Filed: 1/31/2025 8:26 AM

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF	)	
	)	
THEODORE E. ROKITA	)	**CAUSE NO. 25S-DI-29**
Attorney No. 18857-49	)	
	)	

DISCIPLINARY COMPLAINT

The Indiana Supreme Court Disciplinary Commission, with Commission member Bernard Carter not participating, having found reasonable cause to believe the Respondent's acts, if proved, would warrant disciplinary action, by its Executive Director, Adrienne Meiring, pursuant to Indiana Admission and Discipline Rule 23, Section 12, files and presents this Disciplinary Complaint against Theodore E. Rokita. The Disciplinary Complaint is as follows:

BACKGROUND

1. Theodore E. Rokita ("Respondent") is currently an attorney in active and good standing in Indiana.

2. Respondent was admitted to practice law in the State of Indiana on October 23, 1995, subjecting him to the Indiana Supreme Court's disciplinary jurisdiction.

3. At all times relevant to this proceeding, Respondent has been the Indiana Attorney General and has practiced law in Indianapolis, Marion County, Indiana.

4. At all times relevant to this proceeding, Respondent has overseen a staff of more than 400 employees, with over 140 serving as attorneys for the agency.

FACTS GIVING RISE TO MISCONDUCT CHARGES

5. On November 2, 2023, the Indiana Supreme Court issued a Public Reprimand to Respondent in *Matter of Rokita*, Case No. 23S-DI-258, for violations of Indiana Rules of Professional Conduct 3.6(a)[1] and 4.4(a),[2] after a majority of the Court approved the Statement of Circumstances and Conditional Agreement for Discipline ("Conditional Agreement") submitted by the Indiana Supreme Court Disciplinary Commission ("Disciplinary Commission") and Respondent.

6. Approximately two hours after the Court handed down the per curiam opinion in *Matter of Rokita*, Case No. 23S-DI-258, Respondent issued a press release about the discipline.

7. As more fully set forth below, Respondent made statements in the November 2, 2023 press release that contradicted statements he swore to in the Conditional Agreement and affidavit that accompanied the agreement.

8. As more fully set forth below, Respondent's statements in the November 2, 2023 press release retracted his acceptance of responsibility for the misconduct he swore to in

[1] Indiana Professional Conduct Rule 3.6, which governs lawyers' ethical obligations regarding pretrial publicity, is a balance between protecting the right to a fair trial and safeguarding the right of free expression. *See* Ind. Prof. Cond. R. 3.6, cmt. 1. Under this balance, Rule 3.6(a) prohibits a lawyer "who is participating or has participated in the investigation or litigation of a matter" from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Statements about the "character, credibility, reputation or criminal record of a party, a suspect in a criminal investigation, or witness" are rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding. *See* Ind. Prof. Cond. R. 3.6(d)(1).

[2] Indiana Professional Conduct Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have "no substantial purpose other than to embarrass, delay, or burden a third person."

the Conditional Agreement and affidavit that accompanied the agreement.

9. As more fully set forth below, this retraction of his acceptance of responsibility demonstrates that Respondent was not candid with the Court when he attested that he admitted he had violated Indiana Professional Conduct Rules 3.6(a) and 4.4(a) and could not have successfully defended himself if the proceeding were prosecuted.

Disciplinary Complaint in 23S-DI-258

10. On July 1, 2022, an Indiana newspaper published an article titled "Patients Head to Indiana for Abortion Services as Other States Restrict Care." The story discussed an Indiana physician who had performed an abortion on a ten-year-old from Ohio and quoted the physician in the article.

11. In the days that followed, the Consumer Protection Division of the Indiana Attorney General's Office received seven complaints from individuals who were not the physician's patients about the physician's performance of a termination procedure on a ten-year-old.

12. By July 12, 2022, Respondent's office had initiated an investigation into six of the complaints and informed the physician about this investigation.

13. On July 13, 2022, Respondent appeared on a nationally televised program and was asked during the interview about the reporting and HIPPA obligations of the physician who had performed the termination procedure.

14. During the July 13, 2022 interview, Respondent responded to the interviewer as follows:

> Then we have the rape. And then we have this, uh, abortion activist acting as a doctor—with a history of failing to report. So, we're gathering the information. We're gathering the evidence as

> we speak, and we're going to fight this to the end, uh, including looking at her licensure if she failed to report. In Indiana, it's a crime, uh, for, uh, to not report—uh, to intentionally not report.

15. Besides Respondent's appearance on the program, Respondent made other public statements, from July 13, 2022 through September 14, 2022, about the pending investigation of the physician.

16. At the time that Respondent made the statements described in ¶¶ 14 and 15, the Attorney General's Office had launched an investigation of the physician but had not yet filed notice with the Indiana Medical Licensing Board of intent to prosecute the physician and to seek sanctions against her medical license.

17. After Respondent made his public statements about the physician on the national television show on July 13, 2022, the Indiana Supreme Court Disciplinary Commission received Requests for Investigation ("RFIs") from twenty-one different individuals who raised concerns that Respondent's public statements about the physician and/or Respondent's conduct during the pending investigation of the physician violated professional conduct rules.

18. On November 30, 2022, the Attorney General's Office filed an administrative complaint with the Medical Licensing Board against the physician in cause no. 2022 MLB 0024, and an adjudicatory hearing before the Medical Licensing Board was held on May 25 and 26, 2023.

19. On September 18, 2023, the Disciplinary Commission filed a Disciplinary Complaint against Respondent alleging three violations of the Indiana Rules of Professional Conduct. *See* Exhibit 1 – Disciplinary Complaint in Case No. 23S-DI-258.

a. In Counts 1 and 2, the Disciplinary Commission alleged that

Respondent violated Professional Conduct Rules 3.6(a) and 4.4(a) by referring to the physician as an "abortion activist acting as a doctor – with a history of failing to report" during the national television show on July 13, 2022, when the Attorney General's Office had an investigation pending against the physician.

b. In Count 3, the Disciplinary Commission alleged that Respondent engaged in conduct prejudicial to the administration of justice and violated Professional Conduct 8.4(d) by intentionally making public statements and/or directing others to issue public statements from July 2022 – September 2022 about the investigation of the physician, prior to a referral to the Indiana Medical Licensing Board, in contravention of the duty of confidentiality required under Ind. Code § 25-1-7-10(a).[3]

20. On September 18, 2023, Respondent filed a 30-page Answer to the Disciplinary Complaint detailing Respondent's defenses to Count 3. Respondent also issued a press release summarizing his defense and linking to the filed Answer.

Conditional Agreement and Court's Opinion

21. At the completion of the Disciplinary Commission's investigation and prior to the filing of charges, the Disciplinary Commission and Respondent entered into a Statement of Circumstances and Conditional Agreement for Discipline. *See* Exhibit 2 – Conditional Agreement.

22. In the Conditional Agreement, Respondent agreed that he violated Professional Conduct Rule 3.6(a) for making the public statement that the physician was an "abortion activist acting as a doctor – with a history of failing to report" as the statement "could reasonably be considered a statement about the doctor's character, credibility, or

[3]I.C.§ 25-1-7-10(a) provides: "Except as provided in section 3(b) or 3(c) of this chapter, all complaints and information pertaining to the complaints [of a medical professional] shall be held in strict confidence until the attorney general files notice with the board of the attorney general's intent to prosecute the licensee." Subsection (b) of this statute specifically notes that employees of the office of attorney general may not disclose or further the disclosure of information concerning a medical licensing complaint unless an exception applies.

reputation in violation of Rule 3.6(a) because of the presumption raised by Rule 3.6(d)(l)." Exhibit 2, p.4.

23. Respondent also agreed in the Conditional Agreement that he violated Professional Conduct Rule 4.4(a) for making the public statement that the physician was an "abortion activist acting as a doctor – with a history of failing to report" as "a reasonable person could conclude that Respondent's use of the phrase 'abortion activist acting as a doctor - with a history of failing to report' had 'no substantial purpose other than to embarrass or burden' the doctor in violation of Rule 4.4(a)." Exhibit 2, p. 4-5.

24. The Disciplinary Commission and Respondent further agreed that if the Court accepted the Conditional Agreement, Respondent would receive a Public Reprimand for his violations in Count 1 and 2. Exhibit 2, p. 6.

25. As to Count 3, the Disciplinary Commission and Respondent wrote and agreed to the following in the Conditional Agreement:

> The parties dispute whether Respondent acted contrary to Ind. Code § 25-1-7-l0(a) and violated Indiana Professional Rule 8.4(d). However, the parties agree that a trial on the merits on Count 3 would not likely result in a different sanction than the already agreed to proposed sanction on Counts 1 and 2. Accordingly, in the interests of judicial economy, the parties do not believe a trial on the merits is warranted on Count 3, and the Commission agrees to dismiss Count 3 in exchange for Respondent's admission to misconduct on Counts 1 and 2.
>
> Exhibit 2, p. 5.

26. In support of the proposed sanction, the Disciplinary Commission and Respondent agreed that, among other factors, Respondent should receive credit for being "cooperative and responsive to the Commission's requests for information" and for "accept[ing] responsibility for his misconduct." Exhibit 2, p. 5.

27. At the end of the Conditional Agreement in a section titled "Voluntary Consent and Affidavit," the section provides:

> Respondent voluntarily consents to this Statement of Circumstances and Conditional Agreement for Discipline. In this regard, the parties incorporate by reference the attached Affidavit, drafted pursuant to Indiana Admission and Discipline Rule 23, § 12. l(b)(3).
>
> Exhibit 2, p. 7.

28. Respondent and his attorney, H. Christopher Bartolomucci, signed the Conditional Agreement, as did the Disciplinary Commission's legal representatives. Exhibit 2, p. 8.

29. Accompanying the Conditional Agreement, Respondent also submitted a notarized affidavit signed by Respondent on September 1, 2023 ("Affidavit"). In the Affidavit, Respondent swore, under oath upon penalty of perjury, to the following:

a. Respondent was "knowingly, freely, and voluntarily" consenting to the agreed discipline set forth in the "Statement of Circumstances and Conditional Agreement for Discipline," submitted to resolve *In the Matter of Theodore E. Rokita,* Cause Number 23S-DI-258.

b. Respondent "entered into said agreement without being subject to any coercion or duress whatsoever" and that he was "fully aware of the implications of submitting [his] consent."

c. Respondent acknowledged that there "exist[ed] grounds for [his] discipline" and the nature and grounds were "fully set forth in the document, entitled, 'Statement of Circumstances and Conditional Agreement for Discipline,'" which was incorporated into the Affidavit.

d. Respondent acknowledged the material facts set out in the "Statement of Circumstances and Conditional Agreement for Discipline" were true.

e. Respondent was submitting the agreement to discipline because "[he knew] that if this proceeding were prosecuted, [he] could not successfully defend [himself]."

Exhibit 2, p. 9.

30. The Conditional Agreement was submitted to the Court for approval on or about September 19, 2023.

31. On November 2, 2023, at 9:50 a.m., the Court issued a per curiam opinion in *Matter of Rokita*, Case No. 23S-DI-258, with a majority of the Court approving the Conditional Agreement and issuing a Public Reprimand of Respondent.

32. The majority noted in the opinion that, "In a sworn affidavit attached to the conditional agreement, made under penalty of perjury, Respondent admits these two rule violations [Rule 3.6(a) and 4.4(a)] and acknowledges that he could not successfully defend himself on these two charges if this matter were tried." Exhibit 3, p. 4-5. In determining that the proposed sanction was appropriate, the Court's majority specifically credited Respondent's "acceptance of responsibility" as a mitigating factor. Exhibit 3, p. 5. This comports with the Court's practice of consistently noting the importance of remorse and acceptance of responsibility as mitigating factors, including in cases involving public officials.[4] Likewise, the Court views lack of remorse and denial of responsibility as aggravating factors.[5]

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[4] *E.g., In re Norrick*, 233 N.E.3d 403, 406 (Ind. 2024) (judge "accept[ed] responsibility for his misconduct"); *In re Meade*, 200 N.E.3d 448, 451 (Ind. 2023) (judge "accepted responsibility for his conduct and expressed remorse"); *In re Miller*, 178 N.E.3d 1194, 1195–96 (Ind. 2022) (judge "expressed remorse and accepted responsibility for his misconduct"); *In re Scheibenberger*, 899 N.E.2d 649, 651 (Ind. 2009) (judge "accepted responsibility and is remorseful"); *In re Alsip*, 499 N.E.2d 1102, 1102–03 (Ind. 1986) (judge stated "I accept full responsibility for this incident"; "I also occupy public office" and "sincerely apologize to the public, my fellow judges and also the legal profession and also to this Court"; "I have not asked for leniency and I expect none").

[5] *E.g., In re Stern*, 11 N.E.3d 917, 921 (Ind. 2014) ("instead of accepting responsibility for his actions, Respondent blames the judges in the lawsuits, the Commission, and others," and "has shown no insight into his misconduct"); *In re Sniadecki*, 924 N.E.2d 109, 120 (Ind. 2010) (respondent "has failed to accept responsibility for his actions and still denies wrongdoing"); *In re Brewer*, 110 N.E.3d 1141, 1143 (Ind. 2018) (respondent "has failed to accept responsibility for her misconduct"); *In re Jeffries*, 104 N.E.3d 567, 572 (Ind. 2018) (respondent "has not accepted responsibility for his misconduct"); *In re Brown*, 766 N.E.2d 363, 366 (Ind. 2002) (noting respondent's "absolute lack of remorse" and "failure to accept responsibility").

Respondent's November 2, 2023 Press Release

33. On November 2, 2023, at approximately 12:04 p.m.—a little more than two hours after the Court issued its per curiam decision—Respondent directed that a press release titled "Attorney General Todd Rokita's Statement on Disciplinary Commission Resolution" be publicly issued from the Attorney General's Office and distributed to everyone on the Attorney General Office's subscription list. Exhibit 4 – 11/2/23 press release (attached and incorporated in full herein).

34. At Respondent's direction, a copy of the press release also was placed on the Attorney General Office's official website at: https://www.in.gov/attorneygeneral/newsroom/. Exhibit 4 – 11/2/23 Press Release.

35. Respondent's statements in the November 2, 2023 press release included the following:

a. "First things first: I deny and was not found to have violated anyone's confidentiality or any laws."

b. "Despite the failed attempt to derail our work . . . it all boiled down to a truthful 16-word answer I gave a year ago during an international media storm caused by an abortionist who put her interests above her patient's. I received a 'public reprimand' for saying that – '. . . we have this abortion activist acting as a doctor – with a history of failing to report.'"

c. Immediately after the statement in subparagraph (b), Respondent stated in relevant part in the next two paragraphs:

> The media, medical establishment and cancel culture, all on cue, supported - and then attempted to vindicate - the abortionist who intentionally exposed personal health information at a political rally all in furtherance of their shared ideological and business interests.
>
> These liberal activists would like to cancel your vote because they hate the fact I stand up for liberty. . . .

d. In the paragraph following the statements in subsection (c), Respondent stated:

> Having evidence and explanation for everything I said, I could have fought over those 16 words, but ending their campaign now will save a lot of taxpayer money and distraction, which is also very important to me.

e. "In order to resolve this, I was required to sign an affidavit without any modifications."

Exhibit 4 – 11/2/23 Press Release.

36. Respondent's statements in the November 2, 2023 press release, as described in ¶35 (a) through (e), are contradictory to Respondent's assertion in the Conditional Agreement that Respondent "accepted responsibility for his misconduct."

37. Respondent's statement in the November 2, 2023 press release, as described in ¶35(a) that Respondent "[had not] violated . . . any laws," is contradictory to Respondent's sworn assertion in the Conditional Agreement and the accompanying Affidavit that he violated Indiana Professional Conduct Rules 3.6(a) and 4.4(a).

38. Respondent's statement in the November 2, 2023 press release, as described in ¶35(d) ("Having evidence and explanation for everything I said, I could have fought over those 16 words, but ending their campaign now will save a lot of taxpayer money and distraction...."), is contradictory to Respondent's sworn assertion in the Affidavit accompanying the Conditional Agreement that Respondent submitted to the agreement to discipline because he "[knew] that if this proceeding were prosecuted, [he] could not successfully defend [himself]."

