BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF MEMBERS OF THE STATE BAR OF ARIZONA, **ANDREW P. THOMAS, BAR NO. 014069, LISA M. AUBUCHON, BAR NO. 013141, and RACHEL R. ALEXANDER, BAR NO. 020092** Respondents.	**PDJ-2011-9002** **OPINION AND ORDER IMPOSING SANCTIONS** **[Nos. 09-2293, 09-2294, 09-2296, 10-0423, 10-0663, 10-0664]**

This case was heard as a result of a Complaint in attorney discipline being filed against Andrew P. Thomas, Lisa M. Aubuchon and Rachael R. Alexander. Formal hearings were held before the Hearing Panel over 26 days commencing September 12, 2011 and concluding November 2, 2011.

As a result of the findings entered by the Honorable John S. Leonardo in State of Arizona vs. Wilcox, CR-2010-005423-001/OC-2010-005423-001, the Executive Director of the State Bar requested the appointment of independent counsel to investigate allegations of misconduct against then Maricopa County Attorney Andrew Thomas. Pursuant to Article VI of the Arizona Constitution and by Administrative Order No. 2010-41 entered on March 23, 2010, Chief Justice Rebecca White Berch of the Arizona Supreme Court appointed the Colorado Supreme Court Office of Attorney Regulation under the direction of Regulation Counsel, John Gleason, as Independent Bar Counsel.

Mr. Gleason and other attorneys within that office designated by him were invested with "all the power and authority granted to Bar Counsel pursuant to rules, orders, or decisions of the Arizona Supreme Court." Mr. Gleason was charged to investigate and, as he determined appropriate, prosecute allegations of ethical

misconduct against then Maricopa County Attorney Andrew Thomas or lawyers in his employ arising from multiple events occurring during his tenure as County Attorney.

On March 8, 2010, by Administrative order 2010-33, Charles E. Jones, former Chief Justice of the Arizona Supreme Court (now retired), was appointed to serve as the Probable Cause Panelist to review any allegations arising from that investigation. As required by the Supreme Court Rules, Probable Cause Panelist Jones reviewed in its entirety Independent Bar Counsel's "Report of Investigation and Request for Authority to File Formal Complaint." On December 6, 2010, an independent finding of probable cause was entered by that Probable Cause Panelist.

On February 3, 2011, Independent Bar Counsel filed a thirty three (33) claim complaint against Andrew Thomas, Lisa Aubuchon and Rachael Alexander regarding events occurring during his term as County Attorney. Mr. Thomas faced thirty (30) charges; Ms. Aubuchon faced twenty–eight (28) charges and Ms. Alexander seven (7) charges. The alleged violations included, but were not limited to, Conflict of Interest and Prosecutorial Misconduct.

The parties stipulated on September 6, 2011 to multiple facts that are adopted by the Hearing Panel. Each of the Respondents is subject to the jurisdiction of the Arizona Supreme Court pursuant to Rule 31 of the Rules of the Arizona Supreme Court. Andrew P. Thomas was admitted to the Bar of the State of Arizona on October 26, 1991. His Bar Number is 014069. Lisa M. Aubuchon was admitted to the Bar of the State of Arizona on October 27, 1990. Her Bar Number is 13141. Rachel R. Alexander admitted to the Bar of the State of Arizona on May 19, 2000. Her Bar Number is 20092.

Mr. Thomas was elected Maricopa County Attorney in 2004. He was reelected in 2008. He resigned from that office effective April 6, 2010. Ms. Aubuchon worked at the Maricopa County Attorney's Office from 1996 through 2010. Ms. Alexander worked at the Maricopa County Attorney's Office from 2005 through 2010.

Pursuant to Rule 52 of the Rules of the Supreme Court of Arizona, a three person Hearing Panel was appointed by the Disciplinary Clerk. The Hearing Panel was comprised of a volunteer public member, the Rev. Dr. John C. N. Hall, a volunteer attorney member, Mark S. Sifferman and by virtue of his position, the Presiding Disciplinary Judge, William J. O'Neil. Independent Bar Counsel appeared in person and presented evidence and argument in support of its position. Respondents each appeared in person or through counsel. Each Respondent through counsel presented evidence and argument in support of his or her respective individual positions. Closing arguments were permitted to be submitted in writing. The Hearing Panel heard and considered the extensive record and after receiving the closing arguments took the matter under advisement.

INTRODUCTION

In Arizona, "[t]he professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association" as amended by the Supreme Court of Arizona "and adopted as the Arizona Rules of Professional Conduct." R. Sup. Ct. Ariz. 42. Every member of the Arizona Bar Association is subject to these rules regardless of how lofty or low a position they hold.

> The duties and obligations of members shall be:
>
> (a) Those prescribed by the Arizona Rules of Professional Conduct adopted as rule 42 of these rules.

> (b) To support the constitution and the laws of the United States and of this state.
> (c) To maintain the respect due to courts of justice and judicial officers.
> (d) To counsel or maintain no other action, proceeding or defense than those which appear to him legal and just, excepting the defense of a person charged with a public offense.
> (e) To employ for the purpose of maintaining causes confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law.
> (f) To maintain inviolate the confidences and preserve the secrets of a client.
> (g) To avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which the member is charged.
> (h) Not to encourage either the commencement or continuation of an action or proceeding from any corrupt motive of passion or interest, and never to reject for any consideration personal to himself the cause of the defenseless or oppressed.

R. Sup. Ct. Ariz. 41.

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This Decision addresses the Claims in the order they occur in the Complaint. For this reason, the narrative is not always in perfect chronological order.

PREFACE

The way of a fool seems right to him, but a wise man listens to advice. A fool shows his annoyance at once, but a prudent man overlooks an insult. A truthful witness gives honest testimony, but a false witness tells lies. Proverbs 12:15–17.

Like darkened clouds on the horizon, there were, in retrospect, certain events that gave fair warning to the then–impending storm this Complaint addresses. They are described in detail in this report. Always at the center is Mr. Thomas.

Several prior landmarks provide background and context to this man's story: earning a law degree from a prestigious school, joining a prominent law firm, moving into the heights of the governmental corridors of power, suddenly falling from such lofty position, safely landing with a political appointment, resigning to run for state office and a far more personal fall in losing, being hired by a multi-term county attorney but tasked to do menial entry level work, observing Lisa Aubuchon during a new employee training, running for office and winning, hiring Rachael Alexander in his first year in office and perhaps committing to do whatever he determined was necessary to remain there.

Attorney discipline is an inherently personal subject. The Supreme Court of Arizona has declared it *sui generis*, or unique to itself. It is not based on criminal or civil law but rather administrative rules. Each Respondent has been judged independently of one another. The category of individuals who act unethically is not the exclusive province of any single political party, nor is intelligence or its absence a predictor of unethical action. Such untoward conduct is not limited by race, nationality or creed. Until one decides that virtue matters—until it becomes a personal mission—no training will produce the commitment needed to pursue or maintain integrity. While in a discipline case conduct is measured against rules and standards, it is more than those regulations.

Ignoring for the Moment the Charges Re: Supervisors Stapley and Wilcox

In these prefatory comments we choose to set aside for later discussion the charges regarding Supervisor Stapley and Supervisor Wilcox. By our ruling we dismiss the charges related to allegations that either Mr. Stapley or Ms. Wilcox was represented individually by any Respondent. They were not. We explain our other rulings in detail regarding those two individuals. Our general comments regarding

ethics and discipline certainly apply to all. However, in these initial comments we choose to focus on the prosecutorial misconduct related to the charges involving multiple other individuals impacted by the actions of Respondents.

Ethics and Attorney Discipline

Although based on ethics, attorney discipline is not an esoteric speculative exercise, nor is it an intellectual discussion of whether the end justifies the means or could justify them. From antiquities' *Nicomachean Ethics* of Aristotle, to the aphorisms and proverbs of Benjamin Franklin's *Poor Richard's Almanack*, to multiple modern textbooks such as *What's Wrong? Applied Ethicists and Their Critics* by David Boonin and Graham Oddie, ethics are timelessly relevant. Aristotle taught that a person with good character has reason mixed with virtue and together this combination provides the person with the ability to see what to do ethically and to properly act upon it. He called it "practical wisdom." Rule 41 of the Rules of the Supreme Court of Arizona quoted above outlines that "practical wisdom" for attorneys in Arizona. In that sense, this creative capacity is required of all attorneys. Attorney discipline always involves an analysis of rules and standards applied to acts of omission, commission or both.

Attorneys must ever guard against the temptation to confuse what is legal with what is ethical or moral. Because an act is legal, according to the letter of the law, does not make it ethical. Because an act is ethical does not make it legal. Speeding is illegal but isn't always unethical. If one speeds because he believes it will save a life, the action may still be found to be illegal but not necessarily unethical. On the other hand, cheating on a spouse is ethically wrong, but may be legal.

Unethical Behavior

At some point in his career, a leak formed in the dike of Andrew Thomas's ethical restraint. In short time, it rapidly grew. Whether known or not, intended or not; it was existent and became obvious. When it formed it may have been impossible to ascertain. That it formed and accelerated at an alarming rate is beyond any reasonable doubt. Complacency to such an increasing loss of ethical restraint is perhaps the greatest enemy to integrity. He seemingly became complacent to the legion of structural fractures throughout his character that followed. Within a few short years the hole had become a radical moral dislocation.

Respondents would have done well to heed the advice of the favorite saying of Dwight D. Eisenhower, "*Always take your job seriously, never yourself*." They did not. Still, it might not be unreasonable to assess that Respondents, at some prior point in time, intended to do great things. Often unethical behavior can be identified by predecessor actions that bend the line of proper behavior, perhaps for the sake of some real or perceived greater good. These may be followed by increasingly obvious unethical actions which are rationalized. Unethical behavior in that sense can be predictable. It is not uncommon in discipline cases for attorneys to defend unethical behavior by blaming others for their ethical failings, or rationalizing bad behavior, but in the end, it is their actions which identify them, not their words or intentions. The events in this case deal with issues of great weight. But the tapestry began with improper threads of smaller design.

Attorney Discipline in General

Attorney discipline in the most general sense includes an aspect of teaching by identifying unethical behavior. It is in this context that the Arizona Supreme

Court stated, "Attorney discipline is not intended to punish the offending attorney, although the sanctions imposed may have that incidental effect." *In re Swartz,* 141 Ariz. 266, 686 P.2d 1236 (1984). However, individually such cases are not designed to simply teach about ethical rules. Too often that effort leads to what can be a marginalization of the very standards intended to be upheld. A legalistic analysis of precisely how far one can go before crossing the line can be dangerous. It may even lead to the unhealthy attitude of doing just enough to get by. Even more than the result of our efforts, it is the result within us that matters most in ethics. As President James Monroe stated, "*The question to be asked at the end of an educational step is not 'What has the student learned?' but 'What has the student become?'*"

In attorney discipline it is no defense that improper behavior arose from a lack of talent, knowledge or experience, nor should it be excused because one worked hard. That one has no prior record of ethical lapses is not relevant to determining present ethical lapses. Likewise, that a witness is surprised that someone is charged with an ethical violation bears no more weight than the testimony of one who is not surprised. These speculative views aid little in the determination. Talent and work tend to define *how* we do things; ethics or character defines *why* we *truly* do things.

Popularity may make a person admired, but it does not make one honorable. Power may give a person influence, but it does not make one trustworthy. Authority may give a person control, but it does not make one dependable. When we are honorable, we are worthy of authority. When we are ethical we are trustworthy. When we are honorable and worthy of trust, we can be entrusted with

power. As Abraham Lincoln observed, "*Nearly all men can stand adversity, but if you want to test a man's character, give him power.*" Individually, as in this case, the form of one's ethics is the silhouette of that person's future.

When we are slipshod regarding our ethical duties, we disgrace the significance of any task for which we have accepted responsibility. With each action we choose to become a certain kind of person. In the smallest of choices our personal ethics are being hammered out on the anvil of life and our character is constantly being formed with far reaching consequences.

Ethical Frailties

As Winston Churchill said of Russia, it is a "*riddle within a puzzle wrapped within an enigma*" that some human frailties can be so common and predictable and yet are so often repeated. But rarely has the stage been so large or the impact so all–encompassing as in this case. There are multiple frailties that were uncovered by the evidence that stand out as stark reminders. Encircle yourself with people too afraid to speak, as Mr. Thomas did here, and you are bound only by your own thoughts and potentially–flawed analysis. Ignore those few who are not afraid to speak and advise candidly, as Mr. Thomas did here, and you remain bound by your own thoughts and potentially flawed analysis. Remove all layers of oversight and ethical restraint, as Mr. Thomas did here; "*Cry 'Havoc', and let slip the dogs of war*…" Julius Caesar Act 3, scene 1, 270–275*, Shakespeare.* It is a universal recipe for disaster. Allowing feelings to rule is not unique or new. Samuel Adams, one of the founding fathers of the United States noted, "*Mankind is governed more by their feelings than by reason*."

If there is a lesson to be learned in this case, perhaps it is that the legal profession involves relationships of trust. Attorneys are entrusted with something and whether great or small, it is never inconsequential. Certainly in the case of Respondents they were trusted with great power and intentionally misused it. However, even when the responsibility itself has minimal scope, the pattern of conduct established has long–term ramifications. Today one may only be making decisions of little weight, but how those decisions are made tend to be the very same methods one uses in the greatest moments of decision.

While the "why" of conduct is not a required finding for a hearing panel to make, key events offer insight into Respondents' increasingly darkened intent. People may reasonably differ whether Respondents were acting for revenge, retaliation or the most primal desire for control. Regardless, it does not appear their violations fit in any other category. It is enough that the unscrupulous actions have overwhelmingly been proven to be intentional.

Individuals are Unique—Unethical Behavior is Not

Respondents' argument was often stated, in terms of proclamation, that this prosecution of Andrew Thomas was unprecedented in history; that no prosecutor had been as mistreated as he had been due to the filing of these discipline charges. There is no meaningful defense offered by an argument that because no previous prosecutor has been charged with unethical conduct that Mr. Thomas cannot have committed unethical behavior. All individuals are unique; unethical behavior is not. The bringing of discipline proceedings against former North Carolina District Attorney Michael Nifong, resulting in his disbarment for his conduct regarding the Duke University lacrosse case is not ancient history. That case preceded this one.

There had apparently never been such a discipline case brought against a prosecutor in the history of North Carolina before. The absence of any such history is no more proof than the presence of such a past history.

We note that any referral to the bar against him was viewed by Mr. Thomas as a form of "intimidation" and a "threat". Yet Mr. Thomas ordered Ms. Alexander to research any negative comments regarding him and he formed an "ethics" committee of his deputy county attorneys to consider whether to file a complaint with the Commission of Judicial Conduct regarding the behavior of judges in cases or others". Thomas Testimony, Hr'g Tr. 25:1–4.

Hypocritically, he did not view these actions as intimidating or threatening. It is another insight into his ethical ruin. His press releases condemned others for public dollars misspent and yet it appears he lavishly spent millions over his budget demanding to retain the right to hire the special lawyers he chose, while refusing the right to independent counsel for others. The millions he spent also appear to have gone to friends and supporters.

At its core, what causes unethical behavior is rarely unique. Here there seemed a growing, profound arrogance or a supreme confidence that his power had no boundaries. Perhaps because of his might he believed he was right. Clearly the startling absence of any evidence in these prosecutions did not hinder the flex of that power.

Mr. MacDonnell and others straightforwardly informed Mr. Thomas that Lisa Aubuchon was in a fundamental way not ethically capable. They cautioned Mr. Thomas that she was too willing to prosecute regardless of the evidence. She did not seek justice but rather to win. For her, winning justified any means. The need

for such fundamental integrity was clear to his experienced attorneys, but sadly its absence was attractive or wanted by Mr. Thomas. He found her willingness to charge ahead without investigating or fundamental analysis, to be "brave." The result was Respondents became alive in imagined interests of others that never existed. Evidence of the truth was never needed for such vain imaginings and more importantly, never sought nor wanted. For Respondents it did not matter how they produced their results as long as their desired outcome could be achieved. They prosecuted innocent people, without evidence, and did not blink.

The Intentional Removal of Traditional Oversight

Hidden from the public eye, Mr. Thomas began with an evisceration of the protective shield of experienced supervision, accountability reviews and proper protocols long existent in the Maricopa County Attorneys' Office. Those with the most experience were removed from oversight. The malice of the Respondents was toughened by the dissolving of these long–existent protective layers of review. It was reinforced by the weakness of the virtuous. When caution was advised it was thrown to the wind. Any possibility of strong confrontation was purposefully removed and with no explanation. Veiled beneath the image of their smooth public masks was an apparent righteous indignation accelerated by an evident disgust of anything in government not within their control. Without these preliminary follies perhaps these unethical actions would have found neither temptation nor opportunity.

Instead, unhindered by peer review, a vital link of the ethical chain that restrains every prosecutor's office was willfully shattered. Unshackled, a treacherous power to "get" people, regardless of the fact that they were innocent,

was set loose. The result is unmistakable from the hundreds of exhibits and the mountains of transcripts within this case. Rather than do the serious work of real investigation and evidence based analysis, they discarded such required effort with a vengeance and replaced it with any gossip or innuendo that would serve their goal. They knew there was no evidence to find. News releases preceded news conferences and the news reports that followed became their verification. There was an intentional abandonment of even a semblance of true investigative techniques. They pretended to see "corruption" in everyone who disagreed with them and declared that vision as a noble cause.

Motivated by such declared revelation they compounded their corruption by embracing duplicity, deceitfulness and deception. For them, the destruction of their enemies apparently justified their actions. They ignored the law and rules to achieve their objective. The national aspiration of "We the People of the United States" in the United States Constitution, "in order to…establish Justice…" became a tissue thin relic to be ignored. Respondents adopted an altered attitude towards justice; it would serve their selfish desires. They were all too willing to wrap the skin of a reason around an unsubstantiated premise and publically call it the truth.

The Response to the Threat of Criticism

Consistently, when any word of criticism was leveled at his actions, or State Bar inquiries submitted to Respondents, a committee of high level prosecutors was marched out and instructed to consider filing complaints. Millions of public dollars were spent not only to defend but root out such "corrupting forces." Mr. Thomas chanted his mantra that unnamed "retired judges" had complained to the State Bar regarding their actions and the Chief Deputy Sheriff, un-summoned we are told, appeared to investigate, demanding answers. Mr. Thomas's testimony was clear;

reporting him to the Bar "was potentially criminal." Thomas Testimony, Hr'g Tr. 197:13–25, Oct. 26, 2011. But the evidence in these proceedings was also clear: his premise was a public ploy. That unknown, unnamed "retired judges" had reported him was completely unsubstantiated, the details unremembered by Sally Wells and completely and consistently denied from the beginning by the purported source, Mr. Kanefield.

The threat of criticism against him *still* propels a powerful response to invoke his ever dominant weapon of "potential criminal prosecution" to punish those who dare exercise their constitutional right to differ with him. The importance of free speech was well recognized by the founders of the United States and is guaranteed within our Bill of Rights. George Washington knew the danger of the loss of free speech. *"If men are to be precluded from offering their sentiments on a matter which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us. The freedom of speech may be taken away, and, dumb and silent, we may be led, like sheep to the slaughter."*

Yavapai County Attorney Sheila Polk personally informed Sheriff Arpaio and Chief Deputy Hendershott that she had reviewed the investigation involving the *Stapley II* case and that additional investigation was needed. Sheriff Arpaio, through Chief Deputy Hendershott, closing their eyes to his Constitutional rights, ordered Mr. Stapley arrested. They never filed any documents or charges but instead surreptitiously videotaped his arrest, and held him in jail for hours. It was testified that no one ever filed anything against Mr. Stapley regarding this event, but took the time to call the press to inform them that he had been arrested.

Shocked, Ms. Polk demanded a meeting with Sheriff Arpaio, Mr. Hendershott, Mr. Thomas and Ms. Aubuchon. On September 24, 2009, she confronted the

Sheriff in his own office. He exploded. Mr. Thomas and Ms. Aubuchon stood silent. Polk Testimony, Hr'g Tr. 211:18–215:2. Regardless of some counts, Respondents knew they had charged a person with dozens of crimes that he could not be convicted of. When Ms. Polk discovered that Respondents ignored the Constitution by intentionally hiding critical evidence from her, she publically criticized Mr. Thomas and the Sheriff. The retort was to be expected. Lisa Aubuchon reported the actions of Sheila Polk to the Grand Jury. Her witness? Chief Deputy Hendershott. Ex. 185, TRIAL EXB. 02097. To its credit, the Grand Jury refused to be baited.

The Fake Court Tower Investigation

The Court Tower investigation was a subterfuge from the beginning. It began as a result of a purported statement made to Phil MacDonnell by Jack LaSota telling him that Don Stapley "pressured" Presiding Judge Mundell to hire Tom Irvine. It is more than curious that not a soul from either the County Attorney's Office or Sheriff's Office interviewed him. And with good reason. Jack LaSota testified in these proceedings he never said anything like that to Phil MacDonnell or Andrew Thomas. He had heard it only as a rumor and one he labeled as "gossip" despite his animosity towards his competitor Mr. Irvine. Phil MacDonnell testified that he had also heard the rumor, but not from Jack LaSota. It is far more likely the rumor was started with Respondents and Chief Deputy Hendershott. Who needs to investigate when an unsubstantiated rumor will do? Respondent knew there was no truth to the allegations; but were willing to prosecute innocent people.

What Jack LaSota did tell Mr. MacDonnell, who rushed it on to Mr. Thomas was this: "Tom Irvine's up on the tenth floor trying to get business as the Board's lawyer, which would be adverse to us." MacDonnell Testimony, Hr'g Tr. 127:8–10,

Sept. 15, 2011. Many attorneys, including multiple friends of Mr. Thomas, such as Jack LaSota, Ernest Calderon and Dennis Wilenchik collectively earned millions of the dollars that flowed as a result of his campaign promise to increase litigation and his referral of multiple matters to outside counsel. Perhaps the warning of Mr. LaSota was given to identify a threat to that mutually beneficial arrangement. Regardless, it likely started the bonfire of disharmony within Mr. Thomas with which he sought to burn Mr. Irvine.

The testimony regarding the purported Court Tower investigation, which involved entering the sanctity of the homes of large numbers of county employees, often on weekends, was surreal. The evidence was that officers, often late at night, with surreptitiously hidden recorders, demanded to enter the homes of these individual employees to interrogate them. It ignored the very essence of the Fourth Amendment Constitutional rights guaranteed to those employees that each Respondent swore to uphold. Yet, it was normal in the world created by Respondents.

A sampling of the questions foisted on county employees demonstrates they were selling their propaganda. The fly in the ointment of Respondent's discontent was the money being spent; the public's money that they wanted for their own selfish purposes.

> **How do you feel about the County's decision to build the Court Tower?**
>
> **How do you feel about the money being spent on the project?**
>
> **Are you familiar with the Lawsuit regarding the Court Tower Project?**

> **Are you familiar with the efforts to prevent the Maricopa County Attorneys' Office from investigating complaints regarding the Board of Supervisors as they pertain to the Court Tower Project?**
>
> **Why do you think an effort is being made to prevent the project from being investigated?**
>
> **Are you fearful of retaliation or possible termination?**

Ex. 171, TRIAL EXB 341–42 (emphasis added).

This case is replete with intentionally orchestrated malignant actions. To proclaim they meant no one harm is nonsensical. They meant no one well either. The facts within this multi–chaptered story underscore the misery that lays dormant, expectant and waiting for the moment when such a self–centered theme is played to the staccato machine–gun fire of a series of unethical actions in harmony with malevolent rationalizations. This Panel strongly believes that history will characterize the melodrama inflicted on various individuals at such a staggering cost to the taxpaying public in Maricopa County as tragic, unwarranted and without excuse.

Damaging the Public and the Profession

Respondents Thomas and Aubuchon joined hands to inflict an economic blizzard on that public and multiple individuals which is paled only by the intentional infliction of emotional devastation their icy calculated storm left in its wake. That harm is irrefutable, yet still finds Respondents without a shred of remorse. Behind the flimsy fabric of their rationalizations raged apparent unfettered passions that were fueled by a darkness of purpose, blessed by a self–righteous self–centeredness and draped in a disguise of hypocritical indignation. They used a

deadly combination of trusting in their ability to sell the vividness of their own imaginations combined with a resolute refusal to look a fact in the face.

A gaping void was opened in the life of the people of Maricopa County where any citizen's rights could be burned as part of the maintenance of this fake conspiracy. To maintain the weave of such a spell, more and more illusory arguments were cast. More of the public's monies were lavishly sacrificed on the altar of their conjecturing and sprinkled with the opinions of their biased experts' opinions that ignored that their premises had no factual basis. In this war, every civil bond perished between these elected officials or those in public service, from the initial fall out with one elected official to the full scale assault on any and all county employees.

This case is regrettable proof that the absence of ethical behavior fuels uncontrollable actions. Here, the full force of the County Attorney acted to pulverize opponents without any meaningful investigation or evidence. He was willing to shear away the Constitution from citizens of this country to accomplish his goals while alternatively demanding immunity or sanctuary when his power was diminished by his failed election. All could and likely would have been prevented by simply allowing trained deputies and experienced county attorneys to do what they were trained to do. But that would have required risking a loss of the end game.

Reviewing the events established by this record leaves one troubled by the arrogance that relentlessly and inevitably wafts to the surface upon review. It is only aggravated by their bellows of a "corrupt culture" that they knew did not exist but declared only they could fix. Any alternate view was to be hammered into silence and forgotten. The goal became to remove opposition and their means were always rationalized.

In a children's game of dominoes, one lines up each domino in a logical sequence. With the correct positioning, the toppling of the first domino offers an often satisfying flourish of rhythmic sights and sounds culminating in the final domino falling. Here, all too frequently, we find only a final domino sited intentionally in a fallen position followed by a specious declaration that there had to be dominoes of dark criminal purpose that brought its fall. They knew the truth and the truth set them free to endlessly serve up innuendo as the entrée. Like a box of cheap cereal, they pandered their fake conspiracy theory as a complete meal to the public, but when you read the label, as this panel has, you find nothing but empty calories. They preyed on a public weary and distrustful of government. The harm they caused is incalculable.

The Collaboration

There are those who will doubtlessly point accusing fingers at the Office of the Maricopa County Sheriff with condemning tones of an unholy collaboration. The evidence against Respondents in this case speaks for itself. They never looked for evidence, because they always knew there was none. Ms. Aubuchon testified she would casually sit in "Dave Hendershott's office some evenings" to discuss these various events with the Sheriff and him. Aubuchon Testimony, Hr'g Tr. 180:2–10. The Sheriff is not subject to the Professional Rules of Conduct for attorneys.

However, the Maricopa County Attorneys' Office is the legal adviser to the Sheriff. If the Sheriff or his Chief Deputy acted improperly, the only response of their legal advisers was to stand mute. We note there was no hesitation by Mr. Thomas to forcefully remind MCBOS that his office was a "check and balance" on

them. When a legal counselor remains silent in the face of impropriety the result is often predictable; it encourages those actions to continue.

Nevertheless, it was Respondents who encouraged any untoward actions with a resolute refusal to act independently of the Sheriff. With either a wink and a nod or a collaborative voice they supported actions that became increasingly questionable, rather than independently following their seemingly never–assumed role as arbiters of justice. If the mighty forces of the offices of the Sheriff and the County Attorney in Maricopa County were adrift, they were intentionally loosed from their principled moorings by the guided hand of a Respondent with an intellect fueled with ferocity, an irrational ego and a concomitant endless ability to feed their actions with rumors and speculations.

The Voice of the Public Serving as the Grand Jury

On January 4, 2010, the 494th Maricopa Grand Jury met. As directed by Mr. Thomas, Lisa Aubuchon sought indictments against Stephen Wetzel, Andrew Kunasek, Sandra Wilson, Gary Donahoe, Thomas Irvine, and David Smith. That Grand Jury made up entirely of members of the public residing in Maricopa County were told to consider crimes ranging from criminal syndicate, bribery, misrepresentation, intimidation and multiple other crimes.

Detective Tim Abrahamson testified, followed by Chief Deputy David Hendershott. Exhibit 185 is the transcript of that hearing. For nearly twenty pages the Grand Jury peppered Mr. Hendershott with questions. Exhibit 208 is the transcript of the 494th Maricopa County Grand Jury's concluding deliberation on this matter. In their orientation these members of the public had been given instructions by the Deputy County Attorney of when a Grand Jury should "end the

inquiry". Exhibit 162 is the transcript that contains those instructions. They were told to vote to end the inquiry when the "case is so bad you don't want to go any more into the case than you just have. There's no further evidence that's necessary. There's no law that you can conceive indicting this person under. That's what ending inquiry means." The members of the public comprising the 494th Maricopa County Grand Jury voted to end the inquiry because there never was any evidence for the charges.

The Officers of the Maricopa County Sheriff and County Attorney

The Panel believes its ruling will offer little insight or guidance for other prosecutors. We believe the regular prosecutor will be shocked by the methods and actions later described. Importantly, as this report details, multiple Maricopa County Sheriff Deputies, Maricopa County Attorney Investigators, and Deputy County Attorneys took principled stands against the demands of Respondents and at risk to their own careers. Mahatma Gandhi reminds us, *"A 'No' uttered from the deepest conviction is better than a 'Yes' merely uttered to please, or worse, to avoid trouble."*

There are moments when our greatest act of faith is to remain ethical. There will be times where being ethical will not change our circumstances. Being ethical is not always a way out of a crisis. These individual officers acted at great risk to their careers and thus the well–being of their families. The magnitude of the ethical principles and integrity of these officers is herculean in proportion to Respondents. They offered a breath of fresh air in the increasing gloom of these proceedings as the wretched truth came to light from exhibits and the testimony presented. Whether they agreed or supported the hoped–for results of Respondents did not

overrule the ethical vows they pledged when they became law–enforcement officers. We applaud them.

PROLOGUE

Waste no more time arguing what a good man should be. Be one. Marcus Aurelius, Roman emperor from A.D. 161–180.

This case was tried over nine weeks before a hearing panel comprised of the presiding disciplinary judge and two volunteer panel members who worked without compensation. Forty eight (48) witnesses testified and nearly six thousand, two hundred (6, 200) pages of exhibits were admitted. The written closing arguments were five hundred and two (502) pages.

Mr. Thomas graduated from Harvard law school. Mr. Phil MacDonnell helped recruit him to work in Arizona as a law clerk for the law firm that employed Mr. MacDonnell. Mr. Thomas was thereafter employed as an associate of that firm. After Mr. MacDonnell left the firm, they remained friends.

Mr. Thomas left that firm to enter into politics later working as deputy counsel and policy adviser to Governor Symington. In the late 1990's, real estate attorney Mark Goldman met Sheriff Arpaio and worked on Arpaio's successful re–election campaign. As the career of Governor Symington abruptly closed with his resignation, Mr. Thomas was appointed as counsel at the Arizona Department of Corrections.

When Attorney General Janet Napolitano began her successful campaign for Governor of Arizona in 2002, Mr. Thomas ran for the office she would soon vacate when her term expired. Phil MacDonnell was active in his campaign. At the suggestion of Sheriff Arpaio, Mr. Thomas met Mark Goldman, who helped with his election efforts, but he lost the election to Terry Goddard. Multiple exhibits revealed that Mr. Thomas and the Sheriff often proclaimed their criminal

investigations of this same Mr. Goddard as Attorney General, but none were prosecuted.

In 2003, Mr. Thomas was hired by Maricopa County Attorney Richard Romley as a deputy county attorney. He was assigned primarily juvenile cases and never filed a criminal complaint. Through an in–office continuing legal education program he observed Lisa Aubuchon with several other attorneys and was impressed with the way she conducted herself.

Andrew Thomas resigned upon learning of Romley's intent not to seek re–election, campaigning for the office of Maricopa County Attorney in 2004. When questioned before this hearing panel regarding his work history, Mr. Thomas omitted in his testimony that he was employed while he campaigned. While he campaigned he was employed by the law firm of his friend and supporter, Dennis Wilenchik of Wilenchik and Bartness. He ran on a promise that more civil cases would go to trial and that he would try to get better results. That meant paying outside lawyers such as Dennis Wilenchik.

Mr. Thomas solicited the support of Sheriff Arpaio and asked Mark Goldman to be his campaign chairman. Goldman agreed and donated over $10,000 to the campaign. Phil MacDonnell was also active in the campaign. During a campaign debate he met Rachael Alexander, an employee of software provider Go Daddy. Mr. Thomas met with Don Stapley, soon to be chairman of the Maricopa County Board of Supervisors ("MCBOS") and pledged to consider allowing the MCBOS to hire their own attorney in civil matters. Andrew Thomas won his election for Maricopa County Attorney in 2004 and began his term in 2005.

After the election, campaign chairman Mark Goldman, who had never handled criminal law, expressed an interest to Mr. Thomas in working on criminal

cases. Mr. Thomas had Mark Goldman sworn in and named Special Assistant County Attorney. Goldman was given a free office in the "blue carpet" area on the Executive Floor of the County Attorney's Office near the office of Andrew Thomas. Goldman received assignments only from Mr. Thomas which consisted of strategy, political advice and handling special projects for Mr. Thomas.

Ms. Alexander who had never tried a civil or criminal case was hired as a Deputy County Attorney/Special Assistant to Mr. Thomas. She worked on policy projects and researched special projects, working directly for him. One of those projects was to report to Mr. Thomas a compilation of comments by judges who were critical of him or his policies. The twenty pages of Exhibit 29 is one such report authored by Ms. Alexander.

Phil MacDonnell, the man who helped recruit Mr. Thomas to Arizona and actively supported him in both his campaign for Attorney General and County Attorney, was hired as Chief Deputy County Attorney to Andrew Thomas. Phil MacDonnell testified:

> Q: How did–how did it come to pass that you were asked to be the Chief Deputy?
> **A**: **I was active in Andy's campaign in 2006 for A.G. I supported him. And also in 2008 for County Attorney. And we kept up with them and after the election, within a week or so, he contacted me and offered me the position.**

MacDonnell Testimony, Hr'g Tr. 67:6–11, Sept. 20, 2011.

MacDonnell would come to observe something about his friend and then, as County Attorney, his boss. Andrew Thomas saw a "culture of corruption" that only grew with time. "It became a repeated and long litany of basically various people

would come out against him and had ruled against him or whatever, he attributed it to–I'm not going to say a conspiracy–but proof of corruption." *Id.* at 135:14–17.

Mr. MacDonnell directly and candidly expressed his concerns to Mr. Thomas on more than one occasion as the underlying events charged in this complaint were occurring, but to no avail. David McCullough, biographer of Harry Truman reported on the challenge of such confrontation. "*Talking of his hero Andrew Jackson, Truman once said, it takes one kind of courage to face a duelist, but it's nothing like the courage it takes to tell a friend , no.*" To his credit, throughout his testimony, Mr. MacDonnell remained personally supportive of Mr. Thomas although at times puzzled by or critical of his actions. After hearing the testimony of his long time friend and supporter, Mr. Thomas testified he viewed Mr. MacDonnell as cowardly.

Sally Wells was promoted by Mr. Thomas to third in command. Lisa Aubuchon was immediately promoted to the pretrial division head position which Wells had vacated by her promotion. Wells had direct supervision over Ms. Aubuchon as did MacDonnell. Mr. Thomas would soon remove their supervision and ordered Ms. Aubuchon to report only to him and handle the corruption he knew others could not discern. Mr. Thomas discerned he had in Ms. Aubuchon someone all too willing to do whatever was necessary to hammer his opponents, real or imagined, into submission.

After his election, Mr. Thomas routinely appointed Denis Wilenchik of the law firm that employed him while he campaigned, Wilenchik and Bartness, to handle civil litigation instead of his office. He would also appoint Mr. Wilenchik to work with the MACE unit. Various Supervisors who testified substantiated that Mr. Thomas exceeded his budget as a result of such appointments by millions of dollars which soon brought concern to MCBOS. During one of those appointments Mr.

Wilenchik, while assisting the MACE unit, noted in writing that Governor Janet Napolitano had pressured Presiding Judge Barbara Mundell to hire Tom Irvine to get the Court Tower built. No witness was named. Soon, with the aid of Chief Deputy Hendershott, the Governor's name would be replaced with another elected official's name; Donald Stapley.

Sometime in 2005 Andrew Thomas began through press releases to oppose Spanish–speaking DUI treatment courts which had been established in 2002 by then Presiding Judge Colin Campbell and continued by his successor Presiding Judge Barbara Mundell. A treatment court is a supervised intervention program that occurs only after conviction. The DUI Treatment court in Maricopa County was entirely federally funded. Here, Mr. Thomas unfortunately apparently laid the foundation for how he would communicate with others. He did not tell Judge Mundell of his opposition to the program nor meet with her prior to the issuance of his press releases. He did his primary communication through press releases. He would soon do the same with MCBOS quickly losing its confidence. We are reminded of the words of Winston Churchill: "*How easily men could make things better than they are-if only they tried together!"*

After expressing his opposition through such press releases and despite efforts by Judge Mundell, Andrew Thomas regularly refused to meet with Judge Mundell. When he finally acquiesced to meet with her, he would only do so with ten lawyers with him. Within a few short months he would refuse to ever meet with any Board member or MCBOS. In what would also be a typical pattern for him, he describes the program with inflammatory words in his press release.

His press release stated, "Even at the height of segregation, at the height of Reconstruction and Jim Crow, Southern governments did not establish separate courts for people based on race."

"Jim Crow" laws led to the treatment, support and accommodations that were inferior to those provided for white Americans, systematizing a number of economic, educational and social disadvantages for blacks. However, he knew from his own statistical analysis of these programs that Hispanics and Native Americans were ultimately more successful in complying with the terms of their probation with the DUI Treatment setting than without it. But, as would become increasingly apparent in these proceedings, the world for Mr. Thomas was required to hold only his rigid view, regardless of whether there was a fact to support it. He dipped into the well of public funds and hired a Washington DC lawyer to file suit. Both that lawyer and Mr. MacDonnell counseled he had no standing to bring the complaint. They advised having a defendant or victim join him in the suit. Without explanation he summarily rejected their recommendation. When he lost that suit in both the federal District Court and the Ninth Circuit, he clearly hardened against Judge Mundell as he did against others who would disagree with him.

Andrew Thomas believed Donald Stapley had a developer's mentality. To him, a developer of business was someone who played fast and loose with the rules. As a result, Mr. Thomas apparently felt free to play fast and loose with the rules to deal with him. When Mr. Stapley sought to confirm in writing the campaign promise of Mr. Thomas to him, it was Phil MacDonnell who objected and straight–forwardly told Mr. Thomas of his concern. Mr. Thomas began to refuse to meet with individual Supervisors and would never attend a MCBOS meeting. He eventually assigned Mark Goldman to secretly search to see if there were recorded

interests between Mr. Stapley and attorney Tom Irvine. However, Mr. Goldman found no connection between Stapley and Irvine. Mark Goldman testified:

> Q. Did you see any connection between Mr. Irvine and Mr. Stapley?
> **A. No.**
> Q. The research you did, did you turn it over to Mr. Thomas?
> **A. Yes.**
> Q. How did you turn it over to him?
> **A. I brought it down to the office.**
> Q. In what form?
> **A. Just papers in a binder clip, probably.**
> Q. In a binder clip or binder?
> **A. In a binder clip, and then they were put into a binder by one of the secretaries.**

Goldman Testimony, Hr'g Tr. 141:6–142:3, Oct. 12, 2011.

Despite this knowledge, nearly one year later when MCBOS hired Tom Irvine, Andrew Thomas would tell Lisa Aubuchon there was such a connection. She found no such connection either. It would not slow the hand of retribution.

Later, past campaign manager for Mr. Thomas and real estate lawyer Mark Goldman would be hired by Wilenchik and Bartness. There he represented Lisa Aubuchon during the screening phase of these disciplinary proceedings at taxpayer expense. Her present counsel that represented her in these proceedings represents her in her suit against Maricopa County and represents Chief Deputy Hendershott in his suit against the County. Andrew Thomas also filed a notice of claim against the County but withdrew that demand shortly after these proceedings began. With the intervention of independent bar counsel, the fog of deceit had reached the shore of reality.

THE UTILIZATION OF OUTSIDE COUNSEL

1. Claims One through Three involve the dispute between Maricopa County Attorney's Office ("MCAO") and the Maricopa County Board of the Supervisors ("MCBOS") over the hiring of outside counsel.

2. In some instances, such as where a conflict of interest exists or special expertise is required, legal services cannot or should not be provided by any attorney in MCAO. In those situations, private attorneys or law firms may be retained to represent the county.[1]

3. In the case of Maricopa County, a procurement was issued soliciting proposals from private attorneys and law firms to provide "Specialty Legal Services" under a three year contract beginning July 1, 2005.[2] That contract provided, in part, that the "legal services shall be carried out in cooperation with the County Attorney . . . ."[3] The contract also provided:

> It is understood that COUNSEL may be assigned to represent the COUNTY in any particular action only by the decision of the County Attorney, or when authorized by the Restated Declaration of Trust for Maricopa County, Arizona, Self-Insured Trust Fund, Section II(B)(3)(a), by decision of the County Risk Manager.[4]

4. On the recommendation of and at the request of the County Attorney, MCBOS awarded "Specialty Legal Services" contracts to more than fifty local and national law firms.[5] Attorney Thomas Irvine's firm, Irvine Law Firm, PA, was awarded a contract.[6] Very soon thereafter, Mr. Irvine would become a focus of the conduct of Mr. Thomas and Ms. Aubuchon at issue here.

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1. *See* Pima Cty. v. Grossetta, 54 Ariz. 530, 539–40, 97 P.2d 538, 541–42 (1939); Santa Cruz Cty. v. Barnes, 9 Ariz. 42, 48, 76 P. 621, 623 (1904).
2. Ex. 11, TRIAL EXB 00050–00060; Thomas Testimony, Hr'g Tr. 71:2–75:14, Oct. 27, 2011.
3. Ex. 11, TRIAL EXB 00052.
4. *Id.* at 00055.
5. *Id.* at 00058–00061.
6. *Id.*

5. Jones Day, a prominent national law firm, also received a contract.[7] Mr. Thomas would utilize attorneys from Jones Day's Washington, D.C. office for his February 2006 federal court lawsuit against Presiding Judge Mundell and four Superior Court commissioners, in which Mr. Thomas challenged the DUI treatment courts–post-sentencing probation programs adopted for Native American and Spanish-speaking defendants.[8] The federal district court ultimately dismissed the lawsuit for lack of standing, a result which the Ninth Circuit Court of Appeals affirmed.[9]

6. Another national law firm awarded a "Specialty Legal Services" contract was Ogletree Deakins, P.C.[10] Ogletree Deakins attorneys, one of whom was Eric Dowell, were consulted in October and November 2009 about a possible civil RICO lawsuit against MCBOS, as well as other defendants.[11] On November 4, 2009, Mr. Thomas's Chief Deputy, Philip MacDonnell, informed Mr. Thomas that Mr. Dowell had advised that "a civil RICO case makes no sense."[12] In spite of this advice from Mr. Dowell, the additional comment from Phil MacDonnell that "the idea of [a] RICO case based on current evidence is unfounded [and] Peter Spaw, our RICO expert, thinks it makes no sense," and Barnett Lotstein's warning that "accusing the BOS of [a] criminal racketeering enterprise is extreme and doomed to defeat . . .",[13] Mr. Thomas one month later proceeded with a civil RICO lawsuit on his behalf and on behalf of Maricopa County Sheriff Joseph Arpaio, against, among others, the Supervisors and Superior Court

7. *Id.*
8. Ex. 4, TRIAL EXB 00009–00022.
9. Ex. 5, TRIAL EXB 00023–00030.
10. Ex. 11, TRIAL EXB 00061.
11. Ex. 433–34.
12. Ex. 433.
13. Ex. 433.

judges. Mr. Thomas utilized Lisa Aubuchon to draft the Complaint[14], even though she had no RICO experience and very minimal civil litigation experience. For a more in-depth account of the RICO case, see Paragraphs 191–297.

THE 2006 DISPUTES WITH THE SUPERVISORS OVER APPOINTMENT OF COUNSEL

7. Prior to September 9, 2005, Assistant County Attorney Paul Golab was primarily responsible for advising MCBOS. On that day, Mr. Thomas sent a memo to the members of MCBOS advising them of changes being made in the "Division of County Counsel." The "Division of County Counsel" now would be known as the "Civil Division," Ann Longo would be Bureau Chief of the "General Government Bureau" of the Civil Division, and Ms. Longo and Mr. Golab would attend Board meetings together.[15]

8. Near the end of 2005, a dispute arose between MCBOS and Maricopa County Superintendent of Schools Sandra Dowling over who had the authority to decide whether to provide educational services to homeless children in the County. MCBOS was interested in limiting or eliminating funding for such services, while Ms. Dowling contended that her statutory obligation to provide such services precluded MCBOS from rejecting her funding requests. MCBOS initially received legal counsel on this dispute from Chris Keller, a Civil Division attorney. In January 2006, the MCAO engaged Tom Irvine to assist Mr. Keller in advising and representing MCBOS regarding the matter. When MCBOS subsequently eliminated funding for educational services to homeless children, Ms. Dowling filed a lawsuit challenging the action. Mr. Irvine along with Bruce White and Chris Keller from the MCAO defended the County in that lawsuit.[16]

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14. Ex. 145, TRIAL EXB 01767–01785.
15. Ex. 249, TRIAL EXB 03402.
16. Keller Testimony, Hr'g Tr. 58:17–59:8, Oct. 17, 2011; Irvine Testimony, Hr'g. Tr. 22:10–26:3, Sept. 14, 2011.

9. On February 13, 2006, Mr. Thomas advised MCBOS by letter that Paul Golab was retiring effective March 14 and that, therefore, the County Attorney would be selecting an attorney to provide day-to-day advice to MCBOS. Mr. Thomas provided MCBOS members with an advertisement which he proposed to use in that selection process and told MCBOS members that they could submit to him the names of any potential candidates. Mr. Thomas told MCBOS that, in the interim, Bruce White would advise MCBOS on open meeting issues and also provide day-to-day advice to MCBOS's clerk. Chris Keller and Ann Longo would provide MCBOS advice for executive sessions.[17]

10. On February 21, 2006, Donald Stapley, the Chairman of MCBOS, hand-delivered a letter addressed to Mr. Thomas referencing a "recent mutual decision concerning legal representation of [MCBOS]."[18] In the letter, Mr. Stapley claimed that he and Mr. Thomas had agreed that upon Mr. Golab's retirement, MCBOS would select the attorney to represent it.[19] Since Mr. Thomas was out of the office, Mr. Stapley delivered the letter to Phil MacDonnell. Mr. MacDonnell was troubled when he read the letter since he believed that the County Attorney, not MCBOS, had the statutory responsibility and authority to assign the counsel (who would be a MCAO employee) providing advice to MCBOS.

11. When Mr. Thomas returned, he and Mr. MacDonnell discussed the Stapley letter. Mr. Thomas told Mr. MacDonnell that no such agreement was made. Mr. Thomas, however, admitted in his testimony that he and Mr. Stapley had discussed the possibility of MCBOS retaining its own counsel and that he (Mr.

17. Ex. 250, TRIAL EXB 03403–03405.
18. Exhibit 251, TRIAL EXB 03406–03407.
19. *Id.*

Thomas) had been noncommittal during the conversation.[20] Mr. Stapley testified that he and Mr. Thomas made the referenced agreement.

12. In a letter dated March 2, 2006, Mr. Thomas disputed that there was any mutual decision to allow MCBOS to select its own attorney and advised Mr. Stapley that he was operating under a misunderstanding. Mr. Thomas noted that allowing MCBOS to select its attorney would be contrary to A.R.S. § 11-532(A)(9), which imposes a duty on the county attorney to advise MCBOS.[21]

13. Phil MacDonnell and James Candland, a member of Supervisor Stapley's staff, met on March 10 to discuss representation of MCBOS. Mr. Thomas followed up with a March 13 letter in which he agreed to meet with MCBOS to discuss strengthening the representation of MCBOS by the MCAO, but Mr. Thomas stressed that the discussion could not and would not involve Board selection of its own counsel. Mr. Thomas expressed concern that the most recent Board agenda included an item concerning MCBOS's possible selection of its General Counsel, advising that he believed such an action would violate A.R.S. § 11-532(A)(9), especially as interpreted by the Supreme Court in *Board of Supervisors of Maricopa County v. Woodall*, 120 Ariz. 379, 586 P.2d 628 (1978). Mr. Thomas warned that, if MCBOS selected its own counsel, the Supervisors would not have immunity and would be exposing themselves to personal liability.[22]

14. By a March 20 letter, Mr. Thomas expressed concern to the Supervisors that another Board agenda indicated that MCBOS planned on meeting in executive session with "Tom Irvine, Outside Counsel" present. Mr. Thomas noted that he had not appointed Mr. Irvine to advise MCBOS on the matter. He further stated

20. Thomas Testimony, Hr'g Tr. 11:22–12:14, Oct. 27, 2011.
21. Ex. 6, TRIAL EXB 00031–00032.
22. Ex.7, TRIAL EXB 00032–00033.

that, under the *Woodall* decision, MCBOS was entitled to outside counsel only if: (1) the County Attorney was unwilling or unable to represent MCBOS (which Mr. Thomas claimed was not the case) ; or, (2) if there is an actual conflict of interest, in which case he, as County Attorney, would select the outside counsel.[23]

15. Another subsequent proposed MCBOS agenda prompted Mr. Thomas to send the Supervisors a letter dated April 17. The particular agenda indicated that the Supervisors planned to meet in executive session to discuss rewriting the Restated Declaration of Trust for Maricopa County to allow MCBOS to select counsel to defend the County in any civil lawsuit valued in excess of $100,000.00. Mr. Thomas advised MCBOS that the proposed action was unlawful. Mr. Thomas informed MCBOS that he would select outside counsel to advise MCBOS on the legality of the proposed action. Mr. Thomas noted that while he had agreed with the Supervisors that County Manager David Smith and Phil MacDonnell would meet and discuss the issues that had arisen between MCBOS and the MCAO over representation, he considered the planned attempt by the Supervisors to amend the Restated Declaration of Trust to be such an act of bad faith that he was instructing Mr. MacDonnell to cease any further discussions with County Manager Smith.[24]

16. The MCAO selected Tim Casey, an attorney in private practice, to advise MCBOS on its planned action. After amendments to the Restated Declaration of Trust were drafted, they were provided to Chris Keller in the MCAO Civil Division. In a May 17 e-mail, Mr. Keller advised Mr. Casey that he considered the amendments to be unlawful. He instructed Mr. Casey to specifically inform

23. Ex.8, TRIAL EXB 00034–00035.
24. Ex. 9, TRIAL EXB 00036–00037.

MCBOS` that he (Mr. Casey) was not authorized to speak on behalf of the MCAO.[25]

17. On May 18, MCBOS adopted the proposed amendments to the Restated Declaration of Trust which, in effect, gave MCBOS authority to determine whether there was a lack of harmony with the MCAO over representation of the County in civil lawsuits and to select the counsel to represent the County. Mr. Thomas responded with a May 23 letter, asserting that the amendments were null and void.[26] On June 14, 2006, Mr. Thomas filed a civil action (the "First Declaratory Judgment Lawsuit") against MCBOS seeking a determination, among other things, that the amendments to the Restated Declaration of Trust were invalid. To draft, file and pursue the First Declaratory Judgment Lawsuit, Mr. Thomas utilized the well-respected Phoenix law firm Bonnett, Fairbourn.[27]

18. An hour before the lawsuit was filed, Mr. Thomas delivered a letter to Mr. Stapley, the other Supervisors and County Manager Smith advising them that he was suing them.[28] That same day, Mr. Thomas issued a press release announcing the lawsuit and stating that he had filed the lawsuit "to defend the County Attorneys' Office against MCBOS's unlawful attempts to undermine the independence of the office that I hold."[29] Mr. Thomas further stated that he filed the lawsuit "only after holding numerous meetings and discussions with all five supervisors, meeting with MCBOS collectively, sending the Chairman of MCBOS no fewer than five letters making plain the illegality of his proposed actions, and

25. Ex. 252, TRIAL EXB 03408.
26. Ex. 10, TRIAL EXB 00038–00039.
27. Ex. 11, TRIAL EXB 00040–00095.
28. Ex. 12, TRIAL EXB 00096.
29. Ex. 13, TRIAL EXB 00097.

seeking to resolve these matters in various ways."[30] Mr. Thomas then went on to discuss matters beyond the selection of Board counsel:

> Unfortunately, my lawsuit against the board is not unique. This is the third lawsuit filed against the Board by county officers in less than a month. A review of the complaints filed by County Superintendent of Schools Sandra Dowling and County Medical Examiner Philip Keen reveals a disturbing pattern in the allegations. These complaints all note that the Board of Supervisors has sought unlawfully to arrogate powers vested by law in other actions. I am particularly concerned about the Board's attempt to close the Thomas J. Pappas School and the questionable legal grounds it has cited for doing so.

