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**BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE STATE BAR 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**

**INDEPENDENT BAR COUNSEL'S REPLY TO CLOSING ARGUMENTS**

**Case No. PDJ 2011-9002**

Independent Bar Counsel, John S. Gleason, respectfully submits his Reply to Thomas's Post Hearing Memorandum; Aubuchon's Final Argument, Findings of Fact, Conclusions of Law, and Responses to Proposed Sanctions; and Alexander's Closing Argument.

This Reply combines IBC's positions on each Respondent's arguments. In summary, the evidence is clear and convincing that Thomas and Aubuchon should be disbarred and Alexander suspended. Nothing that Respondents argued in their Closing has changed this conclusion. Respondents caused immense damage to the legal system, the integrity of the law profession, and the lives of individuals. Furthermore, not one Respondent has taken any responsibility for their actions or expressed any remorse. Respondents must be sanctioned to protect the public.

The organization of this Reply is set out in the following Table of Contents.

## Table of Contents

## I. General Principles

### *a.* Respondents misunderstand the term "political"

In the Complaint, IBC alleges that Respondents committed misconduct based upon political motives.[1] In responses to IBC's Closing Argument, Respondents state there is no evidence that they acted with a political motivation or that Aubuchon orAlexander were "political" persons.

IBC's position that Respondents acted politically is not based on Respondents' partisan views. Instead, IBC argues that Respondents' disagreements with Board, County, and judicial decisions drove much of Respondents' misconduct. The meaning of political action is not restricted to partisan actions. Politics refers to "the policies, goals, or affairs of a government or of the groups or parties within it." It follows that being political means, "[O]f, pertaining to, or dealing with the study, structure, or affairs of government, politics, or the state." The American Heritage Dictionary of the English Language 1015 (New College ed. 1980). In this broader definition of politics, it does not matter that Respondents had no career ambitions in politics or that they were Republican or Democrat. Evidence shows that Respondents disagreed with Board and County decisions and reacted in ways that violated the Arizona Rules of Professional Conduct.

The evidence is overwhelming that Respondents acted based upon their view of the political situation in Maricopa County. The best evidence of this is the RICO Complaint itself, which Thomas and Aubuchon drafted and filed. The RICO Complaint is not a valid legal complaint, but rather a political statement. In it, Thomas and Aubuchon expressed their conclusions and opinions about how badly the supervisors, County managers, judges and their attorneys acted. They did not

[1] See, e.g., Complaint ¶¶ 82, 107.

explain what crimes had been committed. Instead, they wrote a political argument more appropriate for electioneering than a court pleading. Alexander then joined in this political campaign. Aubuchon herself testified that they filed the RICO case to get the civil division, which the Board decided to take over, returned to MCAO.

In addition to the RICO Complaint, there is other evidence of misconduct based upon political motives, including but not limited to the following:

- Thomas and Aubuchon acted politically when they charged Judge Donahoe with crimes. This case was political because they were trying to remove a judge who ruled against them.
- Aubuchon's free talk with Supervisor Kunasek is another example of her being a political actor.[2] She used the free talk to initiate a conversation with Supervisor Kunasek about the appointment of a successor county attorney if Thomas resigned.
- Aubuchon stated to Sheriff's detectives that if she could not get Supervisor Stapley in the courts, she would try him in the press. This shows her political motivation to strike out at a politician.
- Former Deputy Chief Hendershott stated that the RICO case was brought to force the Board into receivership. Aubuchon's goal was to force the Board to return the civil division to MCAO. These are political motivations.

Respondents' disagreements and reactions to MCBOS members, judges and attorneys' political actions culminated in their violating the Arizona Rules of Professional Conduct.

***b.*** **Culpable mental state is not an issue for many rule violations**

Respondents, in particular Thomas, have argued that there has been no showing of a mental state in order to prove a violation of a particular rule. However, many of the Arizona Rules of Professional Conduct do not require any proof of a lawyer's mental state.

[2] Ex. 196, TRIAL EXB 2273-2323.

Specifically, the following rules do not require the showing of a particular mental state in order for the Hearing Board to find that a respondent committed a rule violation: ER 1.1 (Competence), 1.6 (Confidences), 1.7 (Concurrent Conflicts), 3.1 (Meritorious Claims), 4.4 (Respect for Rights of Others), 8.4(b) (Criminal Conduct)[3], 8.4(c) (Dishonesty) and 8.4(d) (Conduct Prejudicial to the Administration of Justice).

For example, there are charges in this matter that Respondents violated ER 1.7(a) (Conflict of Interest: Current Clients). That rule provides:

> **a.** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exits if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) 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.

The rule does not specify a mental state. There is no requirement that the lawyer "knows" he or she had a conflict in order to be liable under the rule, and in fact a lawyer can act negligently and be disciplined under this rule. *In re Owens*, 182 Ariz. 121, 893 P.2d 1284 (1995).

One rule violation charged against Aubuchon and Thomas, ER 3.8(a) (Claim 24), *does* have a mental state which must be proven. ER 3.8(a) provides that a prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor *knows* is not supported by probable cause (emphasis added). This rule is charged only with regard to Thomas and Aubuchon's conduct in prosecuting Judge Donahoe. The only other rules charged that require proof of a mental state are ER 3.4(c) (Claim 19), which prohibits a lawyer from knowingly disobeying an obligation under the rules

[3] A particular criminal statute that a respondent is charged with violating may, however, contain a mental state that must be proved.

of a tribunal; ER 3.3(a), which prohibits a lawyer from knowingly making a false statement to a tribunal; and ER 3.6(a), which prohibits a lawyer from making an extrajudicial statement he knows or should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Even though mental state is not an issue in most rules for determining whether a rule has been violated, mental state is an issue in determining the level of sanction to be imposed. Most if not all of the ABA *Standards for Imposing Lawyer Sanctions* do analyze a lawyer's mental state, but only for the purpose of determining what sanction to impose. *See also Owens*, *id.* at 126, 893 P.2d at 1289. However, mental state is not an issue for liability purposes unless the specific rule so requires. Each time that a respondent has argued that no culpable mental state has been shown, his or her argument is relevant for liability purposes only if the rule charged contains a mental state. As shown, many do not.

**c. Aubuchon and Thomas do not have to be charged with or convicted of a crime to be liable under ER 8.4(b).**

Thomas and Aubuchon are charged with two violations of ER 8.4(b) because they engaged in criminal conduct – Claims 27 and 28. 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. Both Respondents have argued that they have never been charged with or convicted of a crime, and therefore they cannot be found to have violated this rule. However, 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.

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).

***d.*** **Standard of proof**

IBC must prove the allegations against Respondents by clear and convincing evidence.

> A party who has the burden of proof by clear and convincing evidence must persuade [the fact finder] by the evidence that the claim is highly probable. This standard is more exacting than the standard of more probably true than not true, but it is less exacting than the standard of proof beyond a reasonable doubt.

Revised Arizona Jury Instructions (Civil), 4th Ed., Standard 3, Burden of Proof (Clear and Convincing).

In her argument to this Panel Aubuchon goes to great length to quote and cite to her testimony. She fails to address other witnesses' testimony, and she implies that if she testified to something contrary to what the claims against her assert, then she has shown that there is not clear and convincing evidence. She ignores other testimony and evidence presented to the Panel. For instance, she points to her testimony that her purpose in filing the RICO Complaint was not to retaliate against MCBOS, judges and attorneys.[4] The record is replete with evidence to the contrary.

**II. The Donahoe Case**

**a. Thomas's Misconduct**

**1. Barbara Marshall's involvement in *Donahoe***

[4] *See* Aubuchon Final Arg. 34.

