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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY CSH

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

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4 IN THE MATTER OF A MEMBER)
5 OF THE STATE BAR OF ARIZONA,)
6 **GARY F. FORSYTH,**)
7 **Bar No. 007586**)
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RESPONDENT.

Nos. 05-0504, 05-0674, 05-0887
05-1593, 05-1782, 06-0058
06-1312, 06-0663

HEARING OFFICER'S REPORT

The State Bar of Arizona and Respondent Gary F. Forsyth, represented by Nancy A. Greenlee, have submitted a Tender of Admissions and Agreement for Discipline by Consent pursuant to Rule 56(a), Ariz.R.Sup.Ct. This Hearing Officer has reviewed the Tender and Agreement, the attached exhibits, the Joint Memorandum in Support of the Agreement for Discipline by Consent, and the Joint Post-Hearing Statement. For the reasons set forth below, this hearing officer recommends modification of the proposed agreement.

CONDUCT

1. As reflected in the Tender of Admissions and Agreement for Discipline by Consent (Tender) Respondent Gary F. Forsyth has conditionally admitted that he violated Rule 42, Ariz.R.Sup.Ct., to wit: ER 1.2(a), 1.3, 1.4(a) and (b), 1.16(d), 8.1(b), and Rule 53 (d) and (F), Ariz.R.Sup.Ct.

RELEVANT FACTS

1 2. The statement of facts set forth in the Tender and the Uncontested Facts
2 set forth in the Joint Post-Hearing Statement are adopted herein and incorporated by
3 this reference. A brief summary is noted below.
4

5 3. **Count One, 05-0504/Patton.** Count One involved a series of civil
6 matters wherein the Respondent was representing Nu Look Auto Body and Glass Inc.
7 (Nu Look). Respondent was representing Nu Look on more than one matter and failed
8 to adequately communicate with this client. Respondent also failed to diligently
9 pursue this client's legal interests. Respondent conditionally admits to violations of
10 ER 1.3 (diligence) and 1.4(a) and (b) (communication).
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12 4. **Count Two, 05-0674/Tafoya.** Count Two involved a dependency
13 matter where Respondent was appointed to represent Mr. Tafoya. Mr. Tafoya was in
14 custody on a related criminal matter. (Respondent did not represent Mr. Tafoya on the
15 criminal matter.) By necessity, the dependency matter's resolution would trail the
16 resolution of the criminal charges. Nevertheless, Respondent failed to adequately
17 communicate with this client. During a six month period while Respondent was
18 representing Mr. Tafoya, Respondent never visited/consulted with him at the jail.
19 Respondent did see his client at periodic court proceedings. However, Respondent did
20 not respond to his client's written letters requesting that Respondent communicate with
21 him about his case. Respondent conditionally admits violations of ER 1.2 (Scope of
22 Representation) and ER 1.4 (a) and (b) (Communication).
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5. **Count Three, 05-0887/Mack.** Count Three was a private criminal case.

1 Respondent was hired to represent Mr. Mack in the Show Low Justice Court. Mr.
2 Mack provided Respondent with a check for \$1,000.00 and other documents for his
3 case. During the course of his representation, Respondent continued the trial without
4 communicating with Mr. Mack about the continuance. Mr. Mack was also dissatisfied
5 with his inability to meet and communicate with Respondent. On February 7, 2005
6 Mr. Mack terminated Respondent's representation. In his hand-delivered letter to the
7 Respondent, Mr. Mack demanded the return of his property and the balance of his
8 advance fee deposit. Because Mr. Mack and Respondent were unable to reach an
9 agreement on the amount of the unused deposit, Mr. Mack filed a lawsuit against the
10 Respondent. Mr. Mack obtained a judgment for \$535.00 plus court costs of \$24.00
11 against the Respondent. Respondent conditionally admits to violation of ER 1.4(a)
12 (Communication) and ER 1.16(d) (Termination of Representation).
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16 6. **Count Four, 05-1593/Judicial Referral.** Count Four involved a judicial
17 referral to the State Bar by the Honorable Dale P. Neilson. Count Four involved three
18 separate criminal defendants where Respondent was court appointed counsel. All three
19 defendants were in custody. All three defendants complained that the Respondent had
20 not adequately communicated with them. The Superior Court removed Respondent
21 from representing two of the three defendants. Respondent conditionally admits to
22 violations of ER 1.3 (Diligence) and ER 1.4(a) (Communication).
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1 7. **Count Five, 05-1782/Mason.** Count Five involved a criminal (DUI)
2 case. Initially, Anthony and Linda Mason hired Respondent to represent their son,
3 Mark Mason, for a misdemeanor DUI charge. The initial misdemeanor DUI was
4 handled by the Respondent in a satisfactory manner.

