NO. 55649

Before the Board of Disciplinary Appeals Appointed by The Supreme Court of Texas

WILLIAM ALLEN SCHULTZ,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 14-3
No. D0121247202

BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE *(ORAL ARGUMENT REQUESTED)*

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BRIEF OF APPELLEE
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TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

Appellee, the Commission for Lawyer Discipline, submits this brief in response to the brief filed by Appellant, William Allen Schultz. For clarity, this brief refers to Appellant as "Schultz" and Appellee as "the Commission." References to the record are labeled CR (clerk's record), RR (reporter's record), Pet. Ex. (Petitioner's exhibit to reporter's record), Resp. Ex. (Respondent's exhibit

to reporter's record), and App. (appendix to brief). References to rules refer to the Texas Disciplinary Rules of Professional Conduct[1] unless otherwise noted.

[1] *Reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app A-1. (West 2011).

STATEMENT OF THE CASE

Type of Proceeding: Attorney Discipline

Petitioner/Appellee: The Commission for Lawyer Discipline

Respondent/Appellant: William Allen Schultz

Evidentiary Panel: 14-3

Judgment: Judgment of Probated Suspension

Violations found (Texas Disciplinary Rules of Professional Conduct):

Rule 3.04(a): A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

Rule 3.09(d): The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

ISSUE PRESENTED

Whether a prosecutor violates Rule 3.09(d) and Rule 3.04(a) by failing to disclose to the defendant in an aggravated assault prosecution that the victim admitted she did not see her attacker's face and based her identification of the defendant on the attacker's smell, the appearance of the bottom of his boot, and the stature of his shadow?

STATEMENT OF FACTS

On February 13, 2012, Silvano Uriostegui pled guilty to the offense of aggravated assault in connection with a violent attack against his estranged wife (Pet. Ex. 4, 5; RR 33). Pursuant to the plea agreement, a trial began on February 14, 2012, to determine Mr. Uriostegui's punishment (Pet. Ex. 5). The proceedings that day ended when the court declared a mistrial because the prosecution had failed to disclose to the defense Mrs. Uriostegui's prior statements that she did not see her attacker's face and, therefore, had identified her husband based on the attacker's smell, the appearance of the bottom of his boot, and his stature (Pet. Ex. 5). Defense counsel had previously made multiple requests for discovery from the state, including specific requests for all statements "favorable to the defendant on the issue of guilt or which [affect] the credibility of the government's case" (Pet. Ex. 1, 2, 3; RR 134).

On February 17, 2012, the defense filed an application for a writ of habeas corpus arguing that any retrial of Mr. Uriostegui was constitutionally barred by the Texas and U.S. constitutions (Pet. Ex. 6). On March 2, 2012, the district court heard the writ application (Pet. Ex. 7). During the hearing, the state conceded that the prosecution should have disclosed information regarding Mrs. Uriostegui's identification of her attacker (Pet. Ex. 7 (transcript pg. 8-9)). Schultz also admitted

that he should have disclosed the information (Pet. Ex. 7 (transcript pg. 61-62, 72, 74, 81, 85)).

At the conclusion of the hearing, the court granted the writ application and ordered that Mr. Uriostegui be released from custody (Pet. Ex. 7 (transcript pg. 124)). He also banned Schultz and Schultz's co-counsel from appearing in his courtroom (Pet. Ex. 7 (transcript pg. 126)).

The Commission brought a disciplinary action alleging that Schultz's failure to timely disclose the details of the victim's identification violated Rules 3.04(a) and 3.09(d) of the Texas Disciplinary Rules of Professional Conduct (CR 50-52). A full evidentiary hearing took place on October 15, 2014 (CR 220; RR 1-308). Schultz testified at the evidentiary hearing and admitted that he did not disclose to the defense the limited nature of Mrs. Uriostegui's identification of her attacker (RR 138-42, 149-50).

