein the beneficiaries who brought suit against appellant received $240,000.00, the bar immediately reactivated its investigation and audit which inexcerably led to the present disciplinary proceeding. The Court will see, from an examination of the proffered documents, that the bar reinstituted its proceedings in 1988, not 1989 as suggested in appellant's brief. This matter will be addressed, in detail, in the bar's argument.

SUMMARY OF ARGUMENT

In the hierarchy of bar offenses, none ranks higher than theft of clients' funds and misrepresentation in court proceedings. Upon the establishment of theft from clients, alone, a presumption of disbarment arises. While restitution to the victims of the misappropriations may be considered mitigating, restitution through misappropriation from other sources such as indulged in by the appellant hardly constitutes a basis to rebut the disbarment presumption.

Appellant's claim to rehabilitation is belied by her willful testimony before the referee in which she asserted that she had fully restituted all of her victims, only to concede, upon cross examination, that restitution came from funds of other victims of misappropriation to whom she misrepresented in various accountings rendered by her to such victims.

Her theft, misrepresentation to the probate court (which also creates a presumption of disbarment) and to her victims regarding such theft and her misrepresentations and lack of candor to the referee mandate that respondent be disbarred.

ARGUMENT

I. APPELLANT HAS ESTABLISHED NO MITIGATION TO REBUT THE PRESUMPTION OF DISBARMENT ARISING FROM HER THEFT OF CLIENTS' FUNDS,

While each and every count in the bar's complaint constitutes a separate instance of misappropriation of funds entrusted to appellant for a specific purpose, Count I known as the "Holbrook" transaction constitutes the most glaring example of appellant's misconduct, There, appellant stole $12,500.00 from an estate in which she acted in three (3) fiduciary capacities (attorney, personal representative and accountant), diverted another $1,000.00 for purposes of making up shortages in her regular clients' trust fund, willfully misrepresented the theft and diversion in her accounting to the probate court by camouflaging her thievery with references to "VOID" checks and then declared to the probate court, under oath, 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 monies received and paid out by me as Persanal Representative of the estate of John Francis Holbrook, Deceased, from July 19 through January 16, 1985 (see bar's Exhibit 1 in evidence).

Thus, at this point, without making reference to the other four (4) instances of misappropriation of clients' funds, a presumption of disbarment arises. The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989). A second, independent presumption of disbarment arises from appellant's willful misrepresentation to the probate court regarding her account. In The Florida Bar v. MacMillan, No. 76,563 (Fla. May 21, 1992), this Court, citing Standard 6.11 from Florida Standards For Imposing Lawyer Sanctions, stated:

> Under these standards, disbarment is presumptively the appropriate discipline for the type of misconduct present in this case.

There, as in the instant case, the respondent had misappropriated funds from an estate (guardianship) and hid the transaction from the probate court. In both Schiller and MacMillan, however, the Court stated that the disbarment presumption can be rebutted by various acts of mitigation. It is respectfully submitted that when the so-called mitigation presented by appellant is examined, especially in light of the aggravating circumstances presented to the referee, the consequences are exacerbation, not mitigation.

The first affirmative defense propounded by appellant is that all actions attributable to her were either authorized or ratified by the client(s) involved, The record does not disclose the proverbial scintilla of evidence that any of the theft victims ever had the slightest inkling that appellant lied to them, misappropriated their funds, lied to the probate court or used rents stolen from land trusts to make up shortages. In her brief, appellant makes reference to the fact that the numerous land trust beneficiaries never complained to the bar. Why would they? Respondent secured releases from numerous of such beneficiaries by presenting false accounts to them which, relied upon by such beneficiaries, formed the predicate for their releasing appellant from all claims. Appellant represented to each such beneficiary that the account furnished to him/her was true and accurate (174, 175).* Those beneficiaries who refused to "sign off" sued respondent and received $240,000.00. None had any reason to come to the bar. The Holbrook heirs received all that was coming to them as reflected in

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* The full colloquy is set forth in the bar's counterstatement of facts, pages 7-8.

appellant's final accounting and had no way of knowing that appellant stole the funds used for the restitution. The same is true with respect to the other victims.

Appellant's next affirmative defense was that all funds that she misappropriated were replaced prior to bar involvement. There are two (2) problems with that assertion. Firstly, as the referee found, the interest misappropriated from Mr. Nemetz was not restituted which prompted the referee to recommend that respondent be required to reimburse Mr. Nemetz for his loss (referee's report, pages 14 - 15). Secondly, while the remaining victims were in fact restituted prior to bar involvement, the restitution was made with stolen funds. The evidence presented is irrefutable. In his report, the referee states:

> It was shown that land trust rental checks were used in replacing the misapplied trust funds which are the subject of this proceeding (report of referee, page 14).

