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3 Phoenix, Arizona 85004
4 Hearing Officer 7M

FILED
MAR 20 2006
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *William*

5
6
7 **BEFORE A HEARING OFFICER**
8 **OF THE ARIZONA SUPREME COURT**

9 IN THE MATTER OF A MEMBER OF) No. 04-1904
10 THE STATE BAR OF ARIZONA,)
11 Kevin P. McFadden) HEARING OFFICER'S REPORT
12 Bar No. 014545)
13 Respondent.)
14)

15 This matter was assigned to this Hearing Officer on October 24, 2005. The
16 parties filed a Tender of Admissions and Agreement for Discipline by Consent
17 (Tender) and a Joint Memorandum in Support of Agreement for Discipline by
18 Consent (Joint Memo) agreeing that Respondent Kevin P. McFadden
19 ("Respondent") should be censured and ordered to pay the State Bar's costs for
20 violating Rule 42, ERs 1.15 and 3.1, Ariz.R.S.Ct., and Rules 43 and 44,
21 Ariz.R.S.Ct. No hearing has been held.

22
23
24 Respondent has conditionally admitted that he erred in handling two
25 personal matters. In one matter, he held settlement funds, resulting from his

1 handling of his stepfather's personal-injury case, in his personal bank account
2 with no prejudice to any parties. In the second matter, he raised good-faith but
3 non-meritorious claims in the context of his personal bankruptcy. Both are
4 explained in more detail below.
5

6 The State Bar has notified Respondent of the Tender as required by Rule
7 52(b)(3), Ariz.R.S.Ct.
8

9 The Hearing Officer has determined that no hearing is necessary in order to
10 rule on the Tender. For reasons discussed in more detail below, the Hearing
11 Officer recommends that the Tender be approved and accepted.
12

13 **I. STIPULATED FACTS**

14 1. At all relevant times, Respondent was an attorney licensed to
15 practice law in Arizona, having been admitted to practice in this state on October
16 24, 1992. Respondent has no prior disciplinary record.
17

18 2. The State Bar filed a formal complaint in this matter on October 5,
19 2005.
20

21 **A. The trust-account issue**

22 3. In 2003, Respondent represented his stepfather, James Lee, on a
23 personal-injury case. He represented his stepfather *pro bono*.
24

25 4. Respondent's law firm had declined to take the case, so Respondent
handled the matter outside of his law firm with the firm's knowledge.

1 5. The case settled for about \$67,000. Respondent appropriately
2 withheld about \$19,000 to pay a Medicare lien and paid the balance to his
3 stepfather.
4

5 6. Respondent deposited the portion he withheld to pay the Medicare
6 lien into a personal bank account that he owned jointly with a third person.
7

8 7. Respondent timely paid the Medicare lien in full.
9

10 8. Respondent's stepfather did not complain about his handling of the
11 matter, and no parties were prejudiced by Respondent's actions. Respondent had
12 no prior experience with the management of trust accounts or personal injury
13 settlements.
14

15 **B. The bankruptcy representations**

16 9. Respondent and his now-ex-wife, Elizabeth McCoy, owed to the
17 Arizona Department of Revenue and to the Internal Revenue Service taxes
18 totaling approximately \$38,784.86 for tax years 1998, 1999 and 2000. This debt
19 resulted from Ms. McCoy's admitted tax fraud, which she committed without his
20 knowledge. Respondent alleges, and Respondent's evidence presented to the State
21 Bar appears to corroborate, that he had no knowledge of Ms. McCoy's conduct
22 until he discovered it sometime in early 2001.
23
24
25

1 10. On behalf of Respondent and Ms. McCoy, Respondent's parents,
2 Jacqueline and James Lee, paid the \$38,784.86 directly to the taxing authorities
3 on or about February 12, 2001.
4

5 11. Respondent executed a promissory note, dated February 12, 2001, in
6 which he promised to repay the Lees the \$38,784.86, on or before February 12,
7 2003.
8

9 12. In his answer to the formal complaint, Respondent explained his and
10 his siblings' arrangement with his parents:

