

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL :
Petitioner :
v. : No. 56 DB 2022
PATRICK C. CAREY : Attorney Registration No. 32961
Respondent : (Lackawanna County)

ORDER

AND NOW, this 30th day of July, 2024, in accordance with Rule 215(g), Pa.R.D.E., the three-member Panel of the Disciplinary Board having reviewed and approved the Joint Petition in Support of Discipline on Consent filed in the above captioned matter; it is

ORDERED that PATRICK C. CAREY, be subjected to a **PUBLIC REPRIMAND** by the Disciplinary Board of the Supreme Court of Pennsylvania as provided in Rule 204(a) and Rule 205(c)(9) of the Pennsylvania Rules of Disciplinary Enforcement.

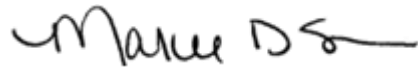
BY THE BOARD:



Board Chair

TRUE COPY FROM RECORD

Attest:



Marcee D. Sloan
Board Prothonotary
The Disciplinary Board of the
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 56 DB 2022
: :
Petitioner : :
: Attorney Reg. No. 32961
PATRICK C. CAREY, : :
: :
Respondent : (Lackawanna County)

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

Petitioner, Office of Disciplinary Counsel (“ODC”), by Thomas J. Farrell, Chief Disciplinary Counsel, and Marie Dooley, Disciplinary Counsel, and Respondent, Patrick C. Carey, and Amy J. Coco, Esquire, Counsel for Respondent, file this Joint Petition in Support of Discipline on Consent under Pa.R.D.E. 215(d), and respectfully represent as follows:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, P. O. Box 62485, Harrisburg, Pennsylvania 17106-2485, is invested, pursuant to Pa.R.D.E. 207, with the power and the 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 the aforesaid Rules.

FILED
07/15/2024
The Disciplinary Board of the
Supreme Court of Pennsylvania

2. Respondent was born in 1955, was admitted to practice law in the Commonwealth of Pennsylvania on December 11, 1980, and maintains his office at Cipriani & Werner, 415 Wyoming Avenue, Scranton, Lackawanna, PA 18503.

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 of Pennsylvania.

FACTUAL BACKGROUND

4. For purposes of this Joint Petition, Respondent and ODC agree that the following facts would be established if this matter proceeded to a hearing:

5. On June 12, 2019, plaintiffs, Gabrielle and Frank Shimkus, initiated a malpractice action, *Shimkus v. Commonwealth Health Network, et. al.*, Case No. 19-cv-3534, Lackawanna County CP, against multiple professionals and healthcare providers alleging professional negligence in the prenatal and postnatal care of Mrs. Shimkus and her twins, born on February 23, 2016.

6. In the malpractice complaint, the Shimkuses alleged that due to multiple breaches of the standard of care by various defendants one of the twins suffered catastrophic long-term health issues.

7. As the case progressed and discovery ensued, the focus of Plaintiff's complaint became the recommendation to deliver dichorionic diamniotic twins "at 38 weeks."

8. In 2016, defendant LVPG Maternal Fetal Medicine ("LVPG MFM") provided Mrs. Shimkus specialized prenatal high-risk healthcare.

9. Defendant Christine Phillips, D.O., was Mrs. Shimkus' treating obstetrician.

10. Dr. Phillips was employed by defendant Physicians Health Alliance ("PHA"), an ostensible agent and employee of defendant Moses Taylor Hospital.

11. In 2016, LVPG MFM employed certified registered nurse practitioner (CRNP), Lisa M. Rusch who provided Mrs. Shimkus care along with two physician superiors John C. Smulian, MD and Albert Sarno, M.D.

12. In the malpractice action, James A. Doherty, Esquire and Grace Doherty Hillebrand, Esquire, represented Dr. Phillips, individually.

13. Respondent represented LVPG MFM.

14. Howard Stevens, Esquire, represented Physicians Health Alliance, Dr. Phillip's employer.

15. M. Sean Maravich, Esquire, and Stuart T. O'Neal, III, Esquire, represented Moses Taylor Hospital.

16. On February 18, 2016, Mrs. Shimkus met with Dr. Smulian and Nurse Rusch for a follow-up visit regarding her dichorionic diamniotic (di-di) twin gestation.

17. The notes for the February 18, 2016 visit reflected, in part, the following:

*Gabrielle A Shimkus is a 35 y.o. female, . . .with an **Estimated Date of Delivery: 3/3/16 with a current gestational age of 38w0d.***

*HPI Gabrielle is here today for a follow up visit regarding her dichorionic diamniotic twin gestation. . . . **We discussed that delivery at any time now would be considered safe for the twin gestation. Call to Dr Phillips to discuss same.***

*We would recommend **delivery at 38 weeks** due to increased swelling, and irregular contractions. . . .*

Instructed on signs and symptoms of labor, and preeclampsia. She verbalized understanding of same.

RECOMMENDATIONS:

***Delivery at 38 weeks** (emphasis added).*

18. Mrs. Shimkus had a prescheduled office visit with Dr. Phillips at PHA for later in the afternoon on February 18, 2016.

19. At Dr. Smulian's direction, Nurse Rusch telephoned Dr. Phillips to convey LVPG's recommendation.

20. Nurse Rusch also faxed the written recommendation that day and again the next morning and the written recommendation is twice contained in Dr. Phillips' chart.

21. Dr. Phillips and Nurse Rusch dispute, *inter alia*, the actual words used in their telephone conference.

22. Dr. Phillips testified at her deposition on September 18, 2020 that Nurse Rusch did not state or indicate that LPVG MFM recommended delivery "that day," but rather advised that the recommendation was "we can ... setup for induction this week" and she followed Nurse Rusch's recommendation.

23. Subsequently Dr. Smulian testified at his October 12, 2020 deposition that "at 38 weeks" meant "that delivery should be scheduled, even in an uncomplicated pregnancy at 38 weeks and zero days."

