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IN THE
SUPREME COURT OF ARIZONA

In the Matter of a Member of the
State Bar of Arizona,

ANDREW P. THOMAS, Maricopa
County Attorney (SBA #014069)

And

THE MARICOPA COUNTY
ATTORNEY'S OFFICE

Petitioners,

v.

STATE BAR OF ARIZONA,

Respondent.

Case No.: CV 08-0162 SA

**REPLY IN SUPPORT OF
PETITION FOR
SPECIAL ACTION**

SBA File Nos. 07-0093
07-0186
07-1693
07-1762
07-1793
07-1952

07-1692
07-1761

(Oral Argument Requested)

1 **I. INTRODUCTION**

2 The Bar’s readiness to punish those who engage in constitutionally protected
3 political speech, interfere with ongoing disciplinary proceedings, and use the
4 disciplinary process to support its own partisan political views calls for intervention
5 from this Court. County Attorney Thomas dared to adopt a position on illegal
6 immigration that was unpopular with some Maricopa County Superior Court judges
7 and, as a result, County Attorney Thomas and his prosecutors were subjected to an
8 onslaught of Bar investigations. Certain Bar Officials, hiding behind a claim of
9 protecting judicial independence, have inextricably combined Bar governance and the
10 orderly process of lawyer regulation. As long ago as 1941, Justice Hugo Black
11 recognized the inherent error in that course, no matter how well-intentioned:

12 The assumption that respect for the judiciary can be won by
13 shielding judges from published criticism wrongly appraises the
14 character of American public opinion. For it is a prized American
15 privilege to speak one’s mind, although not always with perfect
16 good taste, on all public institutions. And an enforced silence,
17 however limited, solely in the name of preserving the dignity of
the bench, would probably engender resentment, suspicion and
contempt much more than it would enhance respect.

18 Bridges v. California, 314 U.S. 252, 270-71 (1941).

19
20 **II. JURISDICTIONAL STATEMENT**

21 Notwithstanding the Bar’s Response (at 25-27), special action jurisdiction is
22 appropriate in this case. The investigations, publicized by these Bar Officials in
23 October 2007, had been languishing with every indication that there would be no
24 speedy resolution by the Bar. In three matters, Bar Counsel notified County Attorney
25 Thomas that the investigations would be “protracted.” (Petition Appendices B-17, B-
26 18, and B-19.) Two of those matters are still pending and, in fact, Bar Officials

1 continue to demand work product and privileged information before continuing with
2 the screening process. (Exhibit 1.) Future resolution of these matters seems unlikely
3 without this Court's intervention. Although many of the investigations have now been
4 dismissed, as discussed below, there are no assurances that Bar Officials will not
5 invoke new investigations on similar, improper grounds and with similar improper
6 involvement by Bar Officials. As the court was required to do in Hawai'i, it is
7 appropriate for this Court to exercise oversight of the Bar. Breiner v. Sunderland, 112
8 Hawai'i 60, 143 P.3d 1262 (2006); In re Hoover, 161 Ariz. 529, 530, 779 P.2d 1268,
9 1269 (1989). With respect to the privilege/protective order issues, irreparable harm
10 will occur if the intervention of special action relief does not preclude the
11 dissemination of the privileged information. See Arizona Independent Redistricting
12 Commission v. Fields, 206 Ariz. 130, 136, 75 P.3d 1088, 1093 (Ct. App. 2003).

13
14 **III. BAR CONDUCT PRECLUDES FAIR AND IMPARTIAL**
15 **CONSIDERATION OF THE REMAINING THOMAS FILES¹**

16 The timing of recent dismissals of all but a few of the so-called Bar complaints
17 is at least as interesting as the timing of their inception. County Attorney Thomas was
18 first informed of the investigations over a period of 90 days beginning shortly after he
19 spoke out about judicial reluctance to enforce Proposition 100. Then, after County
20 Attorney Thomas' attorneys had informed Chief Counsel Robert Van Wyck of their
21 intent to seek Special Action relief based on improper Bar conduct (Petition
22 Appendix A-46), Mr. Van Wyck offered to resolve 4 of the pending investigations
23 (#07-0093 Goudeau, #07-1762 Conditional Hires, #07-0186 Bandy, and #07-1952

24
25 ¹ Although there is some overlap in their origins, the files directed to Mr. Wilenchik
26 and his conduct are not addressed here, only the files directed to Mr. Thomas'
conduct.