39. Respondent's statement in the November 2, 2023 press release, as described in ¶35(e) ("In order to resolve this, I was required to sign an affidavit without any modifications"), is contradictory to Respondent's statement in the Conditional Agreement

that he was "voluntarily consent[ing] to [the] Statement of Circumstances and Conditional Agreement for Discipline."

40. Respondent's statement in the November 2, 2023 press release, as described in ¶35(e), is contradictory to Respondent's statement in the Affidavit accompanying the Conditional Agreement that Respondent "consent[s], knowingly, freely, and voluntarily to the agreed discipline" that was set out in the Conditional Agreement and that he "entered into said agreement without being subject to any coercion or duress whatsoever . . . . "

Aftermath of Respondent's Press Release

41. In the days immediately after Respondent issued the November 2, 2023 press release, various media outlets wrote articles expressing confusion as to the extent of Respondent's reprimanded conduct, raised questions about the inconsistencies between the statements in Respondent's press release and the statements in the Affidavit referenced in the Court's opinion, and/or challenged Respondent's acceptance of responsibility in light of the statements in his press release. *See* Exhibits cited in the Disciplinary Commission's Verified Petition Requesting Conditional Agreement for Discipline and Affidavit Be Released for Public Access in Case No. 23S-DI-258 (incorporated herein).

42. After the issuance of Respondent's November 2, 2023 press release, the Disciplinary Commission's staff and the Court's Public Information Officer received multiple requests from the media and private citizens for copies of the Conditional Agreement and the accompanying Affidavit.

43. Pursuant to Admission and Discipline Rule 23, Section 22(a)(5), conditional agreements for discipline generally are not open to public inspection.

44. Due to the public confusion about Respondent's agreement for discipline, the

Disciplinary Commission filed on December 11, 2023, pursuant to Indiana Access to Court Records Rule 9(B), a Verified Petition Requesting Conditional Agreement for Discipline and Affidavit Be Released for Public Access.

45. On February 1, 2024, the Court granted the Disciplinary Commission's petition, and the Court ordered the Conditional Agreement and accompanying Affidavit made available for public inspection.

46. On or about November 6 and 8, 2023, the Disciplinary Commission received RFIs (Internal Matter Nos. 24-0608 and 24-0618) from two individuals who expressed concerns that Respondent committed ethical misconduct and was dishonest with the Court, given his statements in the November 2, 2023 press release.

47. To evaluate Respondent's intent and meaning regarding certain statements made in the November 2, 2023 press release, the Disciplinary Commission sent Respondent and his communications staff subpoenas duces tecum to provide copies of all prior drafts of the November 2, 2023 press release that were written, edited, revised, or reviewed by Respondent and to provide copies of all written or electronic communications sent to or from Respondent about the November 2, 2023 press release or the prior drafts.

48. The records received in response to the subpoenas revealed that Respondent and his communications team began drafting the proposed press release in early October 2023 and created multiple drafts of the press release.

49. Respondent actively took part in drafting, editing, and instructing other Attorney General's Office employees and a subcontractor about the information Respondent wanted contained in the drafts and final press release.

50. Respondent gave final approval for the November 2, 2023 press release and was

involved in the final edits to the press release minutes before it was issued.

51. Prior drafted public statements/press releases on the matter had proposed titles such as:

> "Rokita Beats Attempt to Take His Law License" (10/19/23 Draft);
> "Rokita Ends Attempt to Remove His Law License" (10/21/23 Draft, ver. 1); and
> "Cancel Culture Loses Battle to Vindicate Abortionist, Take Law License and Stifle Free Speech" (10/22/23 Draft).

52. Prior drafts of the press release/public statement contained the following language as to Respondent's reason for settling the matter and his ability to defend his legal cause:

a. "***This settlement was made only to save Indiana taxpayer money, and I do not feel as though I did anything wrong.*** . . ." (10/13/23 Draft).

b. "This week, as the result of a settlement that ends this matter, I agreed to a simple public reprimand over an X word answer I gave to a TV news host more than one year ago in the middle of an international media storm caused by an abortion doctor.

I was not found to have violated anyone's confidentiality or any laws . . . I will state again— as I did at the time and as I articulate below—that what I said was factual.

But, ***ending this matter now means I can save a significant amount of taxpayer money from defending these facts.*** . . ." (10/16/23 Draft).

c. "My work serving fellow Hoosiers as attorney general will continue without interruption. ***I was not found to have violated anyone's confidentiality or any laws.*** Despite the cancel culture's attempt to take my license . . . it all boiled down to a truthful 16-word answer I gave during an international media storm caused by an abortion activist. I was given a simple public reprimand for stating that '. . . we have this abortion activist acting as a doctor—with a history of failing to report.'

The corrupt media pundits and establishment hypocrites grossly hyped this story even wanting you to believe that saying those 16 words were worse than committing some kind of violent crime . . . ***I could have fought over 16 words, but ending this politically driven***

litigation will save alot of taxpayer money." (10/19/23 Draft).

d. "***I could have fought over these 16 words, but ending this politically driven litigation will save taxpayer's money and allow me to continue focusing on the important work of my office. That is why we settled.***" (10/21/23 Draft, ver. 1)

e. ". . . I am thankful the court system turned back an attempt by others to use a disciplinary process as a back door to removing me from office. ***I was not found to have violated anyone's confidentiality or to have violated any laws. I could have chosen to fight over the attempt to weaponize a 16-word factual statement spoken during a television interview but ending this politically driven litigation will ultimately save taxpayer's money.***" (10/21/23 Draft, ver. 1, short statement).

f. "Despite the failed attempt to suspend my law license . . . ***it all boiled down to a truthful 16-word answer I gave over a year ago*** during an international media storm caused by an abortionist who put her interests above her patient's. ***I received a public reprimand for repeating an interviewer's commentary that '...we have this abortion activist acting as a doctor— with a history of failing to report.'***

***

These hypocrites [media, medical establishment, and cancel culture] would like to cancel your vote because I take them on every day and they don't like it . . . .

I could have fought over those 16 words, but ending their campaign now will save a lot of taxpayer money and distraction." (10/23/23 Draft).

(emphasis added, not in the originals).[6]

53. As recently as January 7, 2025, Respondent was quoted as saying, "One thing that is clear is that the AG did nothing dishonest, illegal, or even wrong, and he will continue to fight for the people of this state no matter how much the Left hates it." *See* Alexa Shrake, *Once Reprimanded Rokita Details His Proposed Changes for Lawyer Discipline*, INDIANA

[6] Items emphasized in ¶52 and its subparts pertain to Respondent's reason for settling Case No. 23S-DI-258 and his beliefs about his ability to defend his legal cause. The remaining statements provide the context for the emphasized statements in the drafts.

LAWYER, Jan. 7, 2025.

54. Respondent's prior drafts, the statements in the November 2, 2023 press release (when compared with the sworn statements in the Conditional Agreement and Affidavit listed below), and his continuing course of conduct demonstrate Respondent's lack of candor and dishonesty to the Court when he swore that he was accepting responsibility for the agreed misconduct:

November 2, 2023	Conditional Agreement & Affidavit
"First things first: I deny and was not found to have violated…any laws."	"[T]he parties agree that Respondent violated Rule 3.6(a), as described in Count 1 of the Complaint." "[T]he parties agree that Respondent violated Rule 4.4(a), as described in Count 2 of the Complaint."
"Having evidence and explanation for everything I said, I could have fought over those 16 words, but ending their campaign now will save a lot of taxpayer money and distraction…."	"I submit my agreement to discipline because I know that if this proceeding were prosecuted, I could not successfully defend myself."
"In order to resolve this, I was required to sign an affidavit without any modifications."	"I consent, knowingly, freely, and voluntarily, to the agreed discipline that is set forth in [the Conditional Agreement]." "I have entered into said agreement without being subject to any coercion or duress whatsoever, and I am fully aware of the implications of submitting my consent." "Respondent voluntarily consents to this Statement of Circumstances and Conditional Agreement for Discipline [and] the parties incorporate by reference the attached Affidavit…."

APPLICABLE RULES OF PROFESSIONAL CONDUCT

55. Indiana Professional Conduct Rule 3.3(a)(1) provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

56. Indiana Professional Conduct Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

57. Indiana Professional Conduct Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

58. Comment 4 to Indiana Rule of Professional Conduct 8.4 notes that, "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional rule of lawyers."

CHARGES

The Disciplinary Commission incorporates the facts set out in ¶¶ 5-54 into the Charges below.

Count 1

The Disciplinary Commission charges that Respondent made false statements to the Supreme Court in the Conditional Agreement and accompanying Affidavit in Case No. 23S-DI-258. These statements included Respondent's sworn assertions that he believed there

existed grounds for his discipline and that he believed he could not successfully defend himself if the matter was prosecuted. By engaging in this conduct, Respondent violated Indiana Professional Conduct Rule 3.3(a)(1).

Count 2

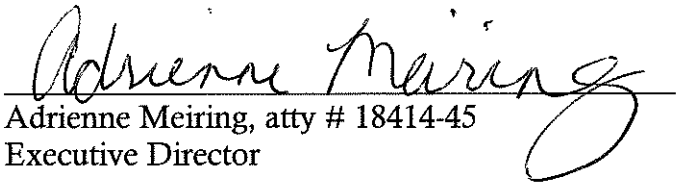
The Disciplinary Commission charges that Respondent engaged in dishonest behavior and misrepresented to the Supreme Court in a Conditional Agreement and accompanying Affidavit in Case No. 23S-DI-258 that he accepted responsibility for his misconduct. By engaging in this conduct, Respondent violated Indiana Professional Conduct Rule 8.4(c).

Count 3

The Disciplinary Commission charges that Respondent violated Indiana Professional Conduct Rule 8.4(d) by issuing a press release on November 2, 2023 in which Respondent made statements that contradicted the statements he swore to in the Conditional Agreement and accompanying Affidavit in Case No 23S-DI-258.

WHEREFORE, the Executive Director requests that Theodore E. Rokita be disciplined as warranted for professional misconduct, and that he be ordered by the Court to pay such expenses to the Clerk of the Court as shall be prepared and submitted to the Court by the Executive Director as an itemized statement of expenses allocable to this case incurred in the course of investigation, hearing and review procedures, pursuant to Indiana Admission and Discipline Rule 23, Section 21.

Respectfully submitted,



Adrienne Meiring, atty # 18414-45
Executive Director

Stephanie Bibbs, atty # 25145-49
Deputy Director of Litigation

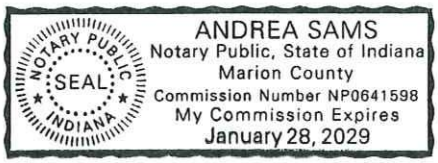
STATE OF INDIANA)
) SS:
COUNTY OF MARION)

VERIFICATION

Adrienne Meiring, being duly sworn upon her oath, deposes and says that she is the Executive Director of the Disciplinary Commission of the Indiana Supreme Court, appointed pursuant to Ind. Admis.Disc.R. 23, § 8(a); that she makes this verification as Executive Director of the Disciplinary Commission; and that the facts set forth in the above motion are true as she is informed and believes.

Adrienne Meiring

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 31st day of January 2025.



Notary Public

My Commission Expires: January 28, 2029
County of Residence: Marion

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing Disciplinary Complaint was served through the Indiana Court's e-filing system and by first-class United States mail, certified, return receipt requested, postage prepaid, this 31st day of January 2025 upon:

Theodore E. Rokita
c/o James J. Ammeen, Jr.
Ammeen Valenzuela Associates LLP
Barrister Building, Suite 550
155 East Market Street
Indianapolis, IN 46204

Adrienne Meiring

Adrienne Meiring

Filed: 9/18/2023 9:12 AM
23S-DI-00258

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF	)
	)
THEODORE E. ROKITA	)
Attorney No.: 18857-49	)

DISCIPLINARY COMPLAINT

The Indiana Supreme Court Disciplinary Commission, having found reasonable cause to believe the Respondent's acts, if proved, would warrant disciplinary action, by its Executive Director, Adrienne Meiring, pursuant to Indiana Admission and Discipline Rule 23, Section 12, files and presents this Disciplinary Complaint against Theodore E. Rokita. The Disciplinary Complaint is as follows:

BACKGROUND

1. Theodore E. Rokita ("Respondent") is currently an attorney in active and good standing in Indiana.

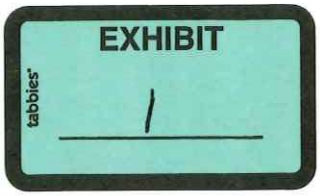
2. Respondent was admitted to practice law in the State of Indiana on October 23, 1995, subjecting him to the Indiana Supreme Court's disciplinary jurisdiction.

3. At all times relevant to this proceeding, Respondent has been the Indiana Attorney General and has practiced law in Indianapolis, Marion County, Indiana.

FACTS GIVING RISE TO MISCONDUCT CHARGES

Statements on Jesse Watters Show

4. On July 1, 2022, the *Indianapolis Star* published an article titled "Patients Head to Indiana for Abortion Services as Other States Restrict Care." The story discussed an Indiana physician, Dr. Caitlin Bernard ("Dr. Bernard"), performing an abortion on a ten-year



old from Ohio who was six weeks and three days pregnant and quoted Dr. Bernard in the article.

5. On July 2, 2022, Dr. Bernard submitted a termination of pregnancy report to the Indiana Department of Health ["IDOH"], as required by Indiana Code § 16-34-2-5(b), after performing a termination of pregnancy procedure on a ten-year-old who had been referred to Dr. Bernard from a doctor in Ohio.

6. On the same date, the Indiana doctor emailed a copy of the termination report to the Indiana Department of Child Services ["IDCS"].

7. From July 8, 2022 through July 11, 2022, the Consumer Protection Division of the Indiana Attorney General's Office received seven complaints regarding Dr. Bernard's performance of a termination procedure on a ten-year old. None of the complainants were patients of Dr. Bernard.

8. On July 11, 2022, a staff member from the Indiana Attorney General's Office requested from the IDOH all termination of pregnancy reports received in the previous thirty (30) days.

9. On July 12, 2022, the Indiana Attorney General's Office notified Dr. Bernard that it was opening an investigation into six complaints. The other submitted complaint was not deemed as having sufficient information to pursue an investigation.

10. Also, on July 12, 2022, staff members from the Indiana Attorney General's Office emailed the IDCS to find out whether a child abuse report had been filed regarding the ten-year old referenced in the July 1, 2022 *Indianapolis Star* article.

11. On July 13, 2022, Respondent sent a letter to Governor Eric J. Holcomb, requesting that the Governor direct IDCS and IDOH to turn over the records to the Attorney

General's Office immediately. (Exhibit A – July 13, 2022 Letter from Rokita to Governor Holcomb). This letter was made public.

12. Also, on July 13, 2022, Respondent appeared on the Jesse Watters show on Fox News.

13. During the show, Jesse Watters made the following statement:

> Caitlin Bernard, the abortion doctor who performed the operation in Indiana, has a legal requirement to report the abortion to both child services and the state's health department. Because a ten-year-old isn't able to give consent and is therefore a rape victim. And from what we can find out so far, this Indiana abortion doctor has covered this up. Failure to report is nothing new, though, for Dr. Bernard. According to reporting from PJ Media, she has a history of failing to report child abuse cases. And our sources, as Trace mentions, are telling Fox that Dr. Bernard's employer, Indiana University Health, has already filed a HIPAA violation against her. So, is a criminal charge next? And, will Dr. Bernard lose her license?

14. Jesse Watters then remarked, "Let's ask the Indiana Attorney General, Todd Rokita. So what's going on, Todd?"

15. Respondent then replied with the following remarks at issue:

> Jesse, thanks for having me on. But, I shouldn't be here, right.
>
> ***
>
> Then we have the rape. And then we have this, uh, abortion activist acting as a doctor—with a history of failing to report. So, we're gathering the information. We're gathering the evidence as we speak, and we're going to fight this to the end, uh, including looking at her licensure if she failed to report. In Indiana, it's a crime, uh, for, uh, to not report—uh, to intentionally not report.