Respondent Thomas claims that Barbara Marshall first suggested charging Judge Donahoe, and that Marshall provided counsel in making that decision.[5] While it is true that Marshall stated Judge Donahoe could be charged with hindering, Thomas mischaracterizes the context in which Marshall made that statement. When Marshall was present during a conversation with Thomas, Aubuchon, Sally Wells, and Barnett Lotstein regarding Judge Donahoe, she was not given any substantive facts or details.[6] At the hearing, she stated, "... I wasn't privy to any of [the Donahoe matter]. I was just hearing Mr. Thomas make all of these comments. And I have a big mouth, so I said flippantly, 'We could always charge him with hindering.' But it was clearly not a serious statement."[7]

After that day, Marshall was never involved in any discussions regarding charging Judge Donahoe, and only learned that he was charged later, on the day the charges were filed.[8] Further, Sgt. Luth testified that then-Chief Deputy Hendershott told him there was a strategy meeting with Thomas, Aubuchon, Sheriff Arpaio, and Hendershott regarding Judge Donahoe, and that it was Sheriff Arpaio's idea to charge Judge Donahoe with crimes.[9] It is not only inaccurate to portray Marshall as informed counsel in the decision to charge Judge Donahoe, but also unfair to deflect the responsibility for the decision to Marshall. Moreover, it is misleading to characterize Marshall as counseling Thomas on the Donahoe case.

**2. Timing of Donahoe Charges**

In regard to the timing of the criminal charges against Judge Donahoe, Thomas's Post Hearing Memorandum does not refute the testimony and evidence IBC presented in its Closing Argument and Proposed Report and Order. The frantic sequence of events leading up to the

[5] Thomas Post Hr'g Mem. 73:4-9; 75:18-24.
[6] Marshall Testimony, Hr'g Tr. 157:23-158:7, Sept. 19, 2011.
[7] Marshall Testimony, Hr'g Tr. 159:6-11, Sept. 19, 2011.
[8] Marshall Testimony, Hr'g Tr. 160:3-5, Sept. 19, 2011.
[9] Luth Testimony, Hr'g. Tr. 101:14-102:16, Oct. 14, 2011.

Donahoe charges undeniably illustrates Thomas and Aubuchon's desire to prevent Judge Donahoe from holding the hearing on December 9, 2009.

MCSO officers testified to the sense of urgency on December 8th and 9th in filing the Donahoe complaint.[10] They testified about their concerns regarding the probable cause statement and the Donahoe complaint.[11] It is unbelievable that Thomas and Aubuchon filed the charges on December 9th for any other reason than to stop Judge Donahoe's hearing.

### 3. Detective Cooning's testimony regarding probable cause[12]

Thomas's Post Hearing Memorandum cites Detective Cooning's testimony presumably in support of their position that there was probable cause to charge Judge Donahoe.[13] Thomas portrays Cmdr. Stribling, who testified that Lt. Hargus and Det. Cooning told him there was no probable cause for the Donahoe complaint, as a "confessed prevaricator."[14] In doing so, Thomas compares Stribling's testimony to Cooning's testimony where Cooning stated that it was not his job to determine whether probable cause was lacking.[15] Although it was not his duty to make such a determination, Cooning, who had 29 years of experience as a detective with the Phoenix police department,[16] was concerned enough about the probable cause statement that he refused to swear to the Donahoe complaint. In fact, Cooning refused to swear to the complaint because the attached probable cause statement did not make sense; he did not know what the crimes were or who investigated the crimes.[17] Even though Cooning did not make a determination whether probable cause was lacking, the logical inference is that he was concerned enough about the probable cause

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[10] *See* IBC Proposed Report and Order 109:9-115:9.
[11] *See* IBC Proposed Report and Order 109:9-115:9.
[12] This section is also a reply to Aubuchon's similar argument in Aubuchon Final Arg. 147:11-15.
[13] Thomas's Post Hr'g Mem. 76:21- 77:2.
[14] Thomas's Post Hr'g Mem. 76:12-21. Thomas attempts to discredit all of Commander Stribling's testimony because Stribling avoided involvement in the *Stapley I* investigation by telling Thomas he was too busy. Commander Stribling's credibility is not harmed by this testimony. Commander Stribling was protecting himself from being involved in an investigation that was flawed and should have been handled by another agency. The fact that Stribling did not feel comfortable telling Thomas the real reason for not wanting to be involved in *Stapley I* does not discredit Stribling. Instead, it reflects on the culture of Thomas's office.
[15] Cooning Testimony, Hr'g Tr. 151:13-16, Oct. 13, 2011.
[16] Cooning Testimony, Hr'g Tr. 136:24-25, Oct. 13, 2011.
[17] Cooning Testimony, Hr'g Tr. 148:1-15, Oct. 13, 2011.

statement that he wanted nothing to do with the Donahoe complaint. Cooning's testimony was not inconsistent with Stribling's.

**4. Conspiracy to violate federal civil rights**

In response to IBC's position that Thomas and Aubuchon violated a federal civil rights statute, 18 U.S.C. § 241, Thomas counters that just because Judge Donahoe might have spoken at the December 9, 2009 hearing does not make holding a hearing an exercise of free speech.[18]

Thomas cites no authority to support his argument that Judge Donahoe had no First Amendment right to freedom of speech regarding the December 9, 2009 hearing. A picket sign and a park are not prerequisites to exercising one's freedom of speech, as Thomas claims.[19] Further, Thomas and Aubuchon's actions in effect created an unconstitutional prior restraint on Judge Donahoe's speech. A prior restraint is a governmental restriction on speech or publication before its actual expression. *Black's Law Dictionary* (9th ed. 2009). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

IBC's Proposed Report and Order cites authority for the proposition that Judge Donahoe had a constitutional right to carry out his duties as a judge.[20] *See also Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279-282 (1985) (holding right to engage in the practice of law is a fundamental right under the Privileges and Immunities Clause). Thomas cites no authority to the contrary.

**5. Perjury**

Thomas argues he did not violate ER 8.4(b) by committing perjury because he did not know Detective Almanza would sign the complaint and because Detective Almanza did not know the

[18] Thomas's Post Hr'g Mem. 81:16-18.
[19] *See* Thomas's Post Hr'g Mem. 81:16-18. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (establishing right to freedom of expression in schools).
[20] IBC Proposed Report and Order 129:1-130:20.

complaint was false.[21] Neither of those facts are relevant to Thomas and Aubuchon's violation of ER 8.4(b).

Thomas and Aubuchon intended to have false charges filed against Judge Donahoe.[22] When the direct complaint against Judge Donahoe was filed, neither Thomas nor Aubuchon actually went to the Superior Court and filed the documents or swore to them. Detective Gabe Almanza filed the documents and swore to their truth. Thomas aided and authorized Aubuchon to file those charges. She knew the charges would have to be "walked through" the court. Aubuchon filed the charges through Detective Almanza. Thomas knew Aubuchon was going to carry out this plan. It is not necessary to prove that he knew every detail of how Aubuchon would accomplish the plan.

Aubuchon drafted the direct complaint to include the line for a detective to sign under oath. Aubuchon expected a detective to sign the complaint. Whether she knew specifically that Almanza would be the signing detective is irrelevant. Almanza swore to the veracity of the charging papers under oath. Almanza's swearing to the Direct Complaint was a probable and natural consequence of the plan Thomas and Aubuchon launched along with Sheriff Arpaio and then-Deputy Chief Hendershott.

