

OFFICE OF THE  
PRESIDING DISCIPLINARY JUDGE  
SUPREME COURT OF ARIZONA

FEB 24 2011

BY \_\_\_\_\_ FILED *M Smith*

1 LAW OFFICES  
2 BROENING OBERG WOODS & WILSON  
3 PROFESSIONAL CORPORATION  
4 POST OFFICE BOX 20527  
5 PHOENIX, ARIZONA 85036  
6 (602) 271-7700  
7 DONALD WILSON, JR. (005205)  
8 TERRENCE P. WOODS (004957)  
9 BRIAN HOLOHAN (009124)

Attorneys for Respondent Andrew Thomas

7 BEFORE THE PRESIDING DISCIPLINARY JUDGE  
8 OF THE SUPREME COURT OF ARIZONA

9 In the Matter of a Member of )  
10 the State Bar of Arizona, )  
11 ANDREW P. THOMAS, )  
12 Bar No. 0014069, )  
13 Respondent. )

No. PDJ 2011-9002

**MOTION TO STRIKE  
in the alternative  
MOTION FOR REMAND TO  
ATTORNEY DISCIPLINE  
PROBABLE CAUSE COMMITTEE**

14 Respondent Andrew Thomas moves pursuant to Rule 12(f) to  
15 strike the complaint for the following reasons:

16 1. The complaint was filed by a person who lacks the legal  
17 authority to commence Bar discipline proceedings;

18 2. Authority to commence the action was given by a person  
19 who lacked the legal authority to give such permission; and,

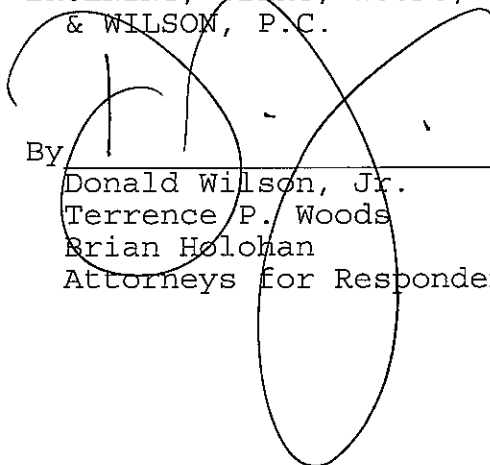
20 3. The Probable Cause panelist exceeded his authority by  
21 directing Bar counsel to file two charges that had not been  
22 "recommended."

23 As an alternative to striking the Complaint, Respondent moves  
24 the Presiding Disciplinary Judge to remand this matter for a proper  
25 probable cause review by the Attorney Discipline Probable Cause  
26 Committee.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

DATED this 24 day of February 2011.

BROENING, OBERG, WOODS,  
& WILSON, P.C.

By  \_\_\_\_\_  
Donald Wilson, Jr.  
Terrence P. Woods  
Brian Holohan  
Attorneys for Respondent Thomas



1 Bar counsel, who received the putative authority to file a  
2 complaint from someone (admittedly, a highly respected former  
3 Supreme Court Justice) who did not have the legal authority to give  
4 permission for this filing because he too was not lawfully  
5 appointed. To compound the lack of procedural due process, the  
6 Probable Cause panelist directed the filing of charges that were  
7 not "recommended."

8 This complaint should be dismissed, and the Bar required to  
9 follow the rules, including, especially, waiting to receive  
10 Respondent's side of the story.<sup>4</sup> As an alternative, the Presiding  
11 Disciplinary Judge should remand this case to the newly formed  
12 Attorney Discipline Probable Cause Committee (a body whose very  
13 existence owes to the shortcomings of the former system) for a  
14 probable cause review.