16. In response to further questioning by Jesse Watters about why it is a crime to not report abortion procedures performed on minors, Respondent stated:

> Well, of course, because this, this is a child. And, there's a strong public interest in understanding. You know, if someone under the age of 16, or under the age of 18, or really any woman is be [sic] is having an abortion in our state. And then if a child is being sexually abused. Of

> course. Uh, Parents need to know. Authorities need to know. Public policy experts need to know. We all need to know as citizens in a free republic, so we can stop this. This is a horrible, horrible scene. Caused, caused by Marxists, socialists, and those in the White House who don't, who want lawlessness at the border. And then this girl was politicized—politicized for the gain of killing more babies. All right, that was the goal. And this abortion activist is out there front and center. The lamestream media, the fake news, is right behind it. Unfortunately, in Indiana, the paper of record is fake news. And they were right there jumping in on all this, thinking that it was going to be great for their abortionist movement when this girl has been, uh, so brutalized.

17. After Jesse Watters thanked Respondent for appearing on the show and asked that he keep the show posted on whether Dr. Bernard would face any scrutiny, Respondent remarked, "I'm not letting it go."

Public Statements About Investigation of Dr. Bernard

18. Besides, the public disclosure on July 13, 2022 on the Jesse Watters show that Dr. Bernard was under investigation, Respondent also made the following public statements about the investigation:

a. On July 13, 2022, Respondent made public the letter he sent to the Governor requesting that the Governor direct two state agencies to provide the Attorney General's Office with records relating to the investigation of Dr. Bernard. In the letter, he specifically named Dr. Bernard.

b. On July 14, 2022, Respondent issued a press release regarding the "Dr. Caitlin Bernard case" and indicated that:

> [W]e are investigating this situation and are waiting for the relevant documents to prove if the abortion and/or the abuse were reported, as Dr. Caitlin Bernard had requirements to do both under Indiana law. The failure to do so constitutes a crime in Indiana, and her behavior could also affect her licensure. Additionally, if a HIPAA violation did occur, that may affect next steps as

well. I will not relent in the pursuit of truth.

c. On September 1, 2022, in a Facebook Live broadcast, Respondent made the following remarks about the Dr. Bernard investigation:

> [W]e're looking into standards of practice of the professional if they were met. If any state or federal laws, employee privacy laws, were violated. And just as background, based on a doctor intentionally reporting her patient's circumstances to the media, my office has undertaken a review of that act in response, again to public concern. My comments are supported by facts as are all statements from my office.

d. On September 14, 2022, Respondent made remarks in an interview in a local newspaper that the investigation of Dr. Bernard was "ongoing." He also made other statements during that interview about the investigation.

e. On September 15, 2022, Respondent discussed the investigation of Dr. Bernard in another local media interview.

19. Indiana Code § 25-1-7-10(a) provides:

> (a) Except as provided in section 3(b) or 3(c) of this chapter, all complaints and information pertaining to the complaints [of a medical professional] shall be held in strict confidence until the attorney general files notice with the board of the attorney general's intent to prosecute the licensee.
>
> (b) A person in the employ of the office of attorney general, the Indiana professional licensing agency, or any person not a party to the complaint may not disclose or further a disclosure of information concerning the complaint unless the disclosure is:
> (1) required under law;
> (2) required for the advancement of an investigation; or
> (3) made to a law enforcement agency that has jurisdiction or is reasonably believed to have jurisdiction over a person or matter involved in the complaint.

20. At the time that Respondent made the statements described in ¶ 18 or directed that those statements be made, the Attorney General's Office had not yet filed notice with the

Indiana Medical Licensing Board of intent to prosecute Dr. Bernard's license.

a. The Attorney General's Office filed an administrative complaint with the Medical Licensing Board against Dr. Bernard on November 30, 2022.

b. None of the exceptions enumerated in Indiana Code § 25-1-7-10(b) allowing for public disclosure of information concerning a complaint regarding a medical license apply to the statements made or directed by Respondent, as described in ¶ 18.

21. On November 3, 2022, Dr. Bernard and another physician filed a Complaint for Declaratory Judgment and Injunctive Relief against Respondent and Respondent's Chief Counsel and Director of the Consumer Division ("Chief Counsel"), requesting that the trial court, among other things, issue a preliminary and permanent injunction enjoining Respondent and his Chief Counsel from violating confidentiality provisions imposed by law.

22. Following a two-day evidentiary hearing, the trial court issued on December 2, 2022, an extensive 43-page Order Denying Plaintiffs' Motion for Preliminary Injunction. (Exhibit B – Order Denying Plaintiffs' Motion for Preliminary Injunction, case no. 49D01-2211-MI-038101).

23. On December 8, 2022, the Plaintiffs filed a Notice of Plaintiffs' Voluntary Dismissal Without Prejudice.

a. Although Respondent initially opposed the motion to dismiss by filing on January 9, 2023 a motion to strike and to reconsider and correct errors in the trial court's preliminary injunction order, he withdrew that motion on April 21, 2023.

b. On April 24, 2023, the trial court dismissed case no. 49D01-2211-MI-

038101.

24. On May 25, 2023, the Indiana Medical Licensing Board held a hearing on the administrative complaint that Respondent filed against Dr. Bernard. Because of the public attention to the matter, due in part to Respondent's array of public statements made prior to the filing of the administrative complaint, the hearing had to be held in a larger venue than normal to accommodate the number of persons who wanted to watch the hearing.

25. By making public comments about the investigation of Dr. Bernard prior to filing an administrative complaint with the Medical Licensing Board, Respondent violated the confidentiality requirements of I.C. § 25-1-7-10(a).

26. By breaching the confidentiality requirements of I.C. § 25-1-7-10(a) when Respondent made public comments about the investigation of Dr. Bernard prior to filing an administrative complaint with the Medical Licensing Board, Respondent caused irreparable harm to Dr. Bernard's reputational and professional image.

27. By breaching the confidentiality requirements of I.C. § 25-1-7-10(a) when Respondent made public comments about the investigation of Dr. Bernard prior to filing an administrative complaint with the Medical Licensing Board, Respondent burdened the court system and caused additional systems and logistical issues for the Medical Licensing Board to navigate.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

28. Indiana Rule of Professional Conduct 3.6(a) provides:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

29. Indiana Rule of Professional Conduct 3.6(d) provides:

> A statement referred to in paragraph (a) will be rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:
>
> (1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness. . . .

30. Indiana Rule of Professional Conduct 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.

31. Pursuant to Indiana Rule of Professional Conduct 8.4(d), it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

32. Comment 4 to Indiana Rule of Professional Conduct 8.4(d) notes that, "Lawyers holding public office assume legal responsibilities going beyond those of other citizens."

CHARGES

Count 1

By referring to Dr. Caitlin Bernard as an "abortion activist acting as a doctor—with a history of failure to report" during the nationally-televised Jesse Watters show on July 13, 2022, while there was an investigation pending, Respondent violated Indiana Rule of Professional Conduct 3.6(a).

Count 2

By referring to Dr. Caitlin Bernard as an "abortion activist acting as a doctor—with a

history of failure to report" during the nationally-televised Jesse Watters show on July 13, 2022, while there was an investigation pending, Respondent violated Indiana Rule of Professional Conduct 4.4(a).

Count 3

By intentionally making public statements and/or directing others to issue public statements from July 2022 – September 2022 about the investigation of Dr. Caitlin Bernard, prior to a referral to the Medical Licensing Board, in contravention of the duty of confidentiality required under Ind. Code § 25-1-7-10(a), Respondent violated Indiana Rule of Professional Conduct 8.4(d).

WHEREFORE, the Executive Director requests that Theodore E. Rokita be disciplined as warranted for professional misconduct, and that he be ordered by the Court to pay such expenses to the Clerk of the Court as shall be prepared and submitted to the Court by the Executive Director as an itemized statement of expenses allocable to this case incurred in the course of investigation, hearing and review procedures, pursuant to Indiana Admission and Discipline Rule 23, Section 21.

Respectfully submitted,

Adrienne L. Meiring

Adrienne Meiring, atty # 18414-45
Executive Director

Stephanie Bibbs, atty # 25145-49
Deputy Director of Litigation

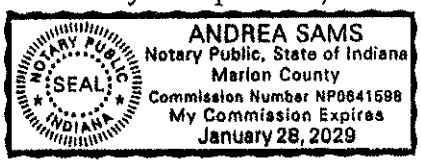
STATE OF INDIANA)
) SS:
COUNTY OF MARION)

VERIFICATION

Adrienne Meiring, being duly sworn upon her oath, deposes and says that she is the Executive Director of the Disciplinary Commission of the Indiana Supreme Court, appointed pursuant to Ind. Admis.Disc.R. 23, § 8(a); that she makes this verification as Executive Director of the Disciplinary Commission; and that the facts set forth in the above motion are true as she is informed and believes.

Adrienne Meiring

Subscribed and sworn to before me, a Notary Public, in and for said County and State, this 18th day of September, 2023.



Notary Public

My Commission Expires: January 28, 2029
County of Residence: Marion

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing Disciplinary Complaint was served through the Indiana Court's e-filing system and by first class U.S. Mail, certified, return receipt requested, postage prepaid, this 18th day of September, 2023 upon:

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Adrienne Meiring

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OFFICE OF THE ATTORNEY GENERAL
STATE OF INDIANA

302 W. WASHINGTON ST. IGCS 5TH FLOOR
INDIANAPOLIS, IN 46204-2770

TODD ROKITA
ATTORNEY GENERAL

July 13, 2022

Governor Eric Holcomb
200 West Washington Street
Indianapolis, IN 46204

Dear Governor Holcomb,

As you are aware, news accounts have swirled in recent days regarding a 10-year-old victim of sexual assault who traveled to Indiana from Ohio to obtain an abortion from Dr. Caitlin Bernard.

A physician presented with a pregnant pre-teen — a victim of sexual assault — must report the assault to law enforcement immediately. One who aborts the pregnancy of such a rape victim must within three days file a report of the abortion with both the Indiana Department of Health and the Indiana Department of Child Services.

Abortion reports, known as Termination of Pregnancy Reports or TPRs, are public documents. Accordingly, on July 11, a key member of my staff called IDOH to ask for all TPRs filed within the last 30 days so that we could review whether any reported an abortion by Dr. Caitlin Bernard on a 10-year-old. A response to a follow-up email the next day, July 12, said only that IDOH has a new system that "would take longer than the old, but I will check with them."

So far, IDOH has produced no Termination of Pregnancy Report in response to our request.

On July 12, my staff also reached out multiple times by email to the Department of Child Services to obtain proof that a report of suspected child abuse has been filed in response to this case. We have received no response.

If Dr. Bernard has failed to file the required reports on time, she has committed an offense, the consequences of which could include criminal prosecution and licensing repercussions.

As state officeholders, we bear an important responsibility to get to the bottom of this matter immediately for the sake of the safety and well-being of children and families across Indiana and even, as in this case, those from other states. And we bear a similar responsibility to ensure that medical professionals abide by the law, particularly those designed to protect children.

TELEPHONE: 317.232.6201
www.in.gov/attorneygeneral/

I respectfully ask that you direct the state agencies under your purview to produce immediately to my office the requested TPRs and to confirm whether a child abuse report was filed with DCS so we can confirm Dr. Bernard's compliance with the law.

As the attorney for the State of Indiana, my office needs these documents and proofs in order to execute the requisite legal protections for the people of Indiana and perhaps more importantly to ensure the public's confidence in your agencies regarding this horrible matter.

Thank you for your attention.

Sincerely,

Todd Rokita
Indiana Attorney General

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-2211-MI-038101

CAITLIN BERNARD, M.D., on her own behalf and on behalf of her patients; AMY CALDWELL, M.D., on her own behalf and on behalf of her patients,

Plaintiffs,

v.

TODD ROKITA, in his official capacity as Attorney General of the State of Indiana; SCOTT BARNHART, in his official capacity as Chief Counsel and Director of the Consumer Protection Division of the Office of the Attorney General of the State of Indiana,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs', Caitlin Bernard, M.D. ("Dr. Bernard"), on her own behalf and on behalf of her patients; Amy Caldwell, M.D. ("Dr. Caldwell), on her own behalf and on behalf of her patients (collectively "Plaintiffs"), Motion for Preliminary Injunction.

The Motion for Preliminary Injunction was filed on November 9, 2022. Defendants, Todd Rokita, in his official capacity as Attorney General of the State of Indiana; Scott Barnhart, in his official capacity as Chief Counsel and Director of the

Consumer Protection Division of the Office of the Attorney General of the State of Indiana (collectively, the "Division"), filed a Brief in Opposition to Motion for Preliminary Injunction on November 17, 2022. The Court heard live testimonial evidence over the course of two days on November 18, 2022 and November 21, 2022.

Having been fully briefed on the issues, the Court finds now as follows:

FINDINGS OF FACT

I. FACTS RELATED TO DR. CAITLIN BERNARD, M.D.

A. Parties

1. Dr. Bernard is an OB/GYN physician licensed to practice medicine in the State of Indiana. Dr. Bernard is employed by IU Health Physicians and by the Indiana University School of Medicine. Declaration of Caitlin Bernard, M.D. ("Bernard Decl.") at ¶ 1.

2. Dr. Amy Caldwell is an OB/GYN physician licensed to practice medicine in the State of Indiana. Dr. Caldwell is employed by IU Health Physicians and by the Indiana University School of Medicine. Declaration of Amy Caldwell, M.D. ("Caldwell Decl.") at ¶ 1.

3. Defendant Todd Rokita is the Attorney General of the State of Indiana ("Attorney General").

4. Defendant Scott Barnhart is the Chief Counsel and Director ("Director") of the Consumer Protection Division of the Office of the Attorney General of the State of Indiana ("CPD").

5. The Attorney General of the State of Indiana, and "Director" (collectively, "Defendants") are charged with investigating consumer complaints against licensed professionals in the state of Indiana

B. Timeline of events for Dr. Bernard

6. On or around June 27, 2022, Dr. Bernard received a phone call from a child abuse doctor in Ohio concerning a 10-year old patient who became pregnant through a rape. After receiving the call from the physician in Ohio, Dr. Bernard contacted the social worker at IU Health.[1]

7. According to Dr. Bernard's testimony prior to the treating the 10-year old patient, she immediately notified the IU Health social worker that the patient was a victim of abuse after she spoke with the Ohio physician. Furthermore, Exhibit 22 was filed and admitted by the Court under seal (pursuant to the Ind. Access to Court Records) because it was a part of the 10-year old patient's confidential medical records and addressed the details of the work completed by the IU Health social worker on behalf of the IU Health medical team. This exhibit confirms along with Dr. Bernard's testimony that the Ohio law enforcement and Ohio DCS had previously been notified of the abuse prior to Dr. Bernard's treatment of the patient. Dr. Bernard fully cooperated with Ohio law enforcement and the Ohio DCS. Dr. Bernard was aware the social worker addressed this reporting requirement for the medical team.

8. On June 29, 2022, Dr. Bernard attended an event on the IU School of Medicine campus. There she spoke with another physician about the public health emergency doctors were facing due to abortion bans in other states and the impact those bans might have for patients. Dr. Bernard mentioned to the other physician a

[1] There was no transcript of the proceedings prepared as of the date of this order, so these findings contain no direct citations to the record. The Court has attempted to make its findings sufficiently specific as to allow any reviewing court to understand this Court's decisions and the processes by which those decisions were made. *See Rose v. State*, 120 N.E.3d 262, 269 (Ind. Ct. App. 2019).

case example that she had recently heard about where a 10-year-old child from Ohio who had been raped and was pregnant.

9. A reporter from the IndyStar who was covering the campus event overheard Dr. Bernard's conversation with the other physician, approached Dr. Bernard, and asked Dr. Bernard to confirm the information she overheard.

