

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

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

ANSWER

Theodore E. Rokita (“Respondent”, “Attorney General” or “Attorney General Rokita”), by counsel, responds as follows:

GENERAL RESPONSES AND AFFIRMATIVE DEFENSES

A. The abortion doctor described in the Commission’s complaint was found by the Indiana Medical Licensing Board to have unlawfully violated her patient’s privacy by making widely published statements about her patient’s private medical information at a political function. She was also fined the maximum amount by that board, and she did not appeal any of the board’s decisions.

B. No confidentiality should be required where Dr. Bernard

1) intentionally and publicly (through her attorneys and through the media) first disseminated the very confidential complaints contemplated by the confidentiality statute referenced by the Commission,

2) violated her duties of confidentiality by disclosing her patient's condition and treatment to the press at a political function, and

3) confidentiality was further breached by publicly discussing patient information, including in an MSNBC interview on July 6, 2023.

C. Public statements and letters about seeking certain versions of Termination of Pregnancy Reports (TPRs) did not concern anything confidential under the statute referenced in the Commission's Complaint because the version of TPRs sought:

- were not confidential,
- should have been made public already by agencies under the control of another elected official, and
- were not part of a licensing investigation yet.

D. Attorney General Rokita's statements about "fight[ing] this to the end" and not "letting it go," referred to getting to the bottom of a high-profile situation known world-wide, which was quickly evolving – literally by the hour at the time – and where many members of the public already condemned *any* review of the matter. Attorney General Rokita's statements reflect his commitment to fulfill official duties regardless of

political sensitivity and to keep the public informed. The comments were consistent with his duties as an elected official, who answers to the public. He kept that promise.

E. Bernard's patient privacy violations caused other overlapping and distinct **non-confidential** investigations to commence, which the Attorney General's statements (outlined in the Commission's Complaint) address;

F. The confidentiality statute referenced in the Commission's Complaint only prohibits discussion of "complaints and information pertaining to the complaints," which Respondent did not discuss;

G. The Attorney General, an elected official who answers to the public, has a duty to keep the public informed of the Office's actions and decisions. It is unclear if the confidentiality statute referenced in the Commission's Complaint applies to the elected Attorney General himself, since that statute specifically limited identifies employees of the Attorney General's Office, who are not elected to their positions.

- H. The Attorney General ultimately answers to the public, which is fundamental to democracy.
- I. The Attorney General is not responsible for the interest generated in the Bernard matter and any judicial burden that ensued. Dr. Bernard's public disclosure of her patient's private medical information at a political function was the primary cause of the public interest. Public interest in administrative and judicial processes is not prejudicial to the administration of justice.
- J. Attorney General Rokita at all times has cooperated with the Indiana Disciplinary Commission and continues to seek the proper administration of justice in a way most transparent to the public.

BACKGROUND

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

RESPONSE: The material allegations contained in this rhetorical Paragraph

are admitted.

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.

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.

RESPONSE: The allegations contained in this Paragraph refer to a document, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writing, they are denied. Respondent respectfully notes that on June 27, 2023, the Medical Licensing Board published its Findings of Fact, Ultimate Findings of Fact, Conclusions of Law and Final Order, concluding among other things that Dr. Bernard violated HIPAA and other rules governing the conduct of doctors when making the above-referenced statements to the reporter, at a political function. She was also fined the maximum amount by the medical licensing board. Any remaining allegations in this Paragraph are denied.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Subject to and without waiving said objection(s), the allegations contained in this Paragraph refer to a document, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writing, they are denied. Respondent respectfully notes that this termination

of pregnancy report attributes an age of 17 to the 27-year-old perpetrator of this crime. Any remaining allegations in this Paragraph are denied.

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

RESPONSE: The allegations contained in this Paragraph refer to a document, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writing, they are denied. Respondent is without sufficient information to admit or deny the allegations in this Paragraph and they are therefore denied.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Respondent further objects to the Commission’s disclosures concerning the confidential complaints against Dr. Bernard, none of which was disclosed by Respondent prior to the administrative filing on November 30, 2022. Respondent further objects to any contention that the 10-year-old patient is the only person who could or should be allowed to complain about the

violation of her rights to privacy, as any such contention is contrary to Indiana law. Subject to and without waiving said objection(s), the allegations contained in this Paragraph refer to documents, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writings, they are denied. Respondent is without sufficient information to know who Dr. Bernard's patients are or were at any given time because of federal and state privacy laws. Any remaining allegations in this Paragraph are denied.

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.

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Subject to and without waiving said objection(s), Respondent admits that an automated process generated six confidential communications to

Dr. Bernard regarding six grievances, asking for her confidential Responses. The Office of the Attorney General receives approximately 15,000 licensing complaints each year and its automated processes for dealing with the volume of complaints are not necessarily indicative of a decision by the Office to conduct a formal licensing investigation under the Statute. As Respondent was not involved in the processes associated with the auto-generated communications, he is without sufficient information to respond to the remaining allegations in this rhetorical paragraph and denies the same.

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.

