BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOSEPH P. ROCCO, Bar No. 009284** Respondent.	**PDJ-2018-9032** **FINAL JUDGMENT AND ORDER OF SUSPENSION** [State Bar No. 17-0740] **FILED SEPTEMBER 27, 2019**

The Supreme Court of Arizona on September 24, 2019 affirmed the decision and sanction of the hearing panel.

Now Therefore,

IT IS ORDERED that **JOSEPH P. ROCCO, Bar No. 009284**, is suspended from the practice of law for ninety (90) days, effective thirty (30) days from the date of the Supreme Court Decision Order.

IT IS FURTHER ORDERED upon reinstatement, Mr. Rocco shall be placed on two (2) years of probation with MAP and LOMAP. Mr. Rocco shall contact the State Bar's Compliance Monitor within ten (10) days of reinstatement and submit to a MAP evaluation and a LOMAP examination of his office procedures. He shall sign the terms and conditions of probation, including reporting requirements, which are incorporated by reference. Mr. Rocco shall be responsible for all costs associated with MAP and LOMAP.

IT IS FURTHER ORDERED Mr. Rocco shall comply with the requirements of Rule 72, Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED Mr. Rocco shall pay any costs and expenses of the State Bar of Arizona as ordered pursuant to Rule 60(b), Ariz. R. Sup. Ct.

DATED this 27th day of September 2019.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

COPY of the foregoing e-mailed/mailed
this 27th day of September 2019 to:

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SUPREME COURT OF ARIZONA

In the Matter of a Member of the State Bar of Arizona	)	Arizona Supreme Court No. SB-19-0004-AP
JOSEPH P. ROCCO, Attorney No. 9284	)	Office of the Presiding Disciplinary Judge No. PDJ20189032
Respondent.	)	

FILED 09/24/2019

DECISION ORDER

Pursuant to Rule 59, Rules of the Supreme Court, Respondent Joseph P. Rocco appealed the hearing panel's findings and sanction. The Court has considered the parties briefs and the record in this matter.

In disciplinary appeals, we accept the panel's factual findings unless they are not supported by reasonable evidence and are clearly erroneous. *In re Alexander*, 232 Ariz. 1, 5 ¶ 11 (2013). Conclusions of law are reviewed de novo. Rule 59(j). We review the imposed sanction de novo as a question of law. *In re Phillips*, 226 Ariz. 112, 117 ¶ 27 (2010).

On appeal, Respondent argues that the presiding disciplinary judge (PDJ) made a number of erroneous evidentiary rulings. With the exception of one ruling discussed below, the Court rejects Respondent's challenges to the PDJ's evidentiary rulings. As to one ruling, Respondent argues that the PDJ erred in precluding his testimony about how he has changed his office procedures and is no longer engaging in the conduct giving rise to the discipline charges. We agree with Respondent that this was relevant evidence of remedial conduct and should not have been excluded. *See In re Peasley*, 208 Ariz. 27, 39 ¶ 53 (2004). Efforts to change behavior and prevent further injury to the public are considered remedial.

Respondent argues that some of the panel's factual findings were clearly erroneous. With the exception of one factual finding discussed below, the Court rejects Respondent's challenges to the panel's findings. Respondent submits that the panel's finding that he took no remedial action following his misconduct is not supported by reasonable evidence. We agree with Respondent that this finding was clearly erroneous. Respondent presented some evidence of remedial conduct and efforts to rectify his misconduct. There was evidence the Respondent instructed his attorney to contact the Wife's attorney and take all necessary measures to make things right.

Respondent also provided medical evidence that he sought treatment to deal with health issues that may have contributed to his misconduct. *See In re Abrams*, 227 Ariz. 248, 253 ¶ 33 (2011). Further, as noted above, Respondent offered testimony that he changed his office procedures to correct his conduct. The panel's finding that Respondent took no remedial steps following his misconduct was clearly erroneous.

Notwithstanding the errors noted above, the Court accepts the panel's findings that Respondent's conduct violated ERs 1.2, 1.5(b), 3.1, 4.1, 4.4, 5.3, and 8.4(c) and (d).

