

David O. Cunanan, Bar No. 014382
Independent Bar Counsel
1501 West Washington, Suite 229
Phoenix, Arizona 85007
Telephone (602)340-7386
Email: dcunanan@courts.az.gov

Stephen F. McCarville, Bar No. 012273
Deputy Independent Bar Counsel
1501 West Washington, Ste. 229
Phoenix, Arizona 85007
Telephone (602) 340-7386
Email: SMcCarvi@courts.az.gov

Donald Wilson, Jr., Bar No. 005205
General Counsel
Broening, Oberg, Woods & Wilson, PC
2800 North Central, Ste. 1600
PHOENIX, AZ 85004
Telephone 602-271-7717
Email: dwj@bowwlaw.com
Respondent's Counsel

**BEFORE THE ATTORNEY DISCIPLINE
PROBABLE CAUSE COMMITTEE
OF THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,**

**ALEXANDER MICHAEL DEL REY
KOLODIN,
Bar No. 030826,**

Respondent.

State Bar File Nos. 22-2063; 20-2776

**AGREEMENT FOR DISCIPLINE BY
CONSENT**

The State Bar of Arizona, by and through undersigned Independent Bar Counsel and Deputy Independent Bar Counsel, and Respondent Alexander Michael Del Rey Kolodin, who is

represented by Don Wilson, submit their Agreement for Discipline by Consent under Rule 57(a), Ariz. R. Sup. Ct. (hereafter all references to rules are to the Arizona Rules of the Supreme Court unless stated otherwise). A Probable Cause Order has not been entered. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admissions and proposed form of discipline are approved.

Under Rule 53(b)(3), by letter transmitted by email on November 7, 2023, bar counsel notified Concerned Citizen Complainants Diane Post, Robert McWhirter, Roxana Bacon, Amelia Craig Cramer, Brendan Mahoney, Victor Aronow and Gail Natale in File No. 20-2776 and 22-2063, and Complainants Michael Teter/The 65 Project as a supplement in File No. 20-2776, of this agreement. Bar counsel notified Complainants they may file a written objections to the agreement with the State Bar within five (5) business days of bar counsel's notice.

Respondent conditionally admits his conduct violated Rule 42, ERs 3.1 and 8.4(d). Upon acceptance of this agreement, Respondent agrees to accept an Admonition with Probation the terms of which are stated below in "Sanctions." Respondent also agrees to pay the costs and expenses of the disciplinary proceeding within 30 days from the date of this order. If costs are not paid within the 30 days interest will accrue at the legal rate.¹ The State Bar's Statement of Costs and Expenses is attached as Exhibit A.

¹ Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

FILE NO. 20-2776

Overview of the Litigation

1. Respondent (and co-Respondents Christopher Viskovic and Sue Becker) filed two separate lawsuits challenging the 2020 election, CV2020-014083 (*Aguilera v Fontes*), and CV2020-014562 (*Aguilera/Drobina v Fontes*).
2. Respondent (and co-Respondents Sidney Powell, Howard Kleinhendler, Julia Haller, Emily Newman, Brandon Johnson and Lin Wood) filed *Bowyer v Ducey*, CV2020-2321 PHX-DJH. Each is addressed separately below.

Aguilera I (CV20-014083)

3. On Nov. 4, 2020, Respondent (and Respondents Viskovic and Becker) filed a Verified Complaint for a Special Action on behalf of Plaintiffs, Laurie Aguilera and Does I-X. Aguilera claimed she was given a sharpie to complete her ballot and the ink bled through causing her ballot to be rejected.
4. The next day, Respondent filed Plaintiffs' First Amended Verified Complaint² for a Special Action. "Plaintiffs asserted: "Under Arizona law tabulation machines must be certified to have perfect accuracy." (1.21AC).

² The Amended Complaint was only verified by plaintiff Aguilera

5. On November 6, 2020, the Secretary of State moved to file an amicus brief in the action advising the court of deadlines and “the crux of Plaintiffs’ claim – that the use of Sharpie brand markers at voting centers in Maricopa County somehow disenfranchised them and other voters – is patently false.”³
6. On November 7, 2020, Respondent filed Plaintiffs’ Notice of Dismissal.