24. Dr. Phillips denied that Nurse Rusch conveyed this recommendation.

25. Dr. Smulian was not involved in the call to Dr. Phillips.

26. Additionally, what occurred at the obstetric appointment was highly disputed between Dr. Phillips and Mrs. Shimkus.

27. On the morning of February 22, 2016, Mrs. Shimkus sustained a placental abruption and another PHA doctor, Dr. Marc Rabin, delivered the twins emergently by c-section, resulting in severe brain damage to one of the twins.

28. The medical experts for the Shimkuses and LVPG MFM asserted that delivery beyond 38 weeks and 0 days breached the standard of care. The medical experts for Dr. Phillips contended that the guidelines of at 38 weeks were only general and delivery at 38 weeks and 5 days was within the standard of care.

29. The question of the appropriate standard of care for the delivery date of di-di twins, whether delivery can appropriately be delayed beyond 38 weeks and 0 days, and if LVPG MFM's recommendation of delivery at 38 weeks required Dr. Smulian to send Mrs. Shimkus to the hospital immediately were at issue for trial.

30. In the latter part of 2019, Respondent suffered significant health issues and did not return to work for some time. When he did return to work, he was on fluid restriction.

31. In or around mid-March of 2020, the COVID-19 global pandemic necessitated court closures and altered deposition protocols.

32. On April 3, 2020, the Lackawanna Court issued an Order that stated, *inter alia*, “[d]epositions should, to the extent practicable, be conducted remotely through telephone, videoconference, or similar advanced communication technology. Court reporters need not be present in the same location as witnesses or counsel, consistent with Governor Tom Wolf’s order dated March 21, 2020.”

33. On July 28, 2020, Respondent emailed to his client a summary of Respondent’s discussions with Dr. Smulian that stated Dr. Smulian “. . . made clear that he advised [Nurse] Rusch to advise the OBGYNs at MTH to deliver *now at 38 weeks*.”

34. On July 31, 2020, Respondent sent an email to Attorney Doherty that:

- a. commented that Mrs. Shimkus’ “cold as ice appearance tells me that she is only interested in money and is willing to lie through

her teeth to get it;" and

- b. conveyed Respondent's belief that "ACOG bulletin 560 [dated as of 2014] was in place [at that time of delivery] and it says 38 weeks means 38 weeks from zero days to seven days."

35. On August 22, 2020, Nurse Rusch discussed with Respondent the underlying events and told Respondent that:

- a. she expressly recommended to Dr. Phillips that the children be born "at 38 weeks" due to contractions and edema;
- b. she believed "at 38 weeks" meant 38 weeks and 0 days;
- c. Mrs. Shimkus was at 38 weeks and 0 days on February 18, 2016; and that
- d. she and Dr. Smulian expected Dr. Phillips to begin the delivery process that day.

36. On August 31, 2020, Respondent sent an email to defense counsel including Attorney Doherty that stated Dr. Smulian was Nurse Rusch's supervising MFM physician on February 18 and "it was his recommendation that Lisa was directed to call and relay to Dr. Phillips as documented in the chart for that day."

37. In the August 31, 2020 email, Respondent did not communicate to Attorney Doherty and the other defense counsel that Dr. Smulian and Nurse Rusch unequivocally believed that “at 38 weeks” meant 38 weeks 0 days and had no other possible meaning.

38. On September 4, 2020, Respondent sent an email to his client indicating that he believed Dr. Phillips was blaming LVPG for not expressing urgency to Dr. Phillips that the baby should be delivered that day.

39. On September 8, 2020, Respondent emailed all defense counsel requesting a conference call to “coordinate on the defense” and indicated that Nurse Rusch would testify consistent with her February 18, 2016 note from that day, which had been faxed to Dr. Phillips.

40. Respondent unsuccessfully attempted to notify Attorney Hillebrand about Nurse Rusch’s testimony. Respondent also contacted hospital defense counsel Attorney O’Neal and informed him that he could not reach Dr. Phillips’ counsel and that the testimony of Lisa Rusch and Dr. Smulian would be that their recommendation to Dr. Phillips was that Mrs. Shimkus’ delivery process start on February 18, 2016 at 38 weeks which means 38 weeks and 0 days. Attorney O’Neal agreed that he and his partner, Sean Maravich would convey the information to Dr. Phillips’ counsel.

41. On September 10, 2020, Respondent sent an email to defense counsel that stated he was unavailable for a call that day due to a scheduling issue, and advised as follows:

“ . . . As I told you, L. Rusch will testify in accordance with her note that she faxed to Dr. Philips after her call. The note says, ‘current gestational age 38 weeks 0 days.’ ‘We recommend delivery at 38 weeks due to increased swelling and irregular contractions...we recommend delivery at 38 weeks’ Lisa got her instruction from Dr. Smulian. You are correct that Lisa did not send Mrs. Shimkus directly to L. & D. for delivery right then and there as there was no emergency – the recommendation was deliver[y] *at 38 weeks* and the patient was at 38 weeks that day.” (emphasis added).

42. Although Respondent knew that LVPG’s defense position was at odds with Dr. Phillips’ and believed he had advised defense co-counsel as described above, Respondent’s September 10, 2020 email did not specify that “at 38 weeks” meant 38 weeks and 0 days.

43. However, Respondent believed at that time that all defense counsel knew the specific recommendation.

44. On September 22, 2020, Nurse Rusch appeared at

Respondent's law office for her remote deposition ("Rusch Deposition") to be held *via* the Zoom video internet platform.

45. Prior to the Rusch Deposition, Respondent had attended only two other remote depositions for the Shimkus action at LVPG-Hazleton offices rather than Respondent's offices.

46. Internet Technology (IT) professionals completed the set up for the two depositions with laptops, individual headsets and microphones.

47. Respondent knew he had limited technology experience and no experience in Zoom deposition setup or in defending a Zoom witness.

48. Respondent relied upon his office staff and made no efforts to learn about Zoom or virtual depositions.

49. Respondent believed that his office staff would set up all IT for the September 22, 2020 disposition.

50. When he arrived at his firm, due to Covid-19, there was no support staff in the office and there was only one laptop computer in the conference room set up for the remote deposition, which was utilized by Nurse Rusch.

