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**BEFORE THE PROBABLE CAUSE PANELIST
OF THE STATE BAR OF ARIZONA**

Summary of Various Matters Referred to by Independent Bar Counsel

Andrew P. Thomas—Lisa Aubuchon—Rachel Alexander

1. The Dispute over Spanish Speaking DUI Courts: Page 5; Probable Cause Report

In February 2006, Thomas and others filed a lawsuit in federal district court challenging the creation (in 2002) of Spanish speaking DUI courts. Thomas named Judge Barbara Mundell and other officers of the Arizona Superior Courts as defendants. The lawsuit was dismissed on Thomas's appeal due to a lack of standing to bring the action. Judge Mundell was later a defendant in the RICO action brought by Thomas and Aubuchon.

2. The Dispute Over Appointment of Civil Attorneys: Page 6; Probable Cause Report

This dispute between Thomas and the Board of Supervisors began around March, 2006. Essentially, the Board of Supervisors directed Chair Donald Stapley to speak with Thomas regarding the Board's perception that Thomas was making appointments of outside counsel to his political allies. Additionally, the Board was concerned with the increasing cost related to Thomas's appointment of outside counsel. The Board decided to remove Thomas from the process and make the appointments themselves. This led to a series of letters from Thomas to the Board and increasing tension between Thomas and the Board.

3. Thomas Irvine, Esq.: Page 8 (and throughout); Probable Cause Report

Phoenix lawyer Thomas Irvine is referenced throughout the report in matters related to the court tower project, the Board of Supervisors' hiring counsel, and other matters. Mr. Irvine was also a named defendant in the RICO action filed by Thomas, Aubuchon, and Alexander.

4. Dispute Related to the Dowling-Keen Matters: Page 11; Probable Cause Report

On June 14, 2006, Thomas sued the Board of Supervisors in a declaratory judgment action concerning the right of the Board of Supervisors to select and appoint outside counsel without the input of the County Attorney. On the same day, Thomas released a public statement

regarding lawsuits brought against Maricopa County by Superintendent of Schools Dowling and Medical Examiner Keen. Thomas stated in the release that the Dowling and Keen matters were “unsupportable” and a reflection of the “unusual chairmanship of Supervisor Don Stapley.” Thomas made the statement notwithstanding the fact that the county and Supervisor Stapley were his clients.

5. Stapley I and Stapley II: Page 14 and Page 57 (and throughout); Probable Cause Report

Stapley I: Page 14; Probable Cause Report. Lisa Aubuchon presented the **Stapley I** matter to a Grand Jury. On December 3, 2008, Supervisor Stapley was served with a 118 count indictment charging felonies and misdemeanors related to his yearly disclosures as a county supervisor dating back to 1994. This was the first time in Arizona history charges such as these were brought against a county supervisor. Many of the charges were outside the statute of limitations and others were dismissed. {Some remaining charges are pending with the Yavapai County Attorney’s Office.}

Stapley II: Page 57; (and throughout) Probable Cause Report.

On December 7, 2009, Thomas and Aubuchon filed a second indictment against Stapley. Thomas had earlier handed off the investigation of this matter to Yavapai County Attorney Sheila Polk, but Thomas took it back from her in September 2009. The Stapley II indictment alleges three areas of conduct upon which the charges were filed: 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. There were 27 counts in the indictment. This case was dismissed by the court on March 15, 2010, on Thomas’s motion. Thomas made this motion through deputy county attorney Kittredge because Judge Leonardo ruled that Thomas and his office had a conflict of interest in the matter.

6. The Dispute over the Arizona Meth Project: Page 18; Probable Cause Report

An Arizona television advertisement project implemented by the Board of Supervisors initially featured Andrew Thomas as a figure-head in the advertisements. The Board later determined that Mr. Thomas was using the advertisements for political purposes rather than the Board’s intended purpose. The Board’s decision to exclude Thomas created tension between Thomas and the Chair of the Board, Donald Stapley.

7. Court Tower Investigation: Page 35 (and throughout); the Probable Cause Report

References to the “court tower” throughout the report refer to the building of the Maricopa County court tower. Thomas initiated multiple “investigations” of the project and it is referenced in matters related to Thomas Irvine, Supervisor Stapley, Judge Gary Donahoe, County managers, and others in the Probable Cause Report.

8. “Dec Action” - Declaratory Action: Page 39; Probable Cause Report

On December 31, 2008, Thomas and Sheriff Arpaio sued the Board of Supervisors over the Board's authority to hire lawyers. The complaint in the Dec Action asked for, among other things, an order that the Board could not hire Mr. Irvine, or any other counsel to advise it about Thomas's conflicts; that the Board could not choose its own counsel if there was conflict in Thomas's representation of the Board; and that only the county attorney, not the Board, could determine if *he* had a conflict of interest.

The Board, through Mr. Irvine, filed an Answer and a Counterclaim on April 6, 2009. The Board asked the court to declare that Thomas's conflicts made him unavailable to act as the Board's attorney, and to declare that the Board could choose its own counsel because the county attorney was unavailable due to his conflicts.

9. *Quo Warranto* Action: Page 40; Probable Cause Report

In December 2008, Thomas sued Thomas Irvine individually at the same time he sued MCBOS. *Thomas v. Irvine, Shughart Thomson & Kilroy and Richard Romley*, CV2008-033193. This action claimed that Irvine had usurped the authority of the County Attorney. No answer was filed, and the case was voluntarily dismissed on December 7, 2009. The parties agreed that this action would be determined by the outcome of the Dec Action, and for that reason there was no substantive litigation of this matter.

10. "Sweeps" Lawsuit: Page 40; Probable Cause Report

On February 27, 2009, Arpaio and Thomas sued the Board in a new action about funds that had been appropriated or encumbered by the supervisors. *Arpaio and Thomas v. MCBOS*, CV2009-006709 (referred to as "the Sweeps" case). The general issue that led to this case was the State needing to withhold funds from each county entity because of a budgetary crisis.

11. Federal Civil RICO Matter: Page 44; Probable Cause Report

On December 1, 2009, Thomas and Aubuchon (Maricopa County Deputy County Attorney Rachel Alexander participated in this matter) filed a federal civil RICO action against various defendants. The purported plaintiffs in this action were Thomas and Sheriff Joe Arpaio. Lisa Aubuchon signed the complaint. Thomas appears as both a plaintiff and the lawyer for plaintiffs in this civil case.

The RICO complaint named the following defendants:

- Maricopa Board of Supervisors, a body politic and corporate;
- Fulton Brock, Supervisor;
- Andrew Kunasek, Supervisor;
- Donald T. Stapley, Supervisor;

- Mary Rose Wilcox, Supervisor;
- Max Wilson, Supervisor;
- David Smith, County Manager;
- Sandi Wilson, Deputy County Manager;

- Wade Swanson, Office of General Litigation;
- Judge Barbara Mundell, Superior Court;
- Judge Anna Baca, Superior Court;
- Judge Gary Donahoe, Superior Court;
- Judge Kenneth Fields, Superior Court;
- Thomas Irvine, attorney;
- Edward Novak, attorney.

12. Grand Jury 2010; Wetzel, Supervisor Kunasek, and Sandi Wilson; Judge Donahoe, Thomas Irvine, and County Manager David Smith: Page 72; Probable Cause Report

On January 4, 2010, Aubuchon began a presentation to the Grand Jury about two areas: 1) allegations that Stephen Wetzel, Andrew Kunasek and Sandi Wilson had illegally used public monies on two separate occasions to conduct sweeps for electronic listening devices at county offices; and 2) allegations that Judge Donahoe, Thomas Irvine and County Manager David Smith had illegally conspired to hinder prosecution and obstruct a criminal investigation involving the court tower. Testimony was taken on January 4, 2010. There were only two witnesses: Detective Halverson and Chief Deputy Hendershott.

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Summary of Alleged Ethical Violations

Andrew P. Thomas—Lisa Aubuchon—Rachel Alexander

Ethical Violation 1: Thomas—Page 10; Conflict of Interest, ER 1.7(a)(2). A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

Thomas had a strong personal and political self-interest as Maricopa County Attorney to make outside counsel appointments that benefited him without interference from the Board of Supervisors. As such, he could not provide counsel to the Board of Supervisors on this very issue.

Ethical Violation 2: Thomas—Page 13; Confidentiality of Information, ER 1.6(a). A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.

In two pending lawsuits against Maricopa County (Keen & Dowling), Thomas stated that the county's position was unsupportable and that he believed the cases against the county had merit. Thomas made the statements notwithstanding the fact that he had an attorney client relationship with the Board and the County. Thomas made the disclosure for the sole reason of buttressing his disputes with the Board of Supervisors.

Ethical Violation 3: Thomas—Page 14; Trial Publicity, ER 3.6(a).

In the Keen and Dowling matters, Thomas issued a press release that he knew or reasonably should have known would have the likelihood of materially prejudicing an adjudicative proceeding. June 14, 2006 press release as stated in Ethical Violation 2.

Ethical Violation 4: Thomas and Aubuchon—Page 17; Respect for Rights of Others, ER 4.4(a).

Thomas and Aubuchon filed charges against Supervisor Stapley that had no substantial purpose other than to burden and embarrass him. Thomas and Aubuchon's efforts to attack and embarrass Supervisor Stapley are based upon disputes that date back to at least March 2006. The evidence will show that their investigations of Supervisor Stapley were personally and politically motivated.

Ethical Violation 5: Thomas and Aubuchon—Page 19; Conflict of Interest, ER 1.7(a)(1). Thomas and Aubuchon’s personal animus against Supervisor Stapley precluded them from providing conflict free representation to either the people of the state of Arizona or the Board of Supervisors. Their personal conflicts precluded them from seeking the indictment of Supervisor Stapley and later in prosecuting him.

Ethical Violation 6: Thomas and Aubuchon—Page 23; Misrepresentations to the Court, ER 3.3(a).

Aubuchon made misrepresentations to the court in pleadings that she filed (Motion for Voluntary Recusal or if Denied Motion for Change of Judge for Cause) by alleging that Judge Fields had filed a complaint against Thomas with the State Bar. (Stapley 1 Matter) Aubuchon filed the motion with the approval of Thomas and with the knowledge that the allegations were false.

Ethical Violation 7: Thomas and Aubuchon—Page 25; Candor Toward the Tribunal, ER 3.3(a).

Aubuchon made misrepresentations to the court in pleadings that she filed (Motion for Voluntary Recusal or if Denied Motion for Change of Judge for Cause) by alleging that Judge Fields had filed a complaint against Thomas with the State Bar. (Stapley 1 Matter) Aubuchon filed the motion with the approval of Thomas and with the knowledge that the allegations were false.

Ethics Violation 8: Aubuchon—Page 26; Misconduct, ER 8.4(d).

On or about December 11, 2008, Aubuchon engaged in conduct prejudicial to the administration of justice when Aubuchon wrote directly to Judge Baca and Judge Mundell requesting that both judges submit to an interview and/or deposition regarding the selection of Judge Fields in the Stapley 1 matter. This extraordinary act was done for no other reason than to intrude into judicial discretion and to intimidate members of the judiciary.

Ethical Violation 9: Thomas and Aubuchon—Page 31; Misconduct, ER 8.4(d).

Thomas and Aubuchon engaged in conduct prejudicial to the administration of justice by charging Supervisor Stapley with 44 misdemeanors when they knew that the charges were barred by the Arizona statute of limitations.

Ethical Violation 10: Aubuchon—Page 32; Misconduct, ER 8.4(c).

Aubuchon engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when she knowingly failed to tell the grand jury that many of the misdemeanor charges filed against Supervisor Stapley were barred by the Arizona statute of limitations.

Ethical Violation 11: Thomas—Page 35; Trial Publicity, ER 3.6(a).

Thomas made improper public statements on August 24, 2009 in the Stapley 1 matter before Judge Fields that had the substantial likelihood of materially prejudicing an adjudicative proceeding.

Ethical Violation 12: Thomas—Page 43; Respect for Rights of Others, ER 4.4(a).

In a letter dated December 5, 2008 Thomas, through Deputy Phillip MacDonnell threatened legal action against County Manager David Smith, Deputy County Manager Wilson, and Chief

Financial Officer Manos if they paid Thomas Irvine or his firm for representation of the Board of Supervisors. This conduct had no other purpose other than to embarrass, delay or burden the county officials.

Ethical Violation 13: Thomas and Aubuchon—Page 43; Respect for Rights of Others, ER 4.4(a).

A December 2008 grand jury subpoena issued to the Maricopa County Administration and a FOIA request to Maricopa County were made for no other reason than to burden the county and its employees. Thomas and Aubuchon issued the subpoena and the FOIA request to their own client—Maricopa County.

Ethical Violation 14: Thomas and Aubuchon—Page 44; Conflict of Interest: Current Clients, ER 1.7(a)(1) & ER 1.7(a)(2).

Court Tower Matter. While representing Maricopa County, Thomas and Aubuchon were investigating their client, the Board of Supervisors, on the very issue on which MCAO had previously represented the Board. Thomas and Aubuchon began the court tower investigation based solely on their personal and political animosity toward the Board of Supervisors.

Ethical Violation 15: Thomas, Aubuchon and Alexander—Page 50; Respect for Rights of Others, ER 4.4(a).

RICO Matter. The filing and continuation of the RICO matter against the Board of Supervisors and its elected members, judges, county officials, and private individuals was filed for no substantial purpose other than to embarrass, delay or burden the named defendants.

Ethical Violation 16: Thomas, Aubuchon and Alexander—Page 51; Meritorious Claims and Contentions, ER 3.1.

RICO Matter. There was no good faith basis in fact or in law to support the filing of the RICO case. Thomas, Aubuchon, and Alexander brought and furthered the action based solely on their personal and political animosity toward the Board of Supervisors, judges, county officials, and private individuals.

Ethical Violation 17: Thomas, Aubuchon and Alexander—Page 52; Competence, ER 1.1.

RICO Matter. The filing and continuation of the RICO matter exhibits a dramatic lack of even basic legal competence. Notwithstanding the malicious and frivolous nature of the complaint and response to motions to dismiss the lawyers lacked basic legal knowledge or skill.

Ethical Violation 18: Thomas, Aubuchon and Alexander—Page 53; Conflict of Interest: Current Clients, ER 1.7(a)(1) & ER 1.7(a)(2).

RICO Matter. Thomas, Aubuchon and Alexander brought the RICO action against many of the county attorney's clients and on behalf of another client, Sheriff Arpaio. Furthermore, their individual personal and political interests limited (or eliminated) their ability to represent anyone in the RICO matter. Thomas, Aubuchon and Alexander alleged that they represented the State of Arizona, Thomas personally and Sheriff Arpaio in the RICO matter notwithstanding the fact that they also contemporaneously represented many of the defendants in other matters.

Ethical Violation 19: Thomas, Aubuchon and Alexander—Page 55; Fairness to Opposing Party and Counsel-Knowingly Disobeying an Obligation Under a Rule of a Tribunal, ER 3.4(c). RICO Matter. Arizona Supreme Court Rule 48(l) precludes any civil action predicated on the filing of Bar complaints. Thomas, Aubuchon and Alexander alleged, in part, that the RICO action was warranted based on Bar complaints filed against Thomas.

Ethical Violation 20: Thomas, Aubuchon and Alexander—Page 56; Misconduct, ER 8.4(d). RICO Matter. Thomas, Aubuchon and Alexander sued four Maricopa County Superior Court judges based solely on their judicial decisions in various matters. The RICO filing was an unprecedented and unlawful effort to intrude upon the independence of the judiciary and the decision-making process of judges. Furthermore, the RICO filing was an attempt to silence judges through a misuse of their prosecutorial powers.

Ethical Violation 21: Thomas and Aubuchon—Page 57; Conflict of Interest: Current Clients, ER 1.7(a)(2).

Supervisor Mary Rose Wilcox Matter. {See Ethics Violation 14} Thomas and Aubuchon brought criminal charges against Supervisor Wilcox notwithstanding a pending civil action (RICO Matter) seeking damages because of alleged damage to Thomas. Furthermore, in February 2010 Judge Leonardo of the Pinal County Superior Court ruled that Thomas and his office could not serve as prosecutors in the Supervisor Wilcox matter.

Ethical Violation 22: Thomas and Aubuchon—Page 59; Respect for Rights of Others, ER 4.4(a).

Stapley II and Wilcox Matters. The charges in the Stapley II and Mary Rose Wilcox cases (both Maricopa County Supervisors) were brought to embarrass and burden the two supervisors. The evidence will reflect that there was no independent complaint or action that led to the investigations of Supervisor Stapley. Rather, the personal and political animosity of Thomas and Aubuchon drove the investigation and charging of the two individuals.

Ethical Violation 23: Thomas and Aubuchon—Page 60; Conflict of Interest: Current Client, ER 1.7(a)(2).

Stapley II Matter. Thomas and Aubuchon sought and brought criminal charges against Supervisor Stapley while at the same time seeking damages from him in a civil action (RICO matter). Furthermore, Thomas's and Aubuchon's personal and political animosity against Supervisor Stapley and the Board of Supervisors precluded the exercise of conflict-free decision making.

Ethical Violation 24: Thomas and Aubuchon—Page 63; Special Responsibilities of a Prosecutor, ER 3.8(a).

