

**FILED**  
AUG 15 2008  
OFFICE OF THE  
SUPPORTIVE  
COUNCIL  
BY *[Signature]*

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

**IN THE MATTER OF A MEMBER OF  
THE STATE BAR OF ARIZONA,  
  
NICHOLAS S. HENTOFF,  
Bar No. 012492**

File No 07-1589, 08-0040

**HEARING OFFICER'S REPORT AND  
RECOMMENDATION TO ACCEPT  
AGREEMENT FOR DISCIPLINE**

Respondent

(Assigned to Hearing Officer 8A,  
Kraig J. Marton)

Pursuant to Ariz R Sup Ct 56(e), the undersigned Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent, as amended, and submits the following report

**I. PROCEDURAL HISTORY**

The complaint was filed on March 7, 2008 and a Case Management Order issued on April 28, 2008. A Notice of Settlement was filed July 7, 2008 and a Tender of Admissions and Agreement for Discipline by Consent was filed, with separate supporting Memorandum, on August 8, 2008. After a conference call with the Hearing Officer, the parties filed a Supplement to Tender of Admissions, on August 13, 2008

**II. FINDINGS OF FACT**

The following facts are stipulated by the parties.

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 June 6, 1989.

**COUNT ONE (File no. 07-1589)**

2 On or about February 21, 2007, Respondent filed a notice of substitution of counsel to represent Terry Roger Bane in his appeal from a criminal conviction in *State of Arizona v Terry Roger Bane*, No 1 CA-CR 06-0593 (Yavapai County Superior Court No CR 2005-0146)

1           3       At the time that Respondent filed the notice of substitution of counsel, Mr  
2 Bane's case had been pending before the Court of Appeals since the notice of appeal was  
3 filed on July 19, 2006

4           4       On or about March 6, 2007, the Court of Appeals entered an order  
5 substituting Respondent in as counsel for Mr Bane. At the time the substitution was  
6 granted, Mr Bane's opening brief was due to be filed on or before March 16, 2007

7           5.       Thereafter, over the course of several months, Respondent filed motions for  
8 extensions of time in which to file the opening brief, and the motions were granted by the  
9 court

10          6       On or about May 30, 2007, Respondent again requested an extension of time  
11 in which to file the opening brief

12          7       On or about June 7, 2007, the court entered an order granting the motion, but  
13 advised Respondent that "[a]bsent compelling circumstances, no further extensions will be  
14 granted"

15          8       On or about July 6, 2007, Respondent again requested that the time for filing  
16 the opening brief be extended.

17          9.       On or about July 12, 2007, the court granted Respondent's motion and  
18 extended the time for the filing of the opening brief to August 9, 2007. The order further  
19 advised Respondent that if the opening brief was not filed on or before that date,  
20 Respondent was to appear before the court on August 15, 2007 to show cause why  
21 sanctions should not be imposed. That order was sent to Respondent by certified mail

22          10.       Respondent failed to file the brief on or before August 9, 2007

23          11       Respondent appeared for the show cause hearing on August 15, 2007. At the  
24 hearing, he informed the court that he had not filed the opening brief because of his  
25 inability to manage his practice

26          12       The court ordered Respondent to file the brief by August 21, 2007. The  
27 court further ordered that if the opening brief was not filed by that date, the court would  
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1 impose a monetary sanction against Respondent in the amount of \$50.00 per day,  
2 commencing August 22, 2007

3 13 Respondent again failed to file the opening brief by August 21, 2007

4 14. On or about September 7, 2007, the court entered an order directing  
5 Respondent to appear and show cause why he should not be held in civil contempt for his  
6 failure to timely file the opening brief

7 15 The court sent the above order to Respondent by certified mail to his address  
8 of record. However, on September 12, 2007, the certified mail was returned to the court  
9 marked "Unable to forward, return to sender."

10 16. Also on September 7, 2007, Vice Chief Judge Timmer called Respondent at  
11 his office and spoke to him about the outstanding brief. During the conversation,  
12 Respondent informed the judge that he was working on the brief and would file it either  
13 that day or by Monday, September 10

14 17. Respondent, however, failed to file the brief by that date.

15 18 Thereafter, on September 19, 2007, Anthony Mackey, Chief Staff Attorney  
16 of the Arizona Court of Appeals, contacted Mr. Bane's former lawyer, Abigail Jensen, to  
17 discuss the possibility of her reappointment to the case

18 19 Shortly thereafter, on the same date, Respondent phoned Mr. Mackey and  
19 requested that he not be removed from the case. At that time, Mr. Mackey informed  
20 Respondent that the court had not yet removed him, and also reminded him that the court  
21 had entered a show cause order requiring Respondent to appear on October 3, 2007, to  
22 show cause why he should not be held in contempt. Respondent assured Mr. Mackey that  
23 the brief would be filed that same day

24 20 Respondent filed the opening brief on September 19, 2007

25 21 Respondent, however, did not pay the sanctions on that date. Were this  
26 matter to go to hearing, Respondent would testify, and for purposes of this agreement the  
27 State Bar does not contest, that when Respondent filed his opening brief, he requested of  
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1 the court clerk the amount of his sanctions. The clerk indicated to him that she could not  
2 make that calculation and that a letter specifying the amount would be sent to Respondent.