At the conclusion of the misconduct phase of the hearing, the Evidentiary Panel announced that it found misconduct as to both rule violations that the Commission had alleged (RR 286-87). The Panel heard argument and evidence regarding sanctions and then announced its decision to suspend Schultz's law license for six months on a fully probated basis (RR 287-306, 307). The Panel did not impose monetary sanctions (CR 235-38; RR 307).

On January 21, 2015, Schultz initiated this appeal (CR 270-71).

SUMMARY OF THE ARGUMENT

The record in this case is based on largely undisputed facts regarding a prosecutor's failure to disclose information that would have revealed substantial weaknesses in a key element of the state's case in an aggravated assault prosecution. Prior to trial, the state's star witness admitted to prosecutors that she was able to identify her attacker based only on his smell, the appearance of the bottom of his boot, and the stature of his shadow. She did not see his face. But because all discovery provided to the defense had indicated that the victim's identification of the defendant was unassailable, defense counsel advised his client to plead guilty.

At the post-plea sentencing trial, the victim volunteered that she never got a good look at her attacker. Because of her surprise testimony, the court granted a mistrial. The court later ruled that due to the intentional nature of the prosecution's nondisclosure, jeopardy had attached and, as a result, the state could not retry the defendant.

The judgment underlying this appeal is well supported by Schultz's admitted failure, as the lead prosecutor, to disclose the limited nature of the victim's identification of her attacker. Schultz misconstrues the disciplinary rules at issue and argues for reversal based on his flawed analysis of the interplay between Rule 3.09(d) and the doctrine set forth in *Brady v. Maryland*. He fails to

recognize that *Brady* and Rule 3.09(d) address two distinct areas of the law that overlap to some degree but are not coextensive. Simply put, Rule 3.09(d) does not codify *Brady*.

Schultz also fails to correctly construe Rule 3.04(a). He urges the Board to graft a "knowing" standard onto the rule despite the absence of any indication that the Supreme Court intended to impose such a standard when it promulgated the rule. And even if the Commission were required to prove knowledge in order to prove a violation of Rule 3.04(a), the evidence in this case would satisfy that burden. The record conclusively demonstrates that Schultz was aware of the limited nature of the victim's identification of her attacker yet he admittedly failed to disclose that information to the defense.

Schultz's various arguments miss their mark because they violate the most fundamental rule of statutory construction – that a statute must be construed according to its plain language. However, his appeal also must fail for a larger reason. He seeks the reversal of a judgment that finds strong support in the record because the evidence leaves no question about his failure to disclose important information that tended to negate the defendant's guilt. Regardless of the *Brady* doctrine or the evolving discovery requirements that prosecutors must follow, the plain language of the disciplinary rules required that he disclose the information at issue. The rules establish *the* standard for determining professional misconduct,

and the Evidentiary Panel correctly applied them.

ARGUMENT

I. Rule 3.09(d) required Schultz to disclose the limited nature of the victim's identification of her attacker regardless of any *Brady* violation.

Schultz first urges the Board to interpret Rule 3.09(d) as a codification of the standard set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* focuses on "materiality" by requiring the reversal of a conviction only if the prosecution failed to disclose exculpatory evidence and there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the criminal proceeding would have been different. Schultz thus argues against a construction of the rule based on the plain meaning of its unambiguous language, which makes no explicit or implicit reference to *Brady*'s "materiality" standard.

A. A prosecutor's ethical obligations are distinct from the obligations imposed by *Brady*.

1. The language of Rule 3.09(d) is broader than the *Brady* doctrine.

As Schultz acknowledges, Rule 3.09(d) is identical to the American Bar Association's Model Rule 3.8(d). The language of both is straightforward:

> The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09(d). The goal of Rule 3.09(d) is to impose *on a prosecutor* a professional obligation to "see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09 cmt. 1. Rule 3.09(d) imposes this obligation on a prosecutor without regard for the anticipated impact of evidence/information on the outcome of a trial. ABA Formal Opinion 09-454 at 3 (July 9, 2009).

