BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA AND A NON-MEMBER OF THE STATE BAR OF ARIZONA **ANDREW D. PARKER,** **Bar No. 028314** **and** **KURT B. OLSEN,** **Respondents.**	**PDJ 2024-9002 (Parker)** **PDJ 2024-9003 (Olsen)** **REPORT AND ORDER OF DISMISSAL** (State Bar Nos. 22-2766, 23-0051) **FILED AUGUST 26, 2024**

At issue in these proceedings is the Complaint the State Bar of Arizona filed against Respondents Andrew D. Parker and Kurt B. Olsen on January 11, 2024.[1] The Complaint alleges Respondents violated the following ethical rules ("ERs") found in Rule 42 of the Rules of the Supreme Court of Arizona: ER 1.1 (competence), ER 1.3 (diligence), ER 3.1 (meritorious claims and contentions), ER 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and ER 8.4(d) (conduct prejudicial to the administration of justice).

An evidentiary hearing was held on June 25, June 26, and June 27, 2024, before a hearing panel comprised of Presiding Disciplinary Judge ("PDJ") Margaret H. Downie, attorney member Ralph J. Wexler, and public member Randall Clark. The State Bar was

[1] The material allegations against Mr. Parker and Mr. Olsen are the same. When necessary to distinguish between them, the hearing panel does so. Otherwise, Mr. Parker and Mr. Olsen are discussed collectively, using the term, "Respondents."

represented by Hunter F. Perlmeter and Kelly A. Goldstein. Mr. Parker was present and was represented by Donald Wilson, Jr. and Brian Holohan. Mr. Olsen appeared on his own behalf.

The State Bar called two witnesses during its case-in-chief: Mr. Parker and Mr. Olsen. During their case-in-chief, Respondents testified again and also called the following witnesses:

- Joseph Pull, Esq.
- Benjamin R. Cotton
- Robert McGuire, Esq.
- Clay Parikh

At the conclusion of the hearing, the PDJ asked the parties to submit proposed findings of fact and conclusions of law, which they did on July 30, 2024.[2]

For the following reasons, the hearing panel concludes that the State Bar did not prove the charged ethical violations by clear and convincing evidence and therefore dismisses the Complaint against Mr. Parker and Mr. Olsen.

FINDINGS OF FACT[3]

1. Mr. Parker was admitted to the State Bar of Arizona on January 13, 2011, and, as relevant to these proceedings, is a member of the bar of the United States District

[2] Mr. Olsen joined in the proposed findings of fact and conclusions of law that Mr. Parker submitted and offered additional proposed facts on his own behalf.

[3] Although the hearing panel appreciates the time and effort the parties devoted to preparation of their proposed findings of fact, the degree of detail they offer is not replicated in this decision. Findings of fact need only be "comprehensive enough to provide a basis for the decision." *Miller v. Bd. of Supervisors of Pinal Co.*, 175 Ariz. 296, 299 (1993).

Court for the District of Arizona. Mr. Parker graduated from law school in 1988 and was admitted to practice in Minnesota that same year. His law firm -- Parker Daniels Kibort -- is located in Minneapolis, Minnesota. The majority of Mr. Parker's law practice consists of federal court litigation.

2. Mr. Olsen is not a member of the State Bar of Arizona but is admitted to practice law in Maryland and the District of Columbia. He graduated from law school in 1992 and has maintained a civil litigation practice since that time -- initially focusing on product liability defense, securities litigation, and labor/employment law. More recently, Mr. Olsen's Washington, D.C.-based practice has consisted primarily of commercial and complex civil litigation. Mr. Olsen was admitted *pro hac vice* in the federal court proceedings at issue.

3. The alleged ethical violations arise out of Respondents' representation of the plaintiffs in civil litigation filed in the United States District Court for the District of Arizona known as *Lake v. Hobbs*. The State Bar's allegations are based on a First Amended Complaint ("FAC") and a Motion for Preliminary Injunction ("MPI") Respondents filed in that litigation.