#### 15 **Background**

16 This case involves the much-publicized travails of Respondent,  
17 former Maricopa County Attorney Andrew Thomas. Thomas came under  
18 fire, and later under investigation by the Bar, for attempting to  
19 investigate and prosecute alleged corruption involving one of the  
20 members of the Maricopa County Board of Supervisors, his  
21 statutorily required obligation under A.R.S. §11-532(A)(1), even

---

22 <sup>4</sup>Mr. Gleason's refusal to afford Mr. Thomas's prior lawyers  
23 the courtesy of a reasonable extension to respond to the hundreds  
24 of pages of Bar charges is chronicled in the Special Action  
25 proceeding Mr. Thomas initiated. Thomas v. Jones, S.Ct. no. CV 08-  
26 0162-SA. In what seems like an ironic case of vindictive  
prosecution, Mr. Gleason alleges the special action proceeding,  
along with all the other procedural challenges Respondent's former  
lawyers mounted, was a violation of Rules 53(d) and (h).

1 though State v. Brooks, 126 Ariz. 395, 399-400, 616 P.2d 70, 74-5  
2 (App. 1980) holds that the County Attorney does not automatically  
3 represent the individual members of a County board merely because  
4 his office represents the Board as an entity.

5 After a dismissal following an initial screening by  
6 independent Bar counsel,<sup>5</sup> the Bar, exercising its function under  
7 former Rule 51 to "screen[] information coming to the attention of  
8 the state bar relating to conduct by a member," decided to  
9 undertake yet another investigation of Respondent following a  
10 ruling by a judge disqualifying Respondent's office from the  
11 prosecution of Mary Rose Wilcox, another member of the County Board  
12 of Supervisors.

13 Citing allegations Respondent made in a civil RICO action he  
14 filed in his official capacity as County Attorney,<sup>6</sup> the  
15 determination was made<sup>7</sup> that independent Bar counsel "may be  
16 appropriate." The decision in other cases to appoint some  
17 independent lawyer to fulfill Bar counsel's function because of a

---

18 <sup>5</sup>That screening was also conducted by a person appointed  
19 Independent Bar Counsel by the Chief Justice by way of  
20 Administrative Order. Because that screening resulted in a  
21 dismissal, there was no need to challenge the procedurally-  
22 irregular appointment.

23 <sup>6</sup>Despite the Bar's assertion it sought to distance itself from  
24 a screening because of the bringing of the RICO action, the filing  
25 of the RICO lawsuit, to no one's surprise, is now one of the  
26 charges against Respondent. Bar counsel has even filed charges  
against one of Respondent's former employees, who worked on the  
RICO case for only a few weeks after it was filed by someone else.

<sup>7</sup>Who actually made this determination is unknown. We know  
only from Mr. Phelps's letter to the Chief Justice that it was  
made. Exhibit 1.

1 perceived conflict is not atypical. Indeed, the Board of Governors  
2 created the Conflict Case Committee, which is charged with the  
3 responsibility to investigate and prosecute all aspects of  
4 disciplinary cases involving a member of the State Bar's Board of  
5 Governors, State Bar staff, a Supreme Court Disciplinary Hearing  
6 Officer or a member of the Court's Disciplinary Commission.  
7 Nevertheless, that Committee was not involved here. Instead, the  
8 Bar's Executive Director, in a flagrant usurpation of Bar counsel's  
9 function<sup>8</sup>, wrote a letter to the Chief Justice of the Arizona  
10 Supreme Court asking her to appoint independent counsel to  
11 investigate Respondent.

12 The Chief Justice responded to the letter by issuing  
13 administrative order no. 2010-33. Citing Article VI of the Arizona  
14 Constitution, the Chief Justice appointed independent Bar counsel.<sup>9</sup>  
15 The order then went further. In ¶6, the Chief Justice appointed a  
16 retired Supreme Court Justice to act as probable cause panelist.  
17 Not only was the Bar's request to the Chief Justice silent on the  
18 issue of a probable cause panelist, but the fact the Chief Justice  
19 chose to appoint a probable cause panelist when no screening had  
20

---

21 <sup>8</sup>Bar counsel's authority was described above. It is important  
22 to note that while Rule 51 provides that Chief Bar Counsel  
23 "[a]ct[s] under the authority of the board [of governors], and  
24 under the direction and appointment of the executive director,"  
25 neither that Rule nor any other makes the Executive Director the  
26 Chief Bar Counsel, a separately defined position.

27 <sup>9</sup>When the lawyer appointed Independent Bar counsel later  
28 declined the appointment, the Chief Justice issued a second order,  
29 no. 2010-41, appointing Mr. Gleason, a Colorado lawyer who was  
30 never admitted to practice in Arizona.