5 8. The Masons also retained Respondent to represent their son on a second
6 felony DUI charge. The Masons paid Respondent an initial retainer of \$2,500 00.
7 During the second case, Respondent filed at least two motions to continue the case
8 without consulting the client or his parents. The Masons were dissatisfied with the
9 Respondent because they traveled 150 miles to Phoenix to pick-up their son and had
10 not been informed that the case was being continued. Respondent contested this
11 allegation. Nevertheless, the Masons terminated the relationship and requested a
12 refund of their advance fee deposit. A dispute arose between the Respondent and the
13 Masons as to how much of the fee had been earned. Respondent admitted that his
14 billing program contained incomplete or inaccurate information which needed to be
15 remedied by hand. Respondent conditionally admits that he violated ER 1.16(d)
16 (Termination of Representation).
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20 9. **Count Six, 06-0058/Yazzie.** The Respondent was appointed to
21 represent Mr. Yazzie in as many as 16 different criminal matters. The matters were
22 scheduled in various courts with many different hearing dates. Mr. Yazzie complained
23 that, *inter alia*, Respondent failed to adequately communicate with him regarding his
24 cases.
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10. With respect to Count Six, Respondent conditionally admits that he
1 violated ER 8.1(b) (Failure to respond to the State Bar) and Rule 53(d) and (f),
2 Ariz.R.S.Ct. (Failure to cooperate/furnish information to the State Bar).
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4 11. **Count Seven, 06-0663/Caid.** Count Seven involved a divorce case. On
5 July 25, 2005 Jenny Caid paid Respondent \$2,500 to represent her with her divorce.
6 Between July 25th and September 21, 2005 Respondent and client encountered various
7 problems in the representation. On September 21, 2005 Ms. Caid obtained new
8 counsel to represent her with her divorce. A dispute between Respondent and client
9 arose regarding the fee that was earned. Respondent's fee agreement contains a
10 provision for fee arbitration. Ms. Caid submitted the dispute to the State Bar's fee
11 arbitration program, but Respondent failed to respond. Respondent agrees to
12 participate in fee arbitration with Ms. Caid on this matter.
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15 12. **Count Eight, 06-1312/Alldredge.** Count Eight involved the
16 representation in a dependency matter. The client had requested a copy of her file
17 from the Respondent. Respondent refused to give the client a copy of the file unless
18 she first paid for the file. There were other breakdowns in communication between
19 Ms. Alldredge and the Respondent as well. When Ms. Alldredge filed a complaint
20 against the Respondent with the State Bar, the State Bar advised Respondent to reply to
21 Ms. Alldredge within twenty days. Respondent failed to responded to the State Bar's
22 request.
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13. In regard to Count Eight, Respondent conditionally admits that he
1 violated ER 8.1(b) (Failure to respond to the State Bar) and Rule 53(d) and (f),
2 Ariz.R.S.Ct. (Failure to cooperate/furnish information to the State Bar.
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4 TENDERED SANCTION

5 14. Respondent agrees to accept a four-motion suspension, two-year
6 probation, which includes LOMAP, and the immediate participation in the Member
7 Assistance Program, participation in fee arbitration with complainants in Counts One,
8 Five, and Seven, and payment of the costs and expenses of the disciplinary
9 proceedings. The State Bar and Respondent agreed previously that these are the
10 appropriate sanctions in these circumstances. In the Post-Hearing Statement the State
11 Bar now recommends that the Consent Documents be modified to increase the
12 suspension from four months to six months and one day.
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14 15. In determining the appropriate sanctions, Respondent and the State Bar
15 considered both the American Bar Association's *Standards for Imposing Lawyer*
16 *Sanctions* ("*Standards*" or "*Standard* _____") and applicable case law.
17

18 16. Given the conduct in this matter, it is appropriate to consider *Standard*
19 4.0 (Violations of Duties Owed to Clients) and *Standard* 8.0 (Prior Discipline Orders).
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21 4.4 Lack of Diligence

22 4.42 Suspension is generally appropriate when:
23 (a) a lawyer knowingly fails to perform
24 services for a client and causes injury
25 or potential injury to a client, or
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(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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2 **8. Prior Discipline Orders**

3 8.2 Suspension is generally appropriate when a
4 lawyer has been reprimanded for the same or
5 similar misconduct and engages in further
6 similar acts of misconduct that cause injury
7 or potential injury to a client, the public, the
8 legal system, or the professions.