1 Basta.). (Exhibit 1.) After that, he dismissed 4 more (#07-1700 Lotstein, #07-1846
2 Conditional Hires, #07-1847 Conditional Hires, #07-1881 Conditional Hires.) What
3 remains are:

- 4 • #07-1693(Thomas)/#07-1692(Wilenchik) — regarding Judge Ryan
- 5 • #07-1793(Thomas)/#07-1761(Wilenchik) — regarding New Times
- 6 • #07-1793(Thomas) — regarding 5/1/08 supplement to New Times

7 In those remaining matters, Bar Counsel continues to request privileged material or
8 work product based on information he gleaned from media articles, has indicated a
9 refusal to resolve the matters until he receives that information, and has informed
10 counsel that the investigations will be “protracted.”² (Exhibit 1 and Petition
11 Appendices B-17 and B-19.)

12 **A. File 07-1693(Judge Ryan)**

13 On behalf of the MCAO, a motion requesting voluntary recusal by Judge Ryan
14 was filed, followed by a motion for involuntary recusal. Whether one agrees with the
15 request or not, it is not an ethical violation to move for a change of judge for cause.
16 Ariz. Rev. Stat. §12-409; Ariz. R. Crim. P. 10.1. The motions were made in good faith
17 and were supported by exhibits and authority. Three judges considered the motions
18 and, while relief was denied, it was with lengthy explanation and without accusation of
19 unethical conduct.³ The Response fails to provide any justification for this file to
20 remain pending because there is none.

21
22
23 ² See Petition Appendix A-12, Declarations of Leo Beus and Dan Cracchiolo, wherein
24 Bar Counsel indicated that he was unwilling to do work on the matters until the
25 privileged information he had requested was fully disclosed.

26 ³ The Bar itself is identified as the complainant here. When Mr. Wilenchik inquired
of Judge Ryan about the subject, Judge Ryan commented that Wilenchik was "giving
[his] ethical responsibilities a competent representation." (Petition Appendix A-25.)

1 Moreover, Joseph Kanefield’s affidavit in the Bar’s Response (Tab 4) indicates
2 that “several members of the State Bar, which may have included retired judges, had
3 contacted the President of the Board of Governors, Dan McAuliffe, and had asked
4 that the State Bar respond in defense of judicial independence given the recent actions
5 of Maricopa County Attorney Andrew Thomas.” Bar Officials did so by issuing a
6 number of public criticisms directed at County Attorney Thomas, apparently without
7 any formal approval from either the BOG or the Scope and Operations Committee.
8 Id. Those actions, directly related to the Ryan Bar investigation, preclude any fair and
9 impartial review of the matter.

10 **B. File 07-1793(*New Times*)**

11 Bar Counsel opened this file in October 2007 with Bar Counsel as complainant
12 based on *New Times* articles received from a retired judge. Bar Counsel later treated a
13 February 2008 letter of claim from counsel for the *New Times* as a supplement to the
14 existing file. The investigation concerned the handling of an underlying criminal
15 inquiry into the *New Times*’ web publication of the home address of the Maricopa
16 County Sheriff, a possible violation of A.R.S. § 13-2401(a). The assertions in the
17 articles, even if true, only described conduct by Mr. Wilenchik as a special prosecutor.
18 There were no assertions about Mr. Thomas’ conduct. As the Response (at 42)
19 acknowledges, as of January 10, 2008:

20 Mr. Thomas already has asserted in these proceedings that he had no
21 managerial or supervisory authority or role with respect to Mr.
22 Wilenchik’s conduct, as special prosecutor, in the *New Times* grand jury
23 matters. . . . As special prosecutor, Mr. Wilenchik was not a member of
24 Mr. Thomas’ office.

25 The supplemental material provided by the *New Times* attorney falsely
26 asserted that the criminal inquiry had been rejected by independent prosecutors
before assignment to Mr. Wilenchik. In fact, the *New Times* attorney received a

1 letter from the Pinal County Attorney’s Office opining that there was indeed a
2 possible criminal violation by the *New Times*. The newspaper's attorney knew
3 full well that the criminal investigation was returned to Maricopa County
4 because a subsequently elected Pinal County Attorney had a personal conflict
5 in pursuing the inquiry that his predecessor did not. (Exhibit 2.) Again, the
6 Response does not provide any justification for this file to remain pending
7 against Mr. Thomas because there is none.

