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IN THE SUPREME COURT
OF
THE STATE OF INDIANA

IN THE MATTER OF	)	
THEODORE E. ROKITA	)	CAUSE NO. 23S-DI-258
Attorney No. 18857-49	)	

VERIFIED RESPONSE TO PETITION
REQUESTING CONDITIONAL AGREEMENT FOR DISCIPLINE
AND AFFIDAVIT TO BE RELEASED FOR PUBLIC ACCESS

Respondent, the Hon. Theodore E. Rokita (hereafter, "Respondent" or "Attorney General", or Attorney General Rokita", by counsel, hereby responds to the Verified Petition Requesting Conditional Agreement for Discipline and Affidavit to be Release for Public Access (the "Petition") of the Indiana Supreme Court Disciplinary Commission ("Commission") pursuant to Indiana Access to Court Records Rule 9(B).

Introduction

Respondent does not object to the relief requested. Respondent would have agreed to waive confidentiality, but the Commission additionally required a gag order on the Attorney General, prohibiting him from talking publicly with constituents about his decision to waive confidentiality, the Conditional Agreement and Affidavit, or other related topics once the documents were released. Attorney General Rokita believes a gag order is something an attorney general cannot agree to because it is a disservice to the directness and accountability Hoosiers deserve from elected officials and otherwise is not something government should impose on people.

If the Court were to find that "extraordinary circumstances" exist, then Respondent suggests all Disciplinary Commission deliberations and meetings related to him be open and public so that the people can benefit from observing the conduct of a body that is not elected and never meets publicly.

There are sound policy reasons for the confidentiality of a conditional agreement and affidavit under Rule 23. These public policy reasons apply to all attorneys, not just the attorney general.

The Commission has not proven its case under A.C.R. 9(B). Neither Attorney General Rokita nor any licensed attorney in Indiana should be punished by losing the expectation of confidentiality under the Rules for Admission to the Bar and the Discipline of Attorneys (hereinafter, the "Rules") for something like this political melee, which is outside the Commission's expertise.

- Attorney General Rokita has always (a) cooperated with the Commission, (b) has never defied this Court or acted defiantly toward it, and (c) immediately agreed publicly that a reasonable person might conclude that he violated two Rules of Professional Conduct.

- Attorney General Rokita stated publicly in a conciliatory manner that regardless of whether this Court accepted the settlement, he accepted discipline and viewed the situation as an opportunity to learn and improve as an attorney—an attitude he takes with everything in his professional and personal life. In doing so, thousands of dollars of taxpayer money were saved.

- Attorney General Rokita always has spoken and written truthfully about the disciplinary matter and the underlying matter. All his statements are supported by evidence. Nothing Attorney General Rokita said or wrote contradicts anything published by the Court, agreed to with the Commission, or-affirmed in his Affidavit. Attorney General Rokita stands by his statement that he was not found to have violated anyone's confidentiality or any state laws.

- The plain language Attorney General Rokita used in his public statement

after this Court's ruling stands on its own "Rules" are not state "statutes" and, therefore, not "laws." Respondent is not responsible for causing "confusion" where media outlets have a pre-determined narrative that keeps them from noticing the difference between words like "Rules," "statutes," "laws," "fines," "fees," and "costs." He was not fined by this Court or any other body. The $250 he was directed to pay for court costs is not a "fine."

- False narratives that caused "confusion" for the Commission stem from suggestions in some circles that Attorney General Rokita made false statements because he admitted that a reasonable person might find he violated the Rules. However, agreement with the Commission that a reasonable person might find the context (time, place, manner) in which something he said contravenes two Rules of Professional Conduct does not mean that what he said was false—the exact point he made in his press release after this Court's Order.

- Attorney General Rokita did not agree to be disciplined on a third Count that the Commission alleged and dismissed. The allegations are not true and should not have been pled. The Count dealt with confidentiality requirements under state *law*. Related cases were dismissed voluntarily. Indiana law holds that when a plaintiff voluntarily dismisses a matter it is as if it never existed. Attorney General Rokita relied upon it when making his public statement.

- Attorney General Rokita is not responsible for alleged "confusion" flowing from a false narrative that equates or extends his admissions made to resolve Counts I and II to Count III. The situation was complicated by the Commission's action to overcharge a count it had agreed to dismiss. The Commission's action here caused the confusion about which it complains.

- The Commissioners knew and agreed that Respondent would issue a public statement to address the allegations in the Count the Commission publicly charged and dismissed. The Commission did not object but insisted on including non-essential matter in the Verified Complaint.