10. Dr. Bernard confirmed that she received a referral from a child abuse doctor in Ohio regarding a 10-year-old patient, and it was understood that the patient was coming Indiana to receive care from Dr. Bernard's medical team. The reporter informed Dr. Bernard that she was writing a news story about the effects of abortion bans in nearby States after *Dobbs v. Jackson Women's Health Organization*, 124 S. Ct. 2228 (2022). Dr. Bernard then confirmed with the reporter the following information: Dr. Bernard had received a phone call from a child abuse doctor from Ohio which she believed to be on Monday, June 27, 2022, regarding a potential patient who had been a victim of sexual abuse; the victim was 10 years old; the victim was an Ohio resident; the victim had been raped; Dr. Bernard agreed to terminate the child's pregnancy; and the child was six weeks pregnant. Exs. B, C.

11. Dr. Bernard terminated the child's pregnancy on Thursday, June 30, 2022, at an Indianapolis hospital. Ex. C.

12. 6. At 5:00 a.m. on Friday, July 1, 2022, the IndyStar published the story, titled *Patients head to Indiana for abortion services as other states restrict care.* The article reported, without quoting Dr. Bernard, on July 1, 2022 that Dr. Bernard "took a call from . . . a child abuse doctor in Ohio" who "had a 10-year-old patient in the office who was six weeks and three days pregnant." Ex. B. Because abortion "still is legal" in

Indiana, the article reported that "the girl soon was on her way to Indiana to Bernard's care." *Id.*

13. On July 2, 2022, Dr. Bernard submitted to the State of Indiana Department of Health a Termination of Pregnancy Report ("TPR"). Bernard Decl. ¶ 3. This TPR contained the patient's age, the date of pregnancy termination, the estimated gestational age and post fertilization age, and that the pregnancy was the result of abuse. Bernard Decl. at Ex. A; *see also* Ind. Code 5-14-3.

14. Also on July 2, 2022, Dr. Bernard emailed a copy of the TPR to the Indiana Department of Child Services ("Indiana DCS"), noting in the email that the TPR was "for a minor," that "[t]his case was already reported through DCS in Ohio," and she had "attached the contact info for our social worker should you need any further assistance." Ex. C.

15. On July 6, a week after the abortion procedure in Indiana on June 30, Ohio law enforcement officers learned the identity of the child's alleged rapist after speaking to the child in her home. Ex. A at 9. After the child left Dr. Bernard's care in Indiana, the girl had returned to Ohio to live in the same home her alleged rapist. Ex. A at 9, 15–16; Ex. R. The man was later arrested and charged with two counts of rape in case number 22-CR-003226 on July 21. Ex. A at 9; Ex. R.

C. Consumer complaints filed against Dr. Bernard

16. The CPD began receiving numerous complaints about Dr. Bernard between July 8 and July 12, 2022. Ex. 6; Ex. W.

17. The Office of the Indiana Attorney General ("Attorney General's Office") makes available a blank "Consumer Complaint" form, *see* Ex. 9, which an individual can

complete and file online, *see* Ex. 8, or can print out the form and mail it to the Attorney General's Office, Consumer Protection Division, *see* Ex. 9 at p. 2.

18. Section 1 of the "Consumer Complaint" form requires personal information of the complainant, and Section 2 requires the identity of whom the complaint is against. Ex. 9 at p. 1.

19. At the bottom of the "Consumer Complaint" form in Section 9, the complainant must "affirm, under penalties for perjury, that the foregoing representations are true." Ex. 9 at p. 2. The complainant must also sign and date the form, as required by Indiana law. *Id.*; Ind. Code § 25-1-7-4. The "Consumer Complaint" form also states in Section 7 that "[t]his office cannot disclose your complaint against a licensed professional to the public unless this office files a disciplinary action against the licensed professional." *Id.*

20. When the "Consumer Complaint" form is submitted, if it relates to a professional licensing matter it is referred to the Licensing Enforcement Division ("Division).

21. Mary Hutchison ("Hutchison") is a Deputy Attorney General and Section Chief of Licensing Enforcement who supervises the Division. There are 34 professional boards within Hutchison's purview, including the Medical Licensing Board.

22. On July 8, 2022, J.L., a California resident, filed a consumer complaint against Dr. Bernard. Ex. 6 at pp. 11–18. This J.L. complaint described the first interaction between the complainant and Dr. Bernard as "[r]eported in the U.S. Media and President of the United States." *Id.* at p. 13. In Box 3–C, which asks "[w]here did the Transaction/Incident occur," J.L. checked the box marked "By Social Media." *Id.* In

Section 5 in response to "Transaction/Incident Details," J.L. complained that "Indiana is a Mandatory Reporter State. Dr Caitlin Bernard stated she treated a 10-yr old girl from Ohio who was pregnant. Dr Bernard refuses to confirm this was reported to law enforcement, as required by law." *Id.* at p. 14.

23. On July 10, 2022, P.W., a Kentucky resident, filed a consumer complaint against Dr. Bernard. Ex. 6 at pp. 27–31. In response to the form question 3-E, "[h]ow did you [p]ay," the complainant noted "I would presume the child's parents paid. . . ." *Id.* at p. 29. P.W. provided the link to the Indianapolis Star article, and complained that Dr. Bernard had "made no mention of reporting the rape of her 10 year old patient," and that "[n]ews agencies who are researching this crime have been unable to find records of any police reports, either in the city where Dr Bernard would have examined the child and terminated her pregnancy or in Ohio." *Id.* at p. 30. She was "additionally concerned about whether either doctor performed a rape exam with law enforcement present" and, if "she retain[ed] the products of conception or perform[ed] DNA sampling of the blood and tissues so they could be use[d] to help prosecute the person responsible for the rape, and impregnation of the child?" *Id.*

24. On July 11, 2022, another California resident, D.H., submitted a consumer complaint against Dr. Bernard. Ex. 6 at pp. 1–4. This complaint listed Dr. Bernard's street address as "U of I" with the zip code "00000" and the phone number "555555555." *Id.* at p. 3. The complaint represented that the transaction was for a "Non-Profit/Church." *Id.* D.H. stated that "Miss Berhard [sic] kept knowledge of the rape of a 10 year old from authorities." *Id.* at p. 4.

25. On July 11, 2022, J.T., an Indiana resident, filed a consumer complaint against Dr. Bernard that identified Dr. Bernard's phone number simply as "317." Ex. 6 at pp. 36–38. The complainant represented that "By Social Media." was where the transaction/incident occurred. *Id.* at p. 37. As to the "Transaction/Incident Details," J.T. stated that "doctor did not report rape of 10 year brought to indy from Ohio foe abortion." *Id.* at p. 38.

26. On July 11, 2022, R.A., an Indiana resident, submitted a consumer complaint and asserted that she had "no personal contact" with Dr. Bernard and the transaction occurred in the "Media." Ex. 6 at pp. 19–26. The complaint referenced, and attached, the July 1, 2022 Indianapolis Star article. Id. at pp. 22–26. The complaint also alleged that Dr. Bernard "violated the confidentiality guaranteed to child survivors of rape" and that "this case is a CHINS case which means [Dr. Bernard] violated the law in releasing any information regarding the case." *Id.* at p. 22. Additionally, the R.A. complaint alleged that "[t]his public announcement served no purpose . . . [i]t was purely a political and activist strategy to support Dr. Bernard's profession as an abortion provider." *Id.*

27. On July 12, 2022, K.H., a Missouri resident, submitted a consumer complaint against Dr. Bernard despite admitting to having had "no direct contact" with Dr. Bernard, and representing that "News Media" is where the "Transaction/Incident" occurred. Ex. 6 at pp. 32–35. The complainant further stated "[f]rom news stories I was made aware that apparently Dr. Bernard has failed to report sexual abuse in a child." *Id.* at p. 35.

28. On July 12, 2022, R.T., an Ohio resident, submitted a consumer complaint against Dr. Bernard, *see* Ex. 6 at pp. 5–10, representing that the transaction with Dr. Bernard was for the complainant's "Family/Household" and occurred "By Social Media," *id.* at p. 7. R.T. stated that "[a]s a citizen of Ohio I feel that this misinformation (aka LIE) harmed my State's image AND is a malicious act intended to harm people such as myself that hold a pro-life position. I have personally experienced hostility against me with specific mention of Dr. Bernard's interviews and her claim of a 10 year old Ohio girl being forced to have an abortion in Bernard's Indiana clinic." *Id.* at p. 8. The complainant also attached an internet search of news articles about Dr. Bernard. *Id.* at p. 10.

29. Between July 12, 2022 and July 14, 2002, the Attorney General's Office sent all but one (which was sent in August) of the seven consumer complaints above to Dr. Bernard, each assigned a different file number and case number, advised her that the Attorney General's Office was investigating the complaints, and requested that she provide a written response. Ex. 6. The D.H. and R.A. complaints, both dated July 11, were assigned separate case numbers and forwarded to Dr. Bernard the next day, on July 12. Ex. 6 at 3-4, 21-26.

30. At the hearing on this motion, Ms. Hutchison testified that she did not believe the R.T. complaint filed on July 12, 2022 warranted investigation and stated that "this one we are not investigating[.]" The Attorney General's Office had previously assigned a case number to the R.T. complaint dated July 12, 2022 and sent it to Dr. Bernard with a request for written response. Ex. 6 at pp. 5–10. Indeed, the Attorney General's Office forwarded the R.T. complaint to Dr. Bernard on July 12, 2022—*the*

very same day it had been filed—reflecting that a file number had been opened regarding "R.T. vs. Caitlin Bernard." . *Id.* at p. 7.

31. .On July 13, 2022, the Attorney General disclosed the investigations against Dr. Bernard on a national television network. Bernard Decl. ¶ 8. He stated: "And then we have this abortion activist acting as a doctor with a history of failing to report. So, we're gathering the information. We're gathering the evidence as we speak, and we're going to fight this to the end, including looking at her licensure. If she failed to report it in Indiana, it's a crime for – to not report, to intentionally not report." *Id.* (emphasis added).

32. On July 13, 2022, the Attorney General also made public a letter he sent to Governor Holcomb that repeatedly referenced Dr. Bernard's name and the allegations he made on national television. See Letter from Todd Rokita, Ind. Att'y Gen., to Eric Holcomb, Ind. Governor (July 13, 2022).

33. On July 14, 2022, the Attorney General's Office issued a press release "regarding Dr. Caitlin Bernard case," stating that "we are investigating this situation and are waiting for the relevant documents to prove if the abortion and/or the abuse were reported, as Dr. Caitlin Bernard had requirements to do both under Indiana law. The failure to do so constitutes a crime in Indiana, and her behavior could also affect her licensure. Additionally, if a HIPAA violation did occur, that may affect next steps as well. I will not relent in the pursuit of truth." Bernard Decl. ¶ 9, Ex. I.

34. On August 19, 2022, the Attorney General's Office issued another press release in response to criticisms of his public statements in which he stated: "We must be critical consumers of information and not just believe anything we read or hear."

(Press Release, Todd Rokita, Ind. Att'y Gen., Attorney General Todd Rokita and team committed to finding the truth (Aug. 19, 2022)).

D. The Attorney General Launches Investigation into Dr. Bernard and Issues Subpoenas for the "Entire Medical File" of Patient.

35. On July 15, 2022, the Attorney General's Office issued a Civil Investigative Demand ("CID") to IU Health, Dr. Bernard's employer. Ex. 10.

36. On July 22, 2022, IU Health responded to the CID, which asked that the Attorney General withdraw the CID because he has "no jurisdiction to conduct the alleged investigation that serves as the CID's purported justification." Ex. 11 at p. 1.

37. On August 23, 2022, the Attorney General issued a subpoena *duces tecum* to IU Health University Hospital requesting:

> The entire medical file, including any and all imaging studies, authorization forms, waivers, consent forms, authorizations for disclosure of the medical records, any written communications between patient/patient's guardian and medical staff, and any notes regarding conversations between patient/patient's guardian and medical staff [for a particular patient number] for the dates June 25, 2022 to July 5, 2022."

Declaration of Kathleen A. DeLaney ("DeLaney Decl."), Ex. A at p. 2.

38. On August 23, 2022, the Attorney General issued a subpoena to the Indiana University School of Medicine requesting:

> The entire medical file, including any and all imaging studies, authorization forms, waivers, consent forms, authorizations for disclosure of medical records, any written communications between patient/patient's guardian and medical staff, and any notes regarding conversations between patient/patient's guardian and medical staff" for a particular patient number "for the dates June 25, 2022 to July 5, 2022.

DeLaney Decl., Ex. B at p. 2.

E. The Attorney General publicly discloses investigations against Dr. Bernard.

39. On July 13, 2022, the Attorney General appeared on one national news broadcast, referring to Dr. Bernard as "this abortion activist acting as a doctor with a history of failing to report" and asserting his office was "gathering the evidence as we speak, and we're going to fight this to the end, including looking at her licensure." Bernard Decl. ¶ 8[2]

40. That same day, the Attorney General made public a letter he sent to the Governor, in which he repeatedly referenced Dr. Bernard by name and made clear that his office was investigating Dr. Bernard.

41. On July 14, 2022, the Attorney General issued a press release that likewise referenced Dr. Bernard by name and expressly stated she was the subject of an investigation.

42. In a "Facebook Live" broadcast on September 1, 2022, the Attorney General made more public comments about his investigation of Dr. Bernard. Bernard Decl. ¶ 10, Ex. J; Ex 16. Asked "the status of the investigation into Dr. Caitlin Bernard," the Attorney General publicly stated that "[w]e're looking into standards of practice of the professional if they were met. If any state or federal laws, employee privacy laws, were violated. And just as background, based on a doctor intentionally reporting her patient's circumstances to the media, my office has undertaken a review of that act in response, again to public concern. My comments are supported by facts as are all statements from my office." *Id.*, Ex. J at pp. 4–5; Ex. 16.

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[2] *Available at* https://www.mediamatters.org/fox-news/after-discrediting-report-10-year-old-ohio-girl-needing-abortion-foxs-jesse-watters-now (including a video and transcript of Attorney General Rokita on Jesse Watters Primetime's July 13, 2022 program).

43. On September 14, he gave an interview to a local newspaper, stating the investigation of Dr. Bernard was "ongoing" and making other comments about the investigation.[3]

44. On September 15, 2022, the Attorney General again discussed his investigation into Dr. Bernard in a local media interview. Kristen Eskow, *Indiana AG Rokita talks enforcement of abortion ban, lawsuits filed*, FOX59 (updated Sept. 18, 2022).[4]

45. On September 21, 2022, IU Health filed a motion to quash the subpoena under cause number 49D12-2209-MI-032634. Ex. D. Two days later, Dr. Bernard intervened and filed her own motion to quash the subpoena to IU Health. Ex. D.

F. Testimony regarding determination of merit before opening investigations into consumer complaints.

46. Before investigating, the Licensing Division does not require that complaints be based on personal knowledge.

47. Before investigating, the Licensing Division does not require that the complaint be based on a consumer transaction.

48. Hutchison is only aware of two subpoenas for medical records of abortion records issued by the Licensing Division—those issued for the medical records of Dr. Bernard's patient and of Dr. Caldwell's patient.

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[3] *Available at* https://www.indystar.com/story/news/health/2022/09/14/indiana-attorneygeneral-todd-rokita-office-declines-to-share-info-on-dr-bernard-complaints/69493958007/.

[4] *Available at* https://fox59.com/indianapolitics/indiana-ag-rokita-talks-enforcement-of-abortion-ban-lawsuits-filed/.

G. Attorney General refers complaint to Medical Licensing Board

49. On November 30, 2022, while this motion was under advisement following two days of live testimony, the Attorney General's Office filed an administrative complaint with the Medical Licensing Board against Dr. Bernard.

H. Evidence and testimony related to Dr. Bernard's experiences following the initiation and public acknowledgment of the investigation against her

50. The investigations and the public statements made by the Attorney General about these investigations have impacted Dr. Bernard's reputation. Dr. Bernard has fears for her personal safety and that of her family as a result of the investigations into her practice of medicine.

51. Dr. Bernard has concerns regarding her patients' privacy as a result of the Attorney General's previous issuing of broad subpoenas seeking the complete medical records and files of Dr Bernard's patient.

52. Dr. Bernard has had to divert time and resources away from patients to address the Attorney General's and the Director's investigations.