11 Respondent alleges that, during his younger years and
12 particularly during college, Respondent's parents provided
13 generous gifts to Respondent and his siblings. Respondent further
14 alleges that, when he and his siblings finished school and began
15 earning their own incomes, Respondent's parents continued
16 providing generous gifts within the family on a less frequent basis,
17 but they began documenting these gifts by requiring Respondent
18 and his siblings to sign promissory notes to indicate advances
19 against each child's inheritance. In this case, the purpose of the
20 note was not to document the gift as "loan," but to keep the gift
21 fair and proportionate to Respondent's and his sibling's eventual
22 inheritance. Respondent further alleges that, in this instance, his
23 parents specifically offered this gift, because of the seriousness of
24 his situation and his inability to repay the amount. Respondent
25 further alleges that his parents, therefore, required him to sign a
note, which both he and his parents viewed both as a gift and as an
advance on his inheritance. Respondent further alleges that he had
an implied understanding with his parents that, in this situation,
the loan was a gift so long as Respondent and his ex-wife
remained married. Respondent's parents did not trust
Respondent's ex-wife; therefore, their intent was to prevent her
from leaving the marriage with the benefit of their generosity.
Respondent further alleges that it was his understanding that, if his
ex-wife was to divorce Respondent, his parents wanted to have the

1 option of possible recourse against the ex-wife based on the notes,
2 so they could recover her community property share of their gifts.
3 With respect to the ex-wife, therefore, Respondent's parents' gift
4 was contingent on the marriage not ending in divorce. This
5 condition was particularly important after the discovery of the ex-
6 wife's tax fraud, which confirmed Respondent's parents' lack of
7 trust. Respondent further alleges that his parents made a notation
8 to their trust instrument expressing that the promissory note was,
9 in fact, an advance on his inheritance.

10 [Answer ¶ 10]

11 13. Respondent and Ms. McCoy, while they were married, filed a
12 Chapter 7 bankruptcy petition, Case No. 01-02414-PHX-SSC, on or about March
13 6, 2001.

14 14. Respondent and Ms. McCoy did not list the loan from the Lees as an
15 obligation on their bankruptcy petition.

16 15. Respondent and Ms. McCoy did not list the pre-petition payment to
17 the taxing authorities on their bankruptcy petition because they were still married
18 and his parents did not expect repayment. Respondent believed in good faith that
19 the promissory note was a gift, and he did not at the time believe that he and his
20 ex-wife would divorce.

21 16. Respondent also did not list the loan because he was not required to
22 list such a payment for tax liabilities, as these are not, in any event, dischargeable
23 in bankruptcy.
24
25

1 17. In a letter dated April 18, 2001, to Maureen Gaughan, the bankruptcy
2 trustee, Respondent sent a document he titled "Statement regarding 1999 and
3 2000 tax returns." In that document, Respondent stated that the money his parents
4 paid to the taxing authorities "was not a loan..." When written, Respondent
5 believed in good faith that the statement was true.
6

7 18. Respondent did not disclose the promissory note to Ms. Gaughan
8 because he believed his parents' payment of the tax liabilities was still a gift, as
9 he and Ms. McCoy were not divorced nor planning to divorce at the time.
10

11 19. If this matter proceeded to a hearing, the State Bar would take the
12 position that by failing to disclose the existence of the loan from his parents in his
13 Chapter 7 bankruptcy petition and by representing to the bankruptcy trustee that
14 the loan from his parents was a gift, Respondent violated ERs 3.3, 8.4(c) and
15 8.4(d), Rule 42, Ariz.R.S.Ct.
16

17 20. Respondent and Ms. McCoy received a bankruptcy discharge on
18 June 28, 2001.
19

20 21. More than two years after he filed the bankruptcy petition,
21 Respondent filed for divorce from Ms. McCoy on or about February 25, 2003, in
22 Maricopa County Superior Court no. FC2003-002105.
23

24 22. Although he had taken the position in their bankruptcy that the
25 money from his parents was not a loan, Respondent, in the divorce proceeding,

1 took the position that Ms. McCoy was obligated to pay half of the loan from his
2 parents. Respondent took this position because his parents had decided to sue
3 Ms. McCoy on their own behalf to recover her half of the payment. They desired
4 to take this action because they believed that she was solely responsible for the
5 tax debt, and they did not want her to have the benefit of their actions, which they
6 took to protect their son and the marital community, not Ms. McCoy, whom they
7 distrusted.
8

9
10 23. In the divorce decree signed May 30, 2003, Respondent and Ms.
11 McCoy each were assigned one-half of the loan from Respondent's parents.