3 22 Respondent later paid a portion of the sanction, along with an affidavit of  
4 inability to pay. At a later proceeding, Respondent paid the remaining amount due on that  
5 sanction to the court clerk.

6 **COUNT TWO (File no. 08-0040)**

7 23 On or about July 13, 2006, Respondent filed a notice of substitution of  
8 counsel for appellant Jose Antonio Verdugo-Munoz in the Ninth Circuit Court of Appeals.

9 24 Prior to Respondent's substitution in the case, Mr. Verdugo-Munoz had been  
10 represented by appointed counsel, Nancy Hinchcliffe.

11 25. At the time Respondent entered his appearance in the case, the opening brief  
12 was due to be filed on or before August 26, 2006.

13 26 Respondent filed a motion to extend time to file the opening brief. The court  
14 granted the motion, and set a new deadline for the filing of the opening brief to October  
15 27, 2006.

16 27. Respondent failed to file the brief by that date or to request an additional  
17 extension of time.

18 28 On or about August 8, 2007, the court entered a default order requiring  
19 Respondent to submit a response within fourteen days of that date to avoid entry of default  
20 in the matter.

21 29 Respondent failed to file a response to the default order.

22 30. On or about September 10, 2007, the court entered an order noting that  
23 Respondent had failed to comply with the court's prior order, and providing Respondent  
24 one additional opportunity to prosecute the appeal. The court ordered that Respondent file  
25 the opening brief, transcript excerpts, and motion for relief from default within fourteen  
26 days from the date of the order.

27 31 On or about September 26, 2007, Respondent filed a motion for relief from  
28 default, and for a one-week extension to file the opening brief.

1           32.    Respondent failed to file the opening brief.

2           33.    On or about October 31, 2007, the court denied the motion for relief from  
3 default, and entered an order to show cause against Respondent. The order required  
4 Respondent to show cause, in writing, why he should not be sanctioned for failing to  
5 comply with the court's orders and rules Respondent was required to respond within  
6 fourteen days The court also ordered Mr Verdugo-Munoz to obtain new counsel, or  
7 proceed on his own.

8           34    Respondent thereafter filed an untimely Motion for Reconsideration  
9 requesting to be reinstated as counsel

10          35.    The court denied Respondent's motion

11          36.    By order dated February 19, 2008, the court sanctioned Respondent in the  
12 amount of \$1,000

13          37    Respondent failed to adequately communicate with Mr Verdugo-Munoz  
14 about the case.

15          38    Respondent failed to timely withdraw from the matter, and to timely refund  
16 Mr. Verdugo-Munoz's unearned fees.

17    **III.    CONDITIONAL ADMISSIONS**

18                                   **COUNT ONE (File no. 07-1589)**

19          39    Respondent has conditionally admitted that his conduct, as set forth in this  
20 count, violated Rule 42, Ariz R Sup Ct , specifically, ERs 1.2, 1 3, 3.4(c), and 8 4(d)

21                                   **COUNT TWO (File no. 08-0040)**

22          40    Respondent has conditionally admitted that his conduct, as set forth in this  
23 count, violated Rule 42, Ariz R Sup Ct , specifically, ERs 1.2, 1 3, 1.4, 1 16(d), 3 4(c) and  
24 8 4(d).

25          41    Respondent's admissions were tendered in exchange for the discipline stated  
26 below.

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1 **IV. SANCTIONS**

2 Respondent and the State Bar have agreed that, on the basis of the conditional  
3 admissions, the appropriate disciplinary sanctions are as follows:

- 4 1) Respondent will be suspended for six months and one day, retroactive to  
5 September 15, 2008, the date that Respondent will become inactive with the  
6 State Bar;
- 7 2) Respondent will be placed on probation upon reinstatement for a period of  
8 time to be determined at reinstatement. The other terms and conditions of  
9 probation will be set at the time of reinstatement.
- 10 3) Respondent will pay all costs and expenses incurred by the State Bar in  
11 bringing these disciplinary proceedings. In addition, Respondent shall pay all  
12 costs incurred in this matter by the Disciplinary Commission, the Supreme  
13 Court, and the Disciplinary Clerk's Office.
- 14 4) As a result of Count Two, involving Jose Verdugo-Munoz, Respondent shall  
15 make restitution of \$40,000.00, and payments shall be made to Mr  
16 Verdugo-Munoz's sister, Irma Verdugo, as she is the person who paid the  
17 retainer on behalf of Mr. Verdugo-Munoz.
- 18 5) In addition, with respect to Restitution in Count Two, Respondent shall  
19 make payment of the \$1,000.00 sanction ordered to be paid by him to the  
20 Ninth Circuit Court of Appeals, in accordance with the Order of the Court  
21 dated October 3, 2007.