51. Respondent did not know how to and did not connect to the Zoom call by separate laptop or cell phone with a camera.

52. Respondent was unable to reach any staff outside of his office for assistance.

53. Respondent did not make any efforts to connect to the Zoom deposition separately by asking the reporter or videographer for direction and assistance.

54. Respondent assumed incorrectly that being off camera could not be remedied and would not be an issue due to relaxed local practice.

55. Respondent primarily sat opposite Nurse Rusch in the conference room, two seats down diagonally, and off camera with an N-95 mask on and at times, and he moved about in the room. He did not view a separate computer screen.

56. Respondent did not sit next to Nurse Rusch, so he was not in camera view during the deposition.

57. Lead plaintiffs' counsel Elizabeth Crawford, Esquire, issued the Deposition Notice, dated September 11, 2020, which expressly stated, *inter alia*, that "no person is permitted to communicate with Deponent by any means not recorded in the same manner as the deposition itself."

58. Respondent conducted himself the same as he had done in an in-person deposition, making no modifications for the fact that he could not

be seen and in some cases heard properly because he was not within the microphone's sensitivity.

59. Respondent's failure to abide by the deposition notice and to appear on camera resulted in his inability to be heard and be seen by all parties and led to the additional proceedings which were unnecessary and expended resources of the court and parties.

60. The prohibition of communication with a deponent during a deposition reflects Pennsylvania's longstanding discovery rule prohibiting witness coaching, intentionally or inadvertently.

61. Lacka. Co. R.C.P. 4007.1 prohibits speaking objections.

62. At the outset of the Rusch Deposition, at 10:08 AM, while sitting off camera, Respondent projected directly into Nurse Rusch's laptop in a loud, clear voice to identify himself for the record and make preliminary comments.

63. Despite Respondent being able to be clearly heard at times by the participants when he was objecting for the record, at several points during the Rusch Deposition, Respondent's voice sounded on the video lower in tone as if he was whispering.

64. During the Rusch Deposition, Attorney Crawford marked twelve

(12) new exhibits and referred to other exhibits previously marked.

65. Respondent had prepared a binder for use in the depositions.

Four of the documents were tabbed with hand-written notations:

- a. "our recommendation"
- b. "ACOG general guidelines;"
- c. "2/18/16 fax;" and
- d. "MFM chart."

66. Respondent made no effort to make it clear for the written record and video that a binder was being referenced.

67. On seven (7) occasions, Respondent's voice sounded on the video as though he used lower tones to suggest phraseology to Nurse Rusch, which Nurse Rusch mostly repeated verbatim as part of her answer.

68. Respondent's statements were not heard by the court reporter and were not transcribed on the record.

69. At a disciplinary hearing, Respondent would provide testimony about his subjective intent and understanding of events at the deposition.

70. At 10:35 AM, the following was stated during the Rusch Deposition (Tr. at 35:1-25; 36:1-7):

Q. And can you describe in terms of your understanding as a -- as a maternal fetal medicine nurse practitioner that works for LVPG,

what is the importance of you understanding these recommendations when you're caring for patients in your practice?

[Respondent slid a binder with the document tabbed "ACOG general guidelines" and spoke to Nurse Rusch stating "ACOG general guidelines." Respondent's statement was not heard clearly on the video and was not transcribed]

A. Because this is a general guideline for how to care for patients with multiple gestations, so you would use these guidelines, along with your assessment of the patient, assessment of the fetuses to plan your care of the patient during the pregnancy. *Emphasis and notations added.*

71. Nurse Rusch repeated "general guideline" as part of her answer.

72. Respondent's failure to state on the record or otherwise advise the participants that he was showing Nurse Rusch a binder tabbed ACOG general guidelines made the participants believe that Respondent had knowingly suggested the words "general guidelines" to Nurse Rusch.

73. However, even unintentional suggestive communication to a deponent is violative of the rules.

74. At 12:15 PM, the following was stated on the record at the Rusch Deposition (Tr. at 114:16-24):

Q. And in terms of this —this review of this ultrasound, did you have any reason to suggest that Dr. Smulian didn't read anything wrong -- or read anything wrong, or anything about this is incorrect?

[Respondent stated "she said I don't read ultrasounds" which sounded in a lower tone on the video as though he were

whispering and was not clearly heard on the record].

A. I don't read the ultrasound. So I can't - I can't comment on that. But I would not expect that. *Emphasis and notations added.*

75. Nurse Rusch repeated "I don't read the ultrasound" as part of her answer.

76. Respondent's failure to be seen on the video and/or seated in front a microphone resulted in cutting of words and made it sound as though Respondent's objection suggested the words "I don't read ultrasounds" to Nurse Rusch.

77. Suggestive objections are violative of the discovery rules.

78. At 12:17 PM, the following was stated on the record at the Rusch Deposition (Tr. at 117:7-25; 118:1-6):

[Respondent spoke directly to Nurse Rusch asking her if she needed a break and then made a joke during testimony referring to how long the deposition was taking stated that "she should have packed a bag," repeating a joke that Nurse Rusch had made to him privately during the preceding break. His comments were not heard clearly and were not transcribed.]

Q. And Dr. Smulian also agreed with that?

A. He did. He, as a matter of fact, went to see the patient and discussed that with the patient.

Q. Were you there when he went to see the patient and discussed that with the patient?

A. I did make rounds with him. And he and I both agreed that she should go home, gather her belongings, make her appointment with Dr. Phillips which was about an hour after our visit and plan to be delivered at 38 and zero.

Q. And when you say, gather her belongings, like pack for the hospital?

A. Yes. **Get a bag and go ahead over.** *Emphasis and notation added.*

79. Nurse Rusch repeated “Get a bag and go ahead over” as part of her answer.

80. Notably, Respondent acknowledges that he should not have spoken to Nurse Rusch and that suggestive communication violates the rules.