Thomas and Aubuchon were accomplices to Almanza. A.R.S § 13-301 defines an accomplice as follows:

> In this title, unless the context otherwise requires, "accomplice" means a person, other than a peace officer acting in his official capacity within the scope of his authority and in the line of duty, who with the intent to promote or facilitate the commission of an offense:
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense.
>
> 3. Provides means or opportunity to another person to commit the offense.

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[21] Thomas Post Hr'g Mem. 11-12.

[22] This Section replies to Aubuchon's arguments about *Donahoe* as well as Thomas's. Aubuchon argues she cannot have violated ER 8.4(b) because she was not convicted of perjury. As explained in Section I.c, a respondent need not be convicted of a crime to be liable under ER 8.4(b).

Pursuant to A.R.S. § 13-303, Thomas and Aubuchon are responsible for Almanza's conduct. That statute provides in part:

> **A.** A person is criminally accountable for the conduct of another if:
>
> 1. The person is made accountable for such conduct by the statute defining the offense; or
>
> 2. *Acting with the culpable mental state sufficient for the commission of the offense, such person causes another person, whether or not such other person is capable of forming the culpable mental state, to engage in such conduct*; or
>
> 3. The person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice. (emphasis added).

It is Thomas and Aubuchon's intent, not Almanza's, that is important. The intent of the ones charged as accomplices (Thomas and Aubuchon), rather than the intent of the main actor (Almanza), controls the accomplices' criminal responsibility. *State v. Wall*, 212 Ariz. 1, 5, 126 P.3d 148, 152 (2006). Thomas and Aubuchon knew Almanza or another detective would swear to the documents he filed. They knew that no detective or MCAO investigator had investigated Judge Donahoe. They knew they had fabricated the charges in order to get Judge Donahoe off of the case he had scheduled for a hearing on December 9, 2009. The evidence is more than clear and convincing that Thomas and Aubuchon aided Almanza in the commission of the crime of perjury – the false swearing to facts in the Donahoe direct complaint.[23]

Thomas and Aubuchon committed perjury using Detective Almanza. In doing so they violated the perjury statute and ER 8.4(b).

[23] IBC recites the perjury statute at pp. 127-28 of his Proposed Findings of Fact and Conclusions of Law.

**b. Aubuchon's misconduct**

**1. Prosecutorial immunity does not apply**

Aubuchon states that prosecutorial immunity exists to prevent IBC's purported "political posturing" against Respondents.[24] According to Aubuchon, disciplinary bodies are not "able to second-guess a prosecutor's charging decision," and the "executive branch" – most likely referring to the judicial branch – is not allowed to "disagree with a charging decision."[25] This novel idea of prosecutorial immunity from discipline is meritless considering ERs 3.1, 3.8, and 4.4 bind all prosecutors in Arizona. For example, under ER 3.8(a), a prosecutor's charging decision is subject to scrutiny to make sure that probable cause existed before the prosecutor brought criminal charges.

Further, in support of prosecutorial immunity, Aubuchon cites *U.S. v. Armstrong*, 517 U.S. 546 (1996), for the proposition that prosecutorial discretion may only be challenged by a defendant based on constitutional claims.[26] This reliance is misplaced in the context of these disciplinary proceedings. In addressing prosecutorial immunity, the U.S. Supreme Court stated the following:

> [A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

*Imbler v. Pachtman*, 424 U.S. 409, 429 (1976). ER 3.8(a) exists to prevent a prosecutor from abusing his prosecutorial discretion where civil lawsuits cannot. Thus, Aubuchon's position on prosecutorial immunity does not apply to these proceedings.

**2. Probable cause must exist before prosecutorial discretion can be exercised**

In Aubuchon's Final Argument, she claims that IBC denies Thomas and Aubuchon's right to prosecutorial discretion.[27] She claims that IBC subjects all prosecutors to having to disprove a

[24] Aubuchon Final Arg. 42:2-3.
[25] Aubuchon Final Arg. 41:16-20.
[26] Aubuchon Final Arg. 43:25-28.
[27] Aubuchon Final Arg. 45:16-20.

conclusory allegation that the prosecutors have an ulterior motive.[28] On the contrary, IBC does not deny that Thomas and Aubuchon had prosecutorial discretion; rather, as stated in IBC's Proposed Report and Order and Closing Argument, Thomas and Aubuchon's prosecutorial discretion is subject to the standard of ER 3.8(a) that prosecutors may not file charges without probable cause.[29]

Just because Aubuchon testified she "believe[d] [Judge Donahoe] had committed crimes"[30] does not mean she or anyone else actually believed it, or that Judge Donahoe in fact committed crimes, nor does it automatically entitle her to prosecutorial discretion. Before seeking an indictment, a prosecutor must have probable cause. *Shepard v. Fahringer*, 158 Ariz. 266, 269-270, 762 P.2d 553, 569-70 (1988). Under ER 3.8(a), a prosecutor must use an objectively reasonable standard in determining whether probable cause exists. *Drury v. Burr*, 107 Ariz. 124, 125, 483 P.2d 539, 540 (1971). [31] In this case, several witnesses testified regarding the probable cause statement attached to the Donahoe complaint and their concerns about probable cause.[32] In fact, Yavapai County Attorney Sheila Polk's testimony directly refutes Aubuchon's claim that there was no evidence that other prosecutors believed there was no probable cause.[33] At the hearing, Aubuchon's counsel asked Polk, a fifteen-year prosecutor,[34] "My question is if everything in [the Donahoe probable cause statement] was true would that constitute probable cause?"[35] Polk testified, "No, it would not."[36] Considering Polk and the other witnesses' testimony regarding probable cause, the objectively reasonable standard for 3.8(a) undermines Aubuchon's position that she is entitled to prosecutorial discretion for bringing charges against Judge Donahoe.

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[28] Aubuchon Final Arg. 45:18-19.
[29] IBC Propsed Report and Order 118:12-126:5.
[30] Aubuchon Final Arg. 45:17.
[31] *See also* IBC Proposed Report and Order 123:19-126:5 for a discussion of the "objectively reasonable" standard for probable cause.
[32] Cooning Testimony, Hr'g Tr. 148:1-15, Oct. 13, 2011; Luth Testimony, Hr'g Tr. 105:1-19, Oct. 14, 2011; Polk Testimony, Hr'g Tr. 112:1-113:7, Oct. 19, 2011.
[33] Aubuchon Final Arg. 149:1-2.
[34] Polk Testimony, Hr'g Tr. 191:9-192:8, Oct. 18, 2011.
[35] Polk Testimony, Hr'g Tr. 113:5-6, Oct. 19, 2011.
[36] Polk Testimony, Hr'g Tr. 113:7, Oct. 19, 2011.

Again, it is important to apply an objective probable cause standard because otherwise any prosecutor could charge any defendant with any crime simply by claiming she thought there was probable cause, rendering ER 3.8(a) meaningless.

**3. There is no evidence of crimes in the *Donahoe* probable cause statement**

Aubuchon claims she believed that the probable cause statement attached to the Donahoe complaint detailed enough evidence to show that Judge Donahoe committed bribery, hindering, and obstruction of justice.[37] Applying the ER 3.8(a) analysis for determining whether probable cause existed, it is evident that Aubuchon did not meet the objectively reasonable standard in finding probable cause for the Donahoe matter.[38]

In her Final Argument, Aubuchon lists the purported evidence of Judge Donahoe's bribery, hindering, and obstruction that was included in the probable cause statement.[39] Nothing from that list shows criminal conduct; much of the purported evidence is Judge Donahoe's judicial acts in cases pertaining to MCAO. As discussed in IBC's Proposed Report and Order, the probable cause statement alleges, at worst, that Judge Donahoe was biased.[40] Aubuchon's credibility is again undermined by her argument. It is unbelievable that she truly believes this list of evidence shows any crime.