Maricopa County Superior Court Judge Gary Donahoe Matter. Thomas and Aubuchon brought serious criminal charges against Judge Donahoe that were not supported by probable cause. Thomas and Aubuchon engaged in prosecutorial misconduct by bringing charges of bribery, hindrance, and obstruction against Judge Donahoe. The evidence will show that there was no basis to begin an investigation of Judge Donahoe let alone charge him with serious crimes. The evidence will show that there was no factual or legal basis for the charges.

Ethical Violation 25: Thomas and Aubuchon—Page 68; Respect for Rights of Others, ER 4.4(a).

Maricopa County Superior Court Judge Gary Donahoe Matter. The purpose for charging Judge Donahoe was to embarrass and burden him so that he would be forced to recuse himself in a matter important to Thomas and Aubuchon (Hearing of December 9, 2010). The evidence will show that the motivation for the charges against Judge Donahoe was the personal and political animosity that Thomas and Aubuchon held against Judge Donahoe.

Ethical Violation 26: Thomas and Aubuchon—Page 69; Misconduct, ER 8.4(c).

Maricopa County Superior Court Judge Gary Donahoe Matter. Thomas and Aubuchon engaged in conduct involving dishonesty, fraud and deceit when they knowingly brought charges against Judge Donahoe that were false and brought without any investigation or evidence.

Ethical Violation 27: Thomas and Aubuchon:—Page 69; Misconduct, ER 8.4(b) Perjury.

Maricopa County Superior Court Judge Gary Donahoe Matter. Thomas and Aubuchon knew that the criminal charges against Judge Donahoe were false and they knew that Detective Almanza to swore to a false complaint. Thomas and Aubuchon knew that the complaint was a sworn document as defined by Arizona law. As such, Thomas and Aubuchon are criminally accountable for the conduct of Detective Almanza because they knowingly caused him to sign and file a false document.

Ethical Violation 28: Thomas and Aubuchon:---Page 70; Misconduct, ER 8.4(b) Conspiracy to Commit Violation of Civil Rights.

Thomas and Aubuchon with each other and others to violate the Constitutional rights of Judge Donahoe by charging him with crimes so that he would recuse himself in a matter.

Ethical Violation 29: Thomas and Aubuchon—Page 72; Conflict of Interest: Current Clients, ER 1.7(a)(2).

Maricopa County Superior Court Judge Gary Donahoe Matter. Thomas and Aubuchon had a concurrent conflict of interest in bringing criminal charges against Judge Donahoe. Their personal and political animosity against Judge Donahoe, based on his judicial rulings, limited their representation and judgment as attorneys for the state.

Ethical Violation 30: Thomas and Aubuchon—Page 72; Misconduct 8.4(d)

Judge Donahoe. Thomas and 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 a pending civil matter.

Ethical Violation 31: Thomas and Aubuchon—Page 74; Conflict of Interest: Current Clients, ER 1.7(a)(2).

Grand Jury investigation of Judge Donahoe, Thomas Irvine, Supervisor Andrew Kunasek, County Manager David Smith and Deputy County Manager Sandi Wilson. Thomas and Aubuchon had a concurrent conflict of interest because they filed a pending federal civil RICO action against the named individuals seeking damages allegedly caused to Thomas. Furthermore, their personal and political animosity against the named individuals limited their representation and judgment as attorneys for the state.

Ethical Violation 32: Aubuchon—Page 75; Misconduct, ER 8.4(c) Dishonesty and Misrepresentation.

Grand Jury matters 2010. On January 4, 2010 Aubuchon appeared before the Grand Jury regarding two matters: 1) allegations that Maricopa County employee Stephen Wetzel, Supervisor Andrew Kunasek, and Deputy County Manager Sandi Wilson illegally used county funds to conduct sweeps for electronic listening devices in county offices; and 2) allegations that Judge Donahoe, Thomas Irvine and County Manager David Smith conspired to hinder a criminal investigation of the court tower project. The Grand Jury voted to “end the inquiry.” On April 2, 2010, Aubuchon sent a letter to Gila County Attorney Daisy Flores regarding matters transferred to Ms. Flores. Aubuchon, however, did not tell Ms. Flores that the Grand Jury had ended the inquiry into the electronic listening sweeps and court tower matters. Aubuchon’s failure to tell Ms. Flores of the Grand Jury’s decision was misleading and dishonest.

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**BEFORE THE PROBABLE CAUSE PANELIST
OF THE STATE BAR OF ARIZONA**

**In the Matter of Members of the
State Bar of Arizona,**

**Andrew Thomas,
Lisa M. Aubuchon and
Rachel R. Alexander**

**Smith v. Thomas, 09-2293;
State Bar v. Thomas, 10-0423;
Smith v. Aubuchon, 09-2296;
State Bar v. Aubuchon, 10-0663;
Smith v. Alexander, 09-2294;
State Bar v. Alexander, 10-0664**

**Independent Bar Counsel's Report of
Investigation and Request for Authority
to File Formal Complaint**

Independent Bar Counsel, John S. Gleason, Regulation Counsel for the Colorado Supreme Court, acting by appointment of Rebecca White Berch, the Chief Justice of the Arizona Supreme Court, as set forth in her Administrative Order No. 2010-41 entered March 23, 2010, respectfully submits his Report of his investigation of respondent Andrew P. Thomas ("Thomas"), Lisa M. Aubuchon ("Aubuchon") and Rachel R. Alexander ("Alexander"). Pursuant to Arizona Rules of the Supreme Court 54(b)(2), Independent Bar Counsel recommends the filing of a formal complaint against Thomas, Alexander and Aubuchon and requests that the Probable Cause Panelist approve the recommendation. Colorado Supreme Court Office of Attorney Regulation Chief Deputy Regulation Counsel James Sudler assisted Independent Bar Counsel with the investigations. Independent Bar Counsel interviewed approximately

1 one hundred individuals, reviewed thousands of pages of documents, and reviewed
2 extensive pleadings and grand jury transcripts. Independent Bar Counsel offered
3 Thomas, Aubuchon and Alexander each the opportunity to be interviewed about the
4 matters discussed herein; none of them took that opportunity.

5 The respondent lawyers filed multiple motions and requests with the Probable
6 Cause Panelist and the Arizona Supreme Court in an effort to limit, block or delay the
7 investigations. Additionally, the respondent lawyers filed multiple actions in an effort
8 to block access to their responses. All of the actions failed.

9 Independent Bar Counsel states as follows.

10
11 **I. JURISDICTION**

12 Andrew P. Thomas was admitted to the Bar of the State of Arizona on
13 October 26, 1991. His Bar Number is 014069. Lisa M. Aubuchon was admitted to
14 the Bar of the State of Arizona on October 27, 1990. Her Bar Number is 013141.
15 Rachel R Alexander was admitted to the Bar of the State of Arizona on May 19, 2000.
16 Her Bar Number is 020092. Thomas, Aubuchon and Alexander are each subject to
17 the jurisdiction of the Arizona Supreme Court pursuant to Arizona Rules of the
18 Supreme Court 31.

19
20 **II. INTRODUCTION**

21 Andrew Thomas was elected Maricopa County Attorney in 2004. He was
22 reelected in 2008. He resigned from that office effective on April 6, 2010, in order to
23 run for Arizona Attorney General.
24
25

1 Lisa Aubuchon began working at the Maricopa County Attorney's Office in
2 1996. In summer 2010 she was placed on administrative leave and was terminated
3 by Interim County Attorney Rick Romley in October 2010.

4 Rachel Alexander worked in the Maricopa County Attorney's Office from about
5 2005 to 2010.

6 This report concludes that Thomas, Aubuchon and Alexander committed
7 serious misconduct. Independent Bar Counsel recommends that the Panelist find
8 that there is probable cause to file a formal complaint against Thomas, Aubuchon
9 and Alexander.¹ Pursuant to the American Bar Association Standards for Imposing
10 Lawyer Sanctions, the allegations of misconduct committed by Thomas and
11 Aubuchon, if proven, warrant disbarment.²

12
13
14 **III. ALLEGATIONS OF ETHICAL MISCONDUCT**

15 **A. Summary**

16 In November 2008 Thomas and Aubuchon charged a county supervisor,
17 Donald Stapley, with 118 counts of criminal activity involving his failing to file
18 appropriate financial disclosures dating back to 1994. In December 2009, Thomas,
19 Aubuchon and Alexander pursued a federal civil RICO action alleging a criminal
20 conspiracy among 14 individuals including supervisors, superior court judges,
21 county employees and private attorneys, all of whom had been involved in disputes
22

23 **REDACTED BY _____**
24 **COUNSEL**

25 ¹ ABA *Standards* § 5.21 states that 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.

1 and disagreements with Thomas and Sheriff Arpaio. In December 2009, Thomas and
2 Aubuchon charged another county supervisor, Mary Rose Wilcox, and filed additional
3 criminal violations against Supervisor Stapley. In December 2009, Thomas and
4 Aubuchon also filed charges against a Superior Court Judge, Gary Donahoe. As set
5 forth in this Probable Cause Statement, there is reason to believe that Thomas,
6 Aubuchon and Alexander pursued these actions not in order to seek justice, but to
7 retaliate against those who had made decisions contrary to Thomas's perceived
8 interests.³ Besides filing and pursuing these cases, Thomas and Aubuchon
9 committed various other acts that involved attorney misconduct. Their actions
10 violated various Arizona Ethical Rules as described below.
11

12
13 **B. Thomas's Disputes with Courts and Board of Supervisors**

14 About a year after Thomas assumed office as County Attorney, disputes began
15 between him and the judges of the Superior Courts. He also had disputes with the
16 Maricopa County Board of Supervisors (referred to herein as "the Board" or
17 "MCBOS") beginning no later than early 2006. These disputes are relevant because
18 in December 2008 and December 2009 Thomas and Aubuchon charged individuals
19 with whom they disagreed with various crimes. In December 2009, Thomas,
20 Aubuchon and Alexander also filed a federal RICO action against many of the people
21 involved in these disputes.
22
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24

25 ³ ABA Criminal Justice Standards; §_3-1.2 states: The duty of a prosecutor is to seek justice, not merely to convict.

1 **Disputes with Superior Courts.** Mr. Thomas admitted that tension between
2 him and the Maricopa County Judiciary began in 2007 over immigration issues.⁴
3 This tension can be seen earlier, however. Thomas and others filed a lawsuit against
4 Judge Barbara Mundell and other officers of the Superior Court in federal district
5 court in February 2006 (Case no. CV-06-00598-PHX-EHC). Thomas alleged that
6 certain post-sentencing probation programs adopted and supervised by the superior
7 court violated his federal constitutional and statutory rights. That matter was
8 dismissed by the trial judge and Thomas appealed to the Ninth Circuit Court of
9 Appeals. *Thomas v. Mundell*, 572 F.3d 756 (9th Cir. 2009). In that lawsuit Thomas
10 challenged the establishment of Spanish-speaking DUI courts, which were
11 established in 2002. Judge Mundell was Presiding Judge of the Maricopa County
12 Superior Courts. Later she was also one of the defendants named by Thomas in
13 what is now commonly known as the RICO case filed in December 2009. See pp. 45-
14 56 below. The Ninth Circuit Court of Appeals held that Thomas did not have
15 standing to bring this action against the courts. The Court of Appeals upheld the
16 trial court dismissal of the lawsuit. Thomas's lack of standing to bring a lawsuit was
17 raised again in two cases discussed below, the "Sweeps" case and the "RICO" case.
18 He was found to have no standing to bring the Sweeps case and his lack of standing
19 was raised as a defense in the RICO case.
20

21 Thomas also disagreed with the Superior Courts about Proposition 100 and its
22 application. This law effectively denies bail to persons charged with a crime who are
23 in the U.S. illegally. Thomas took the position that the courts were not enforcing the
24

25 _____
⁴ RICO Complaint paragraph 31, described below.

1 law and he was vocal in the press about this. On June 17, 2007, Judge Mundell
2 published an article in the Arizona Republic stating that Thomas had an obligation to
3 work through the courts, including appellate courts, if he did not agree with the way
4 the courts were implementing Prop. 100. She stated that prosecutors (in Thomas's
5 office) had created a politically motivated controversy, using the media to agitate the
6 public. She stated that Thomas's criticism was unfounded and unfair. On about
7 June 22, 2007, Thomas filed a Special Action concerning this issue. This lawsuit
8 was dismissed soon after when a new law signed by then-governor Napolitano
9 established probable cause as the evidentiary standard to be applied to determine an
10 immigrant defendant's status.
11

12 In December 2008, Thomas and Aubuchon filed criminal charges against
13 Supervisor Donald Stapley. At the outset of that case, they alleged in letters and
14 pleadings that Judge Mundell, Judge Baca and Judge Fields were assigning the case
15 to Judge Fields because he was biased against Thomas. They also alleged that Judge
16 Donahoe improperly handled a case involving Conley Wolfswinkle. They claimed that
17 Judge Donahoe took the case when he should not have done so.
18

19 **Disputes with MCBOS.** In or about March 2006, a dispute developed between
20 Thomas and the Board over the appointment of lawyers from outside MCAO to
21 represent the county. Occasionally, the county must be represented by an attorney
22 other than the elected county attorney due to conflicts of interest or other issues.
23

24 In early 2006 the Board believed that Thomas was making these appointments
25 for political reasons. The Board perceived that Thomas' appointments were based
upon who was favorable to him, not necessarily upon who was best qualified to

1 represent the county. Additionally, the Board was concerned that the money spent
2 on outside counsel was increasing above what was acceptable. Supervisor Stapley
3 was chair of the Board at this time and the Board asked him to talk to Thomas about
4 this situation. Stapley and Thomas met and Stapley explained the Board's concerns.
5 Stapley and Thomas did not reach an agreement about the Board's authority over the
6 appointment of outside counsel.

7
8 Thomas then wrote a series of letters to Stapley about this dispute. On March
9 2, 2006, Thomas wrote to Stapley stating among other things that he could not agree
10 to allow the Board to make the selection of counsel independently or to retain
11 counsel outside MCAO. Stapley had taken the position that the Board had
12 supervisory authority over attorneys representing the county. The Board also wanted
13 to determine which counsel to hire if the County Attorney had a conflict.

14 On March 13, 2006, Thomas again wrote to Stapley about this subject. He
15 stated, ". . . let me emphasize once again that the Board of Supervisors does not have
16 the lawful authority to retain its own legal counsel outside the County Attorney's
17 Office, and that I have neither the authority nor the intention to consent to such an
18 arrangement." Thomas further said that he would not meet again with Stapley if
19 Stapley wanted to discuss retention of private outside counsel. He also stated that a
20 proposed resolution of the Board to appoint General Counsel separate from the
21 County Attorney was unlawful and that if the Board did so it would be a violation of
22 Arizona statutes and case law. He then stated that Board members are immune from
23 suit when they rely in good faith upon opinions of the County Attorney, but no such
24 immunity would apply and they may be personally liable for actions on advice of
25

1 other counsel. He stated he would be obliged to commence litigation against the
2 Board should the Board move forward to pay outside counsel.

3 A week later, on March 20, 2006, Thomas wrote to Stapley and stated that he
4 had learned that the Board planned to meet in executive session that day. He also
5 learned that attorney Tom Irvine⁵ had attended a Board meeting on March 15, 2006,
6 as "Outside Counsel." Thomas stated that the County Attorney had not retained Mr.
7 Irvine to represent the Board in the matter, and that Mr. Irvine could not provide
8 legal advice to the Board in either executive or open session. Thomas instructed his
9 civil division to delete Mr. Irvine from the agenda. Thomas wrote that his letter to Mr.
10 Stapley was to provide legal advice to the Board. He stated that the Board was
11 entitled to separate legal counsel in only two limited situations: 1) if the County
12 Attorney's Office is unwilling or unable to represent the Board (which he claimed was
13 not the case); or 2) if there was an actual conflict of interest. He claimed that mere
14 disagreement by the Board with the County Attorney's opinion does not constitute a
15 conflict of interest. He said no conflict existed. He requested that the Board not
16 utilize Mr. Irvine in executive session that day. Nevertheless, Mr. Irvine attended that
17 meeting at the invitation of the Board.
18

19 On April 17, 2006, Thomas wrote to Stapley stating that the Board could not
20 amend the County Restated Declaration of Trust to allow the Board to select private
21 counsel for civil litigation. The Board planned to amend the Declaration of Trust
22 concerning the self-insurance of the county to give itself more control over which
23

24
25 ⁵ Mr. Irvine was also named as one of the defendants in the RICO action by Thomas and Aubuchon, as discussed below. Thomas and Aubuchon have also claimed that Mr. Irvine was a target of a grand jury investigation in December 2009.

1 lawyers would be selected. Thomas stated that his opinion was that the Board could
2 not select counsel to defend civil lawsuits without the consent of the County
3 Attorney's Office. He wrote,

4 It would be contrary to law for the Board to seek to exclude the
5 county attorney from the process of selecting counsel for opposing
6 claims against the county. Accordingly, should the Board seek to
7 take this action, our office would be obliged to initiate litigation.
8 As in my earlier correspondence to you on these matters, this legal
9 advice is offered merely in an attempt to explain the full legal
10 consequences of the proposed action.

11 I have decided to assign outside counsel to provide legal advice to
12 the Board on the sole issue of the legality of this proposed action,
13 and to defend against any lawsuit this office may initiate related to
14 same. Because our office did not learn of this possible action until
15 late last week, I have been unable to secure outside counsel prior
16 to the executive session scheduled for today. As I explained in
17 regard to Mr. Irvine's recent improper actions, you or other Board
18 members should not solicit legal advice from this counsel on
19 unrelated matters. I will instruct this counsel not to provide such
20 advice. You will be informed of which counsel has been selected
21 for this matter in the near future. . .