8
9 **IV. THIS COURT SHOULD INTERVENE IN INVESTIGATIONS**

10 The Bar’s Response and accompanying affidavits rely heavily on conclusory
11 statements that there is a clear demarcation between Bar governance and regulation,
12 that the Bar President’s statements in support of the judiciary have nothing to do with
13 the investigations of County Attorney Thomas, and that there are no political
14 motivations underlying these investigations. Specifically, on June 15, 2008, an article
15 by Mr. McAuliffe appeared in the *Arizona Republic*. In it, Mr. McAuliffe claims, inter
16 alia, “the state Bar keeps a clear line of demarcation between its governance function
17 and its regulatory function. So, for example, as state Bar president, I have no role in
18 the initiation, conduct or outcome of any lawyer investigation and played no such role
19 in these.” (Exhibit 3.) This claim is belied by the characterization in the Response (at
20 31) that the Bar President’s “comment on . . . the independence of the judiciary . . .
21 arose in the context of actions [for which the Bar] is investigating Mr. Thomas.”⁴

22
23
24 ⁴ Another example of correspondence that contradicts Mr. McAuliffe’s claim of a
25 hands-off relationship is an email from Mr. McAuliffe to the Bar’s discipline office,
26 seeking material from the Bar’s files which Mr. McAuliffe wanted to use in connection
with his private retention as an expert witness. In it, he makes suggestions to Bar
Counsel about the Bar’s legal position with respect to certain disciplinary rules.

1 This concession directly conflicts with the fictional demarcation otherwise asserted by
2 the Response.

3 When the disciplinary process has become so compromised, as in this case,
4 courts have found it proper to intervene. In Breiner v. Sunderland, the Hawai'i court
5 recognized that the subject attorney had "no other avenue by which to seek relief
6 from alleged unprofessional and oppressive investigation tactics." 112 Hawai'i at 66,
7 143 P.3d at 1268. The same is true here. "[W]e have the responsibility and duty to
8 regulate and direct the actions of the [Bar regulatory officials], and, when a proven
9 need to do so arises, we will not hesitate to exercise our responsibilities and duties."
10 Id. at 64, 143 P.3d at 1266. See also Affidavit of Peter Jarvis (Exhibit 5.)

11 **A. Bar's Demonstrated Lack of Impartiality**

12 **1. Bar Officials Commented on Pending Investigations**

13 One of the biggest problems associated with the Bar's investigation of County
14 Attorney Thomas — one which implicates constitutional mandates of fairness and
15 due process of law — is the clear and unambiguous agenda which has been part of
16 these investigations from the start.

17 At the very beginning of the investigation, Mr. McAuliffe made a media
18 statement to the Yellow Sheet (a publication related to the Capitol Times) stating that
19 a "formal ethics complaint" had been filed against County Attorney Thomas.⁵ That
20

21 (Exhibit 4.) He also obtains Bar materials for a private client while attending a BOG
22 meeting. (Exhibit 4).

23 ⁵ The Response (at 11) claims that "[t]he bona fides of [the Yellow Sheet] are at best
24 suspect" because Mr. McAuliffe did not acknowledge speaking to anyone identifying
25 himself as being associated with the Yellow Sheet. The Bar does not explain how the
26 Yellow Sheet otherwise could have come into possession of information which would
only be known to the Bar. Nor is there a justifiable explanation for the Bar President
publicizing an investigation (of which he should not have known) two weeks before

1 statement, combined with the media campaign by Mr. McAuliffe to denigrate County
2 Attorney Thomas, make it clear to anyone who pieced the Mr. McAuliffe statements
3 together, that (a) County Attorney Thomas was being investigated by the Bar; and (b)
4 the Bar President already had concluded that County Attorney Thomas had engaged
5 in professional misconduct. Bar Counsel concede in the Response (at 32-33)
6 (emphasis added), that anyone who concluded that the Bar engaged in illicit behavior
7 could not be faulted:

8 In light of this [Bar disciplinary] investigation, Mr. Thomas may
9 feel restrained in his speech about other matters of public concern and
likely would feel restrained from speaking about the investigation. . . .