## III. The RICO Case

### a. Thomas's misconduct

#### 1. Thomas was the lawyer on the RICO case

First, Thomas argues he was not the lawyer on the RICO case and therefore cannot be liable for violations of the ethical rules.[41] At the hearing of this matter, Thomas presented a convoluted explanation of why he was not the attorney on the case: he admitted that Aubuchon was an attorney

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[37] Aubuchon Final Arg. 148:6-150:23.
[38] *See* IBC Proposed Report and Order 123:19-126:5 for a discussion of the "objectively reasonable" standard for finding probable cause.
[39] Aubuchon Final Arg. 148:6-21.
[40] IBC Proposed Report and Order 119:19-122:5.
[41] Thomas Post Hr'g Mem. 55-56.

on the case, and that the office of the County Attorney was an attorney on the case, but denied that he, the County Attorney, was an attorney on the case.[42] That explanation contradicts the RICO complaint, amended complaint, and response to motions to dismiss, as well as the testimony of witnesses involved in their drafting.

As Maricopa County Attorney, Thomas was the attorney on every civil and criminal case filed by the Maricopa County Attorney's Office. Specifically, the RICO complaints and response to motions to dismiss contain Thomas's name in the signature block. He is listed as attorney for the plaintiffs, himself and Sheriff Arpaio. He authorized Aubuchon and Alexander to sign their names above his in the signature block.

Further, the evidence shows he was heavily involved in the management and filing of the RICO case. Thomas himself held a press conference the day the RICO complaint was filed.[43] This was not a low-level DUI prosecution of which he was unaware. Thomas transferred Alexander to MCAO's civil forfeiture division and then assigned her the case,[44] but continued to directly supervise her and involve himself in the litigation.[45] Thomas gave research and drafting assignments to Alexander.[46] Thomas was the plaintiffs' attorney.

**2. ER 1.1 and ER 3.1**

Thomas argues that he cannot have violated both ER 1.1 and ER 3.1 because the two charges are incongruous.[47] That argument is without merit. IBC charged ER 3.1 because the RICO case was frivolous and utterly lacked merit—Thomas brought the case with no basis in fact or law.[48] IBC charged ER 1.1 because the complaint and amended complaint were incompetently pled and drafted. That basic incompetence was the basis of Professor Goldstock's testimony.[49] Also, the case was

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[42] Thomas Testimony, Hr'g Tr. 54:5-57:8, Oct. 26, 2011.
[43] Spaw Testimony, Hr'g Tr. 131:5-24, Oct. 17, 2011.
[44] Ex. 169.
[45] *See, e.g.*, Alexander Testimony, Hr'g Tr. 25:16-26:4, Oct. 20, 2011.
[46] *See, e.g.*, Ex. 397.
[47] Thomas Post Hr'g Mem. 56.
[48] *See* IBC Proposed Report and Order 81-98.
[49] *See* IBC Proposed Report and Order 98-99.

incompetently brought because the facts did not support the alleged racketeering activity, so the two charges do overlap. Arizona case law provides precedent for bringing the two charges together. *See In re Wurtz*, 177 Ariz. 586, 588, 870 P.2d 404, 406 (1994); *In re Feeley*, 176 Ariz. 196, 198, 859 P.2d 1329, 1331 (1993); *In re Zawada*, 208 Ariz. 232, 235, 92 P.3d 862, 865 (2004).

Thomas argues he satisfied his duty of competence under ER 1.1 by educating himself and associating with competent lawyers.[50] Even assuming he did those things, he *still* brought a "fatally defective" case[51] that "failed to identify one single federal racketeering act."[52] That association and education informed Thomas the case was meritless.

**3. ER 3.4(c)**

Thomas violated ER 3.4(c) by predicating the RICO action in part on the filing of Bar complaints against him, in violation of Rule 48(*l*), Rules of the Arizona Supreme Court. Thomas argues he did not violate this rule because the federal RICO statute trumps the state court rule conferring immunity on the filing of bar complaints.[53] That argument is without merit. The RICO statute does not preempt Rule 48(*l*).

Federal law sometimes preempts state law under the Supremacy Clause of the U.S. Constitution, but only in certain circumstances. In all federal preemption cases, we "start 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." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted). 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." *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).

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[50] Thomas Post Hr'g Mem. 56-67
[51] Ex. 178A (no TRIAL EXB number assigned).
[52] Ex. 445, TRIAL EXB 8539.
[53] Thomas Post Hr'g Mem. 58-59.

Moreover, 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." *Gadda v. Ashcroft*, 377 F.3d 934, 944 (9th Cir. 2004) (citation omitted). Attorney discipline is not such an area. "In fact, the opposite is true. The Supreme Court of the United States has long recognized that the several states have an important interest in regulating the conduct of the attorneys whom they license." *Id.* (citations omitted).

The hearing board in *In re Smith*, 989 P.2d 165 (Colo. 1999), recommended the respondent be suspended for a year and a day for filing two federal actions—alleging Section 1983 violations for conspiracy to violate his civil rights, as well as state common law claims—against complainants in the disciplinary process in violation of a rule providing absolute privilege to Bar complaints.[54] Because the respondent brought state law claims in addition to federal law claims, the Colorado Supreme Court affirmed without addressing the federal claims. *Id.* at 172. However, the court stated "The right of access to the courts does not include abusive process against persons who seek to have a lawyer investigated for alleged misconduct. The public policy of encouraging people to report lawyer misconduct has been consistently favored over the right of a lawyer who has been falsely accused to obtain judicial relief." *Id.*

As *Smith* demonstrates, to interpret federal preemption as Thomas suggests would be to allow any disgruntled lawyer to sue in federal court, on countless federal law theories, based on a bar complaint filed against him. That result would circumvent the law and public policy of every state with a rule like 48(*l*) in direct contravention of Congressional intent.

By granting immunity to those involved in the lawyer discipline process, the Arizona Supreme Court is not telling the federal district courts what they can or cannot do. It is exercising its authority to regulate the practice of law in Arizona. All Arizona lawyers are subject to the Rules of the Arizona Supreme Court.

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[54] On review, the Colorado Supreme Court disbarred the respondent on other grounds.

Thomas also argues he did not violate ER 3.4(c) because he did not know Rule 48(*l*) existed. Thomas is correct that "ignorance of the law is no excuse."[55] Lawyers are presumed to know the rules governing their conduct. *See Whelan's Case,* 619 A.2d 571, 573 (N.H. 1992) ("We hold that lawyers, upon admission to the bar, are deemed to know the Rules of Professional Conduct."); *Office of Disciplinary Counsel v. Au,* 113 P.3d 203, 216 (Haw. 2005) ("'[M]ere ignorance of the law constitutes no defense to its enforcement.' 'This maxim holds particularly true for lawyers who are charged with notice of the rules and the standards of ethical and professional conduct prescribed by the [c]ourt.'" (Citations omitted)); *In re Cheronis,* 502 N.E.2d 722, 725-26 (Ill. 1986) ("A common maxim holds that ignorance of the law is no excuse, and this is particularly true in a case where the person who claims lack of knowledge of a relevant directive is a practicing attorney."); *State ex rel. Neb. State Bar Ass'n v. Hollstein,* 274 N.W.2d 508, 517 (Neb. 1979) ("We have repeatedly recognized the ancient maxim that ignorance of the law is no excuse . . . . It applies with even greater emphasis to an attorney at law who is expected to be learned in the law." (Citation and internal quotation marks omitted)). Thomas therefore violated ER 3.4(c).