As to the sanction, the panel correctly found the presumptive sanction to be suspension. The most serious misconduct in Respondent's case was his knowing misstatements to obtain the subpoenas, causing injury to the parties and the administration of justice. See ABA Standard 6.12. The Court accepts the panel's findings in aggravation and mitigation. We find, however, that the record supports some additional factors. In aggravation, the record supports a finding of Standard 9.22(b), dishonest or selfish motive. In mitigation, the record supports a finding of Standard 9.32(d), efforts to remediate or rectify the consequences of misconduct; Standard 9.32(l), remorse; and Standard 9.32(m), remoteness of prior discipline offense. The State Bar recommended a short-term suspension in this case. A consideration of these factors in aggravation and mitigation supports a ninety (90) day suspension.

The Court affirms the imposition of a ninety (90) day suspension, probation for two years upon reinstatement with LOMAP and MAP, and the imposition of costs and expenses of the discipline proceedings.

IT IS ORDERED affirming the decision and sanction of the hearing panel as set forth in this order.

DATED this 24th day of September, 2019.

/s/
ROBERT BRUTINEL
Chief Justice

TO:
Ralph W Adams
Karen A Clark
James D Lee
Catherine Montemayor
Sandra Montoya
Maret Vessella
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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

APR 23 2018

FILED

BY

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOSEPH P. ROCCO,** Bar No. 009284, Respondent.	**PDJ-2018-9032** **COMPLAINT** [State Bar No. 17-0740]

Complaint is made against Respondent as follows:

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice law in Arizona on October 15, 1983.

COUNT ONE (File No. 17-0740/Bailey)

2. Bijen Dyrek (Wife) married Christopher Dyrek (Husband) on September 9, 1987, in Sedona, Arizona.

3. On April 27, 2015, Respondent filed, with American Family Insurance Company's authorization, a *Petition for Deposition before Action pursuant to A.R.C.P. Rule 27* (*American Family* petition) in *American Family Insurance Company and Gainsco Insurance Company v. T-Mobile USA and Sprint/Nextel*, Maricopa County Superior Court No. CV2015-051766 (*American Family* case).

   a. The petition named American Family Insurance Company and Gainsco Insurance Company as petitioners and T-Mobile USA, Sprint/Nextel Communications and "ABC Wireless Service Provider Corporations 1 – 10" as respondents.

   b. The petition alleged that American Family's insureds, Rikki D. Bohlmann and Germaine Roberson had made a claim for insurance coverage arising out of the alleged theft of a motor vehicle. The petition also alleged that Gainsco's unidentified insureds had made a claim for insurance coverage arising out of the alleged theft of a motor vehicle.

c. The petition asserted that American Family and Gainsco were investigating claims, but could not complete their investigation and determine coverage in part because of their inability to obtain the records of "Wireless Service Providers" who "ha[d] provided cellular service to their insureds and other individuals reasonably believed to have played a role in, or to have material information concerning the events at issue which give rise to coverage concerns."

d. The petition alleged that the investigation of coverage included intentional acts and/or material misrepresentation and concealment by the insureds. The petition stated, "Petitioners' investigation of coverage includes material misrepresentations commonly known as insurance fraud."

e. The petition noted that American Family had obtained the written consent of its insureds for the release of cellular telephone records and telemetry, and that Gainsco had obtained verbal consent from its insureds for the release of the same types of information and records.

f. Citing Rule 27(a)(1)(i),[1] Ariz. R. Civ. P., the petition indicated that "[t]he Petitioners' [sic] expect to be a party to an action cognizable in a court but are presently unable to bring it or cause it to be brought." (Original in bold typeface).

g. The subject matter was identified as "the collection of wireless (wireless includes cellular and other electronic transmissions using cellular telephone networks and towers) call detail and tower location records and, [sic] other evidence" which the petitioners would not provide without legal process.

h. The petition asserted that the scope of the records to be requested had been predetermined by "the nature of the claim(s) presented, the timing of the claim(s) presented and the statement of the Petitioners' insureds of the date[,] time and place of occurrence of material matters associated with the claim(s)."

i. The petition identified the following as potentially adverse parties: Rikki D. Bohlmann and Germaine L. Roberson, who were American Family's

[1] The 2015 version of Civil Rule 27 differs from the current version of the rule. Attached to this complaint as Exhibit A is a copy of the 2015 rule, and attached as Exhibit B is a copy of the current rule.

insureds, and Ismael Rodriguez and Beatriz Alvarez, who were Gainsco's insureds.

j. Wife and Husband were not parties in the *American Family* case and had no connection with that case. Husband, however, had cell phone service through Sprint.