12
13 24. Before the divorce, Respondent had not expected that his parents
14 would enforce the promissory note, but his parents later believed it was
15 inequitable for Ms. McCoy to benefit from their gift when she had committed tax
16 fraud and the marriage was going to dissolve.

17
18 25. Respondent repaid the entire loan to his parents from his own funds
19 on or about November 12, 2003.

20
21 26. Respondent then sought reimbursement from Ms. McCoy through
22 post-decree proceedings in Maricopa County Superior Court no. FC2003-002105.

23
24 27. At an April 8, 2004, post-decree hearing, Respondent testified in
25 response to questions from Ms. McCoy's attorney, George F. Klink, as follows:

Q (By Mr. Klink): And those schedules do not reflect the obligation to
your – the claimed obligation to your mother and step-father, correct?

1 A (By Respondent): Yeah, we did that on purpose.

2 Q: You told the trustee, however, that, that there was no obligation to
3 your parents, isn't that correct?

4 A: I believe so, yeah. I didn't want her going after my folks.

5 Q: So you indicated to them that it was a gift, didn't you?

6 A: Probably.

7 28. If this matter proceeded to a hearing, Respondent would take the
8 position that Ms. McCoy's counsel caught him by surprise and that despite his
9 testimony, he believed that listing the promissory note on the bankruptcy petition
10 as an "obligation" would have been misleading, as his parents had never acted as
11 creditors nor collected on promissory notes they had ever asked him to sign. In
12 addition, his parents, at the time he filed the bankruptcy petition, still considered
13 the \$38,784.86 as a gift.

14 29. At the April 8, 2004, hearing, Respondent's mother, Jacqueline Lee,
15 testified that she "in no way" considered the money she paid to the taxing
16 authorities to be a gift to Respondent and Ms. McCoy. If this matter proceeded to
17 a hearing, Respondent would take the position that his mother would testify that
18 when she paid the money directly to the IRS and ADOR, she considered the
19 money to be a gift, not a loan. Respondent would contend that the divorce, which
20 occurred after the bankruptcy, changed the nature of his parents' donations from a
21 gift to a loan, because in his parents' mind, the money was never intended to
22 benefit Ms. McCoy. It was meant to benefit Respondent. The money inured to
23 the benefit of the marital community because the community, due to Ms.
24
25

1 McCoy's conduct, had a substantial tax liability. Respondents' parents distrusted
2 Ms. McCoy and did not want to help her. They wanted to help their son and
3 grandchildren out of a difficult situation that Ms. McCoy had created. Thus,
4 when the divorce occurred, Respondent's parents decided that they wanted to
5 enforce the terms of the promissory note so that Ms. McCoy could not benefit as
6 an individual from their actions to defray the tax liability.
7

8
9 30. Respondent's parents made a notation in their trust instrument
10 indicating that the promissory note was an advance on his inheritance.

11 31. By order filed April 28, 2004, the court found the obligation to
12 Respondent's parents to be a loan binding on the community and granted
13 judgment to Respondent against Ms. McCoy for \$19,392.43.
14

15 32. On or about July 13, 2004, Ms. McCoy filed a motion to reopen the
16 bankruptcy proceeding, seeking to discharge her half of the loan from
17 Respondent's parents. The court granted the motion to reopen.
18

19 33. On or about October 7, 2004, Ms. McCoy filed in Bankruptcy Court
20 (Case No. 2:01-bk-02414-SSC and Adv. No. 2:04-ap-01086-SSC) a complaint in
21 which she sought to discharge the loan from Respondent's parents.
22