**b. Aubuchon's Misconduct**

Much of Aubuchon's Final Argument is spent recounting the facts leading to the filing of the RICO case.[56] These facts do not show any evidence of criminal activity; they show political disputes between MCAO, the courts, and the Board.

**c. Alexander's Misconduct**

**1. Alexander's conduct is not mitigated by the conduct of other lawyers**

Alexander bases much of her defense on the argument that her conduct is mitigated by what other MCAO lawyers did or did not do. However, Alexander is responsible for her conduct and compliance with the ethical rules. The fact that other lawyers did not tell Alexander their opinions of the RICO case did not relieve Alexander of the duty to form her own opinion. Alexander did the

[55] Thomas Post Hr'g Mem. 59.
[56] Aubuchon Final Arg. 105-111.

research. Alexander accessed—or tried to access—the supporting investigation. Alexander had more information than any other lawyer. She should have reached the conclusion that the case was meritless and refused to proceed. She should have counseled Thomas and Arpaio to drop the suit. Instead, her conduct prolonged the case and furthered the harm.

**2. Alexander was not inexperienced in the practice of law**

Alexander stresses her relative inexperience.[57] Alexander was admitted to the Arizona Bar in May 2000. At the time of relevant events in this case, she had been licensed for nearly ten years. Alexander is not inexperienced enough to excuse her conduct, nor should inexperience be considered a mitigating factor in determining sanctions. *See In re Cannon*, No. 022137, 2008 WL 5339961 at *4 (Ariz. Disp. Comm'n Oct. 3, 2008) (finding one year of practice "inexperience"); *In re Keller*, No. 07-1474, 2009 WL 2005408 at *13 (Ariz. Disp. Comm'n Mar. 4, 2009) ("relative inexperience" of four years). To the contrary, Alexander was substantially experienced in the practice of law pursuant to ABA *Standards for Imposing Lawyer Sanctions* 9.22(i). *In re Manning*, 180 Ariz. 45, 48, 881 P.2d 1150, 1153 (1994) (Nearly ten years of practicing law considered substantial experience).

Also, her limited tenure at MCAO does not mitigate her misconduct. A lawyer's ethical obligations do not "reset" each time she takes a new job.

**3. The danger of hindsight bias does not preclude a finding of rule violations**

Alexander warns of "hindsight bias."[58] While the opinions of other attorneys may have been hidden from Alexander,[59] she had all the factual and legal information relevant to the RICO case when she chose to file the amended complaint and response to motions to dismiss in early 2010. The Hearing Panel must judge Alexander's conduct at that time, based on what she knew at that

[57] Alexander Closing Arg. 2, 4, 6, 16, 18-19, 21.
[58] Alexander Closing Arg. 3.
[59] Alexander Closing Arg. 3.

time. It was apparent at that time that the case lacked merit. No new information has changed that conclusion, nor would new information be relevant to the Hearing Panel's findings.

**4. Alexander's conduct in the RICO case caused harm.**

Alexander argues that any harm the defendants suffered as a result of the RICO case was caused by the initial complaint, which she did not file. That position is entirely illogical. Alexander's work on the case perpetuated the harm to the RICO defendants. For example, the Polsinelli firm spent about $300,000 defending the case during its pendency, and its lawyers had to spend their own time preparing a motion to dismiss.[60] The other defendants had County lawyers defending them, which forced the County to expend resources to defend the suit.[61] Ed Novak personally lost at least one business opportunity while the suit was pending against him.[62]

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."[63] 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."[64] Alexander's conduct perpetuated that harm.

Finally, Irvine testified specifically that the filing of the first amended complaint caused him harm.[65] The amended complaint was filed in the public record.[66] It repeated the first complaint and added two extra counts.[67] The more specific allegations were harmful to Irvine.[68] The complaint went from "bad, very bad" to "worse."[69]

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[60] 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.
[61] Irvine Testimony, Hr'g Tr. 125:23-25, Sept. 14, 2011.
[62] Novak Testimony, Hr'g Tr. 36:7-37:7, Oct. 3, 2011.
[63] Irvine Testimony, Hr'g Tr. 125:13-16, Sept. 14, 2011.
[64] Irvine Testimony, Hr'g Tr. 126:6-9, Sept. 14, 2011.
[65] Irvine Testimony, Hr'g Tr. 128:25-129:2, Sept. 14, 2011.
[66] Irvine Testimony, Hr'g Tr. 129:3-9, Sept. 14, 2011.
[67] Irvine Testimony, Hr'g Tr. 129:10-16, Sept. 14, 2011.
[68] Irvine Testimony, Hr'g Tr. 129:17-22, Sept. 14, 2011.
[69] Irvine Testimony, Hr'g Tr. 129:17-22, Sept. 14, 2011.

**5. ER 4.4(a)**

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.[70] The political nature of the RICO case is encapsulated in the four corners of the first amended complaint. The first amended complaint does not contain evidence of racketeering, bribery, or any other crime. It contains a comprehensive recitation of a history of political disputes between Respondents and the defendants. [71] Judges ruled against MCAO. The Board took political actions that Thomas, Alexander's boss, disagreed with, including budget decisions. In response, Respondents filed the RICO case. Alexander signed the first amended complaint and thus adopted that response as her own. She knew she was on the hook for RICO case. [72] By merely filing the first amended complaint, Alexander was exacting political retaliation. She furthered this political retaliation by helping to prepare and signing a response to motions to dismiss.

**6. ER 3.1**

Alexander misreads the Arizona Supreme Court's decision in *In re Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993), to hold that a lawyer must bring a case that is *both* objectively unreasonable *and* motivated by a subjective bad-faith purpose in order to violate ER 3.1.[73] She states that because she had no subjective bad faith purpose, she cannot have violated the rule.[74] In fact, the *Levine* court stated as follows:

> [A]lthough the objective reasonableness of a legal claim is the standard to determine whether it is frivolous under ER 3.1, the rule also requires a subjective good faith motive by the client and a subjective good faith argument by the lawyer . . . . Therefore, if an improper motive or a bad faith argument exists, respondent will not escape ethical responsibility for bringing a legal claim that may otherwise meet the objective test of a nonfrivolous claim.

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[70] The first amended complaint incorporates the original complaint in its entirety; only the first amended complaint is referred to here.
[71] *See, e.g.*, IBC Proposed Report and Order 84 n. 474.
[72] Alexander Testimony, Hr'g Tr. 52:19-53:1, Oct. 20, 2011.
[73] Alexander Closing Arg. 14-16.
[74] Alexander Closing Arg. 14-16.

*Id.* at 153, 847 P.2d at 1100 (citation omitted). That means a claim violates ER 3.1 if it is objectively unreasonable, no matter what the lawyer's subjective purpose in bringing the claim might be. In this case, because the RICO case was objectively unreasonable, Alexander violated ER 3.1, and the analysis ends here.

If a claim appears objectively reasonable—which the RICO case does not—the court may examine the respondent's subjective purpose in bringing the claim. A subjective bad-faith purpose will result in a violation of ER 3.1 even if the claim is objectively reasonable. Thus, the rule may be analyzed like this:

- Objectively **unreasonable** claim brought in **good faith**: rule violation
- Objectively **reasonable** claim brought in **bad faith**: rule violation
- Objectively **unreasonable** claim brought in **bad faith**: rule violation

Alexander's subjective purpose in bringing the claim is relevant only to the determination of sanctions, not to a determination of whether she violated the rule. The *Levine* courts holds that a respondent may be suspended under the ABA *Standards* only for "knowing" conduct: "Thus, the objective test to determine the frivolousness of a claim that would warrant suspension also incorporates both the requirement of a "bad faith argument" by the lawyer under E.R. 3.1 and a "knowing" violation under Standard 6.22." *Id.* at 154, 847 P.2d at 1101. Therefore, in order to be suspended, Alexander must have pursued the RICO case for an improper purpose.