4. At the time Respondent filed the petition in the *American Family* case, Civil Rule 27(a)(1)(v) stated that a party must "ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition," and Civil Rule 27(a)(3) stated that the court was required to enter an order if it was "satisfied that the perpetuation of the testimony may prevent a failure or delay of justice." T-Mobile and Sprint/Nextel were the only "persons" named as deponents in the *American Family* petition. The court never entered an order permitting the taking of a deposition or the production of documents or electronically stored information in any of the cases in which Respondent caused civil subpoenas to be issued and served in reliance on the *American Family* petition. Civil Rule 27(a)(4) at the time stated, "If a deposition to perpetuate testimony is taken under these Rules, it may be used in any action involving *the same subject matter* subsequently brought, in accordance with the provisions of Rule 32(a)." (Emphasis added).

5. Respondent used the petition filed in the *American Family* case to obtain and serve subpoenas in a number of cases unrelated to Rikki D. Bohlmann and Germaine L. Roberson's or Ismael Rodriguez and Beatriz Alvarez's claims for insurance coverage arising out of the alleged theft of a motor vehicle. The subpoenas obtained in cases following the initial *American Family* case were improperly obtained and served. For example, Respondent and his staff failed to comply with the requirements of the Rules of Civil Procedure for issuance of pre-litigation subpoenas.

6. Subpoenas based on the *American Family* petition were issued on the following dates (unless otherwise noted the subpoenas requested cell phone records or data): (a) April 7, 2016, to Sprint Nextel; (b) April 7, 2016, to Cellco Partnership;[2] (c) April 28, 2015, to MetroPCS; (d) April 28, 2015, to T-Mobile; (e) May 11, 2015, to Cellco Partnership; (f) May 30, 2015, to Cellco Partnership; (g) May 30, 2015, to City of Phoenix Police Records for "Department Report 2014-01924737B, all supplements, photos or other evidence"; (h) May 30, 2015, to Circle K for all "video recordings . . . for the time period . . . on April 23, 2015 . . . as well as the identification of all

[2] Cellco Partnership is a member of, and d/b/a, Verizon Wireless Services, LLC, in Arizona.

employees on duty that day"; (i) May 30, 2015, to Sprint Nextel; (j) June 19, 2015, to Cellco Partnership (records pertaining to Dwayne Mardis); (k) June 19, 2015, to Cellco Partnership (records pertaining to Lakeitha Smith); (l) July 9, 2015, to Cellco Partnership; (m) July 9, 2015, to AT&T Mobility; (n) July 9, 2015, to T-Mobile; (o) July 9, 2015, to Sprint Nextel; (p) July 20, 2015, to MetroPCS; (q) July 23, 2015, to MetroPCS; (r) August 21, 2015, to AT&T Mobility; (s) August 26, 2015, to TracFone Wireless for "all voice, text and data and/or prepaid records for D. Jefferson Estates . . ."; (t) August 31, 2015, to TracFone Wireless for "all voice, text, and data . . . for Tammy L. Bayne. . ." (u) August 31, 2015, to Cellco Partnership; (v) September 29, 2015, to Sprint Nextel; (w) October 13, 2015, to MetroPCS; (x) October 13, 2015, to Sprint Nextel; and (y) March 22, 2016, to Cellco Partnership in *In re the Marriage of Dyrek and Dyrek*, No. FN2016-090946. Respondent caused those subpoenas to be issued and served because he perceived a need to promptly preserve the wireless service providers' records (i.e., he believed that wireless service providers purge their records in as little as 180 days). The foregoing cases had no connection with the *American Family* case. In most cases, however, a possible party or witness may have had cell phone service through T-Mobile or Sprint/Nextel.

7. During or about 2015, Wife hired a private investigator to obtain evidence she might use in a dissolution of marriage proceeding she was contemplating. The private investigator, who was familiar with Respondent, suggested that Wife hire Respondent to subpoena Husband's cell phone records in an attempt to substantiate her suspicion that Husband was wasting community property assets.