The referee failed to comment, however, upon the clear, convincing and unchallenged evidence that the land trust checks used by appellant to make restitution were not included by appellant in accounts rendered to land trust beneficiaries purporting to embrace the very period during which appellant diverted such rental checks for purposes of making restitution to her clients. The issue regarding how much appellant might have owed to or was owed by the various land trusts and/or how much of her own funds were deposited to and how much receipts appellant took from her trust account simply does not address the fact that appellant, in order to secure releases from her land trust beneficiaries rendered accounts to them which she agreed were represented to such beneficiaries as full, true, complete and accurate and which she intended for them to rely upon in releasing her. Those accounts, admitted into evidence, had omitted therefrom, the same as in

the case of the Holbrook estate, checks which appellant siphoned off and never revealed to her beneficiaries. Such restitution from misappropriated funds can not be considered mitigating. Appellant's representation before the referee, upon direct examination that she had made full and complete restitution to all of her victims, constituted a misrepresentation which was revealed upon cross examination. It is respectfully submitted that the mitigating circumstance of restitution is not available to this appellant.

Appellant asserts that due to her marriage to a cocaine addict, she suffered from diminished capacity at the time of the complained of acts. Fully fifty percent of appellant's presentation was devoted to the portrayal of her disturbed and addicted husband. Divorced in January, 1984, appellant nonetheless voluntarily continued to live with her addict ex-husband. The circumstances obviously were not pleasant. The fact remains, however, that appellant offered no testimony or proof of any type, nature or description to demonstrate that her personal relationships caused her to steal from clients. There was no evidence offered to demonstrate that her personal relationships caused her totally to neglect minimum trust account recordkeeping and procedures. As a matter of fact, appellant, herself, testified that she had divested herself from all responsibility regarding trust accounts from the inception of her entering private practice, long before she became involved with her addict husband; that she didn't even examine her accounts when checks began to bounce. She testified:

> Q. Now, do I understand from the direct examination that I heard from you that from the outset of your establishing your practice as a sole practitioner, because I think you said Attorney Melvin never did practice --
>
> A. Yes.

> Q. -- from that point forward, you personally never made any attempt to look at any of your trust accounts of any type, nature or description but relegated that responsibility solely and exclusively to third parties. Is that my understanding?
>
> A. Yes.
>
> Q. There came a point in time where you actually started to suffer some return checks which were bouncing for insufficient funds; isn't that correct?
>
> A. Yes.
>
> Q. And notwithstanding that, you still made no effort to take a personal hand in arriving at reconciliations of your trust accounts; is that a correct understanding?
>
> A. Yes, but I started putting money into the trust (198, 199).

The bar respectfully suggests that appellant's attempt to establish some diminished capacity is belied by her actions during the time she contends that she was so preoccupied. She entered into numerous tax shelters (land trusts) with her clients and explained haw she continually exercised her business judgment that the properties underlying the shelters would increase in value. As stated, there has been no showing that her marital problems had anything, whatever, to do with her misappropriation. Her in-laws defrayed the cost of her ex-husband's hospitalization (102). Her husband contributed to the marriage (94). Appellant was not called upon to contribute to her husband's drug habit (94).

While the referee expressly found that the appellant's problems do not excuse the misuse of trust funds, he also stated that such problems "undoubtedly" contributed to (respondent's) inattention to the land account balances of the trust funds. That inattention, as above explained, started with the first day appellant entered into private

practice. She totally ignored her trust account as if it didn't exist. How she could have been any less attentive during the course of her stormy marriage is impossible for the bar to comprehend. In any event, this Court has addressed the issue of personal problems vis a vis attorney theft disciplinary proceedings. In The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), faced with a misappropriation case, the Court, in ordering a disbarment, stated as follows:

> This Court has repeatedly asserted that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment (cases cited). In some cases we have found that presumption rebutted by mitigating evidence, and we imposed the slightly lesser discipline of suspension (cases cited). In the overwhelming number of recent cases, we have disbarred attorneys for misappropriation of funds notwithstanding the mitigating evidence presented (cases cited). In the case before us, we likewise fail to find the mitigating evidence submitted warrants a discipline less than disbarment. Respondent argues that his depression, primarily over his marital and economical problems, led him to use his trust account for personal purposes. These problems, unfortunately, are visited upon a great number of lawyers. Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems (1383, 1384).