Mr. Thomas continued:

> It bears noting that these recent lawsuits have occurred during, and largely because of, the unusual chairmanship of Supervisor Don Stapley. While respecting the attorney-client relationship I hold with Mr. Stapley and other members of the board, I would be remiss if I do not help the people of Maricopa County understand why the board has attracted so many costly lawsuits in such a brief period of time.

Mr. Thomas concluded by stating:

> I cannot in good conscience defend the Board of Supervisors in the two legal actions brought by Ms. Dowling and Mr. Keen, as I believe these complaints have merit. Accordingly, I have authorized the retention of outside counsel to defend the Board in these legal actions so that I am not obligated to argue on behalf of the Board of Supervisors for causes that I believe are, at best, questionable as a matter of law and public policy.[31]

19. Outside counsel (Tom Irvine), in fact, already had been selected as early as January 2006 to assist Civil Division attorneys in connection with Ms. Dowling's claims. Once Ms. Dowling filed her lawsuit against the County in April 2006, Mr. Irvine along with Civil Division attorneys Bruce White and Chris Keller defended

30. *Id.*
31. *Id.*

the County.[32] While County Medical Examiner Philip Keen filed his lawsuit against the County earlier in June, attorneys from the Civil Division had provided pre-lawsuit advice to MCBOS. Once Mr. Keen filed his lawsuit, Mr. Thomas selected his friend, Jack LaSota, to defend the County.[33]

20. Mr. Thomas's public statement regarding the *Dowling* lawsuit took the Supervisors and Messrs. White and Irvine by surprise since no one in the MCAO had advised MCBOS or the attorneys involved of any disagreement with the positions being taken by the County and MCBOS.[34] Mr. Thomas admitted that, before issuing his June 14, 2006 press release, he never advised the Supervisors of his opinion about the *Dowling* and *Keen* matters and never consulted any attorney in his Civil Division about those lawsuits.[35]

21. The Supervisors did not file an Answer to the First Declaratory Judgment Lawsuit as they and Mr. Thomas reached a settlement fairly quickly. The settlement was accomplished through the execution of a Memorandum of Understanding ("MOU") on August 21, 2006 and the dismissal of the First Declaratory Judgment Lawsuit. In the MOU, the Supervisors and the MCAO set out an agreed-upon procedure regarding the appointment of counsel.[36] The MOU provided that it would expire on December 1, 2008 (presumably the end of the current terms of office for the Supervisors and Mr. Thomas).

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32. Smith Testimony, Hr'g Tr. 166:15–167:15, Sept. 26, 2011; Keller Testimony, Hr'g Tr. 58:17–59:8, Oct. 17, 2011; Irvine Testimony, Hr'g Tr. 22:10–26:3, Sept. 14, 2011; White Testimony, Hr'g Tr. 25:7–26:3, Sept. 20, 2011.
33. MacDonnell Testimony, Hr'g Tr. 94:1–95:11, Sept. 15, 2011; Stapley Testimony, Hr'g Tr. 82:8–13, Sept. 20, 2011.
34. Irvine Testimony, Hr'g Tr. 26:4–30:17, Sept. 14, 2011; White Testimony, Hr'g Tr. 26:8–25, Sept. 20, 2011.
35. Thomas Testimony, Hr'g Tr. 19:25–22:12, Oct. 26, 2011.
36. Ex. 15, TRIAL EXB 00100–00106.

CLAIM ONE: ER 1.7(A)(2) (CONFLICT OF INTEREST) (THOMAS)

22. ER 1.7(a)(2) prohibits a lawyer, absent informed consent given in writing, from representing a client if a concurrent conflict of interest exists.[37] A concurrent conflict of interest occurs where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[38]

23. Mr. Thomas concedes he had an attorney-client relationship with MCBOS at the time. Independent Bar Counsel alleges Mr. Thomas violated this Rule when he wrote the series of letters to the Supervisors in March, April and May 2006 regarding selection of counsel.[39] More specifically, Independent Bar Counsel contends Mr. Thomas had a personal interest in ensuring that the MCAO selected outside counsel which interest materially limited representation of the Supervisors because the Supervisors desired to control the selection.[40]

24. As noted previously, a statute and case law dictate how outside counsel is selected to represent a county and its board of supervisors. Mr. Thomas, in the letters in question, advised the Supervisors that, under his legal analysis, the Supervisors' contemplated action was unlawful. Providing that legal advice was Mr. Thomas's statutory obligation, and his interpretation of the law was substantially correct.[41] Such a disagreement between a client and an attorney does not create a "conflict" implicating ER 1.7. Independent Bar Counsel provided no authority or persuasive argument to support the conclusion that a

37. R. Sup. Ct. Ariz. 42, ER 1.7(a)(2).
38. *Id.*
39. Complaint, ¶¶ 38–44.
40. *Id.* ¶ 44.
41. *See Woodall*, 120 Ariz. 379, 586 P.2d 628 (1978); *see generally*, Romley v. Daughton, 225 Ariz. 521, 241 P.3d 518 (2010).

disqualifying "personal interest" arose from the happenstance that Mr. Thomas's legal advice would result in the MCAO controlling the selection of outside counsel.

25. To be sure, Mr. Thomas's unilateral withdrawal from the agreed upon "meet and discuss" procedure contributed to a hardening of positions and the resultant litigation. That decision perhaps led to the subsequent distrust evident later in the relationship. However, the decision to cancel the "meet and discuss" arrangement was not alleged in the Complaint as an ethical violation.

26. To summarize, Andrew Thomas wrote a series of letters in March, April and May 2006 to his client, MCBOS, advising it that, under his legal analysis of Arizona law, MCBOS's contemplated action regarding the selection of outside counsel was unlawful.

27. In sending the letters, Mr. Thomas did not have a personal interest that posed a substantial risk of materially limiting his representation of the Supervisors.

28. On Claim One, there is not clear and convincing evidence that Andrew Thomas violated ER 1.7(a)(2).

CLAIM TWO: ER 1.6(a) (DISCLOSURE OF CLIENT INFORMATION) (THOMAS)

29. ER 1.6(a) prohibits a lawyer from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (a), (c) or (d), or ER 3.3(a)(3)."[42] The Complaint charges that Mr. Thomas violated this Rule when,

42. R. Sup. Ct. Ariz. 42, ER 1.6(a).

in his June 14, 2006 press release[43], he criticized the legal positions taken by the Supervisors in the *Dowling* and *Keen* matters.

30. Mr. Thomas's disclosure in the same press release that he had advised the Supervisors on numerous occasions about the unlawfulness of their contemplated action regarding counsel also implicates ER 1.6(a). The Complaint, however, does not premise a charge on that disclosure.[44]

31. Mr. Thomas concedes that his statements about the *Dowling* and *Keen* matters constituted "information relating to the representation of a client" within the meaning of ER 1.6(a).[45] He claims that it was not until the hearing in this matter that he learned that lawyers in his Civil Division were advising MCBOS of Supervisors on the *Dowling* and *Keen* matters.[46] First, whether or not Mr. Thomas knew that his employees were advising the Supervisors on those matters is irrelevant. There is no specific mental state element in ER 1.6(a). Clearly, he knew that MCBOS was his client.

32. Second, the claim is not credible. To criticize the legal positions taken by MCBOS in the *Dowling* and *Keen* matters, Mr. Thomas had to know what those legal positions were, how they were arrived at, and the contrary analysis he believed was correct. It simply is implausible that, while gathering sufficient information to make his judgment about the legitimacy of the Supervisors' legal position, Mr. Thomas did not learn or realize that lawyers either in his Civil Division or engaged by his office as outside counsel were involved. What lawyers did Mr. Thomas think were advising MCBOS on these matters – matters that were so significant that they warranted a public admonishment of MCBOS?

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43. Ex. 13, TRIAL EXB 00097.
44. *See In re* Myers, 164 Ariz. 558, 561–562, 795 P.2d 201, 204–205 (1990) (discipline may not be imposed for conduct not alleged to be unethical).
45. Thomas's Post–Hr'g Memo., 19:18–19.
46. *Id.* at 19:20–23.

That a county attorney would not know what lawyers were giving MCBOS advice in such high profile cases (which is what Mr. Thomas claims) is very troubling.

33. Mr. Thomas asserts that ER 1.13 provides a safe harbor for his press release. It does not. Mr. Thomas rests his ER 1.13 argument on the statements in the press release about counsel selection.[47] As the ER 1.6(a) violation pled does not concern those statements, his argument is beside the point. If ER 1.13 justified "going public" about MCBOS's actions regarding counsel selection, the comments about the *Dowling* and *Keen* matters had nothing to do with selection of counsel. Putting aside the question whether ER 1.13 allows an attorney to issue a press release revealing client information, the Rule required that, prior to any disclosure, Mr. Thomas first consult with MCBOS about the *Dowling* and *Keen* matters. Mr. Thomas admits he never engaged in that consultation and never attempted to engage in the consultation.[48] The comments about the *Dowling* and *Keen* matters were completely gratuitous. They were uttered solely to place the Supervisors in a bad light.

34. Mr. Thomas claims that the voting public's "right to know" justifies his June 14, 2006 press release.[49] Indeed, in his post-hearing memorandum, Mr. Thomas strenuously argues that his belief that the "voters" were "his ultimate client" to whom he owed his "ultimate loyalty" was both objectively and subjectively reasonable.[50] He provides no authority, factual or legal, to support this proposition, which is not surprising. Mr. Thomas could not be more wrong. A governmental lawyer, elected or not, is ethically required to maintain the

47. *Id.* at 20:13–22:24.
48. *Id.* at 19:25–22:12.
49. *Id.* at 22:8–17.
50. *Id.*

confidentiality of information relating to the representation of a client just as non-governmental lawyers are.[51]

35. Mr. Thomas should have realized the invalidity of this "the public is the client" theory when the Arizona Court of Appeals issued its Opinion in *State of Arizona ex rel. Thomas v. Schneider* two months before the June 14, 2006 press release. That case involved a criminal prosecution against some Glendale city council members based upon grand jury testimony from a former Glendale City Attorney who revealed communications he had with the council members. The MCAO argued that the attorney-client privilege did not protect communications between a governmental official and a governmental lawyer in criminal proceedings against the governmental official. The Court rejected this argument stating:

> The state nevertheless argues that the need to foster the public accountability of governmental officials predominates and thus we should find that the attorney-client privilege does not extend to communications between government officials and their government lawyers. We decline to do so.[52]

36. MCBOS was Mr. Thomas's client. In discussing the *Dowling* and *Keen* matters in his press release, Mr. Thomas revealed "information relating to the representation of a client" without consent.

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51. R. Sup. Ct. Ariz. 42, ER 1.6(a), cmt. 6. "The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance." *See also* Arizona ex rel. Thomas v. Schneider, 212 Ariz. 292, 130 P.3d 991 (App. 2006); Roberts v. Palmdale, 5 Cal. 4th 363, 379–80, 20 Cal. Rptr. 2d 330, 339–40 (1993) (rejecting the argument that "the city attorney is the servant of the people, and as a servant, can have no secrets from its master."); People ex rel. Deukmejian v. Brown, 29 Cal.3d 150, 157–59, 624 P.2d 1206, 1209–10 (1981) (rejecting claim that Attorney General is not bound by the ethical rules controlling the conduct of other attorney because he is the "protector of the public interest"); Chun v. Bd. of Trustees of the Employees' Retirement Sys., 87 Haw. 152, 170–74, 952 P.2d 1215, 123–27 (1998);51 Law. Disciplinary Bd. v. McGraw, 194 W. Va. 788, 800–01, 461 S.E.2d 850, 862–63 (1995).

52. 130 P.3d at 997, ¶ 26.

37. Therefore, there is clear and convincing evidence that Andrew Thomas violated ER 1.6(a) with the statements in his June 14, 2006 press release regarding the *Dowling* and *Keen* matters.

CLAIM THREE: ER 3.6(A) (IMPROPER PUBLIC STATEMENTS) (THOMAS)

38. The Complaint alleges that Mr. Thomas' statements about the *Dowling* and *Keen* matters also violated ER 3.6(a), which states:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.[53]

39. It is immaterial that Mr. Thomas was not personally involved in the *Dowling* and *Keen* matters or that, as he implausibly claims, he was unaware that attorneys in his Civil Division were advising the Supervisors on those matters. ER 3.6(d) provides that no lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) may make a statement prohibited by paragraph (a).[54] Stated more plainly, ER 3.6(d) treats Mr. Thomas as a participant in any matter being handled by any attorney in his office.

40. There is no dispute that Mr. Thomas knew that his statements would be disseminated by "means of public communication." The dispute centers on the element of a "substantial likelihood of materially prejudicing an adjudicative proceeding." Since ER 3.6 protects the state's interest in "fair trials[55]," the question to be answered is whether Mr. Thomas knew or reasonably should have

53. R. Sup. Ct. Ariz. 42, ER. 3.6(a).
54. *Id.*
55. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991).

known the statements posed "a substantial likelihood of materially prejudicing" the decision-makers in the *Dowling* and *Keen* lawsuits.

41. When Mr. Thomas issued his June 14, 2006 press release, the *Dowling* and *Keen* lawsuits were in their infancy. No hearings or trials were imminent. It could be many months, and possibly years, before a trial would occur. The timing gap between the statements and any trial lessens the probability of prejudice, especially considering they were uttered publically once.[56] The *Dowling* and *Keen* lawsuits were civil matters, which also reduces the likelihood of prejudice.[57] Finally, considering the size of the population of Maricopa County, it is extremely unlikely that the June 14, 2006 press release would have any effect on any future trial. Indeed, the chance that anyone selected as a potential juror would even remember what Mr. Thomas said in the press release about *Dowling* or *Keen* is remote.[58]

42. To be sure, some statements are so inflammatory that a material prejudicial effect is found even when no trial is imminent or when the proceeding is civil, not criminal.[59] The comments in the June 14, 2006 press release do not qualify.

43. Independent Bar Counsel relies on *Lawyer Disciplinary Bd. v. Sims*, 212 W. Va. 463, 574 S.E.2d 795 (2002) and *In re Litz*, 721 N.E.2d 258 (Ind. 1999). Neither decision is analogous. In *Sims*, the prosecutor was ordered to withdraw from an investigation of the county assessor and to appoint a special prosecutor

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56. Commonwealth v. Lambert, 723 A.2d 684, 692 (Pa. Super. Ct. 1998) (discounting the possibility of a tainted jury pool when the trial is "to be conducted at some time in the future"); Rodriguez by & Through Posso–Rodriguez v. Feinstein, 734 So.2d 1162 (Fla. App. 1999) ("pervasive, adverse publicity does not inevitably lead to an unfair trial."); Atty. Griev. Comm'n v. Gansler, 377 Md. 656, 697, 835 A.2d 548, 572 (2003) ("the timing of an extrajudicial statement may affect its prejudicial effect").

57. R. Sup. Ct. Ariz. 42, ER 3.6(a), cmt 6.

58. *See* United States v. Corbin, 620 F. Supp. 2d 400 (E.D. N.Y. 2009) (densely populated district where jury selection at least six months away).

59. R. Sup. Ct. Ariz. 42, ER 3.6(a), cmt 6.

to handle the matter.[60] The prosecutor, at the same time, was ordered to stop making extrajudicial statements about the assessor.[61] The prosecutor then deliberately proceeded to violate that court order by telling reporters that he had "point-blank proof" the assessor had committed forgery and fraud.[62] The factual determination was made that the prosecutor's comments posed a substantial likelihood of materially prejudicing both the special prosecutor's ability to investigate and prosecute the assessor and the assessor's ability to defend and receive a fair trial.[63]

44. *Litz* involved an attorney who was defending a woman accused of neglecting her daughter.[64] On the eve of a retrial, the attorney published a letter in several newspapers in which he stated his client was innocent, characterized the prosecutor's decision to retry his client as abominable, and disclosed that his client had passed a lie detector test.[65] The matter was decided on a Conditional Agreement for Discipline where the respondent attorney *stipulated* that his extrajudicial comments created a substantial likelihood of material prejudicing the pending jury retrial.[66]

45. To summarize, at the time of the June 14, 2006 press release, attorneys in the MCAO's Civil Division were advising MCBOS on the *Dowling* and *Keen* matters. Mr. Thomas knew the statements he was making about those matters would be "disseminated by means of public communication." However, the evidence is not clear and convincing that the statements had a substantial likelihood of materially prejudicing the *Dowling* and *Keen* proceedings.

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60. 212 W. Va. 463, 574 S.E.2d 795 (2002).
61. *Id.*
62. *Id.*
63. *Id.*
64. 721 N.E.2d 258 (Ind. 1999).
65. *Id.*
66. *Id.*

46. On Claim Three, there is not clear and convincing evidence that Mr. Thomas violated ER 3.6(a) with the statements in his June 14, 2006 press release regarding the *Dowling* and *Keen* matters.

THE INVESTIGATION OF SUPERVISOR STAPLEY

47. Claims Four through Eleven deal with the conduct of Mr. Thomas and Ms. Aubuchon in connection with the investigation and first prosecution of Supervisor Donald Stapley, the culmination of which resulted in a case herein referred to as *Stapley I*. Many individuals played a role in both the investigation and prosecution, and specific dates are often important—if not critical—for each count. As such, background is necessary to provide clarity.

48. In late 2006 or early 2007, Mr. Thomas and Sheriff Arpaio created a joint unit called MACE (Maricopa Anti Corruption Effort).[67] Mr. Thomas and Sheriff Arpaio conceived MACE as a joint operation to investigate organized crime and political corruption.[68] Prosecutors from MCAO and investigators from MCSO made up the MACE Unit. Vicki Kratovil, the head of the Special Crimes Bureau, was initially assigned to MACE as MCAO's representative.[69] Chief Assistant County Attorney Sally Wells and Division Chief Tony Novitsky supervised Kratovil.[70] Phil MacDonnell, the Chief Deputy County Attorney, also attended some early MACE meetings.[71] Brandon Luth, Bruce Tucker and other detectives

67. Thomas Testimony, Hr'g Tr. 226:2–19, Oct. 26, 2011.
68. Hendershott Testimony, Hr'g Tr. 8:25–9:10; 11:1–13:1, Oct. 13, 2011; Arpaio Testimony, Hr'g Tr. 8:2–9:3, Oct. 18, 2011.
69. Kratovil Testimony, Hr'g Tr. 90:16–91:9, Oct. 6, 2011.
70. Wells Testimony, Hr'g Tr. 109:24–112:14, Sept. 13, 2011; Novitsky Testimony, Hr'g Tr. 57:4–18, Oct. 6, 2011.
71. Luth Testimony, Hr'g Tr. 60:16–61:9, Oct. 14, 2011.

represented MCSO in MACE.[72] Sgt. Luth reported to Lieutenant Tucker, who reported to Captain Miller, who directly reported to then-Chief Deputy Sheriff Hendershott.[73] Mr. Hendershott supervised the MACE Unit for MCSO.[74]

49. Meetings of the MACE unit took place weekly or bi-weekly during 2007 and into 2008.[75] Mr. Hendershott attended some meetings,[76] as did Mr. Thomas and Sheriff Arpaio.[77] At some point in early 2008, Ms. Aubuchon replaced Vicky Kratovil as MCAO's representative in the MACE Unit.[78]

50. Early in 2007, MACE began looking into Supervisor Stapley's various activities.[79] Around the same time, Mr. Thomas directed Special Assistant County Attorney Mark Goldman to investigate Supervisor Stapley in order to substantiate a rumor that the Superior Court had been pressured into hiring attorney Tom Irvine. Mr. Thomas also believed there was something strange about Supervisor Stapley's attempt to install Mr. Irvine as MCBOS's attorney.[80] In fact, Mr. Goldman himself, who worked directly for Mr. Thomas, suggested to Thomas that Mr. Goldman be allowed to investigate a tie between Supervisor Stapley and Mr. Irvine. [81]

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72. Kratovil Testimony, Hr'g Tr. 91:10–17, Oct. 6, 2011; Luth Testimony, Hr'g Tr. 59:12–18, Oct. 14, 2011.
73. Luth Testimony, Hr'g Tr. 62:4–10, Oct. 14, 2011.
74. Hendershott Testimony, Hr'g Tr. 10:3–6, Oct. 13, 2011.
75. Kratovil Testimony, Hr'g Tr. 92:8–23, Oct. 6, 2011.
76. Novitsky Testimony, Hr'g Tr. 58:9–12, Oct. 6, 2011; Kratovil Testimony, Hr'g Tr. 91:22–25, Oct. 6, 2011; Hendershott Testimony, Hr'g Tr. 14:22–16:16, Oct. 13, 2011.
77. Wells Testimony, Hr'g Tr. 162:1–19, Sept. 13, 2011; Kratovil Testimony, Hr'g Tr. 91:18–21, Oct. 6, 2011; Johnson Testimony, Hr'g Tr. 100:3–14, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 60:16–61:16, Oct.14, 2011.
78. Hendershott Testimony, Hr'g Tr. 17:6–19:14, Oct. 13, 2011.
79. Ex. 19, TRIAL EXB 00343–00539.
80. Thomas Testimony, Hr'g Tr. 119:18–120:10, Oct. 26, 2011.
81. Goldman Testimony, Hr'g Tr. 125:16–137:13, Oct. 12, 2011.

51. Furthermore, on January 23, 2007, Chief Deputy Hendershott asked Sgt. Brandon Luth to look into Mr. Stapley's conduct, but to keep it confidential.[82] Sgt. Luth was instructed to investigate Mr. Stapley's business dealings, which he did for a few days in January 2007 before stopping.[83] When Mr. Thomas and Ms. Aubuchon later filed charges against Mr. Stapley in 2008, Sgt. Luth testified that he knew there was a Statute of limitations problem due to his earlier involvement.[84]

52. Mr. Goldman conducted research into Mr. Stapley's business dealings and his financial disclosures.[85] He began by looking at Mr. Stapley's financial disclosures to pin down what Mr. Stapley owned, and to see if there was any connection between Mr. Stapley's properties and Mr. Irvine.[86] He did not find such a connection.[87] Mr. Goldman left for Mexico in May of 2007, completing his investigation before his departure.[88] Mr. Goldman provided the information he had obtained to Mr. Thomas and MACE personnel.[89] The information, compiled into a binder, contained documents from public land records and assessor's office records having to do with Supervisor Stapley's real estate holdings.[90]

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82. Hendershott Testimony, Hr'g Tr. 45:2–49:3, Oct. 13, 2011; Luth Testimony, Hr'g Tr. 63:13–64:4, Oct. 14, 2011.
83. Luth Testimony, Hr'g Tr. 65:6–68:1, Oct. 14, 2011.
84. Luth Testimony, Hr'g Tr. 87:15–88:13, 91:15–20, 92:14–21, Oct. 14, 2011.
85. Goldman Testimony, Hr'g Tr. 135:4–138:14, Oct. 12, 2011.
86. Wells Testimony, Hr'g Tr. 116:4–118:20, Sept. 13, 2011; Goldman Testimony, Hr'g Tr. 138:15–141:3, Oct. 12, 2011.
87. Goldman Testimony, Hr'g Tr. 141:16–18, Oct. 12, 2011.
88. Goldman Testimony, Hr'g Tr. 140:11–141:3, Oct. 12, 2011.
89. Ex. 245, TRIAL EXB 03326–83; Novitsky Testimony, Hr'g Tr. 59:4–60:25, Oct. 6, 2011; Tucker Testimony, Hr'g Tr. 36:16–38:4, Oct. 12, 2011; Goldman Testimony, Hr'g Tr. 138:15–146:12, 161:16–162:8, Oct. 12, 2011; Luth Testimony, Hr'g Tr. 74:11–76:1, Oct. 14, 2011.
90. Kratovil Testimony, Hr'g Tr. 99:4–100:16, Oct. 6, 2011; Tucker Testimony, Hr'g Tr. 42:23–44:20, Oct. 12, 2011; Ex. 18, TRIAL EXB 00202–343; Goldman Testimony, Hr'g Tr. 146:13–161:15, Oct. 12, 2011; Luth Testimony, Hr'g Tr. 74:11–75:2, Oct. 14, 2011.

53. In June 2007, a notebook containing information about Mr. Stapley was given to MCSO.[91] This notebook or a memo in it had a sticky note which read: "rec'd Weds. June 20, 2007 @ 1600 from Sally Wells."[92] Lt. Bruce Tucker of the MACE Unit wrote this note.[93] Ms. Sally Wells was third in command of MCAO, behind only Mr. Thomas and Phil MacDonnell. She attended weekly meetings of MACE in 2007.

54. The heading of one memo in the notebook stands out in particular. It reads: "Yavapai County Matters; Issues Related to MCSO Investigation of Donald Stapley."[94] Section IV of the memo bears the heading "Filing Financial Disclosure Statements with False or Misleading Information."[95] Under that section, various criminal statutes are noted, including forgery, theft and misdemeanor disclosure violations under A.R.S. §§ 38-543 and 38-544. The memo and other information in this notebook point towards an unmistakable conclusion: Mr. Stapley's financial disclosures were being investigated earlier than June 20, 2007, the day the MCAO turned over the notebook to the MCSO.[96] The memo regarding "Yavapai County Matters," which was prepared in 2007, is consistent with testimony by Sheila Polk, Yavapai County Attorney establishing that Mr. Thomas talked to her in 2007 about taking cases involving Mr. Stapley.[97]

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91. Ex. 18, TRIAL EXB 00113–99.
92. Ex. 18, TRIAL EXB 00113.
93. Johnson Testimony, Hr'g Tr. 225:22–226:13, Oct. 6, 2011; Tucker Testimony, Hr'g Tr. 44:25–46:23, 67:1–68:22, Oct. 12, 2011.
94. Ex. 18, TRIAL EXB 00114–16.
95. Ex. 18, TRIAL EXB 00116.
96. Johnson Testimony, Hr'g Tr. 222:19–227:18, Oct. 6, 2011.
97. Polk Testimony, Hr'g Tr. 120:11–121:7, Oct. 19, 2011.

55. As noted above, the investigation of Supervisor Stapley was discussed at MACE meetings in early 2007.[98] Deputy County Attorney Vicki Kratovil attended MACE and kept her own notebook which contained agendas for the MACE meetings.[99] Lt. Bruce Tucker wrote these agendas.[100] The Stapley matter is listed on the agendas for MACE meetings occurring May 9, May 23, June 6, June 13, June 20, and June 27, 2007.[101] After Mr. Stapley's name, it is noted in parentheses that these matters are being referred to Yavapai County.[102] Lt. Tucker added the notation because he understood at the time that the Stapley investigation would be referred to Yavapai County.[103] This notation is consistent with the memo in the other notebook described above.[104]

56. Additionally, Ms. Kratovil's handwritten notes show that MACE was looking into both Supervisor Stapley and Tom Irvine in early 2007.[105] As part of the investigation of Supervisor Stapley, MACE decided to set up a post office box under an undercover officer name, so that MCSO could make an anonymous records request concerning Supervisor Stapley.[106] Mr. Goldman was to draft the records request, according to the meeting agenda for June 13, 2007.[107]

98. Kratovil Testimony Hr'g Tr. 97:25–98:24, Oct. 6, 2011.
99. Ex. 19, TRIAL EXB 00343–549; Kratovil Testimony, Hr'g Tr. 94:17–24, 105:7–18, Oct. 6, 2011; Tucker Testimony, Hr'g Tr. 32:21–34:23, Oct. 12, 2011.
100. Novitsky Testimony, Hr'g Tr. 71:25–72:17, Oct. 6, 2011; Kratovil Testimony, 95:14–96:5, Oct. 6, 2011.
101. Ex. 19, TRIAL EXB 00366, 00369, 00373, 00376, 00379–80, 00382.
102. This is not the referral that was done later in April 2009.
103. Tucker Testimony, Hr'g Tr. 35:1–36:1, 70:3–24, Oct. 12, 2011.
104. Ex. 18, TRIAL EXB 00114–16.
105. Kratovil Testimony, Hr'g Tr. 105:19–107:16, Oct. 6, 2011.
106. Kratovil Testimony, Hr'g Tr. 97:4–24, Oct. 6, 2011; Tucker Testimony, Hr'g Tr. 38:17–39:3, Oct. 12, 2011; Luth Testimony, Hr'g Tr. 69:18–70:10, 71:11–72:22, Oct. 14, 2011.
107. Ex. 19, TRIAL EXB 00373.

57. Mr. Goldman delivered the results of his research about Supervisor Stapley's financial disclosures to Thomas.[108] At hearing, Mr. Thomas remembered that part of Mr. Goldman's research included financial disclosure forms, and that Mr. Goldman had shown those forms to him.[109] Additionally, Mr. Thomas testified that Mr. Goldman found at least one of Mr. Stapley's disclosure forms to constitute a violation of law. Mr. Thomas sent Mr. Goldman to a MACE meeting to relay his findings.[110]

58. Mr. Goldman went to MACE meetings and handed out the information he obtained about Supervisor Stapley at a MACE meeting conducted during the first half of 2007.[111] The participants at the MACE meetings looked at some of Supervisor Stapley's disclosure forms and discussed information Mr. Goldman had discovered about properties or transactions in which Supervisor Stapley might be involved that were not listed on the disclosure forms.[112]

59. MCAO Division Chief Novitsky testified that Mr. Goldman brought documents to MACE meetings that are contained in Exhibit 245.[113] Exhibit 245 consists of documents that Mr. Novitsky kept and later gave to the Arizona Attorney General's Office in 2010. Exhibit 245 included a financial disclosure form for Supervisor Stapley from 2004.[114] Mr. Novitsky stated that it appeared that Mr. Goldman had initiated some type of investigation into Mr. Stapley's financial

108. Goldman Testimony, Hr'g Tr. 141:19–142:3, Oct. 12, 2011.
109. Thomas Testimony, Hr'g Tr. 123:3–25, Oct. 26, 2011.
110. Thomas Testimony, Hr'g Tr. 124:15–125:17, Oct. 26, 2011.
111. Ex. 245, TRIAL EXB 03326–83. Novitsky Testimony, Hr'g Tr. 59:4–60:11, 65:10–66:7, 81:20–82:12, Oct. 6, 2011; Goldman Testimony, Hr'g Tr. 142:8–146:12, Oct. 12, 2011.
112. Novitsky Testimony, Hr'g Tr. 84:16–86:10, Oct. 6, 2011.
113. Novitsky Testimony, Hr'g Tr. 59:20–60:11, Oct. 6, 2011.
114. Ex. 245, TRIAL EXB 3326–3327.

disclosure forms and discussed whether they contained irregularities.[115] As is evident from these facts, the discussions concerning Supervisor Stapley started early in 2007.[116]

60. Furthermore, Mr. Thomas testified that Mr. Goldman told him that Mr. Stapley had been involved in a number of corporations without disclosing his role properly in his financial disclosures. Mr. Thomas testified that Mr. Goldman indicated that Mr. Stapley's conduct on a number of those disclosures appeared to be deliberate, and that it appeared to Mr. Thomas that Mr. Stapley had not acted appropriately.[117] Importantly, Mr. Thomas admitted that at least one of the financial disclosures Mr. Goldman found would have triggered the statute of limitations.[118] After Mr. Goldman took his documents to a MACE meeting, nothing was done with them and Mr. Thomas testified he forgot about the matter.[119] Mr. Goldman reminded Mr. Thomas about the matter in early 2008.[120]

61. Ms. Aubuchon eventually took over the Stapley investigation in March 2008, on assignment from Mr. Thomas. This assignment came in spite of warnings from Chief Deputy County Attorney Phil MacDonnell and Appellate Division Chief Barbara Marshall that Ms. Aubuchon was not competent to handle the case.[121] Mr. Thomas ignored these warnings, along with Mr. MacDonnell's warning that

115. Novitsky Testimony, Hr'g Tr. 60:16–61:1, Oct. 6, 2011.
116. Kratovil Testimony, Hr'g Tr. 92:24–93:6, Oct. 6, 2011.
117. Thomas Testimony, Hr'g Tr. 124:15–125:19, Oct. 6, 2011.
118. Thomas Testimony, Hr'g Tr. 126:2–128:13, Oct. 6, 2011.
119. Thomas Testimony, Hr'g Tr. 128:18–129:2, Oct. 6, 2011.
120. Thomas Testimony, Hr'g Tr. 128:18–129:12, Oct. 6, 2011.
121. MacDonnell Testimony, Hr'g Tr. 148:6–153:19, Sept. 15, 2011; Marshall Testimony, Hr'g Tr. 153:17–155:7, Sept. 19, 2011.

MCAO was not qualified to take on—nor should it take on—a case against a political figure.[122]

62. According to Ms. Aubuchon, when Mr. Thomas gave the matter to her, he told her he wanted it done in a month.[123] He also said they had received a tip that Mr. Stapley had failed to disclose some information on his financial disclosure forms.[124] He also told her that Mr. Goldman had looked at some of the documents and it appeared there might be some truth to the tip.[125]

63. Ms. Wells testified that she gave Mr. Goldman's packet of information to Ms. Aubuchon.[126] Mr. Goldman testified that he also gave a notebook of his research to Ms. Aubuchon.[127]

64. Ms. Aubuchon obtained information about Mr. Stapley from Mr. Goldman, and she learned of financial disclosure forms that he had obtained.[128] She retrieved the notebook from Mr. Goldman at his house in Fountain Hills. Ms. Aubuchon testified that Mr. Goldman told her the information came from another investigation of Mr. Stapley, that there was a possibility that Mr. Stapley had not been disclosing things, and that there was an issue about nondisclosure.[129] Ms. Aubuchon also admitted that she saw date stamps on the documents that Mr. Goldman gave her that were from 2007, the year before.[130] In fact, there is clear and convincing evidence that the documents Mr. Goldman gave to Ms. Aubuchon were those contained in Exhibit 18, Bates stamped TRIAL EXB 206 to

122. MacDonnell Testimony, Hr'g Tr. 143:17–148:5, Sept. 15, 2011.
123. Aubuchon Testimony, Hr'g Tr. 36:6–19, 55:21–7, 65:21–23, Oct. 25, 2011.
124. Aubuchon Testimony, Hr'g Tr. 36:6–37:1, Oct. 25, 2011.
125. Aubuchon Testimony, Hr'g Tr. 36:6–37:1, Oct. 25, 2011.
126. Wells Testimony, Hr'g Tr. 117:3–120:17, 125:5–10, Sept. 13, 2011.
127. Goldman Testimony, Hr'g Tr. 162:9–164:7, Oct. 12, 2011.
128. Aubchon Testimony, Hr'g Tr. 41:18–42:5, Oct. 25, 2011.
129. Aubchon Testimony, Hr'g Tr. 44:5–46:6, Oct. 25, 2011.
130. Aubchon Testimony, Hr'g Tr. 46:14–22, Oct. 25, 2011.

342. The pages that are Bates stamped TRIAL EXB 255, 298, 319, 324, 325, 341, 342 show the date that the page was printed from the internet and those pages respectively show Feb. 11, 2007; February 8, 2007; Feb. 5, 2007; Feb. 5, 2007; Feb. 13, 2007; Jan. 23, 2007; and Jan. 23, 2007.

65. After March 2008, Ms. Aubuchon conducted her own investigation into Mr. Stapley's disclosures.[131] Ms. Aubuchon testified that she found a series of nondisclosures by Mr. Stapley. As such, she told Mr. Thomas.[132] Next, Ms. Aubuchon prepared a draft indictment against Supervisor Stapley,[133] which lists May 29, 2008 as the date that the grand jury would return the indictment.[134] This date is not without significance. First, this date was about a year after Mr. Goldman had stopped working on the Stapley matters. Second, it was provided as the indictment return date against the background of Thomas's one month deadline, given to Ms. Aubuchon in March 2008. As discussed below, the statute of limitations on misdemeanor violations in Arizona is one year after law enforcement knew or should have known that there was probable cause to believe a crime had been committed.

66. In early May 2008, Mr. Thomas contacted Mark Stribling, who is now Chief of Investigations of MCAO, and asked him to work on an investigation of Mr. Stapley.[135] Mr. Thomas also told Commander Stribling that the case had to be done in a month.[136] Mr. Thomas told Commander Stribling that he would be

131. Aubchon Testimony, Hr'g Tr. 46:23–48:15, Oct. 25, 2011.
132. Aubchon Testimony, Hr'g Tr. 48:16–20, Oct. 25, 2011.
133. Ex. 30, TRIAL EXB 00777.
134. Aubchon Testimony, Hr'g Tr. 50:8–55:13, Oct. 25, 2011.
135. Stribling Testimony, Hr'g Tr. 58:6–17, Oct. 4, 2011.
136. Stribling Testimony, Hr'g Tr. 59:1–5, Oct. 4, 2011.

working with MCSO Sgt. Brandon Luth.[137] Commander Stribling was provided no information of how any of the information about the case came to the attention of MCAO, but Mr. Thomas told him that Ms. Aubuchon had done internet searches on the properties owned by Mr. Stapley or his affiliates and that Ms. Aubuchon would be the prosecuting attorney.[138] Mr. Thomas provided Commander Stribling with a copy of one of Supervisor Stapley's financial statements.[139] Mr. Thomas also told Commander Stribling that another investigation of Supervisor Stapley would follow, to last between six and twelve months.[140]

67. On May 14, 2008, Ms. Aubuchon, Sgt. Luth, Commander Stribling, another investigator from MCAO (Tadlock), MCSO Captain James Miller, and MCSO Lieutenant Anglin attended an important meeting.[141] The attendees were told that it concerned a new investigation.[142] Ms. Aubuchon explained that the investigation concerned Supervisor Stapley's filing of incomplete financial disclosure statements.[143]

68. At the May 14, 2008, meeting, Ms. Aubuchon handed out documents which she stated she had researched online, showing that Mr. Stapley had filed false and/or incomplete disclosure statements.[144] Some of the documents that Ms. Aubuchon handed out showed that they had been printed from the internet in

137. Stribling Testimony, Hr'g Tr. 58:18–59:1, Oct. 4, 2011.
138. Stribling Testimony, Hr'g Tr. 59:1–5, Oct. 4, 2011.
139. Stribling Testimony, Hr'g Tr. 59:13–25, Oct. 4, 2011.
140. Stribling Testimony, Hr'g Tr. 59:6–12, Oct. 4, 2011.
141. Stribling Testimony, Hr'g Tr. 60:19–61:6, Oct. 4, 2011.
142. Anglin Testimony, Hr'g Tr. 195:3–18, Oct. 11, 2011.
143. Anglin Testimony, Hr'g Tr. 195:19–196:14, Oct. 11, 2011.
144. Ex. 30, TRIAL EXB 00723–1026. Stribling Testimony, Hr'g Tr. 61:9–63:23, Oct. 4, 2011; Hr'g Tr. 57:3–58:18, Oct. 5, 2011; Anglin Testimony, Hr'g Tr. 197:9–24, Oct. 11, 2011.

January or February 2007.[145] Based on statements from Mr. Thomas and Ms. Aubuchon, Commander Stribling believed that Ms. Aubuchon had conducted this research in 2007.[146] However, the evidence establishes that Mr. Goldman did this research and turned it over to Ms. Aubuchon. During the meeting, Ms. Aubuchon distributed the draft indictment, which set forth 65 counts.[147] This draft indictment included allegations of misconduct by Mr. Stapley beginning in 1994.[148] As noted above, the draft indictment showed a date of May 29, 2008 next to the signature page.[149]

69. Commander Stribling questioned how Ms. Aubuchon could have prepared a draft indictment when no investigation had been conducted and no police report had been written.[150] In his twenty-plus years as a police officer and detective, Commander Stribling had never seen an indictment prepared before the investigation was conducted.[151] Sgt. Luth had his own concerns. He asked Ms. Aubuchon if handing out all the information would make her a witness in the case. She responded with words to the effect of "that's why you're going to recreate the books or redo what we've already done."[152] Sgt. Luth conveyed his concerns about the supposed starting date of the investigation to Captain Miller

145. *Compare* Ex. 30, TRIAL EXB 00946 (same document as Ex. 18, TRIAL EXB 00228); Ex. 30, TRIAL EXB 00995–96 (same document as Ex. 18, TRIAL EXB 00298–99); Ex. 30, TRIAL EXB 00998–99 (same document as Ex. 18, TRIAL EXB 00308–09); Ex. 30, TRIAL EXB 1000–03 (same document as Ex. 18, TRIAL EXB 00301–04). Stribling Testimony, Hr'g Tr. 64:5–67:22, Oct. 4, 2011.
146. Stribling Testimony, Hr'g Tr. 132:19–37:24, Oct. 5, 2011.
147. Stribling Testimony, Hr'g Tr. 68:3–69:2, Oct. 4, 2011.
148. Ex. 30, TRIAL EXB 00777–98.
149. Stribling Testimony, Hr'g Tr. 69:3–19, Oct. 4, 2011.
150. Stribling Testimony, Hr'g Tr. 69:20–70:10, Oct. 4, 2011.
151. Stribling Testimony, Hr'g Tr. 70:16–21, Oct. 4, 2011. Commander Stribling's fears caused him to preserve the documents that became Ex. 30, because he knew that at some point the *Stapley I* investigation would come full circle and he wanted to be able to explain his participation. Stribling Testimony, Hr'g Tr. 114:2–115:17, Oct. 4, 2011. He kept them in his home gun safe. Stribling Testimony, Hr'g Tr. 4:17–7:7, Oct. 5, 2011.
152. Luth Testimony, Hr'g Tr. 86:15–25, Oct. 14, 2011.

and Lt. Anglin.[153] Lt. Anglin told Sgt. Luth to document what he was told "in a protect yourself kind of way."[154] When Lt. Anglin asked for clarification as to how the case was brought to the attention of law enforcement, Ms. Aubuchon told him that she was bringing the case to MCSO.[155]

70. Lieutenant Anglin of MCSO was concerned about the statute of limitations issue. He asked Ms. Aubuchon about that issue. She assured him that the statute began to run when the matter was brought to the attention of law enforcement, *i.e.*, that day.[156] Based on Ms. Aubuchon's direction, Lt. Anglin instructed Sgt. Luth to prepare an MCSO report about the *Stapley I* matter, with a start date of May 14, 2008.[157] That report does not indicate why the investigation was commenced or what research or investigation had been done before that date. The report's reference to MCSO receiving information about Supervisor Stapley is a reference to the information provided by Ms. Aubuchon without actually naming her as the source.[158]

71. Another Supplemental MCSO report, undated, mentions a May 14, 2008 meeting with MCAO as the time when MCSO learned about Supervisor Stapley's alleged filing of false and/or incomplete financial statements.[159]

72. At a later MACE meeting in May 2008, Commander Stribling questioned whether the omissions of properties on certain disclosure statements might be

153. Luth Testimony, Hr'g Tr. 87:1–5, Oct. 14, 2011.
154. Luth Testimony, Hr'g Tr. 87:1–14, Oct. 14, 2011.
155. Anglin Testimony, Hr'g Tr. 198:24–199:12, Oct. 11, 2011.
156. Anglin Testimony, Hr'g Tr. 199:13–200:1, 203:6–10, Oct. 11, 2011.
157. Ex. 246, TRIAL EXB 03384–85. Anglin Testimony, Hr'g Tr. 200:11–201:14, Oct. 11, 2011.
158. Anglin Testimony, Hr'g Tr. 202:11–203:5, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 87:15–88:21, Oct. 14, 2011.
159. Ex. 304, TRIAL EXB 04082.

nothing more than a clerical error.[160] Ms. Aubuchon said words to the effect of "if it's not there, it's a crime."[161] Commander Stribling was required to write a report of his work for the MACE Unit on a blank piece of paper, because no Departmental Report number had been assigned to the *Stapley I* investigation.[162] From May 2008 forward, Ms. Aubuchon and Chief Deputy Hendershott ran the *Stapley I* investigation.[163] Ms. Aubuchon kept Mr. Thomas informed about the MACE Unit's investigation of Supervisor Stapley.[164] As was noted above, Mr. Thomas and Ms. Aubuchon did not pursue charges against Mr. Stapley until November 2008 when Ms. Aubuchon presented the case to a grand jury. However, Ms. Aubuchon never presented information to the grand jury that the statute of limitations had run or was even an issue.[165] Ms. Aubuchon did not elicit any testimony from the one witness who testified in front of the grand jury about the time frame of the investigation or who began it.[166] Instead, Ms. Aubuchon asked: "And **at some point in time** did the Maricopa County Sheriff's Office receive information that Donald T. Stapley, Jr., may have failed to disclose different things in his financial disclosure statements?"[167] Ms. Aubuchon mentioned evidence-gathering only in terms of 2008.[168]

160. Stribling Testimony, Hr'g Tr. 73:2–74:12, Oct. 4, 2011.
161. Stribling Testimony, Hr'g Tr. 75:7–18, Oct. 4, 2011.
162. Stribling Testimony, Hr'g Tr. 70:22–71:11, 76:17–77:5, 86:19–87:6, Oct. 4, 2011.
163. Anglin Testimony, Hr'g Tr. 203:23–205:19, Oct. 11, 2011; Hr'g Tr. 6:13–8:9, Oct. 12, 2011.
164. Johnson Testimony, Hr'g Tr. 89:3–90:5, Oct. 11, 2011.
165. *See* Ex. 35, the November 20, 2008 presentation to the Grand Jury, TRIAL EXB 01040–1108.
166. Johnson Testimony, Hr'g Tr. 219:21–220:9, Oct. 6, 2011.
167. *See* Ex. 35, p. 19, ln. 4–8, TRIAL EXB 01058 (emphasis added).
168. *See* Ex. 35, p. 21, ln. 6–9, TRIAL EXB 01060; p. 30, ln. 3–6, TRIAL EXB 01069.

THE PROSECUTION OF DONALD STAPLEY (STAPLEY I)

73. The grand jury returned an indictment against Mr. Stapley, which was filed in court on November 20, 2008.[169] Ms. Aubuchon sought the indictment, though Mr. Thomas was aware that Ms. Aubuchon was seeking the indictment, and even reviewed a draft indictment himself.[170] The case bore the name *State v. Stapley*, CR2008-009242. On about December 2, 2008, a summons was served on Supervisor Stapley.[171] The indictment charged 118 separate criminal violations dating back to 1994—the year he first ran for County Supervisor.[172]

74. *Stapley I* was assigned to retired Judge Fields. Both Ms. Aubuchon and Mr. Thomas saw the appointment of Judge Fields to *Stapley I* as highly suspect, given that both Respondents believed Judge Fields to be biased against Mr. Thomas for various reasons.[173] Ms. Aubuchon filed motions to remove Judge Fields. On December 10, 2008, Judge Fields refused to recuse himself voluntarily.[174] The Motion for Change of Judge for Cause was assigned to Presiding Criminal Judge Anna Baca, who denied the motion without prejudice

169. Ex. 36, TRIAL EXB 01109–46.
170. Thomas Testimony, Hr'g Tr. 34:22–35:12, Oct. 26, 2011.
171. Ex. 38, TRIAL EXB 01150–53.
172. Ex. 36, TRIAL EXB 01109–1146; Stapley Testimony, Hr'g Tr. 65:1–66:8, Sept. 20, 2011.
173. Ex. 51, TRIAL EXB 01189–90; Ex. 53, TRIAL EXB 01194–95; Thomas Testimony, Hr'g Tr. 60:3–11, Oct. 26, 2011. While the assignment of retired Judge Fields to *Stapley I* may not have followed typical protocol, the rules of Maricopa County Superior Court clearly allow the presiding judge to make this type of appointment. Maricopa County Superior Court Local Rule 4.3(a) requires that criminal cases be assigned to trial divisions in a manner to be prescribed **by the presiding judge**. Maricopa Cty. Superior Ct. Local R. 4.3(a); Ex. 27, TRIAL EXB 597, fn. 4 (emphasis added). Furthermore, Rule 4.1 provides that "[c]riminal cases . . . shall be assigned within the criminal divisions and shall remain in those divisions **unless reassigned by the presiding criminal judge or the presiding judge**. *Id.* 4.1 (emphasis added). Clearly, the rules grant the presiding judge wide discretion in assigning criminal cases.
174. Ex. 43, TRIAL EXB 01165. Judge Fields declined to recuse voluntarily a second time on December 23, 2008. Ex. 55, TRIAL EXB 01198–99.

on December 15, 2008. The denial allowed Ms. Aubuchon to file an affidavit in support of her motion.[175]

75. Around December 11, 2008, Ms. Aubuchon wrote a letter to Judge Baca asking her to submit to an interview about the reasons for the selection of retired Judge Fields in *Stapley I*.[176] This was the first time Judge Baca had received such a request.[177] Judge Baca issued an order in response on about December 16, 2008, stating that the court would not accept the letter from the County Attorney since such an off-the-record communication may relate to the case.[178] She directed the County Attorney to communicate in the form of a pleading or motion.

76. On about December 11, 2008, Ms. Aubuchon delivered a similar letter to Judge Mundell requesting to interview her about the assignment of Judge Fields.[179] Judge Mundell wrote back to Ms. Aubuchon and informed her that attorneys do not write letters that are not part of the public file—attorneys file

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175. Baca Testimony, Hr'g Tr. 206:4–16, 209:5–13, Oct. 3, 2011; Ex. 46, TRIAL EXB 01170–71; Baca Testimony, Hr'g Tr. 210:9–211:10, Oct. 3, 2011.

176. Ex. 242, TRIAL EXB 03311. In her letter to Judge Mundell, Ms. Aubuchon cites *State v. Smith* as authority that "a judge can be questioned about his or her ability to be impartial in a case." Ex. 242, TRIAL EXB 3309–12. While that proposition is true in some circumstances, *Smith* is easily distinguished from the facts at issue here. In *Smith*, two criminal defendants filed an application for change of judge, requesting that Judge Birdsall be removed because his previous contact with the case and prior decisions would make it impossible for him to be objective. State v. Smith, 111 Ariz. 149, 151, 536 P.2d 392, 394 (1984). Hearing was set before Judge Truman, and the defendants were granted limited examination of Judge Birdsall to show prejudice or bias arising from facts subsequent to his previous rulings on the case. *Id.* at 152, 395. Judge Truman found no bias or prejudice, and allowed Judge Birdsall to stay on the case. *Id.* The defendants appealed the ruling, and it was upheld by the Supreme Court of Arizona. *Id.*

Smith is illustrative for what it does *not* involve. Namely, the defendants did not send out–of–court letters to either Judge Birdsall or Judge Truman when their motion was denied. They appealed the ruling. Here, Ms. Aubuchon lost on her motions to remove Judge Fields from *Stapley I.* Instead of raising the issue on appeal, she sent letters to the three judges requesting out–of–court interviews, citing *Smith* as her authority to do so, even though *Smith* clearly stands for the proposition that judges may be questioned as to bias or prejudice **only within the confines of the legal system** as outlined in trial and appellate court rules of procedure. Ms. Aubuchon's reliance on *Smith* was both misplaced and outright deceptive.

