

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2426 Disciplinary Docket No. 3
: :
Petitioner : No. 184 DB 2017
: :
v. : Attorney Registration No. 41440
: :
DANIEL J. McCARTHY, : (Out of State)
: :
Respondent :

ORDER

PER CURIAM

AND NOW, this 1st day of June, 2018, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board, the Joint Petition in Support of Discipline is granted, and Daniel J. McCarthy is suspended on consent from the Bar of this Commonwealth for a period of three years. He shall comply with all the provisions of Pa.R.D.E. 217.

Respondent shall pay costs incurred by the Disciplinary Board in the investigation and prosecution of this matter.

A True Copy Patricia Nicola
As Of 6/1/2018

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2426 Disc. Dkt. No. 3
Petitioner :
: No. 184 DB 2017
v. :
: Atty. Reg. No. 41440
DANIEL J. MCCARTHY, :
Respondent : (Out of State)

**JOINT PETITION IN SUPPORT OF DISCIPLINE
ON CONSENT UNDER RULE 215(d), Pa.R.D.E.**

Petitioner, Office of Disciplinary Counsel ("ODC"), by Paul J. Killion, Esquire, Chief Disciplinary Counsel, and by Richard Hernandez, Esquire, Disciplinary Counsel, and Respondent, Daniel J. McCarthy, who is represented by David S. Cohen, Esquire, file this Joint Petition In Support Of Discipline On Consent Under Pennsylvania Rule of Disciplinary Enforcement 215(d) ("the Joint Petition"), and respectfully represent that:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement ("Pa.R.D.E."), with the power and

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FILED
4/30/2018
The Disciplinary Board of the
Supreme Court of Pennsylvania

duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules of Disciplinary Enforcement.

2. Respondent, Daniel J. McCarthy, was born in 1956, was admitted to practice law in the Commonwealth of Pennsylvania on October 24, 1984, and resides in North Wildwood, New Jersey; Respondent is currently on retired status.

3. Pursuant to Pa.R.D.E. 201(a)(1), Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

4. Respondent is aware that there is a pending complaint file, File No. C1-16-984, that was opened based on ODC having received information that Respondent, who was admitted pro hac vice by the Delaware Superior Court to represent a doctor in a medical malpractice action, was under disciplinary investigation in Delaware, which investigation resulted in Respondent being disbarred by Order of the Supreme Court of the State of Delaware, decided on October 23, 2017 ("the Delaware Disbarment Order").

5. By Notice and Order dated December 14, 2017, the Supreme Court of Pennsylvania directed Respondent to inform

our Court within 30 days of "any grounds against the imposition of the identical or comparable discipline in this Commonwealth."

6. After considering responses filed by Respondent and ODC, the Supreme Court of Pennsylvania issued an Order dated February 28, 2018, in which our Court declined to impose reciprocal discipline and referred the matter "to the Disciplinary Board for formal proceedings pursuant to Pa.R.D.E. 208(b)."

7. Respondent has agreed to enter into a joint recommendation for consent discipline that encompasses the allegations of misconduct raised in the Delaware Disbarment Order and the Report and Recommendations of the Hearing Panel, filed on June 6, 2017 ("the Report"), which was attached to the Delaware Disbarment Order.

**SPECIFIC FACTUAL ADMISSIONS AND
RULES OF PROFESSIONAL CONDUCT VIOLATED**

8. Respondent hereby stipulates that the following factual allegations are true and correct and that he violated the Delaware Rules of Professional Conduct as set forth herein.

CHARGE

9. Respondent was admitted pro hac vice by the Delaware Superior Court in and for New Castle County to

represent Dr. Phyllis James in connection with a medical malpractice action captioned *Letoni Wilson, Mother and Next Friend of T█████ J█████, a minor child v. Dr. Phyllis James, et al.*, C.A. No. 07C-04-025 PLA ("the Wilson lawsuit").

10. One of the issues in the Wilson lawsuit was the extent of the jaundice on the baby at the time the baby was examined by Dr. James.

11. The main issue in the Wilson lawsuit was the care that Dr. James rendered to the baby on July 21, 2006.

12. During the proceedings in the Wilson lawsuit, plaintiff's counsel, Kenneth Roseman, Esquire, served Respondent, as counsel for Dr. James, with interrogatories and request for production of documents.