8. On March 20, 2016, the private investigator sent Respondent an email message, requesting his assistance. In response to that email message, Respondent wrote: "I am on this. . . . I suggest we subpoena records on March 30, at the latest. . . . It would be preferable to use a subpoena issued in the Family Court case if it is filed by then." Respondent believed the timing of gathering the cell phone records was critical because Wife needed—or simply wanted—to gather and preserve the evidence but did not want to provide notice to Husband that she intended to file for divorce. At or about that time, Wife gave $500 to the private investigator to hire Respondent to subpoena Husband's cell phone records. Wife never met Respondent.

9. Respondent never provided Wife, who was not a regularly represented client, with a writing that complied with the requirements of ER 1.5(b) even though

he caused a subpoena to be issued and served on her behalf, which resulted in his receipt of Husband's cell phone information and records.

10. On March 22, 2016, Wife, through attorney Jennifer Rubin, filed a petition for dissolution of marriage without children, naming Husband as the respondent (*In re the Marriage of Dyrek and Dyrek*, Maricopa County Superior Court No. FN2016-090946).

11. On April 2, 2016, the private investigator emailed Respondent, stating:

> We are going to need a fee agreement on this case for the client. . . . Jennifer Rubin, Esq, is counsel for the client. She can be reached at (480) 699-0472 and her email is shown above. From this point forward, coordination of the subpoenas for documents . . . should be coordinated thru Ms. Rubin. Please contact her ASAP so the record retrieval can be coordinated.

The private investigator "copied" attorney Rubin and Respondent's assistant (and wife), Carolyn, on that email message.

12. On April 6, 2016, Wife emailed Respondent, stating:

> Hi Joe[, I] wanted to check to see if you have connected with Jennifer Rubin[,] my attorney[,] and the process of subpoenaing the phone records has commenced. Please advise. . . .

13. On April 7, 2016, Respondent or his staff caused a subpoena to be issued for service on Husband's cell phone carrier based upon the *American Family* petition. The subpoena sought Husband's cell phone records even though he

was not named in the *American Family* petition and did not have any connection to that case or the named parties. Husband, however, had cell phone service through Sprint, which was a respondent in the *American Family* case. The subpoena was issued to "Cellco Partnership" (Verizon) and sought Husband's cell phone records from October 1, 2014, through March 30, 2016. Carolyn, Respondent's assistant, obtained the subpoena in the *American Family* case rather than the dissolution case because she was unaware that the dissolution case had been filed. Carolyn never spoke with Respondent regarding the subpoena. Respondent failed to determine that a petition for dissolution of marriage had been filed on Wife's behalf, and failed to adequately and appropriately supervise Carolyn, his nonlawyer assistant, to ensure she obtained the Dyrek subpoena in the dissolution case.

14. Also on April 7, 2016, Carolyn emailed attorney Rubin and the private investigator, stating:

> We decided to issue the subpoenas in our civil case rather than the family court case to streamline things on this end. The subpoenas have been issued and I have received confirmation that service to both Verizon and Sprint has been successful. The subpoenas are attached.

15. Attorney Rubin replied on April 7, 2016, stating: "I am a little confused. What is this civil case?" The private investigator responded on the same date:

"Carolyn just attached the basic subpoenas. The attachment to the subpoena is long and specific. . . . I would review with Joe so he can fill you in."

16. On April 14, 2016, Carolyn wrote to attorney Rubin:

> I have received a fax from Verizon that they are notifying the subscriber of our request. Should no objection be received by April 25, 2016, they will mail out the records. I will follow up with them on that date.

17. On April 16, 2016, a Maricopa County Superior Court Commissioner entered a judgment of dismissal without prejudice of all unadjudicated claims in the *American Family* case due to lack of prosecution (that judgment was filed on April 20, 2016).