4. Both Mr. Parker and Mr. Olsen were involved throughout the *Lake v. Hobbs* representation, though their activities differed in some respects. Generally speaking, Mr. Olsen focused on the evidence supporting plaintiffs' substantive claims and worked closely with the expert witnesses. Mr. Parker and his team of lawyers handled the initial drafting of court filings, including the FAC and MPI. Both Mr. Parker and Mr. Olsen appear as counsel of record on the operative pleadings.

ALLEGATIONS BASED ON THE FIRST AMENDED COMPLAINT

5. Respondents initiated the *Lake v. Hobbs* litigation on April 22, 2022, and filed the FAC on May 4, 2022. The named plaintiffs were then-gubernatorial candidate Kari Lake and then-Secretary of State candidate Mark Finchem. The defendants were then-Secretary of State Kathleen Hobbs, members of the Maricopa County Board of Supervisors, and members of the Pima County Board of Supervisors.

6. Before filing *Lake v. Hobbs*, Mr. Parker's law firm devoted more than 200 hours of attorney time to legal and factual research, expert consultations, and preparation of the Complaint.

7. The *Lake v. Hobbs* plaintiffs sought to prohibit the prospective use of electronic voting machines in Arizona based on constitutional and statutory grounds. The FAC described their cause of action as follows:

> This is a civil rights action for declaratory and injunctive relief to prohibit the use of electronic voting machines in the State of Arizona in the upcoming 2022 Midterm Election, slated to be held on November 8, 2022 (the "Midterm Election"), unless and until the electronic voting system is made open to the public and subjected to scientific analysis by objective experts to determine whether it is secure from manipulation or intrusion. The machine companies have consistently refused to do this.
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> Plaintiffs have a constitutional and statutory right to have their ballots, and all ballots cast together with theirs, counted accurately and transparently, so that only legal votes determine the winners of each office contested in the Midterm Election. Electronic voting machines cannot be deemed reliably secure and do not meet the constitutional and statutory mandates to guarantee a free and fair election. The use of untested and unverified electronic voting machines violates the rights of Plaintiffs and their fellow voters and office seekers, and it undermines public confidence in the validity of election results. Just as the government cannot insist on "trust me," so too, private companies that perform governmental functions, such as vote counting cannot be trusted without verification.

* * * *

> It is important to note that this Complaint is not an attempt to undo the past. Most specifically, it is not about undoing the 2020 presidential election. It is only about the future – about upcoming elections that will employ voting machines designed and run by private companies, performing a crucial governmental function, that refuse to disclose their software and system components and subject them to neutral expert evaluation. It raises the profound constitutional issue: can government avoid its obligation of democratic transparency and accountability by delegating a critical governmental function to private companies?

8. The State Bar is not contending Mr. Parker or Mr. Olsen violated the Arizona Rules of Professional Conduct by alleging in *Lake v. Hobbs* that Arizona's electronic voting systems are susceptible to intrusion and manipulation. The integrity of those systems is not an issue that is addressed or resolved in these proceedings.

9. Paragraphs 23-36 of the State Bar's Complaint are based on the FAC and allege ethical misconduct in four specific contexts: (1) "Comparison to and Reliance on *Curling v. Raffensperger*;" (2) "Arizona Voting Machines' Connection to the Internet;" (3) "Article III Standing;" and (4) "Testing of Arizona's Voting Machines." The hearing panel addresses each topic in turn.