1 even been conducted raises the troubling appearance that permission  
2 to proceed against Respondent had already received the Court's  
3 stamp of approval.

4 In the meantime, other Bar charges were filed. Among others,  
5 an organization calling itself the Arizona Attorneys for Criminal  
6 Justice, a group whose members is largely composed of criminal  
7 defense lawyers who litigated adverse to Respondent and his staff,  
8 filed a separate, inch-plus thick Bar charge of its own chronicling  
9 what it claimed were a parade of other horrors allegedly  
10 committed by Respondent.

11 Mr. Gleason's report was presented to the Probable Cause  
12 panelist on or about November 23, 2010. Having only Mr. Gleason's  
13 version of events, the Probable Cause panelist issued a probable  
14 cause order on December 6, 2010. The Probable Cause Panelist also  
15 sua sponte directed Mr. Gleason to include a charge arising from  
16 Respondent's alleged "failure or refusal to cooperate or respond  
17 substantively to Bar Counsel's requests."

18 **LEGAL ARGUMENT**

19 **I. MR. GLEASON AND THE PROBABLE CAUSE PANELIST WERE UNLAWFULLY**  
20 **APPOINTED.**

21 As noted, at the time of the screening and investigation of  
22 this matter, there were rules in place, adopted by a vote of all  
23 five members of the Supreme Court after consideration and public  
24 comment, relating to the appointment of Bar counsel. There is a  
25 standing committee, created by the Board of Governors, to act as  
26 independent Bar counsel when the need arises. The Bar's Executive

1 Director's approach to the Chief Justice is unprecedented. That  
2 the request came from the Bar's Executive Director, who lacked the  
3 legal authority to seek appointment of independent Bar counsel in  
4 the first instance, only compounds the Bar's failure to follow the  
5 very rules it is charged with enforcing.

6 Putting aside the fact that the Rules themselves create enough  
7 process for the appointment of a independent Bar counsel without  
8 the Court's intervention, respectfully, the Chief Justice does not  
9 have the authority to appoint an independent Bar counsel on her  
10 own. Article VI, §3 of the Arizona Constitution, which does give  
11 the Chief Justice the authority to "exercise the court's  
12 administrative supervision over all the courts of the State[,]"  
13 relates only to the operation of the court system. The Court has  
14 held time and again its power to regulate Bar admission is  
15 separately conferred by Article III,<sup>10</sup> so the Chief Justice's  
16 Article VI power cannot be the source of the authority for her  
17 administrative order.

18 So too, the Rules are explicit concerning who can act as  
19 probable cause panelist. The Rule says it must be a member of the  
20 Board of Governors, or someone "appointed and serving" pursuant to  
21 the Rules. The Rules say nothing about appointments of Probable  
22 Cause panelists by administrative order.

23 . . . .

---

25 <sup>10</sup>In re Creasy, 198 Ariz. 539, 541, ¶6, 12 P.3d 214, 216  
26 (2000); In re Smith, 189 Ariz. 144, 146, 939 P.2d 422, 424 (1979).  
See also State v. Spears, 283 F.3d 992, 1014 (9<sup>th</sup> Cir. 2002).

1           When read together, Rules 46, 51 and 54 require Bar counsel to  
2 obtain from a probable cause panelist permission to proceed.  
3 Neither exist here. The complaint is a nullity, ab initio, and  
4 should be stricken.

5 **II. MR. GLEASON IS NOT ADMITTED TO PRACTICE IN ARIZONA. THE**  
6 **COMPLAINT HE FILED IS THUS VOID.**

7           The fact that Mr. Gleason is not a licensed member of the  
8 Arizona Bar is addressed in the Motion to Disqualify.  
9 Nevertheless, he was also not an active member at the time he filed  
10 the complaint in this action. His lack of active member status  
11 thus has another consequence germane to this motion: The complaint  
12 was filed by someone who lacks the legal authority to represent a  
13 client. The filing by an entity (the State Bar) without counsel is  
14 legally inoperative. See e.g. Ramada Inns, Inc. v. Lane and Bird  
15 Advertising, Inc., 102 Ariz. 127, 128-9, 436 P.2d 395, 396-7 (1967)  
16 (unrepresented corporation's pro per answer legally insufficient to  
17 avoid default).