In The Florida Bar v. Anderson, 594 So.2d 302 (Fla. 1992), the Court stated that it found little mitigating value in the respondent's alleged emotional problems. The Court examined vis a vis mitigation the great stress offered by the respondent in The Florida Bar v. Salnik, No, 75,932 (Fla. April 2, 1992) and rejected the same as mitigating against disbarment. Most recently, in The Florida Bar v. Graham, No. 77,150 (Fla. June 11, 1992), the Court, in disbarring respondent, noted:

> Sadly, stressful familial and financial obligations are common problems. However, we cannot excuse a lawyer's misappropriation of a client's funds and misrepresentations to cover up any wrongdoings as a means to solve life's problems. Absent evidence casting doubt on a lawyer's culpability, such as evidence of mental or substance-abuse problems, a lawyer is held fully responsible for any misconduct.

Appellant suggests that the bar was guilty of laches and urges that the same be considered in mitigation. Firstly, the bar was not guilty of laches. At the commencement of the bar's cross examination of appellant, she agreed that after the bar initially commenced its investigation, she attempted to secure releases from the many land trust beneficiaries (174, 175). Mr. Ruga, the bar's auditor, explained that he was told to defer continuing with his audit so that appellant could attempt to secure releases from the land trust beneficiaries (281, 282). Regardless, laches does not constitute mitigation absent the demonstration of specific prejudice resulting from the delay. No such evidence was presented,

In his report, the referee made reference to the attempted use of laches as mitigation. He stated:

> 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 for 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 (report of referee, page 13).

The record is virtually barren of any evidence regarding laches. During cross examination of the bar's auditor, appellant's counsel discussed with Mr. Ruga the passage of time between the original and final audit reports. It was only during his summation that appellant's counsel devoted virtually his entire remarks to allegations of laches on the bar's part characterizing the delay as unaccounted for and unconscionable. In response, the bar attempted to reopen its case for purposes of rebutting what it considered as an unfounded attack. The referee, at page 1 of his report of referee, stating that he regarded the bar's application as failing to allege sufficient grounds for reopening the bar's rebuttal, denied the application. Upon rehearing, it was explained to the referee that the bar did not attach the thirty-nine (39) documents it wished to have received in evidence to its application in that the referee acted as both judge and the trier of fact (see March 13, 1992 transcript of rehearing argument, page 2). Upon rehearing, however, the referee did determine to permit the bar to proffer the thirty-nine (39) documents as the bar's consolidated Exhibit X so that this Court could review the same and determine whether or not the referee appropriately exercised his discretion in denying the bar's application to reopen and the bar's motion for rehearing upon the denial of such application. It is respectfully submitted that the referee abused his discretion in not affording to the bar an opportunity to reopen and present the thirty-nine (39) documents comprising the bar's Exhibit X.

The fact is, that the thirty-nine (39) documents comprising the bar's Exhibit X totally belie any suggestion of laches. The proffer starts with a letter from the then bar counsel to respondent dated February 28, 1986 in which bar counsel established a three (3) month

monitor period during which appellant was to submit releases executed by the various land trust beneficiaries acknowledging that all funds belonging to the beneficiaries' respective trusts were properly accounted for (A-I)*. By letter dated June 20, 1986 bar counsel reminded appellant that she was tardy in providing the releases (A-3). In response, by letter dated June 27, 1986 appellant's then attorney, wrote to bar counsel explaining that some of the beneficiaries had instituted a civil action against appellant and requested that further action by the grievance committee be abated pending the outcome of the litigation (A-4). In response, by letter dated July 18, 1986, bar counsel wrote to appellant's counsel, in essence, accepting the request for grievance committee monitoring (A-6). An exchange of correspondence continued between counsel and the agreement was formalized by a September 16, 1986 letter from bar counsel to appellant's attorney (A-10).

By letter dated September 30, 1986, appellant, replying to bar counsel's September 16, 1986 letter in which it was demanded that a waiver of laches be submitted, wrote to the bar stating:

> I waive any claim of laches or undue delay against The Florida Bar for the period that the grievance committee monitors Case No. 86-17066CN in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida (A-15).

Thereafter, by letter dated March 28, 1988, appellant's counsel informed bar counsel that the civil litigation matter was settled (A-19). He suggested that bar counsel deal directly with appellant. Shortly

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*References are to Appendix I pages.

thereafter, by letter dated April 11, 1988, appellant informed bar counsel that she would seek separate counsel to represent her in connection with the ensuing bar disciplinary proceedings (A-20). On May 4, 1988 bar counsel received correspondence from appellant's defense counsel announcing his appearance on behalf of appellant (A-21). From that point forward, the rest of the documentation included in the bar's proffered Exhibit X demonstrates an unbroken line of communication between bar counsel and appellant's counsel regarding the ongoing investigation, including efforts by Mr. Ruga to secure various documentation from appellant to aid in concluding the audit. Significantly, it appears that Mr. Ruga had commenced his audit in 1988, not 1989 as suggested by appellant in her brief.