- It is disappointing that an arm of the Supreme Court expends resources to read and collect articles in the press and media outlets to continue litigating a matter that is over. The Commission, like the Office of the Attorney General, has serious business to do for the people of Indiana. Every day, lawyers are charged with stealing from clients, inappropriate sexual conduct, impaired judgment and substance abuse, and fraud on the court, among other things—conduct that poses serious risks to people.

Statement of Facts

On November 2, 2023, the Supreme Court issued its Per Curiam Opinion approving the parties' conditional agreement, imposing a public reprimand, and ordering that Respondent pay $250 in court costs plus the Commission's investigation costs. The Court wrote, "In a sworn affidavit attached to the conditional agreement, made under penalty of perjury, Respondent admits these two rule violations [Ind. Prof. Cond. R. 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." The Court recognized Respondent's acceptance of responsibility, his cooperation with the disciplinary process, and his lack of prior discipline over a lengthy career as mitigating factors. The Court accepted the Conditional Agreement, imposed a public reprimand, and Ordered Respondent to pay court and investigative costs. The Court did not impose a fine.

After the Court issued the Opinion, Respondent issued a press release entitled "Attorney General Todd Rokita's Statement on Disciplinary Commission Resolution." Respondent stated, "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." Respondent also stated, "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. . . I received a 'public reprimand' for saying that "... we have this abortion activist acting as a doctor - with a history of failing to report." He added, "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. . .. In order to resolve this, I was required to sign an affidavit without any modifications."

Respondent Did Not Violate Any Law

Respondent's statement that he was "not found to have violated. . . any laws" did not create ambiguity as to whether he was admitting to any misconduct. Respondent admitted Counts I and II in his Answer. The Commission charged Respondent with violation of a statute in Count III *at the very same time it knew that it would subsequently dismiss Count III.*

Statutes are laws. However, the Rules of Professional Conduct are not laws, instead being "rules of reason." [1] Among other things, Count III alleged that Respondent had violated a statute, i.e., a law. Respondent did not violate any law. To say so is truthful even if some commentators find it confusing. The Commission understands the difference between a rule and a law, which explains at least one reason the Commission voluntarily dismissed Count III.

The Commission Should Not Overcharge Alleged Violations Against an Attorney

Respondent acknowledges that all attorneys in Indiana must comply with the Rules of Professional Conduct. Respondent adds that all Indiana attorneys are required to comply with the Rules to be admitted to the Bar. Common sense suggests that attorneys must comply with the confidentiality rules at Rule 23

[1] Ind. R. Prof'l Cond. Scope. Moreover, the Indiana Court of Appeals has explicitly stated so in a civil case concerning a trial court order to set aside a contract. *See*, *Ozuyener v. Ozuyener*, 26 N.E.3d 1076 (Ind. App. 2015) ("The Rules of Professional Conduct are not law and whether an attorney breached the Rules is not determinative of the enforceability of a contract created as a consequence of an alleged breach [of the Rules of Professional Conduct].")

§ 22(a)(1-5) when participating in the disciplinary process. Neither the Commission nor the grievants are following the Rules.

Additionally, the Supreme Court deviated from its customary practice by referring to the content of the Conditional Agreement and Affidavit. A word search of CaseText and Lexis using the combination "'conditional agreement' & 'successfully defend'" yields only two hits: (i) the 2016 amendment to Rule 23, and (ii) *In re Rokita*, 219 N.E.3d 733 (Ind. 2023). The Supreme Court ventured into unfamiliar territory outside the bounds of Rule 23 § 22(a)(5).

The Affidavit—which is the same affidavit used to resolve a case by agreement—is four paragraphs long. Respondent's Affidavit quotes from Rule 23 § 17.1(a)(4). The language of this Rule is general. It does not encompass counts that the Commission charged and voluntarily dismissed. Without modification, the "could not successfully defend" language in the Affidavit can be taken out of context by a reader to give rise to an inference that Respondent could not successfully defend against Count III. The Court's Opinion does not make clear that the language quoted from Rule 23 § 17.1(a)(4) is necessary for discipline to attach. The language does not contemplate dismissal of charges that are not admitted.

Fortunately, the Supreme Court specifically related the Affidavit to Counts I and II in the Per Curiam Opinion. The confusion in Respondent's case results from the fact that the Commission overcharged Respondent by adding Count III. Had Count III not been charged, there would not be a split result.[2] Respondent's

[2] Respondent refers to the split in the results of the charged Counts, not the Supreme Court's vote line. To be clear, Respondent does not know if the dissenting Justices' votes would have been different if Count III had not been charged.