22 The Board placed its proposed action on its agenda, and on May 18, 2006, the
23 Board did amend the Revised Restated Declaration of Trust for Maricopa County. In
24 a letter to Stapley on May 23, 2006, Thomas said that the Board had acted to give
25 itself the authority to manage, supervise and direct the County Attorney in the
exercise of his duties. He stated that it was inconceivable that the Board would be
permitted to veto a decision made by the County Attorney pursuant to a clear
statutory mandate. He further stated the following:

 Finally, the immunity granted to the Board by A.R.S. § 38-446
requires "good faith reliance on written opinions of . . . a county
attorney." Here, the Board has acted contrary to the written

1 opinions of this office and will not be entitled to immunity if it acts
2 in accordance with the invalid Trust Agreement.

3 Concerning the appointment of lawyers outside the county attorney's office,
4 Thomas viewed his rights and obligations and those of the MCBOS in one way;
5 MCBOS viewed them differently. Thomas wanted to make appointments on his own,
6 unimpeded by the Board.

7 In the above series of letters, Thomas advised his client, MCBOS, about how
8 his client should conduct itself in choosing counsel to represent it. Thomas's advice
9 concerned issues in which Thomas's personal interest and his interest as County
10 Attorney conflicted with the interests of his client. Nonetheless, Thomas counseled
11 his client not to take action that would compromise his own personal interests.

12
13 **1. Ethical Violation #1**
14 **(Thomas) Conflicts of Interest⁶**
15

16 When he advised the Board about its rights and obligations in the appointment
17 of outside counsel, Thomas violated ER 1.7(a)(2). That rule provides that a lawyer
18 shall not represent a client if the representation involves a concurrent conflict of
19 interest. A concurrent conflict of interest exists if there is a significant risk that the
20 representation of one or more clients will be materially limited by the lawyer's
21 responsibilities to another client, a former client or a third person or by the personal
22 interest of the lawyer.

23
24
25 ⁶ Each Ethical Violation charged herein is numbered separately and follows the relevant factual
discussion.

1 Thomas advised the Board about matters in which he had a vested personal
2 interest. He wanted to maintain the power to make the appointments of outside
3 counsel without the involvement of the Board. The Board, however, wanted the
4 power to make those decisions. Thomas advised the Board that it could not do what
5 it wanted to do. This advice was limited by his own personal and political interests
6 as County Attorney. Thomas violated ER 1.7(a)(2).
7

8
9 ***C. Thomas v. Maricopa County Board of Supervisors, and Thomas's
Statement regarding Dowling v. County and Keen v. County.***

10 The dispute between MCBOS and Thomas about appointment of outside
11 counsel continued. On June 14, 2006, Thomas filed a civil action against the Board
12 seeking a declaratory judgment concerning the relative rights and obligations of the
13 County Attorney and the Board about selection and appointment of outside private
14 counsel. *Thomas v. MCBOS*, Maricopa County Superior Court, CV 2006-008971.
15 MCBOS was represented in this lawsuit by Tim Casey.
16

17 On June 14, 2006, the same day that he filed the action against the Board,
18 Thomas released a public statement that he was suing MCBOS. He stated that he
19 was doing so "to defend the County Attorney's Office against the board's unlawful
20 attempts to undermine the independence of the office that I hold." Thomas stated
21 that he had discussed on numerous occasions his concerns with all five supervisors
22 and had sent Stapley, the chairman of the Board, no fewer than five letters making
23 plain the illegality of "his" proposed actions.
24
25

1 The Board did not file an answer, and the matter was resolved in August 2006
2 by a Memorandum of Understanding (MOU) between the parties. The MOU contains
3 the following agreement:

4 The Board agrees, to the extent the law permits, not to file any
5 lawsuit, complaint, or action that in any manner or in any way
6 arises from, or is related to, the complaint, the County Attorney's
7 Statement dated June 14, 2006, or the conduct of the County
8 Attorney between June 14, 2006 and the date this MOU is signed
9 by the parties.

8 County Manager Smith alleges in his Bar complaint (State Bar No. 09-2293) that Mr.
9 Thomas obtained the agreement of the Board not to file a Bar complaint against
10 Thomas, as reflected in the above passage. In the MOU Thomas agreed that he
11 would dismiss the action and that he and MCBOS would follow a system with regard
12 to appointment of outside counsel. The MOU expired by its terms on December 1,
13 2008.

14 In 2006, while the above dispute was occurring, two County officers sued the
15 County. Sandra Dowling, the County School Superintendant, filed one lawsuit, and
16 Philip Keen, the County Medical Examiner, filed the other. Thomas hired Tom Irvine
17 to defend the County in the Dowling case. The County hired other outside counsel to
18 represent it in the Keen case.

19
20 Thomas's June 14, 2006 statement addressed not only the suit Thomas
21 brought against the Board, but also the cases brought by Dowling and Keen.
22 Thomas stated that the County's position in those two cases was unsupportable,
23 despite the fact that Thomas had an attorney-client relationship with the Board.
24 Thomas added that his suit against the County was not unique and that it was the
25 third, including his, against County officers in less than a month. He stated that in

1 all three cases the Board had unlawfully sought to arrogate powers vested in other
2 County agencies. He said that he could not in good conscience defend MCBOS in the
3 Dowling and Keen actions and that he believed those complaints had merit:

4 It bears noting that these recent lawsuits [against the county] had
5 occurred during, and largely because of, the unusual
6 chairmanship of Supervisor Don Stapley. **While respecting the**
7 **attorney-client relationship I hold with Mr. Stapley and other**
8 **members of the board**, I would be remiss if I did not help the
9 people of Maricopa County understand why the board has
10 attracted so many costly lawsuits in such a brief period of time.

11 I cannot in good conscience defend the Board of Supervisors in the
12 two legal actions brought by Ms. Dowling and Mr. Keen, as I
13 believe these complaints [against the county] have merit.
14 (emphasis added)⁷

15 Dowling's lawyers, David Cantelme and Aaron Brown, filed a Motion for
16 Summary Judgment in her case against the County on about June 9, 2006. On
17 June 16, 2006, after Thomas made his public statement, Dowling's attorneys filed a
18 Motion for Leave to Supplement [Dowling's] Statement of Facts asking to include
19 Thomas's June 14, 2010 statement. After the County objected, Judge Margaret
20 Downie did not permit Thomas's statement into evidence.

21 **1. Ethical Violation #2**
22 **(Thomas) Disclosure of Confidential Information**

23 Thomas violated ER 1.6(a) by publicly revealing information relating to the
24 representation of a client. The rule states that a lawyer shall not reveal information

25 ⁷ Thomas and Aubuchon later charged Supervisor Stapley and Supervisor Wilcox with crimes. They also investigated Supervisor Kunasek. Thomas and Aubuchon named all of the supervisors as defendants in the RICO action described below.

1 relating to the representation of a client unless the client gives informed consent.

2 There are exceptions to this general rule that are not applicable. Thomas violated ER
3 1.6(a) by disclosing his opinion that the county's positions in these two lawsuits were
4 unsupported. Trust is the hallmark of the attorney client relationship. ER 1.6 cmt.

5 2. Thomas violated this trust by publicly revealing his opinion of his client's conduct.

6 Even though the County was represented by lawyers outside the County Attorney's

7 Office in the Keen and Dowling cases, the County Attorney still had an attorney-client

8 relationship with the Board and the County itself. Thomas formed his opinion based

9 on his view of his client's rights and obligations. If Thomas actually thought the

10 County's position was unsupportable, he should not have made any public statement

11 about his views of his client's case. Instead, Thomas used the Dowling and Keen

12 cases in an attempt to buttress his own position against the Board and the County.
13
14

15 **2. Ethical Violation #3**
16 **(Thomas) Improper Public Statements**

17 Thomas violated ER 3.6(a) by issuing his public statement about his view of the
18 Keen and Dowling cases. He made extrajudicial statements that he knew or
19 reasonably should have known would be disseminated by means of public
20 communication and would have a substantial likelihood of materially prejudicing an
21 adjudicative proceeding. The information was not permitted to be disclosed under
22 the exceptions to the general rule contained in ER 3.6(b).
23
24
25

1 **D. Prosecution of Supervisor Stapley.**

2 As outlined above, in 2006 Thomas began to see Supervisor Stapley as a foe. In
3 late 2008, Thomas and Aubuchon filed criminal charges against Stapley.⁸

4 Aubuchon presented this case to a grand jury. The grand jury returned an
5 indictment and it was filed in court on November 20, 2008. On about December 3,
6 2008, a summons was served on Stapley. The 118 count indictment charged Stapley
7 with felonies and misdemeanors regarding his yearly financial disclosures as a
8 county supervisor and his periodic candidate disclosures dating back to 1994. An
9 attorney for MCAO argued for the issuance of a warrant and the setting of a bond in
10 the amount of \$100,000. A commissioner denied that request and ordered the
11 issuance of a summons to Stapley. During a hearing about whether a summons or
12 warrant requiring bond should be issued to Stapley, a commissioner recognized that
13 there was a statute of limitations issue.
14

15 Thomas's written press release about the Stapley indictment stated that the
16 case was the result of investigations by the joint anti-corruption task force with the
17 Sheriff (Maricopa County Anti-Corruption Effort, "MACE"). Thomas announced that
18 the investigation was not over and that other county employees were also being
19 investigated.
20

21 Although Independent Bar Counsel has offered Aubuchon and Thomas the
22 opportunity to be interviewed in this matter, neither has accepted. Therefore,
23 Independent Bar Counsel bases conclusions about when and why the Stapley
24

25 _____
⁸ *State v. Stapley*, CR2008-009242.

1 investigation began on what was learned from sheriff's office personnel and
2 inferences from known facts.

3 No reason or explanation has been given to Independent Bar Counsel why the
4 investigation of Stapley was commenced. The evidence does not support the
5 conclusion that the investigation began as a result of a tip or some information being
6 given to MCSO or MCAO about possible criminal activity. Rather, in 2007, the joint
7 task force between Thomas's office and the Sheriff's Office began to look into
8 Stapley's business dealings and his financial disclosures on their own initiative.
9 Chief Hendershott of the Sheriff's Office asked Sgt. Brandon Luth of the Sheriff's
10 Office to start looking at Stapley in January 2007, but to keep it confidential.
11 Aubuchon, if not another deputy county attorney, began in January 2007 to research
12 Stapley on the Internet.
13

14 Aubuchon stated in a pleading in the case that the matter was not initiated
15 through a confidential informant.⁹ However, in that pleading she refused to disclose
16 who initiated the investigation or why it was initiated. She did state that much of the
17 evidence implicating Stapley was readily available through proper search of the
18 Internet.¹⁰ Her statement is important because, as noted above there is evidence that
19 Aubuchon herself initiated an investigation of Stapley by downloading documents
20 from the Internet as early as January 2007. If she did not initiate this investigation
21 herself, then it is likely that former deputy county attorney Mark Goldman did so.
22
23

24
25 ⁹ State's Response to Defendant's Motion to Disqualify Maricopa County Attorney Andrew Thomas For
Improper Bias and Prejudice, p. 4, filed February 9, 2009.

¹⁰ *Id.*

1 Goldman has been identified as attending MACE meetings and handing out
2 information about Stapley at one of those meetings in 2007.¹¹

3 The substance of the indictment returned by the grand jury against Stapley at
4 the direction of Aubuchon is itself evidence of Thomas's and Aubuchon's personal
5 and political attack on Stapley. The Indictment charges 118 separate criminal
6 violations dating back to 1994. It appears that this was the first time in Arizona
7 history that a county supervisor's financial disclosures were the subject of criminal
8 charges. As discussed below, Thomas and Aubuchon brought more than 40 of these
9 charges against Stapley after the statute of limitations had run. While prosecutors
10 have broad discretion to charge, the fact that Thomas and Aubuchon charged crimes
11 they knew were outside the statute of limitations and the fact that they charged so
12 many crimes, including felonies of forgery and perjury, for essentially the same types
13 of acts and omissions is evidence of their motive to retaliate, harm and burden
14 Stapley.
15

16 **1. Ethical Violation #4**
17 **(Thomas and Aubuchon) Filing Charges Against Stapley to**
18 **Embarrass or Burden**

19 ER 4.4(a) states that in representing a client, a lawyer shall not use means that
20 have no substantial purpose other than to embarrass, delay, or burden any other
21 person. Thomas and Aubuchon each violated this rule. There was no substantial
22 purpose to file the charges against Stapley other than to burden and embarrass him.
23
24

25 ¹¹ Mark Goldman is currently practicing in the Wilenchick law firm, and up until recently has represented Aubuchon in this Bar complaint.

1 Thomas and Aubuchon did not prosecute Stapley to seek justice but rather to pursue
2 the political and personal interests of Thomas.

3 Thomas's and Aubuchon's motives to attack Stapley date back to at least
4 March 2006, when, as noted above, Thomas blamed "the unusual chairmanship of
5 Supervisor Stapley" for various lawsuits against the county, including the one
6 brought by Thomas against the Board.

7
8 There is further evidence of tension between Thomas and Stapley regarding the
9 Arizona Meth Project that had been implemented through the Board and Stapley.
10 Before this project, anti-drug television ads had featured Thomas as a figurehead
11 discouraging the use of methamphetamines. At the direction of the Board and
12 Stapley, the television spots were changed to exclude Thomas in favor of an anti-
13 meth message based on the effects of the drug. The Board thought that Thomas had
14 been using the previous ads for political gain rather than for the purpose of
15 discouraging drug use. According to Stapley, Thomas was not happy about this
16 change, which was spearheaded by Stapley.

17 Additionally, there were disputes between the Board, including Stapley, on one
18 side and Thomas and Sheriff Arpaio on the other during the time period before
19 Stapley was indicted. The Board had initiated a freeze on capital spending and
20 Thomas and the Sheriff had refused to work with the Board on this issue.

21
22 Thomas and Aubuchon had several political motives for charging Stapley. As
23 noted above, Thomas had identified him as the supervisor whose "unusual
24 chairmanship" of the Board had led to the county being sued. Thomas also identified
25 Stapley along with other Board members as threatening Thomas's power to appoint

1 attorneys to represent the County without interference by the Board. At the time he
2 was indicted, Stapley was the Chair of the Board. All of this evidence indicates that
3 the 118 count indictment against Stapley was politically motivated to burden and
4 embarrass Stapely.

5 **2. Ethical Violation #5**
6 **(Thomas and Aubuchon) Conflicts of Interest**

7 Thomas and Aubuchon violated ER 1.7(a)(1) because they represented one
8 client, the State, against another client - Supervisor Stapley - in the criminal case
9 against Stapely. Even Thomas himself recognized that he had an attorney-client
10 relationship with Stapley.¹² Thomas never terminated that relationship and never
11 advised Stapley about the conflict or sought a waiver.

12 Thomas and Aubuchon also violated ER 1.7(a)(2) in charging and prosecuting
13 Supervisor Stapley. The rule provides that a lawyer shall not represent a client if the
14 representation involves a concurrent conflict of interest. A concurrent conflict of
15 interest is defined as existing if there is a significant risk that the representation of
16 one or more clients will be materially limited by the lawyer's responsibilities to
17 another client, a former client or a third person *or by the personal interest of the*
18 *lawyer.* (Emphasis added.) The evidence establishes that Thomas and Aubuchon did
19 have a personal conflict of interest in deciding whether to seek an indictment of
20 Stapley, and later in prosecuting the matter against him.
21

22
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¹² See news release of June 14, 2006, quoted above at page 13.

1 Thomas and Aubuchon owed the State of Arizona the duty of conflict-free
2 representation. However, their representation was limited by their personal animus
3 against Supervisor Stapley.

4 Aubuchon argued in a pleading that the "Code of Professional Responsibility"
5 recognizes the County Attorney's statutory duties, and that government attorneys
6 such as the County Attorney must in some circumstances prosecute the officers they
7 represent.¹³ Contrary to this statement, no provision of the Arizona Rules of
8 Professional Conduct authorizes a county attorney to represent anyone while a
9 conflict of interest limits his representation. Aubuchon was trying to urge the trial
10 court to consider case law from other jurisdictions concerning attorneys general who
11 prosecute state officers whom they sometimes represent.¹⁴

13 This conflict issue was litigated further in the Stapley matter after Thomas had
14 transferred the case to Yavapai County Attorney Sheila Polk's office. See below, pp.
15 31-33. On May 1, 2009, Stapley filed a Motion to Dismiss the indictment alleging
16 that MCAO had gained confidential information from Stapley and that it was a
17 violation of his due process for an attorney with a conflict of interest to represent the
18 State in front of the grand jury. On June 10, 2009, Judge Fields denied the Motion
19 to Dismiss. He *did* find that there was an attorney-client relationship between
20 Supervisor Stapley and MCAO. But he found that it was "limited in scope." He ruled
21 further that this "hybrid or limited scope attorney-client relationship" does not give
22 the same protection one would expect from representation by private counsel.
23

25 ¹³ State's Response to Motions for Determination of Counsel and Scheduling Order, p. 7.
¹⁴ *Id.* pp. 5-6 citing among other cases; *State v. Klattenhoff*, 801 P.2d 548 (Haw. 1990).