18. On April 19, 2016, the private investigator sent Carolyn and Respondent an email stating: "Please review these documents you sent on this file—they appear to be incorrect, unless you sent me items for a different file, which may be the case." Carolyn responded on the same date, writing: "I'm not sure what it is you feel is inaccurate relating to the subpoenas; the subpoenas are accurate." Carolyn then listed the name of the accounts subpoenaed, and the phone numbers subpoenaed and wrote: "We have been a bit tied up with a family matter which has prohibited us from getting to some office matters which [are] not on deadline. I will send over the fee agreement." The private

investigator replied on the same date, stating: "The documents you sent me have American Family on them." Attorney Rubin then wrote: "My question exactly." Carolyn responded to attorney Rubin: "Please see my response to [the private investigator] and let me know if that clears things up." Carolyn responded to the private investigator, stating: "Yes, this is our civil case; it has the case name of American Family v. T-Mobile. It is under this rule 27 petition which allows us to obtain this information. The other cases we have worked for you have all been filed under this same case." The private investigator responded:

> I am not clear how this doesn't cloud the water in this case, which is a domestic relations issue. I do not like cloudy water. Now we get defendants asking AMFam questions?????? And we had litigation filed that the subpoenas could have issued on with no problem, avoiding all these questions." Carolyn replied: "Please remember that [Respondent] is an expert in this matter, not acting as an attorney . . . .

19. On April 19, 2016, Respondent replied to Attorney Rubin's email message in which she stated "my question exactly." He wrote: "This is a petition initially issued originally under American Family. We do not re-file a petition every time we issue a subpoena." Respondent explained that "[s]ubpoenas not requested by American Family . . . were issued to preserve and obtain evidence which would have been routinely purged by the third parties to

whom they were issued to the detriment of the parties. . . . The subpoenas fostered timely investigation and payment of insurance claims."

20. On April 20, 2016, Respondent emailed the private investigator and copied attorney Rubin:

> I'll take the blame on this one. We can't issue Family Court subpoenas. We can issue subpoenas out of our . . . American Family cell suit. We will now change our procedures in any case in which there is active litigation to require that we transmit the subpoena attachment to the counsel of record for issuance.

21. The private investigator spoke to Respondent about issuing the subpoena in the *American Family* case, which he believed was improper. Respondent told him it is a lot easier to obtain records using an open case, and that he had subpoenaed other records using the *American Family* case. Respondent informed the private investigator that he had "screwed up and would fix it."

22. Despite knowledge that the subpoena issued and served on Wife's behalf had been improperly obtained, including knowledge obtained through the email messages from Attorney Rubin and the private investigator, Respondent failed to take any corrective or remedial action. For example, he failed to withdraw the subpoenas, notify Cellco Partnership or Verizon about the error, or obtain a properly issued subpoena.

23. Cellco Partnership and/or Verizon provided Respondent with information and/or documents pertaining to Husband's cell phone based upon the subpoena that he or his staff caused to be issued and served. In or about May 2016, Respondent or his staff provided Wife with a copy of Husband's records, which Respondent had obtained from Verizon.

24. On August 5, 2016, Husband filed a motion for sanctions for abuse of discovery in the dissolution case. That motion was based on the inappropriate use of the *American Family* petition to obtain and serve a subpoena in the Dyrek dissolution proceeding. In that motion, Husband asserted that Wife had committed a fraud on the court by using a fictitious civil action to obtain discovery in the dissolution case in bad faith and had attempted to prevent him from learning about the subpoena seeking his cell phone records. Husband requested suppression of his cell phone records, damages, and an award of attorney fees.

25. On August 24, 2016, Wife filed a response to Husband's motion for sanctions. Wife alleged that she was unaware that Respondent attempted to subpoena Husband's cell phone records "in a pending pre-litigation discovery proceeding. . . ." Wife argued that she should not be sanctioned for

Respondent's actions because she did not know about Respondent's subpoena and did not direct or authorize him to issue the subpoena.

26. Maricopa County Superior Court Judge Cynthia Bailey, the judge assigned to the dissolution case, "was extremely concerned based on the pleadings that [Respondent] may have filed a fictitious lawsuit solely for the purpose of gaining access to Husband's phone records and without any other legitimate purpose, in violation of the Arizona Rules of Civil Procedure." On September 19, 2016, Judge Bailey entered a stipulated order appointing a special discovery master (retired Judge Carey Snyder Hyatt) to address any and all discovery and disclosure issues in the dissolution case.

27. On October 7, 2016, the court granted *Husband's Motion to Compel and for Sanctions*, directing Wife to provide certain requested discovery. The court granted Husband's request for sanctions under Rule 65(A)(4)(a), Ariz. R. Fam. Law P., and ordered Husband to file a *China Doll* affidavit regarding the expenses incurred in preparing Husband's *Motion to Compel and for Sanctions*, including attorneys' fees and costs (that order was filed on October 11, 2016). The order did not include any findings of fact or explanation for the granting of the motion. Although a *China Doll* affidavit was filed seeking payment of fees and costs in the amount of $1,967, no order has been entered.