13. Plaintiff's interrogatories asked, *inter alia*, the following: "Have you signed any written statements which you have made concerning this matter?"

14. Plaintiff's request for production of documents requested, *inter alia*, the following: "Copies of any and all writings in your possession or available to you identified or referred to in any way in your answers to Plaintiff's Interrogatories."

15. On November 12, 2007, Respondent submitted:

- a. responses to the interrogatories which indicated that there were no written

statements other than those in the medical chart; and

- b. responses to the request for documents and enclosed a copy of the medical chart.

16. During the course of the Wilson lawsuit, Respondent, on behalf of Dr. James, never supplemented the discovery responses.

17. Prior to the September 4, 2008 deposition of Dr. James, Respondent received altered medical records from counsel for Michelle Montague, a physician assistant employed by Dr. James who was subsequently named as a defendant in the Wilson lawsuit.

- a. One medical record was altered by Ms. Montague, who changed the location of the yellowing on the baby from the abdomen to the sternum.
- b. A second medical record was altered by Dr. James, who added a sentence indicating that she had instructed the mother to monitor and call the office immediately with any changes because an older sibling had been treated for jaundice and the baby was at increased risk.

18. At Dr. James' deposition in the Wilson lawsuit, Dr. James gave false testimony, in that she testified that:

- a. the office records produced in her discovery responses were her office records (even though she had previously reviewed the altered medical records with Respondent);
- b. she had not reviewed anything other than the medical chart in preparation for the deposition;
- c. she did not know whether or not Ms. Montague's note was Ms. Montague's original note (even though Dr. James had reviewed the altered note with Respondent prior to the deposition); and
- d. her office note was written on July 26, 2006 at 4:00 p.m. (in actuality Dr. James had added the last sentence at a later date).

19. Respondent took no action to correct the transcript of Dr. James' deposition or to update the discovery responses provided in the Wilson lawsuit.

20. On November 10, 2008, Ms. Montague was deposed in the Wilson lawsuit; Respondent was present for Ms. Montague's deposition.

21. At Ms. Montague's deposition, Ms. Montague testified that the office records were a complete record of her examination.

22. Respondent took no action to correct the transcript of Ms. Montague's deposition or to update the discovery responses provided in the Wilson lawsuit.

23. A pretrial stipulation was filed in the Wilson lawsuit which stated that the exhibits included the office records for Dr. James' medical practice that were related to the care that the baby received.

- a. The office records produced during discovery and admitted at trial did not include the altered medical records.

24. In March 2010, the Wilson lawsuit went to trial, with Dr. James as the sole defendant; Dr. James testified at the trial.

25. At trial, Dr. James testified that:

- a. the yellowing on the baby was not in the face and had not progressed to the sternum; and
- b. she had given the mother instructions to call Dr. James if the condition worsened due to the family history of jaundice.

26. During Respondent's closing argument, he highlighted the mother's failure to follow Dr. James' instructions.

27. Respondent had over a year from when he received the altered medical records to the trial in March 2010, to

produce the altered medical records.

28. In the Wilson lawsuit, a verdict was rendered for the plaintiff in the amount of \$6,250,000.00.

29. Thereafter, Mr. Roseman represented Dr. James in a lawsuit filed in the Delaware Superior Court in and for New Castle County in a bad faith claim against Dr. James's insurance carrier and a legal malpractice claim against Respondent's firm, said case captioned **Dr. Phyllis James v. Preferred Professional Ins. Co., et al.**, C.A. No. 10C-04-212 PLA ("the James lawsuit").

30. During discovery in the James lawsuit, Mr. Roseman learned for the first time about the existence of the altered medical records that were never produced in the Wilson lawsuit.

31. At the Delaware disciplinary hearing, Mr. Roseman testified that:

- a. if the altered medical records were produced it would have impacted the outcome of the trial and the verdict; and
- b. Dr. James' testimony regarding the location of the jaundice and the instructions to the mother had negatively impacted the jury's verdict.

32. At the Delaware disciplinary hearing, Respondent testified that:

- a. he now would have produced the altered medical records;
- b. he was aware that Rule 26 of the Rules of Civil Procedure for the Superior Court of the State of Delaware ("Rule 26") required supplementation of discovery responses under certain circumstances, but he did not think that Rule 26 required him to provide the altered medical records;
- c. the office visit which was the subject of the altered medical records was the primary issue in the Wilson lawsuit; and
- d. one of the reasons that led him not to produce the altered medical records was the harm that production of those medical records would have caused to Dr. James' credibility.