177. Baca Testimony, Hr'g Tr. 209:14–21, Oct. 3, 2011.

178. Ex. 45, TRIAL EXB 01169.

179. Ex. 242, TRIAL EXB 03310.

motions. Judge Mundell also noted that it was inappropriate for Ms. Aubuchon to try to glean Judge Mundell's thought processes in making a judicial decision. Judge Mundell stated that she would not submit to an interview.[180] Like Judge Baca, Judge Mundell had never received a request like the one Ms. Aubuchon made.[181]

77. Ms. Aubuchon also delivered a similar letter to Judge Fields, requesting an interview.[182] He took no action.[183] Ms. Aubuchon then filed a motion requesting leave to interview or depose Judges Mundell, Baca, and Fields. Judge Baca denied that motion on December 22, 2008.[184] She noted, "No Arizona case, statute or rule mandates or even authorizes a deposition of a Judge in relation to a Rule 10.1 motion."[185]

78. Around March or early April 2009, Mr. Thomas transferred *Stapley I* to Sheila Polk, the Yavapai County Attorney.[186] At that time, Mr. Stapley's motion for determination of counsel was still pending before Judge Fields. In addition, a bar complaint had been lodged against Mr. Thomas accusing him of having a conflict of interest in *Stapley I.* That bar complaint was transferred and assigned to retired Superior Court Judge Rebecca Albrecht to handle as independent bar counsel.[187] Judge Albrecht prepared a decision and, in an effort to give Mr. Thomas advance notice of her decision, she circulated a copy to Mr.

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180. Mundell Testimony, Hr'g Tr. 104:3–21, 168:8–177:3, Oct. 3, 2011.
181. Mundell Testimony, Hr'g Tr. 104:3–21, Oct. 3, 2011.
182. Ex. 242, TRIAL EXB 03312.
183. Fields Testimony, Hr'g Tr. 22:13–23:19, Sept. 13, 2011, p. 22.
184. Ex. 54, TRIAL EXB 01196–97. Baca Testimony, Hr'g Tr. 211:11–212:6, Oct. 3, 2011.
185. Ex. 54, TRIAL EXB 01197.
186. Chief Deputy County Attorney Phil MacDonnell recommended this transfer. MacDonnell Testimony, Hr'g Tr. 154:8–155:18, Sept. 15, 2011; Polk Testimony, Hr'g Tr. 193:14–194:15, Oct. 18, 2011. MCAO also transferred the investigations of Supervisor Wilcox, the "bug sweep" matter, and the Court Tower matter. Johnson Testimony, Hr'g Tr. 222:4–14, Oct. 6, 2011.
187. Albrecht Testimony, Hr'g Tr. 189:11–190:4, 193:6–16, Oct. 3, 2011.

Thomas's counsel and the State Bar.[188] Judge Albrecht dismissed the matter on May 4, 2009, on the condition that Mr. Thomas withdraw from the case and transfer it to Yavapai County.[189] Her letter contained an admonition, however, that the issues were troubling. She stated that the file could be renewed if similar conflict of interest concerns arose at a later time.[190]

79. On April 6, 2009, Mr. Thomas issued a Press Release entitled "County Attorney Offers Compromise to End Infighting, Sends Stapley case, Investigations to Yavapai County; Proposes Mediation." In that Release, Mr. Thomas announced that he had referred the *Stapley I* case to Ms. Polk as well as the Court Tower investigation (discussed more fully in connection with Claims Twelve through Fourteen *infra*) and any current or future investigations or prosecutions involving members of MCBOS or county management. On April 13, Mr. Thomas sent a letter addressed to Supervisor Max Wilson but captioned "An Open Letter to the People of Maricopa County." Mr. Thomas suggested in the letter that he and the Board attempt to resolve their many differences through mediation. However, questions of Mr. Thomas's sincerity still lingered.[191]

80. Ms. Polk entered her appearance on April 15, 2009, and requested that former Navajo County Attorney Melvin Bowers work as the prosecutor on the *Stapley I*.[192] While the Yavapai County Attorney was handling the various investigations, Ms. Aubuchon continued to assist MCSO with the

188. Albrecht Testimony, Hr'g Tr. 193:17–195:8, Oct. 3, 2011.
189. Ex. 101, TRIAL EXB 01436.
190. *See also* the March 5, 2009 draft of the dismissal letter, Ex. 87, TRIAL EXB 01382–84. Albrecht Testimony, Hr'g Tr. 191:8–193:1, 195:23–197:19, Oct. 3, 2011.
191. At least one member of MCBOS viewed these efforts with suspicion and questioned Thomas's sincerity. Kunasek Testimony, Hr'g Tr. 19:9–22:5, Sept. 26, 2011.
192. Polk Testimony, Hr'g Tr. 196:17–197:1, Oct. 18, 2011.

investigations.[193] Although MCSO had scanned thousands of Court Tower documents by the time the Court Tower investigation was transferred, MCSO did not provide any of those documents to the Yavapai County Attorney's office.[194]

81. Supervisor Stapley's counsel filed a motion to dismiss based on what counsel contended was MCAO's conflict of interest in prosecuting Supervisor Stapley.

82. On June 10, 2009, Judge Fields denied the motion to dismiss.[195]

CLAIM FOUR: ER 4.4(a) (FILING CHARGES TO EMBARRASS OR BURDEN) (THOMAS AND AUBUCHON)

83. Claim Four alleges that Mr. Thomas and Ms. Aubuchon violated ER 4.4(a) by filing charges against Supervisor Stapley with no substantial purpose "other than to embarrass, delay, or burden" Mr. Stapley. ER 4.4(a) states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person."[196]

84. The parties dispute the significance of the phrase "no substantial purpose" in the Rule. Respondents' argument boils down to two assertions: (1) "no substantial purpose" means that *any* other substantial, legitimate purpose negates the application of the rule, and; (2) pursuing a criminal prosecution supported by probable cause is *per se* "substantial."[197] As such, a prosecutor pursuing a criminal charge supported by probable cause will always have a "substantial purpose" other than the desire to embarrass, delay, or burden. Respondents note that a complete lack of disciplinary cases involving an

193. Johnson Testimony, Hr'g Tr. 7:10–8:20; 93:2–17, Oct. 11, 2011.
194. Hendershott Testimony, Hr'g Tr. 42:22–45:1, Oct. 13, 2011.
195. Ex. 104, TRIAL EXB 01445–48.
196. R. Sup. Ct. Ariz. 42, ER. 4.4(a).
197. Thomas's Post–Hr'g Memo. at 31.

allegation that a prosecutor violated 4.4(a) in pursuing a charge supported by probable cause bolsters their argument.[198]

85. IBC argues that a prosecutor may violate ER 4.4(a) even if he has probable cause to pursue a charge. Both parties cite *In re Levine* to support their arguments. *In re Levine* involved an attorney who received sanctions by the State Bar of Arizona for knowingly bringing a series of groundless and frivolous actions over course of many years.[199] When the case reached The Arizona Supreme Court, the Court provided guidance on the meaning and application of ER 4.4(a):

> [E]ven where respondent claims that an objectively arguable ground for a legal claim exists, his subjective purpose in bringing the action is relevant to whether a violation of E.R. 4.4 occurred. Therefore, we find no error in the commission's analysis of respondent's personal motives in bringing these claims in its consideration of whether he had violated ER . . . 4.4.[200]

86. Ultimately, as Mr. Thomas notes, the court did not decide whether an objectively legitimate purpose for bringing a claim, such as the pursuit of justice sought by a prosecutor who brings a charge supported by probable cause, renders subjective purpose irrelevant. That issue was not before the Court, since it ultimately decided that Levine's claims lacked objective merit.[201] However, the mere inclusion of the respondent's subjective state of mind in bringing a claim as relevant to a determination of whether he or she violated ER 4.4(a) defeats Respondents' argument that *any* other purpose defeats the

198. *Id.*
199. 174 Ariz. 146, 847 P.2d 1093.
200. *Id.*
201. *Id.*

application of ER 4.4(a).[202] At worst, *Levine* suggests a balancing test in determining which purposes are to be considered "substantial." Such a test necessarily requires a court to resort to the unique and specific facts of each particular case, including both the objective purposes involved in bringing a claim and the evidence indicating a certain, subjective state of mind on the part of a respondent.

87. Indeed, the language of ER 4.4(a) itself suggests a balancing approach. The phrase "no substantial purpose" implies that any other purported legitimate purpose must be "substantial" in order to defeat the application of the rule. Its mere existence is not enough. Naturally, courts must determine whether a purported, legitimate purpose is "substantial," and can only do so using the evidence at hand.

88. Accordingly, overwhelming evidence of improper purpose may outweigh an objectively proper purpose—even one as obvious as the pursuit of justice by a prosecutor bringing charges based on probable cause—especially where the context and nature of the charges themselves provide additional evidence of improper purpose. At some point, even an objectively proper purpose, such as the pursuit of justice, can become so weighed down by evidence of improper purpose that it is relegated from a presumed state of substantiality to only a minor, if even existent, reason for bringing a charge.

89. With the stage set, our task is to balance the purported purposes behind *Stapley I.* On the one hand, Respondents argue that one overriding purpose guided their actions in pursuing criminal charges against Mr. Stapley: to bring

202. Thomas's Post–Hr'g Memo. at 31 (arguing that the Rule's "language requires the exclusion of any other purpose").

allegedly corrupt county officials to justice. On the other hand, IBC argues that Mr. Thomas's and Ms. Aubuchon's truly substantial purpose was to burden and embarrass a political foe.

90. IBC offers the following evidence in support of its proposition that Respondents' purpose was to burden, harass, and embarrass Mr. Stapley: (1) the sheer number of charges (118)[203]; (2) the fact that many of the charges dated back to 1994; (3) the fact that the statute of limitations barred the majority of the misdemeanors; and, (4) the fact that the charges included felonies of forgery and perjury. Furthermore, there is Mr. Thomas's written press release about the *Stapley I* indictment (discussed in connection with Claims Twelve and Thirteen *infra*) which ominously noted that the investigation of Mr. Stapley and other County employees was not over.[204]

91. In addition, this apparently was the first time in Arizona history that a county supervisor's financial disclosures were the subject of criminal charges. Yet, Mr. Thomas and Ms. Aubuchon did not subject *Stapley I* to an incident review, a process by which Division Chiefs evaluated difficult cases at MCAO.[205] Ms. Aubuchon could have requested an incident review.[206] Instead, they prepared the case in isolation, without the benefit of the checks and balances available in MCAO's usual chain of command.[207]

92. IBC contends that Mr. Thomas's purpose in pursuing Supervisor Stapley stemmed back to the dispute over the hiring of outside counsel. They argue

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203. IBC notes that Aubuchon increased the number of charges by charging multiple Counts as to each property for each year. *See* Ex. 36, TRIAL EXB 01110–13.
204. Ex. 37, second page, TRIAL EXB 01148.
205. MacDonnell Testimony, Hr'g Tr. 12:17–14:24, Sept. 19, 2011; Marshall Testimony, 162:6–163:21, Sept. 19, 2011; Novitsky Testimony, Hr'g Tr. 66:14–68:18, Oct. 6, 2011.
206. Marshall Testimony, Hr'g Tr. 8:23–11:13, Sept. 20, 2011.
207. MacDonnell Testimony, Hr'g Tr. 134:14–136:5, Sept. 19, 2011.

that Mr. Thomas initiated the investigation of Supervisor Stapley based merely on an unsubstantiated rumor concerning an alleged bribe between Mr. Stapley and Judge Mundell to hire Tom Irvine to represent the Superior Court on the Court Tower project.[208] Yet, when it was reported to Mr. Thomas that there was no connection found between Mr. Stapley and Mr. Irvine, Thomas decided to investigate and prosecute Mr. Stapley anyway.

93. Furthermore, IBC argues that Mr. Thomas perceived Mr. Stapley as the most aggressive supervisor to challenge Mr. Thomas's power. Mr. Thomas was warned about Mr. Stapley, and warned not to go after him.[209] Yet, Mr. Thomas assigned Ms. Aubuchon to prosecute Mr. Stapley, despite these warnings.

94. Respondents' argument is twofold: First, that the pursuit of justice by a prosecutor bringing charges supported by probable cause is a substantial purpose—period—rendering ER 4.4(a) inapplicable. Second, that the lapse of time between the initial disputes over the hiring of outside counsel (2006) and the indictment against Supervisor Stapley (December 2008) was too long for a reasonable person to conclude that Thomas sought revenge on Mr. Stapley. This argument, Respondents contend, is bolstered by the fact that Mr. Thomas waited to indict Mr. Stapley—a fellow Republican—until after the election of 2008. Simply put, if Mr. Thomas was bent on exacting political revenge on Mr. Stapley, why would he wait so long, and why wouldn't he strike before an election to hit Mr. Stapley the hardest?

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208. Hendershott Testimony, Hr'g Tr. 22:4–22; 26:24–28:21; 31:21–32:22; 118:4–16, Oct. 13, 2011. Hendershott admits the conversation that started the rumor does not constitute a crime. Hendershott Testimony, Hr'g Tr. 118:4–16, Oct. 13, 2011. Judge Mundell denies the rumored conversation ever took place. Mundell Testimony, Hr'g Tr. 118:1–5, Oct. 3, 2011.

209. Thomas's Testimony, Hr'g Tr. 30: 22–24: 8, Oct. 26, 2011 (Thomas had been warned to "watch out" for Stapley); MacDonnell Testimony, Hr'g Tr. 149: 2–3: 38, Sept. 15, 2011 (MacDonnell warned Thomas: "You're crazy to proceed with this case. It'll destroy you.")

95. Respondents' first argument is discussed above. While the pursuit of justice by a prosecutor bringing charges backed by probable cause may usually be a substantial purpose, it is not *necessarily* one in every case. Other factors may lead to the conclusion that justice has been subsumed by other improper motivations to such a degree that it no longer deserves a status of substantiality. Taken to its logical end, Respondent's argument excuses the prosecutor who brings a valid charge against an enemy for jay-walking, while openly acknowledging that his real purpose is improper. As such, only the second aspect of Respondents' argument has a bearing on the outcome of this Claim. Respondents' argue that the passage of over two years between the initial encounter between Thomas and Mr. Stapley and the indictment renders the "politically-motivated-revenge" purpose a nonstarter.

96. IBC's arguments are more persuasive, and demonstrate by clear and convincing evidence that Mr. Thomas and Ms. Aubuchon acted with no substantial purpose other than to embarrass or burden Supervisor Stapley. The passage of time between the dispute over the hiring of outside counsel and the indictment is of little importance for purposes of ER 4.4(a). It is the Respondents' behavior alone in relation to Supervisor Stapley that indicates an improper purpose—not whether it took Respondents two weeks, two months, or two years to effectuate their purposes. Indeed, this would hardly be the first time in history where individuals bent on harming another took their time in doing so.

97. More interesting is the argument that Mr. Thomas waited to indict Mr. Stapley until November out of respect for a fellow Republican's election hopes.

Setting aside the implausible notion that partisanship heals all wounds, this fact, if true, undermines Mr. Thomas's argument that his true purpose and desire was to pursue justice regardless of political ramifications. In the face of all of Mr. Thomas' actions against and interactions with Supervisor Stapley, this one kind gesture (if genuine) does little to diminish Mr. Thomas's role in pursuing a politically-motivated indictment against Mr. Stapley, though it does much to diminish Mr. Thomas's purported purpose—the pursuit of justice.

98. Viewing the evidence as a whole, this Panel is persuaded, by clear and convincing evidence, that Mr. Thomas and Ms. Aubuchon pursued criminal charges against Supervisor Stapley (whose guilt or innocence has never been an issue in this matter) with no substantial purpose other than to embarrass, delay, or burden him in violation of ER 4.4(a).

CLAIM FIVE: ER 1.7(a)(1)-(2) (CONFLICT OF INTEREST) (THOMAS AND AUBUCHON)

99. Claim Five alleges that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(1) and ER 1.7(a)(2). ER1.7(a)(1) prohibits a lawyer from representing a client if the representation "of one client will be directly adverse to another client."[210] 1.7(a)(2) prohibits a lawyer from representing a client if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."[211] Each alleged violation will be addressed in turn.

210. R. Sup. Ct. Ariz. 42, ER 1.7(a)(1).
211. R. Sup. Ct. Ariz. 42, ER 1.7(a)(2).

ER 1.7(a)(1)

100. IBC argues that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(1) by representing one client, the State, against another client, Supervisor Stapley, in the criminal case against Mr. Stapley. The issue is twofold: (1) whether Supervisor Stapley reasonably viewed himself as Mr. Thomas's client, and; (2) whether the County Attorney may bring criminal charges against an individual member of MCBOS when, under statute, the County Attorney represents MCBOS in a legal capacity. Because we find that Mr. Stapley could not reasonably have considered himself a personal client of MCAO, we need not address the second issue.

101. Attorney-client relationships in the government context implicate unique rules. For the County Attorney, case law and statutes establish dual representative duties—he represents the State when he acts as a prosecutor, and he also represents MCBOS.[212] Also important for our purposes is ER 1.13, which deals with public attorneys and their interactions with constituents of their organizational clients. While the rule imposes certain duties of confidentiality on public attorneys who deal with constituents of their organizational clients, Comment 2 to the Rule makes clear that "this does not mean . . . that constituents of an organizational client are the clients of the lawyer."[213] As such, as County Attorney, Mr. Thomas may have held duties and obligations in

212. *See* State ex. Rel. Romley v. Super Ct. (Flores), 181 Ariz. 378, 382, 891 P.2d 246, 250 (App. 1995); Hawkins v. Auto–Owners Ins. Co., 579 N.E. 2d 118, 123 (Ind. App. 1991)(partially vacated on other grounds, 608 N.E.2d 1358 (Ind. 1993)) ("A deputy prosecutor does not represent the victims or witnesses in a criminal proceeding, but rather, is the State's representative"); State v. Eidson, 701 S.W.2d 549, 554 (Mo. App. 1985) ("The prosecutor represents the State not the victim"); Ariz. Rev. Stat. § 11–532 (stating that the County Attorney represents the Board of Supervisors).

213. R. Sup. Ct. Ariz. 42, ER 1.13, cmt. 2. Attorney Tom Irvine, hired by MCBOS to provide outside counsel, admits as much. *See* Irvine Testimony, Hr'g Tr. 192: 11–18: 48, Sept. 14, 2011.

connection with his communications with individual Board members, but as a lawyer, his client was MCBOS itself as an organizational unit.

102. That said, in determining whether an individual is a "client" under the ethical rules, we typically look to the purported client's view of the attorney-client relationship.[214] However, the purported client's belief must be objectively reasonable.[215]

103. Notwithstanding Mr. Thomas's incriminating statement that he viewed Mr. Stapley as his client[216], there is scant evidence to support the proposition that Supervisor Stapley thought he was a personal client of MCAO.[217] Though not binding on this Panel, Judge Fields's statement on the issue is instructive:

> A reasonable person in [Mr. Stapley's] position when soliciting legal advice and assistance from the [MCAO] about business ventures that could be conflicts of interest and/or would be reportable on the elected official's financial disclosure statements would have been aware that the Maricopa County Attorney is also a prosecuting agency in addition to acting as the legal advisor for the Board of Supervisors. This is not a situation where the Defendant first engaged a private attorney for legal assistance, divulged confidences and later was prosecuted by the same attorney on the same matters.
>
> **It was not reasonable under the circumstances here for [Mr. Stapley] to expect that the Maricopa County Attorney was his attorney on all matters.** [218]

104. The Panel agrees with Judge Fields's assessment. Even if Mr. Stapley actually thought of himself as a personal client of MCAO—which is unlikely—such

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214. *See* Paradigm Ins. Co. v. Langerman Law Office*s,* P.A., 200 Ariz. 146, 149, 24 P.3d 593, 596 (2001) ("a purported client's belief that [the lawyer] was their attorney is crucial to the existence of the attorney–client relationship . . . .") (citation omitted).
215. *In re* Pappas, 159 Ariz. 516, 522, 768 P 2.d 1161, 1167 (1988) (*quoting* In *re Neville*, 147 Ariz. 106, 111, 708 P.2d 1297, 1302 (1985)).
216. *See* Ex. 13, TRIAL EXB 00097.
217. IBC cites to one brief passage from the record where Stapley refers to himself as Thomas's "client." See Stapley Testimony, Hr'g Tr. 170: 10–12: 43, Sept. 9, 2011.
218. Ex. 104, TRIAL EXB 01447.

a view was not objectively reasonable under the circumstances, given the nature of the legal relationship between MCBOS and MCAO. As such, the Panel concludes that there is not clear and convincing evidence to find that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(1).

ER 1.7(a)(2)

105. IBC argues that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2), which prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer. According to IBC, Mr. Thomas's personal animosity towards Supervisor Stapley should have precluded them from seeking his indictment and prosecution.

106. ER 1.7(a)(2) does not list what "interests" trigger the application of rule.[219] Suffice to say that "any interest that is inconsistent with the prosecutor's duty to safeguard justice is a conflict that potentially could violate a defendant's right to fundamental fairness."[220]

107. The history of lengthy, contentious disputes between Mr. Thomas and Mr. Stapley has been well-documented, involving—among other things—Mr. Thomas' feelings that Mr. Stapley had attracted several lawsuits against MCBOS, Mr. Stapley's assertions that Mr. Thomas was appointing his political allies as outside counsel in conflicts cases, and the dispute over hiring outside counsel. The evidence clearly and convincingly establishes that Mr. Thomas had a personal interest in investigating and prosecuting Mr. Stapley—an interest arising out of a history of power-struggles between the two influential men. Mr.

219. *See* R. Sup. Ct. Ariz. 42, ER 1.7 cmts. 10, 11, 12 (discussing business, family relationship, and sexual relationship interests).
220. *See* Villalpando v. Reagan, 211 Ariz. 305, 309, 121 P.3d 172, 176 (App. 2005).

Thomas owed the State a duty of conflict-free representation. Yet, his prosecution of Mr. Stapley was tainted, motivated, and materially limited by his personal animosity towards the Supervisor, as indicated by the secretive nature of the investigation, the nature of the charges, the number of charges, and the fact that many were brought outside the statute of limitations.

108. While the personal interest at issue here is primarily attributed to Mr. Thomas, it is also imputed to Ms. Aubuchon because the two worked closely in the same firm, as defined by ER 1.10(a) and ER 1.0(c). ER 1.0(c) provides that government lawyers may be treated as a firm depending on the particular Rule involved and the specific facts of the situation.[221] For purposes of ER 1.7, MCAO is a firm because of its structure—both the civil and criminal divisions report to Mr. Thomas—and because Mr. Thomas and Ms. Aubuchon worked together to charge Mr. Stapley.[222] Mr. Thomas' personal interests were imputed to Ms. Aubuchon under ER 1.10(a) because they presented a significant risk of materially limiting the representation. Ms. Aubuchon, as head of MCAO's pre-trial division and a member of the MACE Unit, reported to and worked directly with Mr. Thomas.[223]

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221. R. Sup. Ct. Ariz. 42, ER 1.0(c).

222. *See* State Bar of Ariz. Ethics Op. 89–08 (Public Defender's Office should be considered a "firm" for purposes of ER 1.10; "A lawyer in a position of ultimate authority and oversight may acquire confidential information about all, or nearly all, of the cases handled by the office during his or her tenure"); State Bar of Ariz. Ethics Op. 92–07 (screening of Deputy Public Defenders is not an adequate remedy for conflict under ER 1.7); State Bar of Ariz. Ethics Op. 93–06 (splitting Public Defender's Office into two divisions does not avoid imputed disqualification). ER 1.10(a) does not require any showing that confidential information has actually been shared or even that the other lawyers in the firm have access to it. State Bar of Ariz. Ethics Op. 93–06, citing Hazard and Hodes, The Law of Lawyering (2d ed.), § 1.10:201 at p. 325 (1992 Supp.).

223. *See* State v. Latigue, 108 Ariz. 521, 523, 502 P.2d 1340, 1342 (1972) (Chief Deputy County Attorney has "supervisory powers and duties over the assistant county attorney who is prosecuting. Moreover, if the County Attorney's Office is functioning efficiently, its staff has frequent meetings to discuss cases, and even without meetings, staff members often talk about their cases with one another").

109. The Panel finds that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2) by representing a client—the State—when there was a significant risk that the representation would be materially limited by Mr. Thomas's personal interest against Supervisor Stapley. Mr. Thomas's conduct is imputed to Ms. Aubuchon under ER 1.10(a) and ER 1.0(c).

CLAIM SIX: ER 3.3(a)(1) (CANDOR TOWARD TRIBUNAL) (THOMAS AND AUBUCHON)

110. After his indictment, Mr. Stapley, through his attorney, filed a "Motion for Determination of Counsel" urging that Mr. Thomas and the MCAO be disqualified from prosecuting him because of a conflict of interest and the appearance of impropriety. Ms. Aubuchon wrote and signed the Response to that Motion. In that Response, Ms. Aubuchon asserted there "has been and is a 'Chinese Wall' between the Criminal and Civil Divisions of the County Attorneys' Office in the prosecution of this case."[224] It is alleged this statement violates ER 3.3(a)(1) which states:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;[225]

111. The term "Chinese Wall" is a generic reference encompassing the "screening" procedures used to prevent confidential information in the possession of one attorney from coming into the possession of another attorney in the same office or firm.[226] In the case of Mr. Stapley, the issue presented

224. Ex. 248A at 7, lines 4–6.
225. R. Sup. Ct. Ariz., ER 3.3(a)(1).
226. *See* Smart Indus. Corp., Mfg. v. Superior Court, 179 Ariz. 141, 146 – 147, 876 P.2d 1176, 1181–1182 (App. 1994); Restatement (Third) of the Law Governing Lawyers, § 124.

was whether confidential information about him in the possession of the Civil Division was "walled off" from Ms. Aubuchon and the Criminal Division.

112. The evidence was clear that, during the relevant time, there was no formalized or written screening policy.[227] Documents prepared or retained by the Civil Division were stored on a computer server not accessible by the Criminal Division. The divisions were physically separated in different buildings and, as an informal practice, lawyers in one division typically did not communicate with lawyers in the other division. However, the electronic mail system did not prevent such communications. Moreover, both divisions reported to Sally Wells, who reported to Mr. MacDonnell, and who reported to Mr. Thomas.[228] Most important, the importance of screening confidential information was not consistently or formally communicated within the MCAO. Any screening was on an informal and ad-hoc basis.

113. One would expect the MCAO to have formal procedures in place to restrict the disclosure of confidential information within the office. But that is not the issue. What must be determined is whether the statement that a "Chinese Wall" existed was a knowing "false statement of fact." As the term "Chinese Wall" is a generic description applicable to multiple screening procedures, it is difficult to conclude that its mere use conveys a definite fact, capable of being true or false. The expression must be read in context to determine if there was a knowing attempt to mislead the Court.

> The state is not intending to use any communications between any attorney in the Maricopa County Attorneys' Office and the defendant, nor is there any information to believe that any statements relating to this case were ever made or advice ever given. The Civil Division has

227. MacDonnell Testimony, Hr'g Tr. 20:10–22:23, 31:21–34:8, Sept. 19, 2011; White Testimony, Hr'g Tr. 21:16–23:11, 34:25–37:25, Sept. 20, 2011.
228. *See* Thomas Testimony, Hr'g Tr. 84:16–21, 85:2–20, Oct. 26, 2011.

> informed the County Attorney that during the last four years, no deputy county attorney has been asked by any supervisor, including the defendant, to assist or advise a supervisor in the preparation of their individual financial disclosure forms. Regardless, the prosecution is not seeking to use any confidences in this case. There has been and is a "Chinese Wall" between the Criminal and Civil Division of the County Attorneys' Office and the prosecution of this case.[229]

114. No evidence was presented establishing that the statement, read as a whole, was false. Indeed, Judge Fields's ruling denying Mr. Stapley's motion recognized the accuracy of the argument. Using the vague and ambiguous term "Chinese Wall" may have been inartful, but it does not rise to a knowing false statement of fact. The term "Chinese Wall" is a generic description of multiple screening procedures. Reading the argument in context, no misstatement of fact was conveyed in the response.

115. As to Claim Six, there is not clear and convincing evidence that Ms. Aubuchon's use of the phrase "Chinese Wall" constitutes a false statement of fact knowingly made in violation of ER 3.3(a)(1).

CLAIM SEVEN: ER 3.3(a) (CANDOR TOWARD TRIBUNAL) (AUBUCHON AND THOMAS)

116. On December 10, 2008, Ms. Aubuchon filed a motion in the Stapley case seeking the recusal or disqualification of Judge Fields.[230] The Motion was defective for a number of reasons: there was no verification based on personal knowledge (information and belief not being sufficient), the exhibits attached to the Motion lacked any authentication, and the attached affidavit of a claimed expert was unsigned.

117. Ms. Aubuchon, in the Motion, set out the following argument heading in bold lettering:

229. Ex. 248A.
230. Ex. 27, TRIAL EXB 00593–00700.

> **"Judge Fields is the complainant in an open and pending State Bar matter that he initiated against County Attorney Thomas."[231]**

Ms. Aubuchon followed that argument heading with the following text:

> On November 8, 2007, the State Bar of Arizona (Bar) sent a letter to County Attorney Thomas requiring a response to various cited ethical rules and attachments. One of the attachments was a letter to the Bar from Kenneth Fields, a retired judge. [Exhibit 11] In his letter to the Bar, retired Judge Kenneth Fields referred the Bar to a New Times article with a headline and content critical of County Attorney Thomas. [Exhibit 12] That Bar matter, File No. 07-1793, is currently pending before another retired Maricopa County Superior Court judge, Rebecca Albrecht.
>
> Because the State Bar considered retired Judge Fields a complainant in the currently pending Bar matter, the State Bar announced its intention to provide Judge Fields with the responses to the inquiry — materials that would not have been made available to the general public.[232]

118. The Exhibit 11 referred to in the above quote is an October 19, 2007 letter from Judge Fields to Robert Van Wyck, then the Chief Bar Counsel for the State Bar of Arizona. In that letter, Judge Fields expressly complains about the conduct of Dennis Wilenchik, a private attorney engaged as a special prosecutor. Nowhere in the letter does Judge Fields complain about Mr. Thomas. Judge Fields never mentions Mr. Thomas's name in the letter. The newspaper article Judge Fields enclosed with his letter to describe the conduct of Mr. Wilenchik about which he was complaining also discussed Mr. Thomas. That circumstance, however, does not mean Judge Fields complained to the State Bar against Mr. Thomas.

119. In spite of the undisputable documentary evidence, Ms. Aubuchon continues even today to claim that Judge Fields filed a bar complaint against Mr.

231. *Id.* at 6, TRIAL EXB 598.
232. *Id.* at 7, TRIAL EXB 599.

Thomas.[233] Mr. Thomas, on the other hand, now concedes Ms. Aubuchon's statement was factually inaccurate but argues that she is only guilty of an "innocent blunder."[234]

120. In the December 10, 2008 Motion, Ms. Aubuchon reasoned that Judge Fields became a complainant against Mr. Thomas because:

> "On November 8, 2007, the State Bar of Arizona (Bar) sent a letter to County Attorney Thomas requiring a response to various cited ethical rules and attachments. One of the attachments was a letter to the Bar from Kenneth Fields, a retired judge. [Exhibit 11]."[235]

121. Notably, Ms. Aubuchon failed to attach the November 8, 2007 letter to her December 10, 2008 motion. That failure is very suspicious. Why would she not submit the document she thinks proves that Judge Fields was a complainant against Mr. Thomas?

122. Respondents did submit that November 8, 2007 letter as an exhibit in these proceedings.[236] However, that exhibit does not contain Judge Fields's letter which, according to Ms. Aubuchon's December 10, 2008 motion, was supposedly enclosed with it. Whether or not the State Bar included Judge Fields's letter in their November 8, 2007 letter to Mr. Thomas, the fact remains that Judge Fields never complained to the State Bar about Mr. Thomas. Since Ms. Aubuchon had Judge Fields' letter, she knew her statement was false.

123. Thomas gave his approval to the December 10, 2008 Motion filed by Ms. Aubuchon seeking Judge Fields's recusal and ratified her statements in that Motion.[237]

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233. Aubuchon's Final Argument at 75–76.
234. Thomas Post–Hr'g Memo., 10–11.
235. Ex. 27 at 7, TRIAL EXB. 599.
236. Ex. 310, TRIAL EXB. 04239.
237. Thomas Testimony, Hr'g Tr. 60:12–61:21, 90:25–91:18, Oct. 26, 2011.

124. Therefore, as to Claim Seven, there is clear and convincing evidence that Ms. Aubuchon and Mr. Thomas violated ER 3.3(a) when Ms. Aubuchon filed a motion asserting that "Judge Fields is the complainant in an open and pending State Bar matter that he initiated against County Attorney Thomas."

CLAIM EIGHT: ER 8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) (AUBUCHON)

125. Claim Eight alleges that Ms. Aubuchon violated ER 8.4(d) by writing letters to Judges Mundell, Baca, and retired Judge Fields seeking to interview them about the appointment of Judge Fields to the *Stapley I* case. Under ER 8.4(d), it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[238] Only negligence is required for a violation of ER 8.4(d).[239]

126. An attorney may not attempt to ascertain a judge's thought process behind a decision.[240] When faced with similar circumstances, other jurisdictions have found violations of ethical rules. The court in *Statewide Grievance Committee v. Burton*, 299 Conn. 405 (2011), found that the respondent engaged in conduct

238 R. Sup. Ct. Ariz. 42, ER 8.4(d). *See* In re Shannon, 179 Ariz. 52, 876 P.2d 548, 552, 563 (1994).

239 In re Clark, 207 Ariz. 414, 418, 87 P.3d 827, 831 (2004).

240 *See* Phillips v. Clancy, 152 Ariz. 415, 419–22, 733 P.2d 300, 304–07 (App. 1986) ("The essential line of demarcation appearing from the cases is that judicial . . . officers may be compelled to testify only as to relevant matters of fact that do not probe into or compromise the mental processes employed in formulating the judgment in question."); U.S. v. Morgan, 313 U.S. 409, 422 (1941) (Examining reasoning behind Secretary of Agriculture's decision, in his role as judge, would be "destructive of judicial responsibility"); Grant v. Shalala, 989 F.3d 1332, 1334 (3d Cir. 1993) ("It has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are generally improper."); U.S. v. Roth, 332 F. Supp. 2d. 565, 567 (S.D.N.Y. 2004) ("[T]he overwhelming authority from the federal courts . . . , including the United States Supreme Court, makes it clear that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments or the reasons that motivated him in the performance of his official duties."); U.S. v. Cross, 516 F. Supp. 700, 707 (M.D. Ga. 1981), *aff'd*, 742 F.2d 1279 (11th Cir. 1984) (holding that the mental processes employed in formulating the decision may not be probed); State ex. rel. Kaufman v. Zakaib, 207 W. Va. 662, 670, 535 S.E.2d 727, 736 (2000) ("[J]udicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts").

prejudicial to the administration of justice by mailing a letter to the Chief Justice of the Connecticut Supreme Court accusing three Superior Court judges of judicial corruption without any credible evidence to support her claim. Similarly, Ms. Aubuchon's letters to the judges demonstrate an impermissible communication with those judges outside the confines of the matter at hand, in an attempt to investigate an allegation of bias.

127. In *Inquiry Concerning Fowler*, 287 Ga. 467 (2010), the court found that a judge engaged in conduct prejudicial to the administration of justice by sending a letter to a probation company requesting that it remove two probation officers from his court. The court found the letter to contain an implied threat to hire a competitor of the probation company if the company did not comply with the judge's request. Similarly, in this case, Ms. Aubuchon's letters constitute an implied threat or intimidation tactic against judges who made decisions with which Ms. Aubuchon disagreed.

128. The court in *In re Madison*, 282 S.W.3d 350 (Mo. 2009), found the respondent to have engaged in conduct prejudicial to the administration of justice where he wrote letters containing false or reckless allegations of ethical misconduct to a judge. The court noted that the respondent improperly chose to write letters to the judge regarding his disagreement with the judge's decision, rather than appeal the decision.[241] Ms. Aubuchon engaged in conduct prejudicial to the administration of justice when she wrote directly to Judges Mundell, Baca and Fields, requesting that the judges submit to an interview regarding the selection of Judge Fields in *Stapley I*. Her attempted inquiry was

241. 282 S.W.3d at 357–58. *See also* Ligon v. Stilley, 2010 WL 4361447 (Ark. Nov. 4, 2010) (violation of Rule 8.4(d) to send letter threatening bar complaint to judge).

an improper effort to intrude into judicial discretion. Furthermore, it had the potential to erode the separation of powers that exist between the judicial and executive branches of Maricopa County government.

129. Most importantly, Ms. Aubuchon's proposed depositions—which sought to ask whether the judges had formed a conspiracy to appoint a judge who supposedly was biased against Mr. Thomas—also had the potential to intimidate the judges. Ms. Aubuchon wrote these letters as a high-level prosecutor working directly for the County Attorney. Her name carried more weight than the typical private attorney, increasing the likelihood that the letter would be read as an attempt to intimidate and threaten the judges.

130. Judge Mundell testified that she was not aware of any bias by Judge Fields against Thomas.[242] She stated that she chose a retired judge because she was concerned about a potential conflict involving sitting judges presiding over a case involving Supervisor Stapley during a time of budget problems—problems which would eventually be decided by MCBOS. Given that each judge plays a role in the budgeting process, her concern is persuasive.[243] A retired judge would not have that potential conflict and would not have the appearance of favoring one of the Supervisors.

131. Finally, there simply was no justification for Ms. Aubuchon to write Judge Mundell and Judge Baca. Ms. Aubuchon's stated purpose for writing to those two judges was in an effort to support her motions to have Judge Fields

242. Mundell Testimony, Hr'g Tr. 109:19–24, Oct. 3, 2011.

243. Rule 1.8 of the Maricopa County Superior Court provides: "Each judge of the court, each court commissioner, the court administrator, the jury commissioner, the director of conciliation, and the director of the law library and other persons shall, no later than sixty (60) days prior to the date for submission of the budget to the board of supervisors, prepare and submit to the court administrator a request for the following fiscal period."

removed, either voluntarily or for cause. This motion was not about either Judge Mundell or Judge Baca; rather, it was about Judge Fields. Ms. Aubuchon's attempt to interview Judge Mundell and Judge Baca could not possibly support her motion about Judge Fields's alleged bias against Mr. Thomas.

132. In sum, by writing and delivering potentially threatening and intimidating out-of-court letters to Judges Mundell, Baca and retired Judge Fields, with the purpose of ascertaining the decision-making thought processes of Judges Mundell and Baca, Ms. Aubuchon engaged in conduct that was "prejudicial to the administration of justice" in violation of ER 8.4(d).

CLAIM NINE: ER 8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE) (THOMAS AND AUBUCHON)

133. Claim Nine alleges that Mr. Thomas and Ms. Aubuchon engaged in conduct prejudicial to the administration of justice, in violation of ER 8.4(d), by bringing charges against Mr. Stapley in late 2008 knowing the statute of limitations had run.

The statute of limitations, A.R.S § 13-107(b), provides:

> Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods after actual discovery by the state or the political subdivision having jurisdiction of the offense or discovery by the state or the political subdivision that should have occurred with the exercise of reasonable diligence, whichever first occurs:
>
> For a class 2 through a class 6 felony, seven years.
>
> For a misdemeanor, one year.

134. The statute of limitations is triggered when the state actually discovers, or through exercise of reasonable diligence should have discovered, that there was probable cause to believe that the offense was committed. In *State v. Jackson*,

208 Ariz. 56, 64-66, 90 P.3d 793, 801-803 (App. 2005), the Arizona Court of Appeals, finding ambiguity as to what constitutes "discovery" of an offense, read a "probable cause element" into the statute of limitations. The court of appeals held that the statute of limitations begins "when the authorities know or should know in the exercise of reasonable diligence that there is probable cause to believe a criminal [offense] has been committed."[244] The court of appeals stressed that "commencement of the limitation period will not depend on law enforcement officers actually establishing probable cause to arrest or charge a suspect. Rather, absent actual discovery, the limitation period will commence when the government, through the exercise of reasonable diligence, "should have" discovered probable cause to believe an offense has been committed, even though probable cause is only later actually established."[245]

135. Mr. Thomas and Ms. Aubuchon charged Supervisor Stapley with fifty-three misdemeanors.

136. At bottom, allegations that the statute of limitations has run on a claim boils down to a familiar question—what did they know, and when did they know it. There is ample evidence to suggest that both Ms. Aubuchon and Mr. Thomas knew—or through reasonable diligence should have known—that the statute had run on many of the charges they brought against Supervisor Stapley. No later than May 2007, Mr. Thomas knew or should have known there was probable cause that Mr. Stapley had allegedly committed offenses. No later than May 14, 2008, Ms. Aubuchon knew that law enforcement authorities knew or should have known about a year earlier that Mr. Stapley had allegedly committed offenses.

244. 208 Ariz. at 66, 90 P.3d at 803. at 65, 90 P.3d at 802 (citation omitted).
245. *Id.* at 66, 803.

137. Mr. Thomas knew that Mr. Goldman started the Stapley/Irvine investigation in early 2007. He was aware that Mr. Goldman found information about Mr. Stapley's financial disclosures before Mr. Goldman left for Mexico in May 2007, finishing his work on the Stapley investigation. Mr. Goldman delivered the results of his work to Mr. Thomas and Mr. Thomas knew that there was information about financial disclosures in that information. Mr. Thomas also knew that Mr. Goldman had found a violation of law. Later in 2008, when Mr. Thomas handed the investigation over to Ms. Aubuchon, he set a one-month deadline for completion of the matter. He imposed the same deadline on Commander Stribling in early May 2008. The logical explanation for this is that he knew there was a problem with the age of this case. Mr. Thomas's argument that he set the one-month deadline because without deadlines, things did not get done, is unpersuasive in the face of all the evidence to the contrary. He knew the investigation had begun in 2007, and that there were issues with Mr. Stapley's disclosures. In fact, Mr. Thomas even admitted that the information Mr. Goldman found triggered the statute of limitations on one of the charges.[246] This was sufficient to put him on notice that it was necessary to investigate the other disclosures. Mr. Thomas's purported justification for waiting until November to bring the charges (Mr. Stapley—a fellow Republican—was up for reelection) do not absolve him of his duty to look into statute of limitations problems of which he either knew or should have known, though his decision to wait undermines his claim that he was simply seeking justice, and not pursuing political ends through the prosecution of high-profile, political figures.

246. Thomas Testimony, Hr'g Tr. 126:2–128:13, Oct. 26, 2011.

138. Ms. Aubuchon knew or should have known by May 14, 2008, that that there was probable cause in early 2007 to believe that Mr. Stapley had omitted information from his financial statements. She further testified that when Mr. Thomas assigned her to the Stapley case in March 2008, he told her they had received a "tip" about Mr. Stapley's financial disclosures. Unfortunately, Ms. Aubuchon did not ask who gave the tip. In addition, she never asked Mr. Goldman the reasons he began the investigation, or when he began it, even though she received investigative information from Mr. Goldman himself. The information she did receive from Mr. Goldman was riddled with documents that indicate that he printed them in early 2007. Again, this was more than sufficient to put Ms. Aubuchon on notice that she needed to ask Mr. Goldman when he began his investigation. Mr. Thomas told her that Mr. Goldman said there might be some truth to the tip he gave Ms. Aubuchon. Again, it is remarkable that Ms. Aubuchon never asked either Special Crimes Bureau Chief Kratovil or Major Crimes Division Chief Novitsky about the investigation into Mr. Stapley. The Panel concludes that Ms. Aubuchon should have inquired when the investigation began into Mr. Stapley's financial disclosures, but she made no effort to do so.

139. When Ms. Aubuchon presented the Stapley matter to MCSO, she instructed them to use May 14, 2008 as the starting date for the investigation. She said the statute of limitations began when the matter was brought to the attention of law enforcement, meaning MCSO. What she failed to tell MCSO was that investigation had already been conducted by Ms. Aubuchon herself and by Mr. Goldman. She directed that the MCSO report about *Stapley I* be dated May 14, 2008. The totality of the facts provide clear and convincing evidence that Ms.

Aubuchon knew there was a statute of limitations issue, and that she knowingly directed detectives away from it.

140. In Arizona, the court lacks jurisdiction to consider crimes against a person on which the statute of limitations has run.[247] Ms. Aubuchon and Mr. Thomas knew that they brought most of the misdemeanor charges against Mr. Stapley outside the statute of limitations and that, as a result, the court did not have jurisdiction to consider those charges.

141. Mr. Thomas and Ms. Aubuchon charged Supervisor Stapley with fifty-three misdemeanors. They charged forty-four of those misdemeanors outside the statute of limitations, which is one year after the alleged conduct was known or should have been known. The Panel concludes that Mr. Thomas and Ms. Aubuchon violated ER 8.4(d) by bringing charges against Mr. Stapley in late 2008 knowing the statute of limitations had run.

CLAIM TEN: ER 8.4(c) (CONDUCT INVOLVING DISHONESTY) (AUBUCHON)

142. Claim Ten alleges that Ms. Aubuchon engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of ER 8.4(c), by failing to disclose to a grand jury that many of the indictments against Supervisor Stapley were barred by the statute of limitations.

143. During Ms. Aubuchon's presentation to the grand jury, which returned the indictment against Supervisor Stapley, she did not mention anything about the statute of limitations.[248] Ms. Aubuchon called only one witness to testify—Sgt. Johnson. Sgt. Johnson was not present at the May 14, 2008 meeting when Ms.

247. State v. Fogel, 16 Ariz. App. 246, 492 P.2d 742 (1972) ("A criminal statute of limitation is not a mere limitation upon the remedy, but a limitation upon the power of the sovereign to act against the accused.").

248. *See* Ex. 35, the the November 20, 2008 presentation to the Grand Jury, TRIAL EXB 01040–1108

Aubuchon first spoke with MCSO about the case and directed them to use May 14, 2008 as the starting date of the investigation. Ms. Aubuchon never asked Sgt. Johnson when the investigation began, or who began it. [249] As noted above, Ms. Aubuchon asked, "And **at some point in time** did the Maricopa County Sheriff's Office receive information that Donald T. Stapley, Jr., may have failed to disclose different things in his financial disclosure statements?"[250] Consistent with this evasive line of questioning, Ms. Aubuchon mentioned evidence-gathering only in terms of 2008.[251] Further, she did not call a witness (and there were many) who could testify at the grand jury about the date the investigation was initiated. She did not tell the grand jury that she was involved in the investigation, or that she had brought it to the Sheriff's office herself. In addition, she failed to tell the grand jury that she knew Mr. Goldman had been involved in a financial disclosure investigation of Mr. Stapley in early 2007. The evidence clearly and convincingly indicates that Ms. Aubuchon intended to give the impression that the investigation began well into 2008, knowing that, in fact, it had begun much earlier.

144. The statute of limitations is a jurisdictional matter in Arizona. As such, if a prosecutor knows that charges are stale, then he or she has a duty to inform the grand jury of those charges, also informing the grand jury not to indict on charges arising from conduct outside the Statute. Ms. Aubuchon fell short of this duty. Instead of painting a complete picture of the Stapley investigation, she knowingly left out critical details—details which would have had a significant

249. Johnson Testimony, Hr'g Tr. 219:21–220:9, Oct. 6, 2011.
250. *See* Ex. 35, p. 19, ln. 4–8, TRIAL EXB 01058 (emphasis added).
251. *See* Ex. 35, p. 21, ln. 6–9, TRIAL EXB 01060; p. 30, ln. 3–6, TRIAL EXB 01069.

impact on grand jury determinations. Much like a grand jury investigation for purely speculative purposes, grand juries which return an indictment on incomplete information—knowingly withheld by the presenting attorney—may become unwilling participants in investigations contrived for "politically or maliciously inspired purposes."[252]

145. Ms. Aubuchon knowingly failed to inform the grand jury that the State lacked jurisdiction to proceed against Mr. Stapley on many charges. Her omission was dishonest. By failing to raise this issue with the grand jury, Ms. Aubuchon engaged in conduct involving dishonesty, deceit, fraud, or misrepresentation in violation of ER 8.4(c).

CLAIM ELEVEN: ER 3.6(a) (IMPROPER PUBLIC STATEMENTS) (THOMAS)

146. On April 2, 2009, Mr. Thomas had a phone conversation with Yavapai County Attorney Sheila Polk during which Ms. Polk agreed to take over the prosecution of *Stapley I* and the investigations involving MCBOS. Mr. Thomas stressed to Ms. Polk that he believed he did not have a conflict of interest in prosecuting Supervisor Stapley but was transferring the matters to help improve relationship with the Supervisors.[253] Four days later, Mr. Thomas issued a press release announcing the transfer to the Yavapai County Attorney of *Stapley I*, the Court Tower investigation and "any current or future investigations or prosecutions involving the Maricopa County Board of Supervisors or county management."[254] That same day, the Yavapai County Attorney's Office entered its appearance for the State in *Stapley I*.[255]

252. Marston's Inc. v. Strand, 114 Ariz. 260, 268, 560 P.2d 778, 786 (1977)(Gordon, J, concurring in part and dissenting in part).
253. Ex. 218, TRIAL EXB 02441–02445.
254. Ex. 97, TRIAL EXB 01429–01430.
255. Ex. 98, TRIAL EXB 01431–01432.

147. On April 9, 2009, Judge Fields held a status conference in *Stapley I*. After that hearing, Ms. Polk met with Mr. Thomas, Ms. Aubuchon and Barnett Lotstein to discuss the matters.[256] In early May, Mr. Stapley's attorneys filed a Motion to Dismiss the indictment, arguing that the MCAO had a conflict of interest involving Mr. Stapley when the matter was presented to the grand jury, resulting in Mr. Stapley being denied due process.[257] Judge Fields denied that Motion in a June 10, 2009 ruling.[258] In that ruling, Judge Fields found that: (a) there was no evidence that any information provided by Mr. Stapley to attorneys in the MCAO Civil Division was used to obtain the indictment against him, and; (b) that a county supervisor who solicited legal advice from Civil Division attorneys would be aware that the county attorney was also the prosecutor, and therefore, it would not have been reasonable for Mr. Stapley to believe that the MCAO was his attorney on all matters.[259]

148. A week later, Mr. Stapley's attorneys filed a new Motion to Dismiss. This Motion argued that dismissal was warranted because: (a) the disclosure laws were unconstitutionally vague, and; (b) there were no standards for financial disclosure applicable to county officials adopted by the Maricopa County Board of Supervisors as required by the state disclosure statutes.[260]

149. After the parties submitted written memoranda and oral argument was held, Judge Fields issued his ruling on the Motion on August 24, 2009.[261] Judge Fields rejected Mr. Stapley's vagueness argument. He, however, did agree with Mr. Stapley's second argument. While the Arizona disclosure statutes require

256. Ex. 218, TRIAL EXB 02441–02445.
257. *Id.*
258. Ex. 104, TRIAL EXB 01445–01448.
259. *Id.*
260. Ex. 244, TRIAL EXB 03314–03324.
261. Ex. 110, TRIAL EXB 01462–01465.

counties to adopt standards of financial disclosure applicable to its elected officials, no such standards existed in Maricopa County. MCBOS had passed a motion indicating its intent to adopt such standards and a later motion to update the disclosure *form*, but there were no existing standards for financial disclosure adopted by MCBOS. More pointedly, Judge Fields pointed out that Mr. Stapley was charged with violating the "Maricopa County Rule or Resolution adopted January 20, 1994," when no such rule or resolution existed.[262] Judge Fields therefore dismissed the misdemeanor counts in the Indictment, which comprised the majority of the counts.[263]

150. Later that day, Mr. Thomas issued a press release regarding Judge Fields's ruling.[264] In that press release, Mr. Thomas urged the Yavapai County Attorney's Office to appeal the ruling and stated:

> It's unjust and improper for this criminal defendant to be able to claim that, as a member of the board of supervisors, he failed to properly pass or amend the very laws he's accused of violating. For him to be able to take advantage of improper performance of his own public duties is wrong by any measure. It's equally wrong that the people of Maricopa County have just been told they're the only citizens of Arizona whose elected county officials don't have to disclose their private business dealings to the voters.
>
> The ruling today also reinforces our office's concerns about the impartiality of Judge Fields. He was handpicked for this case in violation of the rules of court, despite his having filed a bar complaint against the Maricopa County Attorney (which was dismissed) and having campaigned for Mr. Thomas's opponent in last year's election. Four esteemed experts in judicial ethics have stated that Judge Fields was ethically required to recuse himself from this case.[265]

262. *Id.* at 3, TRIAL EXB 01464.
263. *Id.* at 4, TRIAL EXB 01465.
264. EX. 106, TRIAL EXB 01452.
265. *Id.*

151. There are a number of problems with Mr. Thomas's statement in his press release. First, the instances identified by Judge Fields where MCBOS failed to adopt or inadequately adopted financial disclosure standards occurred in 1974, 1984 and 1994.[266] As Mr. Stapley was not on MCBOS at those times[267], it was disingenuous to assert that it was Mr. Stapley who "failed to properly pass or amend the very laws he's accused of violating" or that he was taking "advantage of [the] improper performance of his own public duties." Second, Mr. Thomas repeated the false accusations that Judge Fields was "handpicked for this case in violation of the rules of court" and that he "filed a bar complaint against the Maricopa County Attorney." Finally, Mr. Thomas referred to Mr. Stapley as "this criminal defendant" without also stating that the criminal charge "is merely an accusation" and Mr. Stapley "is presumed innocent until and unless proven guilty" as required by ER 3.6.[268] Mr. Thomas thereby inappropriately conveyed his opinion that Mr. Stapley was guilty.[269]

152. Even though Yavapai County Attorney Polk was handling the *Stapley I* prosecution, Mr. Thomas did not consult with her before issuing his press release. Ms. Polk did not agree with Mr. Thomas's accusation that Judge Fields was biased.[270]

153. Mr. Thomas knew his August 24, 2009 press release would be disseminated to the public.[271] Mr. Thomas knew or should have known the press release had "a substantial likelihood of materially prejudicing" the *Stapley I*

266. Ex. 110, TRIAL EXB 01462–01465.
267. Stapley Testimony, Hr'g Tr. 115:7–116:18, Sept. 20, 2011.
268. R. Sup. Ct. Ariz. 42, ER 3.6 cmt. 5.
269. "The Plaintiffs do not explain why they believe the First Amendment guarantees a prosecutor the right to speech that heightens condemnation of the accused . . . .." Devine v. Robinson, 131 F. Supp.2d 963, 972 (N.D. Ill. 2001) (dismissing prosecutors' constitutional challenge to ER 3.6 as adopted in Illinois).
270. Polk Testimony, Hr'g Tr. 202:22–204:11, Oct. 18, 2011.
271. Thomas Testimony, Hr'g Tr. 112:6–113:19, Oct. 26, 2011.

proceeding. Unlike the civil lawsuits in their infancy involved in Claim Three, this was a criminal prosecution against a high profile defendant. The press release told the public that Mr. Stapley was a criminal and that a biased judge was allowing him to avoid conviction. Public statements by a prosecutor carry inherent authority and credibility. Considering how frequently Mr. Thomas issued press releases, it is clear he thought them to be effective.