The doctrine established by the U.S. Supreme Court in *Brady* (and refined by subsequent decisions) is set forth in distinctly different terms. It is geared specifically toward a post-conviction analysis of the "materiality" of evidence that the state failed to disclose. Under *Brady*, evidence is material only if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The *Brady* doctrine focuses on the outcome of a trial without regard for any individual prosecutor's culpability. [2] *Id.* Its goal is to ensure that a conviction is not tainted by the failure of *the justice system* to provide constitutional due process. Rather than demanding individual accountability as Rule 3.09(d) does,

[2] *Brady* may require reversal even where the prosecution was not aware of undisclosed material evidence that was in the possession of another agent of the state, such as a police officer.

Brady homes in on procedural fairness to determine whether a judgment is constitutionally sound.

2. The history and purpose of Rule 3.09(d) distinguish it from *Brady*.

The disciplinary rules that govern a prosecutor's duty to disclose favorable evidence are unquestionably designed to address the type of conduct prohibited by *Brady*. But there are significant differences between the two in both purpose and application. Lisa M. Kurcias, *Prosecutor's Duty to Disclose Excuplatory Evidence*, 69 Fordham L. Rev. 1205 (2000).

In *Brady*, the U.S. Supreme Court held that the suppression of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 88. The decision's driving principle was the "avoidance of an unfair trial to the accused" rather than the need to sanction the misdeeds of a prosecutor. *Id.* The goal of a *Brady* analysis is to determine whether there is a "reasonable probability" that undisclosed evidence would have changed the outcome of a criminal proceeding. *Bagley*, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*[3]

[3] The standard originally set forth in *Brady* broadly applied to all evidence "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. But *Bagley* formally

In contrast, a prosecutor's *ethical* obligation to disclose favorable evidence is grounded in notions of fairness and an attempt to minimize the disparity of resources between the prosecution and the defense in the criminal justice system.[4] Kurcias, 69 Fordham L. Rev. at 1209. The ethical canons existed a full 55 years before the *Brady* decision was handed down. Richard A. Rosen, *Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 709 (1987). Moreover, the very purpose behind the disciplinary rules—to promote the ethical conduct of lawyers—is entirely absent in a *Brady* analysis, which reviews the fairness of a trial *irrespective of a prosecutor's good faith or bad faith in failing to disclose evidence*. *Brady*, 373 U.S. at 87.

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transformed it into the material-to-outcome analysis that was first introduced by *United States v. Agurs* and is now commonly attributed to *Brady*. *Bagley*, 473 U.S. at 674-78. *Bagley* modified the original *Brady* analysis because the Court determined that due process is implicated only if there is a reasonable probability that the state's error affected the outcome of the case. *Id.*

The original *Brady* analysis was more closely aligned with the standard articulated in Rule 3.09(d). And in fact, it was this broader standard that was in place when the ABA Model Code of Professional Responsibility first adopted "tends to negate guilt or mitigate the offense" as the standard for ethical conduct. *See* Model Code of Prof'l Responsibility DR 7-103(b) (1969).

[4] As a representative of a sovereign, the prosecutor enjoys powers that other lawyers do not. For example, prosecutors have broad discretion in deciding whom to prosecute and what charges to bring. They also have the benefit of a police force that investigates their cases and gathers evidence for them. This broad access puts defendants at a distinct disadvantage in preparing their cases and leads to a great inequity between the prosecution and the defense in a criminal trial. Kurcias, 69 Fordham L. Rev. at 1209. The ethics rules for prosecutors, then, are aimed at alleviating the inherent imbalance between the two sides and promoting the prosecutor's role to "seek justice" rather than conviction. *See id.* at 1210.

More important, however, is the notable omission of any "materiality" requirement in the ethics rules. *Id.* at 714. Courts and commentators have repeatedly noted this important distinction. As early as 1979, ABA Model Rule 7-103(b) was interpreted as imposing a broader duty to disclose favorable evidence than *Brady*.[5] Olavi Maru, Annotated Code of Professional Responsibility 330 (American Bar Found. 1979). "To fulfill *ethical* obligations the prosecutor must disclose all exculpatory evidence whether or not the evidence presented or omitted is significant enough to warrant a reversal of the conviction." Rosen, 65 N.C. L. Rev. at 709 (emphasis added). Thus, an ethical violation may occur without any corresponding due-process/*Brady* violation. *Id.* "Materiality" in the outcome-driven *Brady* sense has little bearing on whether a prosecutor satisfied his obligations under the ethics rules.