Comparison to and Reliance on *Curling v. Raffensperger*

10. At various points, the FAC discusses the United States District Court for the Northern District of Georgia case of *Curling v. Raffensperger* ("*Curling*"). Distilled, the State Bar' contention is that *Curling* is so dissimilar from the facts and issues presented in *Lake v. Hobbs* that Respondents' inclusion of it in the FAC violated the ethical rules. More specifically, the State Bar's Complaint alleges:

The FAC does not allege or acknowledge material aspects of the *Curling* case that were distinguishable from or detrimental to Respondents' clients' claims, including that:

a. The *Curling* court denied the request to enjoin the use of Georgia's electronic voting systems;

b. The injunctive relief the *Curling* plaintiffs sought addressed aspects of the Georgia voting systems that do not exist in Arizona, or were not challenged in the FAC;

c. Unlike Respondents' clients, the *Curling* plaintiffs included voters who suffered actual harm in past elections due to the challenged Georgia voting systems;

d. After the challenged Georgia systems were tested and problems were identified, Georgia officials failed to address the problems; and

e. Arizona had taken steps and followed recommendations made to address the vulnerabilities identified in the Georgia voting systems that also could have impacted the Arizona voting systems.

11. Lawyers are not ethically prohibited from citing and relying on cases or authorities that are distinguishable in some respects. Indeed, our Rules of Professional Conduct acknowledge that attorneys "are not required to present an impartial exposition of the law" and should "present the client's case with persuasive force." ER 3.3, cmt 2. What a lawyer may not ethically do is knowingly make a false statement of fact or law to a tribunal (ER 3.3(a)(1)), assert an issue without a good faith basis in law and fact for doing so (ER 3.1), or fail to disclose "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel" (ER 3.3(a)(2)). The State Bar alleges Respondents violated ER 3.1 and ER 8.4(c) (knowing dishonesty, fraud, deceit, or misrepresentation), but not ER 3.3.

12. The State Bar offers no authority for the proposition that, to comport with ethical requirements and/or applicable rules of civil procedure, a Complaint must set forth not only the plaintiff's claims and theories, but also information that arguably undercuts or contradicts those claims and theories. *Cf. Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986) (lawyers are not required to, "first step into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable."). As the Ninth Circuit observed in *Golden Eagle*, "It is not the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client." *Id*.

13. Mr. Parker, Mr. Olsen, Joseph Pull (an attorney with Mr. Parker's firm), and Seattle lawyer Robert McGuire (one of the lead attorneys in *Curling*) testified at the disciplinary hearing about *Curling* and why, notwithstanding acknowledged differences, the Georgia litigation was appropriately discussed in the FAC. In both cases, the plaintiffs were challenging the constitutionality of state governmental entities' use of electronic voting systems based on concerns about unauthorized manipulation, resulting in incorrect vote tallies. Mr. Parker testified as follows about one aspect of Respondents' reliance on *Curling*:

> *Curling* was an example of plaintiffs suing a governing authority over the use of electronic voting equipment and making it past a motion to dismiss and a summary judgment motion. So the success of those plaintiffs showed that under the right circumstances, a claim like that could get traction with a federal court and a federal judge and you could get a hearing on your evidence.

Mr. Parker further opined that it would have constituted malpractice not to have cited *Curling* -- the most analogous case to *Lake v. Hobbs* -- notwithstanding differences in the two matters.

14. Respondents' experts believed that Arizona's voting systems were susceptible to the same infirmities identified in *Curling*. Two of those experts -- Benjamin Cotton and Clay Parikh – testified to that effect at the disciplinary hearing. The State Bar presented no controverting evidence.

15. The hearing evidence established that Respondents considered the differences between the Georgia and Arizona systems, as well as rulings in the *Curling* case that the defense would likely seize upon, but concluded those matters did not affect the principles for which they were citing *Curling* in the FAC. The State Bar did not prove that Respondents' beliefs were objectively unreasonable or lacking in good faith.

Arizona Voting Machines' Connection to the Internet

16. The State Bar's Complaint includes only one paragraph addressing the issue it identifies as, "Arizona Voting Machines' Connection to the Internet." That paragraph alleges:

> Respondents alleged [in the FAC] that "[a]ll electronic voting machines can be connected to the internet or cellular networks," without acknowledging in the FAC contrary findings by a Special Master that Respondents knew about – that an air-gapped system used in Maricopa County "provides the necessary isolation from the public Internet, and in fact is in a self-contained environment . . . and that election devices cannot connect to the public Internet."