1 However, Judge Fields held that the evidence was undisputed that Stapley
2 consulted about his official duties with the deputy county attorneys assigned to the
3 MCAO's civil division. He ruled that there was no evidence that any of the
4 information disclosed to a civil deputy was used to obtain the indictment. Judge
5 Fields ruled that there was no doubt that the better practice would have been for the
6 Maricopa County Attorney to refer the entire investigation at its inception to another
7 state prosecuting agency. Judge Fields ruled that it was not reasonable under the
8 circumstances for Stapley to expect that MCAO was his attorney on all matters.
9 Judge Fields stated that the circumstances here were unlike those in the court tower
10 matter, 462 GJ 350, before Judge Donahoe, in which Donahoe disqualified MCAO.¹⁵
11 Judge Fields concluded that the MCAO was not attempting to use privileged
12 communications with its client or investigate the Board of Supervisors for activities
13 upon which MCAO gave advice.
14

15 Judge Fields's ruling is not conclusive about the existence of a conflict of
16 interest under the Rules of Professional Conduct. Judge Fields did not rule directly
17 on the issue of whether ER 1.7 had been violated; rather, he was ruling on a due
18 process argument raised in a motion to dismiss the indictment. His ruling
19 addresses primarily whether Stapley could expect that he was a client of MCAO. He
20 based his ruling on a definition of the attorney-client relationship that does not apply
21 to analyzing conflicts under attorney ethics principles. Neither the Arizona Ethical
22 Rules nor the ABA Model Rules of Professional Conduct draw a distinction such as
23 the one drawn by Judge Fields. There is no "hybrid" or "limited-scope" attorney-
24

25 ¹⁵ See below, for discussion of Donahoe's ruling and the court tower matter.

1 client relationship as he termed it for purposes of analyzing Thomas's and
2 Aubuchon's professional responsibility.¹⁶ Once Thomas had an attorney-client
3 relationship with Stapley, Thomas and Aubuchon could not then bring charges
4 against him. The pleadings in the Stapley case do not indicate that Judge Fields was
5 advised that Thomas himself acknowledged his attorney-client relationship with
6 Stapley.

7 **Misrepresentation to Court re: "Chinese Wall".** On December 23, 2008,
8 Stapley's attorney Tom Henze filed a Motion for Determination of Counsel and Motion
9 for Scheduling Order. The Motion for Determination of Counsel argued that Thomas
10 should be disqualified as the prosecutor because of a conflict of interest under ER
11 1.7, and that his actions had the appearance of impropriety. That issue was
12 resolved, as discussed above. The motion argued that Thomas and his office should
13 not be permitted to prosecute Stapley because there had been an attorney-client
14 relationship between MCAO and Stapley.
15

16 Aubuchon filed a response to the motion arguing among other things that the
17 case against Stapley was based upon public records only, and that there was a
18 "Chinese Wall"¹⁷ between the criminal and civil divisions of the County Attorney's
19 Office in the prosecution of the case.¹⁸ There is no evidence of any formal screening
20

21 ¹⁶ ER 1.2(c) does allow an attorney to limit the scope of the representation; however, the client must
22 give informed consent to that limitation. There is no evidence that MCAO ever tried to limit its
23 representation of any supervisor or obtained informed consent to such limitation. Additionally, such
24 limitation must be reasonable under the circumstances.

24 ¹⁷ The term "Chinese Wall" is more properly referred to as "screening" to describe how attorneys can be
isolated from involvement in a particular case.

25 ¹⁸ State's Response to Motions for Determination of Counsel and Scheduling Order, p. 7, lines 4-6:
"There has been and is a "Chinese wall" between the criminal and civil division of the County
Attorney's Office in the prosecution of this case."

1 of some lawyers from others in the county attorney's office. Some lawyers have said
2 that there was no discussion between the two divisions; however, there is no evidence
3 of a formalized or written screening policy ever being implemented in general or in
4 particular about *Stapley I*. Aubuchon's claim that such a formalized policy existed
5 was implicit in Aubuchon's pleading. Aubuchon's statement to the court was
6 dishonest and a material misrepresentation because it implied that the County
7 Attorney had established screening precisely to guard against information being
8 shared by the civil division with the criminal division, and vice versa.
9

10
11 **3. Ethical Violation #6**
(Thomas and Aubuchon) Misrepresentation to Court

12 Aubuchon violated ER 3.3(a) because she knowingly made a misrepresentation
13 of fact to the court. She stated to the court in a pleading that a "Chinese Wall" had
14 been created between the civil and criminal divisions of the county attorney's office.
15 There is no evidence that there was ever such formalized screening. To the contrary,
16 there was no policy to shield the criminal lawyers handling the *Stapley* case from any
17 lawyer in the civil division including those advising *Stapley* and other supervisors.
18 Aubuchon's statement to the contrary was dishonest and self-serving. Thomas is
19 equally culpable for this misrepresentation to the court because, according to
20 Aubuchon, everything that she filed in court was approved by the County Attorney.¹⁹
21
22
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¹⁹ Baker interview of Aubuchon, June 21, 2010, p. 27.

1 ***Motion to Recuse Judge Fields from the Stapley Case.*** After the *Stapley I*²⁰
2 case was filed, Judge Mundell assigned it to retired Judge Kenneth Fields. Thomas
3 and Aubuchon asserted that the assignment of Judge Fields to the *Stapley I* case was
4 made because Judge Fields was biased against Thomas. On December 10, 2008,
5 Aubuchon, on behalf of Thomas, filed a Motion for Voluntary Recusal Or If Denied
6 Motion for Change of Judge For Cause. In her motion Aubuchon stated that Judge
7 Mundell and Stapley had worked together closely on numerous fiscal and countywide
8 issues. Aubuchon stated that Judge Mundell had recently negotiated with Stapley
9 about the funding for the county court tower. Aubuchon alleged that Judge Mundell
10 had interjected herself into the Stapley case and had chosen Judge Fields who had a
11 history of bias and prejudice as well as judicial activism against Thomas and his
12 office.
13

14 In her motion Aubuchon stated, "Judge Fields is the complainant in an open
15 and pending State Bar matter that he initiated against County Attorney Thomas."²¹
16 Aubuchon knew that this statement was untrue because she attached to her motion
17 Judge Fields's letter to the Bar regarding attorney Dennis Wilenchik. This letter was
18 not about Thomas. Judge Fields never initiated a State Bar matter against Thomas.
19 Aubuchon had no evidence that Judge Fields had filed a bar complaint against
20 Thomas. Aubuchon's statement was a knowing misrepresentation to the court.
21
22
23
24

25 ²⁰ This case, CR2008-009242, is referred to as "*Stapley I*" to distinguish it from a second criminal case
Thomas and Aubuchon filed against Stapley in December 2009.

²¹ State's Motion for Voluntary Recusal, p.6, Dec. 10, 2008, CR2008-009242.

1 **4. Ethical Violation #7**
2 **(Thomas and Aubuchon) Misrepresentation to the Court**

3 Aubuchon violated ER 3.3(a) because she knowingly made a misrepresentation
4 of fact to the court. The rule prohibits a lawyer from knowingly making a false
5 statement of fact to a tribunal. Aubuchon stated that Judge Fields had initiated a
6 state bar complaint against Thomas when he had not. Aubuchon had no evidence to
7 support the claim. The letter she attached to her pleading was not about Thomas,
8 but was about another attorney, Dennis Wilenchick. Thomas is equally culpable for
9 this misrepresentation to the court because, according to Aubuchon, everything that
10 she filed in court was approved by the County Attorney.²²

11 ***Aubuchon Sends Letters Directly to the Court.*** On about December 11,
12 2008, Aubuchon wrote to Presiding Criminal Judge Anna Baca requesting that she
13 submit to an interview about the reasons for the selection of retired Judge Fields in
14 *Stapley I*. Judge Baca responded by order on about December 16, 2008, stating that
15 the court declined to accept or read the letter from the County Attorney since such
16 an off-the-record communication may relate to the case. She directed that the
17 County attorney communicate in pleading form.
18

19 On about December 11, 2008, Aubuchon hand delivered a letter to Judge
20 Mundell requesting to interview her about the assignment of Judge Fields.²³ Judge
21 Mundell responded on December 15, 2008, stating that among other things lawyers
22 do not write letters that are not part of the public file; rather, they file motions.
23

24 _____
25 ²² Baker interview of Aubuchon, June 21, 2010, p. 27.

²³ Aubuchon's letter showed that Stapley was copied on it. At that time no attorney had entered an appearance for Stapley.

1 Judge Mundell also stated that it was not appropriate for Aubuchon to attempt to
2 ascertain Judge Mundell's thought processes in making a judicial decision.²⁴

3 Contrary to Thomas's and Aubuchon's assertions, Judge Mundell was not and
4 is not aware of any bias by Fields against Thomas or in favor of Stapley. Judge
5 Mundell explained to Independent Bar Counsel that her choice of a retired judge was
6 based upon her concern about a potential conflict because of budget problems
7 affecting sitting judges that would ultimately be decided by the Board. A retired
8 judge would not have a concern about those problems and would not have the
9 appearance of doing something to favor one of the supervisors. She had two judges
10 in mind and chose Fields because he called her back before the other judge did.
11

12 **5. Ethical Violation #8**
13 **(Aubuchon) Conduct Prejudicial to Administration of Justice**

14 Aubuchon violated ER 8.4(d) in her contacts with the judges and in her
15 attempts to determine why Judge Fields had been appointed to *Stapley I*. Aubuchon
16 requested by private letter to interview or depose Judges Mundell, Baca and Fields
17 concerning their thought processes in the assignment of Judge Fields to the *Stapley I*
18 case. The proposed inquiry intruded into judicial discretion and had the potential to
19 undercut the separation of powers between the judicial and executive branches of
20 Maricopa County government. The proposed depositions (with questions concerning
21 whether the Judges had conspired to appoint a Judge supposedly biased against
22 Thomas) also had the potential to intimidate the Judges and other judges of the
23 Superior Court.
24

25 ²⁴ Judge Mundell, Judge Baca and Judge Fields were later named as defendants in the RICO action by
Thomas and Aubuchon.

1 By requesting interviews of and moving for depositions of the Judges,
2 Aubuchon engaged in conduct prejudicial to the administration of justice (ER 8.4(d)).

3 **Charging Stapley With Crimes Outside the Statute Of Limitations.** The
4 evidence will show that Thomas and Aubuchon charged many of the misdemeanor
5 crimes alleged in the indictment against Stapley knowing that the statute of
6 limitations had run on those misdemeanors. The statute of limitations, A.R.S. § 13-
7 107, provides:

8 (b) Except as otherwise provided in this section, prosecutions for
9 other offenses [i.e., homicide, violent sexual assault, among others]
10 must be commenced within the following periods after actual
11 discovery by the state or the political subdivision having
12 jurisdiction of the offense or discovery by the state or the political
13 subdivision that should have occurred with the exercise of
14 reasonable diligence, whichever first occurs:

- 15 1. For a class 2 through a class 6 felony, seven years.
- 16 2. For a misdemeanor, one year.

17 The investigation of Stapley began as early as January 2007. Brandon Luth, a
18 Maricopa County Sheriff's Department Sergeant, stated that he was told by Chief
19 Hendershott to look into Stapley on January 23, 2007. Hendershott told Luth that
20 he wanted to look into the business dealings of Don Stapley. Luth stated that he
21 researched Stapley's business holdings and dealings for a couple of days in January
22 2007, and then stopped. Luth also remembers being asked in September 2007 about
23 his investigation of Stapley. Sgt. Luth has stated that he knew there was a statute of
24 limitations issue in the Stapley case when the charges were filed by Thomas and
25 Aubuchon.

1 The evidence will show that Aubuchon began investigating Stapley's financial
2 disclosures in January 2007. The evidence of her involvement is as follows:

3 Mark Stribling, who is now Chief of Investigations of MCAO, was contacted by
4 Thomas in early May 2008 and asked to work on an investigation of Stapley. Thomas
5 told Stribling that he would be working with Luth. Stribling stated that he was
6 provided no information of how any of the information about the case came to the
7 attention of MCAO, but Thomas told him that Aubuchon had done Internet searches
8 on the properties owned by Stapley or his affiliates and that Aubuchon would be the
9 prosecuting attorney.
10

11 On May 14, 2008, Aubuchon, Luth, Stribling, another investigator from MCAO
12 (Tadlock), MCSO Captain James Miller, and MCSO Lieutenant Anglin attended a
13 meeting. Aubuchon handed out documents which she stated she had researched on
14 line that showed Stapley had filed false and/or incomplete disclosure statements.
15 Some of the documents that Aubuchon handed out showed that they had been
16 printed from the Internet in January or February 2007. The fact that Thomas told
17 Stribling that Aubuchon had already done research on the internet, and the fact that
18 she gave out documents that were printed out in January and February 2007, shows
19 that she had commenced an investigation of Stapley as early as January 2007, or
20 that she knew an investigation had been commenced by then.
21

22 At the May 14, 2008 meeting, Aubuchon also handed out a draft indictment
23 which set forth 79 counts. This draft indictment includes allegations of misconduct
24 by Stapley beginning in 1994. In order to prepare this indictment, investigation of
25 Stapley had to commence before May 14, 2008.

1 Sgt. Luth asked Aubuchon at the May 14, 2008 meeting if her handing out all
2 the information made her a witness in the matter. According to Luth, she responded,
3 "That's why we are going to have you guys [MCSO] do it." Lieutenant Travis Anglin of
4 MCSO remembers such a meeting and remembers he was concerned about the
5 statute of limitations issue. He asked Aubuchon about that issue and she assured
6 him it was okay. She also told him to use that date (probably May 14, 2008) as the
7 date for the MCSO report.

8
9 The only Sheriff's Departmental Report that has been discovered about the
10 *Stapley I* matter is dated May 14, 2008. That report does not indicate why the
11 investigation was commenced or what research or investigation had been done before
12 that date.

13 There is additional evidence regarding the timing of the *Stapley I* investigation.
14 In June 2007, a notebook of information was given either to Bruce Tucker and/or
15 Travis Anglin of MCSO. This notebook or a memo in it had a sticky note attached
16 saying that it was "rec'd Weds. June 20, 2007 @ 1600 from Sally Wells." Ms. Wells
17 was third in charge of MCAO behind Thomas and Phil MacDonnell. She attended
18 weekly meetings of MACE in 2007. The information in the notebook includes a memo
19 with the following heading: "Yavapai County Matters; Issues Related to MCSO
20 Investigation of Donald Stapley." Section IV of the memo is headed "Filing Financial
21 Disclosure Statements with False or Misleading Information." Under that section
22 various criminal statutes are noted including forgery, theft and A.R.S. §§ 38-504, 38-
23 543 and 38-544. The memo and the information in this notebook indicate that
24 Stapley's financial disclosures were under investigation earlier than June 20, 2007.
25

1 There is also evidence that Stapley was discussed at MACE (Maricopa County
2 Anti-Corruption Effort²⁵) meetings in May and June 2007. Deputy County Attorney
3 Vicki Kratovil went to MACE meetings from December 2006 through about June
4 2007. She kept a notebook containing among other things the agenda for meetings.
5 These agendas were written by Bruce Tucker, formerly of MCSO. Stapley is listed on
6 the agenda for MACE meetings occurring May 9, May 23, June 6, June 13, June 20,
7 and June 27, 2007. After his name it is noted in parentheses that these matters are
8 being referred to Yavapai County. (This is not the same referral that was done later
9 in April 2009.) This notation is consistent with the memo in the notebook that was
10 described in the paragraph immediately above. The meeting agenda for June 13,
11 2007, states that a public records request was to be drafted with the assistance of
12 "Deputy Maricopa County Attorney Mark Goldman."
13

14 The indictment of Stapley charges misdemeanor violations of A.R.S §38-542
15 and §38-544, Failure to File and/or filing False or Incomplete Financial Disclosures.
16 As noted above the evidence establishes that the investigation began in January
17 2007, but no later than early June 2007. Therefore, the State had to commence
18 prosecution of Stapley by June 2008 on 44 of the misdemeanors charged in the
19 indictment.²⁶ However, Stapley was indicted on November 20, 2008. The statute of
20 limitations had run on those charges.
21
22
23

24 ²⁵ MACE was a joint task force between MCSO and MCAO that started in about December 2006.

25 ²⁶ There were 9 misdemeanor charges regarding conduct of Stapley that allegedly occurred in January 2008. The state brought those charges within one year of the conduct and therefore within the statute of limitations.

1 **6. Ethical Violation #9**
2 **(Aubuchon and Thomas) Conduct Prejudicial to the**
3 **Administration of Justice**

4 Aubuchon and Thomas charged Supervisor Stapley with 44 misdemeanors
5 when the Arizona statute of limitations barred those charges. The State, through
6 Yavapai County Attorney, Sheila Polk has conceded that the statute of limitations
7 barred those charges.²⁷ The statute of limitations is triggered when the state actually
8 discovers, or through exercise of reasonable diligence should have discovered that
9 there was probable cause to believe that the offense was committed. As noted above,
10 Aubuchon and MCSO began the investigation of Stapley probably in January 2007,
11 but no later than June 2007.

12 In Arizona the court lacks jurisdiction to consider crimes against a person on
13 which the statute of limitations has run. *State v. Fogel*, 492 P.2d 742, 744 (Ariz. App.
14 1972). In that case the court stated the following:

15 Unlike a statute of limitations in a civil case, a criminal statute of
16 limitation is not a mere limitation on the remedy, but a limitation
17 upon the power of the sovereign to act against the accused. It is
 jurisdictional (citations omitted).