18 **III. THE PROBABLE CAUSE PANELIST EXCEEDED HIS AUTHORITY BY ADDING**  
19 **CHARGES AGAINST RESPONDENT.**

20           The Probable Cause Panelist issued a probable cause order on  
21 December 6, 2010. In it, the Probable Cause Panelist approved all  
22 of the charges sought by Bar counsel. The order then takes the  
23 extraordinary step of adding violations against Respondent for  
24 allegedly failing to cooperate with the Bar's investigation.<sup>11</sup> The  
25 Probable Cause Panelist's addition exceeded his authority.

26 

---

<sup>11</sup>The Probable Cause Panelist also approved the bringing of an

1 Former Rule 54(b)(4) required "any recommendation by the state  
2 bar for a disposition other than dismissal" to be reviewed by the  
3 Probable Cause Panelist. The rule provided that the Probable Cause  
4 Panelist had the authority to "approve, disapprove or modify the  
5 recommendation[.]" Importantly, the ability to "approve" and  
6 "modify" is limited to Bar counsel's "recommendation." Here, there  
7 was no recommendation to charge Respondent with a violation of Rule  
8 53's cooperation obligation.

9 There being no "recommendation" to "approve" or "modify," the  
10 Probable Cause Panelist's addition is without authority. Count 33  
11 should be separately stricken.

12 DATED this 24 day of February, 2011.

13 BROENING, OBERG, WOODS,  
14 & WILSON, P.C.

15  
16 By \_\_\_\_\_

17 Donald Wilson, Jr.  
18 Terrence P. Woods  
19 Brian Holohan  
20 Attorneys for Respondent Thomas

21 COPY of the foregoing mailed  
22 on 24, to:

23  
24 John S. Gleason, Esq.  
25 Independent Bar Counsel  
26 1560 Broadway, Suite 1800  
Denver, CO 80202

allegation that Respondent violated ER 1.8(h) -- which prohibits a  
lawyer from making an agreement that limits the ability of a  
client's right to make a Bar charge -- even though Bar counsel had  
not recommended that charge. To his credit, Bar counsel left that  
charge out of the complaint.

1 Lisa M. Aubuchon  
2 8400 S. Kyrene, #123  
3 Tempe, AZ 85284-2119  
4 Respondent

5 Scott H. Zwillinger  
6 Zwillinger Greek Zwillinger & Knecht PC  
7 2425 E. Camelback Road, Suite 600  
8 Phoenix, AZ 85016-4214  
9 Respondent Rachel R. Alexander's  
10 Counsel of Record

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
By Shari Swartz

IN THE SUPREME COURT OF THE STATE OF ARIZONA

---

In the Matter of: )  
)  
APPOINTMENT OF INDEPENDENT ) Administrative Order  
BAR COUNSEL AND PROBABLE ) No. 2010 - 33  
CAUSE PANELIST TO HANDLE )  
CERTAIN LAWYER MISCONDUCT )  
COMPLAINTS FILED AGAINST )  
MARICOPA COUNTY ATTORNEY )  
ANDREW THOMAS )  
\_\_\_\_\_ )

The Supreme Court has jurisdiction over any person engaged in the practice of law within the State of Arizona, Ariz. R. Sup. Ct. 31, and all lawyers are subject to the disciplinary jurisdiction of this Court, *id.* R. 48. This Court has delegated the duty to investigate and, when necessary, prosecute lawyer discipline matters to the State Bar of Arizona.

The Executive Director of the State Bar has requested the appointment of independent counsel to investigate allegations of misconduct against Maricopa County Attorney Andrew Thomas resulting from the findings entered by the Honorable John S. Leonardo in *State of Arizona vs. Wilcox*, CR-2010-005423-001/OC-2010-005423-001. The Executive Director has also requested that the independent counsel investigate other pending or future allegations of misconduct against Mr. Thomas stemming from related cases or matters.

While the Office of Chief Counsel for Bar Discipline of the State Bar would usually handle these matters, good cause exists to appoint counsel independent of the State Bar.