33. Respondent was obligated under Rule 26 to supplement the discovery responses he provided in the Wilson lawsuit by providing to Mr. Roseman copies of the altered medical records.

34. Respondent knew that Dr. James provided false testimony at Dr. James' deposition and at the trial of the

Wilson lawsuit.

35. Respondent knew that Ms. Montague's deposition testimony was false.

36. By his conduct as alleged in paragraphs 9 through 35 above, and applying Pennsylvania Rule of Professional Conduct 8.5(b), titled "Choice of Law," Respondent violated the following Delaware Rules of Professional Conduct ("DE RPC"):

- a. DE RPC 3.3(b), which states that a lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal;
- b. DE RPC 3.4(a), which states that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

- c. DE RPC 3.4(c), which states that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- d. DE RPC 4.1(b), which states that in the course of representing a client a lawyer shall not knowingly fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6;
- e. DE RPC 8.4(c), which states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and
- f. DE RPC 8.4(d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

SPECIFIC JOINT RECOMMENDATION FOR DISCIPLINE

37. Petitioner and Respondent jointly recommend that the appropriate discipline for Respondent's admitted misconduct is a suspension of three years.

38. Respondent hereby consents to that discipline being imposed upon him by the Supreme Court of Pennsylvania. Attached to this Petition is Respondent's executed Affidavit required by Rule 215(d), Pa.R.D.E., stating that he consents to the recommended discipline, including the mandatory acknowledgements contained in Rule 215(d)(1) through (4), Pa.R.D.E.

39. In support of Petitioner and Respondent's joint recommendation, it is respectfully submitted that there are several mitigating circumstances:

- a. Respondent has admitted engaging in misconduct and violating the charged Delaware Rules of Professional Conduct;
- b. Respondent has cooperated with Petitioner, as is evidenced by Respondent's admissions herein and his consent to receiving a three-year suspension;
- c. Respondent is remorseful for his misconduct and understands he should be disciplined, as is evidenced by his consent to receiving a three-year suspension; and
- d. Respondent has no record of discipline in Pennsylvania.

40. *Office of Disciplinary Counsel v. Allen L. Feingold*, No. 93 DB 2003 (D.Bd. Rpt. 11/18/2005) (S.Ct. Order 3/3/2006) supports the recommendation that Respondent receive a three-year suspension for his Delaware misconduct. Feingold was suspended for three years for having engaged in misconduct in three separate client matters. D.Bd. Rpt. at 18, 24. Feingold's most serious misconduct consisted of Feingold's assisting a client who offered false deposition testimony on topics related to: the client's health; the filing of prior lawsuits; and the existence of prior injuries. *Id.* at 8, 18-20. Feingold attempted to cover up the perjury by instructing an employee of the physician who treated Feingold's client to falsely inform defense counsel that the client's medical records could not be located; defense counsel had subpoenaed medical records which would have revealed an earlier accident and injury involving Feingold's client, thus exposing the client's perjury. *Id.* at 18, 20. Feingold's misconduct in the other two client matters involved the filing of frivolous lawsuits, which was deemed conduct prejudicial to the administration of justice. *Id.* at 18. Feingold had no record of discipline. *Id.* at 3.

There are several ways in which Respondent's matter and *Feingold* are similar. Both Respondent and Feingold: had been present during the depositions of their clients; knew

that their clients had offered false testimony at their depositions; had taken no action to correct the false deposition testimony offered by their clients; were aware of the existence of medical records that would contradict the deposition testimony offered by their clients; and had no record of discipline.

In light of **Feingold**, a suspension of three years is sufficiently lengthy to advance the goals of attorney discipline. Those goals are protecting the public, maintaining the integrity of the courts and the legal profession, and specific and general deterrence. See **Office of Disciplinary Counsel v. Keller**, 506 A.2d 872, 875 (Pa. 1986); **In re Iulo**, 766 A.2d 335, 338-339 (Pa. 2001).