28. By engaging in the conduct set forth above, Respondent violated ER 1.2, ER 1.5(b), ER 3.1, ER 4.1, ER 4.4, ER 5.3, ER 8.4(c) and ER 8.4(d).

DATED this 23rd day of April, 2018.

STATE BAR OF ARIZONA

James D. Lee

James D. Lee
Senior Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 23rd day of April, 2018.

by: _____
JDL:nr

Exhibit A

ed by the Arizona Supreme Court to study malpractice procedure. In the Preamble which accompanied those Rules, it was pointed out that the Committee had proposed certain presumptive limitations, but did not thereby intend to remove judicial discretion with respect to those limits. It was contemplated, however, that variation from the presumptive limits would occur only where there was an affirmative demonstration of good cause.

In a Comment to Rule 2 of the original Uniform Rules of Practice for Medical Malpractice Cases, which was effective January 1, 1990 and was amended effective July 1, 1992, the Committee stated the following, *inter alia*:

"Paragraph B(1) of this rule [now Rule 26.2(a)(1)] requires the plaintiff to serve upon the defendant copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. The committee's intent is that counsel will make a reasonable effort to obtain relevant medical records and make them available under this rule.

With regard to Rule C(1) [now Rule 26.2(b)(1)], it was never intended that the financial information of the defendant would be subject to a request for production unless there was a prima facie case for punitive damages.

It is the intention of the Rule that witness statements will be produced and interrogatories may be propounded requesting a summary of the expected testimony of lay witnesses notwithstanding the ruling in *Sundt v. Farley*, 12 Ariz.App. 346, 470 P.2d 494 (1970).

The term 'parties' when referring to depositions is intended to include the managing agent of any party, and any persons involved in the incident giving rise to the complaint.

* * *

The rule further contemplates full and complete answers to interrogatories in a timely manner. Absent a need for additional discovery, interrogatory answers should be sufficiently complete so that both sides can be informed of the claims and defenses of the other side."

Rule 27. Depositions before action or pending appeal

Rule 27(a). Before action; petition; notice and service; order and examination; use of deposition

1. A person who desires to perpetuate that person's own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition in the superior court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show:

(i) That the petitioner expects to be a party to an action cognizable in a court but is presently unable to bring it or cause it to be brought.

(ii) The subject matter of the expected action and the petitioner's interest therein.

(iii) The facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it.

(iv) The names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known.

(v) The names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each. The petition shall also ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

2. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served either within or without the state in the manner provided in Rule 4.1 or Rule 4.2 of these rules for service of summons, but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4.1 or Rule 4.2 an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, the provisions of Rule 17(g) shall apply.

3. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these Rules, and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these

Rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

4. If a deposition to perpetuate testimony is taken under these Rules, it may be used in any action involving the same subject matter subsequently brought, in accordance with the provisions of Rule 32(a).

Amended Dec. 16, 1980, effective March 1, 1981; Sept. 15, 1987, effective Nov. 15, 1987; Oct. 2, 1991, effective Dec. 1, 1991; Oct. 9, 1996, effective Dec. 1, 1996.

Rule 27(b). Pending appeal

If an appeal has been taken from a judgment of a superior court or before taking an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show the names and addresses of the persons to be examined, the substance of the testimony which the party expects to elicit from each and the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these Rules for depositions taken in actions pending in the superior court.

Amended Sept. 15, 1987, effective Nov. 15, 1987.

Rule 28. Persons before whom depositions may be taken

Rule 28(a). Within the United States; commission or letters rogatory

Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States, the State of Arizona, or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. Depositions may be taken in this state or anywhere upon notice provided by these Rules without a commission, letters rogatory or other writ. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

Upon proof that the notice to take a deposition outside this state has been given as provided by these Rules, the party seeking such deposition may, but is not required, after one full day's notice to the other parties, have issued by the clerk, in the form given in such notice, a commission or letters rogatory or other like writ either in lieu of the notice to take the deposition or supplementary thereto. Failure to file written objections to such form before or at the time of its issuance shall be a waiver of any objection thereto. Any objection shall be heard and determined forthwith by the court or judge thereof.