The documentation in the bar's proffered Exhibit X also demonstrates that notwithstanding appellant's claim of full cooperation with the bar auditor as found by the referee at page 14 of his report of referee, there came a point in time where, despite requests for information, Mr. Ruga was advised by copy of a July 14, 1989 letter addressed to bar counsel from appellant's attorney that "... Ms. Wolf would not be supplying any further information to The Florida Bar as it relates to the audit of her trust account" (A-50).

The last letter in the proffer is dated March 12, 1990 where appellant's attorney refers to his long delay in responding to a bar request and advises the bar to proceed with scheduling a grievance committee hearing (A-53). As the record discloses, the bar's complaint was filed on October 18, 1990.

The distillate of the foregoing is that the Court is presented with a myth fostered both by appellant's brief and by the referee's report.

In appellant's brief reference has been made to unreasonable delay and to a claim that appellant changed her position in reliance upon her expectation that no bar proceedings were in the offing. "Had the Bar rumbled thunder on the horizon during this period, Respondent might have been put on notice and on guard. Instead, she was lulled into a sense of security by an unconscionable and totally groundless delay" (see appellant's brief, page 8). In the report of referee, reference is made that no sufficient reason was presented for the delay of more than three (3) years (report of referee, page 13). The question then presents itself whether or not the truth as revealed in the bar's proffered, Consolidated Exhibit X should be considered or whether it should be buried and disregarded. The bar, indeed, did rumble thunder on the horizon. Appellant was a spectator to the storm standing in the midst thereof and never sheltered therefrom.

It is respectfully submitted that truth and justice should constitute the keystone of judicial inquiry and that the bar's attempt to bring the truth to the attention of the Court should have been permitted. This Court has repeatedly held that bar disciplinary proceedings should not be shackled with the rigid application of rules pertaining to the admission of evidence. "Because bar disciplinary proceedings are quasi-judicial rather than civil or criminal, the referee is not bound by technical rules of evidence." The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991); The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). The decision whether to permit a party to reopen his case to offer new evidence after the party has rested lies within the discretion of the trial court and reopenings may be permitted not only after a party has rested, but before, during or after the close of argument. See 55 Fla. Jur 2d Trial, Sections 47 and 48.

ARGUMENT

11. THE REFEREE ERRED IN DISMISSING COUNT IV OF THE BAR'S COMPLAINT AND IN DISMISSING VARIOUS VIOLATIONS CHARGED BY THE BAR IN COUNTS II, III AND V OF ITS COMPLAINT.

In that appellant's misconduct occurred prior to the adoption of the Rules Regulating The Florida Bar, all violations charged and found are referenced to the Disciplinary Rules of the Code of Professional Responsibility and to the Fla. Bar Integration Rule.

In finding that appellant misrepresented her account in the Holbrook estate to the probate court, to the estate beneficiaries and to the world, the referee found appellant to have violated Disciplinary Rules 1-102(A)(4), 7-102(A)(3) and 7-102(A)(5) of the Code of Professional Responsibility which provide, respectively, that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, 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. Additionally, the referee found that appellant violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3)(a) which provides that the commission by an attorney of any act contrary to honesty, justice or good morals constitutes a cause for discipline. Finally, the referee found that appellant 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.

In addressing Count II of the bar's complaint, the referee found that appellant "necessarily misapplied other trust funds in the account

..." (report of referee, page 8). The only violation that the referee found, however, was Fla. Bar Integr. Rule, article XI, Rule 11.02(4). The bar had charged violation of not only that rule but of Fla. Bar Integr. Rule, article XI, Rule 11.02(3)(a) and Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) of the Code of Professional Responsibility which provide, respectively, that an attorney shall not engage in conduct contrary to honesty, justice or good morals, shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation and shall not engage in other conduct that adversely reflects on her fitness to practice law. The referee's failure to find such violations constitutes error. By finding that appellant "necessarily misapplied other trust funds in the account" it is inescapable that respondent acted contrary to honesty, justice and good morals, engaged in conduct constituting dishonesty and acted in a manner adversely reflecting on her fitness to practice law.

In addressing Count III of the bar's complaint, the referee found that appellant had appropriated $6,448.47 "from funds entrusted to her for the exclusive purpose of application to the SWKO transaction to purposes other than the SWKO transaction ..." As with Count 11, the referee found but one violation, viz., Fla. Bar Integr. Rule, article XI, Rule 11.02(4). The bar had charged appellant with the same violations as in Count II and it is respectfully submitted that, for the same reasons propounded regarding Count 11, the referee erred in not finding the violations as charged by the bar.