II. FACTS RELATED TO DR. AMY CALDWELL, M.D.

53. Dr. Amy Caldwell is an OB/GYN physician licensed to practice medicine in the State of Indiana. Dr. Caldwell is employed by IU Health Physicians and by the Indiana University School of Medicine. Declaration of Amy Caldwell, M.D. ("Caldwell Decl.") at ¶ 1.

54. On April 15, 2022, S.D., an Indiana resident, filed a consumer complaint against "PPIN- Georgetown OR (PPG1)." *See* Caldwell Decl., Ex. A at p.1 ("Who is the Complaint Against?"). The complainant asserted that, based on information she gathered through a "public information request," that "[b]ased on IC 16-34-2 and their

website siting [sic] 13 weeks and 6 days, PPIN-Georgetown OR PPGI [wa]s in violation of performing abortions outside that time frame according to the TPR." *Id.* at p. 2. For her complaint to be resolved, S.D. requested that "a full investigation of this facility" be conducted. *Id.*

55. The Division does not have statutory jurisdiction to investigate complaints against the PPGI facility or hospitals or surgery centers. Employees of the Licensing Division independently renamed the S.D. complaint regarding PPGI and opened an investigation against Dr. Caldwell individually. Caldwell Decl., Ex. A at p. 1.

56. On May 26, 2022, the Attorney General, through the Director, sent a letter to Dr. Caldwell attaching the April 15, 2022 complaint submitted by S.D., which the letter now captioned as "*S.D. v. Amy Caldwell.*" *Id.* at Ex. A at pp. 1, 4–5. The letter indicated that the Division had opened an investigation, to which it had already assigned a file number, and it requested that Dr. Caldwell provide a written response to the complaint. *Id.*

57. Dr. Caldwell provided a written response to the Division, in which she explained "[t]hat there was a clerical error in the report[,]" specifically that the procedure did not take place at Planned Parenthood but in fact had taken place at Eskenazi Hospital. Ex. Y at 18:11-18:25.

58. After having recast the S.D. complaint to be one against Dr. Caldwell, the Division used the complaint as a basis for issuing at least three subpoenas for the entire medical chart of Dr. Caldwell's patient. *See* Ex. 7.

59. On July 22, 2022, the Attorney General, through the Director, issued a subpoena to Dr. Caldwell, for:

> All medical records, including, but not limited to intake information, patient charts, tests results (e.g., x-rays and MRIs), treatment recommendations, office visit logs, referrals, nursing notes, doctors notes, medication administration records, and any electronic documentation, including communications records for the patient who received a medical (surgical) procedure to terminate a pregnancy on December 10, 2021 at Eskenazi Hospital, located at 720 Eskenazi Avenue, Indianapolis, IN 46202, from December 3, 2021 to December 17, 2021.

Caldwell Decl. ¶ 4, Ex. B; *see also* Ex. 18 at p. 2. The cover letter to Dr. Caldwell referenced the S.D. complaint that had been re-named "S.D. v. Dr. Amy Caldwell," with an OAG File Number. *Id.*

60. On October 4, 2022, the Attorney General issued a subpoena to Planned Parenthood – Georgetown requesting:

> [A]ll medical records, including, but not limited to intake information, patient charts, test results (e.g., x-rays and MRIs), treatment recommendations, office visit logs, referrals, nursing notes, doctor notes, medication administration records, and any electronic documentation, including communication records for the patient associated with TPR SFN: 008086, attached as Exhibit A, who received a medical (surgical) procedure to terminate a pregnancy on December 10, 2021."

Ex. 7, at pp. 11–15.

61. The Division also served a subpoena duces tecum to Eskenazi Health based on the consumer complaint caption identifying Dr. Caldwell. *See generally* Ex. 19.

62. On October 12, 2022, Planned Parenthood responded via letter that it had no record of the patient either and indicated that Dr. Caldwell did not perform a second trimester surgical abortion at the Planned Parenthood clinic. Exs. O, P.

63. On November 16, 2022, seven days after Plaintiffs filed their Motion for Preliminary Injunction, the Attorney General's Office sent Dr. Caldwell's attorney a closing letter for the investigation, signed by Mary L. Hutchison, Section Chief,

Licensing Enforcement, Office of the Indiana Attorney General. Ex. 19; Ex. Q; Ex. V at 35–36; see also Ex. Y.

64. The closing letter stated that it "serve[d] as a Warning" to Dr. Bernard regarding the investigation, and that "we are closing this matter with a warning and directive moving forward to accurately and timely comply with Indiana law."

A. Evidence and testimony related to Dr. Caldwell's experiences following the initiation of the investigation against her

65. Dr. Caldwell has concerns that the Division improperly altered the April 15, 2022 complaint against her to gain jurisdiction and may be further harmed if nothing prevents the Defendants from repeating the conduct here, where Defendants rewrote the April 15, 2022 complaint to be against Dr. Caldwell without the consent of the actual complainant. Ex. Y at 30:5-31:24, 32:7-32:11.

66. Dr. Caldwell maintains that the investigation impacted her ability to practice medicine without fear of prosecution or reputational harm, and also disrupts Dr. Caldwell's practice by diverting time and resources away from patient care. Caldwell Decl. ¶¶ 6–7.

67. Having seen the Attorney General publicly discuss investigations and allegations against Dr. Bernard, Dr. Caldwell is now "fearful" that he will publicly mention an investigation of her. Ex. Y at 34:14-34:17.

68. Any findings of fact above which are more appropriately conclusions of law shall be so deemed and incorporated into the conclusions of law section.

CONCLUSIONS OF LAW

I. SPECIFIC RELIEF SOUGHT BY PLAINTIFFS

69. As part of their motion for preliminary injunction, Plaintiffs specifically request that Defendants be enjoined from the following:

a. continuing to investigate any of the pending consumer complaints against Plaintiffs,

b. opening new investigations of Plaintiffs under Title 25 of the Indiana Code based on any consumer complaint as to which an initial determination of merit has not been made or were an allegation is clearly meritless based on available information,

c. publicly disclosing the existence, nature or status of any consumer complaint concerning, or any investigation of Plaintiffs under Title 25 of the Indiana Code, except as provided in IC 25-1-7-10;

d. from referring any of the consumer complaints against Dr. Bernard to the MLB, recommending that the MLB otherwise pursue disciplinary action against Dr. Bernard, or prosecuting any the complaints against Dr. Bernard before the Medical Licensing Board ("MLB") pursuant to Ind. Code Ann. § 25-1-7-7 or § 25-1-7-5(b)(1) (West); and

e. putting the "warning letter" or other mention of the "warning" in Dr. Caldwell's file;

f. referring Dr. Caldwell to the MLB for further proceedings based on the complaint or arising out of the events underlying that complaint; and

g. prosecuting the Administrative Complaint, Case Number 2022 MLB 0024, filed against Dr. Bernard on November 30, 2022 before the Medical Licensing Board of Indiana, and Defendants must withdraw the Administrative Complaint, Case Number 2022 MLB 0024, filed against Dr. Bernard on November 30, 2022 before the Medical Licensing Board of Indiana.

III. CHALLENGES TO PLAINTIFFS' STANDING TO SEEK INJUNCTION

70. Before addressing the preliminary injunction factors, the Court will first address Defendants' arguments related to Plaintiffs' standing to bring this lawsuit and motion for preliminary injunction.

A. Standing arguments with respect to Dr. Caldwell

71. With respect to Dr. Caldwell, Defendants argue Dr. Caldwell's request for a preliminary injunction is moot because the CPD investigation into her is closed. When a court is "unable to provide effective relief upon an issue, the issue is deemed moot." *Larkin v. State*, 43 N.E.3d 1281, 1286 (Ind. Ct. App. 2015) (cleaned up). Because the CPD director's investigation has been completed and closed, Ex. Q; Ex. V at 35–36; *see also* Ex. Y, Defendants argue that Dr. Caldwell can no longer seek any declaratory relief because there is no longer any inquiry to which such relief that could be granted to Dr. Caldwell on her claims.

72. In response, Plaintiffs argue that Dr. Caldwell is also seeking prospective relief to halt *ultra vires* conduct of the Attorney General and the Director. Plaintiffs maintain the Attorney General and Director could still open investigations based on meritless consumer complaints against Dr. Caldwell as they have done previously. Plaintiffs also raise concerns about the "warning" letter the Division issued to Dr. Caldwell being maintained in her file and potentially used against her if the Division were to receive another complaint about Dr. Caldwell. Plaintiffs conclude, therefore, that Dr. Caldwell's claim for injunctive and declaratory relief is not moot and she retains standing to challenge Defendants' *ultra vires* conduct.

73. Upon review, the Court finds that Dr. Caldwell presently lacks standing to move forward with her claims because the evidence establishes there are no active investigations against her and thus, she is not presently subject to the harms from Defendants for which she seeks declaratory and injunctive relief.

74. "[A] plaintiff must show evidence of three elements to establish standing: the plaintiff has suffered an 'injury in fact'—an invasion of a legally protected interest

that is 'concrete and particularized' and '"actual or imminent, not 'conjectural' or 'hypothetical."' *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 730-31 (Ind. Ct. App. 2018) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

75. The undisputed facts show that Dr. Caldwell cannot seek present injunctive relief because there is no active investigation against her that presents an injury in fact for which the Court could enjoin Defendants from pursuing as sought in Plaintiffs' Complaint. Any relief which Dr. Caldwell could seek now would be solely prospective.

76. To establish standing to seek prospective relief, a plaintiff must establish that she is in immediate danger of sustaining a direct injury "as the result of the challenged official conduct, and [that] the injury or threat of injury [is] both real and immediate." *Ind. Family Inst. Inc. v. City of Carmel*, 155 N.E.3d 1209, 1219 n.5 (Ind. Ct. App. 2020) (*citing City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (internal quotations omitted)).

77. Dr. Caldwell has not made any showing that that she will imminently suffer a concrete or particularized injury by Defendants. There is no present investigation against her, and there was no evidence presented suggesting that Dr. Caldwell would the subject of any future complaints. In fact, the timeline of events shows that prospective relief is not necessary in Dr. Caldwell's case. The Defendants opened up an investigation, and after collecting sufficient facts about the circumstances of the alleged complaint, ultimately dismissed the investigation with no further action

being taken against Dr. Caldwell. The Court finds this is the process working as it should.

78. As for the "warning" letter Dr Caldwell has raised concerns about, the Court finds this potential harm is too attenuated to meet the required showing that Dr. Caldwell will imminently suffer any particularized injury from Defendants to grant standing. First, Dr. Caldwell is not presently subject to any consumer complaints, so the alleged risk posed by the letter, that it would be used somehow against Dr. Caldwell in a subsequent proceeding, cannot say to be "imminent" since there is no certainty that another complaint will even be filed to prompt an investigation.

79. Even if Defendants were to include the "warning" letter in any subsequent investigation of Dr. Caldwell for some unknown complaint field in the near or distant future, it is unclear what effect the inclusion of that letter would have. This Court notes that there is no Indiana law enacted by the Indiana General Assembly which permits the Office of the Attorney General to send a "warning" letter which can later be legally used against Dr. Caldwell. Furthermore, the warning has no legal significance because the Defendants dismissed the compliant against Dr. Caldwell finding no wrongdoing.

80. The evidence presented by Plaintiffs does raise serious concerns about how the Division unilaterally modified the consumer complaint by changing the subject of the complaint from PPGI to Dr. Caldwell that prompted the investigation. The licensing investigations statute does not express any authority to the Division to make such alterations to the complaints it receives. In fact, the licensing investigations statute expressly forbids "employees of the attorney general's office acting in their official capacity" from filing consumer complaints. Ind. Code § 25-1-7-4.

81. An employee of the Attorney General, CPD, and Division altering a consumer complaint to change the subject to Dr. Caldwell after receiving the complaint appears precariously close to actually filing that complaint in contravention of the licensing investigations statute.

82. The Court need not review the events that lead to the investigation against Dr. Caldwell further since the matter has been closed and the Division has deemed there to be insufficient evidence to refer the complaint about Dr. Caldwell to the Medical Licensing Board, so the matter is closed.

83. The Court finds that the Defendants and employees of the Attorney General handling consumer complaints are required to process them in compliance with Indiana law.

84. For these reasons, the Court DENIES AS MOOT Dr. Caldwell's Motion for Preliminary Injunction.

B. Standing arguments with respect to Dr. Bernard

85. Defendants also raise numerous arguments to challenge Dr. Bernard's standing to bring this motion seeking to challenge the release of her patient's records by IU Health and to enjoin the CPD from engaging in any other potential future investigations or even continuing any active investigations into her.

86. Defendants argue that Dr. Bernard does not have standing to challenge the revised subpoena issued to IU Health or the investigation in general because she does not have a legitimate privacy interest in the records. Instead, Defendants maintain her sole interest is in avoiding investigation, which would not be a legitimate interest, *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984).

87. Defendants also argue that Dr. Bernard lacks a private right of action under the licensure investigations statute to bring suit for injunctive or declaratory relief on the basis that Defendants violated the statute. *See, e.g., Price v. Indiana Dep't of Child Servs.*, 63 N.E.3d 16, 21–22 (Ind. Ct. App. 2016), *trans. granted, vacated, summarily aff'd in relevant part*, 80 N.E.3d 170, 174 (Ind. 2017); *Lockett v. Planned Parenthood of Indiana, Inc.*, 42 N.E.3d 119 , 126–27 (Ind. Ct. App. 2015), *trans. denied.* Defendants argue that Indiana Code chapter 25-1-7 does not contain an express right of action and does not create any privately enforceable right for which Dr. Bernard can bring suit.

88. Defendants further argue that Dr. Bernard's Complaint should be dismissed pursuant to Ind. Trial Rule 12(B)(8) because Dr. Bernard's suit is also duplicative of the earlier-filed subpoena litigation and thus barred. T.R. 12(B)(8) is triggered when "the parties, subject matter, and remedies of the competing actions are precisely the same, and it also applies when they are only substantially the same." *Kindred v. Indiana Dep't of Child Servs.*, 136 N.E.3d 284, 290 (Ind. Ct. App. 2019), *trans. denied* (citation omitted). Defendants contend that since. Dr. Bernard is already asserting substantially the same arguments in the subpoena litigation, Ex. H, which predates this action, Ex. D, and the outcome of this suit would invariably affect the outcome of the subpoena litigation, Dr. Bernard's suit is thus barred by T.R. 12(B)(8).

89. In response, Dr. Bernard contends that Defendants' arguments for dismissing Dr. Bernard's claims must fail. .

90. First. Dr. Bernard points out that Defendants have previously sought dismissal under T.R. 12(B)(8), and the Court has already rejected this argument. *See*

(November 15, 2022 Order on Whether or Not This Court Has Jurisdiction to Preside Over the Plaintiffs' Request for Preliminary Injunction at p. 5). In the order setting the preliminary injunction hearing, the Court rejected this argument, holding that "this matter and the lawsuit filed by IU health. . . are not substantially similar nor do they seek the same or substantially the same remedies." *Id.* at 6-7.

91. Second, with respect to Defendants' private right of action argument under Ind. Code § 25-1-7 *et seq.* Dr. Bernard notes she is bringing her claims under the Indiana Declaratory Judgment Act and not the licensure investigations statute. *See* Compl. ¶¶ 91, 102, 111. Dr. Bernard maintains that under Indiana law, a declaratory judgment action is the proper procedural vehicle to contest the Defendants' conduct and to determine "the legal right, the legal status, or the legal relationship of parties having adverse interests." *Wells Fargo Bank, N.A. v. Tippecanoe Assocs.*, LLC, 923 N.E.2d 423, 428 (Ind. Ct. App. 2010).

92. Upon review, the Court disagrees with Defendants and finds that Dr. Bernard has an adequate basis to proceed with her claims under the Uniform Declaratory Judgment Act.

93. Starting with Defendants' T.R. 12(B)(8) argument, the Court again rejects Defendants' argument as it did in its November 15, 2022 Order. The Court finds that the relief in both cases is not substantially similar and incorporates its prior findings on that issue into this order.