Aguilera II (CV20-014562)

7. On November 12, 2020, Respondent filed a verified complaint in CV2020-014562 on behalf of Aguilera and Drobina.
8. Plaintiffs’ claims in the Verified Complaint again included:
 - a. “When voters follow the instructions of election officials, those tabulation machines are supposed to automatically scan and tabulate the ballots of election-day voters with perfect accuracy.” (3.11)⁴

³ She cited a Nov. 4, 2020 letter from the Maricopa County Board of Supervisors to the public stating “sharpies do not invalidate ballots” and explaining they are recommended because they have the “fastest drying ink”; Secretary of State Nov. 5, 2020 letter to the AG (responding to the AG’s inquiry) and asserting “the type of pen a voters uses would not cancel or invalidate a voter’s vote”; and a Nov. 5, 2020 letter from the Election Department to the AG also asserting sharpies are the “preferred” way to mark ballots. And because of ballot design, even if there was ink bleed through, it would not create false votes or uncounted/miscounted votes...and Election department explanations that “the sharpie issue is baseless.”

9. On Nov. 16, 2020, the Arizona Democratic Party filed a motion to dismiss arguing Plaintiff lacked standing because they had not alleged an injury and the relief they sought would be “illegal” or would not redress any alleged injury.
10. On November 16, 2020, the County Defendants filed a motion to dismiss.
11. On Nov. 17, 2020, Respondent filed Plaintiff’s opposition to the motions to dismiss.
12. On November 18, 2020, Respondent informed the court that Plaintiffs anticipated calling an expert, Jim Sneeringer, Ph.D., to testify “that the voting system used by the county was designed to automatically read ballots and count the votes as designated and then tabulate the results. Based on his experience and education, this particular voting system has previously been found to reject correctly marked ballots, which would be an error or failure on the part of the system.” (page 6, lines 5-11).
13. On November 20, 2020, the Court held a combined evidentiary hearing on Plaintiffs’ Complaint and the Defendants’ Motions to Dismiss. During that hearing, the court precluded the testimony of Dr. Sneeringer after the Defendants established that the tabulator machine he was attempting to opine about (Dominion Democracy 5.5.A)⁵ which had been rejected by the State of Texas was not the version used by Maricopa County. (Dominion Democracy 5.5.B) and Dr. Sneeringer had never evaluated that version.

⁵ The Dominion Democracy 5.5.A is a Ballot Marking Device (BMD) which allows the voter to cast their votes on a tablet instead of a paper ballot. (Exhibit 30 in *Aguilera/Drobina v Fontes* and Exhibit 11 in *Bowyer v. Ducey*)

14. On Nov. 29, 2020, it issued an order dismissing the case. In its order the court stated in part:

- a. Plaintiffs' expert (Dr. Sneeringer) testified, "There's nothing perfect in this world, including voting systems." The court asserted this "directly contradicts the linchpin of Plaintiffs' Complaint."
- b. "[T]he law cannot provide, nor does it guarantee, perfection."
- c. "[O]nce a ballot has been cast, given the absence of any voter identification information on a ballot, the ballot cannot be "married" to, or tied back to, a specific voter. No party disputes this fact which the evidence established fully. Thus, it is physically impossible to locate, for any purpose, the ballots that were cast by Aguilera and Drobinia on 11/3/2020." (p4). ⁶
- d. The relief Plaintiff Aguilera seeks (to cast a new ballot) is not legally available where she cast one ballot and voting after the polls have closed is prohibited. (p7)..
- e. The court found Plaintiffs failed to allege harm "of the nature required to achieve standing" where both cast ballots, but did not like the process, which was a process applicable to all voters not just the Plaintiffs. And, "the relief sought by Plaintiffs would not alleviate their alleged injuries in how their ballots were processed and handled."

⁶ Respondent acknowledged this in the complaint at Paragraph 3.14, "it would be impossible after election day to ascertain with any certainty whether a particular election day voter's ballot was counted, much less whether all votes contained on any given ballot were tabulated."

f. The Court also held that “none of the plaintiffs’ claims survive the dismissal” and even if this case wasn’t dismissed, Plaintiffs’ evidence did not meet the burden of proof necessary to show the tabulators’ inability to read the ballots was caused by Defendants as opposed to their own error; they suffered any injury and their requested relief is possible and would address their alleged injuries. (p10).

15. Thereafter, Plaintiffs appealed the dismissal of Count 6 of their Verified Complaint, that the county violated the EPM by not allowing public access to facilities where the county conducted the electronic adjudication of votes.