Both elements are satisfied in this case: The RICO case was objectively unreasonable, and Alexander pursued it for an improper purpose. IBC explains the grounds for finding a violation of ER 3.1 on pages 81-98 of his Proposed Report and Order. In addition, the testimony in this case—including Alexander's—as well as the text of the first amended complaint itself demonstrate both the objective unreasonableness and lack of good-faith basis for the RICO case. *See* Section II.C.5 above.

Finally, Alexander argues she complied with ER 3.1 by conducting a "reasonable inquiry" into the case.[75] This argument echoes Aubuchon and Thomas's claim that they complied with ER 1.1 by educating themselves on RICO law. But after conducting a reasonable inquiry into the RICO case, no reasonable attorney could have concluded there was any good-faith basis for pursuing it. Alexander violated ER 3.1 and must be suspended.

**7. ER 1.1**

Alexander argues she satisfied her duty of competence under ER 1.1 by educating herself and associating with competent lawyers.[76] Even assuming she did those things, she *still* brought a "fatally defective" case[77] that "failed to identify one single federal racketeering act."[78] That association and education should have informed Alexander the case was meritless, despite her claims that some of the opinions of MCAO attorneys were withheld from her.

**8. ER 1.7**

Alexander argues she did not have a conflict under ER 1.7(a)(1) because she did not represent any of the Board members.[79] While Alexander did not personally represent any of the Supervisors, MCAO did. That creates a conflict for Alexander under ER 1.10(a).

As to ER 1.7(a)(2), in addition to Alexander's own personal interests, Thomas's personal interests were imputed to Alexander under ER 1.10(a).[80] It is important to note that the Board itself, not just its constituents, was a defendant in the RICO case. Respondents have argued strenuously that they did not represent the Board's individual members, but they cannot claim they did not represent the Board. A.R.S. § 11-532.

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[75] Alexander Closing Arg. 15.
[76] Alexander Closing Arg. 21-22.
[77] Ex. 178A (no TRIAL EXB number assigned).
[78] Ex. 445, TRIAL EXB 8539.
[79] Alexander Closing Arg. 23.
[80] *See* IBC Proposed Report and Order 37 (discussing imputation from Thomas to Aubuchon). Contrary to Alexander's argument on page 23 of her Closing Argument, ER 1.10 applies to government lawyers. *See* ER 1.10(a), ER 1.0(c), State Bar of Ariz. Ethics Op. 89-08 (Public Defender's Office considered a "firm" under ER 1.10).

Alexander argues she was screened off from the executive division when she was transferred to the civil forfeiture division. However, she was still under Thomas's direct supervision and worked closely with him.[81] It is illogical to state she was screened off from the executive division when she reported directly to Thomas, the head of that division.

**9. ER 3.4(c)**

Alexander's federalism argument[82] is addressed in Part III.A.3 of this Reply.

**10. ER 8.4(d)**

Alexander argues she did not violate ER 8.4(d) by suing judges because she based the lawsuit on actions taken outside the scope of their judicial duties, and therefore absolute judicial immunity does not apply.[83] That argument is belied by the first amended complaint: all the judges' actions referenced are judicial actions.[84]

**11. Rule 54, Rules of the Arizona Supreme Court – Failure to Cooperate**

Alexander argues that the failure-to-cooperate cases IBC cites in its Proposed Report and Order are inapplicable because they involve respondents who fail to participate completely, while she provided a substantive response and only filed motions and special actions to "ensure that she received due process."[85] There are no cases directly on point because Respondents' efforts in this case to obstruct the disciplinary process are unprecedented. A review of the motions and special actions filed or joined by Alexander reveals the extraordinary effort Respondents expended to avoid responding to the allegations. That obstruction violated Rule 54.

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[81] *See* Ex. 169, 397.
[82] Alexander Closing Arg. 19-20, 25-26.
[83] Alexander Closing Arg. 26-28.
[84] *See* IBC Proposed Report and Order 103 n. 583.
[85] Alexander Closing Arg. 28-29.

## IV. Thomas's Misconduct in 2006

### *a.* Conflict of interest in advising the Board

During 2006 Thomas advised the Board about the Board's expressed desire to hire its own counsel and to appoint attorneys to represent the County. Thomas had a conflict of interest when he gave this advice because it involved his own office and his own authority. Thomas's representation of the Board was limited by 1) his own interest in keeping himself or his office as the only attorney the Board could consult; and 2) in keeping his ability to appoint outside counsel. He should not have advised the Board as he did and should have told the Board to obtain independent counsel on this issue.

Thomas argues that his conflicted advice was authorized in part by statute which states that the county attorney gives his written opinion to County officers. A.R.S. 11-532(A)(7). However, no statute can give any attorney the authority to violate a Supreme Court Rule of Professional Conduct such as ER 1.7(1)(2). That rule prohibited Thomas from giving advice to the Board when he had a conflict of interest. And as *Romley v. Daughton*, 225 Ariz. 521, 241 P.3d 518 (App. 2010) shows, if a county attorney has a conflict he needs to remove himself from the matter. Clients, such as the Board in this case, are entitled to conflict-free advice.

Thomas argues that the evidence must show a culpable mental state for this rule violation. This is not correct. ER 1.7(a)(2) does not include a mental state. It does not say that a lawyer is liable only if the lawyer knows he has a conflict of interest. A lawyer can be disciplined for negligently having a conflict. *See In re Abrams*, No. 06-1405, 2008 WL 5339945 (Ariz. Disp. Comm'n July 14, 2008). See part I.b above in General Principles.

In April 2006, Thomas stated he had a conflict on these issues because there would have to be litigation. But the conflict existed before he so stated. The conflict existed when he learned the Board's position about his office was different from his position. That occurred no later than February 2006.

### *b.* 2006 news release

Thomas issued a news release about the Dowling and Keen matters when he sued the Board in June 2006.[86] Thomas argues that he did not know that his deputies had represented the County in the Dowling and Keen matters. He argues that his ignorance excuses his misconduct because he did not have a culpable mental state. ER 1.6(a) does not specify a mental state. (See Part I.b above in General Principles.) However, considering the nature of the news release and the fact that MCAO regularly advises the County, Thomas's statement that he was unware of his office's representation is simply not credible.

Thomas's position on this point reflects negatively on his credibility and his fitness to be a lawyer. His position is that he was totally unaware that lawyers in the MCAO civil division had been involved in the Keen and Dowling cases.[87] It is unbelievable that Thomas would issue his news release ignorant of those facts. His actions prove he had no respect for the fact that the Board and the County were his clients. In other words, his actions were those of someone who saw himself in a role different from an attorney for the County. The evidence indicates he saw himself as a check on the Board, as some sort of equal branch of government.[88] But that is a warped view of his attorney-client relationship. The County Attorney is the lawyer for the Board and the County with all the obligations that a lawyer has to a client including loyalty, confidentiality and competence.

Thomas seeks to fit his conduct under ER 1.13, which gives some lawyers the permission to reveal client confidences in limited circumstances. The rule allows a lawyer to reveal information to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization. Thomas's news release was not done to prevent substantial injury to the County. Rather, he says that he made his disclosure because the "voting public . . . had a right to know what was occurring."[89] Thomas goes on to imply that the voting public was his client.[90] However, no statute

[86] Ex. 13, TRIAL EXB 00097.
[87] Thomas Post Hr'g Mem. 19.
[88] *See* Ex. 65, TRIAL EXB 01303.
[89] Thomas Hr'g Mem. 22.

establishes such a relationship between the county attorney and the voting public in the civil context; and such a notion is not supported by any reading of 1.13. Further, Thomas apparently thinks that he could "blow the whistle" on his client in the Keen and Dowling cases without ever talking to his client about his thoughts and opinions, as required by the rule, before going public. Thomas's position reveals how little he respected the attorney-client relationship, and it also shows how the public needs to be protected from him.