94. As for Defendants' private right of action argument, the Court agrees with Plaintiffs that whether the investigation statute has a private right of action is irrelevant since Plaintiffs are bringing their claims under the Uniform Declaratory Judgment Act.

95. Ind. Code § 34-14-1-2, taken from the Declaratory Judgment Act, provides:

> Any person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

96. As clarified by the Indiana Supreme Court recently, a person seeking a declaratory judgment with respect to the application of a statute must make these showings: "(1) [they are] a 'person'; (2) [their]"rights, status, or other legal relations are affected by a statute"; and (3) [they are] questioning the construction or validity of that statute. *Holcomb v. Bray*, 187 N.E.3d 1268, 1284 (Ind. 2022) (citations omitted).

97. Here, the Court finds Dr. Bernard meets all three factors. She is a "person" as defined in the Declaratory Judgment Act. Her rights are being affected by the licensing investigations statute, and she is questioning the construction of that statute, i.e., whether Defendants' conduct has violated that statute.

98. Dr. Bernard's interests includes challenges to subpoenas for her patients' entire medical file. Dr. Bernard can "raise a claim on behalf of a third party if [Dr. Bernard] can demonstrate that [s]he has suffered a concrete, redressable injury, that [s]he has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect [their] own interests." *Osmulski v. Becze*, 638 N.E.2d 828, 833-34 (Ind. Ct. App. 1994). The Court has already found that Dr. Bernard has suffered an injury. As for the ability of her patients to protect their interests, Indiana courts have previously found minors and victims of sexual abuse have privacy concerns that healthcare providers such as Dr. Bernard are uniquely positioned to protect. *See*

Planned Parenthood v. Carter, 854 N.E.2d 853, 870 (Ind. Ct. App. 2006). The Court finds that Dr. Bernard's interest in the privacy of her patients confers her standing to challenge subpoenas into their records on their behalf.

99. The Court, therefore, finds that Dr. Bernard has pleaded a sufficient basis for standing to bring her claims through the Declaratory Judgment Act.

IV. ANALYSIS OF PRELIMINARY INJUNCTION FACTORS

A. Standards on Injunctive Relief

100. The Court grants preliminary injunctive relief pursuant Ind. Trial Rule 65 when the moving party demonstrates by the greater weight of the evidence that: (1) the remedy at law is inadequate and the plaintiff will suffer irreparable harm pending resolution of the action; (2) the plaintiff is reasonably likely to prevail on the merits; (3) the threatened injury to the plaintiff if an injunction is denied outweighs the threatened harm to the adverse party if the injunction is granted; and (4) the public interest will be disserved if injunctive relief is not granted. *See Barlow v. Sipes*, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001); *City of Gary v. Mitchell*, 843 N.E.2d 929, 933 (Ind. Ct. App. 2006); *Norlund v. Faust*, 675 N.E.2d 1142, 1149 (Ind. Ct. App. 1997), *decision clarified on denial of reh'g*, 678 N.E.2d 421 (Ind. Ct. App. 1997); *see also* Ind. Code § 34-26-1-5 (statutory requirements for obtaining pre-judgment injunction).

101. At the outset, the Court reiterates that this order has no bearing on the ultimate issues in this case. This is a preliminary order which may be revisited by the newly-selected sitting judge[5] following additional offerings of evidence and subsequent proceedings.

[5] Defendants filed a Motion for Change of Judge on November 10, 2022. The new judge will take this case at the conclusion of these emergency proceedings.

B. Separation of Powers

102. Before proceeding on the analysis of the preliminary injunction factors, the Court wishes to first ground its analysis within prior Indiana caselaw where private entities have previously sought to enjoin activities by government agencies.

103. Article 3, Section 1 of the Indiana Constitution states: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as this Constitution expressly provided."

104. "The separation of powers doctrine recognizes that each branch of the government has specific duties and powers that may not be usurped or infringed upon by the other branches of government." *Woolley v. Washington Twp. of Marion County Small Claims Court*, 804 N.E.2d 761, 765-66 (Ind. Ct. App. 2004).

105. "Our supreme court has held repeatedly that courts should not intermeddle with the internal functions of either the Executive or Legislative branches of Government." *Planned Parenthood v. Carter*, 854 N.E.2d 853, 864 (Ind. Ct. App. 2006) (citing *Wooley*, 804 N.E.2d at 766).

106. In *Woolley*, the Court of Appeals determined that it did not violate the separation of powers doctrine for a trial court to enter a preliminary injunction against a division of the Indiana Attorney General's Office to enjoin the division from taking actions outside of those specifically granted to that division by the General Assembly. 854 N.E.2d at 859, 864.

107. The *Carter* case is highly instructive to the present proceeding. The *Carter* Court noted that the trial court's role in the matter was to assist in maintaining the

appropriate balance between the branches of government. 854 N.E.2d at 864 (citing *Wilmont v. City of S. Bend*, 221 Ind. 538, 541-42, 48 N.E.2d 649, 650 (1943) ("To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions.")).

108. The Court of Appeals in *Carter* further distinguished between a trial court permissibly issuing an injunction against an agency to rein it in from acting outside of its statutory bounds verses a trial court intervening in an active investigation or prosecution, which would be afforded far less deference. 854 N.E.2d at 864 (comparing the *Carter* case with the United States Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), which overturned a federal court's injunction staying a state criminal proceeding).

109. The Court finds this present proceeding analogous to the circumstances in *Carter*. This matter similarly involves a private person, Dr. Bernard, seeking an injunction against a division of the Indiana Attorney General's Office, the Consumer Protection Division, to prevent that division from acting outside its legislative authority. Dr. Bernard further seeks the same relief against the Attorney General and the Director of the CPD. The Court, therefore, finds that this motion falls within the Court's acceptable oversight of state administrative agencies that aligns with the separation of powers doctrine.

C. Factor 1- Irreparable Harm and Inadequacy of Legal Remedy.

110. "Irreparable harm" is considered to be "that harm which cannot be compensated for through damages upon resolution of the underlying action." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 912 (Ind. Ct. App. 2011). This typically requires movants to establish that they could not be adequately compensated through a legal or

monetary remedy at the conclusion of the case and instead must be immediately granted extraordinary injunctive relief. *See Barlow v. Sipes*, 744 N.E.2d 1, 6 (Ind. Ct. App. 2001).

111. When a motion seeks to enjoin an action that would violate a law or statute, however, the act is considered to case *per se* irreparable harm. *Short on Cash.net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 822. Should the Court find that the nonmovant has committed such an unlawful act, Indiana law deems the public interest in stopping the activity so great that "the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant. *Id* at 823. In other words, where a Court finds that denying a preliminary injunction would permit the nonmovant to continue committing unlawful conduct, the Court need not consider the remaining preliminary injunction factors and instead must issue the relief sought by the movant.

112. Dr. Bernard argues that Defendants have violated the licensing investigations statute, Ind. Code § 25-1-7 *et seq.*, numerous times in their investigation of the consumer complaints against Dr. Bernard, committing irreparable harm *per se*.

113. Dr. Bernard cites two primary violations of the licensing investigations statute.

114. First, Dr. Bernard contends that the Director failed to make a determination of whether the relevant complaints against Dr. Bernard are meritless before starting investigations into Dr. Bernard. Under the licensing investigations statute Ind. Code § 25-1-7-5(b) (1), the Director must review each consumer complaint to determine whether they have merit before the Division may open any investigation.

115. Dr. Bernard argues that the Director could not have made any determination regarding the consumer complaints against her because the complaints are patently meritless, yet the Director still moved to open investigation files on all of them. Dr. Bernard. highlights that most of the complaints come from outside Indiana, suggesting that they come from persons who were not her patients and would not have any personal knowledge of her alleged failures to report or breaches of patient confidentiality of which they are complaining. She also notes that several of the complaints lacked necessary information asked for by the Attorney General's Complaint Form.

116. She further notes that testimony from Ms. Hutchinson, head of the Division, indicated that at least one of the complaints which were investigated should not have been and instead should have been deemed meritless on their face.

117. In sum, Dr. Bernard contends the Division opened investigations into her conduct without first deeming whether the consumer complaints against her had any merit as required by statute.

118. Second, Dr. Bernard argues that Defendants have breached their statutory duty to maintain confidentiality of the investigations against her as required by the licensing investigations statute. Ind. Code § 25-1-7-10(a) requires that the Division keep the investigations into Dr. Bernard confidential until they have been referred for prosecution by the Attorney General to the Medical Licensing Board.

119. Prior to the Attorney General's recent referral, Dr. Bernard points out that the Attorney General had discussed the investigations specifically referring to Dr. Bernard and the potential loss of her medical license in several high profile public

appearances. She contends that these appearances constitute clear violations of the licensing investigations statute's confidentiality provision.

120. In sum, Dr. Bernard maintains that Defendants have committed a number of "unlawful act[s]" which "constitute[] *per se* irreparable harm for purposes of the preliminary injunction analysis." *Clay Twp. of Hamilton Cnty. ex rel. Hagan v. Clay Twp. Reg'l Waste Dist.*, 838 N.E.2d 1054, 1063 (Ind. Ct. App. 2005) (quoting *Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004)), and thus should be found to have committed irreparable harm *per se* against her.

121. As an alternative argument to the *per se* rule for irreparable harm, Dr. Bernard argues that the cumulative designations still demonstrate that she has suffered irreparable injury caused by Defendants' conduct for which there is no adequate legal remedy.

122. Dr. Bernard argues that Defendants' investigations into her based on meritless consumer complaints have proven harmful by distracting her from serving her patients, causing her to fear whether she will be able to continue her medical practices, and to fear for the personal safety of her and her family. She has also argued that the public statements on the investigations into Dr. Bernard have caused reputational harm and threaten her business as a healthcare provider.

123. In response, Defendants contend that Dr. Bernard has not met her burden to establish irreparable harm.

124. Defendants first argue that the *per se* rule cannot be applied in this case since the *per se* rule may be employed only "for clear, uncontested unlawful conduct.".

Indiana Family & Soc. Servs. Admin. v. Walgreen Co., 769 N.E.2d 158, 162 (Ind. 2002). Defendants contend that the Division's investigations do not constitute clearly unlawful conduct that would constitute irreparable harm *per se*.

125. Defendants dispute Dr. Bernard's claims that the Attorney General's public comments have irreparably harmed her because she has willingly put herself in the public spotlight, so any threats or harms to her reputation cannot be derived solely from the Attorney General's public comments. Furthermore, Defendants argue that Dr. Bernard made the investigations a public matter herself by filing this lawsuit in open court.

126. Defendants additionally argued that the Division has conducted their investigations within the scope of their legal authority.

127. Upon review, the Court finds that Dr. Bernard has not met her burden to show irreparable harm for the purposes of a preliminary injunction as to the investigation of the consumer complaints but does find Dr. Bernard has met her burden to show irreparable harm based on the Attorney General's public statements regarding investigations which by Indiana law must have remained confidential until the complaint was filed with the Medical Licensing Board.

128. The Court further finds that the public disclosures by the Attorney General regarding the investigations prior to the Attorney General's recent referral of the matter to the Medical Licensing Board constituted irreparable harm *per se* and that the Attorney General clearly violated Indiana law when discussing the confidential investigations in the media. Because the Attorney General had not referred the matter to the Medical Licensing Board at the time the public disclosures were initially made,

the Court finds that the Attorney General's public comments which were designated as part of the two-day hearing on this motion violated the licensing investigations statute's confidentiality provision.

129. As for Dr. Bernard's arguments for irreparable harm and irreparable harm *per se* with respect to the manner in which the Division was carrying out the investigations, the Court finds that Dr. Bernard has not similarly met her burden.

130. First, the Court finds that Plaintiffs have not satisfactory established a clear indication of unlawful conduct in the manner which the Division was carrying out its investigations to support a finding of irreparable harm *per se*.

131. Ind. Code § 25-1-7-5 permits the Division to investigate consumer complaints and, as part of that investigation, to subpoena witnesses. Plaintiffs have taken issue with the scope of the subpoenas and the apparent lack of notice given to Dr. Bernard regarding subpoenas of their patients' records, but there is nothing in the licensing investigations statute that places any apparent limits on the scope of discovery or requires that the subjects of complaints be alerted of any subpoenas the Division deems necessary to issue. There are, of course, limitations that have been determined through case law, such as the Indiana Court of Appeals' ruling in the *Carter* case, which held that unlimited subpoenas for minors' medical records were not permitted by the Office of the Attorney General in a Medicaid fraud investigation. *Carter*, 854 N.E.2d 853, 883. Limitations as determined in opinions such as *Carter*, however, do not establish that the mere act of issuing an overly-broad subpoena constitutes such unlawful conduct as to show irreparable harm *per se*.

132. As for Dr. Bernard's argument that the consumer complaints should have been rejected out of hand as meritless for a number of issues including deficient information and apparent lack of personal knowledge or relationship with Dr. Bernard, the Court too finds that this conduct is not so unlawful as to determine that Dr. Bernard has suffered irreparable harm *per se.* Dr. Bernard has have inferred from the nature of the complaints that the Division made no determination as to their merit. Defendants' designations and live testimony, however, suggests the that the Division did at least deem most of the consumer complaints against Dr. Bernard were meritorious, even if Ms. Hutchinson did subsequently testify that one of them should have been rejected immediately.

133. Dr. Bernard has argued that the Division opening investigations on all of the complaints, even those from out of state persons, shows they could not have actually determined whether they were first meritorious, but that assumption does not mean that Defendants did not comply with applicable laws. The only express requirements for the consumer complaint stated in the in the licensing investigations statute are that they 1) be written and 2) signed by complainant. Ind. Code § 25-1-7-4. Any person is able to file a consumer complaint for review by the Division. *Id.* There is no personal relationship or personal knowledge of specific events required by the statute before a complaint can be filed, and any person is permitted to file a consumer complaint. *Id.*

134. Finally, reading the subsections of Ind. Code § 25-1-7-5 in full suggests that the Division may actually make a full investigation before coming to a determination on merit. The statute provides that the Director does not need to immediately make a

determination of the merits of the complaint; the Director just needs to make an initial determination. *Id.* -5(b)(1). Once the Director has made that determination, the meritorious complaint is to be submitted to the proper licensing board. *Id.* The same statute also allows for the Director to conduct limited investigations on complaints received. *Id.* at –5(b)(4). If a complaint is deemed meritorious, then it must then be submitted to the proper licensing board. Any investigation as permitted by subsection 5(b)(4) would most likely have to occur prior to the determination of merit. If the Director were to have to immediate determine whether a complaint was meritorious, the Director would not have the opportunity to investigate because either a) the meritorious complaint would be referred to the applicable licensing board or b) the non-meritorious complaint would be rejected. Here, the Director is permitted to first engage in the investigations prior to making a determination under the statute.

135. The Court, therefore, finds the Division's conduct falls within the permitted bounds of the licensing investigations statute in this case. While some of the consumer complaints appeared more meritorious than others on their face, the statute permits the Director and Division to investigate them all the same before coming to any conclusion. While Dr. Bernard has raised concerns about the conduct of the investigations, it is beyond the scope of the Court's irreparable harm *per se* analysis to determine whether the particular tactics employed by the Division in the investigations against Dr. Bernard should be permitted since, unlike the confidentiality issues, *see infra*, there are no express statutes specifically prohibiting the Director and Division from relying on weak consumer complaints taking months of time to complete their investigations before making a determination on merit.

136. As for Dr. Bernard's alternative argument that the Defendants' investigations have caused Dr. Bernard irreparable harm for the purposes of justifying injunctive relief, the Court does not find that Dr. Bernard has met her burden that she has suffered irreparable harm from the investigations into the consumer complaints by the Division. Thus, this Court finds that Dr. Bernard has not met her burden to show irreparable harm arising from Defendants' carrying out of the ongoing investigations of the consumer complaints filed against Dr. Bernard.

137. In contrast, Dr. Bernard's concerns over the Attorney General's breaches of confidentiality requirements under the licensing investigations statute do warrant a finding of irreparable harm *per se*; however, in light of the Attorney General's recent referrals to the Medical Licensing Board, any further public comments would not constitute irreparable harm *per se*.