154. Based on all the evidence, it would be naïve for us to believe that the August 24, 2009 press release was issued without any thought of influencing a future jury. We need not decide whether actual prejudice would have occurred. ER 3.6 prohibits extrajudicial statements in criminal cases "that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found."[272]

155. As such, on Claim Eleven, there is clear and convincing evidence that Andrew Thomas violated ER 3.6(a) with the statements in his August 24, 2009 press release.

THE COURT TOWER INVESTIGATION

156. Claims Twelve through Fourteen arise from Mr. Thomas' and Ms. Aubuchon's actions in relation to the Court Tower investigation, as detailed below.

157. The day after the MOU expired, December 2, 2008, Supervisor Stapley was served with the criminal summons issued in connection with the November 20, 2008 grand jury indictment.[273]

272. R. Sup. Ct. Ariz. 42, ER 3.6. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075, 111 S. Ct. 2720, 2745, 115 L. Ed.2d 888, 923–924 (1991).

273. Ex. 36, 38. The MCAO wanted a warrant issued for Supervisor Stapley's arrest, but the court commissioner assigned to the grand jury refused because, among other things, Mr. Stapley did not pose a flight risk and there were statute of limitation problems obvious on the face of the indictment. Ex. 35, TRIAL EXB 01095–01108

158. Mr. Thomas understood that the Stapley indictment would impair his relationship with MCBOS.[274] In fact, it was Mr. Thomas's perception that, once Mr. Stapley was indicted, MCBOS began to act against him.[275]

159. The day Mr. Stapley was served with the criminal summons, Mr. Thomas issued a press release which noted that the indictment was "the culmination of the *first phase* of an investigation conducted by Operation MACE, a joint anti-corruption task force run by the Sheriff's Office and County Attorney's Office."[276] Mr. Thomas concluded the press release by stating that the "investigation regarding Stapley and **other county employees is not over** . . . ."[277]

160. On December 5, 2008, three Supervisors (not including Supervisors Stapley or Wilcox) met in open session with Special Assistant County Attorney Barnett Lotstein and Deputy County Bruce White. The Supervisors expressed concerns about whether the County Attorney could give them conflict-free advice. They also stated that they felt under siege by the County Attorney, noting that the Mr. Thomas had never attended any Board meeting.[278] Mr. Lotstein responded that no conflict-of-interest existed between the MCAO and MCBOS, MCBOS was not under siege, he took exception to such remarks, the Supervisors would be acting illegally if they went into executive session, and the MCAO would not select an outside attorney to provide advice regarding conflicts.[279] On a two to one vote, MCBOS appointed the law firm of Shughart, Thomson & Kilroy (which Mr. Irvine had joined as a partner) as special counsel.[280]

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274. MacDonnell Testimony, Hr'g Tr. 145:11–146:11, Sept. 15, 2011; Thomas Testimony, Hr'g Tr. Oct. 26, 2011, 39:25–40:13.
275. E.g., Thomas Testimony, Hr'g Tr. 39:18–40:13, Oct. 26, 2011; Ex. 159, TRIAL EXB 01870–01844.
276. Ex. 37, TRIAL EXB 01147–01149 (emphasis added).
277. *Id.* (emphasis added).
278. Ex. 42, TRIAL EXB 01161–01164.
279. *Id.*
280. *Id.*

161. Mr. Thomas, earlier that day, had sent Board Chairman Andrew Kunasek a letter advising him that it would be illegal if MCBOS hired the Shughart, Thomson law firm.[281] Such an act, Mr. Thomas wrote, would place the "Board in a very precarious position of performing an illegal act," which could result in MCBOS being sued to recover any monies "illegally paid."[282] Mr. Thomas also sent a letter that day to Tom Irvine and Paul Golab (now in private practice) advising them that the Arizona Open Meetings Law would be violated if they met in executive session with the Supervisors.[283]

162. On December 12, 2008, Ms. Aubuchon drafted and signed a Maricopa County Grand Jury subpoena duces tecum directed to the "Maricopa County Administration, Attn: David Smith, County Manager."[284] According to Ms. Aubuchon, the MCSO requested the subpoena in connection with an investigation into the Maricopa County Superior Court Tower building[285], whose construction was set to begin. Mr. Thomas had authorized Ms. Aubuchon to conduct the "Court Tower" investigation, and he approved the subpoena.[286]

163. By the time the subpoena was issued, construction of the Court Tower had already been authorized by MCBOS for one and one-half years.[287] The Court Tower (housing the criminal courts) was not a new idea. It grew out of discussions and studies begun in 2000 or 2001 about the County's future court facility needs.[288]

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281. Ex. 41, TRIAL EXB 01159–1160.
282. *Id.*
283. Ex. 40, TRIAL EXB 01155–01158.
284. Ex. 44, TRIAL EXB 01166–01168.
285. Aubuchon Testimony, Hr'g Tr. 102:1 103:2, Oct. 25, 2011.
286. Aubuchon Testimony, Hr'g Tr. 102:20–103:6, Oct. 25, 2011; Thomas Testimony, Hr'g Tr. 43:16–44:13, Oct. 26, 2011.
287. Mundell Testimony, Hr'g Tr. 132:22–133:4, Oct. 3, 2011.
288. Mundell Testimony, Hr'g Tr. 97:24–101:15, 118:6–21, 136:18–139:21, 142:22–144:7, 99:7, Oct. 3, 2011.

164. The "Court Tower" subpoena was served on Acting County Manager Sandi Wilson on December 15, 2009.[289] That subpoena commanded the production within fourteen (14) days of the following documents:

- detailed budgets for construction of the Court Tower, detailed budgets for soft-costs related to the construction of the Court Tower, and detailed budgets for the planning and design of the Court Tower project;
- records relating to outside funding sources for the construction project, including names of businesses and individual contributors to the project;
- documentation of proposed usage and occupancy, including detailed schematics of proposed occupancy;
- request for proposal documents or other documents used by Maricopa County to identify the planning phase of the project, including building design, and to which bidders would have responded and all bids or responses to the request
- contract, agreement, and/or other document executed with all parties selected for the planning and design phase of the Court Tower;
- contract, agreement, and/or other document executed with all parties selected for the construction of the Court Tower;
- all contracts, agreements and/or other documents with any consultants used in any phase of the planning of the Court Tower;
- all contracts, agreements and/or other documents with any consultants used, to be used, or identified to be used in any phase of the construction of the Court Tower;
- any and all documents, correspondence, and email referring to the Court Tower project, to include but not limited to the following:
    - any and all email correspondence, electronic or printed, including, but not limited to, all email contained on the email store server, all email stored locally on a user's computer, and/or all email stored on backup storage media. This includes all emails that have been deleted, but not removed, and all emails that have been archived by the user and/or email store system.
    - any and all email correspondence, electronic or printed, including but not limited to, all email residing on email store system backup media.

289. Ex. 44 TRIAL EXB 01168.

- any and all email system server message logs created by the email system, including, but not limited to, all logs contained on the server, stored locally on a user's computer and/or stored on backup storage media.[290]

165. That day Ms. Wilson also was served with a public records request from the County Attorney's Public Information Officer requesting documents about certain public relations and marketing efforts by MCBOS since 2005.[291] Ms. Wilson sent Mr. Thomas an email stating that her office usually consults with the MCAO Civil Division when a public records request covers many documents over a lengthy period of time, but as this public records request came from the MCAO, creating what she believed to be a conflict of interest, she was retaining the Shughart Thomson firm to give her advice on the public records request.[292] Mr. Thomas told Ms. Wilson to stop communicating with him and instead to go through his Chief Deputy, Phil MacDonnell.[293]

166. Two days later, Mr. MacDonnell responded to Ms. Wilson. He expressed sympathy for the "apparent conflict" of interest confronting Ms. Wilson, but stated that it was inappropriate for her or any County employee other than the County Attorney to retain legal counsel.[294] According to Mr. MacDonnell, the County Attorney had the sole authority to determine that a conflict of interest existed and to appoint outside counsel. Mr. MacDonnell conceded that "it is possible that in this particular situation a conflict appears to exist," but the County Attorney was not going to appoint outside counsel.[295] Mr. MacDonnell instead stated that the Civil Division attorneys would provide the MCAO's

290. *Id.*
291. Ex. 48, TRIAL EXB 01184.
292. *Id.*
293. Wilson Testimony, 125:22–127:22, 132:15–133:17, Sept. 27, 2011.
294. Ex. 50, TRIAL EXB 01187–01188.
295. *Id.*

"standard" advice on what constitutes a public record, Mr. Wilson's office would "pull" every document within the public records request, and then seek legal advice only on those specific documents that raised a legal question or privilege against disclosure.[296]

167. While Mr. MacDonnell stated the MCAO was open to any suggestions on how to resolve the issue, he noted that the MCAO was concerned about "costs" considering "the current budget situation."[297] Mr. MacDonnell completely failed to address Ms. Wilson's concerns about a broad and vague public records requests covering years of documents, not recognizing the "costs" imposed on another part of the County administration, during "the current budget situation," in having to respond to the MCAO's expansive public records request. A clear actual conflict of interest existed between the County Manager's Office and the MCAO which the MCAO refused to acknowledge.

168. Ms. Wilson, at the same time, was also dealing with an inquiry made on a county employee by a sheriff's deputy regarding a computer system outage. Ms. Wilson asked Bruce White in the MCAO Civil Division for outside counsel to give legal advice to the employee. Mr. White informed her that Ernest Calderon had been selected by the MCAO to advise the county employee. Ms. Wilson objected to Mr. Calderon's appointment as he was representing Superintendent Dowling in her lawsuit against the County, this being the same lawsuit where Mr. Thomas had publicly criticized the position of County in his June 14, 2006 press release.[298]

169. On December 31, 2008, identical letters from Mr. Thomas (signed on his behalf by Sally Wells) were sent to Acting County Manager Sandi Wilson, the

296. *Id.*
297. *Id.*
298. Ex. 13, 49.

County Treasurer Charles Hoskins and the County Chief Financial Officer Tom Manos with copies to a number of other County employees. Each letter stated that it was a "demand" that no payments for legal services be made to Irvine, Richard Romley, or their law firms. Each letter warned that any payment to Irvine, Romley or their firms would be illegal, and that anyone involved in the payment would not have immunity and would be subject to a lawsuit for reimbursement.[299]

170. That same day, the MCSO delivered a public records request to "Maricopa County Administration" requesting the same documents described in the supposedly secret December 12, 2008 grand jury subpoena. It is obvious that whoever drafted the MCSO request simply copied the grand jury subpoena. The documents requested are identical word-for-word. Both the subpoena and the document request are addressed to "Maricopa County Administration, Attn: David Smith, County Manager."[300] While Ms. Aubuchon denied having any involvement with the MCSO public records request, she admitted the MCSO public records request was part of the Court Tower investigation she was handling. In responding to the MCBOS' Motion to Quash the subpoena, Ms. Aubuchon wrote: "In fact, the subpoena is seeking documents that should be public records and the State has also attempted to obtain the documents that way as well."[301]

171. On January 7, 2009, Phil MacDonnell wrote Sandi Wilson about recent communications she had with the County Treasurer regarding payment of legal services invoices submitted by Shughart, Thomson and Richard Romley. Mr. MacDonnell warned Ms. Wilson that she was interfering with the MCAO's legal

299. Ex. 66, TRIAL EXB 01309–01311.
300. Ex. 62, TRIAL EXB 01233–01234.
301. Ex. 75 at TRIAL EXB 01338.

representation of the County Treasurer and that payment of any Shughart, Thomson or Romley invoice (except where the MCAO had selected Shughart, Thomson, *e.g.*, Dowling) would be illegal.[302]

172. The letters written by Mr. Thomas or at his request regarding the hiring of the Shughart, Thomson and the payment of that firm's invoices (and Rick Romley's invoices) must be viewed in context. Mr. Thomas had announced that Mr. Stapley's indictment was only the "first phase" of an investigation conducted by an "anti-corruption task force" and that the investigation of "other county employees is not over." Mr. Thomas knew his relationship with MCBOS and County management was strained. He also knew that the Supervisors had expressed a concern, legitimate or not, that that they felt besieged by the MCAO. Mr. Thomas, who never attended a MCBOS meeting, refused to communicate directly with the Supervisors or senior County management. He instead sent his Special Assistant County Attorney Barnett Lotstein to tell the Supervisors that there was no conflict of interest and that they could not engage conflict counsel.[303] While his Chief Deputy County Attorney, Phil MacDonnell, admitted there was a "possible" conflict, Mr. Thomas refused to select any outside counsel to advise MCBOS or the County Manager. When Mr. Thomas did select outside counsel to advise the county employee approached by a sheriff deputy about a computer outage, he imprudently appointed the attorney who was suing the Supervisors and the County on behalf of Ms. Dowling.

302. Ex. 72, TRIAL EXB 01322.
303. Advice that was erroneous. Romley v. Daughton, 225 Ariz. 521, 524, 241 P.3d 518, 521 (App. 2010); Bd. of Supervisors of Maricopa Cty. v. Woodall, 120 Ariz. at 381–82, 586 P.2d at 630–31.

CLAIM TWELVE - ER 4.4(a) (USING MEANS WITH NO SUBSTANTIAL LEGITIMATE PURPOSE) (THOMAS)

173. IBC argues that Mr. Thomas violated ER 4.4(a) by writing letters to county officers demanding that no payments for legal services be made to Irvine, Richard Romley, or their law firms.

174. Even when an objectively arguable ground exists for the action taken, a respondent's subjective purpose in taking the action is relevant to whether ER 4.4 was violated.[304]

175. In *Reeves*, a lawyer wrote a letter to an investment firm alleging the improperly handling of a client's account and warning that a lawsuit was possible. In the letter, the lawyer also accused a specific account executive of misconduct and demanded his termination. The account executive's father happened to be the judge handling the lawyer's personal custody matter. The lawyer was sanctioned because it was found that the demand letter was an attempt to cause the account executive's father to recuse himself in the custody proceeding.

> "Only with tunnel vision can the Demand Letter be deemed, when viewed in its entirety, to have had a solely legitimate 'substantial purpose.' The application of common sense to the making of a finding of the 'purpose' or motive of Reeves in composing and mailing the Demand Letter strongly suggests . . . that Reeves' purpose and motive was to 'embarrass, delay or burden a third person.'"[305]

176. Viewed in the context of contemporaneous events, Mr. Thomas' letters were not sent to give fair warning to the recipients. They were sent with the substantial purpose of embarrassing, delaying, and burdening the recipients.

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304. *In re* Levine, 174 Ariz. 146, 154, 847 P.2d 1093, 1101 (1993); Ky. Bar Ass'n v. Reeves, 62 S.W.3d 360, 364–65 (Ky. 2002).
305. *Reeves*, 62 S.W.3d at 364.

177. As to Claim Twelve, there is clear and convincing evidence that Mr. Thomas violated ER 4.4(a) when he caused letters to be sent to the Supervisors and County management in December 2009 regarding MCBOS's engagement of the Shughart, Thomson as legal counsel to provide advice concerning conflicts and payment of that firm's invoices.

CLAIM THIRTEEN - ER 4.4(a) (USING MEANS WITH NO SUBSTANTIAL LEGITIMATE PURPOSE—GRAND JURY SUBPOENA) (AUBUCHON AND THOMAS)

178. Claim Thirteen alleges that Mr. Thomas and Ms. Aubuchon obtained the Court Tower subpoena with the substantial purpose of embarrassing, delaying, and burdening County employees, in violation of ER 4.4(a).

179. The breadth and generality of the Court Tower subpoena obtained by Ms. Ms. Aubuchon and approved by Mr. Thomas is breath-taking. It is difficult to imagine any document that mentioned or somehow related to the Court Tower whose production would not be required. The subpoena obviously would force County employees to spend countless hours reviewing thousands of potentially producible documents.[306]

180. There was no identifiable crime or potential perpetrator in the Court Tower investigation. The MCSO deputies working with Ms. Aubuchon did not know what crime or person was being investigated. When one deputy asked Ms. Aubuchon who the complainant was, she responded that it was the Sheriff's Office. The MCSO departmental report, however, contained nothing but public records requests.[307]

306. *See* Wilson Testimony, Hr'g Tr. 125:22–127:22, 129:7–130:24, Sept. 27, 2011; Wilcox Testimony, 46:10–49:1; Kunasek Testimony, Hr'g Tr. 12:22–14:2, Sept. 26, 2011.
307. Luth Testimony, Hr'g Tr. 96:8–97:15, Oct. 14, 2011; Almanza Testimony, Hr'g Tr. 117:23–118:9, Oct. 11, 2011.

181. Even though the grand jury subpoena was quashed, County employees still gathered Court Tower documents in response to the public records request.[308] Ultimately, the County employees assembled thirty-three boxes of Court Tower documents and placed them in a room for review by the MCAO and MCSO. It is significant that neither Ms. Aubuchon nor any MCAO attorney ever looked at any document in the thirty-three boxes. When the Court Tower investigation was transferred to the Yavapai County Attorney, the thirty-three boxes of documents were not provided to that office.[309]

182. The breadth and generality of the Court Tower subpoena necessarily leads to the conclusion that no legitimate, and surely no efficient, investigation was being conducted. That conclusion is even more compelling in light of the surrounding circumstances previously discussed, including the facts that the subpoena was served (a) one and one-half years after MCBOS authorized construction of the Court Tower, and (b) ten days after MCBOS, over Mr. Thomas's objection, engaged the Shughart, Thomson firm.

183. Viewed in the context of contemporaneous events, the Court Tower subpoena was obtained with the substantial purpose of embarrassing, delaying, and burdening County employees.

184. As to Claim Thirteen, there is clear and convincing evidence that Mr. Thomas and Ms. Aubuchon violated ER 4.4(a) by obtaining the Court Tower subpoena.

308. Wilcox Testimony, Hr'g Tr. 48:3–49:9, Sept. 21, 2011.
309. Hendershott Testimony, Hr'g Tr. 42:22–45:1, Sept. 21, 2011.

CLAIM FOURTEEN - ER 1.7(a) (CONFLICT OF INTEREST - COURT TOWER INVESTIGATION) (AUBUCHON AND THOMAS)

185. On numerous occasions, lawyers in the MCAO Civil Division had advised MCBOS and County management about the Court Tower. That legal advice included but was not limited to the review of and comment on the many contracts let by the County in connection with the Tower's design and construction.[310] For purposes of the Court Tower, MCBOS and County management were clients of Mr. Thomas and Ms. Aubuchon.[311]

186. *State v. Brooks*, 126 Ariz. 395, 616 P.2d 70 (App. 1980) does not help Mr. Thomas and Ms. Aubuchon. *Brooks* involved the County Attorney's prosecution of a member of the Maricopa County Community College District governing board. While the County Attorney's civil division represented the governing board, the criminal proceeding was not against MCBOS and there had been no consultation between the civil division lawyers and any board member, much less the defendant, regarding the matters involved in the prosecution.

187. Here, the target of the criminal proceeding, *i.e.,* the subpoena, was not an individual. Rather, it was the entity who unquestionably was the MCAO's client.[312] The subpoena sought documents about a subject, *i.e.,* the Court Tower, on which the MCAO lawyers had provided extensive legal advice. Not only did the subpoena seek documents which had been reviewed and

310. Irvine Testimony, Hr'g Tr. 54:2–15, Sept. 14, 2011; White Testimony, Hr'g Tr. 21:4–15, 24:6–13; Sept. 20, 2011; Kunasek Testimony, Hr'g Tr. 105:21–106:16, Sept. 26, 2011; Wilson Testimony, Hr'g Tr. 138:10–139:6, 150:21–151:2, Sept. 27, 2011; Wilcox Testimony, Hr'g Tr., 46:10–49:1, Sept. 21, 2011.

311. State v. Latigue, 108 Ariz. 521, 523, 502 P.2d 1340, 1342 (1972); Turbin v. Super. Ct., 165 Ariz. 195, 797 P.2d 734 (App. 1990); Ariz. Rev. Stat. Ann. § 11–532; Restatement (Third) of the Law Governing Lawyers, § 123, cmts d(ii) and d(iii); *see* Arizona ex rel. Thomas v. Schneider, 212 Ariz. 292, 130 P.3d 991 (App. 2006).

312. Ariz. Rev. Stat. Ann. § 11–532(A)(9).

commented on by MCAO attorneys, the subpoena covered documents consisting of communications to and from MCAO attorneys.

188. Mr. Thomas states that he relied on a legal memorandum prepared by outside counsel William French, a former Maricopa County Superior Court judge.[313] That memorandum, however, was prepared nearly two years previously and addressed a significantly dissimilar issue: whether, based on statements made to a MCAO attorney by a county employee, the MCAO could commence an investigation targeted at another person without first obtaining the consent of MCBOS or the employee.[314] Mr. French was not consulted about the Court Tower subpoena, and, therefore, his memorandum did not expressly address whether a conflict-of-interest existed if the MCAO subpoenaed documents from MCBOS concerning a subject on which the MCAO had provided MCBOS legal advice. However, Mr. French's discussion in that memorandum of *State of Arizona ex rel. Thomas v. Schneider*[315] would lead a reasonable person to conclude that a conflict existed, and, at very least, raise a substantial concern in the mind of any competent attorney.

189. By using the subpoena, Mr. Thomas and Ms. Aubuchon took an action on behalf of one client, the State of Arizona, which was directly adverse to other concurrently represented clients, MCBOS and County management, concerning matters on which the latter had obtained and continued to obtain legal advice from the MCAO. No consent was sought or obtained from any client.

190. As to Claim Fourteen, there is clear and convincing evidence that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(1) by obtaining the Court Tower subpoena.

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313. Thomas's Post–Hr'g Memo., 42:9–13.
314. Ex. 19, TRIAL EXB 00497–00506.
315 Ex. 19. TRIAL EXB 00501–00504.

THE RICO ACT LAWSUIT

Thomas disregards the advice of experienced and knowledgeable attorneys and instead uses Aubuchon who has no RICO experience.

191. Claims Fifteen through Twenty deal with Respondents' conduct in connection with the federal court lawsuit filed on December 1, 2009 attempting to invoke the federal Racketeer Influenced and Corrupt Organizations Act (the "RICO Act"). That federal law creates enhanced criminal penalties and civil liability for persons participating in an "enterprise" engaged in a "pattern of racketeering activity."[316]

192. The plaintiffs in the RICO Act Lawsuit were identified as "Joseph M. Arpaio, in his official capacity as Maricopa County Sheriff, and Andrew P. Thomas, in his official capacity as Maricopa County Attorney."[317]

193. Named as the defendants in the RICO Act Lawsuit were: (a) the Maricopa County Board of Supervisors, "a body politic and corporate"; (b) County Supervisor Fulton Brock; (c) County Supervisor Andrew Kunasek; (d) County Supervisor Donald T. Stapley; (e) County Supervisor Mary Rose Wilcox; (f) County Supervisor Max Wilson; (g) County Manager David Smith; (h) Deputy County Manager Sandi Wilson; (i) Wade Swanson from the "Office of General Litigation"; (j) Superior Court Judge Barbara R. Mundell; (k) Superior Court Judge Anna Baca; (l) Superior Court Judge Gary Donahoe; (m) Superior Court Judge Kenneth Fields; (o) Thomas Irvine; (p) Edward Novak; and (q) Polsinelli Shughart, P.C.[318]

316. 18 U.S.C. § 1961, *et. seq*.
317. Ex. 145, TRIAL EXB 01767-85.
318. Id.

194. A possible RICO lawsuit was first mentioned in late October and early November 2009 emails. These reveal that attorneys with the Ogletree Deakins law firm, including Eric Dowell, were discussing with Chief Deputy Sheriff Hendershott and Peter Spaw, a MCAO attorney, a possible lawsuit against MCBOS under the RICO Act, that any such lawsuit had an almost certain chance of failing, and that sanctions for a frivolous lawsuit would likely be imposed. The lawyers even noted to each other that they "should make sure the Chief [Hendershott] understands the implications of the suit" and the "sanctions for unfounded, vexatiously motivated litigation."[319]

195. In the face of this advice, Mr. Hendershott emailed Andrew Thomas, Phil MacDonnell and Sally Wells that he and Sheriff Arpaio were "all good with the civil rico".[320]

196. Mr. MacDonnell reacted by sending an email to Mr. Thomas with a copy to Barnett Lotstein and Ms. Wells, stating:

> The idea of a civil RICO case based on current evidence is unfounded. Peter Spaw, our RICO expert, thinks it makes no sense. My understanding is that Eric Dowell told MCSO about a week ago that a civil RICO case makes no sense.
>
> If MCSO brings a case against the BOS on a civil RICO theory, the subsequent damage to the statute from Legislative 'reform' could be staggering.
>
> It would be a misuse of the law, which should be reserved for clearly criminal conduct.[321]

197. Mr. Lotstein sent his own email warning that "accusing the BOS of [a] criminal racketeering enterprise is extreme and doomed to defeat . . . ."[322]

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319. Ex. 434.
320. Ex. 433.
321. Id.
322. Id.

198. Mr. Thomas told Messrs. Lotstein and MacDonnell that no RICO lawsuit would be filed and that he would "let Eric Dowell deliver the bad news to Hendershott."[323]

199. One month later, however, Mr. Thomas filed the RICO Act Lawsuit. He did so without (a) discussing the matter any further with his senior advisers (*e.g.*, Lotstein, MacDonell, Wells)[324] or (b) vetting the lawsuit through his office's "incident review" process,[325] whereby MCAO's Division Chiefs and other experienced attorneys at MCAO review and discuss "tough cases."[326]

200. Almost no one at MCAO besides Mr. Thomas and Ms. Aubuchon knew beforehand that they planned to file the RICO case.[327] Mr. Thomas' senior advisers only learned about the RICO Act Lawsuit the day before the complaint was filed, and then only by accident.[328]

201. Mr. Thomas did not retain an outside law firm to file the RICO Act Lawsuit even though he previously used very prominent and capable outside law firms for civil lawsuits he instigated (*e.g.,* the DUI treatment courts lawsuit and the First Declaratory Judgment). For this civil lawsuit, Mr. Thomas turned to Lisa Aubuchon who had very minimal civil experience and no RICO experience.[329]

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323. MacDonnell Testimony, Hr'g Tr. 135:19-137:8, Sept. 15, 2011.
324. MacDonnell Testimony, Hr'g Tr. 137:9-138:19, Sept. 15, 2011.
325. MacDonnell Testimony, Hr'g Tr. 15:15–19, Sept. 19, 2011; Marshall Testimony, Hr'g Tr. 163:17–25, Sept. 13, 2011. Marshall termed the absence of staffing in this type of case "unusual". Marshall Testimony, Hr'g Tr. 14:15–15:3, Sept. 13, 2011.
326. MacDonnell Testimony, Hr'g Tr. 12:17–14:14, Sept. 19, 2011.
327. Thomas Testimony, Hr'g Tr. 150:4–25, Oct. 26, 2011.
328. MacDonnell Testimony, Hr'g Tr. 137:9-138:19, Sept. 15, 2011.
329. Aubuchon Testimony, Hr'g Tr. 119:9-120:25, Oct. 25, 2011.

202. Ms. Aubuchon and Mr. Thomas jointly drafted the RICO complaint,[330] with Ms. Aubuchon signing it. The signature block on the Complaint appears as follows:[331]

> ANDREW P. THOMAS
> MARICOPA COUNTY ATTORNEY
>
> By: /s/Lisa M. Aubuchon
> Lisa M. Aubuchon
> Deputy County Attorney

203. Mr. Thomas appeared both as a plaintiff and as an attorney for the plaintiffs in the RICO Act Lawsuit.[332]

204. Along with filing the RICO complaint, Mr. Thomas issued a press release announcing that Sheriff Arpaio and Mr. Thomas were pursuing a racketeering case against the Supervisors and certain named judges who allegedly blocked the investigation into the Court Tower (that "investigation" is discussed more fully in connection with Claims twelve through fourteen) and acted to protect Supervisor Stapley.[333]

Thomas transfers the RICO Act Lawsuit to the even more inexperienced Alexander.

205. Mr. Thomas hired Rachel Alexander in 2005, making her a Special Assistant Deputy County Attorney to whom he assigned special projects.[334] One such assignment was to search for and document any statement by a judge critical of Mr. Thomas, his office or his policies.[335] Judges Mundell and Fields figured significantly in this research.[336]

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330. Aubuchon Testimony, Hr'g Tr. 92:21–93:19; 120:8–121:16, Oct. 25, 2011.
331. Ex. 145, TRIAL EXB 01767-85.
332. Ex. 145, TRIAL EXB 01767-85.
333. Ex. 146, TRIAL EXB 01786–87.
334. Alexander Testimony, Hr'g Tr. 7:12–8:18, Oct. 20, 2011.
335. Ex. 29, TRIAL EXB 703–22; Alexander Testimony, Hr'g Tr. 15:1–16:10, Oct. 20, 2011.
336. Id.

206. Because of concerns over Ms. Aubuchon having a conflict because she had signed the direct criminal complaint against Judge Donahoe (a RICO Act Lawsuit defendant), Mr. Thomas, on December 11, 2009, transferred the RICO Act Lawsuit to Ms. Alexander.[337]

207. Ms. Alexander had no trial experience, had handled only a few preliminary hearings and initial appearances, and had never litigated a case in federal court.[338]

208. Supervisory lawyers in Mr. Thomas's office warned him that Ms. Alexander lacked sufficient experience and training to work as lead counsel on the RICO case. Specifically, in a December 13, 2009 e-mail that Chief Deputy MacDonnell forwarded to Mr. Thomas, Mark Faull, Ms. Alexander's then Division supervisor, expressed serious doubts about Ms. Alexander's skills as a litigator. He stated: "[i]t is my professional opinion that we are inviting malpractice complications with this assignment."[339]

209. Mr. Faull also stated in his e-mail that he had received reports that Ms. Alexander's court coverage performance was "deficient."[340] This was not the first time Mr. Faull advised Mr. Thomas of his concerns about Ms. Alexander's abilities.[341] Mr. Faull's critique was disregarded.

210. Ms. Alexander was transferred to the asset forfeiture bureau headed-up by Peter Spaw.[342] Mr. Faull cautioned Mr. Spaw to provide Ms. Alexander with close

337. Thomas Testimony, Hr'g Tr. 151:21-152:6, Oct. 26, 2011; Alexander Testimony, Hr'g Tr. 24:14–25:15, Oct. 20, 2011.
338. Alexander Testimony, Hr'g Tr. 7:12–14:25, 23:20–24:20, 32:1–25, Oct. 20, 2011.
339. Ex. 169, TRIAL EXB 01925. Faull Testimony, Hr'g Tr. 87:16–90:9, 106:7–24, Oct. 12, 2011 (emphasis added).
340. Ex. 169, TRIAL EXB 01925.
341. Faull Testimony, Hr'g Tr. 92:8–14, Oct. 12, 2011.
342. Faull Testimony, Hr'g Tr. 90:10–92:14, Oct. 12, 2011.

supervision and assistance,[343] and Mr. Spaw did supervise Ms. Alexander in connection with the RICO case.[344]

211. On December 23, 2009, Ms. Alexander filed a notice of substitution of counsel in the RICO Act Lawsuit.[345] This, she admitted, put her "on the hook" for the RICO case, making her responsible for the accuracy of everything filed on behalf of the plaintiffs in the case thereafter.[346]

212. Defendants in the RICO Act Lawsuit filed motions to dismiss. Ms. Alexander prepared and filed responses to those motions, after review and approval by Mr. Thomas.[347]

213. Ms. Alexander also attempted to file a first amended complaint after that document was reviewed and approved by Mr. Thomas.[348] The amendment incorporated and left unchanged the allegations of the original complaint.[349]

214. The first amended complaint was filed untimely and therefore rejected by the court. Ms. Alexander then asked that the first amended complaint be deemed timely filed or, in the alternative, for leave to file an amended complaint.[350] After the defendants objected, the court disallowed the first amended complaint.

215. The RICO action was voluntarily dismissed in March 2010.

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343. Faull Testimony, Hr'g Tr. 113:20–117:4, Oct. 12, 2011.
344. Thomas Testimony, Hr'g Tr. 151:3–20, Oct. 26, 2011; Spaw Testimony, Hr'g Tr. 132:14–21, Oct. 17, 2011. Spaw testified he supervised Alexander from an "organizational standpoint," not from a "managerial standpoint."
345. Alexander Testimony, Hr'g Tr. 51:22–52:9, Oct. 20, 2011; Ex. 177, TRIAL EXB 1977–79.
346. Alexander Testimony, Hr'g Tr. 51:22–53:1, Oct. 20, 2011.
347. Alexander Testimony, Hr'g Tr. 56:15–59:11, 65:15–66:8, 70:11–71:2, 71:17–73:11, 79:13–81:7, 86:2–89:12, 90:9–93:4, 94:18–95:3, Oct. 20, 2011; Ex. 195, TRIAL EXB 02227–72; Ex. 396, TRIAL EXB 08092; Ex. 397, TRIAL EXB 08093–95; Ex. 398, TRIAL EXB 08096–8115.
348. Ex. 188, TRIAL EXB 02155–86; Ex. 404, TRIAL EXB 0813–71 (e–mail from Spaw to Thomas, noting inclusion of revisions suggested by Thomas); Ex. 447, TRIAL EXB 08541; Ex. 448, TRIAL EXB 08543–44; Ex. 452, TRIAL EXB 08550.
349. Ex. 407, TRIAL EXB 08178–8208.
350. Ex. 191, TRIAL EXB 02192–2200.

The RICO Act Lawsuit was devoid of any legal or factual basis.

The complaint and first amended complaint did not allege any facts to support claims under the RICO Act

216. The RICO complaint was poorly written and extremely confusing. In some places, it was unintelligible or nonsensical.

217. A complaint in federal court must contain *facts*, which if accepted as true, are sufficient to "state a claim to relief that is plausible on its face."[351] This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[352] A "complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[353]

218. Both the complaint and first amended complaint make claims under three parts of the RICO Act, 18 U.S.C. § 1962(b), (c), and (d).[354] Neither pleading, however, contains facts sufficient to state a viable claim under those sections of the statute.

18 U.S.C. § 1962(c)

219. 18 U.S.C. § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[355] To state a claim for relief under Section

351. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).
352. *Id.* at 555.
353. Ashcroft v. Iqbal, 556 U.S. 662, __, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557).
354. Ex. 145 ¶ 66, TRIAL EXB 1783; Ex. 188 ¶ 80, TRIAL EXB 2172.
355. 18 U.S.C. § 1962(c); s*ee also* Goldstock Testimony, Hr'g Tr. 142:7–20, Oct. 19, 2011.

1962(c), a plaintiff must sufficiently allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.[356]

220. An enterprise is defined "to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." A RICO enterprise has been further described as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."[357]

221. An "association in fact" enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."[358] "An association-in-fact enterprise must have a structure, and . . . to establish the existence of an association-in-fact enterprise, a plaintiff must identify at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[359]

222. The complaint at one point labels all the defendants as one "enterprise" in a purely conclusory fashion: "defendants are involved in an enterprise as they are all related by contract association, as a legal entity or as a group of individuals associated in fact."[360] The complaint then confuses matters by referencing *multiple* enterprises: "These enterprises engage in or participate in activities . . .

356. *See* Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004).
357. 18 U.S.C. § 1961(4); U.S. v. Turkette, 452 U.S. 576, 583 (1981).
358. *Id*.
359. *See also* Goldstock Testimony, Hr'g Tr. 140:25–141:18; 145:6–145:20, Oct. 19, 2011; *Boyle v. U.S.*, 556 U.S. 938, __, 129 S. Ct. 2237, 2244 (2009).
360. Ex. 145 ¶ 78, TRIAL EXB 1783.

."[361] Adding to the confusion, the amended complaint states that MCBOS is the enterprise[362] and then describes how some of the defendants—but not the judges—are related to MCBOS.[363] At the same time, the amended complaint maintains the language from the original complaint describing *all* the defendants as one enterprise or enterprises.[364] Nothing remotely resembling a "fact" is mentioned in these pleadings to establish an enterprise.

223. In addition, the complaint and the amended complaint do not state facts establishing the required "pattern of racketeering activity."[365] This pattern must consist of "predicate acts." There must be at least two discrete predicate acts to constitute a pattern.[366]

224. The predicate acts must constitute crimes.[367] The criminal acts making up the pattern of racketeering activity must be identified and pled in the complaint the same way they would be pled in a criminal indictment. That is, the complaint must identify the offense, the date of the offense, the person who committed the offense, and so forth.[368]

225. The complaint and amended complaint make vague references to bribery and extortion.[369] But nowhere are any facts alleged that, if true, establish the elements of these crimes. There simply are no crimes pled. The complaint and amended complaint fail to allege a pattern of racketeering activity.[370]

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361. Ex. 145 ¶ 78, TRIAL EXB 1783.
362. Ex. 188 ¶ 84, TRIAL EXB 2174.
363. Ex. 188 ¶ 85–87, TRIAL EXB 2175.
364. Ex. 188 ¶ 78, TRIAL EXB 2172.
365. Goldstock Testimony, Hr'g Tr. 140:18–143:13, Oct. 19, 2011.
366. *See also* Goldstock Testimony, Hr'g Tr. 145:21–147:2, Oct. 19, 2011; 18 U.S.C. § 1961(5).
367. 18 U.S.C. § 1961(1).
368. Goldstock Testimony, Hr'g Tr. 145:21–147:19, Oct. 19, 2011.
369. Ex. 145 ¶ 66, TRIAL EXB 01783; Ex. 188 ¶ 80, TRIAL EXB 02172.
370. Goldstock Testimony, Hr'g Tr. 153:14–154:11.

18 U.S.C. § 1962(b)

226. 18 U.S.C. § 1962(b) prohibits the "acquisition or maintenance" of control of an enterprise through a pattern of racketeering activity.[371] To state a claim, a plaintiff must allege an "acquisition or maintenance" injury separate and apart from the purported injury the plaintiff is alleged to have suffered as a result of the predicate acts of racketeering activity. The plaintiff must show "a specific nexus between the control of the enterprise and the racketeering activity," and must also allege "an injury to plaintiff resulting from defendant's control or acquisition of a RICO enterprise."[372] Nowhere in the complaint or amended complaint do the plaintiffs plead any such injury.

227. 18 U.S.C. § 1962(b) also makes it unlawful to conspire to violate 18 U.S.C. § 1962(a), (b), or (c). The complaint and amended complaint "assert that a conspiracy exists" to commit bribery and extortion,[373] but do not explain how. Also, because no violation of Section 1962(c) is properly alleged, there can be no violation of 1962(d).[374]

The Plaintiffs lacked Standing to bring the RICO Act Lawsuit

228. Standing is a necessary element of federal-court jurisdiction under Article III of the federal Constitution.[375] To have standing, "the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or

371. 18 U.S.C. § 1962(b); s*ee also* Goldstock Testimony, Hr'g Tr. 142:7–20, Oct. 19, 2011.
372. Wagh v. Metris Direct, Inc., 363 F.3d 821, 830 (9th Cir. 2003) (citations omitted).
373. Ex. 145 ¶ 81, TRIAL EXB 1784; Ex. 188 ¶ 82, TRIAL EXB 2173.
374. Howard v. Am. Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000) (the failure to adequately plead a substantive violation of RICO precludes a claim for conspiracy . . . To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses").
375. Thomas v. Mundell, 572 F.3d 756, 760 (9th Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

hypothetical."[376] A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way."[377]

229. To sue under RICO, the alleged harm must be an injury to the plaintiff's "business or property."[378] The plaintiff must suffer injury to a "personal" interest, rather than an "official" interest.[379]

230. The injuries alleged in the RICO pleadings are not personal to Mr. Thomas or Sheriff Arpaio. If they were suffered, they were suffered in the plaintiff's official capacities as County Attorney and County Sheriff.[380] The only alleged injury arguably personal—the potential threat to Mr. Thomas's law license[381]—was speculative, not actual or imminent. Mr. Thomas and Sheriff Arpaio lacked standing to bring the RICO Act Lawsuit.

No county attorney or deputy county attorney had authority to bring the RICO Act Lawsuit.

231. The complaint and amended complaint requested that damages, including treble damages, be awarded against all defendants, including a sufficient amount to compensate Sheriff Arpaio for the harm he had allegedly suffered.[382]

232. A specific Arizona statute prohibits a county attorney from presenting a demand for damages against the county or advocating such a demand for someone else.[383] The RICO Act Lawsuit violated this statute.

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376. *Thomas*, 572 F.3d at 760 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted).
377. *Id*. at 560 n. 1.
378. 18 U.S.C. § 1964(c); Canyon Cty v. Syngenta Seeds, Inc., 519 F.3d 969, 972 (9th Cir. 2008) (quoting *Holmes v. Sec. Inv. Prot. Corp*., 503 U.S. 258, 268 (1992)).
379. *Thomas*, 572 F.3d at 761.
380. *See* Ex. 145, ¶ 1, TRIAL EXB 01768–69, alleging defendants hindered MCAO's investigations and prosecutions; ¶¶ 5, 75, TRIAL EXB 01769, 01782, alleging defendants reduced MCAO's budget and eliminated its civil division; ¶¶ 4, 63, 75, TRIAL EXB 01769, 01779, 01782, alleging defendants deprived MCSO of its right to be provided legal services by MCAO.
381. Ex. 145, ¶ 6, 31, 58, 76, TRIAL EXB 01770, 01772–73, 01778, 01782.
382. Ex. 145, p. 18, ¶1, TRIAL EXB 01784.

233. Under another Arizona law, county attorneys and their deputies may not engage in the private practice of law.[384] The RICO Act Lawsuit was in contravention of this statute as well.

No attempt was made to gather *evidence* to support the RICO Act Lawsuit

234. Mr. Spaw directed Ms. Alexander to locate all investigative files for the RICO matter so that, in responding to the dismissal motions, specific facts supporting the lawsuit could be identified and detailed.[385] Mr. Spaw warned Ms. Alexander: "Without access to the detailed facts supporting this suit, all other efforts are tantamount to simply rearranging the deck chairs on the Titanic."[386]

235. Ms. Alexander asked Mr. Thomas for the investigative file and facts supporting the RICO complaint. He referred her to Sally Wells and Lisa Aubuchon.[387]

236. Ms. Wells provided Ms. Alexander with court filings from prior proceedings between the MCAO and the Board which evidenced the legal positions taken and the rulings by judges in those cases. Ms. Wells also gave Ms. Alexander letters and other communications between Mr. Thomas and the Board sent during Mr. Thomas's numerous disputes with the Board.[388] Ms. Aubuchon gave Ms. Alexander a packet of documents that supposedly was the case file, but which consisted of pleadings and legal research.[389]

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383. A.R.S. § 11-535.
384. A.R.S. § 11–403(B); see Order re Ruling IBC's Mot. to Compel Witness Testimony of Philip MacDonnell 3.
385. Ex. 180, TRIAL EXB 01983.
386. Ex. 182, TRIAL EXB 01986–90.
387. Ex. 415, TRIAL EXB 08364–69.
388. Ex. 390, TRIAL EXB 08006–07; Wells Testimony, Hr'g Tr. 140:12–141:25, Sept. 13, 2011.
389. Alexander Testimony, Hr'g Tr. 50:4–51:21, Oct. 20, 2011; Aubuchon Testimony, Hr'g Tr. 132:5–134:6, Oct. 25, 2011.

237. Ms. Alexander never located an investigative file for the RICO Act Lawsuit. There was no investigative file. No factual investigation was performed by anyone to discover actual evidence to prove any facts relevant to the RICO Act Lawsuit.[390] Mr. Thomas, Ms. Aubuchon and Ms. Alexander instead followed what had become the standard practice: (i) treating as a fact an unsubstantiated rumor without any investigation to determine its truth, and (ii) ascribing a malevolent motive to every action, ruling or decision contrary to Mr. Thomas's desires and wishes. The numerous pleadings and other court papers authored by Ms. Aubuchon which were placed into evidence in these proceedings, the pleading and motion response filed by Ms. Alexander in the RICO Act Lawsuit, and their testimony before this Panel where they attempted to explain or justify what they had written compels the conclusion that they either did not know how to gather evidence to establish facts or had no interest in doing so.

238. Despite Peter Spaw's warnings about the lack of evidence, Ms. Alexander was adamant that the RICO Act Lawsuit go forward.[391] As late as March 2010, Mr. Spaw emphasized that, for months, he had been asking Ms. Alexander to produce "a precise list of what investigative materials there are in existence."[392] He never received such a list.

239. The allegations in the RICO Act Lawsuit would not have withstood any investigation or thoughtful reflection. For example, the complaint questioned MCBOS's funding of the Court Tower project, describing it as "the most expensive public-works project in the history of Maricopa County government"

390. Aubuchon Testimony, Hr'g Tr. 133:10–134:16, Oct. 25, 2011.
391. Duvendack Testimony, Hr'g Tr. 188:17–189:7, Oct. 14, 2011.
392. Ex. 209, TRIAL EXB 02409–11.

and listing amenities such as "marble, travertine and wood flooring."[393] Mr. Thomas, Ms. Aubuchon and Ms. Alexander ignored the fundamental concept that, as part of the separation of powers in County government, it was for MCBOS to decide what capital improvements to make and when to make them.[394] Furthermore, MCBOS had saved the funds to build the Court Tower[395] and the recession that began in 2007 was a good time to build a large public works project because prices were low and the project would stimulate the local economy.[396] To conclude from the MCBOS's decision to build the Court Tower that its members were racketeers was preposterous.[397]

240. The assertion that MCBOS was providing funds to the Superior Court to pay for the building of the Court Tower reflected a fundamental lack of understanding of how the project was financed.[398] The Court Tower was a County building, paid for by the County as part of its capital improvement program.[399] The Court Tower was not in the Superior Court's budget.[400]

241. The allegation that there was a conspiracy driving the Court Tower project was factually impossible. The Court Tower project had been planned for nearly a decade.[401] It addressed long-standing inefficiencies and inadequacies in the County's criminal justice infrastructure.[402] Finally, MCBOS approved construction of the Court Tower one and one-half years prior to the first indictment of Mr.

393. Ex. 145, p. 6, ¶¶ 28–29, TRIAL EXB 01772.
394. Smith Testimony, Hr'g Tr. 170:13–25, Sept. 26, 2011.
395. Wilcox Testimony, Hr'g Tr. 45:14–17, Sept. 21, 2011.
396. Wilcox Testimony, Hr'g Tr. 45:18–46:9, Sept. 21, 2011.
397. Kunasek Testimony, Hr'g Tr. 108:3–110:8, Sept. 26, 2011.
398. Ex. 145, p. 7, ¶33, TRIAL EXB 01773.
399. Irvine Testimony, Hr'g Tr. 117:10–20, Sept. 14, 2011.
400. Wilson Testimony, Hr'g Tr. 213:19–217:16, Sept. 27, 2011.
401. Stapley Testimony, Hr'g Tr. 121:6–22, Sept. 20, 2011.
402. Wilcox Testimony, Hr'g Tr. 44:17–45:13, Sept. 21, 2011.

Stapley.[403] This history negates the plaintiffs' claim that the Court Tower was being built to reward the judges for hindering the prosecution of Mr. Stapley. It is difficult to understand how the MCAO, which had been involved in advising MCBOS about the Court Tower for many years, could advance a litigation theory so contrary to the facts.[404] Notably, Peter Spaw warned Mr. Thomas in a January 2, 2010 e-mail that "[t]he Court Tower Investigation is mentioned repeatedly in the Complaint, but only in passing and never in a way that allows us to argue that we can connect the list of conduct to the Court Tower Investigation and get an inferred scheme out of the deal."[405]

The RICO Act Lawsuit caused severe damage to the named defendants.

242. The emotional torment suffered by the defendants in the RICO Act Lawsuit was massive.

243. Tom Irvine testified that after the RICO case was filed, "everybody wants to wait to let it play out to see if you are really a racketeer, are you really a criminal. That is still over my head since it's still on Google and everyplace else."[406] He worried ". . . do I have an obligation to resign from the firm, to protect the firm, will they cut me loose. All of that went through my mind for all of the months this was pending."[407]

244. Finally, Irvine testified specifically that the filing of the first amended complaint caused him harm.[408] That document was in the public record.[409] It

403. Swanson Testimony, Hr'g Tr. 22:9–23:5, Sept. 27, 2011.
404. Kunasek Testimony, Hr'g Tr. 16:3–17:6, Sept. 26 2011.
405. Ex. 398, TRIAL EXB 8096.
406. Irvine Testimony, Hr'g Tr. 125:13-16, Sept. 14, 2011.
407. Irvine Testimony, Hr'g Tr. 126:6-9, Sept. 14, 2011.
408. Irvine Testimony, Hr'g Tr. 128:25-129:2, Sept. 14, 2011.
409. Irvine Testimony, Hr'g Tr. 129:3-9, Sept. 14, 2011.

repeated the first complaint and added two extra counts.[410] The more specific allegations were harmful to Irvine.[411] The complaint went from "bad, very bad" to "worse."[412]

245. Defendants suffered monetarily also. The Polsinelli Shughart law firm spent about $300,000 defending the case, and its lawyers had to spend their own time preparing a motion to dismiss.[413] Other defendants had County lawyers defending them, which forced the County to expend resources to defend the suit.[414] Ed Novak personally lost at least one potential new client while the suit was pending.[415]

CLAIM FIFTEEN: ER 4.4(a) (USING MEANS TO BURDEN OR EMBARRASS—RICO) (THOMAS, AUBUCHON, AND ALEXANDER)

246. ER 4.4(a) prohibits attorneys from using means that have "no substantial purpose other than to embarrass, delay, or burden."[416] IBC argues that Mr. Thomas, Ms. Aubuchon and Ms. Alexander filed and pursued the RICO Act Lawsuit for no substantial purpose other than to embarrass, delay or burden the named defendants. This Panel agrees.