WHEREFORE, Petitioner and Respondent respectfully request that:

- a. Pursuant to Rule 215(e) and 215(g), Pa.R.D.E., the Three-Member Panel of the Disciplinary Board review and approve the above Joint Petition In Support Of Discipline On Consent and file its recommendation with the Supreme Court of Pennsylvania in which it is recommended that the Supreme Court enter an Order that Respondent receive a suspension of

three years, and that Respondent comply with all of the provisions of Rule 217, Pa.R.D.E.


- b. Pursuant to Pa.R.D.E. 215(i), the Three-Member Panel of the Disciplinary Board enter an order for Respondent to pay the necessary expenses incurred in the investigation and prosecution of this matter, and that under Pa.R.D.E. 208(g)(1) all expenses be paid by Respondent within 30 days after the notice of the taxed expenses is sent to Respondent.

Respectfully and jointly submitted,

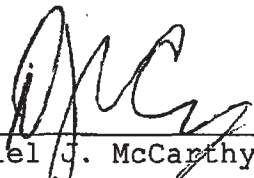
OFFICE OF DISCIPLINARY COUNSEL

PAUL J. KILLION
CHIEF DISCIPLINARY COUNSEL

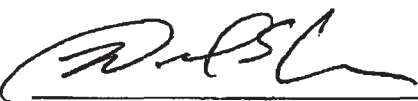
April 26, 2018
Date

By 
Richard Hernandez
Disciplinary Counsel

4/18/18
Date

By 
Daniel J. McCarthy
Respondent

4/20/18
Date

By 
David S. Cohen, Esquire
Respondent's Counsel


BEFORE THE DISCIPLINARY BOARD OF THE
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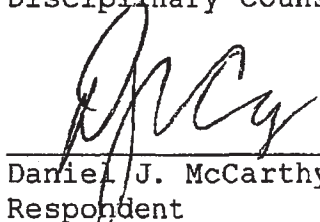
VERIFICATION

The statements contained in the foregoing Joint Petition
In Support Of Discipline On Consent Under Pa.R.D.E. 215(d)
are true and correct to the best of our knowledge or
information and belief and are made subject to the penalties
of 18 Pa.C.S. §4904, relating to unsworn falsification to
authorities.


April 26, 2018
Date


Richard Hernandez
Disciplinary Counsel

4/18/18
Date


Daniel J. McCarthy
Respondent

4/20/18
Date


David S. Cohen, Esquire
Counsel for Respondent

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DANIEL J. McCARTHY, :
Respondent : (Out of State)

AFFIDAVIT UNDER RULE 215(d), Pa.R.D.E.

Respondent, Daniel J. McCarthy, hereby states that he consents to the imposition of a suspension of three years as jointly recommended by Petitioner, Office of Disciplinary Counsel, and Respondent in the Joint Petition in Support of Discipline on Consent and further states that:

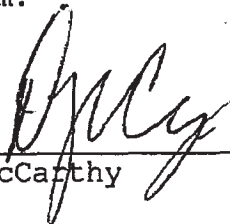
1. His consent is freely and voluntarily rendered; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting the consent; and he has consulted with David S. Cohen, Esquire, in connection with the decision to consent to discipline;

2. He is aware that there is a pending complaint file, File No. C1-16-984, that was opened based on ODC having received information that Respondent was under disciplinary investigation in Delaware, which investigation resulted in his being disbarred by Order of the Supreme Court of the State of Delaware, decided on October 23, 2017; this complaint

involves allegations that he has been guilty of misconduct as set forth in the Joint Petition;

3. He acknowledges that the material facts set forth in the Joint Petition are true; and

4. He consents because he knows that if charges were filed in connection with File No. C1-16-984, he could not successfully defend against them.



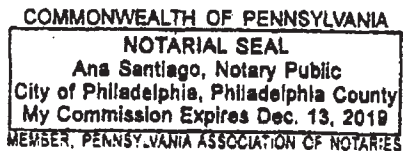
Daniel J. McCarthy
Respondent

Sworn to and subscribed

before me this 18TH
day of April, 2018.



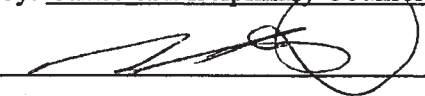
Notary Public



CERTIFICATE OF COMPLIANCE

I certify that this pleading complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Office of Disciplinary Counsel

Signature:  _____

Name: Richard Hernandez, Disciplinary Counsel

Attorney No. (if applicable): 57254

REDACTED