

**FILED**

MAR 02 2009

**BEFORE A HEARING OFFICER OF  
THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF A MEMBER OF  
THE STATE BAR OF ARIZONA,**

**WHITNEY L. SORRELL,  
Bar No. 019313**

Respondent.

No. 06-0531

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY MMB

**HEARING OFFICER'S REPORT**

(Assigned to Hearing Officer 8W,  
Thomas M. Quigley)

The undersigned hearing officer recommends that Respondent Whitney L. Sorrell ("Respondent") be censured based on the findings of fact and conclusions of law below.

**I. PROCEDURAL HISTORY**

The formal complaint in this matter was filed on September 23, 2008. The complaint alleged one count. Respondent did not timely answer, and a notice of default was entered on October 21, 2008. Respondent filed an answer on October 23, 2008. No hearing has been held. A notice of settlement was filed on December 22, 2008, and subsequently the parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Agreement") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") on January 21, 2009. No hearing has been held in this matter.

**II. FACTS<sup>1</sup>**

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 16, 1998.

**COUNT ONE (File No. 06-0531)**

2. In March 2006, the State Bar of Arizona ("State Bar") received a charge from Clarissa Nelson ("Nelson") in which she alleged that Respondent had committed misconduct in his practice of law.

<sup>1</sup> The following facts were conditionally admitted in the Agreement, have been accepted as true by the hearing officer, and form the basis for this report.

1           3.     By letter dated April 17, 2006, State Bar counsel informed Respondent of  
2 Nelson's allegations and requested that he respond to them.

3           4.     By letter dated April 19, 2006, Respondent provided a response to  
4 Nelson's allegations.

5           5.     Respondent informed the State Bar that Nelson was a former employee  
6 whose job duties included bookkeeping responsibilities.

7           6.     Nelson began employment with Respondent's firm in April 2005.

8           7.     Nelson's responsibilities from the beginning of her employment, until her  
9 termination in November 2005, included financial and bookkeeping responsibilities,  
10 including dealing with client financial matters, deposits of funds and tracking expenses.

11          8.     Nelson, through counsel, made additional allegations to the State Bar  
12 concerning possible financial improprieties in Respondent's maintenance of his client  
13 trust account.

14          9.     Nelson was fired by Respondent after he discovered that she had  
15 embezzled approximately \$25,000 in funds from his law practice, and after she was  
16 fired she filed a charge with the State Bar.

17          10.    Based on the information provided by Respondent, and subsequently by  
18 Nelson, an examination of Respondent's client trust account and related record keeping  
19 was initiated.

20          11.    By letter dated August 1, 2006, State Bar counsel requested that  
21 Respondent provide for examination records of his client trust account(s), for the period  
22 of Nelson's employment, including copies of: monthly bank statements; individual  
23 client ledgers; administrative funds ledger; general ledger; records of monthly three-way  
24 reconciliations; duplicate deposit slips; and cancelled checks.

25          12.    Records were also requested from Respondent relating to his operating  
26 account(s) due the nature of Nelson's allegations.

27          13.    Respondent did not provide an administrative funds ledger for his client  
28 trust account because there were no administrative charges to his client trust account

1 during the period of review.

2 14. Respondent did not provide a general ledger or bank register for his client  
3 trust account because Nelson destroyed those documents.

4 15. By letter dated February 16, 2007, the State Bar's, after an initial review  
5 of records, requested additional information from Respondent, including individual  
6 client ledgers for the period under review; copies of a trust account general ledger for a  
7 period of time that both pre- and post-dated Nelson's employment; and for information  
8 on unidentified client transactions.

9 16. The records reviewed by the State Bar revealed that:

10 a. Respondent, on several occasions, effectively either made loans to  
11 clients from personal funds maintained in his client trust account by  
12 disbursing funds from his client trust account for their benefit,  
13 when insufficient funds belonging to the client were present in his  
14 client trust account, in violation of ER 1.8(e) or converted client  
15 funds by disbursing funds from the client trust account funds for  
16 the benefit of individual clients who did not have sufficient funds  
17 belonging to those clients in the client trust account, in violation of  
18 ER 1.15;

19 b. Respondent failed to maintain, or assure that complete and accurate  
20 records were maintained, including, but not limited to, a bank  
21 register or general journal for his client trust account. Respondent  
22 was unable to provide such records to the State Bar because  
23 Nelson destroyed those records;

24 c. Respondent maintained in his client trust account personal funds in  
25 excess of those needed to pay bank or administrative fees,  
26 frequently maintaining amounts several thousand dollars more than  
27 needed;