247. Disregarding the opinions and warnings of experienced attorneys, including some who had handled RICO cases, Mr. Thomas proceeded with the RICO case using Lisa Aubuchon who had no RICO experience and little civil litigation background. The internal review which typically would be conducted on such a high profile case did not take place. Mr. Thomas and Ms. Aubuchon worked in

410. Irvine Testimony, Hr'g Tr. 129:10-16, Sept. 14, 2011.
411. Irvine Testimony, Hr'g Tr. 129:17-22, Sept. 14, 2011.
412. Irvine Testimony, Hr'g Tr. 129:17-22, Sept. 14, 2011.
413. Novak Testimony, Hr'g Tr. 33:18-35:9, Oct. 3, 2011; Irvine Testimony, Hr'g Tr. 123:15-124:3, 125:19-23, Sept. 14, 2011.
414. Irvine Testimony, Hr'g Tr. 125:23-25, Sept. 14, 2011.
415. Novak Testimony, Hr'g Tr. 36:7-37:7, Oct. 3, 2011.
416. R. Sup. Ct. Ariz. 42, ER 4.4(a).

secret without the knowledge of Mr. Thomas's senior advisers. This occurred contemporaneously with the shockingly improper criminal action against Judge Donahoe (discussed *infra* in connection with Claims twenty-four through thirty).

248. Mr. Thomas reassigned the case to Ms. Alexander who was even more inexperienced than Ms. Aubuchon. Mr. Thomas turned a deaf ear to specific warnings about Ms. Alexander's inadequacies. Mr. Thomas valued loyalty over ability.

249. There was a complete absence of any legal or factual basis for the lawsuit.

250. Very troubling is the evidence that the RICO Act Lawsuit was filed with the hope that the County would be placed into receivership, which would burden the County by preventing the existing government from being able to run the County.[417]

251. With the RICO action Mr. Thomas, Ms. Aubuchon and Ms. Alexander abused their power and authority as County officers. They filed and prosecuted the action in retaliation against the defendants, not based upon any alleged criminal activity, but rather based upon the defendants' exercise of lawful authority that frustrated and infuriated Mr. Thomas and Sheriff Arpaio.

252. Mr. Thomas contends that he was not the attorney on the RICO Act Lawsuit.[418] The evidence overwhelmingly contradicts this claim. Mr. Thomas was listed as the attorney on the case, and he was heavily involved in it through his supervision.

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417. Hendershott Testimony, Hr'g Tr. 72:20–73:19, Oct. 13, 2011; Aubuchon Testimony, Hr'g Tr. 117:5–118:9, Oct. 25, 2011. This evidence is corroborated by Kunasek's testimony that Thomas and Hendershott planned to indict a third Board member in an attempt to "destabilize the Board." Kunasek Testimony, Hr'g Tr. 40:2–41:11, Sept. 26, 2011.

418. Thomas's Post–Hr'g Memo. 55–56.

253. Ms. Alexander argues she did not violate ER 4.4(a) because there is no evidence of any improper motive on her part. That argument is belied by the RICO first amended complaint itself.[419] She continued the political payback with the first amended complaint, which contained no evidence of racketeering, bribery, or any other crime. It instead complained about actions of the Supervisors and judges which her boss, Mr. Thomas, did not like.

254. There is clear and convincing evidence that Mr. Thomas, Ms. Aubuchon and Ms. Alexander violated ER 4.4(a) with the RICO Act Lawsuit.

CLAIM SIXTEEN: ER 3.1 (FILING A FRIVOLOUS LAWSUIT)(THOMAS, AUBUCHON, AND ALEXANDER)

255. ER 3.1 states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous.[420]

256. All the prior findings recited about the RICO Act Lawsuit establish, clear and convincingly, that the RICO Act Lawsuit was brought and continued in violation of ER 3.1.

257. This Panel finds that the RICO Act Lawsuit and its continuation was both objectively and subjectively frivolous and in bad faith.

258. Mr. Thomas argues that it is not possible to violate both ER 3.1 and ER 1.1 (addressed below under Claim seventeen)—that they are incongruous.[421] This argument is incorrect. The Respondents violated ER 3.1 by bringing a case with no basis in law or fact. Incompetent representation—the basis of the ER 1.1—

419. The first amended complaint incorporates the original complaint in its entirety; only the first amended complaint is referred to here.
420. R. Sup. Ct. Ariz 42, ER 3.1. *See, e.g.*, In re Levine, 174 Ariz. 146, 171, 847 P.2d 1093, 1118 (1993) (Levine violated ER 3.1 by bringing groundless claims in bad faith over a period of years).
421. Thomas's Post-Hr'g memo. 56.

can obviously co-exist with frivolous claims. The Arizona Supreme Court has held that a respondent may violate both rules.[422]

259. This Panel holds that Mr. Thomas, Ms. Aubuchon, and Ms. Alexander violated ER 3.1 by filing and continuing the RICO Act Lawsuit.

CLAIM SEVENTEEN: ER 1.1 (COMPETENT REPRESENTATION)(THOMAS, AUBUCHON, AND ALEXANDER)

260. ER 1.1 states that a lawyer shall provide competent representation to a client.[423] Competent representation requires the legal knowledge, skill, and thoroughness and preparation reasonably necessary for the representation.[424]

261. IBC's expert witness, Ronald Goldstock, testified that "[t]he RICO complaint was not competently done. It doesn't meet the basic standards of a RICO complaint. It doesn't allege an enterprise. It doesn't allege a pattern of racketeering activity. There's no basis for the suit in terms of the relief that's sought."[425]

262. Mr. Goldstock's testimony also supports the conclusion that the first amended complaint, the response to the dismissal motions, and the continuation of the lawsuit constituted incompetent representation. No reasonably competent attorney could have concluded there was any good-faith basis for pursuing the RICO Act Lawsuit.

263. The conduct of the Respondents evidenced complete ignorance of what was required to plead and prosecute a Rico lawsuit.

422. *See In re* Wurtz, 177 Ariz. 586, 870 P.2d 404 (1994); *In re* Feeley, 176 Ariz. 196, 198, 859 P.2d 1329, 1331 (1993).
423. R. Sup. Ct. Ariz 42, ER 1.1.
424. *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993), 1329, 1331 (1993).
425. Goldstock Testimony, Hr'g Tr. 157:16–22, Oct. 19, 2011.

264. Ms. Aubuchon's belief that the RICO Act Lawsuit would result in the reinstatement of the MCAO civil division showed her lack of knowledge of the possible remedies for a RICO case.

265. Ms. Alexander added further evidence of her incompetency by stating at the conclusion of her response to the dismissal motions:

> As a final alternative, and in the event plaintiffs cannot proceed at all with this Complaint, plaintiffs seek guidance from this Court as to how federal law may be changed to permit local law-enforcement officials to challenge the complained-of conduct in federal court, so that plaintiffs may petition Congress to amend federal law accordingly.[426]

Anyone with a modicum of legal training knows that a court will not advise a party on how to seek changes in the law from Congress or any legislative body.

266. There is clear and convincing evidence that Respondents violated ER 1.1 in connection with the RICO Act Lawsuit.

CLAIM EIGHTEEN: ER 1.7(a)(1) and (2) (CONFLICTS OF INTEREST)(THOMAS, AUBUCHON, AND ALEXANDER)

267. Mr. Thomas, Ms. Aubuchon and Ms. Alexander represented the State of Arizona in bringing the RICO action against their client—MCBOS.[427] However, they were all also purportedly representing Mr. Thomas and Sheriff Arpaio.[428] In so doing, Mr. Thomas, Ms. Aubuchon and Ms. Alexander were suing a client on behalf of at least one other purported client, Sheriff Arpaio. That was a conflict of interest as defined by ER 1.7(a)(1).

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426. Ex. 195, TRIAL EXB 02270–71.

427. Aubuchon stated in a Response to Petition for Special Action, CV 09–00372 SA that the County Attorney, in his official capacity as a county law–enforcement officer, filed the RICO suit against the defendants based in part on criminal conduct. She also stated that the County Attorney requested no personal damages in the RICO case and sought relief only so he could effectively combat the corruption that is being shielded from proper prosecution in the county court system. *See* the Response, Ex. 286, pp. 11, 14, TRIAL EXB 03742, 03745.

428. On February 16, 2010, attorneys Elizabeth Fierman and Robert Driscoll substituted in to represent Sheriff Arpaio in the RICO action.

268. Furthermore, their representation was also limited due to the disputes that had occurred with MCBOS, the Superior Courts, and other RICO defendants. Their judgment was limited by their own self-interest and personal animosity. There was a conflict of interest as defined by ER 1.7(a)(2).

269. There is clear and convincing evidence that Respondents violated ER 1.7(a)(1) and (a)(2) in connection with the RICO Act Lawsuit.

CLAIM NINETEEN: ER 3.4(c) (VIOLATION OF A COURT RULE)(THOMAS, AUBUCHON, AND ALEXANDER)

270. ER 3.4(c) prohibits a lawyer from violating a rule of a court or other tribunal. Mr. Thomas, Ms. Aubuchon and Ms. Alexander violated ER 3.4(c) by basing allegations in the RICO matter on Bar complaints that they alleged the defendants filed against Mr. Thomas and deputy county attorneys.

271. Rule 48(*l*), Rules of the Arizona Supreme Court provides:

> **Immunity from Civil Suit.** Communications to the court, state bar, commission, hearing committees or hearing officers, mediators, the client protection fund, the peer review committee, the fee arbitration program, the committee on the Rules of Professional Conduct, monitors of the Member Assistance or Law Office Management Assistance Programs, probable cause panelists or state bar staff relating to lawyer misconduct, lack of professionalism or disability, and testimony given in the proceedings shall be absolutely privileged conduct, **and no civil action predicated thereon may be instituted against any complainant or witness**. Members of the board, commission, hearing committees or hearing officers, mediators, the peer review committee, client protection fund trustees and staff, fee arbitration committee arbitrators and staff, the ethics committee, monitors of the Member Assistance or Law Office Management Assistance Programs, probable cause panelists, state bar staff shall be immune from suit for any conduct in the course of their official duties. (emphasis added)

272. Respondents alleged in the complaint and the first amended complaint that some defendants had instigated frivolous investigations of Mr. Thomas and MCAO prosecutors with the State Bar of Arizona, or had threatened to go to the State Bar about Mr. Thomas.[429] In making these claims, the Respondents violated Rule 48(*l*), Arizona Rules of the Supreme Court.

273. Respondents argue that Rule 48(*l*) is preempted by federal law, namely, RICO itself. Respondents are incorrect. Federal law preempts state law under the Supremacy Clause of the U.S. Constitution, but not in every situation. All federal preemption begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[430] The RICO statute does not purport to preempt state attorney discipline rules, explicitly or otherwise. "To the contrary, the intent of Congress still appears to be that respondent and others in his position should adhere to the ethical standards prescribed by their licensing courts."[431]

274. Furthermore, courts "apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation."[432] Attorney discipline is not such an area. "In fact, the opposite is true. The Supreme Court of the United States has long

429. Ex. 145, RICO complaint, ¶¶ 31, 39, 58, 64, 70 and 76, TRIAL EXB 01772–74, 1778, 1779–82; Ex. 195, TRIAL EXB 02255.
430. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citation omitted).
431. In re Howes, 123 N.M. 311, 321, 940 P.2d 159, 169 (1997) (rejecting U.S. Attorney's preemption defense and finding him subject to state rules of professional conduct).
432. Gadda v. Ashcroft, 377 F.3d 934, 944 (9th Cir. 2004) (citation omitted).

recognized that the several states have an important interest in regulating the conduct of the attorneys whom they license."[433]

275. There is clear and convincing evidence that Respondents violated ER 3.4(c) in connection with the RICO Act Lawsuit.

CLAIM TWENTY: ER 8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE)(THOMAS, AUBUCHON, AND ALEXANDER)

276. IBC argues that Mr. Thomas, Ms. Aubuchon and Ms. Alexander violated ER 8.4(d) by suing judges who were immune from suit.

277. Respondents sued four judges of the Maricopa Superior Court concerning their decisions in various matters. By doing so, they sought damages against members of the judicial branch of government for carrying out their obligations and duties. Even if those judges had made decisions in error they were immune from civil liability.[434]

278. Judicial immunity is absolute.[435] "As long as the judge's ultimate acts are judicial acts taken within the court's subject matter jurisdiction, immunity applies."[436] Factors determining whether a judge's act is "judicial" relate to "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." There is no indication any of the judges named in the RICO complaint were acting outside the court's subject matter jurisdiction. All of the allegations against the judges in the RICO pleadings were based on

433. *Id*. (citations omitted); accord *In re Smith*, 989 P.2d 165 (Colo. 1999).
434. Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986).
435. Mullis v. U.S. Bankruptcy Court for Dist. Of Nev., 828 F.2d 1385, 1388 (9th Cir. 1987) (citing *Bradley v. Fisher*, 80 U.S. 335, 347).
436. *Ashelman*, 793 F.2d at 1078.

judicial acts.[437] The judges were therefore absolutely immune from lawsuits based on those acts.[438]

279. Respondents filed the RICO case to intrude upon the independence of the judiciary and the decision-making process of judges, and to silence judges. The sparse factual allegations against the judges in the RICO pleadings do not allege any specific acts of wrongdoing but concern only legitimate activities by judges. Respondents pursued the RICO action to retaliate against the named judges and to intimidate the judges of the Superior Court. There is clear and convincing evidence that the Respondents violated ER 8.4(d) in connection with the RICO Act Lawsuit.

THE SECOND PROSECUTION OF DON STAPLEY (STAPLEY II) AND THE PROSECUTION OF MARY ROSE WILCOX

280. Claims Twenty-one through Twenty-three relate to the second prosecution of Supervisor Stapley (*Stapley II*) and the investigation and criminal prosecution of Supervisor Mary Rose Wilcox.

281. At some point in 2009, MCAO and MCSO initiated an investigation of Supervisor Mary Rose Wilcox. MCAO transferred the *Wilcox* investigation to Yavapai County Attorney Sheila Polk, along with the *Stapley I* matter and other investigations. Ms. Aubuchon continued to work on the *Wilcox* case while it was

437. *See, e.g.*, Ex. 145, ¶ 37, alleging Judge Mundell reassigned *Stapley* to Judge Fields; ¶ 41, alleging Judges Mundell, Baca, and Fields "conspired to retain Fields" as the judge in *Stapley*; ¶ 42, alleging Judges Mundell and Baca refused to grant MCAO a hearing on a motion to remove Judge Fields for bias; ¶ 43, alleging Judges Mundell and Fields issued rulings and statements improperly implying MCAO attorneys had committed ethical violations; ¶ 47, alleging Judge Mundell improperly selected Judge Daughton to hear a civil case; ¶ 50, alleging Judge Donahoe improperly quashed a grand–jury subpoena relating to the Court Tower; ¶ 62, alleging Judge Fields dismissed all misdemeanor counts from the *Stapley* indictment; ¶ 63, alleging Judge Daughton issued an improper minute entry upholding the Board's "illegal takeover" of MCAO's civil functions.

438. Ex. 145, ¶ 31 alleges judges "conspired and acted outside the scope of their judicial capacities" to file Bar complaints against Thomas. There is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney. Drummond v. Stahl, 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980).

in Yavapai County. Specifically, she worked with Sergeant Johnson on subpoenas.[439] Despite having transferred this matter to Polk, Mr. Thomas took the *Wilcox* and *Stapley II* matters back from Polk in September 2009.

282. Initially, Mr. Thomas sought to appoint out-of-state special prosecutors to handle the matters. However, MCBOS declined to consider Mr. Thomas' appointments. After MCBOS's denial, Ms. Aubuchon took over the *Wilcox* and *Stapley II* investigations.[440]

283. On December 7, 2009, Mr. Thomas and Ms. Aubuchon caused an indictment to be returned against Supervisor Wilcox.[441] The indictment contained more than twenty counts.[442] A portion of the indictment concerned matters about which Supervisor Wilcox stated she had been advised by Chris Keller, an MCAO attorney.[443]

284. On December 7, 2009, Mr. Thomas and Ms. Aubuchon obtained a second grand jury indictment against Supervisor Stapley (*Stapley II*).[444] The next day, December 8, 2009, Mr. Thomas issued a press release stating that a grand jury had indicted Supervisors Stapley and Wilcox and that all of the defendants named in the RICO complaint were under active criminal investigation for hindering prosecution and other offenses.[445]

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439. Johnson Testimony, Hr'g Tr. 7:10–8:16, Oct. 11, 2011. Aubuchon and Johnson also discussed "conflict of interest law" at that time. Johnson Testimony, Hr'g Tr. 7:10–8:16, Oct. 11, 2011.
440. Johnson Testimony, Hr'g Tr. 10:11–19, Oct. 11, 2011.
441. Ex. 149, TRIAL EXB 01802–19. A second Indictment of Wilcox was issued January 25, 2010. Ex. 193, TRIAL EXB 02205–25.
442. Wilcox Testimony, Hr'g Tr. 36:7–14, Sept. 21, 2011.
443. Wilcox Testimony, Hr'g Tr. 34:23–36:5, Sept. 21, 2011.
444. State v. Stapley, No. CR 2009–007891 Maricopa County Superior Court. The Indictment is Ex. 150, TRIAL EXB 01820–33.
445. Ex. 152, TRIAL EXB 0843–44. The press release demonstrates Thomas's desire to publicly humiliate Stapley by listing personal expenses for which Stapley allegedly used campaign funds and accusing Stapley of "personal aggrandizement."

285. Earlier, Mr. Thomas had transferred the *Wilcox* investigation to Yavapai County Attorney Sheila Polk, but he took it back from her in September 2009. The *Stapley II* indictment alleges three areas of misconduct: Mr. Stapley's use of contributions in his campaign to be elected to an office in the National Association of Counties, obtaining a loan by fraud, and financial disclosure violations. The court dismissed this case on March 15, 2010, on motion of Mr. Thomas. Mr. Thomas made this motion to dismiss, through Deputy County Attorney Kittredge, because Judge Leonardo had ruled in *Wilcox* that Mr. Thomas and his office had a conflict of interest in that matter. The motion stated that the State intended to have a special prosecutor review and decide about the prosecution.

286. When the *Stapley II* and *Wilcox* indictments were filed, Mr. Thomas and Ms. Aubuchon had already sued Mr. Stapley and Ms. Wilcox in the federal RICO action. Mr. Thomas and Ms. Aubuchon brought a criminal case against persons they had sued seeking civil damages. Mr. Thomas, Ms. Aubuchon and Ms. Alexander alleged, among other things, in the RICO complaint that the defendants, including Supervisors Wilcox and Stapley, had threatened his livelihood by bringing Bar complaints against him, had threatened to sue him and his wife to recover legal fees, and had conspired to cut the funding of MCAO by $6,000,000.

287. Supervisor Wilcox moved through her counsel, Colin Campbell, to disqualify MCAO due to conflicts of interest. On February 24, 2010, Superior Court Judge Leonardo ruled that Mr. Thomas and his office could not serve as prosecutors in

Wilcox.[446] The issue before Judge Leonardo was whether a conflict of interest existed in the Wilcox matter so as to deprive her of fundamental fairness.[447] Judge Leonardo found that Mr. Thomas had four areas of conflicts of interest: 1) his retaliation against members of MCBOS for actions they carried out in concert with each other against him; 2) his attempts to gain political advantage by prosecuting those who opposed him politically; 3) his political alliance with Sheriff Arpaio, who targeted members of MCBOS; and 4) his duty to provide confidential, uncompromised legal advice to the members of MCBOS on matter forming the basis of charges in the indictment.[448]

288. Judge Leonardo described the conflicts of interest that Mr. Thomas had:

> There has been a very public confrontation ongoing between [MCAO] and [MCBOS] concerning a number of issues including the propriety of the MCAO to act as legal counsel to the [Board] while at the same time pursuing a criminal investigation of its members; the ability of the [Board] to decline to approve the request of MCAO to appoint special prosecutors to prosecute criminal cases against Board members; the federal civil RICO suit filed by the MCAO against [MCBOS] alleging that members of MCBOS, including [Ms. Wilcox], conspired to have Mr. Thomas's license to practice law revoked by the state bar, and threatened to attempt to recover legal fees from Thomas and his wife if he sued the Board; the [Board's] reduction of the civil budget of MCAO by six million dollars; and the attempts by both sides to obtain investigative information from the other.[449]

CLAIM TWENTY-ONE: ER 1.7(a)(1)-(2) (CONFLICTS OF INTEREST) (THOMAS AND AUBUCHON)

289. Claim Twenty-one alleges that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2) by bringing criminal charges against Supervisor Wilcox while suing her

446. Ex. 199, TRIAL EXB 2380–2386.
447. *Id*. at TRIAL EXB 2383.
448. *Id*. at TRIAL EXB 2383–2384.
449. *Id*. at TRIAL EXB 2385.

civilly at the same time in the RICO case.[450] ER 1.7(a)(2) prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer.[451]

290. As noted above, ER 1.7(a)(2) does not list what "interests" trigger the application of rule.[452] Suffice to say that "any interest that is inconsistent with the prosecutor's duty to safeguard justice is a conflict that potentially could violate a defendant's right to fundamental fairness."[453]

291. Where a prosecutor files criminal charges against an individual he or she is suing civilly, a conflict of interest arises due to the prosecutor's ability to use the criminal case to leverage a favorable settlement of the civil case for his or her benefit.[454]

292. Here, Mr. Thomas and Ms. Aubuchon's prosecution of Ms. Wilcox was materially limited by their self interests. For Mr. Thomas, it was the possibility of recovering damages from Ms. Wilcox in the RICO suit or countermanding MCBOS's actions regarding MCAO. Mr. Thomas's argument that he wasn't the prosecuting attorney on the Ms. Wilcox case or *Stapley II*, or even an attorney at all in the RICO matter is unpersuasive given his heavy involvement in all three lawsuits from investigation to conclusion.

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450. IBC's Complaint originally alleged a violation of ER 1.7(a)(1) within Count 21. However, it's Proposed Findings of Fact and its Reply make no reference to a violation of ER 1.7(a)(1) under Count 21. As such, this Panel will treat that allegation as withdrawn.
451. ER 1.7(a)(2)
452. *See* R. Sup. Ct. Ariz. 42, ER 1.7 cmts. 10, 11, 12 (discussing business, family relationship, and sexual relationship interests).
453. *See* Villalpando v. Reagan, 211 Ariz. 305, 309, 121 P.3d 172, 176 (App. 2005).
454. *See* Sinclair v. State, 278 Md. 243, 254, 363 A.2d 468, 475 (1976) ("[I]f a prosecutor has . . . any pecuniary interest or a significant personal interest in a civil matter which may impair his obligation in a criminal matter to act impartially toward both the state and the accused, then he is . . . disqualified from initiating or participating in the prosecution of that criminal cause.").

293. Ms. Aubuchon's conflict of interest in *Wilcox* and *Stapley II* was somewhat different than that of Mr. Thomas. It was not pecuniary, as she was not seeking damages in the RICO case. That's not to say that she did not have a personal interest in the outcome of both cases, however. She worked for Mr. Thomas, her direct boss on these cases, very closely. Her personal interest was to vindicate the positions taken by her boss against MCBOS. In addition, at the hearing in this matter, she stated that the reason for pursuing the RICO case was to have the civil division returned to her office, MCAO.[455] While pursuing that goal, it was not appropriate to bring criminal charges against the supervisors that could be used as leverage to obtain the return of the civil division to MCAO. Her personal interest may have been different from that of Mr. Thomas's, but the net result is the same: her representation of the State was materially limited by her personal interest in the outcome of the RICO case.

294. In fact, during the prosecution of Supervisor Wilcox, Ms. Wilcox moved to disqualify MCAO due to conflicts of interest. On February 24, 2010, Pinal County Superior Court Judge Leonardo ruled that Mr. Thomas and his office could not serve as prosecutors in *Wilcox*.[456] The issue before Judge Leonardo was whether a conflict of interest existed in the Wilcox matter so as to deprive her of fundamental fairness.[457] While the conflicts issue did not arise under the ethical rules, it is still significant that Judge Leonardo found that Mr. Thomas had four areas of conflicts of interest: 1) his retaliation against members of MCBOS for actions they carried out in concert with each other against him; 2) his attempts

455. Aubuchon Testimony, Hr'g Tr. 123:1–124:2, 135:1–136:5, Oct. 25, 2011.
456. Ex. 199, TRIAL EXB 2380–2386.
457. *Id.* at TRIAL EXB 2383.

to gain political advantage by prosecuting those who opposed him politically; 3) his political alliance with Sheriff Arpaio, who targeted members of MCBOS; and 4) his duty to provide confidential, uncompromised legal advice to the members of MCBOS on matter forming the basis of charges in the indictment.[458]

Judge Leonardo went on to describe the conflicts of interest that Mr. Thomas had:

> There has been a very public confrontation ongoing between [MCAO] and [MCBOS] concerning a number of issues including the propriety of the MCAO to act as legal counsel to the [MCBOS] while at the same time pursuing a criminal investigation of its members; the ability of the [Board] to decline to approve the request of MCAO to appoint special prosecutors to prosecute criminal cases against Board members; the federal civil RICO suit filed by the MCAO against [MCBOS] alleging that members of the Board, including [Ms. Wilcox], conspired to have Mr. Thomas's license to practice law revoked by the state bar, and threatened to attempt to recover legal fees from Thomas and his wife if he sued the Board; the [Board's] reduction of the civil budget of MCAO by six million dollars; and the attempts by both sides to obtain investigative information from the other.[459]

295. This Panel is fully aware that Judge Leonardo's findings regarding Mr. Thomas' conflicts of interest are not binding here.[460] However, the Panel has considered Judge Leonardo's ruling and agrees with its analysis. Both Mr. Thomas and Ms. Aubuchon had too much at stake personally to provide conflict-free representation to the State in the *Wilcox* prosecution. Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2).

458. *Id.* at TRIAL EXB 2383–2384.
459. *Id.* at TRIAL EXB 2385.
460. *In re* Levine, 174 Ariz. 146, 154–156, 847 P.2d 1093, 1101–1103 (1993).

CLAIM TWENTY-TWO: ER 4.4(a) (FILING CHARGES TO EMBARRASS OR BURDEN) (THOMAS AND AUBUCHON)

296. Claim Twenty-two alleges that Mr. Thomas and Ms. Aubuchon violated ER 4.4(a) by prosecuting Supervisor Wilcox and Supervisor Stapley (for a second time) not to pursue justice, but to embarrass or burden the Supervisors.

297. Claim Four alleges a violation of the same Rule in connection with Mr. Thomas and Ms. Aubuchon's prosecution of Supervisor Stapley in *Stapley I*. As noted above, this Panel's role in adjudicating a 4.4(a) allegation is to determine the respondent's substantial purpose or purposes behind bringing a claim or charge.[461] The existence of an objectively proper purpose—the pursuit of justice—does not automatically defeat the application of Rule 4.4(a), as it requires an attorney act with "no *substantial* purpose" other than to cause embarrassment, delay, or harassment. ER 4.4(a)(emphasis added). While the pursuit of justice is often a substantial purpose, even it may be dwarfed by another overriding objective.

298. Mr. Thomas' disputes with MCBOS were contentious and extensive, and are well-documented throughout this Report. The same holds true for Mr. Thomas' disputes with Supervisor Stapley individually. The abundant evidence clearly and convincingly demonstrates that the purpose behind these indictments was control and intimidation—not conviction. Whether or not Supervisors Stapley and Ms. Wilcox deserved to be indicted does not alter the proposition that a prosecutor cannot wield his or her enormous power for primarily political purposes. As for Ms. Aubuchon, her direct involvement with the disputes between MCAO and MCBOS may have been less personal, but her consistent

461. *See* Claim Four.

involvement in investigations and prosecutions of Mr. Thomas' political foes evince a desire to serve Mr. Thomas' ends. Her purpose is not rendered any more proper by a lack of personal participation in the original disputes. In any event, Mr. Thomas' conflicts are imputed to Ms. Aubuchon under ER 1.10(a) and ER 1.0(c).

299. The Panel finds that Mr. Thomas and Ms. Aubuchon violated ER 4.4(a) by prosecuting Supervisors Wilcox and Stapley for no substantial purpose other than to embarrass and burden them.

CLAIM TWENTY-THREE: ER 1.7(a)(2) (CONFLICTS OF INTEREST)(THOMAS AND AUBUCHON)

300. Claim Twenty-three alleges that Mr. Thomas and Ms. Aubuchon had a conflict of interest in prosecuting Supervisor Stapley in *Stapley II*. Specifically, IBC argues that Mr. Thomas's and Ms. Aubuchon's ability to represent the State was materially limited by their personal interests in the prosecution. As was noted in Claim Five, ER 1.7(a)(2) does not define which "interests" trigger the operation of the rule.[462] Suffice to say that "any interest that is inconsistent with the prosecutor's duty to safeguard justice is a conflict that potentially could violate a defendant's right to fundamental fairness."[463]

301. If Mr. Thomas's animosity towards Supervisor Stapley was present during the investigation and prosecution underlying *Stapley I*, it was only exacerbated by the time *Stapley II* began. In addition, by this time Mr. Thomas and Ms. Aubuchon had filed the civil RICO case seeking money damages from Mr. Stapley and Ms. Wilcox. As was noted in Claims Five and Twenty-one, a

462. *See* R. Sup. Ct. Ariz., ER 1.7 cmts. 10, 11, 12 (discussing business, family relationship, and sexual relationship interests).
463. *See* Villalpando, 211 Ariz. at 309, 121 P.3d at 176.

prosecutor that sues an individual criminally and civilly has a conflict in that he or she may use the criminal case to gain a favorable outcome in the civil case.[464] Ms. Aubuchon's personal interests, equally likely to act as a material limitation on her representation of the State, are outlined in Claim Twenty-one.

302. The Panel finds that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2) by prosecuting Supervisor Stapley when their personal interests acted as a material limitation on their representation of the State.

THE CLAIMS REGARDING JUDGE GARY DONAHOE

303. Claims Twenty-four through Thirty involve the actions of Mr. Thomas and Ms. Aubuchon taken against Judge Gary Donahoe.

304. There is no allegation that Respondent Rachael Ms. Alexander was involved in any way with the counts regarding Judge Gary Donahoe. The use of the term "Respondents" in this portion of the ruling is for convenience only, and refers only to Mr. Thomas and Ms. Aubuchon. This Panel makes no findings and intends no suggestion that Rachael Ms. Alexander was involved in the Donahoe counts.

305. The Panel intentionally utilizes a different format for this portion of its ruling as these claims involve multiple events and such format is designed to better outline those events. First, the Panel will provide background on Judge Donahoe himself and review the core facts at issue in the claims related to his prosecution. Next, this portion of the opinion will provide additional events, facts, and testimony related to his prosecution. Finally, this portion will address

464. *See Sinclair*, 78 Md. 243 at 254, 363 A.2d 468 at 475 (1976).

whether each count involving the criminal prosecution of Judge Donahoe has been proven by clear and convincing evidence.

JUDGE GARY DONAHOE

306. In October of 1989 Gary Donahoe was appointed a Commissioner with the Superior Court of Arizona in Maricopa County. In the summer of 2000 he was appointed Superior Court Judge by then Governor Jane Hull. For years, pursuant to Rule 1.2 of the *Local Rules of Practice for the Superior Court, Maricopa County*, Superior Court Judges serving in Maricopa County have been assigned to one of seven specialized divisions. Under the rotation policy in Maricopa County, he was rotated over time to different specialized divisions. Judge Donahoe served in five of those specialized divisions.

307. He was initially assigned to the Civil Division for three and one half years. His next assignment was to the Criminal Division where he worked for three and one half years. He was then transferred again and worked in the Domestic Relations Division for approximately one and a half years. This was followed by a rotation to the Special Assignment Division where he handled special assignment criminal cases.

308. Sometime between August and September of 2008 Judge Donahoe was approached by Presiding Judge Barbara Mundell and requested to accept appointment as Presiding Criminal Court Judge when Presiding Criminal Court Judge Anna Baca retired. Judge Donahoe stated his intention to retire from the bench in October, 2009 but was requested to extend his retirement date until June 1, 2010 to coincide with the expiration of the term of Barbara Mundell as Presiding Judge. He agreed and "shadowed" Judge Baca for six to eight weeks

to learn the duties of Presiding Criminal Judge. There was no Criminal Presiding Judge Manual or written procedure to assist him in this position nor is there are requirement that there be one. However, there are local rules and handed down tradition that preexisted his service. When Judge Baca retired from the bench in mid-January, 2009, he was appointed Presiding Criminal Court Judge. Later, at his request he was rotated to the Probate Division where he worked until his retirement.[465]

309. His testimony regarding the traditional duties of the Presiding Criminal Court Judge in Maricopa County was not refuted.

> **Q**: And can you tell the hearing panel, what does the presiding criminal judge of Maricopa County Superior Court do?
> **A**: It's not written down anyplace, so it's-you have administrative responsibilities. I was responsible administratively to make sure that the criminal department processed in a timely manner and an appropriate manner -- we had 34,000 to 36,000 felony cases each year. We had just started to implement the master calendar system. You probably don't want the details of that, but I was responsible for getting that up and running and working out the administrative issues with that. We were overwhelmed with capital cases. I think at the time I started in January of 2009 we had 125 to 130 capital cases, probably more capital cases than any county in the United States. Had to come up with a way to administer those and get those processed. I was responsible for, administratively, for 50 judges and commissioners and their staff. Then I had judicial duties, too. I empanelled all the county grand juries, handled any issues that came up with the county grand juries also, empanelled the state grand jury every six months, handled any issues that may have arose from that grand jury. Handled all the wiretap applications for Maricopa County, certain types of search warrants that couldn't be handled through our search warrant center, handled motions for change of judge for cause in the criminal department. Did several ex-parte hearings when a

465. Donahoe Testimony, Hr'g Tr. 61:13–55:22, Oct. 5, 2011.

> defendant would want to remove his or her lawyer from a criminal case or if the lawyer wanted to withdraw from a criminal case. So I would do that. Just a variety of things. Those are some of them.[466]

310. In summation the Hearing Panel finds the duties of the presiding criminal court judge in the Maricopa County division of the Superior Court of Arizona included at the time of these events but were not limited to:

1) Empanelling all grand juries in Maricopa County, both County and State.
2) Handling any issue that arose or case that involved any grand jury in Maricopa County.
3) Handling all the wiretap applications for Maricopa County and certain types of search warrants that couldn't be handled through the search warrant center.
4) Exercising general administrative supervision of the criminal calendar,
5) Assignment and reassignment of criminal cases.

311. The Panel finds these duties to be among the "traditional" duties of the Presiding Criminal Court Judge in the Superior Court of Arizona, Maricopa County and these duties were know by Respondents.

THE CORE FACTS REGARDINGTHE FILING OF CHARGES AGAINST JUDGE DONAHOE

312. Judge Donahoe had scheduled a hearing for the afternoon of December 9, 2009 regarding the Notice and Motion filed by Thomas Irvine and Edward Novak on behalf of the County.[467] The motion filed for MCBOS by Irvine and Novak sought an order prohibiting special deputy county attorneys from appearing before a grand jury.

466. Donahoe Testimony, Hr'g Tr. 62:12–63:21, Oct. 5, 2011.
467. Ex. 137, TRIAL EXB 01644–83.

313. On December 9, 2009, under Mr. Thomas's authority and with his approval, Ms. Aubuchon through MCSO detectives filed a criminal case against Judge Donahoe.[468] Mr. Thomas made the decision to file a direct complaint against Judge Donahoe following a meeting with Ms. Aubuchon, Mr. Hendershott, and Sheriff Arpaio.[469] Mr. Thomas and Ms. Aubuchon denied that they wanted to file the charges against Judge Donahoe to stop that hearing.[470] However, as discussed below, the Hearing Panel concludes that the evidence is clear and convincing that Mr. Thomas, Ms. Aubuchon, Sheriff Arpaio and then-Deputy Chief Hendershott decided to file the charges against Judge Donahoe so that he would not hold the December 9, 2009 hearing.

314. Ms. Aubuchon and Detective Gabe Almanza signed the direct complaint.[471] It charged the judge with hindering, obstruction and bribery.[472] There was no investigation in this matter prior to the filing of the direct complaint.[473] Only after the direct complaint was filed did MCSO create a report.[474]

315. Ms. Aubuchon attempted to file the charges against Judge Donahoe a day earlier on December 8, 2009, after a meeting with Mr. Thomas, Sheriff Arpaio and Mr. Hendershott.

316. On the afternoon of December 8, 2009, Chief Deputy Hendershott of MCSO called Sgt. Rich Johnson about filing a case against Judge Donahoe.[475] Chief

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468. Ex. 163, TRIAL EXB 01905–1914.
469. Hendershott Testimony, Hr'g Tr. 78:5–79:16, 110:5–111:1, 116:9–14, Oct. 13, 2011; Thomas Testimony, Hr'g Tr. 171:24–172:5, 172:16–23,176:21–178:22, Oct. 26, 2011; Aubuchon Testimony, Hr'g Tr. 173:9–181:18, Oct. 25, 2011.
470. Thomas Testimony, Hr'g Tr. 178:18–180:10, Oct. 26, 2011; Aubuchon Testimony, Hr'g Tr. 181:10–182:1, Oct. 25, 2011.
471. Ex. 163, TRIAL EXB 01906.
472. Ex. 163, TRIAL EXB 01905–06.
473. Johnson Testimony, Hr'g Tr. 11:10–12:23, 14:13–15:9, Oct. 11, 2011; Almanza Testimony, Hr'g Tr. 136:25–137:7, Oct. 11, 2011.
474. *See* Ex. 158, TRIAL EXB 01866–69, MCSO Supplemental Report concerning Judge Donahoe, dated December 9, 2009; Ex. 159, TRIAL EXB 01870–77, another MCSO Supplemental Report, also dated December 9, 2009.
475. Johnson Testimony, Hr'g Tr. 11:18–25, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 100:4–11, Oct. 14, 2011.

Deputy Hendershott told Sgt. Johnson that they needed it done "now."[476] MCSO Sgt. Brandon Luth, Sgt. Johnson and Deputy Chief Young called Ms. Aubuchon on the afternoon of December 8, 2009, to ask her what was going on and what they needed to charge.[477] Ms. Aubuchon stated they needed a Form 4, a DR (departmental report) and a probable cause statement.[478] Ms. Aubuchon told the MCSO officers she wanted to charge bribery and related charges.[479] Sgt. Luth did not know what to write.[480] Sgt. Luth's orders were to put the case together and accompany Detective Cooning to "walk it through" that evening.[481]

317. Later in the afternoon of December 8, 2009, Ms. Aubuchon, Chief Young, Sgt. Luth, Sgt. Johnson and Chief Hendershott met.[482] Chief Hendershott told them about the racketeering lawsuit, and that they thought Judge Donahoe was going to throw MCAO off all County investigations.[483] Chief Hendershott said that he had met with Mr. Thomas, Ms. Aubuchon, and Sheriff Arpaio, and that Sheriff Arpaio came up with the idea of charging the judge.[484] Chief Hendershott told Sgt. Luth to use as the material for the Form 4, or probable cause ("PC") statement, a complaint that the Chief Deputy had submitted to the Commission on Judicial Conduct against Judge Donahoe.[485] Chief Hendershott

476. Johnson Testimony, Hr'g Tr. 14:13–22, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 100:4–11, Oct. 14, 2011.
477. Johnson Testimony, Hr'g Tr. 12:1–16, Oct. 11, 2011.
478. A "Form 4" is a document for processing a person in custody. It includes a probable cause statement, which aids the hearing officer in making a decision concerning future detention or release. Marshall Testimony, Hr'g Tr. 161:5–20, Sept. 19, 2011. The probable cause statement should contain evidence of all of the elements of an offense. Novitsky Testimony, Hr'g Tr. 72:18–73:9, Oct. 6, 2011; Luth Testimony, Hr'g Tr. 100:21–23, Oct. 14, 2011.
479. Johnson Testimony, Hr'g Tr. 12:1–13, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 100:21–25, Oct. 14, 2011.
480. Luth Testimony, Hr'g Tr. 100:21–101:11, Oct. 14, 2011.
481. Luth Testimony, Hr'g Tr. 111:20–112:3, Oct. 14, 2011.
482. Johnson Testimony, Hr'g Tr. 12:24–13:9, Oct. 11, 2011.
483. Luth Testimony, Hr'g Tr. 101:12–102:16, Oct. 14, 2011.
484. Luth Testimony, Hr'g Tr. 101:14–102:16, Oct. 14, 2011; Arpaio Testimony, Hr'g Tr. 53:25–55:18, Oct. 18, 2011.
485. Johnson Testimony, Hr'g Tr. 13:10–18, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 102:17–103:1, Oct. 14, 2011. Chief Deputy Hendershott's judicial complaint against Judge Donahoe is Ex. 241, TRIAL EXB 03306–09.

printed off his complaint and wrote the charges on it. [486] At the hearing in this case, Mr. Hendershott was unable to describe any criminal conduct by Judge Donahoe.[487]

318. Sgt. Luth drafted the PC statement using Chief Deputy Hendershott's judicial complaint[488] at Ms. Aubuchon's direction.[489]

319. Sgt. Johnson called MCSO's dispatch unit and obtained a Departmental Report number for the case.[490] At about 5:00 p.m., Sgt. Luth took the Donahoe charging documents to Ms. Aubuchon. She read them. She said that "it worked for her."[491] Ms. Aubuchon signed the complaint as Deputy County Attorney.

320. Ms. Aubuchon attempted to have an investigator from MCAO file the direct complaint in Superior Court in the late afternoon or early evening of December 8, 2009. Ms. Aubuchon assigned the task of filing the direct complaint to MCAO investigator Lt. Richard Hargus.[492] Lt. Hargus then asked MCAO Detective Timothy Cooning to meet an MCAO clerk in front of the court at 5:30 p.m.[493] Det. Cooning did so, and the clerk handed him the Donahoe file. Det. Cooning read the file, returned to his office, and informed Lt. Hargus that he felt uncomfortable swearing to the truthfulness of the complaint against Judge Donahoe because he had not investigated the case.[494] Det. Cooning also was uncomfortable signing the probable cause statement because it was unclear what crimes had been committed and who had investigated them.[495]

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486. Luth Testimony, Hr'g Tr. 103:12–23, Oct. 14, 2011.
487. Hendershott Testimony, Hr'g Tr. 81:17–89:9, Oct. 13, 2011.
488. Sgt. Johnson's Testimony, Oct. 11, 2011, p. 14, ln. 3–6; Luth Testimony, Hr'g Tr. 107:10–108:1, Oct. 14, 2011.
489. Hendershott Testimony, Hr'g Tr. 78:21–79:16, Oct. 13, 2011
490. Johnson Testimony, Hr'g Tr. 14:7–15:6, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 108:13–18, Oct. 14, 2011.
491. Luth Testimony, Hr'g Tr. 110:9–111:7, Oct. 14, 2011.
492. Ex. 155, TRIAL EXB 01851–54.
493. Cooning Testimony, Hr'g Tr. 138:7–139:11, Oct. 13, 2011.
494. Cooning Testimony, Hr'g Tr. 138:7–140:5, Oct. 13, 2011.
495. Cooning Testimony, Hr'g Tr. 147:16–148:15, Oct. 13, 2011.

321. Lt. Hargus told his superior, Commander Stribling, that Lt. Hargus and Detective Cooning did not want to file the complaint because there was no probable cause to support it.[496] Commander Stribling agreed that none of his detectives should be put in the position of walking through a complaint on a sitting Superior Court judge when he knew nothing about the investigation that led up to the filing of the complaint.[497] The commissioner assigned to the evening court might ask the detective questions, and the detective would not know what to say.

322. Commander Stribling called Mr. Thomas. Commander Stribling informed Mr. Thomas that Ms. Aubuchon was asking Lt. Hargus and Det. Cooning to get the *Donahoe* complaint filed.[498] Commander Stribling told Mr. Thomas that based on what Lt. Hargus and Det. Cooning had told him, there was no probable cause to support the complaint.[499] Commander Stribling told Mr. Thomas that he refused to have his detective walk through a complaint about which the detective had no knowledge.[500] Mr. Thomas agreed, but insisted that the complaint be filed no later than the next morning.[501]

323. Commander Stribling then called Ms. Aubuchon to explain his decision. The conversation was heated.[502] Commander Stribling suggested that MCSO Sgt. Brandon Luth file the complaint, since he was with the MACE Unit. Eventually, Ms. Aubuchon acquiesced.[503]

324. Because Commander Stribling had refused to have MCAO investigators "walk it through," Ms. Aubuchon turned to the sheriff's office to assist her in

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496. Stribling Testimony, Hr'g Tr. 87:16–88:6, Oct. 4, 2011.
497. Stribling Testimony, Hr'g Tr. 89:10:24, Oct. 4, 2011.
498. Stribling Testimony, Hr'g Tr. 90:10–17, Oct. 4, 2011.
499. Stribling Testimony, Hr'g Tr. 90:17–19, Oct. 4, 2011.
500. Stribling Testimony, Hr'g Tr. 90:19–91:8, Oct. 4, 2011.
501. Stribling Testimony, Hr'g Tr. 91:9–13, Oct. 4, 2011.
502. Stribling Testimony, Hr'g Tr. 91:14–92:12, Oct. 4, 2011.
503. Stribling Testimony, Hr'g Tr. 92:13–93:1, Oct. 4, 2011.

filing the *Donahoe* complaint.[504] At Hargus's instruction, at 6:00 that evening Det. Cooning met Sgt. Luth in front of Det. Cooning's office and gave Sgt. Luth the direct complaint. Det. Cooning told Sgt. Luth he refused to swear to the complaint.[505] Sgt. Luth called Ms. Aubuchon and handed the phone to Det. Cooning. Ms. Aubuchon told Det. Cooning she "can't believe this" and "this is outrageous" and hung up on Det. Cooning.[506] Det. Cooning then agreed to meet Sgt. Luth at the IA court a few minutes later, where Sgt. Luth was to file the complaint. Once there, however, Sgt. Luth refused to file the complaint.[507]

325. Sgt. Luth did not want to file the complaint against Judge Donahoe because he did not want to answer questions by the court about the case when it was filed.[508] He arranged for Det. Almanza and Det. Tennyson to meet with him the next morning.[509]

326. On the morning of December 9, 2009, Sgt. Luth, Det. Almanza and Det. Tennyson met with Ms. Aubuchon.[510] Ms. Aubuchon handed Sgt. Luth the complaint against Judge Donahoe, which she had drafted, with the probable cause statement attached.[511] Sgt. Luth asked Ms. Aubuchon whether she had enough evidence to charge Judge Donahoe.[512] Ms. Aubuchon referred to past court filings and decisions and outlined for Sgt. Luth why she believed Judge Donahoe should be charged with crimes.[513] This struck Det. Almanza as bizarre

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504. *See* Ex. 155, TRIAL EXB 01852, which states: "Complaint returned to MCSO Case Agent for filing", and TRIAL EXB 01854, a sticky note indicating that MCSO Detective Brandon Luth would meet MCAO's agent at the IA court.
505. Cooning Testimony, Hr'g Tr. 141:3–142:7, Oct. 13, 2011.
506. Cooning Testimony, Hr'g Tr. 141:3–143:9, Oct. 13, 2011.
507. Cooning Testimony, Hr'g Tr. 143:11–144:14, Oct. 13, 2011, Ex. 156, TRIAL EXB 1855–57.
508. Almanza Testimony, Hr'g Tr. 125:4–16, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 113:6–13, Oct. 14, 2011.
509. Almanza Testimony, Hr'g Tr. 125:17–19, Oct. 11, 2011.
510. Almanza Testimony, Oct. 11, 2011, Hr'g Tr. 126:1–17, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 117:5–12, Oct. 14, 2011.
511. Almanza Testimony, Hr'g Tr. 126:22–127:10, Oct. 11, 2011.
512. Almanza Testimony, Hr'g Tr. 126:22–127:16, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 117:17–118:4, Oct. 14, 2011.
513. Almanza Testimony, Hr'g Tr. 127:17–128:9, Oct. 11, 2011.

because Ms. Aubuchon was telling Sgt. Luth what the evidence was, rather than the usual procedure, in which the investigator informs the prosecutor of the evidence.[514]

327. Sgt. Luth and the detectives left the meeting. Sgt. Luth took the complaint he had received from Ms. Aubuchon, along with documents Ms. Aubuchon had printed off of her computer.[515]

328. The complaint was filed the same morning of December 9, 2009.[516] Detective Gabriel Almanza signed it under oath.[517] Sgt. Luth told Det. Almanza to sign it.[518] Det. Almanza was not comfortable doing so, because he had not been involved in drafting the complaint and he had no knowledge as to the truth or falsity of it.[519] Det. Almanza had never filed a complaint before.[520] Sgt. Luth assured Det. Almanza that Ms. Aubuchon believed she had enough evidence to charge the judge.[521] Det. Almanza signed it based on his reliance on Ms. Aubuchon's good faith.[522]

329. MCSO Detectives Almanza and Tennyson served the direct complaint on Judge Donahoe.[523] They secretly recorded the service.[524] After Judge Donahoe was served, Sgt. Luth was ordered to take a copy of the direct complaint to Ms. Aubuchon and Chief Deputy Hendershott.[525] When Sgt. Luth gave the copy of the complaint to Ms. Aubuchon, she said she already received an email notifying

514. Almanza Testimony, Hr'g Tr. 128:10–129:17, Oct. 11, 2011.
515. Almanza Testimony, Hr'g Tr. 129:15–130:8, 133:7–10, Oct. 11, 2011.
516 Ex. 163, TRIAL EXB 01905–14.
517. Almanza Testimony, Hr'g Tr. 120:21–121:17, Oct. 11, 2011.
518. Almanza Testimony, Hr'g Tr. 132:5–20, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 119:8–120:7, Oct. 14, 2011.
519. Almanza Testimony, Hr'g Tr. 121:21–124:8, 132:17–133:6, Oct. 11, 2011.
520. Almanza Testimony, Hr'g Tr. 130:4–23, Oct. 11, 2011.
521. Almanza Testimony, Hr'g Tr. 133:11–22, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 119:20–120:7, Oct. 14, 2011.
522. Almanza Testimony, Hr'g Tr. 133:23–134:5 Oct. 11, 2011.
523. Almanza Testimony, Hr'g Tr. 134:6–25, Oct. 11, 2011.
524. Johnson Testimony, Hr'g Tr. 16:2–17:12, Oct. 11, 2011; Almanza Testimony, Hr'g Tr. 135:1–22, Oct. 11, 2011.
525. Luth Testimony, Hr'g Tr. 120:12–20, Oct. 14, 2011.

her that Judge Donahoe had vacated the hearing that had been set for later that afternoon.[526] She appeared pleased and happy.[527] Sgt. Luth then gave the complaint to Chief Deputy Hendershott, explaining that the complaint had been served and that he had just met with Ms. Aubuchon.[528] Chief Deputy Hendershott said, "checkmate."[529]

THE CRIMINAL COMPLAINT FILED AGAINST JUDGE GARY DONAHOE— TESTIMONY OF THOSE INVOLVED

330. Sgt. Brandon Luth testified regarding the meeting held the day before, stating:

> I know that it was brought up in the first meeting with Chief Hendershott when Lisa Aubuchon was there, because that's in my own handwritten notes where, you know, it mentions, you know, the hearing the next day. You know, and that -- the meeting that Chief Hendershott had told me that Andrew Thomas, Lisa Aubuchon, the sheriff, and himself had attended, that was **the purpose of their meeting was to determine how to deal with the hearing for the next day, and the end result was that Donahoe complaint**, so that's my answer.[530]

331. On the pleadings that were filed throughout these various matters, there was a practice that Ms. Aubuchon prior to filing such documents would consult with Andrew Thomas. The pleadings would be given to him, he would review them, make changes as he chose and those changes were generally implemented by Ms. Aubuchon.[531] However, Andrew Thomas personally knew what documents constituted the charging documents and the probable cause

526. Luth Testimony, Hr'g Tr. 121:1–8, Oct. 14, 2011.
527. Luth Testimony, Hr'g Tr. 121:9–13, Oct. 14, 2011.
528. Luth Testimony, Hr'g Tr. 121:17–122:4, Oct. 14, 2011.
529. Luth Testimony, Hr'g Tr. 122:1–5, Oct. 14, 2011.
530. Luth Testimony, Hr'g Tr. 115: 16–26, Oct. 14, 2011 (emphasis added).
531. Aubuchon Testimony, Hr'g Tr. 18:1–22, Oct. 25, 2011.

statement and directed the filing of those criminal charging documents against Judge Donahoe.