81. At 12:25 PM, the following was stated on the record at the Rusch Deposition (Tr. at 125:19-25; 126:1)

Q. When you got off the phone with Dr. Phillips on February 18th, 2016, was it your and Dr. Smulian’s understanding, if you know, that the patient was going to be delivered-- the babies were going to be delivered on that day?

[Respondent slid a binder with the document tabbed “Our recommendation” and spoke to Nurse Rusch stating “Our recommendation.” Respondent’s statement was not heard clearly on the video and was not transcribed.]

A. **That was our recommendation.** *Emphasis and notations added.*

82. Nurse Rusch repeated “our recommendation” as part of her answer.

83. Respondent's failure to advise that he was showing Nurse Rusch a binder tabbed "Our Recommendation" made the participants believe that Respondent had knowingly suggested the words "our recommendation" to Nurse Rusch.

84. Suggestive communication is violative of the rules.

85. At 12:29 PM, while off camera, Respondent interrupted Attorney Crawford and stated "wait for my objection" directly to Nurse Rusch.

86. Respondent was not heard clearly on the recording and not transcribed on the record.

87. At 12:33 PM, the following was stated on the record (Tr. at 133:6-13) referring to the medical record:

Q. And then it says, twice weekly antenatal testing starting at 32 weeks gestation or earlier. Is that just something that just sort of comes into the

[Respondent interrupted Plaintiff's counsel and stated "does it get carried over." Respondent's statement was not heard on the recording and his statement was not transcribed.]

just gets copied and pasted every time?

A. It kind of gets **carried over**. Yes. *Emphasis and notations added.*

88. Nurse Rusch repeated "carried over" as part of her answer.

89. Respondent's failure to appear on the video and to be seated in front of a microphone, and the interruption of the questioner made the participants believe that Respondent knowingly suggested "carried over" to Nurse Rusch.

90. Suggestive communication is violative of the rules.

91. At 12:34 PM, the following was stated on the record (Tr. at 134:17-25; 135:1-3):

Q. Why were you surprised?

A. I had recommended that she be delivered at 38 and zero. I was also surprised that she did not have a vaginal delivery. I was surprised that there was a tragic outcome. It—just the whole thing was very surprising.

[Respondent interrupted Nurse Rusch and stated something about "not predictable." Respondent's statement was not clearly heard and was not transcribed on the record.]

I was — ***it's not a predictable thing***. I mean, you can't say that, yes, I knew this would happen if. It was unpredictable and I was very sad to hear it. *Emphasis and notations added.*

92. Respondent does not recall why he stated "not predictable" and acknowledges he should not have been speaking and that suggestive communication is violative of the rules

93. At 12:37 PM, the following was stated on the record (Tr. at 138:1-12):

Q. And in terms of your dealings with Mrs. Shimkus over the several months that you were involved with her, which included, as you've discussed, her hopes to deliver the babies, does it sound consistent

[Respondent stated "Objection, she said I can't answer that." Respondent's statement was not heard clearly and was not transcribed on the record.]

with your understanding of her that she would want to wait another five days to deliver her babies?

A. Oh, I can't answer that. I don't -- I mean, I never discussed that with her. (*emphasis and notations added.*)

94. Respondent's failure to be seen on the video and/or seated in front a microphone resulted in cutting of words and made it sound as though Respondent's objection suggested the words "I can't answer that" to Nurse Rusch.

95. Suggestive objections are prohibited.

96. At 12:39 PM, the defense attorneys objected on the deposition record to the communication in part on the basis that someone was whispering testimony to Nurse Rusch.

97. Attorney Hillebrand stated on the record that it sounded as though someone was "also testifying before [Nurse] Rusch."

98. Unaware that he had not been clearly heard, Respondent did not acknowledge that he had said anything to Nurse Rusch at that time.

99. Respondent stated “[t]here is no one whispering to Nurse Rusch. There are people coming in and out of the room for things for me to sign and give them direction on. That may be what you're hearing. I don't know.”

100. During the deposition, defense counsel communicated amongst themselves, believing that the Respondent had whispered testimony to Nurse Rusch that she repeated.

101. Just before the objection was raised, Myles R. Wren, Esquire, the Respondent's partner, interrupted the deposition and came into the conference room holding papers.

102. Attorney Wren had his client and others with him who were standing behind him in the hall talking.

103. Attorney Myles Wren would testify that when he entered the room, Respondent lowered his mask and Respondent and Attorney Wren were whispering as Respondent attempted to get them to leave the deposition room.

104. Respondent then inaccurately assumed that defense counsel heard Attorney Wren speaking and did not understand it was Respondent's statements that sounded like whispering.

105. Respondent acknowledges that his failure to appear on the

camera and/or be seated in front of a microphone caused his inability to be heard correctly on the Zoom recording.

106. Respondent acknowledges that it was his obligation to make certain he was always heard on the Zoom recording.

107. Respondent acknowledges that based on the defense counsels' objections he should have recognized that participants could not always hear him properly.

108. Respondent acknowledges that he did not make clear to those appearing via Zoom what was occurring in the deposition room, including when Attorney Wren interrupted it, and when Respondent passed documents to Nurse Rusch.

109. Respondent acknowledges that he did not make any efforts to advise the attendees of what was occurring in the room.

110. Respondent made speaking objections on multiple occasions.

111. Respondent interrupted the questioner on at least one occasion to restate the question as to whether a medical record "carries over."

112. Following defense counsels' objections, at the request of Attorney Crawford, Respondent moved his seat to a chair to Nurse Rusch's right that was in camera view.

113. On November 6, 2020, multiple defendants filed a joint motion to dismiss (“Dismissal Motion”) the malpractice action arguing that Respondent’s conduct improperly interfered in Nurse Rusch’s testimony and asked for dismissal of the matter as to all defendants except LVPG.

114. The Dismissal Motion included a disk of the eight video clips of the Respondent’s statements with audio that sounds like Respondent was whispering, and attached the deposition transcript as an exhibit.