Answer, the Per Curiam Opinion, and the Conditional Agreement and Affidavit *must be read in pari materia, i.e., together*, or the Affidavit can be read too broadly to suggest that Respondent could not have successfully defended against Count III. *The Commission dismissed Count III voluntarily*. Respondent issued his press release to clarify that he had evidence to support his comments about Dr. Bernard and that (i) he had not been found to have violated anyone's confidentiality, (ii) had not been found to have violated any law, (iii) had not been fined, and (iv) that what he said was true, even if the time, place, and manner of his speech could be found to have violated two Rules of Professional Conduct.

The Commission seeks to exonerate itself from the mess it caused by overcharging Respondent with a count it knew it would dismiss. The Commission petitions to deviate from the Rules after entry of a final Order. Respondent maintains it is bad policy to abrogate the confidentiality rules in Rule 23 § 22. It is a risk to every licensed lawyer who might be charged and who is willing to enter into a conditional agreement of discipline with the Commission. How will any lawyer have confidence to rely upon the Commission's representations, or even the Rules themselves, when signing a conditional agreement discipline and affidavit? All it takes is for heat from the dean of Indiana University, past staff of the Commission, or other "influencer" to pressure the Commissioners to petition for release the documents under A.C.R. 9.

Respondent has nothing to hide. Respondent's press release is truthful and consistent with his Answer, the Conditional Agreement and Affidavit, and the

Per Curiam Opinion. Respondent denies having defied the Supreme Court or having contradicted any provision of the Public Reprimand. He asserts the Commission is aiding and abetting his political detractors by petitioning to obtain an exception to the Rules it is charged with enforcing.

The Commission Acted Improperly by Caving to Political Pressure And Shows Prejudice Against Respondent Going Forward

Respondent admits that he and the Commission negotiated about an agreement for him to waive the confidentiality afforded to all attorneys under Rule 23 § 22(a)(5). Respondent and the Commission did not reach an agreement on the terms and conditions by which the confidential documents would or should be made accessible, or what the effect of making the records accessible might be. Then, when negotiations ended, the Commission upped its demand Respondent—demanding that he agree to a gag order in addition to waiving Rule 23 § 22(a)(5)'s confidentiality.

The Conditional Agreement and Affidavit are non-public specifically by Rule 23 § 22(a)(5). Abrogation of the confidentiality rule could weaken the Supreme Court, as appears to be the case here, where an arm of the Court does not regard a final Order as final. Is a rehearing the Commission's objective, whether by reopening the record in this Cause or by facilitating tag-along grievances speculatively based on confidential documents none has seen? The public does not have a right to examine the work of the Supreme Court or the communications between the Commission and a respondent when a disciplinary complaint is resolved by an attorney's agreement to accept discipline. Creating an exception to the confidentiality rule does not increase confidence within the bar or the public at large; it does the opposite if the Commission

can renege on confidentiality.

When a conditional agreement imposing discipline is reached between an attorney and the Commission, the respondent attorney must admit "I could not successfully defend myself" for discipline to attach. An attorney making this admission must have faith that the matter will be kept confidential when presented to the Supreme Court for review and acceptance. Otherwise, there is little incentive for an attorney to agree to discipline even if he or she believes the odds of defending successfully are less than 50%. In the case of the Attorney General, new grievances already have been filed[3] by *lawyers who do not have any actual knowledge*. They are outraged by Respondent's tone in his press release and encouraged by the Supreme Court's deviation from Rule 23 § 22(a)(5). These attorneys publicized their communications with the Commission with reporters.[4] This conduct shows that the risk of a confidential admission being used to form a new grievance or complaint is real. The Conditional Agreement and Affidavit should be kept confidential so that speculative grievances are not promoted by release of confidential material.

The Commission claims extraordinary circumstances and public interest are grounds to release the Conditional Agreement and Affidavit, but the Commission also must show (i) that access or dissemination creates no significant risk of substantial harm to any party, and (ii) that access creates no prejudicial effect

[3] Marilyn Odendahl, "'DISTURBING' CONDUCT': Attorneys condemn AG Rokita's response to public reprimand," (The Indiana Citizen, Nov. 3, 2023, <<https://indianacitizen.org/disturbing-conduct-attorneys-condemn-ag-rokitas-response-to-public-reprimand/>>)

[4] *Id.* For many months, Paula Cardoza-Jones has been writing op-ed pieces that have been published in *The Indiana Lawyer* that are uniformly critical of the Attorney General. These pieces appear to be communications intended to influence the Commission, which is shown by the repetition of her employment history at the Commission.

to on-going proceedings. If it cannot prove those two factors, then an exception to the confidentiality rule should not be granted. In Respondent's case, disclosure is sure to increase political commentary, which could potentially pollute new investigations or proceedings initiated since the press release. In the same way it overcharged Count III, the Commission's conduct in filing the Petition shows on its face that the Commissioners cannot withstand political pressure. The language the Commission uses in the Petition, in particular Paragraph 14(b and c), shows that it cannot be counted on to give Respondent a fair review of new grievances.