9 17. Based on the conditional admissions, the presumptive sanctions for the
10 admitted conduct under the *Standards* is suspension. To determine the applicability of
11 these *Standards*, the factors listed in the theoretical framework must be considered.

12 **The lawyer's mental state**

13 18. The parties agree that Respondent's conduct in the eight counts was
14 knowing, however it is mitigated by the considerable personal and emotional stress he
15 was under.

16 **Potential or actual injury**

17 19. There was potential injury to the legal profession in Count Four as
18 Respondent had to be removed from pending criminal cases, and there was potential
19 injury to clients in all of the other counts.

20 **The aggravating and mitigating circumstances**

21 20. The presumptive sanction for this type of knowing infraction is a
22 suspension.
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21. The following three (3) factors were considered in aggravation:

1 *Standard 9.22(a) – Prior disciplinary offenses.* Respondent has a discipline
2 history regarding the same type of misconduct as in these cases. Respondent
3 previously received an Order of Informal Reprimand and Probation (Fee Arbitration),
4 Restitution and Costs on December 10, 2003, in File No. 03-0969 for violations of
5 Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.3 and 1.4.
6

7 Although diversion cases are not considered prior discipline, it is important to
8 note that Respondent has previously received help from the State Bar, albeit in 1995
9 and 1996, to try and correct what previously were considered minor infractions of the
10 ethical rules, but now form a continuing pattern of misconduct. Respondent previously
11 received an Order of Diversion in expunged File No. 95-0795, for violation of ERs 1.2,
12 1.3 and 1.4; in expunged File No. 95-2003, for violation of ERs 1.2, 1.3 and 1.4; and in
13 expunged File No. 96-0034, for violation of ERs 1.2, 1.3 and 1.4.
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16 *Standard 9.2(c) - A pattern of misconduct.* There are eight separate files in the
17 State Bar's complaint.
18

19 *Standard 9.22(i) – Substantial experience in the practice of law.* Respondent
20 was admitted to practice in Arizona on October 12, 1982, and has been an attorney for
21 36 years.
22

23 22. The following factors were considered in mitigation:

24 *Standard 9.32(b) – Absence of a dishonest or selfish motive.*
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1 *Standard 9.32(c) – Personal or emotional problems* The parties attached the
2 documentation to support this mitigating factor as Exhibit A.

3 *Standard 9.32(g) – Character or reputation.* Had this matter proceeded to a
4 hearing, Respondent would have presented testimony as to his competence and
5 professionalism from Carolyn Holliday, Esq., Hon. Thomas L. Wing, and Sam Roser,
6 Esq.

7 **Proportionality Analysis of Analogous Cases**

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9 23. The Joint Memorandum in Support of Agreement for Discipline by
10 Consent reviewed several cases. These cases included, *In re Rolph, SB-06-0011*
11 *(2006)*; *In re Shaw, SB-05-0152-D (2006)*; and *In re MacDonald, SB-03-0082-D*
12 *(2003)*.

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14 24. In *In re Rolph, SB-06-0011 (2006)*, a two-count case, Rolph, after being
15 conditionally admitted to the State Bar and placed on probation as a term of his
16 admittance, failed to comply with the requirements of the probation. He also failed to
17 cooperate with the State Bar's investigation in two disciplinary matters and failed to
18 appear at a deposition for which a subpoena had been issued compelling his
19 attendance. In both counts, Rolph failed to return clients' phone calls, failed to
20 adequately consult with clients regarding the objectives of their cases, and failed to
21 diligently pursue client matters. Four aggravating factors were found: (1) prior
22 disciplinary offenses; (2) a pattern of misconduct; (3) multiple offenses; and (4) bad
23 faith obstruction of the disciplinary proceeding by intentionally failing to comply with
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the rules or orders of the disciplinary agency. Three factors were found in mitigation:

1 (1) absence of a dishonest or selfish motive; (2) inexperience in the practice of law; (3)
2 and remorse. Rolph's mental state was knowing and there was actual harm as a result
3 of the misconduct. Rolph was suspended for 90 days, with probation for two years
4 with participation in MAP and LOMAP with a practice monitor. Rolph violated ERs
5 1.3, 1.4, 3.4(c), 8.1(b) and 8.4(d), and Rule 53(f), Ariz.R.Sup.Ct.
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8 25. *In re Shaw*, SB-05-0152-D (2006) was a three-count case. Shaw, after a
9 client's bankruptcy discharge, failed to transmit a reaffirmation agreement to a lender
10 and failed to contact a credit card company as he had promised the client. This
11 adversely affected the client's credit rating. For this misconduct Shaw was placed in
12 diversion by order of the probable cause panelist. When Shaw failed to comply with
13 the terms of the diversion, the order of diversion was vacated and an order of probable
14 cause was entered. In another count, a client paid Shaw to handle a bankruptcy matter,
15 but shortly thereafter, he abandoned the case, failed to return the fees paid by the client
16 and failed to cooperate with the State Bar. In the third count, Shaw failed to complete
17 his duties as a court-appointed arbitrator and failed to cooperate with the State Bar.
18 His mental state was knowing and there was injury as a result of the misconduct.
19 There were four aggravating factors: (a) prior discipline; (2) multiple offenses; (3)
20 vulnerability of victim; and (4) substantial experience in the practice of law. There
21 were also four mitigating factors: (1) absence of dishonest or selfish motive; (2) full
22 and free disclosure; (3) other penalties or sanction; and (4) remorse. Shaw was
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1 suspended for 90 days, with two years of probation with participation in LOMAP and
2 MAP, for violating ERs 1.2, 1.3, 1.4, 1 16, 3.2, 3.4 and 8.4(d), and Rules 53(c), (d) and
3 (f), Ariz.R.Sup.Ct.

4 26. In *In re MacDonald*, SB-03-0082-D (2003), a two-count case,
5 MacDonald failed to perform services requested by his client, failed to return his
6 client's telephone calls and update her on the status of her case, and falsely advised his
7 client that he would commence work on her case in the near future. In the second
8 count, MacDonald failed to diligently pursue a client's case resulting in its dismissal
9 for lack of prosecution. MacDonald also failed to cooperate with the State Bar. Four
10 aggravating factors were found: (1) prior discipline; (2) pattern of misconduct; (3)
11 multiple offenses; and (4) substantial experience in the practice of law. Five factors
12 were found in mitigation: (1) absence of dishonest or selfish motive, (2) personal or
13 emotional problems, (3) good faith effort to rectify consequences or make restitution;
14 (4) cooperative attitude; and (5) mental disability or chemical dependency.

15 MacDonald's mental state was knowing. There was found to be no actual harm to
16 clients as a result of his misconduct and minimal harm to the legal system for his
17 failure to respond. MacDonald was suspended for 30 days, with two years of
18 probation for violating ERs 1.2, 1.3, 1.4, 3.2, 8.1(b) and 8.4(d), and Rules 51(h) and
19 (i), Ariz.R.Sup.Ct.
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27. In the Post-Hearing Statement the State Bar suggested that the Hearing Officer should recommend that the consent documents be modified to increase the suspension from four months to six months and one day.

28. In light of the State Bar's new recommendation several other cases were also considered *In re Mankowski*, SB 05-0002-D was a ten-count complaint. Respondent *Mankowski* repeatedly failed to communicate with his client, failed to schedule and/or attend court hearings and failed to diligently represent his client. He collected fees from a client yet failed to perform any work on the case or to return the unearned monies. Respondent *Mankowski* failed to attend depositions, failed to inform his clients about scheduled medical examinations, and ignored discovery requests. He also failed to correct filed documents and failed to correct misstatements made to the court and opposing parties. *Mankowski* consistently failed to respond to repeated and numerous requests from the State Bar during its investigative process. Respondent *Mankowski* was suspended for six months and one day. The suspension was followed by two years of probation.

29. Because there are some similarities with the Respondent's case and *Mankowski*, and because *Mankowski* was a six months and a day suspension, it is helpful to closely compare the two cases. In *Mankowski* four aggravating factors were present, i.e., (1) a pattern of misconduct; (2) multiple offenses; (3) substantial experience in the practice of law; and (4) bad faith obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the disciplinary

agency. Respondent Forsyth's tender has three aggravating factors. In *Mankowski* there were three mitigating factors present, i e., (1) absence of discipline; (2) absence of dishonest or selfish motives; and (3) personal or emotional problems. The Respondent's tender also has three mitigating factors.

32. However a close review of *Mankowski* shows a much greater number of violations were present. This is illustrated by comparing the actual violations in the *Mankowski* matter with the violations in the Respondent's case. The tabulation of the respective violations is noted below:

	<u>Mankowski</u>	<u>Forsyth</u>
ER 1.2	7 – violations	1 – violation
ER 1.3	8 – violations	2 – violations
ER 1.4(a) and (b)	7 – violations	6 – violations
ER 1.5	2 – violations	0
ER 1.16(d)	5 – violations	2 – violations
ER 3.2	1 – violation	0
ER 3.3(a)(1)	1 – violation	0
ER 3.4(c)	1 – violation	0
ER 4.1	1 – violation	0
ER 4.4	1 – violations	0
ER 8.1(b)	0	2 – violations
ER 8.4(c)	1 – violation	0
ER 8.4(d)	3 – violations	0
Rule 53(c)	1 – violation	0
Rule 53(d)	8 – violations	2 – violations
Rule 53(f)	<u>8 – violations</u>	<u>2 – violations</u>
<i>Total</i>	<i>56 – violations</i>	<i>17 – violations</i>