17. Notably, the Complaint does *not* allege Respondents lacked a good faith basis for alleging that all electronic voting machines – including those used in Arizona --

can be connected to the internet. The State Bar instead asserts Respondents acted unethically by not specifically stating -- in the FAC -- that a "special master" retained to examine aspects of Maricopa County's 2020 electronic voting system had concluded that Maricopa County's equipment could *not* be connected to the internet.

18. The special master's conclusions were not binding legal authority in *Lake v. Hobbs*, and Respondents' experts strongly disagreed with them.

19. As with the discussion of *Curling*, *supra*, the State Bar cites no authority for the proposition that Respondents were required to disclose *in the FAC* facts and evidence the defendants would likely rely on in opposing their claims. Respondents provided the special master's report with their MPI-related briefing and explained how and why their experts disagreed with its conclusions about connectivity to the internet.

Article III Standing

20. After extensive motion practice, the District Court ruled that the *Lake v. Hobbs* plaintiffs lacked standing and granted the defendants' motions to dismiss the FAC. The United States Court of Appeals for the Ninth Circuit affirmed that decision.[4]

21. The State Bar's Complaint alleges that, "Respondents' allegations and arguments regarding the plaintiffs' standing were not competent, diligent, or made in good faith."

[4] In later proceedings, the District Court imposed monetary sanctions against Respondents and their respective law firms, based on violations of Rule 11, Fed. R. Civ. P., and 28 U.S.C. § 1927. An appeal of that decision is pending. For the reasons discussed in the Conclusions of Law section, *infra*, the hearing panel does not rely on the District Court's sanctions decision in reaching its conclusions.

22. A legal argument can be so patently lacking in merit that an attorney disciplinary hearing panel has no need for expert testimony to conclude that it crosses the line into unethical conduct. This is not such a case. As Mr. Parker observes, "Federal court standing is a technical and complex legal issue upon which experienced specialists and practitioners reach contrary conclusions."[5]

23. Respondents have no burden of proof in these proceedings and could have chosen not to present any testimony or documentary evidence after the State Bar rested. Instead, they presented substantial evidence in support of their belief that the *Lake v. Hobbs* plaintiffs had standing to bring their claims in federal court.

24. Mr. Parker had knowledge about and prior experience with Article III standing and constitutional claims. Respondents knew that standing would be a material challenge for the plaintiffs to overcome. They and their team performed extensive legal research, consulted recognized experts in the field, and internally debated the arguments for and against standing. Mr. McGuire was one of those experts, and he agreed with Respondents that the *Lake v. Hobbs* plaintiffs possessed the requisite standing. At the disciplinary hearing, Mr. McGuire explained the bases for that opinion in some depth. His testimony was particularly helpful to the hearing panel due to its seeming objectivity and based on his extensive experience litigating Article III standing.

[5] Although the record includes voluminous exhibits consisting of the parties' filings in *Lake v. Hobbs*, Bar Counsel acknowledged in opening statements that, "the substance of those briefs is not significant to the State Bar's case, including because the defendants' arguments do not establish that any of those arguments were correct."

25. The evidence adduced in these proceedings established that Respondents' standing arguments were at least "fairly debatable" or "long shots." *See Ariz. Republican Party v. Richer*, ___ Ariz. ___, 547 P.3d 356, 369-70 (2024) (lawyers are not subject to sanctions for asserting unsuccessful legal arguments that are "fairly debatable" or "long shots").