138. Ind. Code Ann. § 25-1-7-10(a) provides "that all complaints and information pertaining to the complaints shall be held in strict confidence until the attorney general files notice with the board of the attorney general's intent to prosecute the licensee." The Attorney General had not referred the claims to the Medical Licensing Board or initiated prosecution of Dr. Bernard when he made public statements on the investigations prior to November 30, 2022. Such public disclosures prior to that date then were clear violations of Indiana law.

139. Defendants have argued that Dr. Bernard was no longer entitled to confidentiality under the statute as of July 1, 2022 since Dr. Bernard has made her own public comments about the underlying event and the subsequent investigation. The Court disagrees with Defendants on this point for two reasons.

140. First, there is nowhere in the statute that stages the attorney general's obligation to keep the investigation confidential is relieved when the subject of the investigation makes it public.

141. Second, the licensing investigations statute specifies when limited disclosures are authorized and by whom. Ind. Code § 25-1-7-10(b) states that:

> **A person in the employ of the office of attorney general**, the Indiana professional licensing agency, **or any person not a party to the complaint** may not disclose or further a disclosure of information concerning the complaint unless the disclosure is:
>
> (1) required under law;
>
> (2) required for the advancement of an investigation; or
>
> (3) made to a law enforcement agency that has jurisdiction or is reasonably believed to have jurisdiction over a person or matter involved in the complaint.

(Emphasis added). Ind. Code § 25-1-7-10(b) specifies that members of the Attorney General's Office may not disclose any information about the investigation other than in the limited circumstances set forth in the subsection, which Defendants have not established were the reasons behind the Attorney General's public disclosures that relate to this matter. No one from the office of the Attorney General, therefore, should have made any public disclosures during an investigation.

142. The provision states that it applies to anyone that is **not a party to the complaint**. As a party to the complaint, therefore, Dr. Bernard is not required under law to maintain confidentiality about her investigation under the statute. Rather than Dr. Bernard's revelations about the investigation constituting any sort of waiver then, the Court finds that the licensing investigations statute allows her to make public statements while still obligating the office of attorney general to maintain confidentiality. However, the Court finds that Dr. Bernard comments to the IndyStar reporter had no bearing on

the issue of the Attorney General maintaining confidentially as her comments to the IndyStar reporter were made prior to the filling of any complaints with the CPD.

143. The public statements made by the Attorney General prior to the referral of the matter to the Medical Licensing Board, therefore, are clearly unlawful breaches of the licensing investigations statute's requirement that employees of the Attorney General's Office maintain confidentiality over pending investigations until they are so referred to prosecution.

144. Having established that the Attorney General has referred the matter to the Medical Licensing Board on November 30, 2022, however, the Court finds there is no prospective irreparable harm *per se* since making public comments about the investigation into Dr. Bernard is no longer prohibited by statute.

145. Despite there being no showing of further irreparable harm *per se*, the Court finds that Dr. Bernard's concerns about reputational and professional harm as a result of the Attorney General's comments do constitute irreparable harm for the purposes of this preliminary injunction motion.

146. Having found that Dr. Bernard has met her burden on the irreparable harm factor as to the breaches committed by the Attorney General as to the confidentiality of the investigation, the Court will address the remaining preliminary injunction factors.

D. Factor 2- Likelihood of Success On The Merits.

147. The Court next addresses Dr. Bernard's likelihood of success elements of their motion for injunctive relief.

148. In order to meet their burden to show a likelihood of success on the merits of their claim, Plaintiffs must "establish[] a prima facie case." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 911 (Ind. Ct. App. 2011). Plaintiffs are not required to show that

they are entitled to relief as a matter of law in order to obtain preliminary injunctive relief. *Abercrombie & Fitch Stores, Inc. v. Simon Prop. Grp., L.P.*, 160 N.E.3d 1103, 1109 (Ind. Ct. App. 2020).

1. Whether Dr. Bernard has a prima facie case that Defendants violated and will continue to violate statutory confidentiality requirements

149. The Court first addresses Dr. Bernard's motion with respect to the confidentiality provisions of the licensing investigations statute.

150. As discussed above, the Court finds that Dr. Bernard has shown that the Attorney General did breach the confidentiality requirements through the Attorney General's public statements prior to a referral to the Medical Licensing Board.

151. Because the Attorney General's Office has referred their investigation of Dr. Bernard to the Medial Licensing Board for prosecution, however, Defendants are no longer bound by the confidentiality statute.

152. Because there is now no statutory basis for Dr. Bernard to compel the Attorney from making future public comments with respect to the prosecution of her, the Court finds that Dr. Bernard cannot establish the prima facie case that the Defendants remain in violation of the confidentiality provision under the licensing investigations statute. The Court, therefore, finds that Dr. Bernard has failed to meet her burden on the likelihood do success preliminary injunction element with respect to this issue.

2. Whether Defendants failed to make an initial determination of merit before investigating a consumer complaint.

153. While the Court has found that Dr. Bernard failed to meet her burden on the irreparable harm element with respect to this issue, the Court will briefly address the arguments on the likelihood of success which were presented to the Court.

154. Dr. Bernard argues that Defendants failed to make any initial determination on the merits of the complaints before opening an investigation.

155. As stated previously, the Director of the Consumer Protection Division "shall make an initial determination as to the merit of each complaint. A copy of a complaint having merit shall be submitted to the board having jurisdiction over the licensee's regulated occupation, that board thereby acquiring jurisdiction over the matter except as otherwise provided in this chapter." Ind. Code § 25-1-7-5(b)(1).

156. Dr. Bernard argues that the Director must make this determination prior to opening any investigation into the consumer complaint at issue, but as discussed in the previous section, the Court does not agree with that reading of the statute.

157. The Indiana Supreme Court has consistently confirmed that "[t]he best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless otherwise indicated by statute." *Chambliss v. State*, 746 N.E.2d 73 (Ind. 2001). Courts are required to construe statutes "together and avoid invalidating statutes or portions thereof." *Amwest Sur. Ins. Co. v. State (In re The Bond Forfeiture)*, 750 N.E.2d 865, 870 (Ind. Ct. App. 2001).

158. A plain reading of the statute says that once the Director makes a determination on the merits of the complaint, it is to be referred to the appropriate licensing body. The same statute allows the Director to "investigate any written complaint against a licensee" and "to subpoena witnesses and to send for and compel the production of books, records, papers, and documents for the furtherance of any investigation under this chapter." Ind. Code § 25-1-7-5(b)(4-5). If the Director is to refer the consumer complaint upon finding it meritorious, a harmonious reading of the statute

requires the Court to construe the statute to allow the Director to engage in investigation prior to such a determination of merit.

159. Dr. Bernard's argument that the Defendants failed to make determinations on merits prior to launching investigations must fail because the statute expressly authorizes Defendants to conduct their investigations prior to an initial determination of the merits, otherwise the Director would be obligated to refer the complaint before having an opportunity to conduct an investigation.

160. Because the statutes expressly permit the Defendants to investigate prior to making any determination on merits, the Court finds that Dr. Bernard has failed establish a prima facie case for declaratory relief necessary to meet her burden on the likelihood of success element with respect to this issue.

3. *Whether the complaints against Dr. Bernard lack merit*

161. Dr. Bernard argues that, even if the complaints could not be considered meritless initially, there is a prima facie case that they should now be considered meritless.

162. Dr. Bernard notes note that Defendants' have been investigating her largely for three primary violations: (1) the requirement to file a TPR after providing abortion care; (2) the requirement to report suspected child abuse; and (3) federal and state privacy laws.

163. She has asked for injunctive relief to suspend the investigations due to the frivolous nature of these complaints and to preclude Defendants from pursuing future complaints regarding the same subject matter over Dr. Bernard.

164. Over the course of the hearing days, a substantial amount of evidence and testimony was presented on the merits of the claims against Dr. Bernard.

165. Due to the recent referral of the investigations to the Medial Licensing Board by the Attorney General, however, the Court no longer has jurisdiction to make any factual findings over these ultimate questions, even for the purposes of a preliminary order.

166. Once a complaint is deemed meritorious and has been submitted to the licensing board, that board is deemed to have jurisdiction over the matter. Ind. Code § 25-1-7-5(b)(1).

167.. Since these arguments go to validity of the consumer complaints, the Court finds any determination of such to be properly within the jurisdiction of the Medical Licensing Board at this time.

168. Because the Court cannot assess whether Dr. Bernard has made a prima facie case that she did not violate the laws which she is accused of in the consumer complaints, the found finds that Dr. Bernard has not established a likelihood of success on this issue either.

E. No need to determine balance of harms or public interest considerations

169. Having found that Dr. Bernard failed to establish a likelihood of success on the merits, the Court need not address the remaining preliminary injunction factors.

170. Any conclusions of law above which are more appropriately findings of fact shall be so deemed and incorporated into the findings of fact section.

ORDER

The Court hereby DENIES the Plaintiffs' Motion for Preliminary Injunction for the reasons set forth. However, the Court does find that the Attorney General did violate the licensing statue's confidentiality provision by discussing the statutorily confidential

investigation in statements to the media until the filing of a complaint with the Medical Licensing Board against Dr. Bernard on November 30, 2022.

SO, ORDERED, ADJUDGED AND DECREED this 2nd day of December 2022.

Heather A. Welch

Hon. Heather A. Welch, Judge
Marion Superior Court 1

Distribution to counsel of record.

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF	)	
	)	**Cause Number 23S-DI-258**
THEODORE E. ROKITA	)	
Attorney No. 18857-49	)	
	)	

STATEMENT OF CIRCUMSTANCES

AND

CONDITIONAL AGREEMENT FOR DISCIPLINE

Pursuant to Indiana Admission and Discipline Rule 23, § 12.1(b), the Indiana Supreme Court Disciplinary Commission ("Commission") and Respondent, Theodore E. Rokita ("Respondent"), having conditionally agreed upon the discipline to be imposed in this cause, submit the following:

STATEMENT OF CHARGES

In its Disciplinary Complaint under Cause Number 23S-DI-258, the Commission charged Respondent with violating the following rules:

Indiana Rule of Professional Conduct 3.6(a);

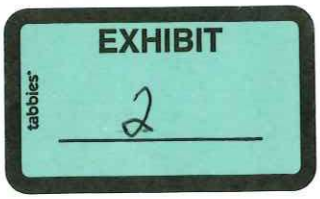
Indiana Rule of Professional Conduct 4.4(a);

Indiana Rule of Professional Conduct 8.4(d).

STATEMENT OF GENERAL FACTS

1. Respondent is currently an attorney in active and good standing in Indiana.

2. Respondent was admitted to practice law in the State of Indiana on October 23, 1995, subjecting him to the Indiana Supreme Court's disciplinary jurisdiction.



3. At all times relevant to this proceeding, Respondent has been the Indiana Attorney General and has practiced law in Indianapolis, Marion County, Indiana.

4. Respondent has no prior discipline.

STATEMENT OF AGREED FACTS

1. On July 1, 2022, the *Indianapolis Star* published an article titled "Patients Head to Indiana for Abortion Services as Other States Restrict Care." The story discussed an Indiana physician, Dr. Caitlin Bernard ("Dr. Bernard"), performing an abortion on a ten-year old from Ohio who was six weeks and three days pregnant and quoted Dr. Bernard in the article.

5. On July 2, 2022, Dr. Caitlin Bernard submitted a termination of pregnancy report to the Indiana Department of Health ["IDOH"], as required by Indiana Code § 16-34-2-5(b), after performing a termination of pregnancy procedure on a ten-year-old who had been referred to Dr. Bernard from a doctor in Ohio.

6. On the same date, Dr. Bernard emailed a copy of the termination report to the Indiana Department of Child Services ["IDCS"].

7. From July 8, 2022 through July 11, 2022, the Consumer Protection Division of the Indiana Attorney General's Office received seven complaints regarding Dr. Bernard's performance of a termination procedure on a ten-year old. None of the complainants were patients of Dr. Bernard.

8. On July 11, 2022, a staff member from the Indiana Attorney General's Office requested from the IDOH all termination of pregnancy reports received in the previous thirty (30) days.

9. On July 12, 2022, the Indiana Attorney General's Office notified Dr. Bernard that

it was opening an investigation into six complaints. The other submitted complaint was not deemed as having sufficient information to pursue an investigation.

10. Also, on July 12, 2022, staff members from the Indiana Attorney General's Office emailed the IDCS to find out whether a child abuse report had been filed regarding the ten-year old referenced in the July 1, 2022 *Indianapolis Star* article.

11. On July 13, 2022, Respondent sent a letter to Governor Eric J. Holcomb, requesting that the Governor direct IDCS and IDOH to turn over the records to the Attorney General's Office immediately.

12. Also, on July 13, 2022, Respondent appeared on the Jesse Watters show on Fox News.

13. During the show, Jesse Watters made the following statement:

> Caitlin Bernard, the abortion doctor who performed the operation in Indiana, has a legal requirement to report the abortion to both child services and the state's health department. Because a ten-year-old isn't able to give consent and is therefore a rape victim. And from what we can find out so far, this Indiana abortion doctor has covered this up. Failure to report is nothing new, though, for Dr. Bernard. According to reporting from PJ Media, she has a history of failing to report child abuse cases. And our sources, as Trace mentions, are telling Fox that Dr. Bernard's employer, Indiana University Health, has already filed a HIPAA violation against her. So, is a criminal charge next? And, will Dr. Bernard lose her license?

14. Jesse Watters then remarked, "Let's ask the Indiana Attorney General, Todd Rokita. So what's going on, Todd?"

15. Respondent then replied with the following remarks at issue:

> Jesse, thanks for having me on. But, I shouldn't be here, right.
>
> ***
>
> Then we have the rape. And then we have this, uh, abortion activist acting as a doctor—with a history of failing to report. So, we're gathering the information. We're gathering the evidence as we speak, and we're

> going to fight this to the end, uh, including looking at her licensure if she failed to report. In Indiana, it's a crime, uh, for, uh, to not report—uh, to intentionally not report.

AGREED VIOLATIONS AND CONCLUSIONS OF LAW

16. Indiana Rule of Professional Conduct 3.6(a) provides:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

17. Indiana Rule of Professional Conduct 3.6(d) provides:

> A statement referred to in paragraph (a) will be rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding when it refers to that proceeding and the statement is related to:
>
> (1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness. . . .

18. The parties agree that Respondent's use of the phrase "abortion activist acting as a doctor – with a history of failing to report" could reasonably be considered a statement about the doctor's character, credibility, or reputation in violation of Rule 3.6(a) because of the presumption raised by Rule 3.6(d)(1).

19. Accordingly, the parties agree that Respondent violated Rule 3.6(a), as described in Count 1 of the Complaint.

20. Indiana Rule of Professional Conduct 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.

21. The parties agree that a reasonable person could conclude that Respondent's use of the phrase "abortion activist acting as a doctor – with a history of failing to report" had "no

substantial purpose other than to embarrass or burden" the doctor in violation of Rule 4.4(a).

22. Accordingly, the parties agree that Respondent violated Rule 4.4(a), as described in Count 2 of the Complaint.

MATTERS IN DISPUTE

The parties dispute whether Respondent acted contrary to Ind. Code § 25-1-7-10(a) and violated Indiana Professional Rule 8.4(d). However, the parties agree that a trial on the merits on Count 3 would not likely result in a different sanction than the already agreed to proposed sanction on Counts 1 and 2. Accordingly, in the interests of judicial economy, the parties do not believe a trial on the merits is warranted on Count 3, and the Commission agrees to dismiss Count 3 in exchange for Respondent's admission to misconduct on Counts 1 and 2.

SANCTION FACTORS

1. Respondent has no prior discipline. (ABA Standards for Imposing Lawyer Sanctions, § 9.32(a)).

2. Respondent has been cooperative and responsive to the Commission's requests for information. (ABA Standards for Imposing Lawyer Sanctions, § 9.32(e)).