In Formal Opinion 09-454, the American Bar Association (ABA) specifically addressed the distinction between a prosecutor's ethical obligation to disclose favorable evidence and his obligations under *Brady*:

> Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligations.

[5] Rule 3.09(d) is based on and substantially the same as former ABA Model Rule 7-103(b).

> In particular, [Model] Rule 3.8(d)[6] is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.

09-454 Formal Opinion at 4. The ABA went on to point out that, unlike the Model Rules that expressly incorporate other legal standards to define the scope of an ethical obligation, the drafters of Model Rule 3.8(d) purposefully chose not to incorporate the *Brady* standard into the rule, thus expressing an intent to create an independent obligation for prosecutors. *See id.* at 4 n. 15.

3. Courts have repeatedly distinguished a prosecutor's ethical obligations from the duties that flow out of *Brady*.

Even before the ABA issued Opinion 09-454, courts had long distinguished a prosecutor's ethical duty to disclose favorable evidence from a post-conviction *Brady* analysis. In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the U.S. Supreme Court noted that *Brady* requires less of the prosecution than do the ABA Standards which call for disclosure of any evidence tending to exculpate or mitigate. "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that is helpful to the defense." *Id.; see also Cone v. Bell,* 556 U.S. 449, 470 n. 15 (2009) (stating that prosecutor's duty to disclose evidence favorable to defense may arise more broadly under a prosecutor's ethical or

[6] Model Rule 3.08(d) is identical to Texas Rule 3.09(d).

statutory obligations).

In *United States v. Acosta*, a federal district court addressed the prosecution's argument that their ethical obligation to disclose evidence was no broader than their obligation under *Brady* and that the rules of professional conduct could not be construed to "supersede well-established Federal constitutional and statutory law." 357 F.Supp.2d 1228, 1232 (D. Nev. 2005). Rejecting this proposition, the Court noted that, "*Brady's* concern whether a constitutional violation occurred after trial is a different question than whether *Brady* is the full extent of the prosecutor's duty to disclose pretrial." *Id.* And because a *Brady* materiality analysis "is only appropriate, and thus applicable, in the context of appellate review," any attempt to impose materiality as a pretrial measure of what must be disclosed is difficult if not impossible. *Id.* at 1233; *see also United States v. Agurs*, 427 U.S. 97, 109 (1976) (there is a "significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge").[7]

In *Brooks v. Tennessee*, the court conducted a *Brady* analysis in which "the

[7] By requiring prosecutors to disclose more than material exculpatory evidence, the disciplinary rules seek to avoid pitfalls that might exist if a prosecutor attempts to determine materiality before making a disclosure. As commentators have highlighted, assessing materiality pre-trial requires prosecutors to "anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place 'the whole case' in a different light." Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1609 (2006).

materiality question [was] a close one." 626 F.3d 878, 892 (6th Cir. 2010). Clearly troubled by the prosecutor's actions, the court stated, "Nevertheless, the *Brady* standard for materiality is less demanding than the ethical obligations imposed on a prosecutor." *Id.* Noting that the prosecutor's actions constituted a "serious professional failing," the court nonetheless ultimately held the evidence was not material under *Brady*. *Id.* at 894.

State courts have likewise interpreted a prosecutor's ethical obligations as broader than the disclosure required under *Brady*:

> To the extent Feland's argument suggests that the proscriptions of Rule 3.8(d) must be read as coextensive with the limits imposed by [*Brady* and its progeny], it ignores the fundamentally differing purposes of the underlying criminal action and the disciplinary proceeding . . . . The primary concern in disciplinary proceedings is to ensure attorneys act in conformity with the ethical standards embodied in the Rules of Professional Conduct, regardless of the surrounding circumstances. While the potential prejudice to the defendant may affect the severity of the sanction imposed, it should not affect the initial determination of whether there has been a violation. A prosecutor's failure to comply with the duties imposed by Rule 3.8(d) should not be excused merely because, based upon the other evidence presented at trial, the result in the case would have been the same.