Testing of Arizona's Voting Machines

26. The State Bar alleges Respondents engaged in ethical misconduct by including and/or omitting certain information in the FAC about Arizona's testing of its electronic voting systems. Specifically, paragraphs 31-34 of the State Bar's Complaint allege:

> 31. In paragraph 20 of the FAC, Respondents alleged: "Defendant Hobbs's certification of the Dominion Democracy Suite 5.5b voting system, as well as its component parts, was improper, absent objective evaluation."
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> 32. In paragraph 57 of the FAC, Respondents alleged: "Arizona intends to rely on electronic voting systems to record some votes and to tabulate *all* votes cast in the State of Arizona in the 2022 Midterm Election, without disclosing the systems and subjecting them to neutral, expert analysis."
>
> 33. Respondents knew that testing of Arizona's voting systems is statutorily required, including, but not limited to, a requirement that the "machines or devices [be] tested and approved by a laboratory that is accredited pursuant to the [H]elp America [V]ote [A]ct of 2022." A.R.S. § 16-442(B).
>
> 34. The FAC contains no allegations regarding the statutorily required testing of Arizona's voting systems.

27. Respondents presented evidence at the disciplinary hearing explaining their belief that, although statutorily required testing of Arizona's equipment had

occurred, that testing was not objective, neutral, or expert. Cybersecurity expert Clay Parikh explained why, in his opinion and experience, the testing Arizona performed pursuant to its statutory duties was not competent (i.e., "expert"), neutral, or objective. The State Bar offered no controverting evidence. As for paragraphs 33 and 34 of the State Bar's Complaint, Respondents do not deny knowing that testing of Arizona's voting systems is statutorily required, and the FAC cites several relevant Arizona statutes.

28. Whether plaintiffs' claims about deficiencies in Arizona's testing were substantively correct is not an issue to be decided in these proceedings. The question before the hearing panel is whether Respondents had a good faith basis for including the challenged statements in the FAC. The hearing evidence established that they did.

ALLEGATIONS BASED ON MPI

29. Before undertaking *Lake v. Hobbs*, Mr. Parker had experience litigating requests for injunctive relief.

30. Respondents and their team began working on the MPI before the FAC was filed. They expended more than 200 hours on the MPI and supporting expert declarations.

31. On June 8, 2022, Respondents lodged the MPI with the District Court and sought leave to exceed the applicable page limitation. The court granted their request.

32. The MPI asked the court to "enter a preliminary injunction barring Defendants from using computerized equipment to administer the collection, storage, counting, and tabulation of votes in any election until such time that the propriety of a permanent injunction is determined."

33. Briefing, oral argument, and an evidentiary hearing ensued regarding the MPI. Ultimately, the District Court dismissed the MPI as moot after it granted defendants' motions to dismiss the FAC. No court has adjudicated the substantive merits of the MPI.

34. As it relates to the MPI, the State Bar's Complaint alleges Respondents: (1) lacked a good faith basis for seeking the requested injunctive relief "less than five months before the 2022 Midterm Election;" (2) "had no good faith basis to assert that the injunctive relief the plaintiffs were requesting would 'cause little, if any, harm to the Defendants[;]'" and (3) failed to cite *Garcia v. Google*, 786 F.3d 733 (9th Cir. 2015), or address the legal standard articulated in *Garcia* for mandatory injunctive relief.

Timing of MPI

35. The State Bar alleges Respondents lacked a good faith basis for seeking the requested injunctive relief "less than five months before the 2022 Midterm Election." Extensive hearing time and briefing has been devoted to discussion of the United States Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), which articulates considerations relevant to the timing of requests for injunctive relief in election cases.

36. Respondents and their team engaged in substantial legal research and discussion regarding the so-called "*Purcell* issue" and concluded, "the MPI was being filed more than four months prior to the immediately affected election, and did not affect the location of polling places, voter identity requirements or other matters that case law has identified as particularly problematic under *Purcell*."

37. At the disciplinary hearing, Mr. Pull – the primary drafter of the MPI -- testified about *Purcell* and explained why the attorneys working on *Lake v. Hobbs* did not view that decision as fatal to the plaintiffs' request for injunctive relief. He stated:

> My research from reading *Purcell* itself was that *Purcell* sets a principle or a guideline for the federal courts. And that's not unusual for Supreme Court decisions, they often paint in broad strokes and let the district and the circuit courts kind of work out the details later.
>
> But as I reviewed cases from the lower courts applying the *Purcell* principle, I discovered that different judges read it very differently, and you could find case law pointing a lot of different directions. And the broad principle, you know, don't tell voters to go to a different place or do something radically different right before an election, was clear enough. But how that applied to different regulations relating to elections was not clear.
>
> And there was authority that could support a lot of different interpretations about what kind of relief would be acceptable under *Purcell* and how close to an election you could enter different kinds of relief, without running afoul of the principle the Supreme Court was concerned about there.