23 34. At a January 19, 2005, hearing on the complaint, Respondent's
24 bankruptcy counsel advised that the loan from Respondent's parents should have
25 been listed on the couple's Chapter 7 petition. If this matter proceeded to a

1 hearing, Respondent would take the position that this statement did not reflect
2 Respondent's good-faith belief that, at the time he executed the promissory note,
3 the money was a gift.
4

5 35. In the bankruptcy proceeding, the court ruled that Ms. McCoy could
6 not discharge her half of the debt to Respondent's parents because the couple
7 incurred the debt to pay non-dischargeable taxes.
8

9 **II. Conditional admissions**

10 36. Respondent has conditionally admitted that by failing to hold in a
11 trust account the money he withheld from his stepfather's personal-injury
12 settlement to satisfy the Medicare lien, Respondent unintentionally and without
13 prejudice to any parties committed a violation of ER 1.15, Rule 42, Ariz.R.S.Ct.
14

15 37. Respondent has conditionally admitted that by taking the position in
16 the bankruptcy proceeding that the \$38,784.86 his parents paid to satisfy tax
17 liabilities was not a loan, despite the existence of a promissory note, Respondent
18 violated ER 3.1, Rule 42 Ariz.R.S.Ct., although Respondent's position was a
19 good-faith reflection of his belief as to his parents' intent at the time.
20

21 **III. Conditional dismissals**

22 38. The State Bar has conditionally dismissed the allegations that
23 Respondent's conduct in the bankruptcy proceeding violated ERs 3.3, 8.4(c) and
24 8.4(d), Rule 42, Ariz.R.S.Ct.
25

1 **IV. Sanction**

2 39. Respondent has been represented by counsel in this matter.
3 Respondent has acknowledged that he has received a copy of the Tender and has
4 read it. Respondent has represented that he submitted the Tender freely and
5 voluntarily, and without coercion or intimidation, and with full awareness of the
6 Supreme Court rules with respect to discipline.
7

8 40. By entering into the Tender, Respondent knowingly waived his right
9 to a formal disciplinary hearing to which he would otherwise have been entitled
10 pursuant to Rule 57(i), Ariz.R.S.Ct., and the right to testify or present witnesses
11 on his behalf at a hearing.
12

13 41. By entering into the Tender, Respondent also knowingly waived all
14 motions, defenses, objections or requests that he had made or could have raised, if
15 the conditional admissions and stated form of discipline are approved.
16

17 42. Respondent understands that the Disciplinary Commission must also
18 approve the Tender, and that the Arizona Supreme Court may elect to review the
19 matter as well. Respondent understands that this matter will not become final
20 until the Arizona Supreme Court issues its judgment and order.
21

22 43. If the Tender is rejected, the parties' conditional admissions are
23 withdrawn.
24
25

1 44. Respondent has conditionally admitted that he engaged in the
2 conduct set forth above, and the rule violations indicated, in exchange for the
3 form of discipline set forth in the following paragraph.
4

5 45. Respondent and the State Bar agree that based on the conditional
6 admissions, Respondent shall receive a censure and shall pay the State Bar's
7 costs and expenses of this disciplinary proceeding.
8

9 A. ABA STANDARDS

10 46. In determining the appropriate sanction, Arizona generally follows
11 the ABA Standards for imposing Lawyer sanctions ("the *Standards*"). *In re*
12 *Zawada*, 208 Ariz. 232, 92 P.3d 862 ¶ 12 (2004).
13

14 47. The Standards list the following factors to consider in imposing the
15 appropriate sanction:

16 (1) the duty violated;

17 (2) the lawyer's mental state;

18 (3) the actual or potential injury caused by the lawyer's misconduct;

19 and
20

21 (4) the existence of aggravating or mitigating circumstances.
22

23 ABA Standard 3.0. *Zawada* at ¶ 12. The Hearing Officer has considered all of
24 the required factors.
25

1 48. The theoretical framework analysis contained in the *Standards* states
2 that where there are multiple acts of misconduct, the sanction should be based
3 upon the most serious misconduct, with the other acts being considered as
4 aggravating factors. *See also In re Cassalia*, 172 Ariz. 372, 375, 843 P.2d 654,
5 657 (1992).