**1. 2006 news release violated ER 3.6(a).**

The evidence shows that Thomas violated ER 3.6(a) when he issued his 2006 news release. The evidence fits the elements for a violation of that rule. Thomas's office actively participated in both Dowling and Keen matters. Thomas knew that his news release would be disseminated by the media—that was his goal. And he knew that the release would have a substantial likelihood of materially prejudicing a proceeding. He wanted to show the public—including judges and potential jurors—what he thought of the Board's position. He wanted to affect the proceedings in his case and the other two cases. He wanted the public to know, and among the public are judges and jurors.

## V. Thomas and Aubuchon's misconduct in Stapley I

### *a.* Thomas and Aubuchon violated ER 4.4(a)

ER 4.4 prohibits a lawyer from using means that have no substantial purpose other than to burden or embarrass another. Thomas and Aubuchon argue that as long as there was probable cause to charge Stapley, then they could not have violated ER 4.4(a). Just because there may have been probable cause does not mean that Thomas and Aubuchon did not violate the rule. *In re Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993). The clear and convincing evidence shows that the substantial purpose of charging Stapley was to burden and embarrass him. As previously shown, the 118 counts, the counts brought 14 years after the conduct, and the counts brought after the statute had run

[90] Thomas Hr'g Mem. 22.

show the true purpose of the case. There was no substantial purpose other than to burden and embarrass Stapley.

Although Stapley was charged in November 2008, Thomas began investigating him in January 2007, a short time after the MOU was reached in the dispute with the Board. The fact that he did not move forward with charging Stapley does not mean that he lost sight of Stapley as a target. One cannot forget the testimony of Mr. MacDonnell, who characterized Mr. Stapley as the strongest Board member and an aggressive chairman, and when he was chairman things happened. Stapley had ideas about where he wanted the County to go.[91] Stapley was a powerful figure who was aggressive.

Thomas argues that the amount of time that passed between the disputes in 2006 and the charging of Stapley in 2008 indicates that Thomas was not obsessed with Stapley. However, another possible explanation for Thomas waiting to charge Stapley was that there was an MOU in place until December 1, 2008.[92] Stapley had signed the MOU as Chairman of the Board. It is logical that Thomas did not want to file charges against Stapley while that MOU was still in force. Additionally, Thomas himself was up for election in 2008, so another plausible explanation for waiting to charge Stapley was to make sure that it caused no political fallout to Thomas. The passage of time does not mean that Thomas and Aubuchon did not want to burden and embarrass Stapley by filing 118 counts against him, a substantial portion of which were stale.

***b.*** **Thomas violated ER 8.4(d) – Statute of limitations.**

Thomas admitted at the hearing in this matter that the statute of limitations was triggered at least for one of Stapley's disclosures when Goldman gave him information in the early part of 2007.[93] Thomas fails to acknowledge this admission in his Post Hearing Memorandum. Thomas

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[91] MacDonnell Testimony, Hr'g Tr. 82:5-83:7; 95:12-96:7, Sept. 15, 2011.
[92] Ex. 15, TRIAL EXB 00100.
[93] *See* Thomas Testimony, Hr'g Tr. 126:2-128:13, October 26, 2011. Thomas in his Post Hr'g Memo mistakenly states at page 37, lines 18-22, that IBC did not cite to the testimony on this point in IBC's Proposed Report and Order Imposing Sanctions. IBC cited Thomas's testimony at footnote 113 on page 22 of IBC's Proposed Report and Order Imposing Sanctions.

made this admission after IBC read portions of his deposition testimony that effectively impeached his credibility. Thomas's admission is important: if the highest law enforcement officer of the County at that time knew the statute of limitations was triggered for at least one alleged disclosure violation, then he is on notice to investigate other disclosures. It is not reasonable for Thomas to argue that he knew about one year's omissions but chose not to look at other years until later.

IBC thoroughly detailed the evidence of Thomas's statute of limitations violations on pages 18-27 of its proposed findings. That evidence will not be repeated here. In summary, however, the evidence clearly and convincingly shows that Thomas knew the investigation of Stapley's disclosures had been conducted in 2007 and that there was a problem with those disclosures. He knew many of the charges filed in late 2008 were stale. He engaged in the charged misconduct.

***c.* Aubuchon violated ER 8.4(d) – statute of limitations**

The evidence showing Aubuchon's misconduct in charging Stapley outside the statute of limitations is different from that showing Thomas's misconduct. The central question is this: when did Aubuchon know that law enforcement knew or should have known that there was probable cause to believe Stapley had committed crimes? Pages 22-27 of IBC's Proposed Report and Order detail the evidence of Aubuchon's participation in and knowledge of the Stapley investigation. In summary, Aubuchon knew that Goldman had done an investigation in 2007 that in part was about Stapley's financial disclosures. Thomas told her that they had received a tip about Stapley's failure to disclose some information on his disclosure forms and that Goldman had said there might be truth to the tip about his disclosures. Aubuchon conveniently turned her head away from learning what Goldman or anyone else had done earlier, although she had some documents that Goldman gave her. Aubuchon lied to investigators at a meeting on May 14, 2008 and told them that the investigation began that day. Aubuchon never asked the detective who testified at the Grand Jury when the investigation began. All of this supports the finding that there is clear and convincing evidence that

Aubuchon knew there was a statute of limitations issue in charging Stapley with those misdemeanors.

***d.*** **Thomas's conflict of interest in charging Stapley and Aubuchon's liability**

Thomas disputes the fact that he had an attorney-client relationship with Stapley. In so doing he tries to argue that he could not have a conflict in charging Stapley and could not violate ER 1.7(a)(1), which prohibits a lawyer from suing a client on behalf of another client. However, Thomas never addresses his own written statement admitting he had an attorney-client relationship with Stapley. In his June 14, 2006 news release Thomas states:

> 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 the 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 short time.

Ex. 13, TRIAL EXB 00097. In addition to this evidence, Stapley referred to himself as Thomas's client.[94]

Thomas and Aubuchon rely heavily on *State v. Brooks*, 126 Ariz. 395, 616 P.2d 70 (App. 1980). IBC has clarified that *Brooks* is not precedent in attorney discipline cases and that *Brooks* concerned a disqualification motion, not the Rules of Professional Conduct.[95] Those arguments will not be repeated here. Importantly, the County Attorney in *Brooks* did not admit he had an attorney-client relationship with the County officer he was charging. Thomas did.

Thomas violated ER 1.7(a)(1) in charging Stapley.

Thomas also violated the other part of the conflicts rule, ER 1.7(a)(2). This provision prohibits a lawyer's representation when it would be limited by the lawyer's own personal interests. As explained in IBC's Proposed Report and Order, Thomas charged Stapley in retaliation for his actions in 2006, when Thomas believed Stapley had caused various lawsuits against the County.

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[94] Stapley Testimony, Hr'g Tr. 170:10-12, Sept. 20, 2011.
[95] *See* IBC Proposed Report and Order 34-36.

Stapley was the spearhead of the Board's efforts.[96] It was just a short time after this that Thomas began to investigate Stapley even though he did not file charges until November 2008.