Now, therefore, pursuant to Article VI of the Arizona Constitution,

IT IS ORDERED that J. Scott Rhodes is appointed to serve in this matter as Independent Bar Counsel as follows:

1. Independent Bar Counsel Rhodes shall have all the power and authority granted to State Bar Counsel pursuant to rules, orders, or decisions of the Supreme Court.
2. Independent Bar Counsel Rhodes shall investigate and, as he determines appropriate, prosecute allegations of ethical misconduct stemming from the prosecution in *State v. Wilcox*.

3. Independent Bar Counsel Rhodes shall investigate and, as he determines appropriate, prosecute any other allegations of misconduct filed against Maricopa County Attorney Andrew Thomas arising out of criminal investigations or prosecutions involving the Maricopa County Board of Supervisors and its staff, collectively or individually; the judges of the Superior Court in Maricopa and their staff, collectively or individually; and matters assigned by Special Master Ruth V. McGregor.
4. Independent Bar Counsel Rhodes may, at his sole discretion, designate lawyers to assist him and employ other staff as reasonably necessary to carry out his duties as Independent Bar Counsel.
5. Independent Bar Counsel Rhodes and lawyers he designates to assist him shall be immune from civil suit and from disciplinary complaints as provided by Supreme Court Rule 48(l) and (m), respectively.

IT IS FURTHER ORDERED that:

6. Charles E. Jones, former Chief Justice of the Arizona Supreme Court (now retired), is appointed to serve as the Probable Cause Panelist to review allegations arising from the matters addressed in this Administrative Order and shall have all powers and authority granted to a panelist pursuant to Rules of the Supreme Court.
7. The State Bar shall pay reasonable costs for services provided and expenses incurred by Independent Bar Counsel Rhodes and Probable Cause Panelist Jones as necessary to carry out the duties required by this Order.

Dated this 8th day of March, 2010.

---

REBECCA WHITE BERCH  
Chief Justice



March 2, 2010

The Honorable Rebecca White Berch  
Chief Justice  
Supreme Court of Arizona  
1501 West Washington Street  
Phoenix, Arizona 85007-3231

Dear Chief Justice Berch:

Based on information that has come to my attention and pursuant to my authority and responsibilities under Rule 51, Arizona Supreme Court Rules, I have determined that it is necessary to initiate an investigation into matters associated with the recent Arizona Superior Court ruling by Judge John Leonardo (CR-2010-005423-001), dated 24 February 2010.

Judge Leonardo's findings implicate potential violations of the Arizona Rules of Professional Conduct (Rules) by Maricopa County Attorney Andrew Thomas. Consistent with the State Bar's responsibilities to investigate and when appropriate prosecute violations of the Rules, we are prepared to take immediate and deliberate action by commencing an investigation into Mr. Thomas' actions as described in Judge Leonardo's ruling.

As you know, some prior charges against Mr. Thomas prompted the appointment of outside counsel to avoid a perceived conflict of interest. I believe the conditions that influenced that appointment have been eliminated. I must acknowledge, however, that a member of our Board of Governors, Edward Novak, whose firm represents the Maricopa County Board of Supervisors, has been named as a defendant in a federal complaint filed by Mr. Thomas. In addition to allegations made by Mr. Thomas against Mr. Novak, the complaint alleges that the State Bar was improperly influenced, as part of a conspiracy, to take action against Mr. Thomas. I find no credible basis to support these allegations. However, because these allegations are adverse to a member of our Board and the Bar in general, it may be appropriate to again consider the appointment of an independent counsel to investigate Mr. Thomas.

If an independent counsel were appointed, it may be appropriate to include current charges pending against Mr. Thomas and others relating to similar matters in the investigation.

I have every confidence that our organization can fairly and effectively act in this regard. I also appreciate the need to protect this process from any appearance of a conflict of interest, and would therefore ask that you consider appointing an independent counsel to investigate the above matters. The State Bar will refrain from taking further action regarding Mr. Thomas until I receive your guidance.

Very respectfully,

A handwritten signature in black ink, appearing to read 'J. Phelps'.

John F. Phelps  
Chief Executive Officer &  
Executive Director