10 When the subject of an investigation is an elected official . . . , the
11 charges deal with speech, and when the Bar speaks publicly about the
12 same matter of public concern, **it may be too much to ask the public
and Mr. Thomas to accept that the Bar is acting impartially.**
13 Absent impartiality, there can be little public or lawyer confidence in the
14 discipline process or its results.

15 Indeed, the Bar's own structure contradicts Mr. McAuliffe's statements.⁶ The
16 second vice president of the Bar is the probable-cause panelist. The officers and

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18 the subject attorney was even notified. When asked by letter about the accuracy of his
19 press statements, the response was to direct the inquiry elsewhere. No answer to the
20 question has been received. (Exhibit 6.)

21 ⁶ The ABA Model Rules for Lawyer Disciplinary Enforcement recommend a
22 disciplinary agency as a component of the state supreme court with the bar
23 association having no role in the appointment of anyone to the agency and has no
24 role in any of the functions of the disciplinary agency. The ABA thus recognizes that
25 giving a bar association a role in the disciplinary process invites the potential for abuse
26 based upon political and other inappropriate considerations. It further recognizes that
lawyer discipline is a judicial function of the third branch of government, and that
government, and not a trade association of lawyers, ought to be responsible for all
facets of that responsibility.

1 disciplinary attorneys are institutionally commingled, attend BOG meetings together,
2 and discuss regular reports on the disciplinary process. As this case has made clear,
3 this arrangement can no longer withstand scrutiny.

4 **2. Bar Officials Continue to Comment on Investigations**

5 Even after the Petition for Special Action was filed with this Court, Bar
6 Officials commented on the pending Bar investigations. On Wednesday, May 28,
7 2008, incoming State Bar President Edward Novak spoke to members of the Arizona
8 Women’s Lawyer Association, Maricopa County Chapter. As part of his introductory
9 comments, he said, “We have a certain elected official who believes that he is immune
10 from Bar discipline.” (Exhibit 7.) Even if made in jest, the comment underscores the
11 degree to which the operational side of the Bar has become entwined with the
12 disciplinary side of the Bar.

13 Again, on June 24, 2008, the Bar included a link to a copy of its Response to
14 the Petition for Special Action in its eLegal newsletter. This newsletter apparently
15 goes to every attorney and judge with an email address on file with the State Bar. The
16 introduction to the link states, “The State Bar has filed a detailed response to a request
17 from the Maricopa County Attorney to stop investigating him for allegations of
18 unethical conduct.” The link goes to a press release from the State Bar which states,
19 inter alia, “In the brief the Bar states that ‘A lawyer who happens to be an elected
20 public officer...cannot simply opt out of the lawyer-regulatory system claiming the
21 privilege of his elected office.’” (Exhibit 8.)

22 The Bar’s Response (at 1-2) similarly mischaracterizes Thomas as claiming to
23 be above the ethics rules.⁷ Petitioner Thomas never has contended that he is not
24

25 ⁷ Actually, in all of Arizona, it is only the Bar Officials themselves who are above the
26 law with respect to being disciplined for professional misconduct. In a rule which is
virtually unknown in any of the other 49 States and the District of Columbia, persons

1 subject to discipline for professional misconduct. He recognizes and acknowledges
2 that he should be treated the same as all other attorneys in Arizona — no better and
3 no worse. All attorneys deserve fairness and due process in disciplinary proceedings
4 without the addition of a negative media campaign by these Bar Officials.

5 What he has stated is that, as a prosecutor, he has a wide degree of
6 prosecutorial discretion. In State v White, 194 Ariz. 344, 354, 982 P.2d 819, 829,
7 (1999), this court held that “[i]t would be inappropriate for this court to encroach on
8 reasonable prosecutorial discretion, absent a clear indication of misconduct.” Mr.
9 Thomas has the utmost respect for this Court and the rules it promulgates and does
10 not seek to be bound by any other standard than that articulated by this Court. He
11 certainly has never claimed that he should be immune from disciplinary investigation
12 where there is actual evidence indicating “a clear indication of misconduct.” Bar
13 Counsel, however, has not acted upon any clear indication of professional
14 misconduct, but rather has relied on unverified information in media articles and/or
15 has substituted his own discretion for that of the County Attorney or his deputies.