Aubuchon's liability for this violation is based mainly on the fact that Thomas had conflicts in charging Stapley in 2008. Those conflicts are imputed to Aubuchon. IBC explained the imputation rules in his Proposed Report and Order at pages 36-37. In summary, Thomas and Aubuchon were in the same firm for the purposes of the Arizona Rules of Professional Conduct. *See* ER 1.0(c) and 1.10. Thomas's conflicts were imputed to Aubuchon. She is thus liable for engaging in conflicts of interest. Essentially, no one in MCAO who was as close to Thomas as she was could have prosecuted this case. The conflicts that Aubuchon engaged in later, such as those in the RICO case, come not just from imputation of Thomas's conflicts but from her own personal conflicts.

## VI. Thomas and Aubuchon's misconduct in December 2008 and Early 2009

### *a.* Letters interfering with attorney-client relationship between the Board and Irvine

Thomas asserts that the letters sent to County employees and Supervisor Kunasek threatening legal action if attorney Tom Irvine was paid were not meant to burden the recipients. Thomas asserts those letters were appropriate.[97] No statute quoted by Thomas justifies his interfering in the relationship between the Board and Irvine by threatening and burdening County employees. In fact, it was later determined that Irvine's hiring was appropriate and Thomas's attempts to block his hiring were a violation of ER 4.4. *See Romley v. Daughton*, 225 Ariz. 521, 241 P.3d 518 (App. 2010).

Thomas's argument that he was just doing his job by warning County employees that they might be liable for money paid to Irvine is absurd. Thomas's real goal was to stop the Board from using Irvine as their attorney. He then went further by suing the County.[98] Thomas sent the letters

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[96] *See* IBC Proposed Report and Order 10.
[97] Thomas Post Hr'g Mem. 29.
[98] IBC has never claimed that suing the Board and Irvine in this circumstance was misconduct.

threatening County employees for no substantial purpose other than to burden the recipients and to prevent payment to Irvine.

***b.*** **Grand Jury subpeona duces tecum – December 2008.**

Thomas testified at the hearing in this matter that he talked to Aubuchon about the grand jury subpoena that was issued to the County in December 2008. He also said that he approved the issuance of the subpoena.[99] There is no doubt that Thomas, as well as Aubuchon, bears responsibility for the issuance of this broad and burdensome subpoena. Thomas and Aubuchon have argued that they were legitimately investigating the court tower project, but the timing of the subpoena belies that argument. The subpoena was issued ten days after the Board hired Irvine. Obviously, the two events were not mere coincidences. Thomas argues that the purpose of the subpoena was to get records to substantiate the "court-tower-for-hiring-Irvine tip."[100] That was not the purpose because Thomas knew of the "tip" since at least early 2007, when he initiated the investigation into a connection between Stapley and Irvine.[101] Yet, it was not until after the Board hired Irvine in late 2008 that Thomas and Aubuchon issued this overbearing subpoena. The only possible conclusion is that they wanted to burden the Board and the County administration. They were retaliating for the hiring of Irvine.

This discussion underscores the conflict that both Aubuchon and Thomas had in investigating the court tower matter, just as Judge Donahoe found. The conflict of interest was based upon the following:

- they disagreed with the decision by their client, the Board, to build the court tower;
- they thought it odd that the Board, their client, was going forward with the project in the economic environment;
- other departments were suffering budget cuts;

[99] Thomas Testimony, Hr'g Tr. 43:10-44:5, Oct. 26, 2011.
[100] Thomas Post Hr'g Mem. 46.
[101] Hendershott Testimony, Hr'g Tr. 22:4-22; 26:24-28:21; 31:21-32:22; 118:4-16, Oct. 13, 2011.

- Irvine, whom the Board had hired, was being paid a lot of money for being a "space planner";
- Aubuchon compared her salary to the hourly rate of Irvine;
- they were punishing the County and the Board, their client, for hiring Irvine; and
- MCAO had represented the County in the court tower project.

*See* IBC's Proposed Report and Order Imposing Sanction, pp. 56-66.

**VII. *Wilcox* and *Stapley II***

Thomas and Aubuchon charged Supervisors Wilcox and Stapley in December 2009 about a week *after* filing the RICO case. Thomas and Aubuchon (and Alexander for that matter) have never recognized that charging defendants with crimes while suing them in a civil action is a problem for a prosecutor. As prosecutors, Thomas and Aubuchon could use the criminal cases to force a resolution of the civil matter to MCAO's advantage.[102] Aubuchon and Thomas had a conflict of interest in violation of ER 1.7(a)(2) by charging Wilcox and Stapley. They also had a conflict because of all the events of 2009, including Thomas filing the Dec Action, Thomas filing the Sweeps Action, the County filing the motion to remove MCAO from the court tower investigation, Judge Donahoe's ruling removing MCAO from the court tower investigation, Judge Daughton's ruling that the Board had acted appropriately in 2008, and the dismissal of charges against Stapley. All of these events limited the advice that Aubuchon and Thomas could give their client, the State of Arizona, in the two criminal matters. To pursue these two Supervisors with all that history in the background was unethical. Thomas and Aubuchon were retaliating.

**VIII. 2010 grand jury – bug sweep and court tower**

For the same reasons stated immediately above in Section VII, it was a conflict for Thomas and Aubuchon to go forward seeking criminal indictments in 2010 against many of the same people they were suing civilly in the RICO action. In addition, no one can deny that Thomas and

[102] *See* IBC Proposed Report and Order 104-109 for further elaboration on this conclusion.

Aubuchon's representation of the State of Arizona in a criminal matter against all of these people was conflicted by all that had happened in 2008 and 2009—for example, initiating a grand jury proceeding against Irvine was a blatant conflict of interest given that he had been the target of civil actions and had been the attorney who had filed motions against Thomas and Aubuchon. Any reasonable prosecutor would have sent the investigations to another agency, such as Sheila Polk in Yavapai County. But by that time, she had said there was no criminal activity in the court tower or the bug sweep.

## IX. Failure to Cooperate

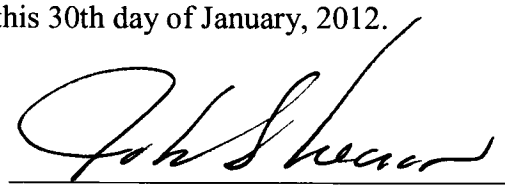
No lawyer has the right to file frivolous pleadings and motions in response to an investigation by the State Bar into the lawyer's conduct. Even if a lawyer does so on the advice of counsel, a lawyer cannot waste the time and resources of the Probable Cause Panelist and the Supreme Court with nonsensical motions. After reading all of the motions and pleadings that Respondents filed during the screening investigation, one comes away with one conclusion: the purpose was to harass and delay. There was no good faith and no timely cooperation with the investigation. These were not legitimate efforts to defend themselves. For example, all of the Respondents filed a Joint Motion For Repudiation of the State Bar of Arizona's Pending Threat Against Lawyers Acting On Behalf of the Investigative Subjects and Motion for Immunity from Bar Complaints for Lawyers Acting on Behalf of the Investigative Subjects.[103] After this motion was denied, Respondents filed a Motion to Reverse Panelist's Ruling Regarding Repudiation of Threat[104] and then a Special Action with the Arizona Supreme Court.[105] These pleadings demonstrate the Respondents' frivolous attempts to thwart the investigations.

[103] Ex. 223, TRIAL EXB 02644.
[104] Ex. 232, TRIAL EXB 02968.
[105] Ex. 234, TRIAL EXB 03051.

## X. Conclusion

Based on their misconduct and violations of the Arizona Rules of Professional Conduct, Thomas and Aubuchon should be disbarred and Alexander should be suspended.

**RESPECTFULLY SUBMITTED** this 30th day of January, 2012.



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