A.C.R. 9(B)(1) sets out five factors for the Court to consider. A.C.R. (D) requires at least one of them by clear and convincing evidence for the Court grant relief, but it does not exclude consideration of all factors. It is a balancing test.[5] The Commission looks past three of the five factors, but all must be considered.[6] The Court must consider the Public Access and the privacy interests served by the rule and the grounds demonstrated by the requestor.

The Commission's assertion that extraordinary circumstances exist is not supported by anything more than the fact that Respondent is a statewide elected official who has a big platform and high visibility for a press release. That no one disputes it does not mean that extraordinary circumstances are clearly and convincingly present. Respondent admitted in his publicly filed Answer that he "could reasonably be considered to have violated Indiana Rule of Professional Conduct"

[5] Compare favorably the multi-factor balancing test for child custody as a statutory example. IC §§ 31-14-13-2, 31-17-2-8. Not all factors are entitled to equal weight because it depends on the case. The same kind of balancing applies here, but with the caveat that at least one factor must be proven by a higher clear and convincing standard.
[6] The fifth factor is not applicable and does not have any weight.

3.6(a) and 4.4(a). The Conditional Agreement contains the same language in ¶¶ 18 and 21. The Answer is a public record. Nothing in Respondent's press release contradicts his Answer or the Per Curiam Opinion. More to the point, nothing here constitutes an extraordinary circumstance that justifies deviation from the Rules as to the agreement between the Commission and Respondent. The Commission's contention does not meet the clear and convincing standard, and it does not outweigh the potential prejudice to Respondent in other proceedings before the Commission.

The Commission's assertion that the public interest will best be served by allowing public access to the Conditional Agreement and Affidavit is wishful thinking. The subparagraphs to ¶ 14 contain much argument and little evidence to prove service to public interest. It contains a collection of press clippings and derogatory language in a case involving the Attorney General's speech in the context of abortion politics. It is disappointing that an arm of the Supreme Court expends resources to read and collect articles in the press and media outlets to continue litigating a matter that is final. It is inappropriate for the Commission to consider political pressure in any disciplinary case. It should not remain enmeshed in a public dispute among pundits parsing words to judge whether Respondent "had his fingers crossed behind his back"[7] when he accepted a public reprimand. It is not subject matter that the Commission should be investigating, or the Office of the Attorney General should be defending.[8] Public interest is served best by the Commission doing

[7] Odendahl, *supra*, note 3.

[8] The Commission, like the Office of the Attorney General, has serious business to do for the people of Indiana. Every day, lawyers are charged with stealing from clients, inappropriate sexual conduct with clients, and fraud on the court, among other things—conduct that poses serious risk to people.

its job without fear, passion, or prejudice.

The subparts of paragraph 14 clearly and convincingly evidence that Respondent cannot receive fair treatment at the Commission any longer. These are the weightiest factors in ACR R 9 (B)(1)(c and d). Their weight relates to fundamental fairness and due process. As such, these factors should outweigh consideration of extraordinary circumstances and public interest.

The Commission used charged language with actual knowledge that Paula Cardoza-Jones and William Groth filed new grievances against Respondent after publication of the press release.[9] An example of the Commission's prejudicial language includes the allegation that he "flouted the authority of the Court." The Commission claims that Attorney General Rokita has been inconsistent, which is not the case as shown above. The Commission questioned Respondent's sincerity and acceptance of responsibility, which has nothing to do with deviation from Rule 23 § 22(a)(5). The Commission alleges damage to the "public's perception of the integrity and justness of the attorney discipline system," but the Commission wants to change the rules after the final horn sounded. Rhetorically, what can be more damaging than changing rules after one has relied on them when accepting discipline? It would do more to promote the public's perception of the integrity of justness of the attorney discipline system to hold attorneys Groth and Cardoza-Jones personally accountable for having violated Rule 23 § 22(a) and dismiss their grievances. *The confidentiality rules protect all lawyers whose licenses and livelihoods are on the line.* The

[9] Odendahl, *supra*, note 3.

Commissioners are willing to deviate because the Commission has been criticized. This consideration is not a reason for creating an exception to the Rule.