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in

this Paragraph. Subject to and without waiving said objection(s), the allegations contained in this Paragraph refer to a document, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writing, they are denied. Respondent further states that public statements and letters about seeking Termination of Pregnancy Reports (TPRs) did not concern anything confidential under the Statute because TPRs are not confidential, should have already been made public by others, and efforts to obtain TPRs for the public were not yet part of a licensing investigation under the Statute. Therefore, statements that related to TPRs or that simply stated Indiana law were not considered confidential by Respondent. Any remaining allegations in this Paragraph are denied.

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

RESPONSE: To the extent this Paragraph relies on a recording, the recording speaks for itself, and Respondent denies any allegations inconsistent therewith. Respondent admits that he appeared on the Jesse Watters show on July 13, 2022.

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?

RESPONSE: To the extent this Paragraph relies on a recording, the recording speaks for itself, and Respondent denies any allegations inconsistent therewith. Any remaining allegations in this Paragraph are denied.

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

RESPONSE: To the extent this Paragraph relies on a recording, the recording speaks for itself, and Respondent denies any allegations inconsistent therewith. Any remaining allegations in this Paragraph are denied.

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.

RESPONSE: To the extent this Paragraph relies on a recording, the recording speaks for itself, and Respondent denies any allegations inconsistent therewith. Respondent admits that this quotation is consistent with what was said during the program.

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.

RESPONSE: To the extent this Paragraph relies on a recording, the recording speaks for itself, and Respondent denies any allegations inconsistent therewith. Respondent admits that this quotation is consistent with what was said during the program.

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.”

RESPONSE: To the extent this Paragraph relies on a recording, the recording speaks for itself, and Respondent denies any allegations inconsistent therewith. Respondent admits that this quotation is consistent with what was said during the program.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Subject to and without waiving said objection(s), the allegations contained in this Paragraph refer to documents and/or recordings, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writings and/or recordings, they are denied. Respondent denies that the comments referenced in this Paragraph are related to an investigation within the meaning of Indiana Code 25-1-7-10(a). Respondent further provides that it is unclear whether the Statute was intended to apply where the license holder 1) intentionally and publicly disseminated the very confidential complaints contemplated by the Statute and 2) violated her duties of confidentiality by disclosing her patient's condition and treatment to the press at a political function to affect political change, because no public purpose behind confidentiality is served in these instances. Respondent further provides that, besides the licensing enforcement action, there were other overlapping and intersecting non-confidential matters raised by the license holder's privacy violations, which Respondent's statements address. Further, the Attorney General has a legal duty to keep the public informed of the Office's actions and

decisions; and, it is unclear how the contours of the confidentiality afforded by the Statute interact and intersect with the Attorney General's duty to keep the public informed about non-confidential matters.

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.

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Subject to and without waiving said objection(s), Respondent agrees that no investigation of Dr. Bernard within the meaning of Indiana Code 25-1-7-10(a) had begun prior to comments referenced in Paragraph 18. Respondent admits that the Office of the Attorney General filed an administrative complaint with the Medical Licensing Board against Dr. Bernard on November 30, 2022, after she admitted under oath to a privacy violation by disclosing her underage patient's private health information without informed consent from the child and/or the mother. Respondent denies Subsection B of this Paragraph. Respondent further states that public statements and letters about seeking Termination of Pregnancy Reports (TPRs) did not concern anything confidential under the Statute because TPRs are not confidential, should have already been made public by others, and efforts to obtain TPRs for the public were not part of a licensing investigation under the

Statute. Respondent further states that the Statute only prohibits discussion of “complaints and information pertaining to the complaints” and Respondent did not discuss those topics. Respondent further provides that, besides the licensing enforcement action, there were other overlapping and intersecting non-confidential matters raised by the license holder’s privacy violations, which Respondent’s statements address. Any remaining allegations in this Paragraph are denied.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Respondent further objects to the reference to the cause of action filed on November 3, 2022, as that cause of action was dismissed by the Plaintiff. Under Indiana law, when causes of action are voluntarily dismissed, such causes of action are treated as if they never happened. Consequently, it is improper for the Commission to include Paragraphs in this Complaint that reference a cause

of action that was voluntarily dismissed. Subject to and without waiving said objections, Respondent states that the allegations contained in this Paragraph refer to a document, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writing, they are denied. Respondent denies the legal conclusion as to the thrust of the November 3, 2022 Complaint. Any remaining allegations in this Paragraph are denied.

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).