7 49. The trust-account violation involves *Standard* 4.13,¹ which states in
8 relevant part that:

9
10 4.13. [Censure] is generally appropriate when a lawyer is
11 negligent in dealing with client property and causes injury or
12 potential injury to a client.

13 50. The bankruptcy matter is more complicated, and does not perfectly
14 fall under any of the *Standards*. The closest, however, are *Standards* 6.23 and
15 6.24.

16 51. *Standard* 6.23 provides in relevant part that:

17
18 [Censure] is generally appropriate when a lawyer negligently fails
19 to comply with a court order or rule, and causes injury or potential
20 injury to a client or other party, or causes interference or potential
21 interference with a legal proceeding.

22 ¹ Standard 4.13 applies because Respondent has conditionally admitted that his
23 trust account violation was negligent, rather than knowing. The Hearing Officer
24 questions how a decision to commingle trust funds with personal funds could be
25 negligent instead of knowing. The Hearing Officer, however, has accepted the parties' stipulation that Respondent had no prior experience with the management of trust accounts or personal injury settlements, and that his violation was therefore merely negligent. If the commingling was knowing, the relevant standard would be 4.12 which generally provides for suspension.

1 52. *Standard 6.24* provides in relevant part that:

2 [*Informal reprimand*] is generally appropriate when a lawyer
3 engages in an isolated instance of negligence in complying with a
4 court order or rule, and causes little or no actual or potential
5 injury, or causes little or no actual or potential interference with a
6 legal proceeding.

7 1. **The Duties Violated**

8 53. The duties violated are discussed above.

9 2. **Respondent's Mental State**

10 54. Pursuant to the conditional admissions, the parties have agreed that
11 Respondent's trust account violations were committed "unintentionally." This
12 conditional admission, together with the discussion in the Joint Memo, suggests
13 that the parties agree that Respondent acted **negligently** in violating his duties to
14 safeguard funds that did not belong to him.

15 55. The conditional admissions did not specify a particular mental state
16 relating to the violation of ER 3.1 in the bankruptcy court. Respondent has
17 conditionally admitted that the position he took in the bankruptcy court was a
18 "good-faith reflection of his belief." This conditional admission, together with
19 the discussion in the Joint Memo, suggests that the parties agree that Respondent
20 acted **negligently** in violating his duties not to advance non-meritorious claims or
21 contentions.
22
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1 **3. Actual or Potential Injury Caused by Misconduct**

2 56. It does not appear that any actual injury resulted from Respondent's
3 trust account violation.
4

5 57. By commingling client funds with his personal funds, Respondent
6 caused "potential injury." Respondent has attempted to minimize the potential
7 for injury by asserting that the risk for conversion of the funds was low because
8 the other signatory to the personal bank account into which the trust funds were
9 placed was a "trusted individual." The risk of conversion, however, was not the
10 only potential injury caused by this improper commingling. By commingling
11 client funds with personal funds, Respondent placed the client funds in jeopardy
12 by subjecting them to a potential garnishment of his personal bank account.
13 "Lawyers sometimes forget that the dangers of commingling are not merely that
14 the lawyer will squander the money 'borrowed' from a trust account and not be
15 able to restore it, but that the commingled funds might be subject to attachment
16 by a lawyer's creditors, thus preempting the lawyer's ability to do so." Geoffrey
17 C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: Handbook on the*
18 *Model Rules of Professional Conduct*, § 19.4 (3d ed. 2001& Supp. 2002). The
19 commentary to Standard 4.12 states that "Because lawyers who commingle
20 clients' funds with their own subject the client's funds to the claims of creditors,
21 commingling is a serious violation for which a period of suspension is appropriate
22
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1 even in cases where the client does not suffer a loss.” Given Respondent’s
2 history of financial problems, the risk of his personal bank account being
3 garnished was more than nominal.
4

5 58. The issue of actual or potential injury is difficult to apply in
6 connection with the different positions Respondent took in regard to the
7 characterization of the loan from his parents in the bankruptcy and subsequent
8 divorce proceedings. Whatever injury may have potentially or actually occurred
9 was not injury to a “client.” Rather any harm would have been to Respondent’s
10 creditors and/or his ex-spouse.
11