Mr. McGuire offered similar testimony, observing that *Purcell* articulates no bright-line deadline for requesting injunctive relief in election cases and that evaluating the timing of a particular request is intensely fact-dependent.

38. The State Bar's allegation that the MPI ran afoul of ER 3.1 is based, in part, on *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020) ("*Hobbs*") – a decision Respondents acknowledge as binding precedent. Respondents cited *Hobbs* in the MPI and stated:

> The principle that a federal court should not cause confusion among voters by enjoining state election laws immediately before an election, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), does not apply in these circumstances. First, the 2022 Election is more than four months away, not bare weeks, as in *Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086-87 (9th Cir. 2020) and the cases cited therein. . . . The 2022 Election is upcoming, but not so

imminent that inadequate time remains to allow for the relief sought by Plaintiffs.

39. Respondents knew that the *Lake v. Hobbs* defendants would rely on *Hobbs* because the timing of the requests for injunctive relief and the relief sought in the two cases were similar. Respondents believed, though, that *Hobbs* could support their position because the District Court in *Hobbs* granted injunctive relief in September -- in advance of a November election, even though the Ninth Circuit later stayed that decision pending appeal. According to Mr. Parker, the fact that a federal judge had issued an injunction two months before an election offered a good faith basis for Respondents to believe that a request made more than four months before an election might not be rejected on *Purcell* grounds, particularly if the District Court acted quickly. Mr. Pull offered similar testimony and opined that the differing views of the District Court and the Ninth Circuit in *Hobbs* "was an example of the ambiguity of the *Purcell* principle."

40. The hearing panel has no expertise regarding the timing of requests for injunctive relief in election cases, and the State Bar offered no expert testimony on this point. Although the hearing panel is left with the impression that injunctive relief in *Lake v. Hobbs* was a long shot due to the timing of the request, the hearing evidence fell short of establishing by clear and convincing evidence that Respondents acted unethically by filing the MPI when they did.

Assertions About Harm to Defendants

41. The State Bar alleges Respondents "had no good faith basis to assert that the injunctive relief the plaintiffs were requesting would 'cause little, if any, harm to the

Defendants.'" The language the State Bar cites appears in the MPI, under the heading, "The Balance of Equities Favors an Injunction." The full text of Respondents' argument reads:

> The balance of equities favors entering the injunction sought by Plaintiffs. It will cause little, if any, harm to the Defendants, because the system currently intended to be used already requires the creation of paper ballots for each voter, and the counting of the paper ballots by hand at 2% of precincts. *See* A.R.S. § 16-602(B). By Arizona law, the Defendants are already able to carry out the relief sought by Plaintiffs. The requested injunction would merely require the use of hand counting for all voters and all contests.
>
> In contrast, failing to enter the injunction and permitting use of the currently intended system would inflict immeasurable harm. In addition to the deprivation of Plaintiffs' constitutional rights, the true election results would never be known with certainty, casting a pall of illegitimacy over the subsequent official acts of the winning candidates. If the defining feature of self-government is the selection of governing officials by majority vote, then conducting an "election" process in which it is not and *cannot* be confidently known which candidate actually received the majority vote means intentionally casting aside self-government. That enormous harm would be felt by all persons, whether citizens, voter, or neither, because it would bring into disrepute the governance of the public authorities. The resulting loss of legitimacy and increase in political strife would be felt by all.