Amended July 6, 1983, effective Sept. 7, 1983.

Rule 28(b). In foreign countries

In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by the name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

Amended March 26, 1963, effective June 1, 1963; Sept. 15, 1987, effective Nov. 15, 1987.

Exhibit B

(b) Timing of Expert Disclosure. The parties must disclose the identities and opinions of standard of care and causation experts simultaneously, unless the parties agree or the court orders otherwise for good cause.

Added Aug. 31, 2017, effective July 1, 2018.

Rule 27. Discovery Before an Action Is Filed or Pending an Appeal

(a) Before an Action Is Filed.

(1) *Petition.* A person who wants to perpetuate testimony—including his or her own—or to obtain discovery to preserve evidence about any matter cognizable in any court within the United States may file a verified petition in the superior court in the county where any expected adverse party resides. The petition must be titled in the petitioner's name and must:

(A) show that the petitioner expects to be a party to an action cognizable in any court within the United States but cannot presently bring it or cause it to be brought;

(B) identify the subject matter of the expected action and the petitioner's interest;

(C) show the facts that the petitioner desires to establish by the proposed discovery and the reasons for perpetuating it in advance of the expected action;

(D) identify the name or a description of each person whom the petitioner expects to be an adverse party and the person's address to the extent known;

(E) identify the name and address of each person from whom discovery is sought—who may but need not be a person identified as an expected adverse party under Rule 27(a)(1)(D)—and the evidence the petitioner expects to obtain from the discovery; and

(F) ask for an order: (i) directing the clerk to issue a subpoena under Rule 45 at the petitioner's request to obtain testimony or other evidence from each named person in order to preserve the testimony or other evidence; (ii) under Rule 35 for a physical or mental examination of an expected adverse party or of a person in the custody or under the legal control of an expected adverse party; or (iii) permitting the petitioner's deposition under Rule 30 to preserve his or her testimony.

(2) *Hearing Required.* Unless the petitioner and all expected adverse parties file a stipulation agreeing to the discovery requested in the petition, or unless the court orders otherwise for good cause, the court must hold a hearing on the relief that the petition seeks.

(3) *Notice and Service.* Unless the court orders otherwise for good cause, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing at least 20 days before the hearing date. If an expected adverse party is a minor or incompetent, Rule 17(f) applies. The petition and notice may be served either inside or outside Arizona in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable. If the petition seeks an order under Rule 35 for a physical or mental examination, the petition and notice must be served on the expected adverse party whose examination is sought or who has custody or legal control of the person whose examination is sought. In all other instances, if service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise.

(4) *Opposition and Reply.* Unless the court orders otherwise, any expected adverse party may file an opposition to the petition at least 5 days before the hearing date. The opposition must be served on the petitioner and each other expected adverse party using any of the methods described in Rule 5(c). Unless the court orders otherwise, the petitioner may not file a reply memorandum.

(5) *Order and Effect.*

(A) Order. If satisfied that perpetuating the testimony or preserving other evidence may prevent a failure or delay of justice, the court must enter an order that: (i) identifies each person who may be served with a subpoena under Rule 45 to obtain testimony or for the inspection of documents or premises and specifies the subject matter of the permitted examination; (ii) permits the physical or mental examination of an expected adverse party or of a person in the custody or under the legal control of an expected adverse party; or (iii) permits the deposition of the petitioning party.

(B) Effect and Use. Discovery authorized by the court must be conducted, and may be used, as provided in these rules. A reference in these rules to the court where an action is pending means, for this rule's purposes, the court where the petition for the discovery was filed. A deposition to perpetuate testimony taken under these rules may be used under Rule 32(a) in any later-filed action in an Arizona state court involving the same subject matter. Subpoena recipients have the rights of nonparties under Rule 45 regardless of whether they are identified as an expected adverse party under Rule 27(a)(1)(D).

(C) Appointment of Counsel. If a court authorizes a deposition, but an expected adverse party is not served in the same manner that a summons and pleading are served under Rule 4, 4.1, or 4.2, as applicable, and is otherwise unrepresented by counsel, the court must appoint an attorney to represent that expected adverse party and to cross-examine the deponent. The petitioner must pay for an appointed attorney's services in an amount fixed by the court.