115. On November 9, 2020, after preliminary review of the Dismissal Motion and the video clip evidence, the Honorable Judge James A. Gibbons issued a notice that:

- a. scheduled, *inter alia*, an evidentiary hearing for November 20, 2020;
- b. required all parties, including Nurse Rusch, appear ***in-person*** despite the pandemic rather than the previous scheduled Zoom hearing; and
- c. stated in bold and capitalized letters “**BOTH PROCEEDINGS WILL BE HELD IN PERSON RATHER THAN ZOOM AS ORIGINALLY SCHEDULED.**” *Emphasis in the original.*

116. On November 16, 2020, Attorney Crawford filed an objection to the Dismissal Motion that advised she did not know whether anything improper happened and that from her perspective the alleged whispered statements were not material to the Shimkuses' case and had no effect on the issues in the case.

117. On November 16, 2020 Respondent filed his response to the Dismissal Motion.

118. On November 20, 2020, Judge Gibbons conducted a hearing regarding Respondent's conduct during the September 22, 2020 deposition.

119. On December 7, 2020, Judge Gibbons issued his Memorandum, precluding Nurse Rusch "from testifying [at trial] as to any of the items [*i.e.*, the seven stricken questions and answers] specifically identified in the Motion to Dismiss" and sanctioning both Nurse Rusch and Respondent personally for their conduct during the deposition.

120. Attorney Crawford agreed to the preclusion of the questions and answers on the basis that they were not material to the Shimkuses' case and did not affect their case nor the burden of proof.

121. The December 7, 2020 Memorandum imposed monetary sanctions in the form of reimbursement of all counsel fees, costs and

expenses associated with the filing of the Dismissal Motion and the November 20, 2020 hearing against Nurse Rusch and Respondent, both nonparties.

122. Judge Gibbons' ruling prohibited Respondent's law firm or LVPG from paying Nurse Rusch's sanctions.

123. Judge Gibbons expressly stated that his December 7, 2020 Memorandum and Order should be provided to ODC.

124. Respondent paid ½ of the attorneys' fees which amounted to \$7,541.25 (\$1,500 to Burns White LLC; \$2,555.75 to Marshall Dennehey Warner Coleman & Goggin, P.C.; and \$3,485.50 to Scanlon Howley & Doherty Law, P.C.).

125. If a hearing were to take place, Nurse Rusch would testify that:

- a. nothing Respondent did in the deposition affected her testimony;
- b. she testified truthfully, and at no time did Respondent whisper to her; and
- c. the audio in the courtroom at the time of the hearing sounded very different than what Respondent sounded like in the deposition room.

126. When Respondent initially provided his DB-7 Statement of Position, dated December 1, 2021 and supplemental response dated January 27, 2022, Respondent did not provide the professional technology reports, as he was unfamiliar with Zoom video technology and had no other explanation for why he sounded like he was whispering other than the wearing of a mask muffling his voice.

127. Respondent was aware his medical condition required him to wear the recommended N95 mask during the deposition.

128. However, Respondent was not aware of how his health condition, and the medications he was taking, affected his ability to project his voice.

129. Subsequently, he was advised by his treating cardiologist to consult with an otolaryngologist.

130. Both his cardiologist and otolaryngologist have indicated they would testify that Respondent's medical condition could cause his voice to sound, at times, as though he were whispering.

131. Respondent would present two technology professionals who would testify in their professional opinion that the video could not constitute clear and satisfactory evidence that Respondent was whispering.

132. Lizbeth Chapman, owner of court reporting service Digital Justice LLP, who reviewed the full deposition, would testify that the Zoom recording of a deposition cannot establish that Respondent was whispering. Zoom software may at times: cut off the first one or two words of a speaker, have difficulty picking up two speakers speaking at the same time, and not transition properly causing garbled, static-like audio quality.

133. Thomas Gurzynski, Professor of Communications at Penn State with degrees in communications, and media services manager Media Department Manager of Wyoming Valley Health Care System for over 25 years, would testify that if Respondent “were whispering, the audio would not have it picked up at all, mask, or no mask.” The gain and sensitivity reception zone of the laptop greatly affects how the sound would transmit on the Zoom recording. Additionally, sound suppression settings on Zoom are set to auto, which cuts out perceived background noise.

134. Both Chapman and Gurzynski rely on Respondent’s explanation that his health issues, mask wearing and location during the deposition affected his ability to project.

135. Respondent acknowledges that as a result of his conduct in (1) failing to seat himself within the sensitivity range of a microphone either by

sitting next to Nurse Rusch, or by logging in on his own device, (2) by interrupting Nurse Rusch, and the questioner and or (3) speaking directly to Nurse Rusch, he caused the video to sound as though he were whispering and was suggesting answers.

136. When the Motion to Dismiss was filed, Respondent and his firm offered LVPG and Nurse Rusch separate counsel.

137. Both refused and insisted that Respondent continue to represent them.

138. Respondent's partner, Amy Shwed, Esquire, met with Nurse Rusch. Nurse Rusch insisted that Respondent had done nothing wrong and that her testimony had not been influenced in any way.

139. Attorney Shwed accompanied Nurse Rusch to the November hearing to represent Nurse Rusch's interests and the interests of LVPG.

140. Attorney Shwed, in representing Nurse Rusch, attempted to explain Respondent's behavior.

141. Respondent should have recognized, at the time the Motion to Dismiss was filed, the seriousness of the allegations against him and the conflict of interest required separate counsel.

142. Respondent failed to recognize the conflict because both he and

Nurse Rusch were consistent that he was not whispering answers to her.

143. The December 7, 2020 Memorandum required Nurse Rusch to be personally sanctioned and Nurse Rusch's employer, and Respondent could not pay the sanctions.

144. After issuance of the December 7, 2020 Memorandum, Respondent failed to advise Nurse Rusch in writing that she should obtain separate counsel from LVPG to appeal the monetary sanction because her interests diverged from her employer's interests when they chose not to appeal the Court's December 6, 2020 ruling.