16 **3. Bar Officials Admit Interference With Political Speech**

17 In its Response (at 33)(emphasis added), the Bar concedes that it should no
18 longer continue the investigation of County Attorney Thomas – even if this Court
19 declines to intervene:

20 These are unusual circumstances: an elected official, running for re-
21 election, under investigation **in part for conduct that arguably**
22 **involves political speech**, and the State Bar having taken public

23 who are “immune from any charge or discipline complaint alleging ethical misconduct
24 that arises out of an administrative act performed in the exercise of discretion under
25 the authority granted under these rules” include (a) the Board of Governors of the
26 Bar, and (b) Bar Counsel or attorneys acting under the direction or authority of such
persons. See Ariz. Sup. Ct. Rule 48(m).

1 positions on the same subject matter. Therefore, if this Court declines
2 to exercise jurisdiction, as the State Bar believes it should, the State Bar
3 will appoint an independent investigator and probable cause panelist to
4 assume the investigation of Mr. Thomas in the remaining discipline
5 matters.

6 The unusual circumstance here is that the Bar continues to investigate an
7 exercise of acknowledged political speech. As pointed out in the Petition, attorney
8 speech concerning a court's actions in a case is political speech protected by the
9 Fourteenth Amendment. Shelley v. Kramer, 334 U.S. 1, 14 (1948).

10 **4. Bar Officials Intimidate Witness**

11 “Maybe he shouldn’t have filed the affidavit.” State Bar President McAuliffe’s
12 statement to a Valley newspaper was intended as an answer to media queries about
13 why the Board of Governors (BOG) did not reappoint incumbent Ernest Calderón to
14 the ABA House of Delegates. See East Valley Tribune, May 31, 2008, p. A-2 (Exhibit
15 9.) The statement was made less than a week after the Maricopa County Attorney’s
16 Office filed its petition that included Ernest Calderón’s affidavit summarizing his
17 opinion about the merits of the various so-called Bar complaints filed against County
18 Attorney Thomas and several of his prosecutors. (Petition Appendix A-2).

19 Ernest Calderón did nothing more than express his opinion about the merits of
20 certain Bar investigations. As a result, Mr. Calderón was denied an opportunity to
21 serve as Arizona’s representative to the ABA House of Delegates. Mr. Calderon told
22 a reporter that he believed the decision not to reappoint him was made solely because
23 of his work for Thomas. (Exhibit 9.) The message from these Bar Officials and the
24 BOG was clear – anyone who sides with County Attorney Thomas in the pending Bar
25 investigations may suffer consequences.

26 Therefore, in addition to other remedies, this Court is asked to intervene not
only to ensure the integrity of the disciplinary process, but also to protect attorneys

1 who have taken positions contrary to these Bar Officials. In fact, should this Court
2 choose to select a mutually agreed upon investigator rather than dismissing the
3 remaining matters, that investigator should also have the protection of this Court. Bar
4 Counsel Van Wyck acknowledged the need for protection when he was asked for a
5 timetable at his meeting with Respondent's counsel on May 15, 2008, "No, I can't,
6 'cause then I'll be getting political pressure from the other side." (Petition Appendix
7 A-12.)

8 **B. Bar's Failure to Support Claims or Close Files**

9 One of the key rules designed not only to expedite the processing of
10 unfounded grievances, but also to avoid unnecessary impact on innocent attorneys, is
11 Ariz. R. Sup. Ct. 54(b)(1)(B). That rule requires Bar Counsel to "close the matter if the
12 allegations would not constitute misconduct or incapacity under these rules, even if
13 found to be true." Another key rule is Ariz. R. Sup. Ct. 54(b)(3), which states that
14 "[a]fter conducting a screening investigation, if there is no probable cause to believe
15 that misconduct or incapacity under these rules exists, bar counsel may dismiss a
16 discipline proceeding by filing a notice of dismissal with the Bar."

17 Applying these two rules to File No. 07-1793, for example, one is hard-pressed
18 to understand how such a file can remain open against Mr. Thomas. Given that the
19 Bar was aware that Mr. Thomas had nothing to do with the New Times grievance,
20 and not citing any information to the contrary over the past five months, how does
21 the Bar justify not dismissing the grievance under rule 54(b)(1)(B) or 54(b)(3)? The
22 Bar cannot.

23 Even though the Response quotes Ariz. R. Sup. Ct. 54(b)(1)(D), it ignores the
24 Petition's charges that certain matters, on their face, did not indicate the existence of
25 professional misconduct and should have been closed immediately without the
26

1 necessity of a screening investigation. By ignoring the charge, the Response concedes
2 the need for closure.