28 d. Respondent failed to prevent the conversion of client funds that

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- occurred when a check written on his client trust account cleared twice. Those funds were withdrawn from his account without his consent by Nelson, in excess of the limits of her authority and in violation of their agreement as to her access to those funds;
- e. Respondent commingled client funds by depositing unearned client funds into the operating account and by depositing personal funds into his client trust account;
  - f. Respondent made an unauthorized loan to a client ("Client Z") when he distributed personal funds held in the client trust account for Client Z's benefit, or in the alternative converted client funds when he disbursed funds for Client Z from the client trust account when the funds received from Client Z were insufficient, or uncollected, to cover the disbursements;
  - g. Respondent converted client funds and permitted his client trust account to maintain negative balances on at least seven (7) occasions when client funds should have been present in his client trust account. These occurrences were the direct result of Nelson's action;
  - h. Respondent failed to maintain cancelled checks and duplicate deposit slips, failed to promptly record, or cause to be recorded, all transactions relating to his client trust account. Nelson destroyed pertinent records;
  - i. Respondent failed to maintain records of his client trust account for five years after final disposition by him of the funds. Nelson destroyed numerous records;
  - j. Respondent failed to conduct, or cause to be conducted, monthly three-way reconciliations of his client trust account;
  - k. Respondent failed to maintain adequate individual client ledgers, or

1 the equivalent, for each client for whom monies were received in  
2 trust;

- 3 I. Respondent failed to ensure that employees assisting him in the  
4 performance of his duties relating to his client trust account,  
5 specifically Nelson, were competent and properly supervised;
- 6 m. Respondent failed to maintain adequate internal controls;
- 7 n. Respondent failed to review on a regular basis the records and  
8 maintenance of his client trust account after having delegated those  
9 duties to a non-lawyer member of his staff;
- 10 o. Respondent failed to make all account disbursements by pre-  
11 numbered check or by electronic transfer by disbursing funds, or  
12 permitting funds to be disbursed, from his client trust account on at  
13 least twelve (12) occasions by methods including telephone  
14 transfers, cashier's check(s), by a check payable to cash bearing no  
15 check number, by receiving cash back from a deposit and/or by  
16 miscellaneous debits. Three transactions (one cash-back from  
17 deposit transaction and two checks bearing no check number) were  
18 conducted by Nelson;

19 17. Respondent failed to adequately supervise his employee Nelson, ensure  
20 that the firm had in effect measures giving reasonable assurance that Nelson's conduct  
21 was compatible with his ethical obligations, or make reasonable efforts to ensure that  
22 Nelson's conduct was compatible with Respondent's professional obligations and failed  
23 to take prompt and appropriate remedial action to avoid or mitigate the effects of her  
24 misconduct. By the time Respondent discovered Clarissa Nelson's crimes, the damage  
25 due to her misconduct was complete.

26 **III. CONCLUSIONS OF LAW**

27 Based on the facts conditionally admitted and accepted by this hearing officer,  
28 Respondent violated either ER 1.8(a), (e) (by loaning his funds to clients without

1 obtaining informed consent) and/or ER 1.15 (by disbursing funds belonging to one  
2 client to another client) and the trust account rules, Ariz. R. Sup. Ct. 43, 44.

3 **IV. THE APPROPRIATE SANCTION**

4 The purpose of lawyer discipline is not to punish the lawyer, but to protect the  
5 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d  
6 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the  
7 profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297  
8 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter*  
9 *of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

10 In imposing discipline, it is appropriate to consider the facts of the case, the  
11 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards")  
12 and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178  
13 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

14 **A. ABA STANDARDS**

15 The *Standards* provide guidance with respect to an appropriate sanction in this  
16 matter. The Supreme Court and Disciplinary Commission consider the *Standards* a  
17 suitable guideline. *See In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772  
18 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P. 2d 1037, 1040 (1990).

19 In determining an appropriate sanction, the Supreme Court and the Disciplinary  
20 Commission consider the duty violated, the lawyer's mental state, the actual or potential  
21 injury caused by the misconduct and the existence of aggravating and mitigating factors.  
22 *See, Peasley*, 208 Ariz. at 35, 90P.3d at 772; *Standard* 3.0.

23 1. The Duty Violated.

24 The *Standards* identify four distinct categories in which a lawyer has specific  
25 duties: to his client; to the general public; to the legal system; and, to the profession.  
26 Respondent primarily violated his duties to his clients, thereby putting client property at  
27 risk.

28 2. The Lawyer's Mental State.

1           *Standard* 4.1 is implicated by Respondent's failure to appropriately maintain his  
2 client trust account. *Standard* 4.13 provides that reprimand (censure in Arizona) is  
3 generally appropriate when a lawyer is negligent in dealing with client property and  
4 causes injury or potential injury to a client. The State Bar accepted, as does this hearing  
5 officer, that Respondent was negligent in failing to have adequately supervised his  
6 employee and the maintenance of his client trust account. However, Respondent  
7 necessarily acted with knowledge when he disbursed funds to clients, which funds were  
8 potentially the funds of other clients. *Standard* 4.12 indicates that suspension is the  
9 presumptive sanction for dealing improperly with a client's funds when the lawyer  
10 should know that he is dealing improperly with the client's funds and a potential for  
11 injury exists.

12                           3.       Actual or Potential Injury.

13           Certainly the potential for injury existed here. There are no facts here that  
14 demonstrate actual injury to any client.

15                           4.       Aggravating and Mitigating Factors.

16           The parties agreed, and this hearing officer finds, the following factor in  
17 aggravation:

18           *Standard* 9.22(c) Pattern of misconduct. Respondent's mishandling of his client  
19 trust account was pervasive and thereby constituted a pattern of misconduct.