RESPONSE: Respondent objects to the reference to the cause of action filed on November 3, 2022, as that cause of action was filed by and then dismissed by Dr. Bernard. Under Indiana law, when causes of action are voluntarily dismissed, such causes of action are treated as if they never happened. Consequently, it is improper for the Commission to include Paragraphs in this Complaint that reference a cause of action that was voluntarily dismissed. Respondent, therefore, further objects that any Orders issued in the voluntarily-dismissed action are inadmissible as evidence in this matter and should not be referenced in this Complaint. Subject to and without waiving said objections,

Respondent states that the allegations contained in this Paragraph refer to a document, the terms of which speak for themselves; to the extent the allegations in this Paragraph are inconsistent with the writing, they are denied.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Respondent further objects to the reference to the cause of action filed on November 3, 2022, as that cause of action was filed by and dismissed by Dr. Bernard, who filed the action. Under Indiana law, when causes of action are voluntarily dismissed, such causes of action are treated as if they never happened. Consequently, it is improper for the Commission to include Paragraphs in this Complaint that reference a cause of action that was voluntarily dismissed. Subject to and without waiving said objections, Respondent states that the allegations contained in this Paragraph refer to documents, the terms of which speak for themselves; to the extent the allegations

in this Paragraph are inconsistent with the writings, they are denied.

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.

RESPONSE: Respondent objects to the compound nature of the allegations in this Paragraph. Respondent admits that the Medical Licensing Board chose to hold the proceedings in Indiana Government Center South, Conference Room C, which is not the normal place that the Board conducts hearings. Respondent is without sufficient information to respond as to the reasons for the Medical Licensing Board's determination on the venue for the hearing, and therefore denies that his statements "caused" the change in venue. Respondent further provides that the location and size of the venue for a hearing is not recognized as "prejudicial" to the administration of justice and Respondent refers to the Commission to such programs as the "Appeals on Wheels" which encourage public access and transparency by holding hearings in larger, more public

venues. Any remaining allegations in this Paragraph are denied.

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).

RESPONSE: This Paragraph states a disputed legal conclusion, not an allegation fact, to which no response is required, and is therefore denied on that basis.

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.

RESPONSE: This Paragraph states a disputed legal conclusion, not an allegation of fact, to which no response is required, and is therefore denied on that basis. Respondent further denies that Dr. Bernard suffered any harm or that he caused her any harm.

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.

RESPONSE: This Paragraph states a disputed legal conclusion, not an allegation of fact, to which no response is required, and is therefore denied on that basis. Respondent denies that he burdened the court system or that he caused “additional systems and logistical issues for the Medical Licensing Board to navigate.” Respondent further denies that any “systems and logistical” choices made by the Medical Licensing Board could be traced to the actions of Respondent versus the publicity intentionally set in motion by Dr. Bernard.

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.

RESPONSE: The material allegations contained in this rhetorical Paragraph

are admitted.

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. . . .

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.”

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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.”

RESPONSE: The material allegations contained in this rhetorical Paragraph are admitted.

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).

RESPONSE: Respondent admits that use of the phrase “abortion activist acting as a doctor — with a history of failure to report” on July 13, 2022 could

reasonably be considered to have violated Indiana Rule of Professional Conduct 3.6(a); nevertheless, should a hearing be necessary, Respondent demands strict proof thereof. Any remaining allegations in this Paragraph are denied.

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).

RESPONSE: Respondent admits that use of the phrase “abortion activist acting as a doctor—with a history of failure to report” on July 13, 2022 could reasonably be considered to have violated Indiana Rule of Professional Conduct 4.4(a); nevertheless, should a hearing be necessary, Respondent demands strict proof thereof. Any remaining allegations in this Paragraph are denied.

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).

RESPONSE: The allegations in this Paragraph are denied.

Respondent denies each and every material allegation not heretofore controverted and demands strict proof thereof.

ADDITIONAL DEFENSES

Comes now Respondent, by counsel, and offers the following Additional Defenses to the claims raised in the Complaint. Respondent does not assume the burden of proof on these defenses where the substantive law provides otherwise.

1. It is unclear whether the Statute was intended to apply where the license holder 1) intentionally and publicly disseminated the very confidential complaints contemplated by the Statute and 2) violated her duties of

confidentiality by disclosing her patient's condition and treatment to the press to affect national public opinion at a political function, because no public purpose behind confidentiality is served in these instances.

2. The scope and contours of the Statute are unclear, because on its face it only prohibits discussion of "complaints and information pertaining to the complaints" and Respondent did not discuss those topics.

3. It is unclear if the Statute applies to the Attorney General himself, since the Statute is limited in scope to employees of the Attorney General, not the democratically elected official who answers to the people.

4. The Attorney General has a legal duty to keep the public informed of the Office's actions and decisions; and, it is unclear how the contours of the confidentiality afforded by the Statute interact and intersect with the Attorney General's duty to keep the public informed about non-confidential matters.

5. Besides the licensing enforcement action, there were other overlapping and intersecting non-confidential matters raised by the license holder's privacy violations, which Respondent's statements addressed; and, it is unclear how non-confidential matters involving license-holders should be handled.

6. This action violates the Separation of Powers provided by the Indiana Constitution.

7. This action violates the First Amendment of the U.S. Constitution as well as Article 1, Section 9 of the Indiana Constitution.

WHEREFORE, Respondent requests that this cause of action be dismissed, with costs paid by the Disciplinary Commission, and all other relief just and proper in the premises.

Respectfully submitted,

/s/ James J. Ammeen, Jr.
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Attorneys for the Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the forgoing was served through the Indiana Court's e-filing system to all counsel of record.

/s/ James J. Ammeen, Jr.
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