16. On June 15, 2021, the Court of Appeals dismissed the appeal for lack of jurisdiction. Because Plaintiffs did not bring their complaint as a Special Action, subject to specific requirements and discretionary jurisdiction, they cannot seek relief on appeal special actions when they did not file a special action below.

Bowyer v Ducey, CV20-02321-PHX-DJH

17. The verified complaint⁷ was filed December 2, 2020 and sought declaratory, emergency, and permanent injunctive relief. Plaintiffs alleged “massive election fraud” “for the purpose of illegally and fraudulently manipulating the vote count to manufacture an election of Joe Biden...and down ballot democrat candidates...” and sought to eliminate “the mail ballots from counting in the 2020 election,” or to disqualify

⁷ The complaint was verified by Dr. Kelli Ward

Arizona's electors "from counting toward the 2020 election," or an order that the Arizona electors "be directed to vote for President Donald Trump."

18. The Respondent was the only attorney admitted to the Arizona District Court on December 2, 2020.

19. On December 3, 2020, the court conducted a return hearing and entered an expedited schedule for future pleadings.

20. A motion was granted on December 4, 2020 allowing the Maricopa County Board of Supervisors and Adrian Fontes to intervene.

21. All three Defendants, Governor Doug Ducey, Secretary of State Hobbs and Intervenors Maricopa County Board of Supervisors and Adrian Fontes, filed a Response in Opposition to Motion for Declaratory, Emergency, and Permanent Injunction Relief as well as a Motion To Dismiss.

22. The Court set December 8, 2020 as the hearing date on the Motion to Dismiss and November 10, 2020 as the evidentiary hearing. After oral argument on December 8, 2020, the Court dismissed the complaint and found:

"By any measure, the relief Plaintiffs seek is extraordinary. If granted, millions of Arizonans who exercised their individual right to vote in the 2020 General Election would be utterly disenfranchised. Such a request should then be accompanied by clear and conclusive facts to support the alleged "egregious range of conduct in Maricopa County and other Arizona counties...at the direction of Arizona state election officials." Yet the Complaint's allegations are

sorely wanting of relevant or reliable evidence, and Plaintiff's invocation of the Court's limited jurisdiction is severely strained..

The allegations they put forth to support their claims of fraud fail in their particularity and plausibility. Plaintiff append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections...

Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for the earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona's 2020 General Election."

FILE NO. 22-2063

Overview of the Litigation

23. On January 6, 2021, the date scheduled for certification of the November 3, 2020 Presidential election, a mob attacked the Capitol.
24. On January 12, 2021, 42 members of the Arizona Legislature signed a letter directed to Acting U.S. Attorney General Jeffrey Rosen and F.B.I. Director Christopher Wray (the Criminal Referral letter).
25. Charlene Fernandez was one of the Arizona legislators who signed the letter. Her signature appears to be the 11th out of 42 signatures on the letter; there is nothing about

her signature that suggests she had greater involvement in preparing or distributing the letter.

26. The Criminal Referral letter sought an investigation into the “attack on our country” stating in part, “For weeks prior to the breach, a group of Republican Arizona legislators and legislators-elect publicly advocated for the overthrow of the election results which encouraged precisely the kind of violent conduct that we witnessed.” The Criminal Referral used Plaintiffs’ social medial posts to suggest they were present at the riot on January 6, 2021 and “actively encouraged the mob, both before and during the attack on the Capitol.” The letter concluded seeking an investigation. It stated:

We the undersigned members of the Arizona Legislature, urge you to fully investigate the extent of their involvement. Expedition timing of this request is critical, as if you find any evidence that these individuals incited, encouraged, or participated in the lawless behavior that took place on that day, we believe they would be potentially criminally liable and ineligible for public office under Section 3 of the Fourteenth Amendment to the United States Constitution, as having engaged in insurrection and rebellion.

27. On February 26, 2021, Plaintiffs Mark Finchem and Anthony Kern, who are members of the Arizona Legislature, filed a Complaint in the Yuma County Superior Court against Defendant Charlene Fernandez alleging the Criminal Referral letter defamed them.