18 Aubuchon and Thomas knew that most of the misdemeanor charges they
19 brought against Stapley were commenced outside the statute of limitations. Their
20 conduct violated ER 8.4(d) because it was prejudicial to the administration of justice
21 to obtain an indictment knowing that the court did not have jurisdiction over Stapley
22 for those 44 alleged violations. Furthermore, Aubuchon never presented information
23 to the grand jury which returned the indictment that the statute of limitations had
24

25 ²⁷ See Appellant's Reply Brief, fn. 1, *State v. Stapley*, Arizona Court of Appeals, 1 CA-CR 09-0682,
May 3, 2010.

1 run. Aubuchon did not elicit any testimony from the one witness who testified in
2 front of the grand jury about the time frame of the investigation or who began it.
3 This is further evidence of conduct prejudicial to the administration of justice in
4 violation of ER 8.4(d).

5
6 **7. Ethical Violation #10**
7 **(Aubuchon) Dishonesty**

8 ER 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty,
9 misrepresentation, fraud or deceit. Aubuchon engaged in dishonesty by failing to tell
10 the grand jury that many of the misdemeanor charges were barred by the statute of
11 limitations. There is significant circumstantial evidence that she knew those charges
12 were outside the statute. Because the statute of limitations is a jurisdictional matter
13 in Arizona, if a prosecutor knows that charges are barred, then she must inform the
14 grand jury and should advise the grand jury not to indict on charges arising from
15 conduct outside the statute. Instead, Aubuchon presented an indictment listing all
16 of the charges including 44 barred by the statute. Aubuchon's failure to tell the
17 grand jury about the State's lack of jurisdiction to act against Stapley on those
18 charges was dishonest.

19
20 ***Transfer of the Stapley Case to Sheila Polk.*** In March or early April 2009,
21 Thomas transferred *Stapley I* to the Yavapai County Attorney, Sheila Polk. At this
22 time Stapley's motion for determination of counsel was still pending in front of Judge
23 Fields.
24
25

1 In addition to the challenge to MCAO's ability to act as counsel for the State in
2 the Stapley case, a bar complaint had been filed against Thomas alleging a conflict of
3 interest in that case. See Bar Complaint 08-2289. The State Bar is named as the
4 complainant and the matter was filed in December 2008. That bar complaint was
5 transferred and assigned to retired Superior Court Judge Rebecca Albrecht to handle
6 as independent bar counsel. Judge Albrecht dismissed the matter on May 4, 2009,
7 on the condition that Thomas withdraw from the case and transfer it to Yavapai
8 County. She stated in her letter, however, that the issues were highly concerning
9 and should similar conflict of interest concerns come up in the future, the file could
10 be reviewed anew.
11

12 On April 2, 2009, the Yavapai County Attorney, Sheila Polk, agreed with
13 Thomas to take over the prosecution of *Stapley I*. She also agreed that she would
14 handle pending investigations regarding members of the board of supervisors
15 including allegations against Supervisor Wilcox and an investigation of the court
16 tower project.

17 On April 6, 2009, Thomas wrote to Supervisor Max Wilson and stated at the
18 top that it was "An Open Letter to the People of Maricopa County." He stated that he
19 referred the *Stapley* case to Polk and that he was also transferring to her the
20 completion of the investigation related to the Maricopa County Superior Court Tower
21 as well as current or future investigations or prosecutions involving the MCBOS or
22 county management. Also on April 6, 2006, Thomas issued a News Release
23 captioned, "County Attorney Offers Compromise to End Infighting, Sends Stapley
24 case, Investigations to Yavapai County; Proposes Mediation."
25

1 Ms. Polk entered her appearance on April 15, 2009 and asked former Navajo
2 County Attorney Melvin Bowers to serve as the prosecutor in the case.

3 Although all of these matters, including *Stapley*, were transferred to Polk,
4 Aubuchon still advised the Maricopa County Sheriff about them. The evidence of her
5 continued involvement is her statement at a meeting in September 2009 with Polk,
6 and Polk's assistant Dennis McGrane. When Polk stated that there was more to do
7 on the investigation of Supervisor Wilcox, Aubuchon said that she had advised the
8 sheriff's office of that need.

9
10 Aubuchon responded to Independent Bar Counsel stating that she was not
11 aware of the Albrecht letter, she was not a party to it, and it did not pertain to her.
12 She has not disclosed when she became aware of the Albrecht letter. She has not
13 denied, however, knowing that Thomas had transferred the matter to Polk while
14 allegations of a conflicts of interests were pending against Thomas and her office.
15 Further, she has not denied that, notwithstanding the transfer to Polk, she stayed
16 involved in the Stapley matter.

17 ***Thomas' Public Statement About the Dismissal of Stapley I.*** Attorneys for
18 Mr. Stapley filed motions to dismiss the criminal charges against him based upon
19 grounds other than MCAO's conflicts of interest. First, they asked the court to
20 dismiss the case for vagueness. They also filed a motion to dismiss based upon the
21 county's failure to follow the requirements of A.R.S. § 38-545 to promulgate
22 standards for financial disclosure. On August 24, 2009, Judge Fields denied the
23 vagueness motion, but granted the second motion in part and dismissed many
24 counts. Thomas issued a public statement on the same day as Judge Fields's ruling.
25

1 Although Polk was the prosecutor for the State on that day, Thomas nevertheless
2 issued this press release. In his public statement he urged Ms. Polk to appeal the
3 ruling. Thomas further stated the following:
4

5 It is unjust and improper for this criminal defendant to be able to
6 claim that as a member of the board of supervisors, he failed to
7 properly pass or amend the very laws he's accused of violating.
8 For him to be able to take advantage of the improper performance
9 of his own public duties is wrong by any measure. It's equally
10 wrong that the people of Maricopa County have just been told
11 they're the only citizens of Arizona whose elected county officials
12 don't have to disclose their private business dealings to the voters.

13 The ruling today reinforces our office's concerns about the
14 impartiality of Judge Fields. He was handpicked for this case in
15 violation of the rules of court, despite his having filed a bar
16 complaint against the Maricopa County Attorney (which was
17 dismissed) and having campaigned for Mr. Thomas' opponent in
18 last year's election. Four esteemed experts in judicial ethics have
19 stated that Judge Fields was ethically required to recuse himself
20 from this case.

21 **8. Ethical Violation #11**
22 **(Thomas) Improper Public Statements**

23 Thomas violated ER 3.6(a) in making the above statement when Judge Fields
24 dismissed some of the counts against Stapley. ER 3.6(a) applies to a lawyer who is
25 participating or has participated in the investigation or litigation of a matter. Thomas
had participated in both the investigation and litigation of the *Stapley I* case.
Thomas made an extrajudicial statement that he knew or reasonably should have
known would be disseminated by means of public communication and that would
have a substantial likelihood of materially prejudicing an adjudicative proceeding in
the matter.

1 **E. Occurrences at about the Time of Stapley Indictment and**
2 **Thereafter.**

3 In December 2009, Thomas, Aubuchon and Alexander committed multiple
4 ethical violations by retaliating against members of the Board, judges and attorneys
5 who were involved in disputes with Thomas.

6 The following outline summarizes the disputes that occurred primarily during
7 2009 that led to further retaliation by Thomas, Aubuchon and Alexander against
8 Supervisor Mary Rose Wilcox, Supervisor Don Stapley, Superior Court Judge Gary
9 Donahoe, and against all of the defendants in the RICO case discussed below.

10
11 ***The Court Tower Investigation.*** In late 2008, Thomas and the Maricopa
12 County Sheriff began to question the decision to build the new court tower, a
13 decision in which they had no official role. They began to investigate the Court
14 Tower, and their decision to do so was personally and politically motivated.

15 According to Eric Dowell, who has acted as an attorney for Thomas, in late
16 2008 and early 2009 MCSO and others expressed concern about the County's
17 decision to cut jobs without making any cuts to the \$347 million Court tower project.
18 Mr. Dowell stated that, accordingly, MCAO and MCSO launched a criminal
19 investigation into the Court Tower.²⁸

20
21 Chief Hendershott testified in front of a grand jury in January 2010 that there
22 was concern at a MACE unit meeting that the Court Tower should not be built.²⁹

23
24
25 ²⁸ Dowell Letter to State Bar, April 1, 2010, Bar Complaint against Novak and Irvine, p. 3, Statement of Information.

²⁹ January 4, 2010, GJ transcript, p.44.

1 There also was some concern that attorney Thomas Irvine was being paid as a space
2 planner on the Court Tower.

3 In Aubuchon's words, the Court Tower investigation was initiated because it
4 was not clear why the Board would still be going forward with the project in the face
5 of an economic downturn.³⁰ Ms. Aubuchon stated to Supervisor Kunasek in
6 February 2010 that it was "basically a little odd" that the Board slashed county
7 budgets, laid people off and went forward with a three hundred and fifty million
8 dollar project that was not really needed.³¹ Aubuchon expressed concern about the
9 hiring of Mr. Irvine to assist with the court project.³²

10 As noted in a Maricopa County Sheriff's Office (MCSO) Departmental Report
11 ("DR") in the case against Judge Donahoe (Sheriff's Office Supplemental Report - DR#
12 09-225204), officials of both the sheriff's office and MCAO perceived that the Board
13 began "to act against the County Attorney" after the *Stapley I* indictment was served
14 or filed. The DR states that "they," meaning the Board, hired attorney Tom Irvine to
15 "block investigations and prosecutions directed toward them (Board Members)."

16 Sgt. Luth of the MCSO stated that he did not know who the complainant was
17 on the Court Tower investigation. He stated that he asked Lisa Aubuchon where the
18 complaint came from and she stated, "it was your guys' case."

19 Independent Bar Counsel found no evidence justifying the initiation of the
20 Court Tower investigation. Independent Bar Counsel also discovered no evidence of
21 the slightest amount of criminal conduct by the Board, counsel for the Board, judges
22
23

24 _____
25 ³⁰ Transcript of taped discussion between Kunasek, his attorney, and Aubuchon date February 10, 2010.

³¹ *Id.*

³² *Id.*, p. 3

1 or County employees. The evidence suggests that the motivation for initiating this
2 investigation was personal animosity by Thomas, Aubuchon and the sheriff against
3 the Board, county officials and attorney Thomas Irvine.

4 ***Ruling by Donahoe Re: GJ Subpoena.*** On February 6, 2009, Judge Gary
5 Donahoe ruled in the Court Tower Grand Jury Case (Case No. 462 GJ 350). Judge
6 Donahoe's ruling covered three pending motions: 1) MCBOS's motion to quash the
7 subpoena duces tecum on the County; 2) Thomas and Aubuchon's motion to
8 disqualify Irvine's firm; and 3) Thomas and Aubuchon's motion to assign an out-of-
9 county judge to rule on the motion to quash and the motion to disqualify. Judge
10 Donahoe denied the motion to appoint an out of county judge, stating that he had no
11 interest in the court tower project. Judge Donahoe disqualified MCAO. He stated
12 that the issue was the ethical propriety of the Board's attorney (Thomas) seeking
13 documents from his client (MCBOS) as a part of a grand jury investigation. He found
14 that MCAO was counsel for the Board and gave the Board legal advice regarding the
15 court tower, and therefore they had a conflict of interest that disqualified MCAO from
16 conducting an investigation of its client on the very topic on which it gave legal advice
17 to its client. Judge Donahoe also denied Thomas and Aubuchon's motion to
18 disqualify Irvine's firm.

19
20 Thomas and Aubuchon filed a special action requesting review of Donahoe's
21 rulings in the court of appeals, CA-SA 09-0056, and then in the Supreme Court, CV
22 09-0165 PR. The Court of Appeals declined to take jurisdiction in May 2009. The
23 Supreme Court declined to review it on December 1, 2009. Neither Thomas nor
24 Aubuchon appealed the ruling. Judge Donahoe's ruling stands.
25

1 **Hiring Irvine regarding Thomas Conflicts.** On about December 5, 2008,
2 four county supervisors (Stapley recused himself) met and decided to hire attorney
3 Tom Irvine to review Thomas' conflicts in representing the Board. It was generally
4 known that Irvine had been hired by the Maricopa County Superior Court to assist
5 with the court tower project. He had openly attended and noted his attendance in
6 writing to various meetings about the Court Tower project as working for the court.
7 Irvine's providing counsel to the courts became an issue later when Deputy County
8 Attorney, Elizabeth Ortiz, filed a pleading on behalf of MCAO claiming that it was
9 "newly discovered" that Mr. Irvine worked for the courts. *See Thomas v. Donahoe,*
10 Amended Petition for Review, Supreme Court CV 09-0165 PR. This pleading did not
11 contain Lisa Aubuchon's signature, but she is identified on the cover page as one of
12 the lawyers representing the County Attorney.

14 **MCBOS Acts to Manage Civil Litigation.** On about December 23, 2008, the
15 Board voted to manage all of the civil legal actions in which the County was a party.
16 MCBOS delegated to County Manager David Smith the implementation of that action.
17 Eventually a civil litigation department separate from the county attorney's office was
18 established with Wade Swanson, Esq., as the director. (Both Mr. Smith and Mr.
19 Swanson were also later named as defendants in the RICO action.)

21 **Declaratory Judgment Action.** On December 31, 2008, Thomas and the
22 sheriff sued the Board over their authority to hire lawyers. *Thomas and Arpaio v.*
23 *MCBOS*, CV2008-033194 (commonly referred to as "the Dec Action," short for
24 declaratory judgment action.) Thomas Irvine represented the Board in the suit.
25 MCAO was represented by three named lawyers at Ogletree, Deakins, Nash, Smoak &

1 Stewart, including Eric Dowell. (Mr. Dowell represented Mr. Thomas in the bar
2 investigations of Mr. Thomas until recently.)

3 The complaint in the Dec Action asked for, among other things, an order that
4 the Board could not hire Mr. Irvine, or any other counsel to advise it about Thomas's
5 conflicts; that the Board could not choose its own counsel if there was conflict in
6 Thomas's representation of the Board; and that only the county attorney, not the
7 Board, could determine if *he* had a conflict of interest.

8 The Board, through Mr. Irvine, filed an Answer and a Counterclaim on April 6,
9 2009. The Board asked the court to declare that Thomas's conflicts made him
10 unavailable to act as the Board's attorney, and to declare that the Board could
11 choose its own counsel because the county attorney was unavailable due to his
12 conflicts.

13 Judge Daughton ruled against Thomas in this case and in favor of the Board as
14 discussed below.

15 ***Quo Warranto Action.*** In December 2008 Thomas sued Tom Irvine
16 individually at the same time he sued MCBOS. *Thomas v. Irvine, Shughart Thomson*
17 *& Kilroy and Richard Romley*, CV2008-033193. This action claimed that Irvine had
18 usurped the authority of the County Attorney. No answer was filed, and the case was
19 voluntarily dismissed on December 7, 2009. The parties agreed that this action
20 would be determined by the outcome of the Dec Action, and for that reason there was
21 no substantive litigation of this matter.

22 In addition to suing Irvine and the County over the hiring of Irvine, Thomas
23 sent letters to the county employees threatening them with criminal prosecution if
24
25

1 they paid any money to Irvine or his firm. In a letter to Supervisor Kunasek, dated
2 December 5, 2008, Thomas, through Deputy Philip MacDonnell, urged him to consult
3 about this issue with the Civil Division of the County Attorney, and that if the Board
4 hired Mr. Irvine's firm the Board would be performing an illegal act and subject the
5 Board to actions for recovery of money paid. In a letter to County Manager Smith,
6 Deputy Manager Wilson, and chief Financial Officer Manos, Thomas demanded that
7 they issue no warrants for outside counsel and stated that the Board's action taken
8 on December 5, 2008 was unlawful. If any moneys were paid to Mr. Irvine's firm,
9 Thomas threatened legal action to recover funds from them personally.

10
11 **"Sweeps" Lawsuit.** On February 27, 2009, Arpaio and Thomas sued the
12 Board in a new action about funds that had been appropriated or encumbered by the
13 supervisors. *Arpaio and Thomas v. MCBOS*, CV2009-006709 (referred to as "the
14 Sweeps" case). The case arose out of the State's decision to withhold funds from each
15 county entity because of a budgetary crisis. Both Arpaio and Thomas were
16 represented by Eric Dowell's firm. Irvine represented MCBOS. In part the
17 defendants alleged that Thomas should be precluded from bringing this suit because
18 it essentially equated to a lawyer suing his own client for an act that he had
19 previously approved. Judge Klein did not rule on this issue in his order, but he
20 granted summary judgment for the county on June 10, 2009, finding that Thomas
21 and Arpaio had no standing. This matter is on appeal and oral argument occurred in
22 May 2010.

23
24 **Ruling by Daughton regarding Declaratory Judgment Action.** On Aug. 27,
25 2009, Judge Daughton ruled on motions filed in the Dec Action. He found that the

1 County Attorney 1) was subject to the Rules of Professional Conduct; 2) that he had
2 not complied with his professional obligations concerning client conflicts; 3) that
3 Thomas is not the one to decide if there is a conflict; and 4) MCBOS actions on
4 December 5 and 23, 2008, were appropriate. The court entered judgment against
5 MCAO. This matter was appealed to the court of appeals by route of Special Action,
6 Case No. CA-SA 09-0212. On October 27, 2010, the Court of Appeals issued its
7 opinion in this matter. In summary the opinion upholds Judge Daughton's ruling
8 but remands it to the trial court to determine conflicts of interest on a case-by-case
9 basis.