12 59. Standard 6.23 does not require injury to a client. This standard
13 applies if there is an injury to any party to a proceeding, or if the action causes
14 interference or potential interference with a legal proceeding. The subsequent
15 domestic relations litigation over the characterization of this loan could have been
16 avoided had Respondent disclosed the loan from his parents on the parties’
17 bankruptcy petition and dealt with the issue at that time. As such, Respondent
18 caused injury to his former spouse, and interfered with both the bankruptcy and
19 divorce proceedings.
20
21

22 **4. Aggravating and Mitigating Circumstances**
23

24 60. The parties have stipulated to the following aggravating and
25 mitigating circumstances.

1 **a. In aggravation:**

2 i. *Standard 9.22(i) (substantial experience in the practice*
3 *of law)*: Respondent was admitted to practice on October 24, 1992.
4 The parties have stipulated, however, that Respondent had no prior
5 experience with trust accounts or personal injury settlements. The
6 parties have also stipulated that the events surrounding the tax
7 liability of Respondent's marital community were highly unusual,
8 and impacted his personal rather than his professional life.
9

10 **b. In mitigation:**

11 ii. *Standard 9.32(a) (absence of a prior disciplinary*
12 *record)*: Respondent has had no other complaints during his more
13 than 13 years of practice.²
14

15 iii. *Standard 9.32(b) (lack of dishonest and selfish motive)*:
16 The parties have stipulated that Respondent had no dishonest or
17 selfish motive in holding his stepfather's money in his personal bank
18 account, because Respondent did not have access to his firm's trust
19 account, and he believed that holding the money in his trust account
20 was an option, as he had handled the matter for stepfather, and there
21
22
23

24 ² **In the Joint Memo, the parties further asserted that this factor should apply in**
25 **mitigation because "and this complaint was instigated by his ex-wife." Whether or not**
a victim complains, however, is neither aggravating nor mitigating. See Commentary
to Standard 9.4.

1 was no dispute that the money he held in his account was owed to a
2 third party (which Respondent promptly paid). The parties have also
3 stipulated that Respondent had no dishonest or selfish motive in
4 asserting in the bankruptcy proceeding that the money from his
5 parents was a gift, because it would not have been a dischargeable
6 debt in any event, because the money was used to pay
7 nondischargeable taxes.
8
9

10 iv. Standard 9.32(e) (full and free disclosure to a
11 disciplinary board or cooperative attitude toward proceedings):
12 Respondent has fully cooperated throughout the investigation and
13 formal proceedings.
14

15 v. *Standard 9.32(g) (character or reputation)*: Although
16 the parties stipulated in the Joint Memo that this factor could be
17 considered in mitigation, the parties provided no facts to support its
18 application.
19

20 61. The Hearing Officer agrees with the parties position in the Joint
21 Memo that the balance of the aggravating or mitigating circumstances is not
22 sufficient to change the presumptive sanction in this case.
23
24
25

1 **B. RECOMMENDED SANCTION**

2 62. Because Respondent engaged in multiple acts of misconduct, the
3 sanction should be based upon the most serious misconduct, with the other acts
4 being considered as aggravating factors. *In re Cassalia*, 172 Ariz. 372, 375, 843
5 P.2d 654, 657 (1992). Based upon the stipulated facts, the trust account violation
6 was the more serious violation. The presumptive sanction for this violation is a
7 censure. The presumptive sanction for the less serious bankruptcy violation is
8 either a censure or an informal reprimand. The parties have stipulated that a
9 tender is the appropriate sanction. The Hearing Officer agrees that censure is
10 appropriate in the circumstances of this case.
11

12 **C. PROPORTIONALITY**

13 63. The last step in determining if a particular sanction is appropriate is
14 to assess whether the discipline is proportional to the discipline imposed in
15 similar cases. *In re Peasley*, 208 Ariz. 27; 41, 90 P.3d 764, 778 (2004). “This is
16 an imperfect process because no two cases are ever alike.” *In re Owens*, 182
17 Ariz. 121, 127; 893 P.2d 1284, 1290 (1995). As the Arizona Supreme Court
18 stated in a very recent discipline case:
19