145. Respondent's deposition interference influenced the discovery record and needlessly entangled his client in protracted discovery disputes.

146. Currently, the disciplinary hearing is scheduled for July 29, 30, and 31, 2024.

147. Respondent and his counsel have indicated they intend to petition the Hearing Committee and Disciplinary Board for additional hearing dates to present numerous witness and evidence.

SPECIFIC RULES OF PROFESSIONAL CONDUCT VIOLATED

148. By his conduct as set forth in paragraphs 1 through 149, Respondent admits that he violated the following Rules of Professional

Conduct:

- a. RPC 1.1, which provides, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] requires lawyers to maintain "requisite knowledge and skill[of] the benefits and risks associated with relevant technology....;"
- b. RPC 1.7(a)2), which provides, in part " . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . .
. (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer;" and
- c. RPC 8.4(d), which states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

SPECIFIC JOINT RECOMMENDATION FOR DISCIPLINE

149. ODC and Respondent jointly recommend that the appropriate

discipline for Respondent's admitted misconduct is a Public Reprimand.

150. Respondent failed to adhere to long-established discovery rules prohibiting suggestive communication during active questioning at a deposition. Respondent's communications to Nurse Rusch obstructed the purpose of the deposition to obtain Nurse Rusch's own recollection of events. See ABA Formal Opinion 508, 08-05-23 (“[o]vertly attempting to manipulate testimony-in-progress would in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d)”); See also *Faile v. Zarich*, Case No. HHDX04CV065015994S, 2009 WL 2036786 (Conn. Super. Ct. Jun 15, 2009)(“obstruction of the discovery process interferes with and is prejudicial to the administration of justice”) (applying similar Connecticut ethical rule in sanctions against Madonna Sacco, Esquire, a Connecticut barred attorney). All parties in litigation are entitled to unfettered and untainted testimony from the deponent/trial witness. Truth assessments are the factfinder's purview.

151. Respondent hereby consents to the discipline being imposed upon him. Attached to this Petition is Respondent's executed Affidavit required by Pa.R.D.E. 215(d) stating that he consents to the recommended discipline and includes the mandatory acknowledgements contained in

Pa.R.D.E. 215(d)(1) – (4).

152. In support of the Joint Recommendation, it is respectfully submitted that the following mitigating circumstances are present:

- a. Respondent has admitted engaging in misconduct and violating the Pennsylvania Rules of Professional Conduct;
- b. Respondent has cooperated with ODC in connection with this Petition, as evidenced by Respondent's admissions herein and his consent to receive public discipline;
- c. Respondent is remorseful for his misconduct and consents to receive a public reprimand, which saves the resources of the attorney disciplinary system;
- d. Specifically, Respondent acknowledges that many lawyers and others will be inconvenienced and a significant amount of resources expended to proceed to hearing in this matter and he wishes to avoid that for all involved by consenting to discipline;
- e. Respondent cooperated with ODC during the investigation, voluntarily providing information and documents needed to complete the investigation;
- f. Respondent met with ODC in person to express his remorse and

desire to “make things right;” and

g. upon receipt of the DB-7 letter of inquiry, Respondent attended Zoom technology continuing legal education courses.

153. Respondent has modified his behavior to ensure he has the technical knowledge necessary to operate virtual proceedings and now understands the differences between virtual proceedings and in-person proceedings, which necessitates different conduct.

154. Additionally, Respondent has modified his behavior in both in-person and virtual depositions to refrain from speaking directly to a witness during questioning, interrupt questioners and making prohibited speaking objections.

155. Respondent would present numerous character witnesses, including 25 physicians, retired judges and lawyers, who would state that he has an excellent reputation for honesty, integrity and professionalism, and specifically has a reputation for professionalism during discovery matters.

156. Respondent has practiced law for over 40 years and has no record of discipline.

157. Respondent has never been sanctioned or disciplined for conduct in discovery, or in litigation in general (or otherwise).

158. Through counsel, Respondent apologized to Judge Gibbons that his conduct caused additional proceedings.

159. Violations of RPC 8.4(d) causing obstruction of the administration of justice have resulted in discipline ranging from informal admonition to public reprimand to suspension depending on the facts and circumstances.

160. The below matters involved similar conduct resulting in private discipline:

- a. In ***Office of Disciplinary Counsel v. Anonymous***, (C3-16-838, discipline 10/12/2018), an attorney received an Informal admonition following his improper questioning of a co-defendant under oath during a preliminary hearing before a nonlawyer magisterial judge that was conducted (1) without co-defendant's counsel present, (2) without co-defendant's counsel's prior approval, and (3) over the co-defendant's express objection. The attorney refused to acknowledge any misconduct and caused significant delay and unnecessary expenditure of judicial resources as the court was forced to take action to protect the co-

defendant's rights; and

- b. Similarly in the matter of ***Office of Disciplinary Counsel v. Anonymous***, No. 167 DB 2018, an attorney received a private reprimand, following multiple sanctions for engaging in a pattern of conduct ignoring court orders, filing frivolous pleadings and causing unnecessary delays. The court found the litigation tactics objectionable, vexatious and obstructive and the attorney flagrantly and unashamedly disobeyed court orders. The attorney showed remorse and had no prior discipline.