10
11 ***Thomas Takes Stapley II and Other Cases Back From Polk.*** In September
12 2009, under pressure from Sheriff Arpaio, Thomas took back control of *Stapley II*,³³
13 the investigation of Supervisor Wilcox, what is known as the court tower investigation
14 and the "bug sweep" investigation against county officials from Yavapai County
15 Attorney Sheila Polk. Thomas did so because he was pressured by the Sheriff who
16 thought that Ms. Polk was not cooperative in issuing subpoenas that were desired by
17 Sheriff's investigators.

18 Thomas never informed the State Bar or Judge Albrecht that he was doing so.
19 Judge Albrecht had dismissed the Bar complaint against Thomas because Thomas
20 represented that he had withdrawn from the matter. Even if Thomas did not agree
21 with Judge Albrecht's handling of the investigation, or her statement that his conduct
22

23
24
25 ³³ *Stapley II* refers to a second criminal investigation and the subsequent case filed against Donald
Stapely in December 2009, CR2009-007891.

1 raised serious concerns, he should have informed her or the bar that he was taking
2 these investigations back.

3 **Thomas's Efforts to Appoint Special Prosecutors.** After taking the cases
4 back Thomas wanted to appoint two lawyers from Washington, D.C. to investigate the
5 court tower matters and to handle *Stapley I*. This led to another fight with the
6 MCBOS because they would not approve his choice for outside counsel.

7
8 **1. Ethical Violation #12**
9 **(Thomas) Using Means with no Substantial Purpose other than**
10 **to Embarrass, Delay or Burden**

11 Thomas violated ER 4.4(a) by sending letters to Supervisor Kunasek and other
12 county employees threatening them that the payment to Mr. Irvine's firm would be
13 unlawful and would subject them to action recover the funds from them personally.
14 The sole purpose of Thomas' threats was to intimidate and to burden county
15 employees and Mr. Irvine.

16 **2. Ethical Violation #13**
17 **(Thomas and Aubuchon) Issuing Grand Jury Subpoena and**
18 **FOIA Request to Burden County**

19 The grand jury subpoena that Aubuchon and Thomas issued in December
20 2008 was broad and overreaching. The subpoena was directed to "Maricopa County
21 Administration" and was to the attention of David Smith, County Manager. It
22 required the production of budgets; records about funding; documents regarding
23 proposed usage, occupancy, RFP's, contracts re: planning and design; contracts re:
24 construction; contracts re: consultants; and any and all documents, correspondence
25 and email referring to the Court Tower project. Aubuchon signed the subpoena. The

1 purported justification for this subpoena was that, as noted above, the Board was
2 going forward with the Court Tower project while in an economic downturn, and
3 Treasurer of the County, Hoskins, was unable to get information from the MCBOS
4 about how the money was being spent on the court tower; and general concern that
5 attorney Irvine was being paid too much money.

6 In addition to the grand jury subpoena, Thomas also issued FOIA requests to
7 the county. He was in essence making FOIA requests to his own client. The FOIA
8 requests were broad and burdensome.

9 Thomas and Aubuchon violated ER 4.4(a) in issuing the grand jury subpoena
10 and the FOIA requests. Considering the totality of the circumstances, including the
11 overbroad scope of the requests and the political motivations behind them, Thomas's
12 FOIA requests had no substantial purpose other than to burden the county and its
13 employees.
14

15
16 **3. Ethical Violation #14**
17 **(Thomas and Aubuchon) Conflicts of Interest in Court Tower**
18 **Investigation**

19 Thomas and Aubuchon violated ER 1.7(a)(1) in investigating the court tower
20 matter. They were representing the State as prosecutors and investigating their
21 client, the Board of Supervisors. As found by Judge Donahoe, they were
22 investigating a matter about which MCAO had advised the Board. They represented
23 one client against another, which is a concurrent conflict of interest.

24 Additionally, Thomas and Aubuchon violated ER 1.7(a)(2) by initiating and
25 conducting the court tower investigation. Their representation of the State of Arizona

1 as prosecutors was limited by their own personal interests. They were motivated to
2 investigate the court tower because of their personal disagreement and hostility
3 toward the Board and others including Thomas Irvine.

4 This conflict of interest led to Thomas issuing needless FOIA requests to the
5 County through county attorney employee Mike Scerbo (not a licensed lawyer). The
6 Sheriff had also made FOIA requests. These FOIA requests were sweeping and cost
7 the county hundreds of thousands of dollars in order to comply.

8
9
10 ***F. The RICO Case.***

11 On December 1, 2009, Thomas and Aubuchon filed a federal civil RICO action
12 against various defendants.³⁴ The purported plaintiffs in this action were Thomas
13 and Sheriff Joe Arpaio. Lisa Aubuchon signed the complaint. The signature block
14 appears as:

15 ANDREW P. THOMAS
16 MARICOPA COUNTY ATTORNEY

17 By: s/Lisa M. Aubuchon
18 Lisa M. Aubuchon
19 Deputy County Attorney

20 Thomas appears as both a plaintiff and the lawyer for plaintiffs in this civil case.

21 The RICO complaint named the following defendants:

- 22 • Maricopa Board of Supervisors, a body politic and corporate;
23 • Fulton Brock, Supervisor;
24 • Andrew Kunasek, Supervisor;

25 ³⁴ The day before this complaint was filed, Judge Gary Donahoe set a hearing to occur on December 9, 2009. The hearing would consider a motion to remove MCAO from handling criminal investigations of county employees.

- 1 • Donald T. Stapley, Supervisor;
- 2 • Mary Rose Wilcox, Supervisor;
- 3 • Max Wilson, Supervisor;
- 4 • David Smith, County Manager;
- 5 • Sandi Wilson, Deputy County Manager;
- 6 • Wade Swanson, Office of General Litigation;
- 7 • Judge Barbara Mundell, Superior Court;
- 8 • Judge Anna Baca, Superior Court;
- 9 • Judge Gary Donahoe, Superior Court;
- 10 • Judge Kenneth Fields, Superior Court;
- 11 • Thomas Irvine, attorney;
- 12 • Edward Novak, attorney.

13 The complaint itself is confusing, difficult to analyze, and does not set out the
14 elements of a RICO civil action. The complaint is deficient because at a minimum it
15 fails to define an enterprise, fails to identify the racketeering activity, and fails to
16 allege proper injury or damages.

17 The federal Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §
18 1961 *et seq.*, was passed in order to address the infiltration of legitimate businesses
19 by organized crime. *U.S. v. Turkette*, 425 U.S. 576, 591 (1981). One provision of
20 RICO establishes a civil cause of action. The purpose of a civil RICO action is not
21 merely to compensate victims but to turn them into private attorneys general
22 dedicated to eliminating racketeering activity. *Rotella v. Wood*, 528 U.S. 549, 557
23 (2000). The statute provides that any person injured in his business or property by
24 reason of a violation of 18 U.S.C. § 1962 shall recover threefold the damages he
25 sustains and the costs of the suit. 18 U.S.C. § 1964(c). One seeking to recover
under the civil remedy must show that a violation of 18 U.S.C. § 1962 occurred.
Simply stated that provision prohibits: 1) using funds obtained through racketeering
to establish an enterprise; 2) acquiring an interest or control of an enterprise through

1 a pattern of racketeering activity; 3) conducting an enterprise's affairs through a
2 pattern of racketeering activity; and 4) conspiring to do the above activities.

3 To establish liability under a civil RICO claim, one must show that a defendant
4 was involved in (1) conduct (2) of an enterprise (3) through a pattern (4) of
5 racketeering activity. *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (9th Cir.
6 2004).

7 The complaint filed by Thomas and Aubuchon does not establish what the
8 "enterprise" was. Under RICO there are two categories of associations that come
9 within the purview of the "enterprise" definition. The first encompasses organizations
10 such as corporations, partnerships and other "legal entities." The second covers "any
11 union or group of individuals associated in fact although not a legal entity." *U.S. v.*
12 *Turkette*, 542 U.S. at 581-2. In paragraph 78 of the complaint Thomas and
13 Aubuchon concluded that all of the defendants were engaged in an enterprise, as
14 they were all related by contract, or they were a legal entity or a group associated in
15 fact. In the same paragraph they state that "these enterprises" engaged in activities
16 which affected interstate commerce. However, there are no specific allegations in the
17 complaint as to what the enterprise was and what its structure was.³⁵ There is no
18 evidence that the defendants were in an "enterprise" as defined by RICO.
19

20 Although Thomas and Aubuchon mentioned bribery and extortion in various
21 places in the RICO complaint, they did not specifically allege any conduct of a specific
22

23
24
25 ³⁵ "In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere
conclusory allegations, which establish the existence of an enterprise." *Elliott v. Foufas*, 867 F.2d 877,
881 (5th Cir. 1981).

1 defendant or enterprise constituting bribery or extortion.³⁶ Racketeering activity can
2 be bribery and extortion under state law if punishable by imprisonment for more
3 than one year. 18 U.S.C. § 1961(1). However, there must be a pattern of such
4 activity. The complaint fails to set forth any factual basis that establishes
5 racketeering activity as contemplated by the RICO statute.

6
7 A plaintiff in a RICO action can only recover damages to his business or
8 property by reason of the conduct of an enterprise through a pattern of racketeering
9 activity. 18 U.S.C. § 1964(c). Thomas and Aubuchon alleged that some of the
10 defendants had instigated frivolous investigations of Thomas and MCAO prosecutors
11 with the State Bar of Arizona, or had threatened to go to the State Bar about
12 Thomas.³⁷ MCAO deputy county attorney Rachel Alexander continued to make this
13 assertion in a response she filed to motions to dismiss. She argued that part of the
14 injury to Thomas was that the defendants attempted to deprive him of his license to
15 practice law.³⁸ In asserting these claims Thomas, Aubuchon and Alexander
16 disregarded Rule 48(l) of the Arizona Supreme Court which states that anyone who
17 complains to the State Bar about an attorney is immune from civil suit.

18
19 There is no evidence that an investigation was conducted into the facts alleged
20 in the complaint and no MCAO file has been produced to establish otherwise.
21 Aubuchon has admitted as much to attorney Kate Baker who conducted an
22 investigation into Aubuchon's conduct.³⁹ Rather, the inference to be drawn from the

23
24 ³⁶ RICO Complaint, ¶¶ 1, 34, 70, 79 and 81.

25 ³⁷ RICO Complaint, ¶¶ 31, 39, 58, 64, 70 and 76.

³⁸ Plaintiffs' Response to Defendants' Motions to Dismiss, pp 29-31.

³⁹ Baker, Report of Personnel Investigation Re: Deputy County Attorney Lisa Aubuchon, p. 64.
(Hereinafter referred to as "Baker Report.")

1 lack of a file and the lack of an investigation is that Aubuchon and Thomas drafted
2 the RICO complaint based not on facts but on their personal animosity toward all the
3 defendants.

4 Many of the defendants filed motions to dismiss the RICO case. Alexander filed
5 a frivolous response to these motions and, as noted above, her response continued
6 the suit needlessly and without justification. Alexander's response was not based on
7 any facts. She did not obtain any facts or any investigative file on which to base her
8 argument that the complaint should not be dismissed. Alexander had been warned
9 by another Deputy County Attorney, Peter Spaw, that she needed to obtain the
10 investigation file for the matter so that she could determine what the facts were.
11 Unknown to Mr. Spaw at that time, there was no such file. Alexander's efforts to
12 maintain the RICO case were meritless and frivolous.

14 Alexander also filed a First Amended Complaint in the RICO action. This
15 version attempted to define the enterprise as the Board. After the defendants
16 objected the court did not allow the First Amended Complaint.

17 Significant evidence shows that other lawyers in the MCAO did not think that
18 the RICO case had any factual basis or merit. Thomas, Aubuchon and Alexander
19 were all aware of at least one other lawyer's views that the RICO case lacked merit.
20 Deputy County Attorney Spaw was asked to work on the RICO case both before and
21 after it was filed. Most of his involvement was after the case was filed. He advised
22 both Thomas and Aubuchon that the case lacked merit.

24 The RICO action was voluntarily dismissed in March 2010. At the same time
25 Thomas and Arpaio announced that they were turning the matter over to the Public

1 Integrity Section of the U.S. Department of Justice. It appears that they actually
2 referred nine "investigations." Those matters were all transferred to the U.S.
3 Attorney's Office for Arizona. On October 22, 2010, Dennis Burke the United States
4 Attorney for Arizona wrote to County Attorney Romley stating that there was a total
5 lacking of any evidence that a federal crime was committed. He stated that in several
6 instances the evidence was so lacking as to make a theory of liability nearly
7 incomprehensible.

8
9 In the RICO action the evidence indicates that Thomas, Aubuchon and
10 Alexander were abusing their power and authority as county officers.⁴⁰ They filed the
11 RICO case in retaliation against the defendants not based upon their criminal activity
12 as alleged but based upon the defendants' exercise of lawful authority that frustrated
13 and infuriated Thomas, Aubuchon and the sheriff.

14 **1. Ethical Violation #15**
15 **(Thomas, Aubuchon and Alexander) Using Means That**
16 **Have No Other Purpose than To Burden or Embarrass A Person**

17 ER 4.4(a) states that in representing a client, a lawyer shall not use means that
18 have no substantial purpose other than to embarrass, delay, or burden any other
19 person. The purpose of the RICO case was to burden and/or embarrass the
20 defendants. No factual or legal basis supported the filing of the RICO case. The
21 motive for filing the RICO action was retaliation against those who had acted against
22 Thomas and MCAO. In filing and pursuing the RICO case, Thomas, Aubuchon and
23 Alexander each violated ER 4.4(a).

24 ⁴⁰ Paragraph 1 of the RICO complaint states in part: "This action arises from a concerted scheme to
25 hinder the criminal investigation and prosecution of elected officials and employees of Maricopa
County, Arizona and their attorneys in the course of committing the predicate offenses described herein
related to the finding and construction of the Maricopa County Superior Court Tower."

1 **2. Ethical Violation #16**
2 **(Thomas, Aubuchon and Alexander) Filing a Frivolous Suit**

3 The RICO case was meritless and frivolous. There were no facts and no law
4 that supported the case for the following reasons:

- 5 • Neither of the plaintiffs had standing to bring the action
6 • There was no good faith basis in fact for the action
7 • There was no good faith basis in law for the action
8 • There was no statutory authority for Thomas to sue under the RICO
9 statute for himself or for Arpaio
10 • Most of the defendants including the named judges and county
11 officials were immune from such an action.

12 ER 3.1 states that a lawyer shall not bring or defend a proceeding, or assert or
13 controvert an issue therein, unless there is a good faith basis in law and fact for
14 doing so that is not frivolous which may include a good faith and non-frivolous
15 argument for an extension, modification or reversal of existing law. Thomas and
16 Aubuchon brought the RICO case, and Alexander defended it. In doing so each of
17 them violated ER 3.1.

18 Arizona statutes do not empower a county attorney to bring an action such as
19 the RICO case. The complaint states that it is brought in the name of Thomas and
20 Arpaio in their official capacities as County Attorney and as County Sheriff
21 respectively. Among the defendants is the county Board "as a body politic." One of
22 the requests for relief asks the federal court to award treble damages against all
23 defendants, and specifically damages to make Arpaio whole from the harm he had he
24 had allegedly suffered. A.R.S. §11-535 prohibits a county attorney from presenting a
25

1 demand for allowance against the county or advocating the demand for an allocation
2 of another. Therefore, Thomas, Aubuchon and Alexander could not bring this action
3 against the Board. The suit was meritless on these grounds as well.
4

5 **3. Ethical Violation #17**
6 **(Thomas, Aubuchon and Alexander) Competence**

7 ER 1.1 states that a lawyer shall provide competent representation to a client.
8 Competent representation requires the legal knowledge, skill, thoroughness and
9 preparation reasonably necessary for the representation. Thomas, Aubuchon and
10 Alexander each failed to provide competent representation in the RICO action. The
11 complaint that Thomas and Aubuchon filed was legally deficient. Further, there were
12 no facts that supported the RICO complaint. Alexander's attempts to prolong and
13 continue the case were based upon incompetent reasoning. She accepted the
14 conclusions based upon "facts" alleged in the complaint filed by Thomas and
15 Aubuchon without question.
16

17 At the end of the response to the motions to dismiss Alexander wrote the
18 following:

19 As a final alternative, and in the event plaintiffs cannot proceed at all
20 with this Complaint, plaintiffs seek guidance from this Court as to how
21 federal law may be changed to permit local law-enforcement officials to
22 challenge the complained-of conduct in federal court, so that plaintiffs
23 may petition Congress to amend federal law accordingly.⁴¹

24 Alexander's plea for guidance from the U.S. District Court about how to change
25 federal law to allow a challenge to the "complained-of" conduct is a telling admission

⁴¹ *Id.* at p. 45.

1 that she, Thomas and Aubuchon were fundamentally incompetent in bringing the
2 RICO action.