In re Feland, 820 N.W.2d 672, 678 (N.D. 2012); *see also In re Kline*, 113 A.3d 202 (D.C.App. 2015) (rejecting notion that disciplinary rule should adopt *Brady*'s materiality standard and discussing at length that "constitutional protections in the criminal context serve a fundamentally different purpose than disciplinary proceedings in the ethical context"); *Commonwealth of Virginia v. Tuma*, 285 Va.

629, 639 n.2, 740 S.E.2d 14, 20 n.2 (2013) (noting that a *Brady* analysis is not concerned with the character of the prosecutor because *Brady* is not a canon of prosecutorial ethics but rather a determination of whether a defendant was denied due process at trial); *Lawson v. State*, 242 P.3d 993, 1009 (Wyo. 2010) (stating that although materiality had not been shown under *Brady*, the prosecutor's conduct is the type that raises a potential violation of the ethics rules regarding disclosure); *Lawyer Disciplinary Bd. v. Hatcher*, 199 W.Va 227, 483 S.E.2d 810 (1997) (noting distinction between *Brady* analysis and analysis of whether prosecutor violated ethical duties to disclose exculpatory evidence).

4. Although Rule 3.09(d) and *Brady* may overlap, they impose distinct standards.

All in all, it is clear that the requirements imposed by the plain language of Rule 3.09(d) and *Brady* may, and often do, overlap. However, each serves a different purpose and operates independently of the other.

For example, if a prosecutor knowingly failed to disclose exculpatory evidence that was in the possession of police and likely would have changed the outcome of a criminal trial, the nondisclosure would probably violate Rule 3.09(d) *and* lead to a new trial under *Brady*. But if the same evidence was in the possession of police without the prosecutor's knowledge, only *Brady* would be implicated. Conversely, if the same evidence was in the possession of police with the prosecutor's knowledge but, unbeknownst to the prosecutor, the defense

independently learned about the evidence in time to utilize it at trial, only 3.09(d) would be implicated.

Because of these obvious and undeniable distinctions in purpose and application, Rule 3.09(d) and *Brady* are not coextensive.

B. Rule 3.09(d) sets forth a clear standard that is not overly burdensome.

1. The cases cited by Schultz are inapposite.

To support his argument that the Board should construe Rule 3.09(d) as a codification of the *Brady* standard, Schultz cites cases from three other jurisdictions (Colorado, Ohio, and Wisconsin) which decided that their counterparts to Rule 3.09(d) should not impose a broader obligation than *Brady*. Appellant's Br. 9-11. In Schultz's cases, the courts' decisions reflect their concern over interpreting their ethical rules more broadly than *Brady* either because such a holding would require prosecutors to juggle multiple standards or because it would essentially expand discovery requirements in criminal cases. *In re Reik*, 834 N.W.2d 384 (Wis. 2013); *Disc. Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 127 (Ohio 2010); *In re Attorney C*, 47 P.3d 1167, 1171 (Colo. 2002) (en banc). Schultz urges the Board to adopt a similar holding.

Schultz's position reflects a policy argument that is no longer valid in light of recent amendments to criminal discovery requirements in Texas. Effective January 1, 2014, the Texas legislature amended the Code of Criminal Procedure to

generally require open-file discovery in criminal prosecutions. As a result, Texas law now mandates that prosecutors abide by disclosure requirements that are substantially broader than both *Brady* and Rule 3.09(d). TEX. CODE CRIM. PRO. art. 39.14 (West 2015). A prosecutor who adheres to the high standards imposed by the new discovery requirements is unlikely to run afoul of either *Brady* or Rule 3.09(d).