332. The testimony of Chief Deputy Hendershott sheds light on Mr. Thomas's knowledge of and involvement in the direct complaint:

> Q: Can you explain how the excerpt from your complaint against Judge Donahoe ended up in a public cause statement attached to the direct complaint?
> **A: Sure. I believe on the day that the decision was made by Mr. Thomas to do a direct complaint against Judge Donahoe, myself, Sheriff Arpaio, Lisa Aubuchon and Andy Thomas attended a meeting in the afternoon in Mr. Thomas's office for what I would say was approximately two hours.**[532]
>
> **A: short time later, maybe half hour, 45 minutes later, I received a call from Lisa Aubuchon. Lisa Aubuchon said that Mr. Thomas wanted to issue a direct indictment. I asked her specifically what should we use in the probable cause statement. She indicated that we could use what was already in the judicial complaint and so that's exactly what we did.**[533]

333. Ms. Aubuchon helped write and approved the probable cause statement and wrote and signed the criminal complaint against Judge Gary Donahoe at the direction of Mr. Thomas. Respondents affirmed the accuracy of the documents by her signature and they assured that the complaint was filed on December 9, 2009. A specific request was made that no warrant issue.

532. Hendershott Testimony, Hr'g Tr. 78:5–13, Oct. 13, 2011.
533. Hendershott Testimony, Hr'g Tr. 79:9–16, Oct. 13, 2011.

Filing a Criminal Complaint in Arizona Overview

a. The rule governing the filing of a criminal complaint

334. In Arizona, felonies charges may be commenced by either indictment of the Grand Jury or by the filing of a complaint before a magistrate.[534] As defined in Rule 2.3 of the *Rules of Criminal Procedure*, "a complaint is a written statement of the essential facts constituting a public offense."[535] It may be signed by a prosecutor, or made upon oath before a magistrate, typically by a law enforcement officer, or both.

b. The traditional process under the Arizona Rules of Criminal Procedure

> Rule 2.4. Duty of magistrate upon filing of complaint.
>
> a. If a complaint is made upon oath before a magistrate, the magistrate shall make a determination whether there is probable cause to believe an offense has been committed and the defendant committed it. The magistrate shall then proceed under Rule 3.1 if a determination of probable cause is made. If no such determination is made, the magistrate shall dismiss the complaint.
>
> b. If a complaint is signed by a prosecutor, the magistrate shall proceed under Rule 3.1.

335. Rule 2.4(a) of the Arizona Rules of Criminal Procedure require that when a complaint is made upon oath before a magistrate, "the magistrate shall make a determination whether there is probable cause to believe an offense has been committed and the defendant committed it… If no such determination is made,

534. Ariz. R. Crim. P. 2.2.
535. *Id.* 2.3.

the magistrate shall dismiss the complaint."[536] This is a fundamental right with its origins in the Constitution of the United States. Amendment IV of the United States Constitution requires that "no warrants shall issue but upon probable cause supported by oath or affirmation…describing the person(s)… to be seized." In Arizona, "The Constitution of the United States is the supreme law of the land."[537]

336. Typically when a complaint is made upon oath or upon information and belief, it becomes the duty of the magistrate to inquire as to the sources of the complainant's information and the grounds of his belief. The magistrate should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.[538] The Arizona Supreme Court has ruled that "[t]he purpose of Rule 2.4 is to ascertain 'whether probable cause exists to believe that a named, or adequately described, defendant committed a public offense.'"[539]

c. *The nontraditional process used with Judge Gary Donahoe.*

337. Under Rule 2.4, if a complaint is signed by a prosecutor, no probable cause finding is required to be made by the magistrate except under certain conditions that did not apply in this case. Instead the magistrate "shall proceed under Rule 3.1" to issue a warrant or a summons. If a warrant is requested, a Magistrate must find probable cause to grant the request.

> Upon presentment of a complaint signed by a prosecutor, the court shall…after a finding of probable cause, issue a warrant.[540]

536. *Id.* 2.4(a).
537. ARIZ. CONST. art. VI, §3.
538. Kuhn v. Smith, 154 Ariz. 24, 739 P.2d 1341 (Ct. App. 1987).
539. Flager v. Derickson, 134 Ariz. 229, 655 P.2d 349 (1982).
540. Ariz. R. Crim P. 3.1(a).

338. Ms. Aubuchon testified about this process:

> Q: Now, before I get to that, you signed the Probable Cause -- you signed the Direct Complaint against Judge Donahoe?
> **A: Correct.**
> Q: And when you drafted the Direct Complaint against Judge Donahoe, there's a signature line for somebody else, correct, the "Complainant"?
> **A: There is a signature line. It's not required, but yes.**
> Q: Well, whether or not it's required, you included it; correct?
> **A: Yes.**
> Q: And you included the language below it that says, "Subscribed and sworn upon information and belief this 9 day of December, 2009"; correct?
> **A: Yes.**
> Q: And that's because that's the form, that's the form that the Direct Complaint follows; correct?
> **A: It's the form, but that part is optional.**
> Q: And was it your understanding that they were going to go file it at that time?
> **A: Yes**.[541]
>
> Q: And you knew that someone was going to sign that Complaint, didn't you?
> **A: Not necessarily, no.**
> Q: "Not necessarily." What do you mean by "not necessarily"?
> **A: In–there's a Criminal Rule, 2.4, that says that a complaint is valid and filed upon a signature of a prosecutor. It does not need a judge to determine probable cause; it does not need a law enforcement officer to sign it. It is filed**.[542]

339. Ms. Aubuchon signed her affirmation to the complaint *and* requested no warrant be issued, removing any requirement of an initial finding of probable cause by the magistrate to proceed with the case. The Hearing Panel finds that Respondents intentionally had Ms. Aubuchon sign the complaint and not request

541. Aubuchon testimony, Hr'g Tr. 189:18–190:11, Oct. 25, 2011.
542. Aubuchon testimony, Hr'g Tr. 197:23–198:10, Oct. 25, 2011.

a warrant to preclude a probable cause review by the Magistrate to avoid the complaint being summarily dismissed.

d. *The required probable cause statement*

340. Rule 41 of the Criminal Rules of Procedure lists certain forms which are utilized for the processing of such a criminal complaint. Included among those forms is Form 4. Form 4 under Rule 41 directs that the Probable Cause Statement shall "explain the crime(s) in detail."[543] That detail is to include the name of the person who witnessed the event and a listing of the physical evidence which connected Judge Gary Donahoe to the offenses charged. None of that required information was listed by Ms. Aubuchon in the probable cause statement. Form 4 provides:

> Summarize and include the facts which establish probable cause for the crime(s) charged. Certain felonies may be non-bondable and require facts which establish proof evident or presumption great for the crime(s) charged. These include (1) felonies involving a capital offense, sexual assault, sexual conduct with a minor who was under fifteen years of age, or molestation of a child who is under fifteen years of age, (2) any class 1, 2, 3, or 4 felony or any violation of 28-1383 if the person has entered or remained in the United States legally, and (3) felony offenses committed when the person charged is already admitted to bail on a separate felony charge.
>
> Explain the crime(s) in detail (e.g., arresting officer or other law enforcement officers witnessed offense, physical evidence directly connects defendant to offense, multiple eyewitnesses, defendant admissions, victim statements, nature of injuries, incriminating photographic, audio, visual, or computer evidence, defendant attempted to flee or resist arrest).[544]

543. Ariz. R. Crim. P. 41, form 4.
544. *Id.*

The Drafting of the Criminal Complaint.

a. Knowing the MCSO officers knew nothing about the alleged crimes, Ms. Aubuchon instructed them to draft the criminal complaint and accompanying documents declaring they "would have time to put the case together afterwards."

341. Sgt. Brandon Luth gave testimony on the criminal complaint:

> Q: Were you concerned?
> **A: I had concerns, yes.**
> Q: What were your concerns?
> **A: That normally when we prepare a case, we do the full investigation and we bring that information to a prosecutor and go that route. This was a cart in front of the horse scenario. I had great concerns, because it was a judge and all I had knowledge of was motions and rulings that he had made, and I thought for me, I thought that judges have some level of judicial immunity in things and I didn't understand it. They didn't have my buy-in. I was very concerned.**[545]

342. Respondents knew that neither MCAO investigators nor MCSO officers or deputies knew anything about the allegations regarding Judge Donahoe. None of them had done any investigation regarding him. Notwithstanding, Ms. Aubuchon instructed MCSO officers to prepare the criminal complaint, a Departmental Report (DR) and a probable cause statement.[546] She had her secretary fill out a special detail request for the MCAO to assign an investigator to file the complaint.[547] Deputy Chief Hendershott called Sgt. Johnson and told him they were going to be charges filed against Judge Donahoe. As a result, Sgt. Johnson called Sgt. Brandon Luth into his office and told him they were "going to be filing charges against Judge Donahoe that day and they wanted it

545. Luth Testimony, Hr'g Tr. 105:8–19, Oct. 14, 2011.
546. Johnson Testimony, Hr'g Tr. 12:7–16, Oct. 11, 2011.
547. Aubuchon testimony, Hr'g Tr. 192:22–193:1, Oct. 25, 2011.

served that evening."[548] They knew nothing about the allegations. Unaware of how to proceed, Johnson and Sgt. Luth called their superior, Chief Young and explained their concerns. They decided they needed to have a conference call with Ms. Aubuchon to proceed.

343. They called Ms. Aubuchon on the afternoon of December 8, 2009. Ms. Aubuchon stated they needed a Form 4, a DR (departmental report) and a probable cause statement. Ms. Aubuchon told the MCSO officers she wanted to charge Judge Donahoe with Hindering prosecution, bribery and related charges.[549] Sgt. Luth did not know what to write. Ms. Aubuchon instructed him what she wanted and said "put all that stuff together so the documents could be drafted." She concluded telling them that they "would have time to put the case together afterwards." Sgt. Johnson immediately recused himself from the case.[550]

b. The officers are informed that Mr. Thomas, Ms. Aubuchon, Sheriff Arpaio and Mr. Hendershott want the complaint filed.

344. Ms. Aubuchon testified:

> Q: Why didn't you have Dave Hendershott sign the Complaint on -- on that blank line?
> **A. Because that's just not the normal process.**[551]
>
> Q: Now, Chief Hendershott was the witness you had testify at that hearing -- or excuse me -- at the Grand Jury about the Court tower, as you call it, obstruction case; correct?
> **A: Correct**.[552]

548. Johnson Testimony, Hr'g Tr. 100:7–11., Oct. 11, 2011.
549. Johnson Testimony, Hr'g Tr. 12:1–13, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 100:21–25, Oct. 14, 2011.
550. Luth Testimony, Hr'g Tr. 100:21–101:11, Oct. 14, 2011.
551. Aubuchon testimony 200:17–19, Oct. 25, 2011.
552. Aubuchon testimony 209:12–16, Oct. 25, 2011.

345. Not knowing what to write, Sgt. Luth again called Chief Young. Chief Young called Chief Deputy Sheriff Hendershott. Mr. Hendershott told them "we're going to filing this—filing charges, the direct complaint on Judge Donahoe." Sgt. Luth received direct orders to put the case together and accompany Detective Cooning, an investigator with the Maricopa County Attorney's Office to help "walk it through" that evening.[553]

346. Later in the afternoon of December 8, 2009, Sgt. Luth still struggled with what to write. As a result, Ms. Aubuchon, Chief Young, Sgt. Luth, Sgt. Johnson and Chief Hendershott met.[554] Chief Hendershott told them about the racketeering lawsuit, and that they thought Judge Donahoe was going to throw MCAO off all County investigations.[555] Chief Hendershott said that he had met with Mr. Thomas, Ms. Aubuchon, and Sheriff Arpaio, and that Sheriff Arpaio came up with the idea of charging the judge.[556]

The Drafting of the Probable Cause Statement

347. Regarding the initial drafting of the probable cause statement, Sgt. Boyd Richard Johnson testified:

> Q: Were you involved in any way of the preparation of charges against Judge Donahoe?
> **A: I was.**
> Q: Would you tell the hearing panel how you were involved?
> **A: Basically I remember getting a phone call from Chief Hendershott saying, "Hey, Lisa needs," what in the State of Arizona is called Form IV but a probable cause statement for the direct-"She wants to file a direct complaint against Judge Donahoe." And I remember saying, "What is this about?"**

553. Luth Testimony, Hr'g Tr. 111:20–112:3, Oct. 14, 2011.
554. Johnson Testimony, Hr'g Tr. 12:24–13:9, Oct. 11, 2011.
555. Luth Testimony, Hr'g Tr. 101:12–102:16, Oct. 14, 2011.
556. Luth Testimony, Hr'g Tr. 101:14–102:16, Oct. 14, 2011; Arpaio Testimony, Hr'g Tr. 53:25–55:18, Oct. 18, 2011.

> **We had no idea what this was about. And I remember in-I think it was in my office-but I remember a telephone call with Chief Young present, Brandon Luth, myself, calling Lisa and saying, "What is this about? The chief wants us to put together a probable cause statement on what?"**
> Q: And did you talk to Ms. Aubuchon?
> **A: We did, on the telephone.**
> Q: What did she say?
> **A: She explained it, said that she wanted to charge Judge Donahoe with bribery and other charges and that she needed us to put together the Form IV, very adamant about that**.[557]

a. The judicial ethics complaint Ms. Aubuchon helped write becomes the basis for the intial probable cause statement.

348. Sgt. Luth testified:

> Q: And what did Detective -- or Chief Deputy Hendershott tell you when you expressed those concerns to him?
> **A: That's when he provided me with the judicial complaint and said just use this information.**
> Q: So that satisfied your concerns?
> **A: No.**
> Q: Did you tell him that?
> **A: No.**
> Q: You just did what you were ordered?
> **A: Yes**.[558]

349. In the meeting with Chief Hendershott, Sgt. Johnson, Chief Young and Ms. Aubuchon, Sgt. Luth stated, "I don't know what to write in the probable cause statement." Chief Hendershott told Sgt. Luth to consider as the material for the Form 4, or probable cause ("PC") statement, a judicial complaint that the Chief Deputy Hendershott had submitted to the Commission on Judicial Conduct against Judge Donahoe.[559] Ms. Ms. Aubuchon helped Chief Hendershott prepare

557. Johnson Testimony, Hr'g Tr. 11:15–12:13, Oct. 11, 2011.
558. Luth testimony, Hr'g T. 127:4–14, Oct. 14, 2011.
559. Johnson Testimony, Hr'g Tr. 13:10–18, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 102:17–103:1, Oct. 14, 2011. Chief Deputy Hendershott's judicial complaint against Judge Donahoe is Ex. 241, TRIAL EXB 03306–09.

that judicial complaint.[560] During the meeting with Ms. Aubuchon, Chief Hendershott printed off his complaint and wrote the charges on it for Sgt. Luth.[561] Sgt. Luth was "very concerned about the whole scenario."[562] At the hearing in this case, Mr. Hendershott was unable to describe any criminal conduct by Judge Donahoe.[563] Sgt. Luth copied into the PC statement Chief Deputy Hendershott's judicial complaint[564] at Ms. Aubuchon's direction.[565]

b. The "tight time frame" and the obtaining, for the first time, an investigative Departmental Report number.

350. As they began working on the probable cause statement it was obvious to Sgt. Johnson, "they were working on it and obviously had a tight time frame." When asked why it was so obvious to him, he testified, "Because so many phone calls were made, and Chief Hendershott and Lisa said, "We need it now." It was only then that Sgt. Johnson called MCSO's dispatch unit and obtained a Departmental Report number for the case.[566]

c. The Officers are Unwilling to Swear to the Truthfulness of the Charging Documents.

i. Ms. Aubuchon reviews the charging documents including the probable cause statement and says it works for her, but the MCAO investigators find no probable cause and refuse to sign or walk the complaint through.

351. MCAO Commander Stribling Testified as follows:

Q: What does an investigator do?

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560. Aubuchon Testimony, Hr'g Tr. 207:6–14, Oct. 25, 2011.
561. Luth Testimony, Hr'g Tr. 103:12–23, Oct. 14, 2011.
562. Luth 105:3.
563. Hendershott Testimony, Hr'g Tr. 81:17–89:9, Oct. 13, 2011.
564. Johnson's Testimony, Hr'g Tr.14:3–6, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 107:10–108:1, Oct. 14, 2011.
565. Hendershott Testimony, Hr'g Tr. 78:21–79:16, Oct. 13, 2011
566. Johnson Testimony, Hr'g Tr. 14:7–15:6, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 108:13–18, Oct. 14, 2011.

A: Investigate.[567]

352. Ms. Aubuchon testified as follows:

> Q: And so you knew that Mr. Stribling wasn't involved; correct?
> **A: Correct.**
> Q: And you knew that Mr. Cooning was not involved in the investigation; correct?
> **A: Correct.**
> Q: And you knew that Lieutenant Hargis wasn't involved in the investigation; correct?
> **A: Correct.**
> Q: Now, from the Sheriff's Office, did anybody that you know of, investigate the allegations against Judge Donahoe except David Hendershott?
> **A: What -- what do you mean "investigate"?**
> Q: Was there an investigation of Judge Donahoe by the Sheriff's Office before charges were filed against him?
> **A: Not an investigation in your traditional sense, no.**
> Q: Was there an investigation by Brandon Luth?
> **A: There was a report put together by Brandon Luth, yes.**
> Q: That's after Judge Donahoe was charged; correct?
> **A: Yes.**
> Q: Was there a report done by Detective Gabe Almanza before Judge Donahoe was charged?
> **A: No.**
> Q: Was there a report done by Sergeant Young before Judge Donahoe was charged?
> **A: No.**
> Q: Was there a report done by Detective Tennyson before the charges were filed against Judge Donahoe?
> **A: No.**
> Q: So is it accurate to say that nobody at the Sheriff's Office, perhaps exception -- with the exception of Hendershott, was involved in the investigation of the allegations that led to the charges against Judge Donahoe?
> **A: And Sheriff Arpaio.**[568]

353. At about 5:00 p.m., Sgt. Luth took the Donahoe charging documents to Ms. Aubuchon. She read them. She said that "it worked for her."[569] Ms. Aubuchon

567. Stribling testimony, Hr'g Tr. 13:11–12, Oct. 4, 2011.

568. Aubuchon testimony 191:1–192:12, Oct. 25, 2011.

signed the complaint as Deputy County Attorney. Ms. Aubuchon attempted to have an investigator from the Maricopa County Attorney's Office file the direct complaint in Superior Court in the late afternoon or early evening of December 8, 2009. It is undisputed that no investigator with the MCAO office knew anything about the case. There was no investigation regarding the allegations leveled against Judge Gary Donahoe prior to the filing of the direct complaint.[570] Ms. Aubuchon assigned the task of signing and filing the direct complaint to MCAO investigator Lt. Richard Hargus.[571] Lt. Hargus directed MCAO Detective Timothy Cooning to meet a MCAO clerk in front of the court at 5:30 p.m.[572]

ii. MCAO Detective Cooning finds no probable cause and refuses to swear to the truthfulness of the complaint

354. Det. Cooning met with a Maricopa County Attorney Office clerk who handed him the Donahoe file. Det. Cooning read the file, returned to his office, and informed Lt. Hargus that he felt uncomfortable swearing to the truthfulness of the complaint against Judge Donahoe because he knew nothing about the case. He had conducted no investigation into the matter. It was traditional to have an investigative officer's report attached to substantiate the allegations. There was no investigative officer's report attached because no investigation had been done. Det. Cooning didn't know who had even prepared the documents.[573] Det. Cooning also was uncomfortable signing the probable cause statement because it was unclear what crimes had been committed and who had investigated

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569. Luth Testimony, Hr'g Tr. 110:9–111:7, Oct. 14, 2011.
570. Johnson Testimony, Hr'g Tr. 11:10–12:23, 14:13–15:9, Oct. 11, 2011; Almanza Testimony, Hr'g Tr. 136:25–137:7, Oct. 11, 2011.
571. Ex. 155, TRIAL EXB 01851–54.
572. Cooning Testimony, Hr'g Tr. 138:7–139:11, Oct. 13, 2011.
573. Cooning Testimony, Hr'g Tr. 138:7–140:5, Oct. 13, 2011.

them.[574] His testimony was clear. "There was no probable cause whatsoever to walk this complaint".[575]

iii. MCAO Lieutent Hargus finds no probable cause and refuses to swear to the truthfulness of the complaint.

355. Lt. Hargus agreed with the assessment of Det. Cooning. He informed his direct superior, Commander Stribling, that both he and Detective Cooning did not want to file the complaint because there was no probable cause to support it.[576]

iv. MCAO Commander Stribling finds no probable cause and refuses to force any of his detectives to swear to the truthfulness of the complaint.

356. Commander Stribling determined that none of his detectives should be put in the position of walking through a complaint "when they knew absolutely nothing about the investigation that led up to the filing of the complaint."[577] He told Lieutenant Hargis: "We're not going to walk through that complaint because there's no probable cause."[578] They also had concerns that the commissioner assigned to the evening court by the magistrate might ask probable cause questions, and the detective would not know what to say.

v. Commander Stribling tells Mr. Thomas of his decision and is ordered, "We need to make sure that this complaint gets walked through by midmorning tomorrow."

357. Commander Stribling informed Mr. Thomas that Ms. Aubuchon was asking Lt. Hargus and Det. Cooning to get the *Donahoe* complaint filed.[579] Commander Stribling told Mr. Thomas that based on what Lt. Hargus and Det. Cooning had

574. Cooning Testimony, Hr'g Tr. 147:16–148:15, Oct. 13, 2011.
575. Stribling Testimony, Hr'g Tr., 88:3–5, Oct. 4, 2011
576. Stribling Testimony, Hr'g Tr. 87:16–88:6, Oct. 4, 2011.
577. Stribling Testimony, Hr'g Tr. 89:10:24, Oct. 4, 2011.
578. Stribling Testimony, Hr'g Tr. 89:20–24, Oct. 4, 2011.
579. Stribling Testimony, Hr'g Tr. 90:10–17, Oct. 4, 2011.

told him, there was no probable cause to support the complaint.[580] Commander Stribling told Mr. Thomas that he refused to have any of his detectives walk through a complaint about which the detective had no knowledge. Mr. Thomas said, "Okay, but we need to make sure that this complaint gets walked through by midmorning tomorrow."[581]

vi. Ms. Aubuchon yells at Commander Stribling.

358. Commander Stribling called Ms. Aubuchon to explain his decision. When he began to explain the decision, Ms. Aubuchon began yelling at him.[582] She yelled "Why aren't you guys doing what you're supposed to do, why aren't your detectives doing what they're supposed to do." The conversation was heated.[583] Ms. Aubuchon continued yelling at him.

vii. None of the MCSO investigators will swear to its truthfulness.

359. Because of the refusal of Commander Stribling, Ms. Aubuchon turned to the sheriff's office to get the *Donahoe* complaint filed.[584]

d. The recommendation that MCSO Sgt. Brandon Luth "walk" the complaint through.

360. Sgt. Luth testified as follows:

> Q: Was Maricopa County Attorney investigator Tim Cooning correct when he said that the protocol should be for the case agent to sign the direct complaint?
> **A: I don't know.**
> Q: You didn't agree with him when he said that?

580. Stribling Testimony, Hr'g Tr. 90:17–19, Oct. 4, 2011.
581. Stribling Testimony, Hr'g Tr. 90:19–91:11, Oct. 4, 2011.
582. Stribling Testimony, Hr'g Tr.13:2–6, Oct. 5, 2011.
583. Stribling Testimony, Hr'g Tr. 91:14–92:12, Oct. 4, 2011.
584. *See* Ex. 155, TRIAL EXB 01852, which states: "Complaint returned to MCSO Case Agent for filing", and TRIAL EXB 01854, a sticky note indicating that MCSO Detective Brandon Luth would meet MCAO's agent at the IA court.

> **A: I understood his concerns and why he felt that was appropriate, but I don't know if that's proper protocol.**
> Q: It's just something you don't know the answer to; is that what you're saying?
> **A: I didn't have any experience with walking direct complaints through, so I didn't know what the process was at the time.**
> Q: In your 15-plus years -- well, it was less than 15 years at that point, you did not have much experience in walking direct complaints through?
> **A: No, I had never walked a direct complaint through**.[585]

361. Because Ms. Aubuchon headed the MACE Unit, Commander Stribling assumed MACE had done the investigation. He suggested Ms. Aubuchon use MCSO Sgt. Brandon Luth to file the complaint because he was with the MACE Unit. He assumed Sgt. Luth would know how to answer any questions about the case. However, Sgt. Brandon Luth had done no investigation regarding the Donahoe matter. He had no experience with such direct complaints. He did not know the protocol for who should sign complaints. More importantly he had never in his 15 year career "walked through" a complaint before. For respondents, he was the ideal candidate. Ms. Aubuchon responded: "Fine, we'll do it in the morning."[586]

e. Aubuchon threatens Det. Cooning for his refusal to swear to the truthfulness of the complaint.

362. Det. Cooning testified as follows:

> Q: Did you have any concerns about your job security?
> **A: Well, when I was told by Ms. Aubuchon that my conduct was outrageous and that she was calling Mr. Thomas I felt like yes, there was a possibility that there would be repercussions.**[587]

585. Luth testimony, Hr'g Tr. 128:23–129:15, Oct. 14, 2011.
586. Stribling Testimony, Hr'g Tr. 92:13–93:1, Oct. 4, 2011. Luth Testimony, Hr'g Tr. 128:23–129:15, Oct. 14, 2011.
587. Cooning testimony, Hr'g Tr. 144:21–25, Oct. 13, 2011.

363. Det. Cooning was instructed by Commander Stribling through Lieutenant Hargis to accompany the case agent assigned by the Sheriff to walk the complaint through the Magistrate. Sgt. Brandon Luth was ordered to file the documents.[588] Later that evening Det. Cooning met Sgt. Luth in front of Det. Cooning's office and gave Sgt. Luth the direct complaint. Det. Cooning told Sgt. Luth he refused to swear to the complaint.[589] Sgt. Luth called Ms. Aubuchon and handed the phone to Det. Cooning. Ms. Aubuchon told Det. Cooning that she "can't believe this" and "This is outrageous. I'm calling Mr. Thomas." She then hung up the phone on Det. Cooning.[590]

f. MCSO Sgt. Luth refuses to swear to the truthfulness of the complaint believing there was no probable cause.

364. Det. Cooning later again agreed to meet Sgt. Luth at the IA court some time later, where Sgt. Luth was to file the complaint. Once there, however, Sgt. Luth refused to file the complaint. Sgt. Luth refused to file the complaint against Judge Donahoe because he was not able to swear to the truthfulness of it. [591] He also did not want to answer questions by the court about the case when it was filed.[592]

g. Sgt. Luth calls MCSO Chief Young but they are unable to find anyone to swear to the truthfulness of the complaint.

365. Sgt. Luth called his immediate supervisor Chief Young. They brainstormed for a little bit and came up with the idea to get a deputy sheriff from the courts

588. Cooning Testimony, Hr'g Tr. 141:3–8, Oct. 13, 2011.
589. Cooning Testimony, Hr'g Tr. 141:3–142:7, Oct. 13, 2011.
590. Cooning Testimony, Hr'g Tr. 141:3–143:9, Oct. 13, 2011.
591. Cooning Testimony, Hr'g Tr. 143:11–144:14, Oct. 13, 2011, Ex. 156, TRIAL EXB 1855–57.
592. Almanza Testimony, Hr'g Tr. 125:4–16, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 113:6–13, Oct. 14, 2011.

that doesn't know anything about the case. But they were unable to. They called Mr. Hendershott who agreed they should try again in the morning.[593]

h. The Final Probable Cause Statement: "Put everything together afterwards…"

366. Regarding the final probable cause statement, Sgt. Luth testified:

> **I asked her (Ms. Aubuchon) something to the effect of are you sure, are you okay, are you good with this, and she said that she was very sure, you know, we just needed to get all the evidence together and put everything together afterwards and that she would be providing me with a lot of that information.[594]**

i. Mr. Hendershott and Ms. Aubuchon arrange the meeting. The officers are told "Put everything together afterwards…" Ms. Aubuchon drafts and prints the final criminal complaint and probable cause statement.

367. Mr. Hendershott arranged for Det. Almanza and Det. Tennyson to meet with Ms. Aubuchon the next morning.[595] On the morning of December 9, 2009, Sgt. Luth, Det. Almanza and Det. Tennyson met with Ms. Aubuchon.[596] Rather than use the complaint and probable cause statement the officers had tried to draft, Ms. Aubuchon had directed her aide to bring into the meeting a complaint and probable cause statement Ms. Aubuchon had written and printed off her computer. Ms. Aubuchon looked the documents over and then handed to Sgt. Luth the complaint against Judge Donahoe, which she had drafted, with her probable cause statement attached.[597] Sgt. Luth asked Ms. Aubuchon whether she had enough evidence to charge Judge Donahoe.[598] Ms. Aubuchon referred

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593. Luth Testimony, Hr'g Tr. 114:18–115:9, Oct. 14, 2011.
594. Luth testimony, Hr'g Tr. 117:22–118:1, Oct. 14, 2011 (emphasis added).
595. Almanza Testimony, Hr'g Tr. 125:17–19, Oct. 11, 2011.
596. Almanza Testimony, Hr'g Tr. 126:1–17, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 117:5–12, Oct. 14, 2011.
597. Almanza Testimony, Hr'g Tr. 126:22–127:10, Oct. 11, 2011.
598. Almanza Testimony, Hr'g Tr. 126:22–127:16, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 117:17–118:4, Oct. 14, 2011.

to past court filings and decisions and stated we just needed to get all the evidence together and "put everything together afterwards".[599] This struck Det. Almanza as bizarre because Ms. Aubuchon was telling Sgt. Luth what the evidence was, rather than the usual procedure, in which the investigator informs the prosecutor of the evidence.[600]

368. On this matter, Ms. Aubuchon testified:

> Q: Now, when you gave the Direct Complaint to Sergeant Luth, or the one he took with him, he left your office and took it; correct?
> **A: Yes.**
> Q: And was it your understanding that they were going to go file it at that time?
> **A: Yes.**
> Q: And you knew that someone was going to sign that Complaint, didn't you?
> **A: Not necessarily, no**.[601]
>
> Q: Did you assume someone was going to sign the Direct Complaint besides you?
> **A: I assumed that they might, yes.**
> Q: And you had no problem with someone signing the Direct Complaint?
> **A: No, I had no problem with that**.[602]

369. Sgt. Luth and the detectives left the meeting. Sgt. Luth took the complaint and probable cause statement he had received from Ms. Aubuchon which she had printed off of her computer.[603] Ms. Aubuchon knew that neither of them were involved in the investigation or had any knowledge of the allegations she was leveling against Judge Donahoe. She also knew one of them was going to sign the complaint. The complaint was taken to be filed the same morning of December 9, 2009.[604]

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599. Almanza Testimony, Hr'g Tr. 127:17–128:9, Oct. 11, 2011.
600. Almanza Testimony, Hr'g Tr. 128:10–129:17, Oct. 11, 2011.
601. Aubuchon testimony, Hr'g Tr. 197:19–198:3, Oct. 25, 2011.
602. Aubuchon testimony, Hr'g Tr. 199:4–9, Oct. 25, 2011.
603. Almanza Testimony, Hr'g Tr. 129:15–130:8, 133:7–10, Oct. 11, 2011.
604. Ex. 163, TRIAL EXB 01905–14.

j. The probable cause statement written by Ms. Aubuchon to be filed:

From December 15, 2008 to December 08, 2009 Gary E. Donahoe did the following:

I.
Judge Donahoe failed to disclose his attorney-client relationship with attorneys appearing before him on a grand jury investigation into Maricopa County's new criminal court tower. The Maricopa County Board of Supervisors hired Attorneys Thomas Irvine and Edward Novak to quash a grand jury subpoena related to the criminal court tower investigation. The investigative subpoena targeted Mr. Irvine, Mr. Novak, the court, and the Board as all were under investigation for potential wrongdoing. However Judge Donahoe refused to send the case to another county and also refused to remove Messrs. Irvine and Novak from the case. Instead Judge Donahoe removed the Maricopa county Attorney's Office, finding a conflict existed because MCAO had assisted the Sheriff's Office the criminal investigation. Judge Donahoe never addressed the fact that the court itself had entered into a contract with Messrs. Irvine and Novak so that Mr. Irvine could serve as the "Space Planner" for the Superior Court's new criminal court tower. To make matters worse, Judge Donahoe failed to see that a conflict existed or that allowing Messrs. Irvine and Novak to appear before him could raise an appearance of impropriety.

The MCAO appealed Judge Donahoe's disqualification decision. The Arizona Court of Appeals refused to exercise jurisdiction over that Special Action (See 2CA-SA 09-0056). After the Court of Appeals refused to hear the Special Action, the Sheriff's Office and the MCAO discovered the true relationship between the Court and Messrs. Irvine and Novak. A local news media investigation revealed that the Court hired Messrs. Irvine and Novak as attorneys for the Court on the project under a contract approved by the Arizona Attorney General, who was also under investigation by the Sheriff's office. As the criminal presiding judge, Judge Donahoe surely knew what attorneys represented the Court in the criminal court tower project. Given this knowledge, Judge Donahoe acted improperly by quashing a subpoena at the request of his counsel on a matter involving their contractual, attorney-client relationship and never

disclosing that attorney-client relationship to either the opposing party of the appellate courts. Prosecuting authorities appealed Judge Donahoe's astonishing decision to the Arizona Supreme Court, and that matter is currently pending (CV-09-0165-PF).

Similarly, Judge Donahoe failed to hold County Supervisor Donald Stapley in contempt for disclosing grand jury information to his personal criminal attorney. Mr. Stapley learned the grand jury information in his professional capacity as a County Supervisor, yet he disclosed this confidential information to his personal defense attorney for use in his personal criminal case. Mr. Stapley's disclosure stymied the investigation and clearly raised serious ethical and obstruction of justice concerns, yet Judge Donahoe took no action against Mr. Stapley.

II.

Earlier this year, County Supervisor Stapley faced pending criminal charges. After a Search Warrant was executed on the premises of one of his associates, Attorney Grant Woods filed a motion to controvert. Despite the clear statutory scheme requiring that the motion to controvert be filed in the court where the search warrant was obtained (here, the Justice Court), presiding criminal court Judge Donahoe picked up the case one day after Mr. Woods filed the motion and set the matter for a hearing. (See CV2009-005990). The prosecuting authorities presented Judge Donahoe with the law, and Judge Donahoe even acknowledges that the Mr. Wood's motion should have been filed in the justice court. However, Judge Donahoe did not end his involvement in the Stapley matter. When Mr. Woods later appealed the justice court decision, Judge Donahoe, who is not the assigned lower court appeals judge, somehow assigned himself to the Stapley case and ruled against the Sheriff's Office. (See LC2009-000701).

III.

On or about April 24, 2009, Judge Jonathan Schwartz wrote an e-mail to Judges Mundell, Judge Donahoe and Judge Ryan complaining that the Sheriff's Office and the Court Security Division failed to transport criminal defendants to court in a timely manner. Judge Schwartz indicated that the late arrivals might be due to "budget crisis." That same day, Judge Donahoe e-mailed Captain Bill Van Ausdale of the Sheriff's Office Court Security Division. Judge Donahoe informed Captain Van Ausdale

that he had concluded defendants were more likely to arrive to court on time if they were not in the Sheriff's custody. Judge Dona hoe further stated that according to that morning newspaper the "sheriff" had committed over 200 deputies to an operation. Judge Donahoe therefore concluded that the late arrival issue "doesn't appear to be a staff shortage issue but rather a 'staff allocation' issue." Judge Donahoe closed this e-mail stating that he was inclined to begin reviewing release conditions and "getting the number of defendants under the control of the sheriff down."

Several days later, on or about April 28, 2009, Judge Donahoe e-mailed to Captain Van Ausdale nothing that "things haven't improved." Judge Donahoe stated that the Sheriff's office used "200 deputies and posse for a crime sweep [immigration detail] but insufficient deputies to carry out the mandated function of transporting defendants to court-something just isn't right here." Judge Donahoe told Captain Van Ausdale that his next step would be to advise defense agencies that due to MCSO's inability to transfer inmates, the court would review defendants' release conditions in an effort to "reduce" the number of inmates needing transport. Judge Donahoe concluded by asking Captain Van Ausdale to advise him (Judge Donahoe) if the Captain would get "permanent and sufficient staffing" in the "next few days." That same day, Deputy Chief David Trombi met with Judge Donahoe in an effort to clarify that the Sheriff's Office would do the best it could given the circumstances. Judge Donahoe, quickly and sharply stated that he would inform criminal defense counsel to file motions to release their in-custody clients and would then "blame the Sheriff [Arpaio] for this to media and citizens. Captain Van Ausdale, Sergeant Glenn Chapski and Lieutenant Ken Colbert from the Sheriff's Office and Bob James, Marcus Rankensmeyer and Phil Knox from the Superior Court all witnessed Judge Donahoe's threat. Judge Donahoe's unprofessional threat to use both the Court's power and the media to embarrass Sheriff Arpaio clearly violates canons of judicial ethics.

IV

On information and belief, on July 17, 2009 Deputy Chief Trombi sent a letter to Chief Judge Mundell in which he complained about Judge Donahoe's April 2009 conduct, discussed above. Deputy Chief Trombi also complained about several statements that Judge Mundell made to the media and pointed out statistical figures compiled by the

Sheriff's Office showing that the Court and other judicial office personnel-not the Sheriff's Office-caused late starts for court appointments roughly 65% of the time.

On information and belief, Judge Donahoe is biased against the Sheriff and the Sheriff's office and working in concert with Chief Judge Mundell to publicly attack the Sheriff's Office for its role in pending investigation in Maricopa County. Several recent rulings demonstrate Judge Donahoe's bias. First, after the July 17 letter, Judge Donahoe charged Deputy Chief Trombi with contempt and fined him for his conduct. Second, Judge Donahoe held a detention office in contempt over a security matter. Judge Donahoe also issued a bizarre and inappropriate ruling in the detention office matter requiring the detention office to call a public press conference and apologize to the citizens or face jail. These issues place a serious cloud over the ethics and tactics currently employed in the Maricopa County Courts.

V

Finally, on information and belief Bob James, Judicial Services Administrator-Trial Courts of Arizona for Maricopa County Superior Court spoke in person with MCSO Court Security Divison Sergeant Chapski in the Superior Court hallways. Because of his position within the Court system, Mr. James would have personal knowledge of the Court's strategy on various issues. During his conversation with Sergeant Chapski, Mr. James told Sergeant Chapski that "they" (referring to Judge Mundell and other judges) felt that they only going to get on shot at Sheriff Arpaio.

VI

Judge Donahoe has set a hearing to attempt to remove the Maricopa county Attorney's Office from prosecution of cases against the Maricopa County Board of Supervisors and County Management.[605]

605. Ex. 163, TRIAL EXB 01905–01914.

k. The order is given to sign.

370. Sgt. Luth ordered Det. Almanza to sign the complaint.[606] Detective Gabriel Almanza signed it under oath.[607] Det. Almanza was not comfortable doing so, because he had not been involved in drafting the complaint and he had no knowledge as to the truth or falsity of it.[608] Det. Almanza had never filed a complaint before.[609] Sgt. Luth assured Det. Almanza that Ms. Aubuchon believed she had enough evidence to charge the judge.[610] Det. Almanza signed it based on his reliance on Ms. Aubuchon's good faith.[611]

The Contents of the Criminal Complaint filed against Judge Gary Donahoe.

a. The three charges against Judge Donahoe.

> COUNT I
> GARY DONAHOE on or between December 15, 2008 and December 8, 2009 with intent to hinder the apprehension, prosecution, conviction or punishment of Maricopa County employees, officials, judges or attorneys Tom Irvine and/or Ed Novak for Bribery A.R.S. 13-2602, Theft by Extortion A.R.S. 13-1804 or Fraudulent Schemes and Artifices 13-2310, a felony, rendered assistance to Maricopa County employees, officials, judges or attorneys Tom Irvine and/or Ed Novak with money, transportation, weapon, disguise or other means of avoiding discovery, apprehension, prosecution or conviction.
>
> COUNT II
> GARY DONAHOE on or between December 15, 2008 and December 8, 2009, knowingly by means of bribery, misrepresentation, intimidation, force or threats of force attempted to obstruct, delay, or prevent the communication of information or testimony relating to a violation of Bribery A.R.S. 13-2602, Theft by Extortion A.R.S. 13-1804 or Fraudulent

606. Almanza Testimony, Hr'g Tr. 132:5–20, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 119:8–120:7, 126:22–24, Oct. 14, 2011.
607. Almanza Testimony, Hr'g Tr. 120:21–121:17, Oct. 11, 2011.
608. Almanza Testimony, Hr'g Tr. 121:21–124:8, 132:17–133:6, Oct. 11, 2011.
609. Almanza Testimony, Hr'g Tr. 130:4–23, Oct. 11, 2011.
610. Almanza Testimony, Hr'g Tr. 133:11–22, Oct. 11, 2011; Luth Testimony, Hr'g Tr. 119:20–120:7, Oct. 14, 2011.
611. Almanza Testimony, Hr'g Tr. 133:23–134:5 Oct. 11, 2011.

Schemes and Artifices 13-2310, a criminal statue, to a peace officer, magistrate, prosecutor or grand jury.

COUNT III
GARY DONAHOE on or between December 15, 2008 and December 8, 2009, with corrupt intent, while a public servant or party officer, solicited, accepted or agreed to accept a benefit from Maricopa County employees, officials, judges or attorneys Tom Irvine and/or Ed Novak, upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion or other action as a public servant or party officer might be influenced.

b. The order to videotape Judge Donahoe while he was being served with the criminal complaint.

371. MCSO Detectives Almanza and Tennyson served the direct complaint on Judge Donahoe.[612] They were ordered to secretly record the Judge being served with the criminal complaint. The camera was hidden within a day planner.[613] After Judge Donahoe was served, Sgt. Luth was ordered to take a copy of the direct complaint to Ms. Aubuchon and Chief Deputy Hendershott.[614]

c. "Checkmate!" and happy.

372. When Sgt. Luth gave the copy of the complaint to Ms. Aubuchon, she said she already received an email notifying her that Judge Donahoe had vacated the hearing that had been set for later that afternoon.[615] She appeared pleased and happy.[616] Sgt. Luth then gave the complaint to Chief Deputy Hendershott, explaining that the complaint had been served and that he had just met with Ms. Aubuchon.[617] Chief Deputy Hendershott said, "Checkmate."[618]

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612. Almanza Testimony, Hr'g Tr. 134:6–25, Oct. 11, 2011.
613. Johnson Testimony, Hr'g Tr. 16:2–17:12, Oct. 11, 2011; Almanza Testimony, Hr'g Tr. 135:1–22, Oct. 11, 201.1.
614. Luth Testimony, Hr'g Tr. 120:12–20, Oct. 14, 2011.
615. Luth Testimony, Hr'g Tr. 121:1–8, Oct. 14, 2011.
616. Luth Testimony, Hr'g Tr. 121:9–13, Oct. 14, 2011.
617. Luth Testimony, Hr'g Tr. 121:17–122:4, Oct. 14, 2011.
618. Luth Testimony, Hr'g Tr. 122:1–5, Oct. 14, 2011.

The Press Conference and Press Release

a. The release of personally identifying information.

373. On the day Judge Donahoe was charged, Mr. Thomas issued a Press Release summarizing his decision to file the criminal complaint.

> Judge Donahoe had scheduled a hearing today on the Board of Supervisors' unprecedented request that the County Attorney be barred from prosecuting them or other county employees for any crime. Such a hearing, which the County Attorney's Office regards as illegal, has apparently never before been held in Arizona history. It would have allowed, and all but ensured, that ongoing grand-jury matters, which are confidential by state statute, be aired in front of criminal defendants and suspects.[619]

374. As pointed out above, when Judge Donahoe was served with criminal complaint he was secretly videotaped. Contained within that same press release, Mr. Thomas released documents related to the complaint that revealed Judge Donahoe's home address; making it possible for criminals he sentenced to locate him.

b. The process server used in the RICO case filed the prior week.

375. When coupled with the use by Mr. Thomas and Ms. Aubuchon of John Cox as their process server for the RICO racketeering federal complaint which they filed the prior week on December 1, 2008 and served on Judge Donahoe as a defendant, such release of personal information is found to be conclusively hostile with ill intent.

376. Jack Cox was a litigant who was prosecuted by the MCAO for threatening Judge Donahoe. The sons of Mr. Cox had inherited from their grandmother approximately $330,000. While serving in the Probate division Judge Donahoe

619. Ex. 164, TRIAL EXB 01915.

ordered those funds be put in a restricted account for the benefit of those children. Mr. Cox began to squander the funds and Judge Donahoe ordered their seizure. Mr. Cox left voice mails on the office voice mail of Judge Donahoe threatening to kill him. Mr. Cox told a reporter that there were going to be bodies over this. As a result the presiding judge consulted with the police who determined that Mr. Cox's actions constituted a credible threat. Judge Donahoe was guarded at his home and going back and forth to work by the Phoenix Police until they determined he was no longer at risk. It was Jack Cox who served Judge Donahoe with the racketeering complaint.[620]

CLAIM TWENTY-FOUR: ER 3.8(A)
(PROSECUTING A CRIMINAL CHARGE WITHOUT PROBABLE CAUSE)
(THOMAS AND AUBUCHON)

377. E.R. 3.8(a) mandates that a lawyer who is a prosecutor "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[621]

378. Yavapai County Attorney Sheila Polk testified as follows:

> Q: You read the probable cause statement in the Donahoe matter, did you not?
> **A: In the Donahoe matter I did.**
> Q: I'm sorry, I apologize. I'm dyslexic and I massacre names. It's not done with any disrespect. Thank you very much for correcting me. You read the probable cause statement in that matter, did you not?
> **A: Yes.**
> Q: If every statement in that probable cause statement was true, would that have constituted probable cause?
> **A: I don't think so. I'd have to review it again.**
> Q: Do you have it? Do we know what number it is, the probable cause statement?

620. Donahoe Testimony, Hr'g Tr. 96:19–97:25, Oct. 5, 2011.
621. R. Sup. Ct. Ariz 42, ER 3.8(a)

MR. MORIARITY: While he's looking for it, Your Honor, I'll see here if I have anything else.
MR. BOOKE: I believe it's 163. It's Exhibit 163, Your Honor, the fourth page.
Q: May I ask you to turn to Exhibit 163? It would be 1913 in the upper right-hand corner.
A: Okay.
Q: If you want to take a minute to read it, please do.
A: The probable cause statement starts on --
Q: It starts on 12. I did that before.
A: Yes.
MR. MORIARITY: Sorry, Your Honor.
A: I've looked at it.
Q: My question is if everything in it was true would that constitute probable cause?
A: No, it would not.[622]

379. The Hearing Panel finds Mr. Thomas and Ms. Aubuchon violated ER 3.8(a). "A prosecutor should not seek an indictment without probable cause."[623] Nor is a prosecutor expected to obtain an indictment until he or she believes that the accused's guilt can be proven beyond a reasonable doubt.[624]

380. The best evidence of what probable cause existed for the filing of the complaint against Judge Donahoe is that probable cause statement. The probable statement filed with the Magistrate freezes in time that which Mr. Thomas and Ms. Ms. Aubuchon based their belief that probable cause existed. The signing of the complaint was an acknowledgement under affirmation by Ms. Aubuchon, with the personal approval and knowledge of Mr. Thomas, that they had listed the essential facts in the probable cause statement upon which they rested their belief that probable cause exists.

381. The Panel finds the testimony of Ms. Aubuchon on multiple occasions to be intentionally false. She knew there was no need for the signature of an officer

622. Polk testimony, Hr'g Tr. 112:1–113:6, Oct. 9, 2011.
623. R. Sup. Ct. Ariz.. 42, E.R. 3.8(a); Ariz. Rev. Stat. Ann 17A.
624. United States v. Lovasco, 431 U.S. 783, 790–91, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977). *See* Shepard v. Fahringer, 158 Ariz. 266, 269–70, 762 P.2d 553, 569–70 (1988).

and yet in drafting the document, she provided for not only a signature line but that it was under oath.

382. The basis for the criminal charges was an unsupported judicial complaint written by then-Deputy Chief Hendershott with the help of Ms. Aubuchon, that itself failed to allege any criminal activity and failed to identify any criminal statute.[625] Specifically, there was no evidence that Judge Donahoe engaged in bribery, hindrance or obstruction. The Hearing Panel finds that Mr. Thomas and Ms. Aubuchon knew that not one of the charges against Judge Donahoe was supported by probable cause. The sole reason for filing the charges was to prevent the hearing scheduled before Judge Donahoe. That decision was testified to by Sgt. Brandon Luth:

> I know that it was brought up in the first meeting with Chief Hendershott when Lisa Aubuchon was there, because that's in my own handwritten notes where, you know, it mentions, you know, the hearing the next day. You know, and that -- the meeting that Chief Hendershott had told me that Andrew Thomas, Lisa Aubuchon, the sheriff, and himself had attended, that was the purpose of their meeting was to determine how to deal with the hearing for the next day, and the end result was that Donahoe complaint, so that's my answer.[626]

The Alleged Probable Cause for the Filing of the Criminal Complaint

383. Mr. Thomas testified as follows:

> I had Lisa Aubuchon and her MACE unit do an analysis of whether it was proper, they looked at the ruling by Judge Donahoe, it was not inconsistent with prosecution for the acts that led to the shutting down of the investigation. It was not prosecution for the underlying acts that were at issue in the court tower matter. And, in particular, Judge Donahoe, as I recall, had ruled that our office could not investigate the court tower matter because civil deputies

625. Ex. 241, TRIAL EXB 03306–09.
626. Luth Testimony, Hr'g Tr. 115: 16–26, Oct. 14, 2011.

> in our office had given civil legal advice. That was not an issue prosecuting Gary Donahoe, because he had never been a client of me or the Maricopa County Attorney's Office, he as a Superior Court judge was a client of the Attorney General's Office, so that issue had gone away.[627]

384. The decision to charge Judge Donahoe began with the disagreement of his ruling to quash the grand jury subpoena a year earlier. Notwithstanding the quashing of that subpoena, all the documents except privileged communications including health records of county employees were turned over to the Sheriff as a result of his public records request. That such a request would gather virtually precisely the same information was stated in Respondents responsive pleadings at the time. The investigation of the Sheriff was not stopped by the ruling. However, the decision to pursue criminal charges against Judge Donahoe happened immediately after his ruling based on the above quoted testimony of Mr. Thomas. A year later, there was still no investigative record or number associated with Judge Donahoe nor evidence uncovered. To the contrary the review of the disclosed Court Tower documents demonstrated no evidence to corroborate Respondents' speculation about either Mr. Irvine or Judge Donahoe

385. The Hearing Panel has no duty nor is it inclined to analyze in detail the merits of any of the pleadings that were exhibits filed in this case, which include various pleadings. However, in weighing the truthfulness of witnesses, it has considered statements made in every exhibit including those admitted exhibits which are pleadings. That which is written by a witness may be used for a variety of reasons by a hearing panel. Some of those reasons include to corroborate, impeach or to clarify positions or intent.