3. Respondent has accepted responsibility for his misconduct. (ABA Standards for Imposing Lawyer Sanctions, § 9.32(k)).

4. Respondent is a public official. He has been a government attorney and public official for 14 years. As such, he has substantial experience in the practice of law. (ABA Standards for Imposing Lawyer Sanctions, § 9.22(i)).

AGREED DISCIPLINE

Respondent and the Commission agree and respectfully suggest to the Court that the following discipline should be imposed:

Respondent should receive a **Public Reprimand** for violating Indiana Professional Conduct Rules 3.6(a) and 4.4(a), as described in Counts 1 and 2. The Commission will dismiss Count 3.

PRECEDENT

Several cases are relevant to the appropriate sanction in this matter. In *Matter of Brizzi*, 962 N.E.2d 1240 (Ind. 2012), the Supreme Court imposed a public reprimand on an elected prosecutor who violated Rules 3.6(a) and 3.8(f) by making statements to the media prior to trial about a defendant's character and that the defendant "deserve[d] the ultimate penalty for this crime" and "To do otherwise would be a travesty." Similarly, in *Matter of Litz*, 721 N.E.2d 258 (Ind. 1999), the Court imposed a public reprimand on a criminal defense attorney who violated Rule 3.6(a) by writing a letter to the editor, while the case was pending on retrial, claiming that his client was innocent and stating that his client had passed a lie detector test.

In the recent case of *Matter of Kyres*, 183 N.E.3d 299 (Ind. 2022), this Court accepted a conditional agreement to discipline of a public reprimand for an attorney's violation of Rule 4.4(a) when he opposed a protective order, in part, by accusing opposing counsel of having an affair with the police sergeant who investigated the matter and then later falsely claiming he "had a source" for the false allegation. Public reprimands also have been imposed for other Rule 4.4(a) violations. *See Matter of Campiti*, 937 N.E.2d 340 (Ind. 2009); *Matter of Edwards*, 894 N.E.2d 552 (Ind. 2008). In cases in which a more severe sanction was imposed, other significant factors that are not present here were involved. *See, e.g. Matter of Hall*, 108 N.E.3d 889 (Ind. 2018); *Matter of Richardson*, 792 N.E.2d 871 (Ind. 2003).

COMMISSION'S RIGHT TO WITHDRAW

The parties agree that until acceptance of this Conditional Agreement by the Indiana Supreme Court, the Commission may unilaterally withdraw from this Conditional Agreement upon notice to Respondent and to the Indiana Supreme Court of the Executive Director's determination of a substantial change in circumstances with regard to Respondent, including but not limited to a previously unknown allegation that Respondent has engaged in misconduct.

STIPULATION AS TO COSTS

The parties have discussed the costs and expenses associated with *Matter of Theodore E. Rokita* and stipulate that the costs and expenses associated with the matter are as follows:

Disciplinary Commission Expenses	
Investigation/Litigation Expenses	$ TBD
Clerk of Supreme Court Expenses	
Court Costs	$ 250.00
Hearing Officer Expenses	
Hearing Officer Expenses	$ 0.00
Total Due:	**$**

VOLUNTARY CONSENT AND AFFIDAVIT

Respondent voluntarily consents to this Statement of Circumstances and Conditional Agreement for Discipline. In this regard, the parties incorporate by reference the attached Affidavit, drafted pursuant to Indiana Admission and Discipline Rule 23, § 12.1(b)(3).

WHEREFORE, Theodore E. Rokita and the Indiana Supreme Court Disciplinary Commission respectfully submit this Statement of Circumstances and Conditional Agreement for Discipline to the Indiana Supreme Court for its consideration and respectfully request that said Conditional Agreement be approved.

Respectfully submitted,

Adrienne L. Meiring, #18414-45
Executive Director

Theodore E. Rokita, #18857-49
Respondent

Stephanie K. Bibbs, #25145-49
Deputy Director of Litigation

H. Christopher Bartolomucci
Counsel for Respondent

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AFFIDAVIT

I, Theodore E. Rokita, having been duly sworn upon my oath, depose and say under the penalties for perjury, that:

1. I consent, knowingly, freely, and voluntarily, to the agreed discipline that is set forth in a document entitled, "Statement of Circumstances and Conditional Agreement for Discipline," submitted in resolution of a certain disciplinary proceeding entitled, *In the Matter of Theodore E. Rokita*, Cause Number 23S-DI-258 . I have entered into said agreement without being subject to any coercion or duress whatsoever, and I am fully aware of the implications of submitting my consent.

2. I am aware of a presently pending disciplinary proceeding involving allegations that there exist grounds for my discipline. The nature of said grounds is fully set forth in the document entitled, "Statement of Circumstances and Conditional Agreement for Discipline," which document is incorporated by reference as though fully set out herein.

3. I acknowledge that the material facts set out in the "Statement of Circumstances and Conditional Agreement for Discipline" are true.

4. I submit my agreement to discipline because I know that if this proceeding were prosecuted, I could not successfully defend myself.

Further, the affiant sayeth not.

Theodore E. Rokita
Respondent

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 1st day of September, 2023.

Elizabeth Sutton
Notary Public (Signature)

Elizabeth Sutton
Notary Public
Notary Public - Official Seal
State of Indiana
Commission Number NP0745227
My Commission Expires Nov. 29, 2030

Elizabeth Sutton
Notary Public (Printed)

My Commission Expires: November 29, 2030

My County of Residence: Owen

IN THE

Indiana Supreme Court

Supreme Court Case No. 23S-DI-258

In the Matter of
Theodore E. Rokita,
Respondent.

Decided: November 2, 2023

Attorney Discipline Action

Per Curiam Opinion

Justices Massa, Slaughter, and Molter concur.
Chief Justice Rush and Justice Goff dissent.

Per curiam.

Respondent Theodore Rokita is, and at relevant times was, the Attorney General of Indiana. On July 13, 2022, Respondent appeared on a national television program to discuss an Indiana physician who had performed an abortion on a ten-year-old rape victim from Ohio. During that appearance Respondent described the physician as an "abortion activist acting as a doctor—with a history of failing to report."

Respondent admits, and we find, that he engaged in attorney misconduct by making this statement. This matter is before us on a disciplinary complaint the Indiana Supreme Court Disciplinary Commission filed and a conditional agreement the parties submitted to this Court pursuant to Indiana Admission and Discipline Rule 23(12.1)(b). Respondent's 1995 admission to this state's bar subjects him to this Court's disciplinary jurisdiction. We approve the parties' conditional agreement and their proposed discipline of a public reprimand.

Procedural Background and Stipulated Facts

On July 1, 2022, a local news outlet published an article titled "Patients Head to Indiana for Abortion Services as Other States Restrict Care." The article referenced an Indiana physician who had performed an abortion on a ten-year-old Ohio child who was six weeks and three days pregnant.

On July 2, the physician submitted reports required by state law to the Indiana Department of Health (IDOH) and the Indiana Department of Child Services (IDCS). In the ensuing days, the Attorney General's office received seven complaints regarding the physician's termination of the Ohio child's pregnancy. None of the complainants were patients of the physician.

On July 11 and 12, staff members of the Attorney General's office requested records from IDOH and IDCS; and on July 12, the Attorney General's office notified the physician it was opening an investigation into six of the complaints. On July 13, Respondent appeared on a national television program to discuss the matter. After the program's host stated

that "from what we can find out so far, this Indiana abortion doctor has covered this up" and the doctor "has a history of failing to report child abuse cases," Respondent said:

> [T]hanks for having me on. But, I shouldn't be here, right.
>
> * * *
>
> Then we have the rape. And then we have this, uh, **abortion activist acting as a doctor—with a history of failing to report**. So, we're gathering the information. We're gathering the evidence as we speak, and we're going to fight this to the end, uh, including looking at her licensure if she failed to report. In Indiana, it's a crime, uh, for, uh, to not report—uh, to intentionally not report.

(Emphasis added).

The parties agree that, through his use of the phrase emphasized above, Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

> 3.6(a): Making an extrajudicial statement that a lawyer participating in the litigation or investigation of a matter knows or reasonably should know will be publicly disseminated and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> 4.4(a): Using means in representing a client that have no substantial purpose other than to embarrass, delay, or burden a third person.

In exchange for Respondent's admission to these two violations, the Commission has agreed to dismiss a third charged violation.

Discussion and Discipline

The parties propose that Respondent receive a public reprimand for his misconduct. In assessing whether the proposed sanction is appropriate, we consider, among other things, the nature of the misconduct, the duties Respondent violated, any resulting or potential harm, Respondent's state of mind, our duty to preserve the integrity of the profession, and matters

in mitigation and aggravation. *Matter of Philpot*, 31 N.E.3d 468, 469 (Ind. 2015).

We issued public reprimands for misconduct of a similar nature in *Matter of Brizzi*, 962 N.E.2d 1240 (Ind. 2012), and *Matter of Litz*, 721 N.E.2d 258 (Ind. 1999). In *Brizzi*, a county prosecutor issued a press release after two suspects were charged with the murders of seven people. The press release stated, among other things, that the prosecutor "would not trade all the money and drugs in the world for the life of one person, let alone seven," the evidence was overwhelming, one defendant deserved the death penalty, and it would be a travesty not to seek the death penalty. In *Litz*, a criminal defense attorney representing a client facing a retrial for neglect of a dependent submitted letters to the editors of three local newspapers stating his client was innocent and had passed a lie detector test, and characterizing the State's decision to retry his client as "abominable."

Like the extrajudicial statements at issue in *Brizzi* and *Litz*, Respondent's statement was of a type rebuttably presumed to have a substantial likelihood of materially prejudicing an adjudicative proceeding[1] and did not fall within any of Professional Conduct Rule 3.6's "safe harbors." Respondent's statement additionally violated Professional Conduct Rule 4.4(a) because the statement had no substantial purpose, in connection with Respondent's legal representation of the State, other than to embarrass or burden the physician. *See Matter of Kyres*, 183 N.E.3d 299 (Ind. 2022) (approving an agreed public reprimand for a Rule 4.4(a) violation).

In a sworn affidavit attached to the conditional agreement, made under penalty of perjury, Respondent admits these two rule violations and acknowledges that he could not successfully defend himself on these two

[1] Although not specified in the conditional agreement, we note the Attorney General's office filed an administrative complaint with the Indiana Medical Licensing Board against the physician in November 2022, which was heard by the Board in May 2023. (Complaint at 6-7; Answer at 17, 21).

charges if this matter were tried. Respondent's acceptance of responsibility is a mitigating factor, as are his cooperation with the disciplinary process and his lack of prior discipline over a lengthy career. But that same length of experience also "counsels that he should have known better" than to conduct himself in the manner he did. *See Matter of Hill*, 144 N.E.3d 184, 196 (Ind. 2020). And Respondent's misconduct, which occurred on a national television program, had far greater reach than the statements made in a press release and to local newspapers in *Brizzi* and *Litz*, respectively.

"Whether extrajudicial statements of this sort warrant reprimand or suspension is fact sensitive." *Litz*, 721 N.E.2d at 260. Balancing the factors relevant to sanction in their entirety, a majority of the Court agrees with the parties that a public reprimand is appropriate in this case.

Conclusion

The Court concludes that Respondent violated Indiana Professional Conduct Rules 3.6(a) and 4.4(a) by making an extrajudicial statement that had a substantial likelihood of materially prejudicing an adjudicative proceeding and had no substantial purpose other than to embarrass or burden the physician. For Respondent's professional misconduct, he is hereby publicly reprimanded.

The costs of this proceeding are assessed against Respondent. Pursuant to the parties' stipulation in their conditional agreement, the Court orders Respondent to pay $250.00 by check made payable and transmitted to the Clerk of the Indiana Supreme Court. The Clerk shall retain those funds in their entirety upon receipt. The parties further stipulate that the Commission's investigation costs under Admission and Discipline Rule 23(21)(a)(1) remain to be determined.

All Justices concur, except Rush, C.J., and Goff, J., who would reject the conditional agreement, believing the discipline to be too lenient based on the Respondent's position as Attorney General and the scope and breadth of the admitted misconduct.

ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR INDIANA SUPREME COURT DISCIPLINARY COMMISSION

Adrienne L. Meiring, Executive Director
Stephanie K. Bibbs, Deputy Director of Litigation
Indianapolis, Indiana

EXHIBIT
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Attorney General Todd Rokita's Statement on Disciplinary Commission Resolution

Thursday, November 2, 2023

OFFICE OF THE INDIANA ATTORNEY GENERAL

I'm (https://events.in.gov/event/44711635216212/confirm?interestedreturn=https%3A%2F%2Fevents.in.gov%2Fevent%2Fattorney_general_todd_rokitas_sta

ABOUT THIS EVENT

Add to calendar

"First things first: I deny and was not found to have violated anyone's confidentiality or any laws. I was not fined. And I will continue as Indiana's duly-elected attorney general.

Despite the failed attempt to derail our work —which could have disenfranchised nearly 2 million voters, the largest amount in Indiana history for any state office candidate — it all boiled down to a truthful 16-word answer I gave over a year ago during an international media storm

caused by an abortionist who put her interests above her patient's. I received a 'public reprimand' for saying that "...we have this abortion activist acting as a doctor— with a history of failing to report."

The media, medical establishment and cancel culture, all on cue, supported— and then attempted to vindicate—the abortionist who intentionally exposed personal health information at a political rally all in furtherance of their shared ideological and business interests.

These liberal activists would like to cancel your vote because they hate the fact I stand up for liberty. In the healthcare space alone, I stopped the vaccine mandate, publicly contested severely flawed Covid data, significantly curtailed Indiana's abortion business and fined hospitals and healthcare providers for not putting patients' privacy first.

Having evidence and explanation for everything I said, I could have fought over those 16 words, but ending their campaign now will save a lot of taxpayer money and distraction, which is also very important to me. In order to resolve this, I was required to sign an affidavit without any modifications.

Now, I will focus even more resources on successfully defending Indiana's laws, including our pro-life laws, and fighting the mob that silences parents, employees, conservative students, law enforcement, Believers of all faiths, American patriots and free enterprise itself.

As I said at the time, my words are factual. The IU Health physician who caused the international media spectacle at the expense of her patient's privacy is by her own actions an outspoken abortion activist.

Many know that she openly discussed with a reporter, and caused to be identified, a 10-year-old rape victim at a political rally. She also used this opportunity to wedge herself into various media outlets, including MSNBC and CBS News. In the end, she had the attention of the entire country, including the pro-abortion President and Vice President.

Less well- known is that for years she has appeared as the keynote speaker at pro-abortion rallies and has roamed the hallways of the legislature in a white lab coat attempting to influence lawmakers. Then, in 2019, the doctor unsuccessfully brought litigation against the people of Indiana to legalize a brutal abortion procedure where the living child is extracted piece by piece. She also poses and is interviewed regularly in media outlets and her full-time patient practice focuses exclusively on performing abortions.

Bernard also claims a tattoo —an image of a coat hanger— that she displays and openly discusses with the national media. Whether you think this behavior is good or bad, I challenge any objective Hoosier to conclude that she isn't an "abortion activist," as I stated.

Also, according to media accounts and complainant press releases, it was in fact publicly alleged well before my tv interview that the abortionist had failed to properly report her work to the state's department of health.

Privacy must exist between doctor and patient in order for trust to exist so that healthcare can advance. So, we work hard to protect personal health information—like a little girl's identity and medical trauma—from publication by their caregivers. This is why Bernard's own peers fined her the maximum allowed by law.

By the way, the Office of Attorney General has nearly two dozen patient privacy cases pending at any time, debunking any claims of a vendetta against Bernard.

Had the cancel culture establishment been successful disenfranchising us, they also would have stifled other elected officials from keeping voters, citizens, and taxpayers informed—especially when uncomfortable facts fall outside a preferred narrative.

I thank Hoosiers for their continued support as we fight for our values."

###

EVENT DETAILS

EVENT TYPE

PRESS RELEASES (/SEARCH/EVENTS?EVENT_TYPES%5B%5D=34006056633355)

CALENDAR

AGENCY (/SEARCH/EVENTS?EVENT_TYPES%5B%5D=34731297000171)

ATG (/SEARCH/EVENTS?EVENT_TYPES%5B%5D=35642400191644)

GROUP

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