20           The parties agreed, and this hearing officer find the following factor in  
21 mitigation:

22           *Standard* 9.32(a) Absence of a prior disciplinary record.

23           In addition, the hearing officer finds on the admitted facts the additional  
24 mitigating factor of:

25           *Standard* 9.32(b) Absence of dishonest or selfish motive.

26           Absent this last mitigating factor, suspension may be warranted. However given  
27 that Respondent did not attempt to profit in anyway from the violations here, the  
28 purposes of lawyer discipline can best be achieved by a censure with appropriate

1 conditions of probation.

2 **B. PROPORTIONALITY REVIEW**

3 In the past, the Supreme Court has consulted similar cases in an attempt to assess  
4 the proportionality of the sanction recommended. *See In re Struthers*, 179 Ariz. 216,  
5 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept or  
6 proportionality review is “an imperfect process.” *In re Owens*, 182 Ariz. 121, 127, 893  
7 P.3d 1284, 1290 (1995). This is because no two cases “are ever alike.” *Id.*

8 To have an effective system of professional sanctions, there must be internal  
9 consistency, and it is appropriate to examine sanctions imposed in cases that are  
10 factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the  
11 discipline in each case must be tailored to the individual case, as neither perfection nor  
12 absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In*  
13 *re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207,  
14 660 P.2d 454, 458 (1983)).

15 The recent matter of *In re Cochran*, SB-07-0204-D (2008), demonstrates  
16 proportionality here. Cochran failed to properly manage and supervise other lawyers in  
17 the firm and failed to safeguard client property in the firm’s possession, resulting in  
18 considerable funds being embezzled by his law partner. Cochran further failed to  
19 adhere to trust account rules and guidelines in the overall management of the trust  
20 account. Violations of Rules 43 and 44, as well as ER 1.15 were found and Cochran  
21 was censured, placed on probation and required to complete remedial education courses  
22 offered by the State Bar, including TAEPP.

23 **V. CONCLUSION**

24 Upon consideration of the facts, application of the *Standards*, including  
25 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer  
26 recommends acceptance of the Tender of Admissions and Agreement for Discipline by  
27 Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent  
28 providing for the following:

- 1           1.     Respondent shall receive a Censure.<sup>2</sup>
- 2           2.     Respondent shall pay all costs and expenses incurred by the State Bar in  
3 these proceedings within thirty (30) days of the Supreme Court's Final Judgment and  
4 Order.
- 5           3.     Respondent shall serve a term of probation for two (2) years under the  
6 following conditions:
- 7           a.     Respondent shall contact the State Bar's Law Office Management  
8 Assistance Program (LOMAP) within thirty (30) days of the date of the Supreme  
9 Court's Judgment and Order. The director of LOMAP shall develop a probation  
10 contract, and its terms shall be incorporated herein by reference. The probation  
11 period will begin to run on the date of the final Judgment and Order in this case,  
12 and will conclude two (2) years from the date that all parties have signed the  
13 probation contract;
- 14           b.     Respondent shall complete the State Bar's Trust Account Ethics  
15 Enhancement Program ("TAEEP"), during the period of probation.
- 16           c.     Respondent shall refrain from engaging in any conduct that would  
17 violate the Rules of Professional Conduct or other rules of the Supreme Court of  
18 Arizona;
- 19           d.     In the event that Respondent fails to comply with any of the  
20 foregoing probation terms, and information thereof is received by the State Bar  
21 of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing  
22 entity, pursuant to Rule 60(a)(5). The imposing entity may refer the matter to a  
23 hearing officer to conduct a hearing at the earliest practicable date, but in no  
24 event later than thirty (30) days after receipt of notice, to determine whether a  
25 term of probation has been breached and, if so, to recommend appropriate action  
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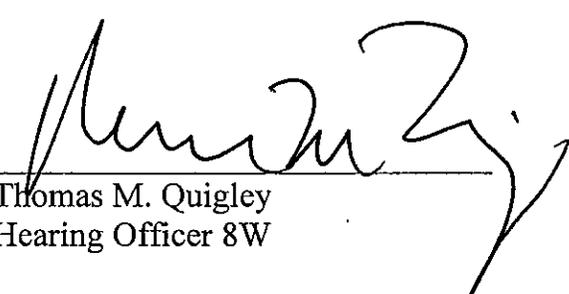
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27 <sup>2</sup> The State Bar does not seek restitution on behalf of any injured party.  
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1 and response. If there is an allegation that Respondent failed to comply with any  
2 of the foregoing terms, the State Bar of Arizona bears the burden of proof to  
3 prove noncompliance by clear and convincing evidence.

4 Respondent shall also pay the costs and expenses of this action during the  
5 period of probation.

6 DATED this 27<sup>M</sup> day of February, 2009.

7  
8   
9 Thomas M. Quigley  
Hearing Officer 8W

10 Original filed this 27<sup>M</sup> day of February,  
11 2009 with the Disciplinary Clerk of the  
12 Supreme Court.

13 Copies of the foregoing mailed this 27<sup>M</sup>  
14 day of February, 2009, to:

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By: 