Addressing Count V of the bar's complaint, the referee found that "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 Integr. Rule, article XI, Rules 11.02(3)(a) and 11.03(4) .., (report of referee, page 9). The bar had charged appellant with violations of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6), as well. It is respectfully submitted that having found appellant to have violated the specific entrustment to her and have characterized such conduct as contrary to honesty, justice or good morals, it necessarily follows that appellant's misappropriation must have constituted the remaining violations charged by the bar consisting of conduct contrary to honesty and conduct adversely reflecting on appellant's fitness to practice law.

The referee dismissed Count IV of the bar's complaint claiming that the admission by the appellant through stipulation of the facts did not negate the possibility that other funds were deposited in appellant's trust account which may have negated the bar's charge of misappropriation. Appellant produced no proof to establish that any such deposit was made. In characterizing the evidence as inconclusive, the referee erred. Count IV is not susceptible to speculation. The bar specifically charged that on October 1, 1984 appellant had a balance in her client trust account in the sum of $1,576.52. The bar further alleged that subsequent thereto, through October 15, 1984 the sums deposited to the subject trust account consisted of $24,736.01 in land trust receipts. Thus, when charged with withdrawing $7,151.52 on October 15, 1984 payable to a purpose having no nexus or connection to the land trusts, an ipso facto misapplication of funds was established. The referee's speculation had no basis in law or in fact and his dismissal of Count IV should be reversed.

ARGUMENT

III. APPELLANT'S MISAPPROPRIATIONS, MISREPRESENTATIONS TO THE COURT AND OTHERS AND HER LACK OF CANDOR BEFORE THE REFEREE MANDATE HER DISBARMENT.

The facts regarding appellant's misappropriations and her misrepresentations to the probate court, estate beneficiaries and to the world have been demonstrated not only by clear and convincing evidence but beyond every reasonable doubt. Her claims of mitigation have similarly been discredited, Should the court determine to consider the documents comprising the bar's proffered Exhibit X, attached hereto as Appendix I, then it is conclusively established that appellant's claim of cooperation with the bar auditor is without substance, and her claim of laches and reliance upon an assumption that the bar proceeding would not be pursued has been demonstrated to be groundless. Most significantly, appellant's claim of restitution has been demonstrated to constitute a perversion of the word. Her restitution, as demonstrated by clear and convincing documentary evidence consisting of bank statements and cancelled checks was accomplished by misappropriating funds from land trust beneficiaries in order to make up shortages to clients, The land trust beneficiaries from whom such funds were misappropriated, in turn, were led to believe that accounts rendered to them were accurate and complete when in fact rent receipts were concealed therefrom and misappropriated by appellant. This is hardly the portrait of an attorney who, having stolen and having misrepresented to a court, clients and to the world, has rebutted the presumptions of disbarment accompanying misappropriation and misrepresentation,

Most telling of all, is the fact that even six (6) years after her thefts and misrepresentations, appellant has shown a propensity to continue to indulge in such misconduct. Her testimony in the bar disciplinary proceeding regarding the issue of restitution was belied by the cross examination establishing her misrepresentations to land trust beneficiaries and her misappropriations from such beneficiaries. Her conduct was such as to cause the referee to report to this Court that appellant demonstrated a "Lack of candor in her testimony as to the reasons for her improper use of trust funds" (report of referee, page 13).

Standard 4.11 of Florida Standards For Imposing Lawyer Sanctions calls for disbarment when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Standard 6.11 calls for disbarment when a lawyer with the intent to deceive the court, knowingly submits a false document. Based on precedent, based on standards, based on her continuing propensity for lack of candor, appellant has demonstrated no reason why the presumptions of disbarment are rebutted in this disciplinary proceeding.

CONCLUSION

Appellant misappropriated from clients and from land trust beneficiaries, She misrepresented her defalcations, under oath, to a probate court and misrepresented her thefts to her victims inducing many of them thereby to exonerate her from liability. The passage of time created by the bar's concession to appellant's request for deferment of the disciplinary proceedings so that she could resolve extant civil litigation should not constitute a basis to afford different treatment to appellant from that meted out to other attorneys.

Appellant should be disbarred.

All of which is respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing brief of The Florida Bar has been furnished to F. Lee Bailey, Attorney for Appellant, 1400 Centrepark Blvd., Suite 909, West Palm Beach, FL 33401 by regular mail, on this 16th day of June, 1992.

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