(b) Pending Appeal.

(1) *Generally.* The superior court that rendered judgment may, if an appeal has been taken or may still be taken, permit a party to conduct discovery under the rules

to preserve evidence for use in any later superior court proceedings in that action.

(2) *Motion.* A party who seeks to perpetuate testimony or preserve evidence under the rules may move for leave to conduct discovery. The moving party must provide the same notice and serve the motion in the same manner as if the action was still pending in superior court. The motion must:

(A) identify the name and address of each person to be deposed or from whom discovery under the rules is sought, and the expected substance of the testimony or other discovery; and

(B) show the reasons for perpetuating the testimony or other discovery.

(3) *Order and Effect.* If satisfied that perpetuating the testimony or preserving the other evidence may prevent a failure or delay of justice, the court may order the requested discovery. Discovery authorized by the court must be conducted, and may be used, as provided in these rules.
Added Sept. 2, 2016, effective Jan. 1, 2017.

Rule 28. Persons Before Whom Depositions May Be Taken; Depositions in Foreign Countries; Letters of Request and Commissions

(a) Deposition in the United States.

(1) *Generally.* Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths by federal law, Arizona law, or the law of the place of examination;

(B) a person appointed by the court where the action is pending to administer oaths and take testimony; or

(C) any certified reporter designated by the parties under Rule 29.

(2) *Definition of "Officer."* The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29.

(b) Deposition in a Foreign Country.

(1) *Generally.* A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths by federal law, Arizona law, or the law of the place of examination; or

(D) before a person commissioned by the court where the action is pending to administer any necessary oath and take testimony.

(2) *Form of a Request, Notice, or Commission.* When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(3) *Letter of Request—Admitting Evidence.* Evidence obtained in response to a letter of request need not be excluded because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Letters of Request and Commissions.

(1) *Not Required.* A deposition in a pending superior court action may be taken anywhere upon notice prescribed by these rules without a letter of request, commission, or other like writ.

(2) *Issuing Letter of Request or Commission.* The clerk may issue a letter of request—whether or not captioned a "letter rogatory"—a commission, or both:

(A) on appropriate terms after an application and one full-day's notice to the other parties; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) *Objections; Waiver.* A party waives any error in the form of a letter of request or commission if it does not file a written objection before the clerk issues the letter of request or commission. The court must rule on any timely filed objection before the clerk may issue a letter of request or commission.

(d) Disqualification. A deposition may not be taken before a person who is:

(1) any party's relative, employee, or attorney;

(2) related to or employed by any party's attorney; or

(3) financially interested in the action.
Added Sept. 2, 2016, effective Jan. 1, 2017.

Rule 29. Modifying Discovery and Disclosure Procedures and Deadlines

Text of Rule 29 effective until July 1, 2018. See, also, Rule 29 effective July 1, 2018.

(a) By Written Agreement.

(1) *Generally.* Unless the court orders otherwise, the parties may agree in writing to:

(A) take a deposition before any certified reporter, at any time or place, on any notice, and in any manner specified, in which event it may be used in the same way as any other deposition; and

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BY G. Lebs

BEFORE THE ATTORNEY DISCIPLINE PROBABLE CAUSE COMMITTEE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOSEPH P. ROCCO** **Bar No. 009284** Respondent.	No. 17-0740 **PROBABLE CAUSE ORDER**

The Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona ("Committee") reviewed this matter on October 13, 2017, pursuant to Rules 50 and 55, Ariz. R. Sup. Ct., for consideration of the State Bar's Report of Investigation and Recommendation and Respondent's Response.

By a vote of 7-0-2[1], the Committee finds probable cause exists to file a complaint against Respondent in File No. 17-0740.

IT IS THEREFORE ORDERED pursuant to Rules 55(c) and 58(a), Ariz. R. Sup. Ct., authorizing the State Bar Counsel to prepare and file a complaint with the Disciplinary Clerk.

Parties may not file motions for reconsideration of this Order.

DATED this 2 day of November, 2017.

Daisy Flores

Daisy Flores, Vice Chair
Attorney Discipline Probable Cause Committee
of the Supreme Court of Arizona

[1] Committee members Judge Lawrence F. Winthrop and Jeffrey G. Politt did not participate in this matter.

Original filed this 2nd day
of November, 2017 with:

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