161. However, the below matters resulted in public discipline for obstruction of the discovery process:

- a. In ***Bar Counsel v. Jeffrey M. Rosin***, by Order dated October 23, 2023, the Massachusetts Board of Bar Overseers, No. 2023-12, imposed a public reprimand on Rosin for his suggestive communication to a deponent during active questioning. The district court judge determined that Rosin plainly frustrated plaintiffs' rights to a fair examination and engaged in a pattern and practice of interference that undermined the truth-seeking purpose of discovery. Rosin's conduct was not "a momentary or

single lapse of judgment but were repeated numerous times over the course of the day.” Rosin contended he was frustrated with the deposition questions and that opposing counsel was unprofessional and improperly asked repetitive questions. However, like Respondent, Rosin failed to utilize proper objection procedures to address his concerns; and

- b. In *The Florida Bar v. Derek Vashon James*, the reviewing disciplinary referee found that James inappropriately communicated to a deponent during testimony by texting statements to the deponent causing the unlawful obstruction of another party’s access to evidence. James sent approximately 16 texts that included not just short phrases but entire answers and directed the deponent not to answer other questions. For example, James texted, “just say it anyway,” and “don’t give an absolute answer,” which strongly suggests that James induced the deponent to provide false testimony. The discipline referee concluded that “telling [the deponent] what to say, how to answer, to avoid providing certain information, to remember a deposition but not discuss certain checks, and to not give an absolute

answer” was dishonest. No. SC20-128 (Fl. Nov. 18, 2021), Per Curiam Order (observing “James engaged in conduct aimed at defeating the opposing party’s lawful attempts to obtain evidence, undermining the adversarial process, and as a result, the trial court’s intervention was required”). Unlike here, the referee determined that James was deceptive both on the date of the deposition as well as to the judge in his insistence that the text messages were only exchanged during the break in testimony and that he texted only his wife and daughter during the deposition, which was false. The Florida Supreme Court agreed that James interfered with the presentation of evidence and compounded his violations through additional misrepresentations. Because of James’ obvious deceptive conduct, the Florida Supreme Court increased the recommended suspension from 30 days to 91 days, which requires a reinstatement hearing. The Florida Supreme Court cited James’ denial of his misconduct and misrepresentations to the judge in the case as particularly egregious. James’ conduct is more egregious than Respondent’s in that James repeatedly involved

his client in the surreptitious misconduct through his texting throughout the deposition and knowingly sought to induce false testimony. Further, off camera texting is a far more dishonest form of coaching because it is less likely to be observed.

- c. In ***ODC v. Francis T. Colleran***, No. 196 DB 2011 (D. Bd. Order 7/24/2012), Colleran received a public reprimand for, *inter alia*, violating RPC 3.4(a) by altering a preliminary report by redacting the “draft report” stamp and providing it to opposing counsel in a medical malpractice action as a final report. At the time, physician depositions were still pending. Thus, the report was incomplete. Like here, in determining that a public reprimand was appropriate, the Disciplinary Board considered in mitigation that Colleran had no prior discipline, admitted his misconduct, and cooperated with ODC; and
- d. In ***ODC v. Julie Chovanes***, No. 106 DB 2021 (D. Bd. Order 8/18/21), Chovanes received a public reprimand on consent for, *inter alia*, repetitive obstructive behavior during a deposition in a California district court matter. *La Jolla Spa MD, Inc. v. Avidas Pharmaceuticals, LLC*, Case No. 17-CV-1124-MMA(WVG), 2019

WL 4141237 (S.D. Cal. Aug. 30, 2019). The district court sanctioned Chovanes for 133 instances of deposition interference when she “continuously interrupted, lodged frivolous objections, improperly instructed [the client] to not answer questions, extensively argued” with opposing counsel, and in a “large outburst” accused opposing counsel of threatening her client without evidentiary support. Additionally, Chovanes was disruptive during teleconferences with a federal magistrate judge and failed to report herself to ODC despite the judge’s directive that she do so. Chovanes failed to respond to ODC’s DB-7 letter of inquiry in violation of Pa.R.D.E. 203(b)(7). Chovanes ultimately admitted misconduct and consented to public discipline. Although the Chovanes matter may seem more egregious, notably, the obstruction conduct Chovanes engaged in was curable, and did not result in any testimony being struck as tainted for purposes of trial.

162. By contrast, the following matters, which resulted in suspension, involved far more egregious conduct, falsification of evidence and other serious rule violations:

- a. In ***ODC v. John Larason***, No. 1 DB 2002 (D. Bd. Rpt. 5/21/2004) (S. Ct. Order 8/19/2004), Larason received a three-month suspension for, *inter alia*, altering a bankruptcy court schedule in violation of RPC 3.4(b) and using the altered document to defend his client in a municipal court matter.
- b. In ***ODC v. Michael B. Fein***, 147 DB 2018 (D. Bd. Rpt. 12/8/2014) (S. Ct. Order 2/10/2015), Fein received a six-month suspension for, *inter alia*, manipulating a document production to include only records that were favorable to his client.
- c. In ***ODC v. Allen L. Feingold***, No. 93 DB 2003 (D. Bd. Rpt. 11/18/2005) (S. Ct. Order 3/3/2006), among other acts of misconduct, Feingold assisted his client in offering false testimony during the client's deposition and attempted to conceal the client's false testimony in violation of RPC 3.4(a), RPC 3.4(b) and RPC 3.4(d). As a result, the Pennsylvania Supreme Court suspended Feingold for three years.
- d. In ***ODC v. Itzhak Kornfeld***, No. 177 DB 2007 (S. Ct. Order 6/24/2009), Kornfeld altered a document, and knowingly submitted the document to the court. Kornfeld subsequently

made false statements to the court regarding the document, for which he consented to a two-year suspension.

163. The suspension cases are distinguishable from Respondent's deposition interference because they involved more egregious conduct.

164. Notably, although Respondent improperly influenced the evidentiary record by suggestive communication, there is no evidence, and the Court made no determination, that Respondent induced false testimony. Thus, ODC agrees that a suspension is unwarranted.

WHEREFORE, ODC and Respondent respectfully request that:

- a. pursuant to Pa.R.D.E. 215(e) and Pa.R.D.E. 215(g), the three-member panel of the Disciplinary Board review and approve this Joint Petition in Support of Discipline on Consent and Respondent receives a public reprimand; and
- 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 expense be paid by Respondent within 30 days after the

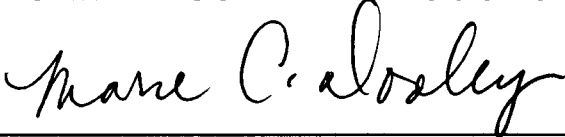
notice of the taxed expenses is sent to Respondent.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL

THOMAS J. FARRELL
CHIEF DISCIPLINARY COUNSEL

Date: 07-15-24

By 

Marie C. Dooley, Esquire
Attorney Registration No. 203681
Disciplinary Counsel

Date:

By _____

Patrick C. Carey, Esquire
Attorney Registration No. 32961
Respondent

Date:

By _____

Amy J. Coco, Esquire
Attorney Registration No. 73416
Counsel for Respondent


notice of the taxed expenses is sent to Respondent.