3 Alexander's continued efforts to argue that Thomas could sue the RICO
4 defendants because they had allegedly filed Bar complaints against him were
5 incompetent.⁴² She also argued that judicial immunity did not apply to the judges
6 being sued because they had committed acts outside the scope of their judicial
7 duties.⁴³ Her argument was that the judges had issued rulings that ignored the
8 law.⁴⁴ Alexander's arguments in response to the motions to dismiss were
9 incompetent as was the original complaint.
10

11
12 **4. Ethical Violation #18**
13 **(Thomas, Aubuchon and Alexander) Conflicts of Interest**

14 Thomas, Aubuchon and Alexander represented the State of Arizona in bringing
15 the RICO action against the Board of Supervisors, as a body, each of the individual
16 supervisors, the county manager and his deputy.⁴⁵ However, they were all also
17 purportedly representing Thomas and Arpaio.⁴⁶ In so doing, Thomas, Aubuchon and
18 Alexander were suing various clients on behalf of at least one other purported client,
19
20

21 ⁴² Plaintiffs' Response to Motions to Dismiss, p. 29 *et seq.*, filed 2/01/10 in RICO case.

22 ⁴³ *Id.*, at p.43 *et seq.*

23 ⁴⁴ *Id.*

24 ⁴⁵ Aubuchon stated in a Response to Petition for Special Action, CV 09-00372 SA, that the County
25 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. Response, pp. 11, 14.

⁴⁶ On February 16, 2010, attorneys Elizabeth Fierman and Robert Driscoll substituted in to represent the
Sheriff Arpaio in the RICO action.

1 Arpaio. In doing so, Thomas, Aubuchon and Alexander violated ER 1.7(a)(1); they
2 represented clients who were directly adverse to other clients.

3 In bringing and pursuing the RICO action against supervisors, judges and
4 attorneys, Thomas's, Aubuchon's and Alexander's representation of their client or
5 clients was limited by their own personal interests in violation of ER 1.7(a)(2). By the
6 time the RICO complaint was filed in early December 2009, Thomas and Aubuchon
7 had been involved in many disputes with the defendants they sued in the RICO
8 action. Judges who were defendants in the RICO action had ruled against Thomas
9 and his office. Supervisors had exercised their lawful authority contrary to the
10 personal and professional wishes of Thomas and his office. Each of these disputes
11 was resolved unfavorably to Thomas. Among the disputes and rulings were:
12

- 13 • Thomas' and Aubuchon's unsuccessful attempts to depose
14 or interview Judge Mundell and Judge Baca about the
appointment of Judge Fields to the *Stapley I* case.
- 15 • Thomas' and Aubuchon's unsuccessful attempts to remove
16 Judge Fields from the *Stapley I* case.
- 17 • MCBOS (less Stapley) hired attorney Irvine to determine if
18 Thomas had conflicts of interest.
- 19 • MCBOS determined to manage all the county's civil litigation
through county manager Smith.
- 20 • Thomas sued MCBOS in the "Dec Action."
- 21 • Judge Donahoe quashed the court tower grand jury
22 subpoena, and disqualified MCAO from that investigation.
- 23 • Judge Daughton ruled against Thomas in the "Dec Action."
- 24 • Thomas sued attorney Tom Irvine in the Quo Warranto
action.
- 25 • Thomas sued MCBOS in the "Sweeps" action.

- 1
- 2 • Thomas fought with MCBOS over the appointment of special
- 3

4 Each of the above disputes and rulings limited the representation that Thomas,
5 Aubuchon and Alexander could give to their clients in the RICO case.⁴⁷ Their
6 judgment was limited by their own self interest and personal animosity.

7

8 **5. Ethical Violation #19**
9 **(Thomas, Aubuchon and Alexander) Disobeying an Obligation**
10 **Under a Rule of a Tribunal**

11 Arizona Supreme Court Rule 48(l) provides:

12 **Immunity from Civil Suit.** Communications to the court, state
13 bar, commission, hearing committees or hearing officers,
14 mediators, the client protection fund, the peer review committee,
15 the fee arbitration program, the committee on the Rules of
16 Professional Conduct, monitors of the Member Assistance or Law
17 Office Management Assistance Programs, probable cause panelists
18 or state bar staff relating to lawyer misconduct, lack of
19 professionalism or disability, and testimony given in the
20 proceedings shall be absolutely privileged conduct, **and no civil**
21 **action predicated thereon may be instituted against any**
22 **complainant or witness.** Members of the board, commission,
23 hearing committees or hearing officers, mediators, the peer review
24 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)

25 ⁴⁷ As noted above, it is difficult to determine who was the client in the RICO action. It is clear that at
least for a period of time, Thomas, Aubuchon and Alexander sought to represent the sheriff. Such
representation of the sheriff was not authorized by law.

1 Thomas, Aubuchon and Alexander violated Rule 48(l) by predicating the RICO
2 action in part on alleged Bar complaints or statements to the Bar about Thomas and
3 other MCAO lawyers. By violating that rule they violated ER 3.4(c), which states that
4 a lawyer shall not knowingly violate an obligation under the rules of a tribunal.
5

6 **6. Ethical Violation #20**
7 **(Thomas, Aubuchon and Alexander) Conduct Prejudicial to the**
8 **Administration of Justice**

9 Thomas, Aubuchon and Alexander sued four judges of the Maricopa Superior
10 Court concerning their decisions in various matters. By doing so they sought
11 damages against members of the judicial branch of government for carrying out their
12 obligations and duties. Even if those judges had made decisions in error they were
13 immune from civil liability. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).
14 The RICO suit was an unlawful effort to intrude upon the decision making of judges
15 and to intimidate them and retaliate against them. In doing so Thomas, Aubuchon
16 and Alexander violated ER 8.4(d). Furthermore, the RICO suit was an attempt by
17 Thomas, Aubuchon and Alexander to silence the judges through misuse of their
18 power.
19

20 **G. Criminal Prosecution of Mary Rose Wilcox.**

21 In January 2010, a grand jury returned an indictment charging Supervisor
22 Wilcox with numerous crimes. MCAO initiated this matter, but it was transferred to
23 Sheila Polk (Yavapai County Attorney) along with the *Stapley I* matter and other
24 investigations. Thomas took the Wilcox matter back, as described above, in
25

1 September 2009. The Wilcox matter was transferred to the Gila County Attorney,
2 Daisy Flores, as was *Stapley II* in March 2010.

3 As with the other investigations, it is unknown why the investigation of Wilcox
4 was commenced. At the time the indictment was returned against Wilcox, Thomas
5 and Aubuchon had sued Wilcox along with other defendants for damages caused by
6 their alleged violations of the RICO statute. As noted above, Thomas alleged in the
7 RICO Complaint that the defendants had threatened his livelihood by bringing Bar
8 complaints against him, had threatened to sue him and his wife to recover legal fees,
9 and had conspired to cut the funding of MCAO by \$6,000,000. As analyzed below,
10 filing criminal charges against someone the prosecutor is suing civilly is prejudicial to
11 the administration of justice in part because the prosecutor can use the criminal case
12 to leverage a favorable settlement of the civil case for the prosecutor's benefit.
13

14
15 **1. Ethical Violation #21**
16 **(Thomas and Aubuchon) Conflicts of Interest**

17 Thomas and Aubuchon violated ER 1.7(a)(2) in bringing criminal charges
18 against Supervisor Wilcox. First, they had a concurrent conflict of interest because
19 they had a pending civil case seeking damages caused to Thomas and then filed
20 charges against her. Second, the analysis of conflicts stated in Ethical Violation 14
21 applies here.
22

23 Furthermore, in February 2010, Judge Leonardo of the Pinal County Superior
24 Court ruled that Thomas and his office could not serve as prosecutors in the Wilcox
25 case.

1 As discussed below in Ethical Violation 22, Thomas and Aubuchon also
2 violated ER 4.4(a) by charging Wilcox.

3 **H. Charging Stapley II (and an Additional Charge regarding the Wilcox**
4 **case).**

5 On December 7, 2009, Thomas and Aubuchon obtained a second grand jury
6 indictment against Stapley. (*Stapley II*)⁴⁸ Thomas had earlier handed off the
7 investigation of this matter to Yavapai County Attorney Sheila Polk, but Thomas took
8 it back from her in September 2009.

9
10 The *Stapley II* indictment alleges three areas of conduct upon which the
11 charges were filed: Stapley's use of contributions in his campaign to be elected to an
12 office in the National Association of Counties; obtaining a loan by fraud; and financial
13 disclosure violations. There were 27 counts in the indictment. The court dismissed
14 this case on March 15, 2010, on motion of Thomas. Thomas made this motion,
15 through deputy county attorney Kittredge, because Judge Leonardo had ruled in the
16 case against Wilcox that Thomas and his office had a conflict of interest in that
17 matter. The motion stated that the State intended to have a special prosecutor
18 review and decide about the prosecution.

19 Before the dismissal, the indictment in *Stapley II* was brought by Thomas as
20 County Attorney and signed by Aubuchon.

21
22 When the *Stapley II* and *Wilcox* indictments were filed Thomas and Aubuchon
23 had sued Stapley and Wilcox among others in the federal RICO action above.

24
25

⁴⁸ *State v. Stapley*, No. CR 2009-007891.

1 Thomas and Aubuchon brought a criminal case against persons they had sued
2 seeking civil damages.

3
4 **1. Ethical Violation #22**
5 **(Thomas and Aubuchon) Filing Charges Against Stapley and**
6 **Wilcox to Embarrass or Burden**

7 ER 4.4(a) states that in representing a client, a lawyer shall not use means that
8 have no substantial purpose other than to embarrass, delay, or burden any other
9 person. Thomas and Aubuchon violated this rule again in charging Wilcox and
10 Stapley in this second case. There was no substantial purpose to file the charges
11 against each supervisor other than to burden and embarrass each of them. These
12 prosecutions were not done to seek justice but rather to intimidate the Board and to
13 pursue the political and personal interests of Thomas. When Thomas filed charges
14 against Stapley and against Supervisor Wilcox in December, 2009, Thomas and the
15 Board were involved in three civil lawsuits against each other: 1) the Dec Action; 2)
16 the Sweeps case; and 3) the RICO case. Additionally, Thomas had fought with the
17 Board over the appointment of special prosecutors, and the hiring of Thomas Irvine.
18 Thomas and Aubuchon had also lost their fight to investigate what they believed was
19 a conspiracy in the Court Tower matter. All of this evidence shows that Thomas and
20 Aubuchon charged Stapley and Wilcox for no substantial purpose other than to
21 embarrass and burden these two political officials.
22
23
24
25

1 **2. Ethical Violation #23**
2 **(Thomas and Aubuchon) Conflicts of Interest**

3 Thomas and Aubuchon violated ER 1.7(a)(2) in bringing charges against
4 Stapley in December 2009. First, they had a concurrent conflict of interest because
5 they had a pending civil case seeking damages Stapley and others caused Thomas,
6 when they filed criminal charges against Stapley. Second, they had a conflict for all
7 the above reasons that limited their representation in the RICO action.

8 Thomas and Aubuchon also had a conflict of interest in pursuing criminal
9 charges against Stapley in this second indictment for all the same reasons their
10 bringing the first criminal case against Stapley, and the RICO action naming Stapley
11 was a conflict of interest in violation of ER 1.7(a)(2).
12

13 ***I. Charging of Judge Gary Donahoe.***

14 Aubuchon and an MCSO investigator filed a criminal case against Judge
15 Donahoe on December 9, 2009. The complaint was signed by Aubuchon and the
16 investigator, Gabe Almanza. It charged the judge with hindering, obstruction and
17 bribery. Attached to the complaint was a probable cause statement. The probable
18 cause statement was drafted by Detective Brandon Luth directly from a complaint
19 that Deputy Hendershott had written to the Judicial Qualifications Committee about
20 Judge Donahoe. There was no investigation in this matter. The evidence indicates
21 that Aubuchon attempted to file the charges on December 8, 2009.
22

23 Thomas and Aubuchon wanted to file the charges against Judge Donahoe
24 because he had scheduled a hearing for the afternoon of December 9, 2009 regarding
25 a motion filed by attorney Edward Novak on behalf of the County. The motion sought

1 an order removing MCAO from all criminal matters involving Maricopa County
2 employees. Thomas, Aubuchon, and others, believed that Judge Donahoe would
3 recuse himself from hearing that motion if they filed criminal charges against him.

4 There is evidence that Chief Hendershott called Sgt. Rich Johnson about filing
5 a case against Donahoe on the afternoon of December 8, 2009. MCSO Sergeant
6 Brandon Luth and Sgt. Johnson both stated that they met with MCSO personnel and
7 they called Aubuchon on the afternoon of December 8, 2009, to ask her what was
8 going on and what they needed to charge. Aubuchon told him they needed a Form 4,
9 a DR (departmental report) and a probable cause statement. Aubuchon told him that
10 they would have to figure out what they were going to charge Judge Donahoe with,
11 “probably hindering, bribery and theft by extortion.” Sgt. Luth told her they did not
12 have a case put together. Sgt. Luth stated that Aubuchon knew no investigation had
13 been done to support the criminal charges. Sgt. Luth’s orders were to put the case
14 together and get it filed with an Initial Advisement judge that evening.

15
16 Sgt. Luth said that later in the afternoon of December 8, 2009, he, Aubuchon,
17 and sheriff’s deputies Terry Young, Rich Johnson and Chief Hendershott met. Sgt.
18 Luth said that Hendershott told them about the racketeering lawsuit, and that they
19 thought Judge Donahoe was going to throw MCAO off all county investigations.
20 Hendershott said that he had met with Thomas, Aubuchon, and Arpaio, and that
21 Arpaio came up with the idea of charging the judge. Hendershott told Sgt. Luth to
22 use his judicial complaint letter for the Form 4. Hendershott printed off the
23 complaint and wrote the charges on it. Hendershott told them to describe the
24
25

1 "benefit" that Judge Donahoe received for his illegal conduct as the Court Tower. In
2 other words, the bribe Judge Donahoe was receiving was a new court building.

3 At about 5:00 p.m. Sgt. Luth took the documents to Aubuchon. She read
4 them. She said that "it worked for her." Aubuchon signed the complaint as Deputy
5 County Attorney. Aubuchon knew that no criminal investigation of the alleged
6 charges had occurred and that there was no factual basis for the charges.

7 Aubuchon attempted to have an investigator from MCAO file the complaint in
8 Superior Court in the late afternoon or early evening of December 8, 2009. No MCAO
9 investigator involved would file the complaint because they had not been involved in
10 the matter. When no MCAO investigator would sign the complaint and "walk it
11 through" Aubuchon turned to the sheriff's office to assist her in filing it. Sgt. Luth
12 refused to file the complaint against Judge Donahoe because he did not want to
13 answer questions by the court about the case when it was filed. The complaint was
14 filed in the morning of December 9, 2009. Detective Gabriel Almanza signed it under
15 oath. Detective Luth stated that he told Almanza to sign it, but Almanza had not
16 been involved in drafting the complaint and he had no knowledge as to the truth or
17 falsity of the complaint.
18

19 The evidence indicates that the only attorneys in MCAO involved in the drafting
20 of the complaint against Judge Donahoe were Andrew Thomas and Lisa Aubuchon.
21 No other attorney has admitted involvement, and virtually each MCAO deputy
22 interviewed stated he or she was shocked when they heard Judge Donahoe had been
23 charged.
24
25

1 **1. Ethical Violation #24**
2 **(Thomas and Aubuchon) Prosecuting a Criminal Charge**
3 **Without Probable Cause**

4 ER 3.8(a) states that a prosecutor in a criminal case shall refrain from
5 prosecuting a charge that the prosecutor knows is not supported by probable cause.
6 Thomas and Aubuchon knew that the each of the charges against Judge Donahoe
7 was not supported by probable cause. There was no police or sheriff's investigation
8 into the matter. The basis for the criminal charges was an unsupported judicial
9 complaint written by Hendershott that itself failed to allege any criminal activity and
10 failed to identify any criminal statute.

11 Specifically, there was and is no evidence that Judge Donahoe engaged in
12 bribery, hindrance or obstruction. Each of these alleged crimes is discussed below.

13 **Bribery.** A.R.S. § 13-2602 defines bribery as:

14 Bribery of a public servant or party officer;

15 A. A person commits bribery of a public servant or party officer if
16 with corrupt intent:

17 1. Such person offers, confers or agrees to confer any benefit
18 upon a public servant or party officer with the intent to
19 influence the public servant's or party officer's vote, opinion,
20 judgment, exercise of discretion or other action in his official
21 capacity as a public servant or party officer; or

22 2. While a public servant or party officer, such person
23 solicits, accepts or agrees to accept any benefit upon an
24 agreement or understanding that his vote, opinion,
25 judgment, exercise of discretion or other action as a public
servant or party officer may thereby be influenced.

 B. It is no defense to a prosecution under this section that a
person sought to be influenced was not qualified to act in the
desired way because such person had not yet assumed office,
lacked jurisdiction or for any other reason.

1
2 C. Bribery of a public servant or party officer is a class 4 felony.

3
4 There was no evidence that Judge Donahoe acted with corrupt intent. The
5 probable cause ("PC") statement attached to the complaint does not describe any
6 corrupt intent by Judge Donahoe. At the very worst, the PC statement alleges that
7 Judge Donahoe was "biased" against Sheriff Arpaio; but bias is not evidence of
8 corrupt intent. Further, there is no evidence supporting the conclusion that Judge
9 Donahoe was actually biased against the county attorney or the county sheriff.