3 At the same time, these Bar Officials failed to respond to the Petition's charges
4 that none of the grievances should have survived a screening investigation because
5 there was no evidence that Mr. Thomas engaged in any professional misconduct. The
6 Response concedes the meritlessness of the investigations by failing to contradict the
7 expert affidavits (Zlaket, Calderón, LaSota, Hazard, Schwartz, Jarvis). To this date,
8 some seven and one-half months after these cases were opened, these Bar Officials
9 have yet to demonstrate any professional misconduct by Mr. Thomas. Certainly, none
10 is set forth in the Bar's Response.

11
12 **V. THE INFORMATION SOUGHT AND DISCLOSED TO DATE IS**
13 **PROTECTED BY THE EXECUTIVE, WORK-PRODUCT, AND**
14 **ATTORNEY CLIENT PRIVILEGES**

15 Significantly, these Bar Officials apparently no longer challenge Petitioners'
16 standing to claim a privilege with respect to matters disclosed in the two Wilenchik
17 files. See Petition at 46-47. This purported lack of standing, however, was the exact
18 (flawed) basis upon which the protective order motions relating to the Wilenchik files
19 were denied. (Petition Appendix A-66). Furthermore, the Response makes no
20 reference to or argument regarding the work product privilege. Presumably, these Bar
21 Officials concede that, even were this court to accept their argument on the
22 application of the attorney-client privilege, the work product doctrine justified the
23 relief requested. Finally, while the Response makes a passing reference to the
24 executive or deliberative process privilege, it does not provide any substantive analysis
25 as to why communications detailing the mental processes of a high-ranking, elected
26 prosecutor should be open for wholesale dissemination to the general public,

1 including criminal defense counsel and other civil adversaries – especially when a basis
2 for the investigation is lacking.

3 **A. The Attorney-Client Privilege Applies to Some Requested**
4 **Communications**

5 The Response contends that Thomas claims to be both the attorney and the
6 client for purposes of claiming the attorney-client privilege. It supports that claim by
7 erroneously combining attorney-client communications, deliberative process
8 communications and work product together and applying the attorney-client privilege
9 doctrine to all of them. The result makes no sense. In some matters, County
10 Attorney Thomas took on the role of government client, while in others he acted as
11 an executive communicating with his advisors. In still other situations, his
12 communications were part of prosecutorial work product.

13 Thomas is not and has never claimed to be both attorney and client for
14 purposes of asserting the attorney-client privilege in these proceedings. State v.
15 McBride, 773 So. 2d 849 (La. Ct. App. 2000), relied upon by Bar Counsel, did not
16 involve the privileged communications between a prosecutor and a contract attorney
17 hired to advise the prosecutor’s office on isolated legal matters. Rather, in McBride,
18 the prosecutors sought an attorney-client privilege for communications they had with
19 a criminal defendant. The court was therefore careful to limit the breadth of its
20 holding — “The persons who communicated in this situation were the prosecutors
21 and Defendant, with the prosecutors representing the State. Thus, there were no
22 protected communications between the State and the prosecutors. Accordingly, the
23 trial court erred in finding an attorney-client privilege existed.” Id. at 856. McBride
24 negates rather than supports the Bar Officials’ position here. The court in McBride
25 made it a point to recognize that the State may indeed have an attorney-client
26

1 privilege in communications between representatives of the State and its government
2 attorneys. Id. at 856.

3 The Response efforts (at 47) to distinguish State ex rel. Schneider, 212 Ariz.
4 292, 130 P.3d 991 (Ct. App. 2006) are equally unavailing. Schneider involved the
5 claimed attorney-client privilege of members of the Glendale City Council against
6 disclosure of communications they considered confidential by a former city attorney.
7 There the subject communications between governmental officials and government
8 attorneys were held to be protected by the attorney-client privilege. Id. at 298, 130
9 P.3d at 997 (citations omitted) (emphasis added). See also DES v. O'Neil, 183 Ariz.
10 196, 198 P.2d 1226, 1228 (Ct. App. 1995) (“We therefore conclude that because the
11 relationship between DES and the Arizona Attorney General is one of attorney and
12 client, their communications are protected by the attorney-client privilege.”).