28. Finchem and Kern were represented by Respondent Alexander Kolodin, Christopher Viskovic, an associate in Respondent's firm, George Wentz, and Brant Hadaway. Wentz and Hadaway were both pending pro hac vice admission at the time of the filing of the Complaint and are members of the Davillier Law Group located in Idaho.
29. On March 8, 2021, Defendant Fernandez, through counsel, asked Plaintiffs to dismiss the lawsuit, noting their exposure to Rule 11 and A.R.S. § 12-349.
30. On May 12, 2021, Plaintiffs filed their First Amended Complaint (FAC). The FAC added Paul Gosar as an additional Plaintiff and added two counts: "Conspiracy to Commit the Underlying Tort of Defamation" and "Aiding and Abetting Defamation".
31. On August 27, 2021, Defendant sent Plaintiffs a Rule 11 letter and filed a 12(b)(6) Motion to Dismiss asserting she had a First Amendment right to engage in speech on a matter of public concern, and Plaintiffs failed to allege facts showing actual malice.⁸
32. On September 13, 2021, Plaintiffs filed a Motion for Leave to File Second Amended Complaint (SAC). The SAC included the same Plaintiffs and same three counts.
33. After oral argument on March 2, 2022, the Court granted Plaintiffs' Motion to Amend and Plaintiffs filed the SAC on March 7, 2022.

⁸ In this context, "actual malice" is not ill-will. Rather, it is evidence that the speaker knew the statements were false, or engaged in the speech with reckless disregard to whether the speech was false.

34. On April 29, 2022, the Court granted Defendant's previously filed Motion to Dismiss, finding the Criminal Referral Letter, "goes to the heart of free speech and the right to petition to government in connection with matters of great public concern."
35. The parties then briefed the issue of whether an award of attorneys' fees and costs was appropriate.
36. On August 29, 2022, the Court issued an order awarding \$75,616.20⁹ against Plaintiffs jointly and severally. However, the "Court declines to find that such fees/costs should be awarded against Plaintiffs' attorneys."
37. The Court awarded Defendant her fees/costs both under Arizona Revised Statute 12-349 and Arizona Rule of Civil Procedure, Rule 11(C). The Court found Plaintiffs, "brought their claim without substantial justification, meaning that it was groundless and not made in good faith" based upon the Defendant's First Amendment rights to sign the Criminal Referral letter. The Court further found "(i)t very much appears that a significant portion of the contents of the original Complaint and First Amended Complaint were written for an audience other than the assigned trial court judge. . . . The Court finds that Plaintiffs' lawsuit against Defendant was brought for an improper purpose, having been filed against a political opponent primarily for purposes of harassment." Finally, the court held that "(t)he claims made by Plaintiffs were not

⁹ The breakdown is as follows: \$75,000 in attorney fees and \$616.20 in costs.

warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, pursuant to Rule 11(b)(2).”

38. Plaintiffs appealed the Court’s fee award, but did not appeal the underlying decision dismissing their defamation action. The Arizona Court of Appeals affirmed the trial court’s award of fees/costs on August 10, 2023.

39. Complainants, a group of concerned citizens, then filed a bar charge relating to this matter on August 30, 2022.

CONDITIONAL ADMISSIONS

Respondent’s admissions are being tendered in exchange for the form of discipline stated below and are submitted freely and voluntarily and not as a result of coercion or intimidation. Respondent conditionally admits he violated Rule 42, ERs 3.1 and 8.4(d).

CONDITIONAL DISMISSALS

There are no conditional dismissals.

RESTITUTION

Restitution is not an issue.

SANCTION

Respondent and the State Bar of Arizona by Independent Bar Counsel agree a sanction of Admonition with Probation for 18 months with the possibility of early termination after one year upon the successful completion of all terms of probation that are ordered. The terms of probation are:

1. CLE: In addition to annual MCLE requirements, Respondent shall complete the following Continuing Legal Education ("CLE") programs within 18 months from the date of service of the Order accepting this consent agreement:
 - a. Avoiding Ethical Pitfalls, JA323/J2107
 - b. Ethics Café Series: ER3.4 – Fairness to Opposing Party and Counsel, JA297
 - c. Ethics Café: ER 3.3 – Candor Towards Tribunal, JA257
 - d. Ethics Café: ER 3.1 Meritorious Claims and Contentions, JA232
 - e. Ethic Issues for the 21st Century Lawyer, J2289/MP1213

Respondent shall provide the State Bar Compliance Monitor with evidence of completion of the programs by providing a copy of handwritten notes and certificate of completion. Respondent shall contact the Compliance Monitor at 602-340-7258 to submit this evidence. Respondent will be responsible for the cost of the CLE.