22 **ABA STANDARDS**

23 In determining an appropriate sanction, our disciplinary system considers the facts  
24 of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions*  
25 ("*Standard*" or "*Standards*") and the proportionality of discipline imposed in analogous  
26 cases. *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994), *In re Bowen*, 178 Ariz.  
27 283, 286, 872 P.2d 1235, 1238 (1994), *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037,  
28 1040 (1990).

1           Given the conduct in this matter, the most applicable *Standards* are *Standard 4.0*,  
2 regarding the Duties Owed to the Client, and specifically *Standard 4.4* for lack of  
3 diligence (ERs 1.2, 1.3 and 1.4) *Standard 4.42* provides "Suspension is generally  
4 appropriate when a lawyer knowingly fails to perform services for a client and causes  
5 injury or potential injury to a client, or a lawyer engages in a pattern of neglect and causes  
6 injury or potential injury to a client." Respondent failed to diligently pursue client cases or  
7 adequately communicate with clients. Additionally, *Standard 6.0*, regarding the Violation  
8 of Duties Owed to the Legal System, and specifically *Standard 6.2* for abuse of the legal  
9 process (ERs 3.4(c) and 8.4(d)) *Standard 6.22* provides "Suspension is appropriate when  
10 a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a  
11 client or a party, or interference or potential interference with a legal proceeding" The  
12 Respondent failed to meet court deadlines and court orders to timely file appellate briefs.

13           In deciding what sanction to impose, the following aggravating and mitigating  
14 circumstances should be considered:

15   **Aggravating Factors:**

- 16       •   *Standard 9.22(a)* (prior disciplinary offenses) Respondent received two  
17       Informal Reprimands in 1999, one for violation of ER 1.16(d) for failing to  
18       provide a client with a copy of the settlement agreement in a timely manner  
19       after the conclusion of representation and failing to pay an expert witness fee  
20       out of his portion of the settlement, as agreed. The second informal  
21       reprimand was for violation of ERs 1.3, 1.4, 1.16, 3.2 and 8.4(d) for failing  
22       to respond to a motion for summary judgment resulting in a client's case  
23       being dismissed with prejudice. Respondent also failed to return the clients  
24       records in a timely manner. Respondent received an Informal Reprimand in  
25       2000 for violation of ERs 1.2, 1.3, 1.4 and 1.16 for failing to exercise  
26       diligence and communicate adequately with a client in the course of  
27       representing the client in a matter for almost four years. The underlying case  
28       was dismissed twice from the inactive calendar. Respondent then received a



1 be tailored to the individual case, as neither perfection nor absolute uniformity can be  
2 achieved *In re Riley*, 142 Ariz. 604, 615, 691 P 2d 695 (1984)

3 In *In re Schlievert*, SB-07-0034-D (2007), Schlievert engaged in a pattern of  
4 neglect with clients, failed to perform services requested by his clients and failed to  
5 comply with court orders. Schlievert entered into an agreement for discipline by consent  
6 and was suspended for six months and one day for violating ERs 1 2, 1 3, 1 4, 1 15,  
7 1.16(d), 3 2, 3.4(c) and 8 4(d)

8 In *In re Hyndman*, SB-06-0170-D (2006), Hyndman failed to comply with court  
9 orders and failed to timely pay a sanction in one matter He also violated the terms of his  
10 prior probation. Hyndman was suspended from the practice of law for ninety days and  
11 placed on probation upon reinstatement Although Hyndman was placed on short-term  
12 suspension, there was a significant difference in his case in that his discipline history  
13 consisted of only one prior Informal Reprimand., and SB-06-0170-D involved only one  
14 court proceeding

15 **V. RECOMMENDED SANCTION**

16 After reviewing all of the facts of this matter, the applicable *Standards*, including  
17 the relevant aggravating and mitigating factors, as well as the proportional case law, this  
18 Hearing Officer recommends that the Tender of Admissions and Agreement for Discipline  
19 by Consent, as amended, be accepted

20 Based on the *Standards* and all factors, this Hearing Officer believe that suspension  
21 for six month and one day is the appropriate sanction in this case and will serve the  
22 purposes of lawyer discipline The sanction will serve to protect the public, instill  
23 confidence in the public, deter other lawyers from similar misconduct, and maintain the  
24 integrity of the bar

25 DATED this 15th day of August, 2008

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Craig J. Marton  
Hearing Officer 8A

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Original filed with the Disciplinary Clerk  
of the Supreme Court this 15<sup>th</sup> day  
of August, 2008 and copy mailed to

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By: \_\_\_\_\_