627. Thomas Testimony, Hr'g Tr. 80:21–82:1, Oct. 26, 2011.

386. Respondents in their probable cause statement affirmed that "The investigative subpoena targeted Mr. Irvine, Mr. Novak, the court, *and MCBOS* as all were under investigation for potential wrongdoing." (Emphasis added). In short Respondents unequivocally affirmed that their target of the Court Tower Grand Jury Subpoena was MCBOS. In addition the targets were Mr. Irvine and Mr. Novak. Yet in this hearing, doubtlessly as a result of the guidance of their ethics expert they backtrack, having been informed "Neither the county nor MCBOS as an entity can be guilty of criminal wrongdoing. Only an individual may be charged with criminal conduct."[628] That does not change what their state of mind was at the time of their written pleadings. They were prosecuting their client the MCBOS. Perhaps their purpose was in furtherance of the stated goal to force the county into receivership in previously cited testimony of Chief Deputy Hendershott.

387. Consistent with their position that they believed MCBOS could be charged with a crime, they stated in their Response to the Motion to Quash the Grand Jury Subpoena that MCBOS had violated the crime of unlawful disclosure of Grand Jury proceedings.

> "Unfortunately in this case, *the Board* has violated Arizona Revised Statutes §13-2812 by releasing information to one of the potential targets in this case."[629]

388. In the probable cause statement Respondents affirmed that Irvine, Novak and the entire Superior Court of Arizona were the *targets* of that same

628. Ex. 286, TRIAL EXB 03866.
629. Respondent's Response to the Motion to Quash the Grand Jury Subpoena, Page 2.

subpoena. Yet in their Response to the Motion to Quash they argued these were only interested parties.

> "In addition, this proceeding being heard by the superior court has resulted in disclosure of the investigation to yet another interested party and illustrates the importance of the secrecy being maintained during an investigation."[630]

389. Yet when testifying under oath in these proceedings, the testimony was there was no certainty at all, which is an entirely different and inconsistent story presented by Respondents:

> Q: Now, can you tell the Hearing Panel what the main purpose of issuing this Grand Jury subpoena was. What were you looking for?
> **A: To find out if there was anything criminal about all the different contracts that were out there for the Court tower going forward on a $345 million project at a time when everybody else's budgets were being cut and slashed and people were being paid millions of dollars for space planning.**
> Q: And why would you think that there's something criminal going on?
> **A: I didn't know if for sure there was anything criminal going on. That's the whole purpose of the Grand Jury subpoena.**[631]

390. The Probable Cause Statement directed to be filed and affirmed by respondents is Exhibit 163 and has been quoted in its entirety above. That document outlines the probable cause claimed by respondents to charge Judge Donahoe. As pointed out above the probable cause form created in the Arizona Criminal Rules of Procedure directs a prosecutor to "Summarize and include the facts which establish probable cause for the crime(s) charged." In addition a prosecutor is directed to "[e]xplain the crime(s) in detail," listing other law

630. *Id.* 2–3.
631. Aubuchon Testimony, Hr'g Tr. 105:1–14, Oct. 25, 2011.

enforcement officers who witnessed the offense. It requires the listing of physical evidence that "directly connects defendant to offense" who the eyewitnesses are and the nature of injuries. None of the requirements were met.[632]

391. The vast majority of the allegations contained in the probable cause statement have been abandoned by Respondents. Even Respondents own attorneys argued there was no relevance to the allegations contained in much of the probable cause statement. Regarding the transportation of prisoners for hearings allegations, even Sheriff Arpaio testified he knew there was a concern that inmates weren't being brought to the court on time and that those minor issues had been administratively resolved.[633] None of those allegations even suggest a crime and Respondents knew it at the time they filed the probable cause statement.

392. Similarly there can be no serious argument that Judge Gary Donahoe "stopped" the investigation of the court tower. His ruling did the opposite; he specifically authorized any prosecutor other than the Maricopa County Attorney to proceed with the investigation. The ruling of Judge Donahoe precluded the Maricopa County Attorney Office from issuing an overly broad subpoena addressed to Maricopa County Administration which included "confidential communications correspondence between MCBOS and its former attorney, the Maricopa County Attorney." Judge Donahoe ruled,

> Motion to Quash Subpoena Duces Tecum is granted without prejudice to the right of another prosecutorial

632. Ariz. R. Crim. P. 41, Form 4.
633. Arpaio Testimony, Hr'g Tr. 52:14–18, Oct. 18, 2011.

agency requesting non-privileged documents from the Maricopa County Administration.[634]

Paragraph I of the Probable Cause Statement.

Q: You mentioned with regard to the first paragraph when you were looking at the judicial complaint, but I believe it's the same or close to the first paragraph under Roman numeral I on your judicial complaint, that there was a conspiracy. Do you remember that?
A: Yes.
Q: Is there any charge of conspiracy against Judge Donahoe in the direct complaint?
A. Had this complaint ever been investigated.
Q: I'm sorry, I don't understand your answer.
A: Had my complaint ever been investigated we might have been able to find out.[635]

a. Judge Donahoe had no attorney client relationship.

393. The probable cause statement alleges that "Judge Donahoe failed to disclose his attorney-client relationship with attorneys appearing before him on a grand jury investigation into Maricopa County's new criminal court tower." Even if true it would not be a crime. However, Respondents knew such allegation to be false. Knowledge of the Arizona Constitution is fundamental. Respondents knew that the presiding judge is a constitutional office in Arizona. Thomas Irvine did not represent the Superior Court of Arizona but rather one person, the presiding judge of the superior court of Arizona in Maricopa County, Judge Barbara Mundell. Respondents were dishonest in their representations to the contrary. They either ignored the Constitution of Arizona or did not know it. Neither is acceptable nor excusable.

> There shall be in each county a presiding judge of the superior court. In each county in which there are two or

634. Ex. 85, TRIAL EXB 01376–01379.
635. Hendershott Testimony, Hr'g Tr. 84:15–85:1, Oct. 13, 2011.

> more judges, the Supreme Court shall appoint one of such judges presiding judge. **Presiding judges shall exercise administrative supervision over the superior court and judges thereof in their counties, and shall have such other duties as may be provided by law or by rules of the Supreme Court.**[636]
>
> The superior courts provided for in this article shall constitute a single court, composed of all the duly elected or appointed judges in each of the counties of the State. The judgments, decrees, orders and proceedings of any session of the superior court held by one or more judges shall have the same force and effect as if all the judges of the court had presided.[637]

394. The Superior Court of Arizona is a single court. There are no "county" Superior Courts. The Superior Court is a statewide court with judges mandated in each county. The Supreme Court of Arizona has administrative supervision over all the courts. That administrative supervision of the Supreme Court is exercised through the Chief Justice of the Arizona Supreme Court.[638]

395. The Superior Court is the general jurisdiction court for Arizona. The office of the Presiding Judge of the Superior Court is also established by the Arizona Constitution. The Arizona Constitution mandates that "in each county" there shall be a presiding judge of the superior court.

396. By way of example, in the multiple counties of Arizona that have one Superior Court Judge, that Judge serves as the Presiding Judge. The duties of each presiding judge are also constitutionally mandated. "Presiding judges shall exercise administrative supervision over the superior court and the judges thereof in their counties, and shall have such other duties as may be provided

636. ARIZ. CONST. art. VI, § 11 (emphasis added).
637. ARIZ. CONST. art. VI, § 13.
638. ARIZ. CONST. art. VI, § 3.

by law or by rules of the Supreme Court." In short, the superior court is fleshed out administratively through the presiding judge.

397. There is no requirement a presiding judge issue an order of self appointment as Presiding Criminal Court Judge as that office is not a constitutional or statutory office. It exists through the delegation powers of the presiding judge. It is not unusual for a Presiding Judge serving in a multi-judge county to appoint a Presiding Civil, Probate, Family or Criminal Court Judge.

398. As outlined in the Arizona Constitution, there is one presiding judge in each county. It has been stipulated as a fact that at the time of these events, Judge Barbara Mundell was the presiding judge, not Gary Donahoe. As presiding judge she was assigned under the Arizona Constitution "such other duties as may be provided by law or by rules of the Supreme Court." It is no mean expectation of an attorney, when faced with a constitutional provision that refers to the Supreme Court Rules, to expect one to actually look at and read those rules. Respondents knew those rules and intentionally ignored them.

b. The Arizona Supreme Court Rules mandate the presiding judge to "determine the need for and approve the construction of new court buildings, courtrooms and related physical facilities."

399. Respondents knew both the constitutional provision and the Supreme Court Rule associated with the duties of the presiding judge. Section (a)(5) of Rule 92 mandates the presiding judge "shall:"

> (5) Determine the need for and approve (i) the allocation of space and furnishings in the court building; (ii**) the construction of new court buildings, courtrooms and related physical facilities**; and (iii) the modification of existing court buildings, courtrooms and related physical facilities; (Emphasis added).

400. Respondents knew Thomas Irvine represented the presiding judge, not the other judicial officers. Their argument to the contrary is disingenuous. Even if Judge Donahoe knew that Judge Mundell had hired Tom Irvine to provide "provide various services" relating to the planning, construction and/or funding of the new court tower complex"[639] which included legal aid to the presiding judge in the process of the Court Tower project, such knowledge would not cause recusal. In any event, it is undisputed that Judge Donahoe did not know Tom Irvine, had never met him and was unaware he had been hired by the presiding judge. The fact the issue involved a county building that he would never work in was not a factor under long established law.

> To hold otherwise would require the recusal of every judge who owns a hunting rifle, for example, when the issue of the dangerous nature of firearms is before the court. That is not the kind of personal knowledge…the rule was meant to protect against."[640]

c. Judge Donahoe did not remove the MCAO because it had helped the Sheriff's office.

401. The probable cause statement further alleges "Judge Donahoe removed the Maricopa county Attorney's Office, finding a conflict existed because MCAO had assisted the Sheriff's Office the criminal investigation." No where within the ruling of Judge Donahoe is there even a hint that he declared the MCAO conflicted because it assisted the Sheriff's office. Respondents knew this was blatantly untrue and yet affirmed it to be true anyway.

639. Ex. 77 at TRIAL EXB 01351.
640. U.S. v. Smith, 210 F.3d 760, 764 (7th Cir. 2000).

402. In ruling to grant the County's Board of Supervisors' Motion to Disqualify the Maricopa County Attorney's Office Judge Donahoe made clear the issue before him and it had nothing to do with the Sheriff's Office.

> The issue is not whether the Maricopa County Attorney would be disqualified from prosecuting an individual indicted by a grand jury for a crime committed in regard to the court tower. The issue is the ethical propriety of the Board's attorney seeking documents as part of a grand jury investigation from the attorney's client.[641]

He explained on the next page of his ruling why the County Attorney had a conflict of interest by quoting a long existent ruling of the Arizona Supreme Court.

> We do not rest our decision only on the fact that the attorney involved here is the County Attorney's chief deputy; even if he were not, that office would have to divorce itself from the prosecution in this case, because even the appearance of unfairness cannot be permitted. What must a defendant and his family and friends think when his attorney leaves his case and goes to work in the very office that is prosecuting him? Even though there is no revelation by the attorney to his new colleagues, the defendant will never believe that. Justice and the law must rest upon the complete confidence of the thinking public and to do so they must avoid even the appearance of impropriety. Like Caesar's wife, they must be above reproach. As the Ethics Committee Opinion No. 235 put it:
>
> > 'Ordinarily knowledge or information held by any one member of the County Attorney's office is tantamount to knowledge of all such members, and that public confidence in our judicial system may be undermined if the appearance of evil, as well as the evil itself, is not avoided.'
>
> We are cognizant of the fact that No. 235 was to some extent overruled by later No. 260, but the above-quoted paragraph represents our concept of what must be done, and should be the law of this State.
>
> It is, of course, necessary that the County Attorney secure the appointment of a special prosecutor if he wishes to continue the prosecution of this case.[642]

641. Ex. 85 at TRIAL EXB 1377.
642. State v. Latigue, 108 Ariz. 521, at 523, 502 P.2d 1340 at 1342 (1972)(emphasis added).

403. This Hearing Panel noted the statement of Respondents in their later Motion for Reconsideration *Exhibit* 286 where they avow to Judge Donahoe, "Tellingly, in doing so, this Court heavily quoted and relied upon the overruled, thirty-year-old holding in *State v. Latique*." (Emphasis included in original). Yet Respondents cite to no case stating the overruling or reversal of *Latique*. Also left unexplained by Respondents was the Supreme Court's approving reference to the *Latique* in *State v Hursey* 176 Ariz 330; 861 P.2d 615 (1993) and *In re Ockrassa* 165 Ariz 576; 799 P.2d 1350 (1990), where the court stated; "We believe that *Latigue* and the existing informal ethics opinions contain sufficiently applicable language to alert respondent to the potential ethical problems his conduct created, regardless of the opinions of his superiors." Both cases were well after the adoption in 1985 of the Arizona Rules of Professional Conduct.

d. Judge Donahoe did the requisite analysis under the Judicial Canons to determine if he should recuse himself.

404. Respondents alleged: "To make matters worse, Judge Donahoe failed to see that a conflict existed or that allowing Messrs. Irvine and Novak to appear before him could raise an appearance of impropriety." Respondents knew neither attorney represented Judge Donahoe. Even if he had not addressed the appearance of impropriety it would not be a crime in any event. More importantly Judge Donahoe *did* address the appearance of impropriety, but Respondents intentionally misrepresented that fact.

405. In these proceedings Respondents have also argued that because they thought Judge Donahoe might work one day in the tower that it caused an appearance of impropriety. Respondents knew that to be untrue or should have. Judge Donahoe ruled,

> This Judge has no direct or indirect interest in the court tower nor does any factor exist that would require this Judge to disqualify himself pursuant to the Canons of the Judicial Code of Conduct. This Judge has absolutely no interest in the court tower that would be affected in any way, let alone a substantial way, by this litigation."[643]

406. Judge Donahoe in these proceedings also testified regarding this issue. He was questioned, "Did you have any thought that you would be moving to the Court tower yourself?" He answered:

> No. In fact, no offense to anybody, I didn't even like the design of the Court tower, at least the judicial suites. I thought my suite was nicer and still is. And I knew I would be – I knew that this building wasn't going to open until January or February of I think 2012, and I knew I was going to retire before then. So I had no expectation of ever being in the Criminal Court tower.[644]

407. The more specific argument of respondents is that they disagree with the ruling of Judge Donahoe not to recuse. It is an argument that states Mr. Thomas and Ms. Aubuchon believe *they* would have ruled differently because *they* determined in *their* minds that *his* conduct would create in reasonable minds a perception that the judge engaged in other conduct that reflects adversely on the judge's impartiality. There are multiple reasons such argument is specious.

e. Respondents presented no tangible evidence of any conflict.

408. In Arizona any request to recuse must be supported by "tangible evidence" of bias or prejudice.[645] The burden of proof is upon the party asking the judge to recuse:

643. Ex. 85 at TRIAL EXB 1377.
644. Donahoe Testimony, Hr'g Tr. 68:9–19, Oct.5, 2011.
645. State v. Cropper, 205 Ariz. 181, 68 P.3d 4007 (2003).

> A party challenging a trial judge's impartiality must overcome a strong presumption that trial judges are "free of bias and prejudice." *State v. Medina*, 193 Ariz. 504, 510 P 11, 975 P.2d 94, 100 (1999) (quoting *State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987)). Overcoming this burden means proving "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975). The moving party must "set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced." *Medina*, 193 Ariz. at 510 P 11, 975 P.2d at 100.
>
> We rejected the defendant's argument because he neither filed a Rule 10.1 motion nor presented tangible evidence of bias. 7 *Id.* at 510 PP 12-13, 975 P.2d at 100. We held that a judge's capacity for fairness and impartiality should not be questioned for "mere speculation, suspicion, apprehension, or imagination."[646]

f. The standard for "reasonable minds" is based on the hypothetical, fully informed, reasonable observer.

409. The hypothetical reasonable observer "is not a person unduly suspicious or concerned about a trivial risk that a judge may be biased."[647] It is rather, "whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case."[648] Arizona has formally adopted the Pepsico view:

> The Arizona Supreme Court created the Judicial Ethics Advisory Committee to study and render advisory opinions on judicial ethical issues. After an opinion of the Committee is reviewed and approved by the State Supreme Court it is circulated within the judiciary and becomes binding on all judges. The Judicial Ethics

646. *Id.* at 510 P 12, 975 P.2d at 100 (quoting *Rossi*, 154 Ariz. at 248, 741 P.2d at 1226).
647. United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998), cert. denied, 119 S. Ct. 1793 (1999).
648. Pepsico, Inc. v. McMillan, 764 F.2d 458, 460 (7th Cir. 1985). (*Emphasis added.)*

> Advisory Committee is, therefore, the only body in Arizona that the State Supreme Court has authorized to render advisory opinions on judicial ethics issues and those opinions become effective upon approval by this court.[649]

The Arizona Judicial Ethics Advisory Committee issued an advisory opinion in 1998 and judges are to follow that advice in those opinions. In 1998 that committee formally cited favorably the Pepsico case cited above.

> The more difficult assessment is the objective one, whether one external to the case might reasonably question the judge's impartiality. Understandably, judges tend to err on the side of safety and to judge the reasonableness of questioned impartiality from the standpoint of the most darkly suspicious member of the public. That is not the test. Rather, it is whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought (or disqualification contemplated) would entertain a significant doubt that justice would be done in the case. *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985). Judges should not act hastily in manufacturing reasons to avoid judging. It is the real, not the chimerical, appearance of bias and prejudice that disqualifies.[650]

g. Judge Donahoe balanced the requirements of the Canons.

410. Any analysis of recusal must balance the mandate of Canon 3 of the Arizona Judicial Code which mandates: "**A judge *shall* perform the duties of judicial office impartially, competently, and diligently**." (Emphasis added.) Generally this analysis has been called the "legal sufficiency rule." Any decision to not handle a case will ordinarily depend on the court's assessment of the legal sufficiency of the averments within the request and any affidavits filed in support.

649. *In re* Walker, 153 Ariz 307, 736 P.2d 790 (1987).
650 Arizona Judicial Ethics Advisory Committee, Opinion 98–2 (March 24, 1998).

> The term "legal sufficiency" is broad on its face; but for a disqualification motion to be legally sufficient, more than mere technical compliance with the mandates of the operative judicial disqualification provision is generally required.
>
> To be legally sufficient, a judicial disqualification motion usually must set forth facts that would prompt a reasonably prudent person to believe that he may not receive a fair hearing or trial before the assigned judge. Where it does not, such a motion may properly be denied, even when it is unopposed, or joined in by the other side. In fact, some courts have espoused the view that, unless a party can establish a reasonable factual basis for doubting the assigned judge's impartiality by some kind of probative evidence, that judge has an obligation not to recuse himself; but rather to hear the case as assigned.[651]

411. The United States Supreme Court has made clear a judge "has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."[652] Multiple courts have held "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is."

412. The Arizona Judicial Code mirrors the Model Code of Judicial Conduct created and approved by the American Bar Association (hereinafter "ABA.") The ABA has issued annotations to aid in the interpretation of the Arizona Judicial Code. Those annotations offer additional insight to this analysis.[653]

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651. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION (California: Banks & Jordan Law Publishing Co., 2d Ed., 2007.)
652. Laird v. Tatum, 409 U.S. 824 (1972)
653. Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir. 1987). Accord Nakell v. AG of N.C., 15 F.3d 319, 325 (4th Cir. 1994); In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir. 1988); Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351, 1356 (6th Cir. 1988); Suson v. Zenith Radio Corp., 763 F.2d 304, 308–09 n.2 (7th Cir. 1985); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981).

> Judges should not recuse themselves merely because an unfounded claim of bias or prejudice has been lodged against them. Nor should they recuse to avoid difficult or controversial cases…Recusing for these reasons or for no reason at all would contravene public policy by unduly delaying proceedings, increasing the workload of other judges, and fostering impermissible judge shopping. Though a judge has a duty to recuse when required by Canon 3E, a judge has an equally strong duty not to recuse when the circumstances do not require recusal.[654]

413. A fully informed reasonable observer would know that Judge Donahoe was soon retiring and would never work in the Court Towers. A reasonable observer would know that Judge Donahoe had never met Tom Irvine. A reasonable observer would be informed that Judge Donahoe did not know that Tom Irvine was employed by Barbara Mundell to represent *her*, as the presiding judge. They would know he did not represent *every other judge* as imagined by Respondents.

h. Respondents waived the conflict explaining why they did not appeal.

414. The pleadings filed involving the request to quash the grand jury Court Tower subpoena are civil and subject to the Civil Rules of Procedure. A.R.S. 12-409 outlines statutorily the method by which a party may remove a judge(s) for cause. When respondents sought the removal of Judge Kenneth Fields for cause they failed to follow the criminal procedural *rule* for removal by not filing an affidavit. By *statute* and rule in a civil case one must file an affidavit to remove a judge or judges for cause. Respondents knew this.

654. ART GARWIN, EDITOR, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 187 (Ill. ABA Publishing, 2004)

12-409. Change of judge; grounds; affidavit.

A. If either party to a civil action in a superior court files an affidavit alleging any of the grounds specified in subsection B, the judge shall at once transfer the action to another division of the court if there is more than one division, or shall request a judge of the superior court of another county to preside at the trial of the action.
B. Grounds which may be alleged as provided in subsection A for change of judge are:
1. That the judge has been engaged as counsel in the action prior to appointment or election as judge.
2. That the judge is otherwise interested in the action.
3. That the judge is of kin or related to either party to the action.
4. That the judge is a material witness in the action.
5. That the party filing the affidavit has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial.

415. Civil Rule 42 explains the process and time limits for the filing of such affidavit. In Arizona a party has a right to a change of judge without stating a reason for the change. Alternatively a party may file a motion to remove a judge or judges for cause. However any such affidavit must be filed within twenty days after discovery that grounds exist. The failure to file such an affidavit "shall constitute waiver of rights to change of judge based on cause."

Waiver; Rule 42(f)(2)(C) Rules of Civil Procedure.

An affidavit shall be timely if filed and served within twenty days after discovery that grounds exist for change of judge. No event occurring before such discovery shall constitute waiver of rights to change of judge based on cause.

416. The Motion to Quash was filed on December 23, 2008. The Response was filed on January 13, 2009. MCAO knew of the purported "conflict," and either failed or chose not to file a demand for change of judge supported by affidavit

and waived any perceived conflict. Respondents knew they had waived such conflict and likely chose not to appeal which would have resulted in recusal being confirmed and the waiver being declared. The Panel finds that respondents failing to timely adhere to both law and rule sought the recusal which was analyzed above. None of these actions were in good faith.

i. The fact that the Sheriff was investigating the Attorney General is meaningless.

417. Respondents affirmed that "the Court hired Messrs. Irvine and Novak as attorneys for the Court on the project under a contract approved by the Arizona Attorney General, who was also under investigation by the Sheriff's office." The fact that the Sheriff was investigating the Arizona Attorney General does not establish any probable cause for criminal charges against Judge Donahoe. Further Respondents knew there was no evidence that the presiding judge hired Messrs Irvine or Novak under a contract approved by the Arizona Attorney General, nor were they hired under any such contract.

Paragraph II of the Probable Cause Statement.

418. Often respondents have broadly proclaimed that Judge Donahoe was assigning cases to himself in violation of rule and law. For example, see the December 1, 2009 Press Release of respondents contained in Exhibit 146. In their closing argument they reiterated their position that Judge Donahoe was improperly assigning cases to himself. "He was keeping cases that did not belong to him." In their RICO suit they swore the standard policies of the

Maricopa County Superior Court "require a 'blind draw' to ensure the impartial administration of justice."[655]

a. Respondents acknowledged in their pleadings filed January 13, 2009 that cases were "automatically" assigned to the presiding criminal judge.

419. As pointed out above, the dishonesty of Respondents' argument regarding case assignment violations is found in the written pleadings of Ms. Aubuchon in these underlying matters. Respondents knew the judicial assignment policy of criminal matters to the presiding criminal judge included civil motions involving unspecified criminal subpoenas filed in the superior court and issues involving the grand jury. Respondents acknowledged in writing that the *civil* request of MCBOS to quash the Court Tower subpoena was properly "automatically set before the criminal presiding judge…"[656]

b. Respondents knew since 1978 the Maricopa Local Rules approved by the Supreme Court authorized such assignments by the presiding criminal court judge.

420. Respondents knew the assignment was "automatic" because in the Superior Court of Arizona in Maricopa County the appointment of a Presiding Criminal Court Judge is mandatory pursuant to the *Local Rules of Practice for the Superior Court, Maricopa County.* Established with the approval of the Arizona Supreme Court, those Local Rules were promulgated July 28, 1978 and effective September 1, 1978.[657] Rule 4.1(c) of those local rules mandates, "The presiding judge shall appoint one of the criminal division judges as the presiding

655. Ex. 145 at TRIAL EXB 01774, lines 9–10.
656. Exhibit 77 at TRIAL EXB 01352.
657. By way of example, the office Presiding Criminal Court Judge in Maricopa County is referenced by the Arizona Court of Appeals in *State v. LaBarre* 115 Ariz. 444, 565 P.2d 1305 (1977).

criminal judge." By such appointment the presiding judge assigns authority in the criminal area of law to another judge.

421. As a result of such delegation, the presiding criminal court judge is empowered by rule and practice to act regarding criminal cases where the authority might otherwise be exercised by the presiding judge. By way of example under A.R.S. 13-916, the chief adult probation officer in each county is required to appoint intensive probation teams "with approval of the presiding judge." However, that authority may be delegated to the presiding criminal court judge. In Maricopa County it is delegated by rule.

422. In Maricopa County by rule certain administrative powers reside within the presiding criminal court judge rather than the presiding judge. The respondents knew these rules and ignored them intentionally. They did so to benefit the story they were telling and to augment their unethical conduct.

> The presiding criminal judge shall exercise general administrative supervision of the criminal calendar, *including the assignment and reassignment of cases* and the equalization and coordination of work and case loads."[658]

Respondents' repeated position that cases in the superior court were required to be assigned randomly was pointedly rejected by the Supreme Court of Arizona in *State v. Eastlack*, 180 Ariz. 243; 883 P. 2d 999 (1994):

> First, we agree with Judge Meehan's ruling that 'there [is] no basis either by rule or by statute for random selection' of judges in capital (or other) cases. Defendant points to no authority requiring superior courts to make random selections.[659]

658. Maricopa Cty. Superior Ct. Local R. 4.1(c) (emphasis added).
659. 180 Ariz. 243, 883 P. 2d 999 (1994).

Respondents were unable to refer this Panel to anything that supports their repeated declarations of mandatory random assignment of cases. The reason is because they knew at the time that such a statement was false and most likely broadcast it to mislead the public.

423. The presiding criminal judge in Maricopa County has the administrative discretion, by rule, to assign or reassign criminal cases as that judge chooses and respondents knew it. If they did not, there is no excuse for their failure to not be aware of the fundamental rules of procedure for the superior court of Arizona in Maricopa County.

c. Respondents knew by state law the presiding criminal court judge convened and impaneled the grand jury.

424. Respondents are well familiar with the criminal code. They knew at the time of choosing to seek the subpoena that in Maricopa County, by local rule and practice the statutory duties of the presiding judge were delegated to the presiding criminal court judge. They also knew that under the Criminal Code of Arizona, the grand jury in Maricopa County meant "a body of the required number of qualified persons who are duly convened and impaneled by the presiding judge of the superior court." They knew indictments, which are the charging documents of the grand jury, are returned to the presiding criminal judge.

d. The actions of Judge Donahoe regarding the motion to controvert followed routine policy.

425. The probable cause statement addresses the filing of a motion to controvert a criminal search warrant. Respondents complain in the probable cause statement that Judge Donahoe "picked up the case" when it should have been

filed in the Justice Court from which it issued. It is no crime for a litigant to file such a motion in the wrong court anymore than it is for the presiding criminal court judge to follow the unrefuted routine procedure of handling such criminal search warrant motions that aren't associated with a Superior Court matter. Judge Donahoe ordered the motion to be remanded to the limited jurisdiction court where it should have been filed in the first place.

426. Nor is the Panel impressed with the Respondents' more current argument that the motion to controvert was a civil motion and should have been heard by a civil judge. The pleadings filed to quash the grand jury Court Tower subpoena were civil motions as well. Yet the Respondents acknowledged in writing that such a motion involving a criminal subpoena was properly "automatically assigned to the presiding criminal court judge." The only inconsistency regarding this process is the position respondents now take.

e. Respondents knew the Local Rules of Practice for the Superior Court in Maricopa County anticipated that the case be returned to Judge Donahoe.

427. When the ruling was appealed the entire file, including the original order of Judge Donahoe remanding it to the Justice Court was returned to Judge Donahoe by the Clerk of the Court. There is no contrary testimony. The Respondents never cited any rule or law that was violated. To the contrary, the Local Rules list the factors for the case to return to him and those principles were followed by the clerk in returning the case to Judge Donahoe.

> (A) Whether substantive matters have been considered in a case;
> (B) Which judge has the most familiarity with the issues involved in the cases;
> (C) Whether a case is reasonably viewed as the lead or principal case; or

(D)Any other factor serving the interest of judicial economy.[660]

428. More importantly, there was no testimony that the ruling he issued was incorrect. The only testimony was that his ruling was proper.

f. Judge Donahoe overruled the objection of defendant and allowed the prosecutor to retain copies of the items subpoenaed.

429. The implication that Judge Donahoe acted to aid the defendant is nonsensical. His ruling did nothing to inhibit the investigation. The defendants requested the return of the various items taken pursuant to the subpoena. However the Sheriff Deputies had made copies of those items. The defendant requested Judge Donahoe order the deputies to return not only the originals but copies of those items. Judge Donahoe denied Defendant's request and allowed the Sheriff to *keep* copies of the items they had improperly subpoenaed.

g. The MCAO Statement of Investigation Report showed no evidence.

430. Exhibit 154 is the Maricopa County Attorney's Office Law Enforcement Statement of Investigation Status. Every box is marked "Not Applicable" except one, that box states there are attached, "All Supplemental and/or Connect-Up Reports and/or Existing Transcripts of Interviews."[661] The following page states "All reports have been completed and are attached to this submittal." The only attachment is the probable cause statement.

h. The MCSO Investigative Supplemental Report contradicts Respondents.

431. Exhibit 159 is the Maricopa County Sheriff's Office Investigative Supplemental Report which outlines the evidence for the charge of Bribery of a

660. Maricopa Cty. Superior Ct. Local R. 3.1(c)(4).
661. Ex. 154 at TRIAL EXB 01846.

Public Servant against Judge Donahoe. It outlines the stated view of Respondents and the Office of the Sheriff regarding the evidence against Donahoe.

> In May of 2007 the Maricopa County Board of Supervisors elected to approve the construction of the new Court Tower Project…Many concerns associated with the cost and timeliness of the project arose prior to construction. The building is intended to house our Criminal Court Judges as well as other court personnel and court related offices. But the cost to the county taxpayers comes at a time of extraordinary economic hardship.
> As a result, officials from the County Attorneys' Office along with the County Sheriff's Office launched an inquiry into the project finances and those responsible for the expenditures.[662]

432. This report verifies that the purpose of the entire initial Court Tower investigation was the disagreement by Mr. Thomas and Ms. Aubuchon with the decision to build the Court Tower Project. It is unrefuted that planning for the project began long before 2007. The steel for the building was purchased years earlier. Respondents have changed their view of opposition to the Court Tower project perhaps as a result of the uncontroverted evidence that monies were specifically earmarked for the project from funds dedicated to justice complex construction.

i. The Sheriff's Report notes lower court appeals are heard by the lower court.

433. The Investigative Supplemental Report states as a basis for the alleged criminal activity of Judge Donahoe regarding this lower court subpoena ruling that;

662. Ex. 159 at TRIAL EXB 01870–71.

> It should be noted that it is a well established practice in Superior Court that lower court appeals are heard by the lower court.[663]

j. The unsubstantiated accusation by the Respondents.

434. One can only conclude that the angst of Respondents is that the litigant was stated within the probable cause statement as being an associate of Don Stapley. In the same Motion for Reconsideration Respondents avowed to Judge Donahoe that "Upon information and belief, both Mr. Irvine and Supervisor Stapley are professional associates of convicted felon-developer Colin Wolfswinkel."[664] However in the proceedings before this Panel the testimony was consistent from law enforcement investigators. There was *no* evidence ever found that Tom Irvine was involved in any land holdings with Donald Stapley. As is regrettably consistent, the mere fact that Respondents *felt* Irvine was so associated was enough to make the avowal and declare him to be associated. The same is true for Judge Donahoe.

Paragraphs III-V of the Probable Cause Statement.

435. As pointed out above, Respondents largely abandoned their argument that Paragraphs III-V formed probable cause for any crime. Sheriff Arpaio testified he knew there was a concern that inmates weren't being brought to the court on time and that those minor issues had been administratively resolved.[665] None of these allegations even remotely suggest a crime and Respondents knew it at the time they filed the probable cause statement.

663. Ex. 159 at TRIAL EXB 01874.
664. Ex. 286 at TRIAL EXT 03855–56.
665. Arpaio Testimony, Hr'g Tr. 52:14–18, Oct. 18, 2011

Paragraph VI of the Probable Cause Statement.

> "VI Judge Donahoe has set a hearing to attempt to remove the Maricopa county Attorney's Office from prosecution of cases against the Maricopa County Board of Supervisors and County Management."[666]

436. At the heart of the matter, Respondents purpose was to stop the hearing on MCBOS's Motion for Order Re: Unauthorized Special Deputy County Attorneys. There is no question respondents believed the holding of the hearing by anyone on the motion was a crime. Mr. Thomas's press release is clear as is the repeated testimony of Ms. Aubuchon:

> "Such a hearing, which the County Attorney's Office regards as illegal, has apparently never before been held in Arizona history."[667]

a. MCBOS's Notice and Motion for Order re: Unauthorized Special Deputy County Attorneys.

437. MCBOS's Motion was dated November 13, 2009.[668] The legal argument was basic and comprised less than two full pages. The Motion cited State law A.R.S 11-403(B): "With consent of the board of supervisors, a special deputy county attorney may be appointed upon a fee basis in like manner as a special assistant attorney general."

438. It was unrefuted in these proceedings that to be a Special Deputy County Attorney, such lawyer(s) had to be lawfully procured in accordance with this statute. This procurement was, in essence, accomplished through MCBOS pre-approving a list of lawyers who had applied and been "vetted." Those approved were awarded a Maricopa County legal services contract. The motion specifically

666. Ex. 163, TRIAL EXB 01905–01914.
667. Ex. 164, TRIAL EXB 01915.
668. *See* Ex. 137, TRIAL EXB. 01644–01683.

referenced the proper proposal by Mr. Thomas of a local attorney who had a county contract but that attorney withdrew from the contemplated representation.

439. MCBOS's motion on its first page cited media reports that Respondent "Thomas has appointed two Washington D.C. lawyers as Special Deputy County Attorneys for Maricopa County." In context, they pointed out that Thomas had already announced his assignment of investigations of Maricopa County governmental activities to the Yavapai County Attorney's Office. Attached to the Motion was an exhibit generated from the MCAO requesting approval of the appointments of Joseph diGenova, and his wife, Victoria Toensing and David Eisenberg as "Independent Special Deputy County Attorneys". The exhibit states the "expenditures impact on the budget was "N/A." The exhibit states there was no financial impact.

440. Also attached to the motion was the Official Appointment and Oath of Office prepared by Mr. Thomas. That document names Mr. diGenova as Independent Special Deputy County Attorney and grants him the power to name as many other such deputies as he appoints to assist him including his wife, Victoria Toensing and David Eisenberg. It was apparently unrefuted that neither of the two Washington D.C. lawyers named in the media reports possessed an existing Maricopa County legal services contract. Apparently neither was licensed to practice law in Arizona nor were they associated with local counsel. By footnote the motion pointed out the budget concerns that were potentially raised. MCBOS also pointed out that Mr. Thomas had proposed Retired-MCAO prosecutor Rizer was also sought, but he did not have a county contract.

441. As a result the relief sought was specific and narrow. "Consequently MCBOS seeks this Court's Order prohibiting any purported 'Special Deputy County Attorney' from acting before a grand jury or utilizing any other court processes without prior consent of MCBOS, as required by A.R.S. 11-403."

b. The Press Release of Andrew Thomas.

442. In response Mr. Thomas released a November 16, 2009 press release.[669] Mr. Thomas stated:

> The Maricopa County Board of Supervisors has filed a lawsuit against the Maricopa County Attorney's Office seeking to halt any potential criminal investigations and prosecutions of themselves and county employees, for any possible crimes, by the Maricopa County grand jury. The suit, filed late Friday afternoon, asks the presiding criminal judge of the county to prevent county prosecutors from using the county grand jury to investigate or prosecute any member of the Board of Supervisors or any other county employee for any crime. The suit also asks the court to conduct a public "fishing expedition" regarding current investigations by the grand jury, whose operations are secret by state law.

443. While the motion speaks for itself, the Panel could find no request within the motion for any review, investigation or "expedition" regardless of how termed regarding current investigations by the grand jury. The request for relief is limited to a request for an "Order prohibiting any purported 'Special Deputy County Attorney' from acting before a grand jury or utilizing any other court processes without prior consent of MCBOS, as required by A.R.S. 11-403."

c. The MCAO Motion to Strike Motion in Unspecified Criminal Matter.

444. Respondents did not deny the allegation that "Thomas has appointed two Washington D.C. lawyers as Special Deputy County Attorneys for Maricopa

669. Ex. 139, TRIAL EXB 01744–01745.

County." Instead by an eleven page motion dated November 26, 2009 and authored by Ms. Aubuchon, Respondents requested the Court to strike MCBOS's motion.[670] The opening paragraph stated;

> The State of Arizona opposes the extraordinary request by the Board of Supervisors that this court block future, potential, and necessarily unspecified actions by the Maricopa County grand jury. The State asks this Court to strike the Board's Motion immediately. There is no evidence that any special deputy county attorneys have acted in excess of lawful authority, and the Board has no standing to file such a pleading.

On page two, the motion further avows that the request is "based on mischaracterization" and "rooted in the worst sort of self-interest." They stated,

> Using taxpayer-funded lawyers, the Board requests that this Court shut down any and all possible ongoing criminal investigations or pending prosecutions of any member of the Board of any county employee by any county prosecutor appearing in front of the grand jury.[671]

445. Again, the motion speaks for itself. However this Panel could find nothing that resembled such a request. While the Panel recognizes the opposition of respondents to the motion, the Panel finds no small irony in respondents complaining of the use of "taxpayer-funded lawyers" by MCBOS when respondents were taxpayer-funded lawyers that were proposing *carte blanche* appointment of multiple "taxpayer-funded lawyers" as special deputies. Yet in their request form that had no apparent hesitancy to state there was no expenditure impact on the fiscal budget and claim there was no financial impact upon the taxpayers by such proposed appointments.

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670. Ex. 141, TRIAL EXB. 01751–01761.
671. *Id.*

d. The hidden perspective of respondents.

446. This Panel has little interest in the merits of the competing motions. What it is interested in, is how the holding of a hearing on the motion is probable cause for a crime. The argument of respondents that it was "illegal" for the hearing to be held in the superior court stretches credibility well past the breaking point. Respondents wrote and published a press release regarding MCBOS's motion and broadcast that it was a grand jury matter. Then they condemn MCBOS because it has become public. At page 5 of their motion they repeat the refrain that was the opening mantra of the press release.

> Even if the Motion were somehow lawfully before this criminal Court, which it is not, the Motion relies entirely on the speculation that some person or persons may act as special prosecutors before the grand jury without being appointed by the Board as special deputy county attorneys. The Board offers no evidence that a violation of those laws has occurred.

447. Put in proper perspective, what respondents were arguing is 1) MCBOS doesn't get to know what has been going on in grand jury proceedings and 2) that means MCBOS has no evidence that non-appointed special deputy county attorneys have appeared in front of the grand jury and 3) and that makes MCBOS concern regarding special deputy county attorneys speculative. The problem with such argument is that Respondents never denied they were using special deputy county attorneys not approved by MCBOS. The problem is it appears it was more than speculative.

448. When asked under oath what acts Judge Donahoe did that made him an accessory to bribery part of his answer was that in regard to this motion; it was "threatening to damage irreparably in terms of grand jury testimony…"[672]

e. The crime of holding a hearing in court

449. Ms. Aubuchon testified:

> Q: So how could that possibly be the basis for alleged criminal conduct by him, as you charged on December 9, 2009?
> **A: Because he's having a forum. He is using his position to hear the matter brought to him and possibly rule one way or the other.[673]**

450. Both in the press release and in the pleadings cited respondents declare the actions of permitting a hearing on the motion to be illegal and criminal. Ms. Aubuchon testified the Court had no jurisdiction to hear the matter.[674] When asked how such conduct could constitute a crime she declared, "He is using his position to hear the matter brought to him and possibly rule one way or the other."

The untrue testimony regarding the 10.1 Motion for Change of Judge for Cause.

451. Regarding the 10.1 Motion for Change of Judge for Cause, Ms. Aubuchon testified:

> **A: And at that point, I filed a 10.1 Motion that was being ignored as well.**
> Q: And the 10.1 Motion was actually filed the day before he was charged; correct?
> **A: That's correct.**
> Q. So you don't even know if he knew about the 10.1 Motion when you charged him?
> **A: I called his court and I talked to his assistant.**

672. Thomas Testimony, Hr'g Tr. 184:1–4, Oct. 26, 2011.
673 Aubuchon Testimony, Hr'g Tr. 183: 1–7, Oct. 25, 2011.
674. Aubuchon Testimony, Hr'g Tr. 184:11–12, Oct. 25, 2011.

> Q: But you don't know if he knew about the 10.1 Motion when you charged him, do you?
> **A: When I talked to his assistant, I believe he did.**
> Q. What did his -- what did his assistant say to you?
> **A: I said, "We filed a 10.1 Motion. Is he going to send that to another judge?" She said, "No. He's going forward with the hearing."**
> Q: But you have no idea, do you, Ms. Aubuchon, that Judge Donahoe actually knew about the 10.1 Motion?
> **A: All I can know is that his -- his office had received it and his -- what his assistant told me.[675]**

452. On December 9, 2009, the day scheduled for the hearing on the motions, Respondents filed a 10.1 Motion for Change of Judge for Cause.[676] The Arizona Rules of Criminal Procedure authorize a party within 10 days after discovery that grounds exist for change of judge to file a motion to change a judge for cause. The motion must be verified by affidavit and allege specifically the grounds for the change. Except regarding grounds of timeliness, the challenged judge must forward the motion to the presiding judge for assignment or ruling.

453. The basis of the motion holds little interest for the Panel. The testimony of the respondents does. Ms. Aubuchon testifies that she served the motion on December 8, 2009. The Respondents both testified that Ms. Aubuchon called Judge Donahoe's secretary and was informed that he had refused to hand off the matter and that the hearing on the motions would proceed.[677] Mr. Thomas also testified this was further proof of Judge Donahoe's complicity in crime.[678]

454. The testimony is untrue. The affidavit signed by Ms. Aubuchon is notarized and attached to the motion is dated November 9, 2009.[679] This Panel would be

675. Aubuchon Testimony, Hr'g Tr. 183:9–184:4, Oct. 25, 2011(emphasis added).
676. Ex. 151, TRIAL EXB 01834–01842.
677. Thomas Testimony, Hr'g Tr. 187:24–188:2, Oct. 26, 2011; Aubuchon Testimony, Hr'g Tr. 183:9–184:4, Oct. 25, 2011.
678. Thomas Testimony, Hr'g Tr. 183:22–25, Oct. 26, 2011.
679. Ex. 151 at TRIAL EXB 01841.

inclined to give the benefit of the doubt regarding such testimony. For an event that occurred nearly two years earlier, such memory lapse would be understandable. What can't be disputed is that the motion was not served on the day before it was signed. Nor was it served before it was signed. The written language of the motion reveals a darker intent in the testimony:

> The State addressed the Motion to Judge Donahoe because that was the name on the "Plaintiff's" pleading. However, it wasn't until November 30 that the State learned this Court was actually assigned. The State is still at a loss to figure out what the cause of action is based on.
> **This Court vacated today's hearing but the State is filing this Motion to preserve the matter.**[680]

455. The respondents' testimony is more than a simple lapse in memory. Both testify to a specific conversation and assert the refusal by Judge Donahoe to honor the 10.1 as essentially the "last straw." As with much of their testimony, they wrap the skin of a reason around a rumor, speculation or lie and call it the truth. There was no probable cause to file the criminal complaint against Judge Donahoe. Respondents acted with a purpose, intentionally and in violation of the ethical rules of conduct.

CLAIMS TWENTY-FIVE TO THIRTY

456. The following analysis applies to Claims Twenty-five through Thirty, with the holdings for each Count provided in the subsequent sections.

457. The Hearing Panel finds that Mr. Thomas's testimony about the timing of the charges against Judge Donahoe was not credible. Mr. Thomas testified that he wanted Judge Donahoe charged so Mr. Thomas could have a press conference to announce the filing of the charges and to invite the media to go

680. *Id.* at TRIAL EXB 01836.

over to the hearing so they could observe firsthand Judge Donahoe's behavior.[681] He stated that his intent was not to nullify the hearing but to publicize it.[682] Mr. Thomas testified that he believed there was a unique moment in time to fully educate the community about the lawlessness they were dealing with in the county government.[683] The Hearing Panel finds that Mr. Thomas's explanation for filing criminal charges at that time is unbelievable. If his goal was to have the hearing proceed then why file the Motion for Change of Judge for Cause? Mr. Thomas's goal of public education could have been accomplished by issuing a news release explaining his concerns about the hearing Judge Donahoe was conducting. Alternatively, instead of filing criminal charges right before the hearing, Mr. Thomas could have filed charges after the scheduled hearing on December 9, 2009. Mr. Thomas's filing charges to publicize a hearing is unbelievable.

458. The Hearing Panel also finds Ms. Aubuchon's testimony about why Judge Donahoe was charged on December 9, 2009, incredible. Ms. Aubuchon testified that she did not file the charges against Judge Donahoe to force him to vacate the hearing he had scheduled.[684] Ms. Aubuchon testified that there was no urgency about charging Judge Donahoe on December 8 or December 9, 2009.[685] She testified that she did not wait until a later time, say January 2010, to charge Judge Donahoe because she believed he had committed a crime. She made this decision despite the fact that, had the hearing been held on Dec. 9, she might have developed more evidence of criminal conduct that could support her view

681. Thomas Testimony, Hr'g Tr. 186:11–188:12, Oct. 26, 2011.
682. Thomas Testimony, Hr'g Tr. 186:11–188:12, Oct. 26, 2011.
683. Thomas Testimony, Hr'g Tr. 191:17–192:11, Oct. 26, 2011.
684. Aubuchon Testimony, Hr'g Tr. 181:10–182:1, Oct. 25, 2011.
685. Aubuchon Testimony, Hr'g Tr. 181:19–182:1, Oct. 25, 2011.

of Judge Donahoe's behavior.[686] Ms. Aubuchon also testified that Judge Donahoe was considering a motion which was trying to stop an investigation into himself, his supervisor, the attorneys who were filing the motion, and everyone else. She also believed that Judge Donahoe's 'having a forum' for that motion was criminal conduct.[687] She thought that he should not have set the hearing in the first place and she wanted him to vacate the hearing.[688]

459. As stated above, the first thing that Ms. Aubuchon said to Sgt. Luth after he advised her that the charges had been filed was that she already received an email notifying her that Judge Donahoe had vacated the hearing scheduled that afternoon. She appeared pleased and happy.

460. However, a day earlier on December 8, 2009, Ms. Aubuchon tried to get the charges filed and was angry that no one would file them. If she and Mr. Thomas were not trying to get Judge Donahoe to vacate that hearing, they would have waited to file the charges until after that hearing on December 9, 2009. Any lawyer would know that Judge Donahoe would have to vacate such a hearing upon being charged with crimes.

461. Mr. Thomas and Ms. Aubuchon's testimony about the timing of the charges is unbelievable.

462. At the hearing in this matter, Mr. Thomas testified that he brought the bribery charge against Judge Donahoe because the Judge was an "accessory" to the "Mundell-Stapley-Irvine triangle."[689] Mr. Thomas stated that he charged Judge Donahoe as an accomplice "because he was repeatedly beating back

686. Aubuchon Testimony, Hr'g Tr. 187:1–20, Oct. 25, 2011.
687. Aubuchon Testimony, Hr'g Tr. 181:19–184:19, Oct. 25, 2011.
688. Aubuchon Testimony, Hr'g Tr. 184:7–19, Oct. 25, 2011.
689. Thomas Testimony, Hr'g Tr. 181:4–184:9, Oct. 26, 2011.

investigations into not only the court tower, but any of the principals who were involved in other matters or at the periphery of that deal, which [Mr. Thomas] considered corrupt."[690] According to Mr. Thomas, Judge Donahoe was an accessory to bribery because he did the following:

a. Quashed a grand jury subpoena concerning the Court Tower;

b. Disqualified MCAO from the Court Tower matter; and

c. Quashed a search warrant of an office in the Stapley matter.[691]

463. The Hearing Panel finds this testimony to be unbelievable. There was no mention in the PC statement attached to the direct complaint against Judge Donahoe that Judge Donahoe was an accessory to an alleged bribe involving Mundell, Stapley and Irvine.[692] Mr. Thomas had attached the complaint and the PC statement to his news release about charging Judge Donahoe.[693] The fact that there is not one mention of Mr. Thomas's theory in the PC statement indicates that his explanation is an attempt to create probable cause where there was none. No other witness in this hearing, including Ms. Aubuchon, testified that the theory for charging Judge Donahoe was that he was an accessory.

464. Further, this testimony is unbelievable because the three acts that Mr. Thomas points to as criminal were judicial decisions that Judge Donahoe made. There was no evidence presented to this Hearing Panel that MCAO or MCSO had evidence that Judge Donahoe accepted a bribe for making these judicial decisions. Mr. Thomas's testimony that these acts constituted acts of an

690. Thomas Testimony, Hr'g Tr. 181:11–22, Oct. 26, 2011.
691. Thomas Testimony, Hr'g Tr. 182:13–184–15, Oct. 26, 2011.
692. Ex. 163, TRIAL EXB 01912–14.
693. Thomas Testimony, Hr'g Tr. 188:13–189:5, Oct. 26, 2011.

accessory to bribery is totally incredible. The Hearing Panel finds that Mr. Thomas engaged in misrepresentation at the hearing on this issue.

465. Ms. Aubuchon testified that the PC statement set forth probable cause to believe that Judge Donahoe engaged in bribery, hindering and obstruction.[694] The Hearing Panel finds that testimony incredible. A reading of the PC statement indicates that it does not set forth any evidence of criminal conduct by Judge Donahoe. No lawyer, especially one with extensive criminal prosecution experience, could conclude otherwise. For Ms. Aubuchon to testify that it did set forth probable cause indicates that she engaged in misrepresentation to this Hearing Panel. As noted above, no other evidence except that in the PC statement was presented to this Hearing Panel that Judge Donahoe engaged in crimes.

CLAIM TWENTY-FIVE: ER 4.4(a) (USING MEANS TO BURDEN OR EMBARRASS)(THOMAS AND AUBUCHON)

466. Mr. Thomas and Ms. Aubuchon violated ER 4.4(a) by filing the charges against Judge Donahoe.

467. The Hearing Panel finds that Mr. Thomas and Ms. Aubuchon's purpose in charging Judge Donahoe was to burden or embarrass him in an effort to force him to recuse himself from the hearing he was handling the afternoon of December 9, 2010, which concerned the Notice and Motion filed by MCBOS objecting to special deputy county attorneys appearing before the grand jury. Judge Donahoe vacated the hearing scheduled for the afternoon of December 9, 2009 after being served with the direct complaint.[695]

694. Aubuchon Testimony, Hr'g Tr. 203:16–207:5, Oct. 25, 2011.
695. Ex. 168, TRIAL EXB 01924. Donahoe Testimony, Hr'g Tr. 82:21–84:17, Oct. 5, 2011.