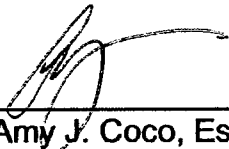
Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL

THOMAS J. FARRELL
CHIEF DISCIPLINARY COUNSEL

Date: _____
By _____
Marie C. Dooley, Esquire
Attorney Registration No. 203681
Disciplinary Counsel

Date: _____
By 
Patrick C. Carey, Esquire
Attorney Registration No. 32961
Respondent

Date: _____
By 
Amy J. Coco, Esquire
Attorney Registration No. 73416
Counsel for Respondent

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 56 DB 2022
: :
Petitioner : :
: Attorney Reg. No. 32961
PATRICK C. CAREY, : :
: :
Respondent : (Lackawanna County)

VERIFICATION

The statements contained in the foregoing *Joint Petition In Support of Discipline on Consent Discipline* are true and correct to the best of my knowledge or information and belief and are made subject to the penalties of 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.

Date: 07-15-24 By Marie C. Dooley
Marie C. Dooley, Esquire
Attorney Registration No. 203681
Disciplinary Counsel

Date: By _____
Patrick C. Carey, Esquire
Attorney Registration No. 32961
Respondent

Date: By _____
Amy J. Coco, Esquire
Attorney Registration No. 73416
Counsel for Respondent

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

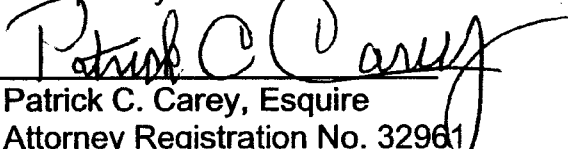
OFFICE OF DISCIPLINARY COUNSEL, : No. 56 DB 2022


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: Attorney Reg. No. 32961
PATRICK C. CAREY, :
:
Respondent : (Lackawanna County)

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Date: By _____
Marie C. Dooley, Esquire
Attorney Registration No. 203681
Disciplinary Counsel

Date: By 
Patrick C. Carey, Esquire
Attorney Registration No. 32961
Respondent

Date: By 
Amy G. Coco, Esquire
Attorney Registration No. 73416
Counsel for Respondent

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 56 DB 2022

Petitioner

:

: Attorney Reg. No. 32961

PATRICK C. CAREY,

:

Respondent

: (Lackawanna County)

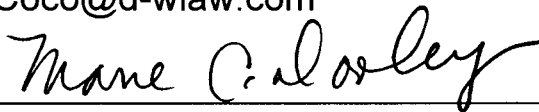
CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 204 Pa. Code §89.22 (relating to service by a participant).

First Class Mail and Email, as follows:

Patrick C. Carey, Esquire
c/o Amy J. Coco, Esquire
Weinheimer, Haber & Coco, P.C.
429 Fourth Ave. Ste 200
Pittsburgh, PA 15219
ACoco@d-wlaw.com

Dated: 07-15-24



Marie C. Dooley, Esquire
Disciplinary Counsel
Attorney Registration No. 203681
Office of Disciplinary Counsel District II
820 Adams Avenue, Suite 170
Trooper, PA 19403
(610) 650- 8210

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 56 DB 2022
: :
Petitioner : :
: Attorney Reg. No. 32961
PATRICK C. CAREY, : :
: :
Respondent : (Lackawanna County)

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

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF LACKAWANNA:

Patrick C. Carey, Esquire, being duly sworn according to law, deposes and hereby submits this affidavit consenting to the recommendation of a public reprimand in conformity with Pa.R.D.E. 215(d) and further states as follows:

1. He is an attorney admitted in the Commonwealth of Pennsylvania, having been admitted to the bar on or about on December 11, 1980.
2. He desires to submit a Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d).
3. His consent is freely and voluntarily rendered; he is not being subjected to coercion or duress, and he is fully aware of the implications of submitting this affidavit.
4. He is aware that there is presently pending a proceeding into allegations that he has been guilty of misconduct as set forth in the Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d) to

which this affidavit is attached.

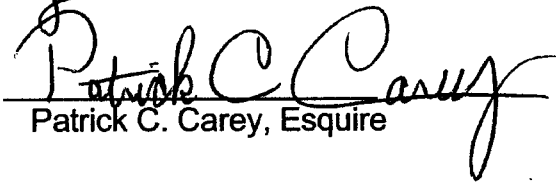
5. He acknowledges that the material facts set forth in the Joint Petition are true.

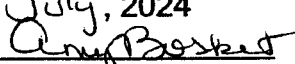
6. He submits the within affidavit because he knows that if charges predicated upon the matter under investigation were filed, or continued to be prosecuted in the pending proceeding, he could not successfully defend against them.

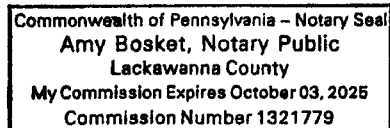
7. He acknowledges that he is fully aware of his right to consult and employ counsel to represent him in the instant proceeding. He has retained, consulted and acted upon the advice of counsel, in connection with his decision to execute the within Joint Petition.

It is understood that the statements made herein are subject to the penalties of 18 Pa.C.S.A. §4904 (relating to unsworn falsification to authorities).

Signed this 15 day of July, 2024.


Patrick C. Carey, Esquire

Sworn to and subscribed
before me this 15th day
of July, 2024

Notary Public



CERTIFICATE OF COMPLIANCE

I certify that this filing 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 Discipline Counsel
Signature: Marie C. Dooley
Name: Marie C. Dooley
Attorney No. (if applicable): 203681