42. Mr. Parker and Mr. Pull testified that the point they were trying to convey was that the constitutional importance of correct election results substantially outweighed any administrative costs that might befall the defendants. According to Mr. Parker, the relative harm stemming from the asserted constitutional violation was "far and away more weighty" than defendants' cost-related concerns. Respondents also believed the defendants were significantly overstating the burden they would actually suffer if injunctive relief were granted. Finally, Mr. Parker proffered federal case law that

led him to believe that the cost of complying with constitutional requirements is not a cognizable legal "harm" suffered by a state or local government.

43. Read in isolation, the assertion that the requested injunctive relief would cause "little, if any, harm to the Defendants" might be viewed as hyperbolic or even disingenuous. But when the entirety of the MPI argument is considered, along with the hearing evidence, the hearing panel cannot find by clear and convincing evidence that Respondents violated ER 3.1.

Garcia v. Google

44. The State Bar alleges Respondents acted unethically by failing to cite *Garcia v. Google*, 786 F.3d 733 (9th Cir. 2015), in the MPI or address the legal standard articulated in *Garcia* for mandatory injunctive relief.[6]

45. Respondents presented testimony at the disciplinary hearing explaining their decision to cite *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), rather than *Garcia*. Mr. Pull testified that: (1) *Hernandez* was a more recent decision by the Ninth Circuit; (2) *Hernandez* involved plaintiffs who were asserting constitutional claims and seeking injunctive relief that paralleled the claims in *Lake v. Hobbs*; (3) the court in *Hernandez* granted injunctive relief, whereas the court in *Garcia* did not; and (4) *Garcia* did not involve constitutional claims. The record (and common sense) support Mr. Parker's

[6] Respondents and the State Bar dispute whether the *Lake v. Hobbs* plaintiffs were seeking mandatory injunctive relief or a prohibitory injunction. The hearing panel need not resolve this issue to decide the relevant ethical issues. We note, however, that Mr. Parker and Mr. Pull offered knowledgeable, credible testimony about this issue at the disciplinary hearing, and no controverting testimony was presented.

pragmatic observation that, "A competent advocate seeking to persuade a district court to enter a preliminary injunction would gain more benefit from citing a case in which an injunction was granted than a case in which an injunction was denied."

46. The State Bar does not allege Respondents misstated the holding in *Hernandez* but rather contends *Garcia* was the more appropriate citation. Respondents rebutted that allegation with credible testimony, and the State Bar did not prove by clear and convincing evidence that the failure to cite or discuss *Garcia* violated the Arizona Rules of Professional Conduct.

CONCLUSIONS OF LAW

1. The State Bar is required to prove the allegations in its Complaint by clear and convincing evidence. Rule 58(j)(3), Ariz. R. Sup. Ct. Respondents have no burden of proof and are not required to prove they did *not* violate the charged ethical rules.

2. The State Bar may not use the District Court's decisions in *Lake v. Hobbs* to establish the charged ethical violations, though "transcripts and other evidence" from those proceedings may be considered (and has been considered). *Hancock v. O'Neil,* 253 Ariz. 509, 514 (2022).

3. Although *Hancock* cautions against admitting collateral court orders "finding improper attorney conduct" in subsequent disciplinary proceedings, 253 Ariz. at 514, n.8, the PDJ denied Mr. Parker's motion in limine seeking to preclude admission of the District Court decisions, stating that the hearing panel would "determine the proper weight to accord this evidence." After further consideration, the hearing panel concludes that, consistent with *Hancock*, the federal court decisions should be given no

weight.[7] *Hancock* mandates that these disciplinary proceedings go forward on a clean slate, with the State Bar bearing the burden of independently proving its allegations of ethical misconduct by clear and convincing evidence. In a case such as this, that is a heavy burden.

4. The hearing panel is bound by decisions of the Arizona Supreme Court, including the relatively recent opinion issued in *Ariz. Republican Party v. Richer*, ___ Ariz. ___, 547 P.3d 356 (2024) ("*Richer*"). *Richer* holds that courts should not sanction lawyers "for bringing debatable, long-shot complaints" – particularly in the election context. *Id.* at 369-70. A claim "may lack winning merit without being sufficiently devoid of rational support to render it groundless." *Id.* There is no reason to believe our Supreme Court would apply a different or lesser standard in the context of attorney disciplinary proceedings.