33. Another similar case is *In re: Johnson*, SB-03-1020-D. *Johnson* was a fourteen count complaint. His misconduct consisted primarily of failing to act with diligence and failing to adequately communicate with his clients. *Johnson* also failed

to respond to requests for information concerning the status of clients' cases. Johnson failed to provide clients with an accounting for fees they had paid. In addition, Johnson was held in contempt for repeated violations of orders to file opening briefs and for his lack of candor in his request for extensions. He also failed to properly respond to the State Bar's investigation of the case. Respondent Johnson was suspended for six months and one day. He was also ordered to serve two years of probation with conditions upon reinstatement. *Johnson*, like Respondent Forsyth, both had three aggravating factors present. The aggravating factors in the *Johnson* were, (1) pattern of misconduct; (2) multiple offenses; and (3) prior disciplinary history.

34. A review of the respective violation between *Johnson* and the Respondent is noted below:

	<u>Johnson</u>	<u>Forsyth</u>
ER 1.2	2 – violations	1 – violation
ER 1.3	6 – violations	2 – violations
ER 1.4	12 – violations	0
ER 1.4(a)	0	4 – violations
ER 1.4(b)	0	2 – violations
ER 1.15(b)	3 – violations	0
ER 1.16(d)	1 – violation	2 – violations
ER 8.1	2 – violations	0
ER 8.1(b)	0	2 – violations
ER 8.4(k)&(d)	1 – violation	0
Rule 51(h)	4 – violations	0
Rule 53(d)	0	2 – violations
Rule 53(f)	<u>0</u>	<u>2 – violations</u>
<i>Total</i>	<i>31 – violations</i>	<i>17 – violations</i>

Discussion

1 35. Upon review of the parties Joint Post-Hearing Statement filed February
2 13, 2007, the State Bar's concerns deserve consideration. As to the January 22, 2007
3 test results, both sides presented reasonable interpretations of the "positive" test result.
4 Because the issue was not definitively settled, it was given no weight in review of
5 Respondent's case.
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7 36. On the other hand, the delay in signing the MAP contract (November 1,
8 2006 to January 5, 2007) was worrisome. The excuses and explanations offered for the
9 delay fall short. This should have been a matter of highest priority for the Respondent.
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11 37. From the view of this Hearing Officer, the Respondent's conduct is more
12 serious than the conduct found in *In re Rolph*, SB-06-0011 (2006); *In re Shaw*, SB-05-
13 0152-D (2006); and *In re MacDonald*, SB-03-0082-D (2003). On the other hand, the
14 level of misconduct does not rise to that found in *In re Mankowski*, SB 05-0002-D and
15 *In re Johnson*, SB-03-1020-D.
16

17 Suggested Modification

18 For the reasons stated above, pursuant to Rule 56(e)(2), this Hearing Officer
19 recommends the submitted *Tender of Admissions and Agreement for Discipline by*
20 *Consent* be modified as follows.
21

22 1. That Respondent agree to a **six- month suspension**, with all the
23 same conditions previously stipulated to; and
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2. Respondent is to participate in a comprehensive evaluation at an approved Evaluation Center. (This refers to the recommendation of Dr. Sucher that is found in ¶ 15 of the Post-Hearing Statement. The participation should include complete evaluation and testing procedures noted therein)

IT IS ORDERED that the parties have until **Tuesday, May 8, 2007** to execute the proposed modifications and file the modified agreement and joint memorandum for consideration.

If the parties fail to submit a modified agreement within the time provided, the agreement shall be deemed rejected.

DATED this 20th day of April, 2007.

Neal C. Taylor /cs
Neal C. Taylor
Hearing Officer 8I

Original filed with the Disciplinary Clerk
this 20th day of April, 2007.

Copy of the foregoing mailed
this 20th day of April, 2007, to:

Nancy A. Greenlee
Respondent's Counsel
821 East Fern Drive North
Phoenix, AZ 85014

Copy of the foregoing hand-delivered
this 20th day of April, 2007, to:

1 Shauna R. Miller
2 Senior Bar Counsel
3 State Bar of Arizona
4 4201 North 24th Street, Suite 200
5 Phoenix, AZ 85016-6288

6 by Christina [Signature]

7 /cs

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