2. Respondent shall commit no further violations of the Rules of Professional Conduct.

NON-COMPLIANCE WITH PROBATION

If Respondent fails to comply with any of the foregoing probation terms and the State Bar of Arizona receives information thereof, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5). The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether Respondent breached a term of probation and, if so, to assess an appropriate sanction. If the State Bar alleges that Respondent failed to comply with any of the foregoing terms the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

If Respondent violates any of the terms of this agreement, the State Bar may bring further discipline proceedings.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* under Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in imposing sanctions by identifying factors courts should consider and applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary.

In determining an appropriate sanction the Court considers the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Standard* 3.0.

The duty violated

Respondent's conduct violated his duty to the legal profession, the legal system, and the public.

The lawyer's mental state

Respondent conducted himself negligently in the manner described above.

The extent of the actual or potential injury

There was potential harm to the legal profession, the legal system, and the public.

The parties agree that the following *Standards* apply:

Standard 6.14 – Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding;

Standard 6.24 - Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

Standard 7.4 – Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

Aggravating and mitigating circumstances

The presumptive sanction is Admonition. The parties conditionally agree that the following aggravating and mitigating factors should be considered:

In aggravation: *Standard 9.22*—

- (a) Multiple offenses;
- (b) Substantial experience in the practice of law.

In mitigation: *Standard 9.32*—

- (a) Absence of prior disciplinary record;
- (b) Absence of dishonest or selfish motive;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (j) imposition of other penalties or sanctions

Discussion

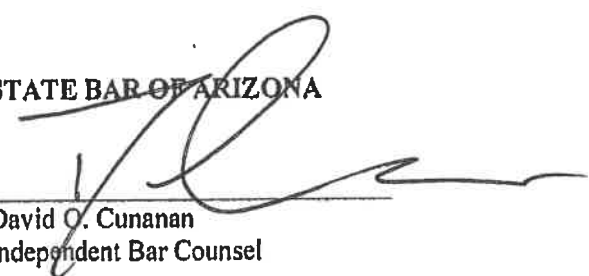
Given the nature and scope of the bar charges and the aggravating and mitigating factors the presumptive sanction of admonition with probation is appropriate. Based on the *Standards* and given the facts and circumstances, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanctions and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *In re Peasley*, 208 Ariz. 27 (2004). Recognizing that determination of the appropriate sanction is the prerogative of the ADPCC and/or the Presiding Disciplinary Judge, the Independent Bar Counsel, Deputy Independent Bar Counsel and Respondent believe the objectives of discipline will be met by imposing an Admonition with Probation, and assessing costs and expenses. A proposed form of order is attached as Exhibit B.

DATED this 6 day of November 2023.


STATE BAR OF ARIZONA


David O. Cunanan
Independent Bar Counsel

Stephen McCarville
Deputy Independent Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

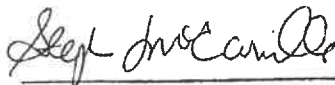
DATED this 6th day of November, 2023.


Alexander Kolodin
Respondent

DATED this _____ day of November 2023.

STATE BAR OF ARIZONA

David O. Cunanan
Independent Bar Counsel

 11/06/2023

Stephen McCarville
Deputy Independent Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

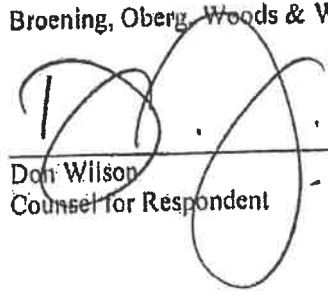
DATED this 6th day of November, 2023.



Alexander Kolodin
Respondent

DATED this 6 day of November, 2023.

Broening, Oberg, Woods & Wilson, PC



Don Wilson
Counsel for Respondent

Original filed this ____ day of November, 2023, with
Attorney Discipline Probable Cause Committee
of the Supreme Court of Arizona

Copy of the foregoing emailed
this ____ day of November, 2023, to:

Attorney Discipline Probable Cause Committee
Supreme Court of Arizona
1501 West Washington Street, Suite 102
Phoenix, Arizona 85007
E-mail: probablecausecomm@courts.az.gov

Copy of the foregoing emailed
this ____ day of November, 2023, to:

Donald Wilson, Jr.
Broening, Oberg, Woods & Wilson, PC
2800 North Central, Ste. 1600
Phoenix, AZ 85004
Telephone 602-271-7717
Email: dwj@bowwlaw.com
Respondent's Counsel

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th St., Suite 100
Phoenix, Arizona 85016-6266

by: _____