The Commission cites a number of rules from other jurisdictions and Rule 2 § VIII(B)(1)(c). However, all these rules relate to *judicial* disciplinary cases and do not apply to attorneys. These rules do not apply to either the legislative or executive branches of government, where attorneys regularly serve. The case against Respondent is about attorney misconduct, which is different than judicial misconduct. Attorneys advocate and use fiery language; judges find facts, make conclusions of law, and enter orders that imprison people, award money, and adjust relationships. The attorney general does not have general criminal jurisdiction or authority to fine. Moreover, the cited rules are not analogues because those rules relate to public statements made during a proceeding, not after it has been concluded.

At the end of the day, no one can get inside the head and heart of Respondent to measure the quantum of remorse or contrition. If forced to defend further, Respondent will come forward with irrefutable evidence to show he has spoken truthfully in every regard, that he has shown the appropriate remorse so much as the Rules outline such conduct. He will also show how the Commission is being used to further a political agenda that has not been carried-out at the ballot box—the only appropriate forum for political action. The Commission needs to be disentangled from ongoing politics driven by political commentators. If the Commission is not cordoned-off from the political stage, then its meetings need to be made fully public when called upon to consider matters affecting Respondent, any

lawyer who is a public official, or even any lawyer.

Conclusion

The Order of the Supreme Court specifically points out that Respondent's Affidavit relates to Counts I and II. The Court noted in passing that Count III was dismissed. Had the Commission not overcharged a count it would voluntarily dismiss, the Court's Opinion would not have had to make any differentiation. Respondent's press release, as evidenced by its title, is just a public statement that follows-up to the Opinion. It makes clear that he still serves as the Attorney General and that Count III's allegations about breaches of confidentiality and law are not the grounds for his public reprimand. Publication of a statement on these facts was necessary because Respondent is a public official who cannot avoid the matter. Further discussion of the allegations underlying Count III was and is inevitable, especially in press and mass media accounts that paint different narratives for political purposes, which is not an extraordinary circumstance.

Respondent is vocal, aggressive, and successful regarding policies important to Hoosiers. He speaks in a manner that the "Establishment" abhors. The content of his conservative message offends the Left, if not Liberals. Respondent also enjoys the highest vote total ever recorded in Indiana for a statewide office.

Respondent's style and content are not grounds for discipline as a lawyer. On the bottom line, Respondent admitted a reasonable person could find his conduct violated Professional Conduct Rules 3.6 and 4.4. He accepted a public reprimand for it. He has not recanted or denied his admission to it. He was not fined,

and he was not found to have broken any laws. His press release made clear those facts in his combative style, but nothing written rendered his Affidavit false or defied the Supreme Court.

Notwithstanding the foregoing arguments, Respondent hereby does not object if the Court decides to annul the rule of confidentiality by granting the Commission's request despite public policy reasons to not do it. If the Court were to find that "extraordinary circumstances" exist, then Respondent suggests that all Disciplinary Commission deliberations and meetings that relate to him are extraordinary and should be opened to the public in real time so that the Public can benefit from observing deliberations of a body that is not elected and never has meetings open to the Public.

VERIFICATION

I DECLARE, DEPOSE, AND ATTEST UNDER PENALTIES FOR PERJURY THAT THE FOREGOING STATEMENTS ARE BASED ON MY PERSONAL KNOWLEDGE AND ARE TRUE AND CORRECT.

Date: 1/02/24

Theodore E. Rokita

Respectfully submitted,

By: /s/James J. Ammeen, Jr.
James J. Ammeen, Jr. (No. 18519-49)
AMMEEN VALENZUELA ASSOCIATES LLP
750 Barrister Building
155 E. Market Street
Indianapolis, Indiana 46204
(317) 423-7505 Phone
(800) 613-4707 Fax
jamesa@avalawin.com
Attorney for Theodore E. Rokita
Respondent

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44, I verify that this Response contains 4,160 words as counted by the Microsoft Word® application.

/s/James J. Ammeen, Jr.
James J. Ammeen, Jr., No. 18519-49
Ammeen Valenzuela Assoc. LLP

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing *Verified Response to Petition Requesting Conditional Agreement for Discipline and Affidavit to be Release for Public Access* was served on all counsel of via the Odyssey/IEFS system on or about the 2nd day of January 2024:

By: /s/James J. Ammeen, Jr.
James J. Ammeen, Jr. (No. 18519-49)
Attorney for Theodore E. Rokita,
Respondent

AMMEEN VALENZUELA ASSOCIATES LLP
750 Barrister Building
155 E. Market Street
Indianapolis, Indiana 46204
(317) 423-7505 Phone
(800) 613-4707 Fax
jamesa@avalawin.com