468. Further, the Hearing Panel finds that the purpose of charging Judge Donahoe was to retaliate against him for actions he had taken earlier, in particular the removal of MCAO from the investigation of Court Tower matters in February 2009. Judge Donahoe's ruling on the Court Tower matter was the subject of a special action that Mr. Thomas and Ms. Aubuchon filed, review of which was denied for the final time on December 1, 2009, eight days before they charged Judge Donahoe with felonies.

469. Additionally, the Hearing Panel finds that the Mr. Thomas and Ms. Aubuchon brought charges against Judge Donahoe to retaliate against him for rulings against MCSO and disputes he had with MCSO. This conclusion is inescapable given that the PC statement is based largely on these rulings and disputes, which were contained in Mr. Hendershott's complaint to the Commission on Judicial Conduct.

CLAIM TWENTY-SIX: ER 8.4(c) (ENGAGING IN CONDUCT INVOLVING DISHONESTY)(THOMAS AND AUBUCHON)

470. Mr. Thomas and Ms. Aubuchon violated ER 8.4(c) by filing the charges against Judge Donahoe.

471. Mr. Thomas and Ms. Aubuchon engaged in conduct involving dishonesty, fraud, and deceit when they knowingly brought charges against Judge Donahoe that were false and made without any investigation or evidence.[696]

CLAIM TWENTY-SEVEN: ER 8.4(b) (VIOLATION OF A CRIMINAL LAW)(THOMAS AND AUBUCHON)

472. Mr. Thomas and Ms. Aubuchon committed a violation of an Arizona criminal statute, which in turn violates ER 8.4(b).

696. *Compare In re* Peasley, 208 Ariz. 27, 90 P.3d 764 (2004) (Peasley presented false testimony in a capital murder trial, in violation of, among other Rules, ER 8.4(c); the court ordered disbarment).

473. ER 8.4(b) states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. *See In re Savoy*, 181 Ariz. 368, 891 P.2d 236 (1995), in which the respondent testified before a grand jury that he did not have records requested by its subpoena. A search of his office shortly thereafter revealed the requested records. The respondent was subsequently charged and convicted of perjury.[697] The Disciplinary Commission imposed a two-year suspension.[698]

474. **Perjury**. Mr. Thomas and Ms. Aubuchon engaged in perjury, a criminal act that reflects adversely on their honesty, trustworthiness or fitness as a lawyer.

475. Perjury is defined by A.R.S. § 13-2702:

> 1. A person commits perjury by making either:
>
> a. A false sworn statement in regard to a material issue, believing it to be false.
>
> b. A false unsworn declaration, certificate, verification or statement in regard to a material issue that the person subscribes as true under penalty of perjury, believing it to be false.
>
> c. Perjury is a class 4 felony.

476. On December 9, 2009, Mr. Thomas and Ms. Aubuchon knew that the criminal complaint against Judge Donahoe was to be filed in Superior Court.

477. Ms. Aubuchon signed the direct complaint that she and Mr. Thomas filed against Judge Donahoe. The direct complaint, prepared by Ms. Aubuchon, contained a signature line for a "complainant" from MCSO. Detective Gabe Almanza signed the document as "complainant" and did so under oath. Detective Almanza had not conducted any investigation into alleged criminal

697. *Id.* at 238.
698. *Id.* at 240.

conduct by Judge Donahoe. Mr. Thomas and Ms. Aubuchon knew that the criminal charges they brought against Judge Donahoe were false, that Detective Almanza swore to a false complaint, and that a complaint is a sworn document as defined by A.R.S. § 13-1701. Therefore Mr. Thomas and Ms. Aubuchon are criminally accountable for the conduct of Detective Almanza because they knowingly caused him to sign and file a false sworn document and/or they ratified his conduct after he had signed the complaint. Mr. Thomas and Ms. Aubuchon committed perjury because they acted with the culpable mental state to engage in perjury and did so through the acts of another. Accordingly, they are criminally responsible under A.R.S. § 13-303 for the acts of another. By committing perjury, Mr. Thomas and Ms. Aubuchon violated ER 8.4(b).

CLAIM TWENTY-EIGHT: ER 8.4(b) (VIOLATION OF A CRIMINAL LAW)(THOMAS AND AUBUCHON)

478. Claim Twenty-Eight alleges that Mr. Thomas and Ms. Aubuchon engaged in criminal conduct, in violation of ER 8.4(b), by acting in violation of a federal criminal statute: 18 U.S.C. § 241, which states:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .
>
> They shall be fined under this title or imprisoned not more than ten years, or both.

479. ER 8.4(b) makes it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." It is not necessary for a lawyer to have been convicted in court in order to violate the rule. The plain language of the

rule does not require a conviction. "Because subsection (b) [of ER 8.4] is concerned with a lawyer's conduct rather than procedural matters, it is not necessary for a lawyer to be convicted of, or even charged with a crime to violate the Rule."[699]

480. 18 U.S.C. § 241 makes it a crime to conspire to injure, oppress, threaten or intimidate any person in the free exercise or enjoyment of a right or privilege secured to him by the U.S. Constitution. A judge's work-related expression and ability to engage in his profession both implicate privileges secured to him by the Constitution.[700]

481. The evidence clearly and convincingly suggests that Mr. Thomas and Ms. Aubuchon, together with Chief Deputy Hendershott and Sheriff Arpaio, met on December 9, 2008, with the intention of stopping Judge Donahoe from issuing a ruling at a hearing scheduled the next day by filing criminal charges against him. That evidence is detailed in full throughout this opinion. Perhaps most telling, however, is the testimony of Sergeant Brandon Luth, who recounted Hendershott's and Aubuchon's reactions upon learning that the hearing had been vacated after the direct complaint against Judge Donahoe had been filed.

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699. ABA *Annotated Model Rules of Professional Conduct,* Sixth Ed. at 579. *See Att'y Grievance Comm'n of Md. v. Maignan,* 423 Md. 191, 31 A.3d 467 (2011) (suspended lawyer disbarred because he engaged in unauthorized practice of law, which was a crime although no charge or conviction); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Lustgraaf, 792 N.W.2d 295 (Iowa 2010) (lawyer found to have engaged in criminal conduct re: taxes in violation of 8.4(b) even though never charged or convicted); In re Smith, 348 Or. 535, 236 P.3d 137 (2010) (lawyer committed trespass and violated Oregon equivalent of 8.4(b) even though not charged with a crime*); In Re Riddle,* 700 N.E.2d 788 (Ind. 1998) (lawyer violated 8.4(b) even though no charges filed*); People v. Odom, 941* p.2d 919 (Colo. 1997) (lawyer engaged in criminal conduct by concealing property to avoid seizure even though never charged).

700. *See, e.g.*, Perry v. McGinnis, 209 F.3d 597, 603-604 (6th Cir. 2000) (prison disciplinary hearing decision is a communicative act entitled to First Amendment protection)700; *See* Engquist v. Or. Dept. of Agriculture, 478 F.3d 985, 996-999 (9th Cir. 2007) (finding a protected substantive due process right to pursue a particular profession in the 9th Circuit); U.S. v. Patrick, 54 F. 338, 348-49 (M.D. Tenn. 1900) (conspiracy against public officer in the performance of his duties is violation of predecessor statute to 18 U.S.C. § 241).

Sgt. Luth testified that Aubuchon "looked pleased" when she mentioned to Sgt. Luth that the hearing had been cancelled.[701] In addition, Sgt. Luth testified that when he handed the direct complaint to Mr. Hendershott and informed him that the hearing had been vacated, Mr. Hendershott uttered the word "checkmate."[702] This, together with all the evidence, clearly and convincingly suggests that Mr. Thomas and Ms. Aubuchon conspired to muzzle Judge Donahoe.

482. Were this a criminal case, we are confident that the evidence would establish this conspiracy beyond a reasonable doubt. Nevertheless, while Mr. Thomas and Ms. Aubuchon did violate ER 8.4(b) by violating 18 U.S.C. § 241, sanctions will not issue from this particular violation, nor will it be considered in aggravation. While a criminal charge or conviction is not necessary to a finding that Respondents violated ER 8.4(b), this Court is fully aware that it is not a criminal court. In criminal court, a finding that Respondents violated 18 U.S.C. § 241 would involve additional pre-trial and trial criminal procedures and standards not applicable to this Court. As such, no sanctions will issue from this finding, nor will Respondents' violation of 8.4(b) in this Claim be considered in aggravation.

CLAIM TWENTY-NINE: ER 1.7(a)(2) (CONFLICT OF INTEREST)(THOMAS AND AUBUCHON)

483. Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2).

484. Mr. Thomas and Ms. Aubuchon had conflicts of interest in bringing criminal charges against Judge Donahoe. Mr. Thomas and Ms. Aubuchon's animosity

[701] Luth Testimony, Hr'g Tr. 121:12-13:31, Oct. 14, 2011.
[702] Luth Testimony, Hr'g Tr. 122:5: 31, Oct. 14, 2011. This Court is aware that Hendershott denied having used this phrase. However, Luth's testimony is entirely more persuasive, given that Hendershott was unable to recall many events surrounding the direct complaint against Judge Donahoe. *See* Hendershott Testimony, Hr'g Tr. 89: 10-25: 23 and 90: 1-15: 23, October 13, 2011.

against Judge Donahoe, based on his judicial rulings, limited their representation and judgment as attorneys for the State of Arizona.

485. Mr. Thomas and Ms. Aubuchon were biased against Judge Donahoe starting in February 2009, when he quashed the grand jury subpoena and he disqualified MCAO from investigating the Court Tower project. Their bias against him is further indicated by the PC statement attached to the direct complaint. The PC statement alleges no crime but sets forth MCSO's view of Judge Donahoe's bias against MCSO.

CLAIM THIRTY: ER 8.4(d) (CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE)(THOMAS AND AUBUCHON)

486. Mr. Thomas and Ms. Aubuchon violated ER 8.4(d).

487. Mr. Thomas and Ms. Aubuchon engaged in conduct prejudicial to the administration of justice by charging Judge Donahoe with crimes for the sole purpose of compelling his recusal in the pending Court Tower matter. Their conduct prejudiced the administration of justice by forcing Judge Donahoe to recuse himself and not hear a motion the County had filed.

CLAIM THIRTY-ONE: ER 1.7(a)(2) (CONFLICT OF INTEREST) (AUBUCHON AND THOMAS)

488. On January 4, 2010, Ms. Aubuchon, with the approval of Mr. Mr. Thomas, presented testimony to a grand jury seeking indictments against Andrew Kunasek and Sandi Wilson for allegedly misusing public funds in having the County Executive offices "swept" for surveillance devices, and against David Smith, Gary Donahoe and Mr. Thomas Irvine for allegedly impeding the Court Tower investigation.[703] At the time, Mr. Mr. Thomas and Sheriff Arpaio, through the MCAO, had a civil RICO lawsuit pending against Messrs. Kunasek, Smith and Irvine, Ms. Wilson and Judge Donahoe based on the same allegations. Since Ms.

703. Ex. 185 TRIAL EXB 02017–02130.

Aubuchon drafted the original RICO complaint, she was aware of the pending civil action. It is clearly a conflict-of-interest for a prosecutor to engage in a civil lawsuit against someone he or she is criminally prosecuting based on the same allegations.[704] As one Court said:

> "To you, and to any others in the profession . . . . who have labored under this misconception that there is nothing wrong when a district attorney acts as counsel for a litigant in a civil case, and prosecutes a criminal case based upon the facts giving rise to the civil action, we give warning: This court will not countenance or tolerate such conduct. We condemn it."[705]

489. As detailed at length previously, the allegations against Messrs. Kunasek, Smith and Irvine, Ms. Wilson and Judge Donahoe had absolutely no factual or legal substance and were based on unsubstantiated and uninvestigated rumor. The evidence is overwhelming that Mr. Thomas and Ms. Aubuchon shared a common purpose in bringing these accusations – vengeance to satisfy personal animosity.

490. After testimony was given to the grand jury, but before a draft indictment was presented, a stay was issued in Judge Donahoe's criminal case whereupon the grand jury was requested to recess. Subsequently, Judge Leonardo ruled in the *Wilcox* prosecution that the MCAO had a disqualifying conflict-of-interest, whereupon the MCAO decided to dismiss that case without prejudice. On March 3, 2010, Ms. Aubuchon appeared before the grand jurors and requested, based on the *Donahoe* stay and the *Wilcox* dismissal, that the grand jurors return the matter to the MCAO.[706] After deliberation, the grand jurors refused Ms.

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704. In re Peiffer, 27 B.R. 675 (Bkry N.D. Ala. 1982); In re La Pinska, 72 Ill.2d 461, 381 N.E.2d 700 (1978); Sinclair v. State, 278 Md. 243, 363 A.2d 468 (1976); In Re Truder, 37 N.M. 69, 17 P.2d 951(1932); In Re Williams, 174 Okla. 386, 50 P.2d 729 (1935); Commonwealth v. Dunlap, 474 Pa. 155, 377 A.2d 975 (1977).
705. People v. Respondent Attorneys, 162 Colo. 174, 177, 427 P.2d 330, 331 (1967).
706. Ex. 185. TRIAL EXB 02017–02131

Aubuchon's request and decided instead to take the very unusual step of voting to "end the inquiry," *Exhibit 185*, precluding consideration of the matters by any other grand jury. During the grand jurors' orientation in December 2009, they were told that "end inquiry" meant:

> "This case is so bad you don't want to go any more into the case than you just have. There's no further evidence that's necessary. There's no law that you can conceive indicting this person under. That's what ending inquiry means."[707]

491. In sum, Ms. Aubuchon, with the approval of Mr. Thomas, commenced criminal proceedings against Messrs. Kunasek, Smith and Irvine, Ms. Wilson and Judge Donahoe when the MCAO and Mr. Thomas were suing them in a civil RICO case based on the same allegations.

492. The allegations against Messrs. Kunasek, Smith and Irvine, Ms. Wilson and Judge Donahoe made by Ms. Aubuchon, with the approval of Mr. Thomas, lacked any factual or legal substance, were based on unsubstantiated and uninvestigated rumor, and resulted from the desire of Mr. Thomas and Ms. Aubuchon to exact punishment or to satisfy personal animosity.

493. As to Claim Thirty-one, there is clear and convincing evidence that Mr. Thomas and Ms. Aubuchon violated ER 1.7(a)(2) in commencing the grand jury proceeding against Messrs. Kunasek, Smith and Irvine, Ms. Wilson and Judge Donahoe.

CLAIM THIRTY-TWO: ER 8.4(C) (CONDUCT INVOLVING DISHONESTY) (AUBUCHON AND THOMAS)

494. After Judge Leonardo ruled in the *Wilcox* prosecution that the MCAO had a disqualifying conflict-of-interest, the MCAO dismissed the *Wilcox* and *Stapley II* prosecutions without prejudice. Gila County Attorney Daisy Flores subsequently

707. Ex. 162, TRIAL 01902–01904.

agreed to handle any further investigation and prosecution of those two matters. Along with material regarding *Wilcox* and *Stapley II*, Ms. Aubuchon sent Ms. Flores information about the charges she had presented to the January 4, 2010 grand jury when seeking indictments against Messrs. Kunasek, Smith and Irvine, Ms. Wilson and Judge Donahoe.[708] Ms. Aubuchon told Ms. Flores that:

> • The grand jurors had requested a draft indictment, but the Court required the jurors to adjourn on account of the lateness of the hour before the draft indictment could be presented.
> • She subsequently advised the grand jurors of the stay in the *Donahoe* matter and requested that they stop consideration of the matters until the stay could be appealed.
> • Once the MCAO was determined to have a conflict, the MCAO dismissed *Wilcox* and *Stapley II* without prejudice.
> • That the MCSO was requesting that Ms. Flores review the matters presented to the grand jury on January 4, 2010.[709]

495. Ms. Aubuchon failed to tell Ms. Flores that she had requested the grand jurors to return the matters to the MCAO, but that the jurors refused her request and voted to "end the inquiry." Ms. Aubuchon's omission was a misrepresentation in violation of ER 8.4(c).[710] Her actions were intentional and knowing.

496. In sum, Ms. Aubuchon sent Gila County Attorney Daisy Flores information regarding the matters she had presented to the grand jury on January 4, 2010. In doing so, Ms. Aubuchon stated that the MCSO requested that Ms. Flores review it for possible further investigation and prosecution. Ms. Aubuchon advised Ms. Flores that she requested that the grand jury delay further

708. Ex. 214, 215, TRIAL EXB 02422 – 02436.
709. *Id.*
710. *In re* Alcorn, 202 Ariz. 62, 41 P.3d 600 (2002).

consideration until the *Donahoe* stay was resolved. Ms. Aubuchon intentionally and knowingly misled Ms. Flores by not telling Ms. Flores that the grand jurors subsequently had voted to "end the inquiry."

497. There is no evidence that Mr. Thomas knew of, authorized or approved Ms. Aubuchon's statements to Ms. Flores.

498. Therefore, as to Claim Thirty-two, (i) there is clear and convincing evidence that Ms. Aubuchon violated ER 8.4(c) in communicating with Ms. Flores regarding the matters on which the grand jurors had voted to "end the inquiry," and (ii) there is not clear and convincing evidence that Mr. Thomas similarly violated ER 8.4(c).

CLAIM THIRTY-THREE (FAILURE TO COOPERATE)(THOMAS, AUBUCHON, AND ALEXANDER)

499. On or about April 12, 2010, Independent Bar Counsel began the screening investigations in the matters.

500. Respondents all provided a letter to Independent Bar Counsel in response to its screening investigation letters.

501. The responses by Respondents did not address the allegations and instead asserted broad privileges.

502. From May 5, 2010 – August 21, 2010, Respondents authorized their counsel to file approximately fifteen (separate and/or joint) meritless, frivolous and dilatory motions, replies, and special actions with the Probable Cause Panelist and the Court.[711]

503. Such motions and special actions were an attempt to delay, obstruct and burden the screening investigations.

711. *See* Ex. 221–224, 228–237.

504. All motions filed by the Respondents were either denied or jurisdiction was declined.

505. Former Rule 53(d) (refusal to cooperate) provides that it is grounds for discipline for a lawyer to refuse cooperate with officials and staff of the State Bar.

506. Former Rule 53(f) (failure to furnish information)[712] further provides that it is grounds for discipline for a lawyer to fail to furnish information or fail to respond promptly to any inquiry or request from bar counsel.

507. Independent Bar Counsel offered two matters for the Panel's consideration regarding violations of Rule 53(d) and (f) to demonstrate that the liability under Rules 53(d) and (f) is not limited to lawyers who fail to participate in a investigation *entirely. In Re Garza, Jr*., 2009 WL 2005427 (Ariz.Disp.Comm. Mar 4, 2009), held that the response must be meaningful and *In re Howell, III* 2008 WL 5413039, in which late or incomplete responses and records were filed resulting in a violation of R. Sup. Ct. Ariz. 53(f). The Panel however, did not consider *Garza* as Mr. Sifferman was the hearing officer in that matter.

508. Respondents Thomas, Ms. Aubuchon and Ms. Alexander all failed to cooperate with the State Bar's investigations as required pursuant to Rule 53(d) and failed to respond by failing to promptly respond to an inquiry from Independent Bar Counsel as required by Rule 53(f). Numerous pleadings were filed which delayed and burdened the process.

509. As such, this Panel holds that Claim Thirty–three has been proven by clear and convincing evidence. Respondents' failure to cooperate constitutes a violation of said Rules.

712. Former Rules 53(d) and (f) are currently combined into Rule 54(d), R. Sup. Ct. Ariz.

SANCTIONS

510. In determining an appropriate sanction, Court generally utilizes the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as a guideline.[713] The appropriate sanction however, depends on the facts and circumstances of each case.[714]

Analysis under the ABA Standards

511. When imposing a sanction, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors.[715]

512. Respondents violated their duty to their clients, the public, the legal system and as a professional.

513. In regards to mental state, the *Standards* define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." The *Standards* define "intent" as "the conscious objective or purpose to accomplish a particular result." The *Standards* further define "injury" as the "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct."[716] A person's knowledge may also be inferred from the attending circumstances.[717]

514. The *Standards* however, do not account for multiple charges of misconduct and advise that the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct.[718] Here, the evidence establishes that Respondents' misconduct was knowing, if not intentional in all

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713. R. Sup. Ct. Ariz. 58(k).
714. In re Wines, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983).
715. In re Peasley, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004). *See also Standard* 3.0 at 11.
716. *Standards* at 9.
717. R. Sup. Ct. Ariz. 42, ER 1.0(f).
718. *See Standards, Theoretical Framework* at 7.

proven counts and the *Standards* in most instances cite to disbarment as the presumptive sanction for knowing misconduct.

515. *Standard* 5.0–*Violations of Duties Owed to the Public*–is applicable to Respondents' (Thomas and Aubuchon) most serious misconduct in this matter, the filing of a criminal complaint against Superior Court Presiding Criminal Judge Gary Donahoe without probable cause. The presumptive sanction is disbarment.

516. *Standard* 5.21–*Failure to Maintain the Public Trust*–is generally appropriate in matters involving public officials who engaged in conduct prejudicial to the administration of justice. It provides:

> Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

517. Respondents' (Thomas and Aubuchon) knowing, if not intentional, misconduct undermined the public trust and caused serious injury to the defendants and to the integrity of the legal system when they filed felony charges against Judge Donahoe without any evidence of criminal activity and caused serious injury to the legal process. They knowingly, if not intentionally, used their position and power to intimidate and remove any opponents and advance their own agenda to the detriment of county government.

518. *Standard* 4.31 is applicable to Respondents' (Thomas and Aubuchon) conflict of interest violation and provides:

> Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
> (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the

intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

519. *Standard* 6.11, *False Statements, Fraud, and Misrepresentation* is applicable to Respondents' (Thomas and Aubuchon) violation of ER 3.3(a)(1) and provides:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes serious or potentially serious adverse effect on the legal proceeding.

520. Additionally, *Standard* 7.1 is applicable to conduct involving duties owed as a professional and provides:

> Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

521. *Standard* 5.22–*Failure to Maintain the Public Trust* is also applicable to Respondent Alexander's most serious misconduct in this matter. It provides:

> Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

522. Respondent Alexander knowingly filed an Amended RICO claim without the benefit of a factual investigation and without the necessary elements for such a case and caused serious injury to the defendants and to the legal system.

523. Also applicable to Respondent Alexander's violation of ER 1.1 is *Standard* 4.52–*Lack of Competence*–which provides:

> Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

524. The amended RICO complaint filed by Alexander was fundamentally deficient in that it failed to set forth any factual basis that would establish racketeering activity under the RICO statute. Suspension is the presumptive sanction regarding Respondent Alexander.

Aggravating and Mitigating factors, Standard 9.0

525. After an ethical rule violation has been established, the Panel may consider aggravating and mitigating circumstance to aid in the imposition of a sanction. Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence.[719]

526. The Panel finds the following aggravating factors are present in this matter:

- 9.22 (b) dishonest and selfish motive (Thomas and Aubuchon);
- 9.22(c) pattern of misconduct (Thomas, Aubuchon and Alexander)
- 9.22(d) multiple offenses (Thomas, Aubuchon and Alexander);
- 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or

719. Matter of Peasley, 208 Ariz. 27, 90 P.3d 764 (2004).

orders of the disciplinary agency (Thomas, Aubuchon and Alexander);

- 9.22(g) refusal to acknowledge wrongful nature of conduct (Thomas, Aubuchon and Alexander); and
- 9.22(i) substantial experience in the practice of law (Respondents Thomas and Aubuchon).

527. The Panel finds the following mitigating factor is present:

- 9.32(a) absence of a prior disciplinary record (Thomas, Aubuchon and Alexander).

528. The Panel determined that the significant aggravating factors present in this matter outweigh the sole mitigating factor and do not overcome the presumptive sanction.

CONCLUSION

529. In their oath of admission, each of Respondents pledged to "abstain from all offensive conduct," "at all times faithfully and diligently adhere to the rules of professional responsibility and a lawyer's creed of professionalism" and "maintain the respect due to courts of justice and judicial officers."[720] They did not. Instead they ignored their sworn obligations to do good and as a result never erected the best barrier against doing wrong. "Faith in public officials is difficult to restore."[721] Misconduct of this magnitude can only erode public confidence in our legal profession.

530. Thomas Jefferson gave fair warning to office seekers to safeguard themselves carefully, for *"[w]hen a man has cast his longing eyes on office a*

720. *See* R. Sup. Ct. Ariz. 31 (The Oath of Admission to the Bar), 37(b).
721 In re Koch, 181 Ariz. 352, 354, 890 P.2d 1137, 1139 (1995).

rottenness begins in his conduct." It is distressing, and as often said, tragic, that the preexisting safeguards of the office were cast off. Respondents became dependent on the public's increasing mistrust of government. Their power tactics fueled and then fed on that ill will. They were co-dependent on press conferences and public relations and devoid of any balanced independent investigation. Their actions were neither legal nor ethical. We find no good intentions by Respondents.

531. *Vogue* editor Diana Vreeland's motto was "*Fake it, fake it*." Her advice to others was *"Never worry about facts. Project an image to the public."* For her to be successful was to fashion a reality *"as you feel it to be, as you wish it into being*." In the stylistic world of make believe and images perhaps that is good advice. Tragically, Mr. Thomas and Ms. Aubuchon *haute couture* never worried about facts and only about their image creating a never ending spin-zone. Justice requires far more.

532. Ironically both Mr. Thomas and Ms. Aubuchon opposed these proceedings being open to the public by camera. We now better understand their reluctance. But no one is entitled to a "secret" trial. As was stated in the ruling of May 2, 2011 in this case,

> Regardless of the reasons for the publicity preceding this disciplinary matter, this court believes information will not taint the public but rather reported proceedings will clarify and better inform a public that is presently left with little other than innuendo or partisan conjecturing. Few things are more certain to trigger an increase in public distrust than the removal of proceedings from public scrutiny. The best clarification to dark allegations is not more darkness but rather the light of informed reasoning.

No shade was drawn on these proceedings.

533. We, like the public, began uninformed. We are now fully informed. We are fully decided in our opinion. The evidence is overwhelming against Respondents. We hope the openness in which these proceedings were held will help restore the public's faith in our legal institutions and deter attorneys from similar misbehavior. The purpose of attorney discipline is to maintain the integrity of the profession in the eyes of the public, protect the public from unethical or incompetent lawyers, and deter other lawyers from engaging in illegal or unprofessional conduct.[722]

534. Sadly, their own individual basic mistrust of others, when combined together, became multiplied by dishonesty, an abuse of power and a remarkable willingness to spend the public's money for their *cause célèbre.* The aggravating factors devastate the mitigating factors. We find they knew they had no evidence and prosecuted people anyway. There was no "noble cause." There was only self–interest. The harm done to the public, individuals, and the profession was stunning on every front.

535. Ironically, counsel for Lisa Aubuchon, who has aided both plaintiffs and defendants throughout his long career, well–identified the concern.

> The facts should be developed by a fair and impartial investigation, which compiles all of the facts, including exculpatory facts, and presents them to the probable cause panel. The developed facts should be just that- "facts" and not simply conclusions of the investigative body.[723]

722. In re Scholl, 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001).
723. Joint Prehearing Statement Page 27, Lines 8-12.

He then expounded,

> "It is unfair to have an investigation conducted by the individuals who are the lawyers who represent the side that has the burden of proof. This is part of the reason why there is, virtually always in every jurisdiction in a democratic society, a separation of the investigative role from the prosecutorial role. This is why, in a democratic system, police officers are not prosecutors. If they have a vested interest in the prosecution of the case, such as developing the case, then they cannot be fair and impartial in their role as investigators. When the police officers investigate their cases they are subject to laws, regulations and common law that regulates the scope and fairness and procedures they must follow. They are subject to cross-examination in the cases they investigate. They turn the investigation over to the prosecutors who then present the evidence to the fact finders. The person charged with the violation is then given the right to a trial. At the trial the person charged is giving the right to confront the witnesses against them, including the investigators who develop the case. The framers of the constitution recognized this need for confrontation when they drafted the Sixth Amendment that gives persons accused of wrongdoing the right to confront the witnesses against them.[724]

536. As stated at the beginning of these proceedings, justice is not some "dot to dot" child's puzzle with pre-ordained numbers to follow. Yet that is precisely what Respondents wanted. "**When the police officers investigate their cases they are subject to laws, regulations and common law that regulates the scope and fairness and procedures they must follow. They are subject to cross-examination in the cases they investigate. They turn the investigation over to the prosecutors who then present the evidence to the fact finders**."[725] Respondents tried to assure that justice would not occur.

724. *Id.* at 25–26.
725. *Id.*

537. The Founders of these United States wanted a society which would be built on justice, one person at a time. Those founders found a symbol for their cause. Over time it received a nick-name, "Old Glory." Agree or not, that flag has been the symbol of our national unity and our national aspiration. It reminds us of the constant struggle for independence of a union preserved, of liberty and the sacrifices of brave men and women to whom these ideals have been dearer than life.

538. With time, a pledge was created to underscore the foundational principles of our great country. That pledge ends with four words. The words may be simple, but they are profound. "And justice for all." This Panel is firmly convinced justice for all has occurred in this case. It is also firmly convinced Respondents never intended the same.

IT IS HEREBY ORDERED that Respondent, **Rachel R. Alexander, Bar No. 020092**, is hereby suspended for six months and one day for her conduct in violation of the Arizona Rules of Professional Conduct, effective May 10, 2012.

IT IS HEREBY ORDERED that Respondent, **Lisa M. Aubuchon, Bar No. 013141**, is hereby disbarred for her conduct in violation of the Arizona Rules of Professional Conduct, effective May 10, 2012.

IT IS HEREBY ORDERED that Respondent, **Andrew P. Thomas, Bar No. 014069**, is hereby disbarred for his conduct in violation of the Arizona Rules of Professional Conduct, effective May 10, 2012.

DATED this 10th day of April, 2011.

THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:

_____

Mark S. Sifferman Volunteer Attorney Member

_____

Rev. Dr. John C. N. Hall, Volunteer Public Member

CONCURRING OPINION—Public Panelist Rev., Dr. John C.N. Hall

While concurring fully with the opinion, I choose to write a concurring opinion from a public member's view.

Fiat Justitia: Let Justice Be Done.

During the tenure of Andrew Thomas as the Maricopa County Attorney, the official seal of his office contained the phrase, inscribed in both Latin and English, "Fiat Justitia: Let Justice Be Done." Nevertheless, much of Thomas' leadership let justice *not* be done. Rather, Thomas and his deputies Lisa Aubuchon and Rachael Alexander defiled justice and encouraged others to join in the desecration. Over a period of several years, Thomas, Aubuchon, and Alexander, exploited the power invested in them, undermined the public trust, and flagrantly misused the law for their own purposes. This is their story.

A roller coaster of power and fear.

This is a story of power and fear. It is the story of legal maneuvering, driven like a roller coaster intentionally ripped from its rails, by unethical operators bent on misusing power and promulgating fear. It is the story of the power of law, and its assault at the hands of those entrusted to protect and uphold justice. It is the story of the fear of loss, and the chokehold it clamped on abuser and abused alike.

Once this story's coaster begins to move, many human hearts beat faster. Each new loop of track causes pain for the riders, strapped down and confronted with the great forces being unleashed. As the story unfolds and the cars begin to jump their track, ethical equilibrium is lost and truth goes terribly wrong. This multi-year legal odyssey is a ride fraught with incredible accusation, unbelievable charges, and meritless prosecution. Its legal twists and turns are recklessly run by County Attorneys whose arrogant concoctions, incompetent practice, and prideful psyches, in the end, leave justice in a smoldering heap.

The first loop – Thomas' power struggle with MCBOS.

Andrew Thomas was elected to the office of Maricopa County Attorney in 2004. As such, Thomas was to serve as the attorney for the Maricopa County Board of Supervisors ("Board") and to serve the County. However, in 2006, about a year after he took office, substantial disagreements arose between Thomas and MCBOS, and the first round of a significant power struggle began. In question was whether MCBOS could appoint outside counsel to represent MCBOS. The Supervisors, with Don Stapley in the position of Chairman, wanted a new method of selecting counsel which allowed MCBOS to control the process.

Andrew Thomas sensed a challenge to his authority and an impending loss of power. He disagreed with the Supervisors' plans and proceeded to send a flurry of letters to his client, MCBOS, informing them of his displeasure and warning of repercussions if they proceeded. Thomas wanted complete control over the choice of outside counsel for MCBOS of Supervisors. MCBOS wanted to control this instead.

In June 2006, Thomas sued MCBOS over the question of appointing counsel. At the same time, as would prove to be his custom, he issued a revealing press release. Thomas wrote:

> It bears noting that these recent lawsuits have occurred during, and largely because of **the unusual chairmanship of Supervisor Don Stapley**. While respecting **the attorney-client relationship I hold with Mr. Stapley and other members of the board,** I would be remiss if I did not help the people of Maricopa County understand why the board has attracted so many costly lawsuits in such a brief period of time.
>
> **I cannot in good conscience defend the Board of Supervisors** in the two legal actions brought by Ms. Dowling and Mr. Keen, as I believe these complaints have merit.[726]

In this press release, Thomas identified the conflict with MCBOS and his understanding of his attorney-client relationship with them. He also mentioned two other lawsuits that had been filed against MCBOS and gave his personal opinion about his client's legal position in these cases. But beyond this, Thomas tellingly narrowed his sights on Supervisor Don Stapley. In this press release, the personal nature of the power struggles that would mark the rest of Thomas' tenure went public.

A straight ride for a time – or so it seemed.

Like a stretch of roller coaster track that for a moment is deceptively straight, in August of 2006, a period of seemingly peaceful cooperation between Andrew Thomas and MCBOS of Supervisors ensued. At that time, Thomas and MCBOS entered into an armistice by mutually accepting a Memorandum of Understanding (MOU).[727] In the MOU, Thomas agreed to drop his suit against MCBOS in return for MCBOS's agreeing to follow a system of appointing outside counsel that was acceptable to Thomas.

The MOU would be in effect for sixteen months, until December 1, 2008. In the days after it was signed, at least on the surface, Thomas and MCBOS maintained the give and take of compromise, like two sentries guarding opposite

726. Ex. 13, TRIAL EXB 00097.
727. Ex. 15, TRIAL EXB 00100.

sides of a border line drawn in the sand. Yet, just behind the doors of the executive wing of the County Attorney's office, in what was known as the "blue carpet" area, Andrew Thomas and his deputies were hard at work planning the painfully sharp turns that lay ahead.

Behind–the–scenes work.

Under the cover of the MOU, Thomas began in earnest to find a reason – any reason – to burden those whom he felt had crossed him. In 2007, Thomas joined forces with the Maricopa County Sheriff's Office and created a joint task force known as the Maricopa County Anti-Corruption Effort or MACE. This new unit would be the seed bed for nurturing rumors for future use.

At this same time, Thomas appointed Mark Goldman, a lawyer-friend who was Thomas' political benefactor, to the position of Special Agent and gave him a blue carpet office in the County Attorney's executive wing. Acting on vague rumors about supposed secret connections between Supervisor Stapley, Presiding Superior Court Judge Barbara Mundell, and Phoenix attorney Tom Irvine, both the MACE unit and Thomas' special agent went to work. Goldman surfed the Internet with hopes of providing Thomas with evidence against Stapley and other perceived adversaries. Hearsay about Judge Mundell being pressured into hiring Irvine as a "space planner" for the multi-million dollar Court Tower building project swirled around the offices of MACE and the County Attorney. Thomas fueled the rumor, and ignored the facts about Irvine, despite having first-hand knowledge that "Tom Irvine is an attorney for the Court, not a design or construction expert."[728]

Goldman's Internet inquiry about Stapley yielded no nefarious connections, but noted some sporadic irregularities in financial disclosures that Stapley was

728. Ex.18, TRIAL EXB 00118.

required to file as a member of MCBOS. Even with Goldman's printouts from the web in hand, Thomas did nothing to follow up. Rather, he waited for an opportune time.

Months later, in March 2008, Thomas informed his Deputy County Attorney Lisa Aubuchon that he had obtained a tip about Stapley's disclosures. He passed on Goldman's old research to Aubuchon and directed her to handle the matter. Aubuchon proceeded to circumvent normal investigative channels, and gave a 65-count draft indictment to the MACE unit on May 14, 2008. In the process, she told the MACE detectives that the investigation began that day, rather than when Goldman had first looked into Stapley, thereby misleading the officers.

Andrew Thomas was reelected in November of 2008 to a second term. To those beyond the blue carpet area and closed-door MACE meetings, all appeared calm for the moment. Yet, the twists ahead would turn everything upside down.

The second term begins and the loops get bigger.

On December 1, 2008 the MOU expired and the ride went wild. The very next day, December 2, 2008, Thomas and Aubuchon produced a Grand Jury indictment of their own client, charging Don Stapley with 118 criminal violations relating to financial disclosures. Even though she knew that some of the charges had allegedly occurred as much as 14 years earlier and were well outside the Statute of limitations, Aubuchon failed to reveal this to the Grand Jury when charging Stapley.

The case, which would become known as "*Stapley I*,"[729] was randomly assigned to Judge Kenneth Fields, whom Thomas and Aubuchon felt was biased against them. Aubuchon thought that Presiding Judge Mundell and Judge Anna Baca had assigned Fields the case simply to retaliate against Thomas.

729. Ex. 36, TRIAL EXB 01109.

Soon, Aubuchon filed a motion to recuse Fields, where she charged, "Judge Mundell has […] overruled established rules and practices in order to select the judge personally."[730] Then, increasing the pressure, Aubuchon wrote to Mundell and Baca questioning them about their handling of the case, and interfering with the administration of the court. Yet, Aubuchon should have understood that Mundell had the power and authority to assign Fields. This is especially true noting that just two pages later, in the same motion, Aubuchon cites Mundell's authority, writing, "Maricopa County Superior Court Local Rule 4.3(a) requires that criminal cases be assigned to trial divisions **in a manner prescribed by the presiding judge…**"[731] (emphasis added).

This marked the beginning of a concerted effort by Thomas and Aubuchon, working with Maricopa County Sheriff Joe Arpaio and Chief Deputy David Hendershott, to wrestle power from MCBOS, County officials, and Superior Court judges, and to instill fear in the hearts of those who would resist. In fact, Hendershott testified in the hearing of this matter that at one point the goal "was to take the County into receivership."[732] Thomas started with Stapley, had judges in his sights, and was preparing for the rest.

The ride speeds up.

Soon, sparked by concerns about Stapley's indictment and Thomas's conflict of interest, MCBOS hired attorney Tom Irvine for help. Aubuchon felt slighted by Irvine's work with the County and envied him, feelings she would eventually admit to Supervisor Andrew Kunasek.[733] Thomas, who felt his power

730. Ex. 27, TRIAL EXB 00595.
731. *Id.*
732. Hendershott testimony, Hr'g Tr., Oct. 13, 2011.
733. Ex. 196, TRIAL EXB 02275: Aubuchon is speaking about sitting in on Court Tower planning meetings with Tom Irvine, and says of him, "And when I sat in those meetings, I have an attorney [Irvine] being paid $400 an hour and his $300 an hour assistant sitting there talking about whether the County Attorney should have a bigger office or a smaller office in the RCC, so they're getting paid $700 an hour, I'm making my measly county salary, which I haven't had a raise in years, and I'm wondering why they're getting paid $700 an hour to talk about space."

being questioned by MCBOS's hiring of Irvine, cranked the ride's speed to high. Thomas and his staff began to retaliate by sending letters to county employees threatening them with criminal prosecution if they paid Irvine for his work with MCBOS.

Then, on December 15, 2008, about ten days after MCBOS hired Irvine, Thomas and Aubuchon issued a Grand Jury subpoena[734] that spun their client the County like a roller coaster in a corkscrew, twisting this way and that. The sweeping subpoena demanded that the County produce many thousands of documents regarding the Court Tower project – a project that Thomas and Aubuchon looked upon with envy and suspicion.

On April 2, 2009, Thomas entered into an agreement with Sheila Polk, the Yavapai County Attorney, to take over the prosecution of *Stapley I* and the case transferred to Prescott.

On March 5, 2009, Judge Rebecca A. Albrecht attempted to inject some sanity into Andrew Thomas' behavior. In a letter she penned to Thomas dismissing a bar complaint against him, she wrote:

> However, as the elected Maricopa County Attorney, **your conduct is subject to much greater scrutiny than that of other attorneys in the County, including your deputies.** That is as it should be. Those who assume the mantle of public office assume the responsibility of preserving and protecting the rights of every citizen. The integrity of your office, and indeed the justice system, is in part measured by your response to the matters brought to your office and by your office.[735]

On August 24, 2009, Judge Fields granted a motion to dismiss and threw out many of the counts against Stapley. In retaliation, on the same day, Thomas issued a press release peppered with untruths about *Stapley I*, even though he

734. Ex. 44, TRIAL EXB 01166.
735. Ex. 87, TRIAL EXB 01383.

had transferred the case to Sheila Polk. He stated, "The ruling today reinforces our office's concerns about the impartiality of Judge Fields. He was handpicked for this case in violation of the rules of court, despite his having filed a bar complaint against the Maricopa County Attorney (which was dismissed) and having campaigned for Mr. Thomas' opponent in last year's election."[736]

The coaster begins to leave the rails on the RICO curve.

In a particularly grim twist on this roller coaster ride, Thomas and Aubuchon drafted, and on December 1, 2009 filed, a federal civil Racketeer Influenced and Corrupt Organizations (RICO) action.[737] Shortly thereafter, at Thomas' direction, respondent Rachel Alexander filed an amended RICO complaint,[738] as well. This racketeering lawsuit brought the respondents' actions to a new level of brazen arrogance and incompetent unethical practice.

Andrew Thomas, in a press release referring to the RICO suit, stated, "Nobody is above the law."[739] However, the RICO suit was never about upholding the law. The suit was brought simply to retaliate against the sixteen defendants Thomas, Aubuchon, and Alexander named, who included MCBOS of Supervisors as a group and each Board member individually, the County Manager and the Deputy County Manager, Superior Court Judges, and local lawyers.

The charges in the RICO complaint were an amazing mix of incredible concoctions with no factual foundation whatsoever. One of the allegations, for example, claimed the existence of a secret faction of judges, a group the respondents named the "Mundell-Fields faction,"[740] who were supposedly working to undermine Thomas and Aubuchon. Another racketeering charge

736. Ex. 106, TRIAL EXB 01452.
737. Ex. 145, TRIAL EXB 01767.
738. Ex. 188, TRIAL EXB 02155.
739. Ex. 152, TRIAL EXB 01844.
740. Ex. 145, TRIAL EXB 01773.

stated that some of the RICO defendants laughed at Aubuchon in court.[741] Still another charge suggested that judges and others had conspired to file Bar complaints against Thomas.[742] And the list went on.

In the hands of the reckless respondents, the RICO action was nothing short of Thomas, Aubuchon, and Alexander fumbling with the law, like children wielding a buzzing chainsaw, cutting off Thomas' political opponents at the knees. Yet, the incompetent trio failed to plead even the most the basic elements required of a legitimate RICO complaint. In bringing the action, Thomas zealously disregarded the many warnings from his staff against pursuing the suit, all the while knowing the complete inexperience and unbelievable inability of those who worked on it.[743]

Amazingly, each of the respondents showed no remorse for pursuing the RICO action. To the contrary, for example, at the hearing on this matter, Alexander stated that she authored and filed the amended RICO complaint at Thomas' direction despite finding absolutely no evidence for any of the charges in the complaint.[744] Yet, even this didn't slow the respondents, who continued careening down their track.

One ride with Stapley wasn't enough for this roller coaster.

On December 8, 2009, just one week after Thomas and Aubuchon filed the RICO complaint, they caused a Grand Jury to indict Don Stapley for a second

741. *Id.* at ln. 10.
742. *Id.* at ln. 16
743. Ex. 169, TRIAL EXB 01925: December 13, 2009 email from Mark Faull to Phil MacDonnell and forwarded by MacDonnell to Andrew Thomas "Please be advised as Rachel's Division supervisor I believe she lacks sufficient attorney legal experience and training to be assigned as lead atty to a case of this complexity […] "In addition she has always been under the direct work supervision of Mr. Thomas as is Lisa Aubuchon for the special MACE criminal investigation. Any attempt to keep the RICO case in Executive will ultimately present separation issues due to the direct supervisory role of Mr. Thomas in the criminal investigation and the problem with parallel proceedings." Ex. 189, TRIAL EXB 02188: January 15, 2010 email from Peter Spaw to Andrew Thomas stating "[…] clearly Rachel [Alexander] is not remotely experienced enough to handle the complicated issues presented by this [RICO] litigation."

744. Alexander Testimony, Hr'g Tr., Nov. 2, 2011

time, in what became known as "*Stapley II*."[745] On that same day, they also produced a Grand Jury indictment of Supervisor Mary Rose Wilcox.[746] Both Stapley and Wilcox already had Thomas' civil RICO case pending against them, and now Thomas compounded the damage with new criminal charges, blinded by his own ambition to wield power and strike fear in the hearts of any who would challenge him.

While the charges against Stapley and Wilcox might have been appropriately filed by another prosecuting office, by now the only substantial purpose that Thomas and Aubuchon had was to burden and embarrass their foes. At this point, there was so much conflict between Thomas and MCBOS that Judge John Leonardo ruled that Thomas and Aubuchon could not even prosecute Wilcox,[747] ruling that Thomas had acted strictly in retaliation.

The coaster crashes in flames in "Bizarro World."

Immediately after bringing the *Stapley II* and Wilcox indictments, in what is possibly the darkest moment of this nightmarish ride, on December 8, 2009, Thomas and Aubuchon quietly met with Arpaio and Hendershott behind closed doors. This shameful gathering had but one motive. The foursome met to conspire about how to muzzle their next most-feared nemesis. After much late-night intrigue by Thomas and Aubuchon, the conclave's results were revealed the following morning. On December 9th, Thomas and Aubuchon filed criminal charges against Presiding Criminal Judge Gary Donahoe[748] without a shred of evidence that Donahoe had committed any crime.

Their provocation was fear, and their purpose was simple. They charged Donahoe to stop him from holding a hearing that was scheduled that afternoon.

745. Ex. 150, TRIAL EXB 01820.
746. Ex. 149, TRIAL EXB 01802:
747. State of Arizona vs. Wilcox, CR-2010-005423-00l/OC-2010-005423-001.
748. Ex. 163, TRIAL EXB 01905.

They feared the judge might rule against Thomas and his office, halting them from handling any more cases involving MCBOS and the County.

The direct complaint filed against Judge Donahoe charged him with bribery, obstruction, and hindering, with absolutely no evidence to support even a single claim. The probable cause statement that accompanied this despicable work was borrowed wholesale from David Hendershott's musings and had no basis in reality. In fact, in the hearing of this current matter, Thomas and Aubuchon could not testify to a single scrap of evidence of a crime committed by Judge Donahoe. Knowing full well that the complaint was patently false at the time it was filed, in Thomas' and Aubuchon's "Bizarro World,"[749] the respondents committed perjury and caused others to perjure themselves[750] when they charged Judge Donahoe.

A smoldering heap.

The worst was done. The ride was in flames. Yet, Thomas and Aubuchon still couldn't see for all the smoke. As if the damage wasn't enough, on January 4, 2010, Aubuchon began to speak with a Grand Jury, presenting accusations meant to launch two fresh attacks.

The first alleged that members of MCBOS and County officials had illegally used public monies on two separate occasions to conduct sweeps for electronic listening devices at county offices – in what would be called the "Bug Sweep"[751] – an accusation that was also contained in the RICO suit.[752] At question was this circular puzzle: May the County Administration use County funds to determine if the County Sheriff and the County Attorney have bugged County offices to spy

749. Almanza Testimony, Hr'g Tr., Oct. 11, 2011. Almanza dubbed the events surrounding Thomas and Aubuchon charging Judge Gary Donohoe with criminal acts as "Bizarro World."
750. *Id.* Aubuchon caused Almanza to sign the direct complaint against Donohoe under oath even though she knew the charges were completely without merit
751. Ex. 146, TRIAL EXB 01786.
752. Ex. 145, TRIAL EXB 01773 (page 7, paragraph 36, located at pleading line 28); Ex. 188, TRIAL EXB 02162 (page 8, paragraph 36, located at pleading line 3).

on the County Administration? MCBOS felt the need to conduct such a search as protection against Thomas and Arpaio. Thomas and Aubuchon felt the need to produce some tidbit of criminal intent in the Bug Sweep, but found none.

The second tack taken with the Grand Jury alleged that Judge Donahoe, Tom Irvine, and County Manager David Smith had illegally conspired to hinder prosecution and obstruct a criminal investigation involving the Court Tower. These were again the wild, groundless claims of Thomas and Aubuchon, grasping at anything to keep the ride going.

When it sought advice on how to proceed, the Grand Jury was given three options. They could ask for a draft indictment, end the inquiry, or hear additional evidence. The Grand Jury voted to end the inquiry. Hiding the truth, Aubuchon would fail to tell this to Gila County Attorney Daisy Flores, who, in March 2010, took on a review of these matters along with reviews of the *Stapley II* and Wilcox cases.

Justice denied.

On April 1, 2010, Andrew Thomas announced he was resigning as County Attorney in order to run for Arizona Attorney General. In his April 5th news release, entitled "Final Remarks," Thomas wrote, "As I leave the County Attorney's Office, I have reflected on some of the key issues and problems in our community that our office has sought to address. The motto of this office, *"Let Justice Be Done,"* captures fundamentally what we are about. As a prosecutor's office, *we seek justice […] and to uphold the rule of law"*[753] (emphasis added). Thomas went on to write, "The people of this county have *honored me with their trust* in electing me to this office."[754]

753. Ex. 217, TRIAL EXB 02438.
754. *Id.* at TRIAL EXB 02440 (emphasis added).

Ironically, the tragic tale of this misguided roller coaster, marked by incredible accusation, unbelievable charges, and meritless prosecution, belies Thomas' lofty farewell remarks. Justice was denied.

This is the story of three unethical attorneys, Andrew Thomas, Lisa Aubuchon, and to a lesser extent, Rachel Alexander. This is the story of County Attorneys who did not "let justice be done," but rather, birthed injustice after injustice. This is the story of the public trust dishonored, desecrated, and defiled. This multi-year-wreck-of-a-ride, operated by Andrew Thomas and staffed by Aubuchon and Alexander, outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law. By the time Andrew Thomas resigned, with his hopes of attaining higher public office and greater public trust, his legacy lay in a smoldering heap, its smoke slowly curling skyward like a prayer for relief.

An especially fitting footnote to this matter.

In reading through the thousands of pages of stipulated exhibits in the hearing of this matter, one exhibit seems exceptionally poignant. On December 28, 2010, a letter was written by Paul K. Charlton to Sheila Polk requesting her to dismiss the *Stapley I* matter that Andrew Thomas had transferred to her. In the letter, Charlton speaks of how Andrew Thomas' behavior reminded him of a speech by former U S Attorney General Robert H. Jackson, who later became a Justice on the U. S. Supreme Court and the lead prosecutor at the Nuremberg war crimes trials. Jackson's words speak clearly to the prosecutorial misconduct and ethical violations of the respondents in this hearing. The expanded quote that Charlton shares from Jackson follows:

> "If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick

> people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself. [… T]he best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."[755]

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COPY of the foregoing e-mailed and mailed this
10th day of April, 2012, to:

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755. Ex. 277, TRIAL EXB 03553: Letter from Paul K. Charlton to Shiela Polk in which Charlton quotes United States Attorney General Robert H. Jackson. Expanded quote is taken from 24 Journal of the American Judicature Society 18 (1940).

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