10 There was no evidence described in the PC statement nor was there any
11 evidence that Judge Donahoe solicited, accepted or agreed to accept any benefit. One
12 theory that has been advanced by Thomas' attorneys is that the benefit to Judge
13 Donahoe was:

- 14 ▪ His keeping his position as Presiding Criminal Court Judge;
- 15 ▪ Maintaining a beneficial relationship with the Presiding
16 Judge of Maricopa county; and
- 17 ▪ Allowing the Superior Court to benefit from funding by the
18 Board for the court tower as well as other projects.⁴⁹

19 There is no evidence that Judge Donahoe's position as Presiding Criminal Court
20 Judge was in any jeopardy if he decided issues in a certain manner. There is no
21 evidence that Judge Donahoe desired or sought to maintain a beneficial relationship
22 with Judge Mundell. There is no evidence that Judge Mundell ever communicated
23 with Judge Donahoe about her desires regarding the court tower. Further, there is
24

25

⁴⁹ Legal Opinion of Bob Barr, Esq., 7-10, August 5, 2010.

1 no evidence that Judge Donahoe cared in the slightest about whether the court tower
2 was built.

3 There was no investigation into these alleged benefits. For instance, there was
4 no interview of any witness about whether Judge Donahoe cared about keeping his
5 position as presiding criminal court judge or whether he cared about any relationship
6 he might have with Judge Mundell. Furthermore, there was no investigation into
7 whether Judge Donahoe would actually move into the new court tower when built. In
8 fact, Judge Donahoe planned to retire before completion of the court tower. There
9 was no evidence described in the PC Statement nor was there any evidence that
10 Judge Donahoe made a decision or issued a ruling because of a benefit he solicited,
11 accepted or agreed to accept.

12
13 There was and is no evidence at all, much less probable cause to believe that
14 Judge Donahoe engaged in bribery.

15 **Hindering.** A.R.S. § 13-2512 defines Hindering as:

16 Hindering prosecution in the first degree; classification

17 A. A person commits hindering prosecution in the first degree if,
18 with the intent to hinder the apprehension, prosecution, conviction
19 or punishment of another for any felony, the person renders
assistance to the other person.

20 B. Hindering prosecution in the first degree is a class 5 felony
21 [except in situations inapplicable here].

22 There was no evidence described in the PC Statement nor was there any
23 evidence that Judge Donahoe hindered the apprehension, prosecution, conviction or
24 punishment of anyone for any felony. Thomas's attorneys have argued that there
25 was evidence of Hindering by Judge Donahoe because he had:

- 1 • Disqualified the Maricopa County Attorney from the Court Tower investigation;
- 2
- 3 • Failed to transfer matters to a Superior Court Division that “could document its lack of a conflict of interest and/or to courts in other Arizona counties, which would not be burdened with the same conflicts that plagued the Maricopa County judges;” and
- 4
- 5
- 6 • Selected cases by method of cherry picking rather than by the “normal, random assignment process.”⁵⁰
- 7

8 The charges against Judge Donahoe do not specify whom he intended to help
9 avoid prosecution, or conviction and for what crime. In his order disqualifying the
10 MCAO from handling the court tower investigation Judge Donahoe did not disqualify
11 MCSO, or order an end to the investigation. He simply disqualified MCAO based
12 upon its conflict. No investigation was performed concerning the reasons that Judge
13 Donahoe disqualified MCAO from the court tower investigation beyond reading his
14 order. However, the criminal charges against him assume that there was some
15 hidden motive not stated in his order. Instead of conducting any investigation into
16 Judge Donahoe’s motive for hindering an investigation, Thomas and Aubuchon filed
17 unsupported charges.
18

19 There was and is no evidence at all, much less probable cause, to believe that
20 Judge Donahoe engaged in hindering.

21 **Obstruction:** A.R.S. § 13-2409 defines Obstruction as:

22 A person who knowingly attempts by means of bribery,
23 misrepresentation, intimidation or force or threats of force to
24 obstruct, delay or prevent the communication of information or
25 testimony relating to a violation of any criminal statute to a peace

⁵⁰ Legal Opinion of Bob Barr, Esq. 10-11, August 5, 2010.

1 officer, magistrate, prosecutor or grand jury or who knowingly
2 injures another in his person or property on account of the giving
3 by the latter or by any other person of any such information or
4 testimony to a peace officer, magistrate, prosecutor or grand jury is
5 guilty of a class 5 felony.

6 There was no evidence described in the PC Statement, nor was there any
7 evidence, that Judge Donahoe attempted to use bribery, misrepresentation,
8 intimidation, force or threats of force to delay or prevent the communication of
9 information about a crime to any peace officer, prosecutor or grand jury. Thomas's
10 attorneys have argued that there was evidence of Obstruction by Judge Donahoe
11 because he had:

- 12 • Inappropriately intervened in a case (which is believed to be
13 Conley Wolfswinkel's motion to controvert a search warrant);
- 14 • Prevented the MCAO from assisting the MCSO and the grand
15 jury from investigating the court tower, Donald Stapley and
16 Conley Wolfswinkel;
- 17 • Delayed and/or prevented MCSO from obtaining information
18 related to the violation of criminal statutes.

19 Judge Donahoe's conduct was not Obstruction. Obstruction requires three
20 people: a defendant [Donahoe]; a law enforcement officer, or other specified official;
21 and another, prospective informant or witness. *Walker v. Superior Court In and For*
22 *County of Navajo*, 956 P.2d 1246 (Ariz. App. 1998). There must be evidence that
23 Judge Donahoe attempted to prevent some person from communicating with a law
24 enforcement officer or grand jury. There never was any such evidence.

25 Judge Donahoe was not obstructing any witness from doing anything. When
he disqualified MCAO from the court tower investigation, Judge Donahoe simply

1 ruled MCAO could not be involved. There was no prospective informant or witness
2 whom he was preventing from communicating to anyone. Furthermore, Judge
3 Donahoe's quashing of the grand jury subpoena did not prevent the communication
4 of any information to law enforcement. It was a ruling that the subpoena was
5 invalid. Such a ruling does not prevent anyone from communicating with the police;
6 it simply means that the subpoena cannot be enforced.

7
8 There was and is no evidence at all, much less probable cause, to believe that
9 Judge Donahoe engaged in obstruction. Thomas and Aubuchon knew that the
10 charges against Judge Donahoe were not supported by probable cause. The charges
11 were filed for improper and unlawful reasons.

12 **2. Ethical Violation #25**
13 **(Thomas and Aubuchon) Using Means That Have No Other**
14 **Purpose than To Burden, Delay or Embarrass a Person**

15 ER 4.4(a) states that in representing a client, a lawyer shall not use means that
16 have no substantial purpose other than to embarrass, delay, or burden any other
17 person. The purpose of charging Judge Donahoe was to burden or embarrass him in
18 order that he would remove himself from the matter he was handling the afternoon of
19 December 9, 2010. The purpose was also to burden and embarrass Judge Donahoe
20 in retaliation for decisions that Thomas and Aubuchon did not like and did not agree
21 with.
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1 **3. Ethical Violation #26**
2 **(Thomas and Aubuchon) Engaging in Conduct Involving**
3 **Dishonesty**

4 Aubuchon signed the complaint unlawfully charging Judge Donahoe with three
5 felonies. She and Thomas knew that the charges were false and that they were
6 brought without the benefit of any investigation or evidence. Aubuchon arranged for
7 a Deputy Sheriff, Gabe Almanza, to sign the criminal complaint under oath. By doing
8 so Aubuchon engaged in dishonesty, misrepresentation, deceit and fraud in violation
9 of ER 8.4(c). Thomas had direct knowledge of what Aubuchon was doing, evidenced
10 at least by his press release announcing that Judge Donahoe had been charged. He
11 also knew because Chief of Investigators Stribling talked to Thomas about the filing
12 of the charges the night before they were filed. Thomas also engaged in dishonesty
13 by approving and ratifying Aubuchon's filing of false charges, and he thereby violated
14 ER 8.4(c).

15 **4. Ethical Violation #27**
16 **(Thomas and Aubuchon) Engaging in Criminal Conduct**

17 ER 8.4(b) states that it is professional misconduct for a lawyer to commit a
18 criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness
19 as a lawyer in other respects. Thomas and Aubuchon engaged in perjury, a criminal
20 act that reflects adversely on their honesty, trustworthiness or fitness as a lawyer.
21 Perjury is defined by A.R.S. § 13-2702:

22 A. A person commits perjury by making either:

- 23 1. A false sworn statement in regard to a material issue, believing
24 it to be false.
25

1 2. A false unsworn declaration, certificate, verification or statement
2 in regard to a material issue that the person subscribes as true
under penalty of perjury, believing it to be false.

3 B. Perjury is a class 4 felony.

4
5 On December 9, 2009, Thomas and Aubuchon knew that the criminal
6 complaint against Judge Donahoe was to be filed in Superior Court. Both of them
7 knew that the complaint was to be signed by Gabriel Almanza under oath. Thomas
8 and Aubuchon knew that Detective Almanza would be swearing to facts and
9 allegations against Judge Donahoe that were false. Thomas and Aubuchon knew
10 that Detective Almanza signed the complaint that was false and they knew that it was
11 filed in Superior Court. Such complaint was a "sworn statement" as defined by
12 A.R.S. § 13-1701.

13 Under A.R.S. § 13-303, Thomas and Aubuchon are criminally accountable for
14 the conduct of Detective Almanza because they acted with the culpable mental state
15 for perjury and caused another, whether or not such other person was capable of
16 forming the culpable mental state, to engage in perjury.

17 Thomas and Aubuchon violated ER 8.4(b).

18
19 **5. Ethical Violation #28**
20 **(Thomas and Aubuchon) Engaging in Criminal Conduct**

21 Thomas and Aubuchon also violated ER 8.4(b) by engaging in conduct that
22 violated a federal criminal statute, 18 U.S.C. § 241. That statute provides in
23 pertinent part:
24

25 If two or more persons conspire to injure, oppress, threaten, or
intimidate any person in any State, Territory, Commonwealth,

1 Possession, or District in the free exercise or enjoyment of any
2 right or privilege secured to him by the Constitution or laws of the
United States, or because of his having so exercised the same; . . .

3 They shall be fined under this title or imprisoned not more than
4 ten years, or both.

5 Thomas and Aubuchon conspired with each other and with others to injure, oppress,
6 threaten or intimidate Judge Donahoe in the free exercise of his First Amendment
7 rights to freedom of speech, a right or privilege secured to him by the U.S.
8 Constitution and laws of the U.S., or they did so injure, oppress, threaten or
9 intimidate Judge Donahoe because he had exercised his right to freedom of speech.
10

11 Under 18 U.S.C. § 241 the gravamen of the violation is the conspiracy to injure,
12 oppress, threaten or intimidate someone from exercising a right under the U.S.
13 Constitution. *See U.S. v. Lanier*, 520 U.S. 259 (1997). In order to be criminally liable
14 under this statute it does not need to be shown that any actual injury, oppression or
15 intimidation occurred. It is the conspiracy to do so which is prohibited.

16 A judge when issuing an opinion or a ruling is exercising his First Amendment
17 right to freedom of speech. *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000). The
18 intent of Thomas, Aubuchon and others was to muzzle Judge Donahoe so that he
19 would not rule on the motion to be heard on the afternoon of December 9, 2009.

20 Judge Donahoe also had a constitutional right to engage in his profession and
21 do his job as a judge. A conspiracy against a public officer in the performance of his
22 duties is a violation of 18 U.S.C. § 241. *U.S. v. Patrick*, 54 F. 338, 348-49 (C.C. Tenn.
23 1893). *See also U.S. v. Davis*, 103 F. 457 (C.C. Tenn. 1900) (conspiracy to deprive
24 U.S. Marshal and Deputy Marshal of their constitutional right to arrest a person on
25

1 legal process violates the statute). A judge when hearing a motion is exercising his
2 constitutional right to perform his function as a public officer. By conspiring to
3 charge Judge Donahoe with a crime unsupported by any evidence, Thomas and
4 Aubuchon violated 18 U.S.C. § 241.

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7 **6. Ethical Violation #29**
8 **(Thomas and Aubuchon) Conflicts of Interest**

9 Thomas and Aubuchon violated ER 1.7(a)(2) in bringing charges against Judge
10 Donahoe. First, they had a concurrent conflict of interest because they had a
11 pending civil case against Judge Donahoe, among others, seeking damages caused to
12 Thomas at the time they then filed charges against Judge Donahoe. Second, they
13 had a conflict because Judge Donahoe had ruled against them in disqualifying MCAO
14 from the Court Tower grand jury matter and quashing the subpoena. Their personal
15 animosity toward Judge Donahoe limited their representation and judgment as
16 attorneys for the State.

17
18 **7. Ethical Violation #30**
19 **(Thomas and Aubuchon) Conduct Prejudicial to the**
20 **Administration of Justice**

21 Thomas and Aubuchon engaged in conduct prejudicial to the administration of
22 justice in violation of ER 8.4(d) by charging Judge Donahoe with crimes in order to
23 burden him to the point where he recused himself from the pending motion.

1 **J. Grand Jury Matters in 2010.**

2 On January 4, 2010, Aubuchon began a presentation to the Grand Jury about
3 two areas: 1) allegations that Stephen Wetzel, Andrew Kunasek and Sandi Wilson
4 had illegally used public monies on two separate occasions to conduct sweeps for
5 electronic listening devices at county offices; and 2) allegations that Judge Donahoe,
6 Thomas Irvine and County Manager David Smith had illegally conspired to hinder
7 prosecution and obstruct a criminal investigation involving the court tower.
8 Testimony was taken on January 4, 2010. There were only two witnesses, Detective
9 Halverson and Chief Deputy Hendershott. After the testimony, the Grand Jury asked
10 Aubuchon for a draft indictment. Aubuchon provided a draft indictment, but the
11 Grand Jury did not reach any conclusion.

12 In the meantime, Judge Donahoe requested and received a stay on the
13 prosecution against him. Additionally, Judge Leonardo had disqualified MCAO from
14 prosecuting the case against Mary Rose Wilcox.
15

16 On March 3, 2010, Aubuchon appeared in front of the Grand Jury. She
17 advised them of the stay in the Donahoe matter and of the disqualification in the
18 Wilcox case. She asked that the Grand Jury return the bug sweep and court tower
19 matters to MCAO so that when a special prosecutor was found, that prosecutor could
20 make a determination how to proceed. The Grand Jury asked for advice as to how it
21 could proceed. They were advised that they could ask for a draft indictment, end the
22 inquiry, or call for more witnesses or evidence. The Grand Jury voted to end the
23 inquiry.
24

1 In March 2010, Gila County Attorney Daisy Flores agreed to review the *Wilcox*
2 and *Stapley II* matters which had been dismissed by MCAO.

3 On April 1, 2010, Thomas announced his resignation as County Attorney
4 which he stated was effective April 6, 2010.

5 On April 2, 2010, Aubuchon sent Ms. Flores a letter, memorandum and
6 departmental report about the bug sweep investigation. She wrote in her memo that
7 the matter was presented to the county grand jury as part of an overall investigation
8 into local corruption. She wrote that the grand jurors had not finished deliberating
9 on an indictment when a judge entered a stay as to one of the suspects, Judge
10 Donahoe. Aubuchon stated that she asked the grand jurors to stop considering the
11 matter until that issue was resolved. She wrote further that her office was found to
12 have a conflict in the Mary Rose Wilcox case and that the office decided to dismiss
13 the matters relating to the other county officials. She said that if Ms. Flores decided
14 to go forward with the charges, parts of the grand jury presentation may need to be
15 accessed or disclosed after court order as it was all in a sealed grand jury proceeding
16 under number 494 GJ 156, January 4, 2010. Aubuchon did not tell Ms. Flores that,
17 in fact, the grand jury had voted to end the inquiry.
18
19
20

21 **1. Ethical Violation #31**
22 **(Thomas and Aubuchon) Conflicts of Interest**

23 Thomas and Aubuchon violated ER 1.7(a)(2) in pursuing a grand jury
24 investigation of Judge Donahoe, Thomas Irvine, Andrew Kunasek, David Smith and
25 Sandi Wilson. First, they had a concurrent conflict of interest because they had filed

1 a pending civil RICO case against these individuals seeking damages caused to
2 Thomas, and then they pursued a criminal investigation of them. Second, they had a
3 conflict for all the same reasons noted above that limited her representation in the
4 RICO action. See Ethical Violation 14 above. Additionally, Thomas's and
5 Aubuchon's representation of the State was limited by their personal animosity
6 toward these individuals.

7
8
9 **2. Ethical Violation #32**
10 **(Aubuchon) Dishonesty and Misrepresentation**

11 Aubuchon should never have disclosed to Ms. Flores any matters attendant the
12 grand jury.⁵¹ However, once she did so, she had to be honest about what she
13 revealed. Aubuchon engaged in dishonesty and misrepresentation in violation of ER
14 8.4(c) because she knowingly failed to tell Ms. Flores that the grand jury had voted to
15 end the inquiry. Given that Aubuchon had told Ms. Flores that she had presented
16 matters to the grand jury concerning local corruption, her failing to inform Ms. Flores
17 that the grand jury had ended the inquiry was misleading and dishonest.

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20 **IV. CONCLUSION**

21 Based upon the above, Independent Bar Counsel recommends that the
22 Probable Cause Panelist find that there is probable cause to believe the above
23

24
25

⁵¹ A.R.S. §_13-2812 criminalizes disclosure of matters attendant a grand jury proceeding unless a court order permits one to do so.

1 allegations and to approve the filing of a formal complaint against Andrew Thomas,
2 Lisa Aubuchon and Rachel Alexander.

3
4 **RESPECTFULLY SUBMITTED** this 23rd day of Nov, 2010.

5
6 

7 _____
8 John S. Gleason
9 Independent Bar Counsel
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