13 **B. Protective Orders, as Bar Counsel Views Them, Are No Solution**

14 County Attorney Thomas, the MCAO, and Dennis Wilenchik all requested
15 protective orders pursuant to Rule 70(g) at Bar Counsel’s prompting. Bar Counsel
16 suggested filing motions for protective orders as a way to protect privileged or
17 confidential information. In responding to those motions, however, Bar Counsel
18 consistently took the position that the confidential nature of the information was not
19 grounds to grant a protective order. The panelist agreed with him.

20 Moreover, in some communications with respondents, Bar Counsel threatened
21 discipline if the confidential information was not provided promptly, knowing that no
22 protective order was in place and that the complainants would be sent the
23 information. Mr. Van Wyck routinely instructs respondents that a copy of anything
24 provided to the Bar may be also provided to the complainant pursuant to Ariz .R.
25 Sup.Ct. 52(b)(1). (See, e.g., Exhibit 10.) No rule prohibits dissemination by the
26 complainant and no sanction for such dissemination is mentioned in the rules.

1 Inexplicably, in a May 15, 2008 letter to Respondent’s counsel, Mr. Van Wyck
2 demanded confidential information in the New Times investigation and claimed, “The
3 investigation is confidential and the Probable Cause Panelist has already ordered that
4 such is subject to a protective order. Refusal to provide the information may be
5 considered as a failure to cooperate and could result in a separate charge.” (Exhibit
6 1.) Respondent’s counsel are not assured that any such protective order is in place.
7 There is no written assurance that the confidential information will not be released to
8 the attorney for the *New Times* either before or after this appellate action.

9 Confidential communications, whether subject to the attorney-client privilege,
10 the deliberative process or executive privilege, or the work product doctrine, may not
11 be provided without a specific express legal exception or court order. Bar Counsel
12 has not provided a sufficient legal basis for allowing an exception to confidentiality
13 and protective orders cannot be a substitute for express legal exceptions. Therefore,
14 without this Court’s intervention, the three vital privileges at issue here will be
15 nullified and Arizona will be the only state in the nation in which Bar Counsel can
16 pierce these privileges at will.

17 **C. The Motions for Protective Orders Were Broad Because Bar Counsel**
18 **Refused to Meet and Confer Beforehand**

19 The Response (at 45-48) defends the probable cause panelist’s rulings by
20 arguing that the “breathtaking scope” justified summary denial. However, the
21 breadth of the privilege request was due in large part to the refusal of Bar Counsel to
22 meet and confer regarding the identification of specific communications and
23 documents at issue. (Appendix A-61, p.7 and A-62, p. 2; see also Exhibit 11).

24 Thus, when faced with an outright refusal to cooperate on these issues,
25 Petitioners had no choice but to assert their privileges as broadly as they reasonably
26 could. Rather than ordering the parties to meet and confer in an effort to narrow the

1 scope of the dispute as requested, the probable cause panelist simply denied the
2 motions.

3 **VI. CONCLUSION**

4 Reiterating the request of the Petition, and for all the reasons stated herein,
5 Petitioners request that this court grant the relief requested in the Petition, and:

- 6 • direct the immediate termination of all Thomas/MCAO prosecutor Bar
7 investigations or, at a minimum, assign them to a mutually acceptable
8 independent investigator to promptly bring them to a proper conclusion;
 - 9 • direct the Bar to return the privileged Wilenchik material to MCAO;
 - 10 • direct the Bar to cease attempts to obtain privileged material;
 - 11 • direct the sealing of the Bar files containing privileged information until this
12 court completes the investigation and can provide for appropriate protections;
 - 13 • appoint a special master to investigate the conduct of these Bar Officials in
14 these matters;
 - 15 • enter protective orders prohibiting these Bar Officials from intimidation or
16 unfair treatment of attorneys or investigators who have been appointed,
17 retained as experts, or who have provided information in preparation of this
18 Special Action; and
 - 19 • grant such other relief as this court deems just and proper.
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CERTIFICATE OF COMPLIANCE

The foregoing Reply in Support of Petition for Special Action is in compliance with rules 6(c) of the Arizona Rules of Civil Appellate Procedure and rule 7(e) of the Arizona Rules of Procedure for Special Actions, in that it is double spaced with a proportionate spaced typeface of Garamond, 14 point, and has a word count (exclusive of items as described in appeal rule 14(b)) of 4764 words.