20 Consideration of the sanctions imposed in similar cases is necessary to
21 preserve some degree of proportionality, ensure that the sanction fits the
22 offense, and avoid discipline by whim or caprice. . . . Proportionality
23 review however, is an imperfect process. . . . Normally the fact that one
24 person is punished more severely than another involved in the same
25 misconduct would not necessarily lead to a modification of a disciplinary

1 sanction. Both the State Bar in its capacity as prosecutor and the
2 Disciplinary Commission in its quasi-judicial capacity have broad
discretion in seeking discipline and in recommending sanctions.

3 *In re Dean*, ___ Ariz. ___, ___ P.3d ___, 2006 Ariz. LEXIS 24 at ¶ 24 (March 16,
4 2006).

6 64. Because perfect uniformity cannot be achieved, the Arizona Supreme
7 Court has long recognized that the discipline in each situation must be tailored for
8 the individual case. *In re Piatt*, 191 Ariz. 24; 31, 951 P.2d 889, 896 n.5 (1997).
9 The Hearing Officer has attempted to do so in this case.

11 65. In the Joint Memo, the parties submitted that a censure was
12 supported by the decision in *Matter of Riggs*, 177 Ariz. 494, 869 P.2d 170 (1994).
13 In *Riggs*, the attorney commingled client funds with personal funds. The
14 commingling apparently continued for five years. The Disciplinary Commission
15 found that in light of various mitigating circumstances, a sanction more severe
16 than censure would be inappropriately harsh in that matter. The facts in *Riggs*
17 suggest that the potential injury to the client in that case was much more
18 significant than in the present matter.
19

21 66. Other similar cases where attorneys have been censured for
22 commingling trust and personal funds include the following: *In re Smith (No. SB-*
23 *02-0121-D)*, 2002 Ariz. LEXIS 145 (2002); *In re VanBalen (SB-01-0160-D)*, 2001
24 Ariz. LEXIS 139 (2001) (insufficient funds in trust account, and commingling of
25

1 personal funds); *In re Leiber (SB-01-0122-D)*, 2001 Ariz. LEXIS 95 (2001)
2 (insufficient funds in trust account, and commingling of personal funds).

3
4 67. The Hearing Officer finds that a censure would be proportional with
5 sanctions imposed in similar cases involving trust account violations.

6 68. Given the unusual circumstances surrounding the characterization of
7 the loan from Respondent's parents, it is not surprising that there are no prior
8 cases that involve similar facts.

9
10 69. In addition to the cases cited in the Joint Memo, the following cases
11 involve somewhat similar circumstances, and would support the imposition of a
12 censure. *In re Gabriel (89-1652)*, 172 Ariz. 347, 837 P.2d 149 (1992) (attorney
13 censured for willfully failing to provide discovery in litigation to which he was
14 personally a party); *In re Manning*, 177 Ariz. 496, 869 P.2d 172 (1994) (attorney
15 censured for failing to comply with a Court order).

16
17 70. The Hearing Officer finds that a censure would be proportional with
18 sanctions imposed in similar cases involving misleading courts or obstructing
19 judicial proceedings.

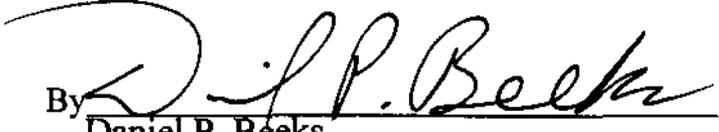
20
21 71. Overall, the Hearing Officer believes that the stipulated sanction of a
22 censure is proportional with sanctions in similar cases.
23
24
25

1 **V. CONCLUSION**

2 72. For the reasons discussed above, the Hearing Officer recommends
3 that Respondent should be censured, and ordered to pay the State Bar's costs and
4 expenses of this disciplinary proceeding.
5

6 DATED: March 20, 2006

7 HEARING OFFICER 7M

8
9 By 

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14 ORIGINAL of the foregoing filed
15 March 20, 2006, with:

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