5. The State Bar did not prove by clear and convincing evidence that Respondents violated ER 1.1's mandate to "provide competent representation to a client." Competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ER 1.1. The hearing evidence established that Respondents and the team they assembled collectively possessed the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the *Lake*

[7] In addition to the strictures imposed by *Hancock*, the record before the hearing panel is materially different from the record that was before the District Court. Moreover, in reaching its decisions, the District Court focused on several issues and arguments that the State Bar is not pursuing. And unlike in the federal court litigation, Respondents have no burden of proof in these proceedings.

v. Hobbs representation. Respondents anticipated and researched potentially problematic legal issues, devoted substantial time to the litigation, and engaged in extensive consultation with outside lawyers of demonstrated competence. *See* ER 1.1, cmt 2 (lawyers can provide competent representation in new or novel areas through study and through associating with lawyers "of established competence in the field in question.").

6. The State Bar did not prove by clear and convincing evidence that Respondents violated ER 1.3, which appears in Rule 42 under the heading, "Client-Lawyer Relationship," and requires lawyers to "act with reasonable diligence and promptness in representing a client." The comment to ER 1.3 focuses on the duty to "act with commitment and dedication to the interests of the client," the duty to avoid procrastination and unreasonable delay, and the duty to "carry through to conclusion all matters undertaken for a client." The hearing evidence demonstrated that Respondents acted with reasonable diligence and promptness in representing their clients. No undue delay, procrastination, or lack of commitment and dedication to the clients was established. Respondents' clients have voiced no concerns about their representation. Mr. Parker credibly testified: "I don't know of a case that I've worked on in 35 years where I spent more time assuring myself of what was going to be filed, because of the fact that I knew that there was controversy around the issues that this case involved."

7. The State Bar did not prove by clear and convincing evidence that Respondents violated ER 3.1, which states, in pertinent part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good faith basis in law and fact for doing so

> that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law.

Lawyers must "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith and nonfrivolous arguments in support of their clients' positions." ER 3.1, cmt 2. An action is not frivolous, "even though the lawyer believes that the client's position ultimately will not prevail." *Id.*

As noted *supra*, the State Bar called no witnesses at the disciplinary hearing other than Mr. Parker and Mr. Olsen. Not surprisingly, neither Respondent acknowledged a violation of ER 3.1 (or any other ethical rule). On the contrary, Respondents offered substantial testimony – both from themselves and others -- demonstrating that they had a good faith, nonfrivolous basis in law and fact for making the challenged statements and allegations. The fact that Respondents were unsuccessful on the merits of some of their claims does not compel a contrary conclusion.

8. The State Bar did not prove by clear and convincing evidence that Respondents knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of ER 8.4(c).

9. The State Bar did not prove by clear and convincing evidence that Respondents engaged in conduct prejudicial to the administration of justice, in violation of ER 8.4(d).

CONCLUSION

Retrospective scrutiny of any complex litigation may reveal some measure of imprecision, legal arguments fairly characterized as long shots, puffery in advocacy, and reliance on authorities that are distinguishable in some respects. Such is the case here. Based on the hearing evidence, the only somewhat close call relates to the MPI and ER 3.1. But for the hearing panel to conclude that objective attorneys would not have acted as Respondents did in that context, significantly more evidence would be necessary – particularly given the State Bar's high burden of proof, Respondents' strong substantive defense, and the safe harbor afforded fairly debatable and long shot claims advanced in litigation.

Based on the foregoing,

IT IS ORDERED dismissing the Complaint filed against Andrew D. Parker and Kurt B. Olsen on January 11, 2024.

DATED this 26th day of August, 2024.

/s/signature on file
Margaret H. Downie, Presiding Disciplinary Judge

/s/ signature on file
Ralph J. Wexler, Attorney Member

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