Because of the recent legislative changes, neither of the concerns raised in Schultz's cases is valid in Texas. The Board cannot prevent the establishment of a standard different from *Brady* by construing Rule 3.09(d) as a codification of *Brady*. The legislature has already acknowledged *Brady*'s shortcomings by enacting very broad disclosure requirements that all Texas prosecutors must follow. Therefore, regardless of Rule 3.09(d), Texas law no longer allows a prosecutor to function according to *Brady*'s relatively low standard.

2. Decisions which limit the scope of Rule 3.09(d) according to the *Brady* doctrine suffer from obvious flaws.

The plain language of Rule 3.09(d) includes no reference to "materiality." A fundamental principle of statutory interpretation is the presumption that the particular language of a statute is chosen intentionally and the omission of terms is likewise intentional. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2010). If the Supreme Court had intended for Rule 3.09(d) to include a

"materiality" requirement, it easily could have expressly incorporated one into the rule.

In addition, the ethical obligations of prosecutors to disclose favorable evidence existed more than 50 years before the *Brady* decision, thus demonstrating an independent ethical basis for disclosure that is not tied to or limited by the *Brady* doctrine. *See* Rosen, 65 N.C. L. Rev. at 709.

Third, and perhaps most important, the purpose of the disciplinary rules – to impose mandatory ethical standards on lawyers – would conflict with a materiality requirement. It would not be ethical for a prosecutor to withhold favorable, exculpatory evidence from the defense based on a determination that reversal is not likely should the evidence later be discovered.[8]

And finally, by its very nature, a *Brady* analysis is a post-conviction analysis. "[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the

[8] Richard Rosen notes that as a consequence of the materiality standard in *Brady*, a prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in the reversal of a conviction. Rosen, 65 N.C. L. Rev. at 731-32. This is true no matter how flagrant or intentional the prosecutor's misconduct. *Id.*

prudent prosecutor will resolve doubtful questions in favor of disclosure." *Agurs*, 427 U.S. at 108.

It would be near impossible to apply a *Brady* analysis in the context of an aborted prosecution (such as the Uriostegui prosecution) because the substance of the evidence that *would have been* relevant to a *potential* conviction would be purely speculative. Consequently, the "materiality" of the undisclosed evidence would be uncertain. Thus, to limit Rule 3.09(d) to *Brady* would drastically limit prosecutors' accountability under the disciplinary rules because their failure to disclose evidence could only be addressed where a conviction occurred.

In sum, whereas the disciplinary rules governing prosecutors are aimed at ensuring ethical conduct by prosecutors, the *Brady* doctrine is aimed at determining, after the fact, whether a defendant received a fair trial. Though the two doctrines are congruent in many respects, they cannot be conflated so as to relieve a prosecutor of his ethical duties when evidence might not meet the standard of "materiality" imposed in a *Brady* analysis or he deems the gamble of a *Brady* violation to be worthwhile.

II. Schultz violated *Brady*.

Even if the Board were to interpret a prosecutor's ethical duty to disclose exculpatory evidence to require only the disclosure of evidence that is "material" under *Brady*, Schultz's argument would still fail because the evidence that Schultz

withheld was "material."

The district court that presided over the criminal trial conducted an evidentiary hearing regarding the state's nondisclosure, the purpose of which was to examine the circumstances surrounding the nondisclosure to determine whether retrial of the defendant was barred by the double jeopardy clause.[9] At that hearing, the state admitted that the nondisclosure violated *Brady* (Pet. Ex. 7 (transcript pg. 8-9)). Schultz also admitted the *Brady* violation (Pet. Ex. 7 (transcript pg. 61-62, 72, 74, 81, 85); RR 154).[10] And at the conclusion of the hearing, Judge Kennon unequivocally declared that the *Brady* violation was obvious and inexcusable:

> I can't fathom how they do not understand this is a *Brady* violation only in retrospect. My jaw dropped to the ground when Mrs. Uriostegui testified the way that she did. I was shocked. And for the state to actually know this and not disclose it, the only good thing I can say from this miserable hearing is at least Forrest Beadle told the truth and was not evasive and was straightforward. I don't particularly like his answers, but at least [he] was honest.
>
> I can't fathom how somebody who's been to law school, let alone practiced law for this period of time, doesn't understand *Brady*,

[9] The district court specifically examined the prosecution's conduct to determine whether it was intentional such that retrial was prohibited under a narrow exception to the general rule that usually allows a retrial. After a defense-requested mistrial, the prosecution cannot retry the defendant if the motion for mistrial was necessitated by the prosecution's intentional failure to disclose exculpatory evidence in order to avoid an acquittal. *See Ex parte Masonheimer*, 220 S.W.3d 494, 507-08 (Tex.Crim.App. 2007) (discussing standard for determining whether jeopardy attached).

[10] At the evidentiary hearing in the proceedings below, Schultz attempted to sidestep his admission that the nondisclosure violated *Brady* (RR 153-56). The inconsistency between his testimony in district court and his testimony before the Evidentiary Panel called his credibility into question. As such, the Evidentiary Panel easily could have rejected his belated effort to change his story.

> doesn't understand the law. And based upon their answers, the way they were answered – the questions were answered, the original conduct in trial, I can only find that they intentionally goaded the defense into having to make a motion for mistrial, that they purposefully withheld *Brady* material.

(Pet. Ex. 7 (transcript pg. 124-25))

The district court's ruling reflects that the evidence at issue was material and Schultz's failure to disclose it violated *Brady*. In other words, the court found a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 682.

The judge's condemnation of Schultz's conduct is not surprising. Mrs. Uriostegui was the state's star witness. The state's case hinged on her identification of the defendant as the attacker. Defense counsel's ability to cross-examine her would have been critical to a successful defense. The information that she was unable to view her attacker's face would have provided potent ammunition for the defense. Thus, the evidence was material and exculpatory on its face.

Schultz's testimony during the evidentiary hearing in this matter implies that somehow the information regarding Mrs. Uriostegui's method of identifying the defendant was not material because she had identified him as her attacker multiple times in police interviews and at a protective-order hearing. But the information

was vitally important precisely because Mrs. Uriostegui had identified the defendant as the attacker multiple times. Her doing so led defense counsel to believe that the identification was unassailable when, in fact, it was inherently suspect because it was both unusual (not based on her visual identification of the attacker himself) and tenuous (based on unreliable criteria).

And although Schultz claims he was certain that Mrs. Uriostegui could positively identify the defendant as the attacker, his admission that he was concerned about another potential suspect undercuts his claim. Schultz impliedly acknowledged that the identification was not iron clad when he admitted that he inquired into the possibility that another man – one who had previously attacked Mrs. Uriostegui – had attacked her again. [11]

Moreover, defense counsel testified that he absolutely would have advised his client not to plead guilty if he had known about the details of Mrs. Uriostegui's identification (RR 58). But because the prosecution had led him to believe that the identification was invulnerable, he advised him to plead guilty.

It is hard to fathom a plausible argument that testimony from the state's only eyewitness indicating that she never actually saw her attacker was not material. As the district court held and the state unequivocally admitted, *Brady* mandated the

[11] Schultz's reliance on other incriminating evidence of the defendant's guilt is equally unhelpful to Schultz's defense in this disciplinary action. "A prosecutor's ethical duty to disclose all exculpatory evidence to the defense does not vary depending upon the strength of the other evidence in the case." *In re Feland*, 820 N.W.2d at 678.

disclosure of the nature of Mrs. Uriostegui's identification of her attacker. Schultz cannot now mince words to get around an obvious *Brady* violation.

III. The record soundly refutes Schultz's arguments regarding the sufficiency of the evidence.

Schultz next argues that "[t]he preponderance of the evidence shows that Mr. Schultz did not hear that Mrs. Uriostegui unequivocally stated she could not see her attacker's face in any meeting that he had with her." Appellant's Br. 22. Contrary to Schultz's assertion, overwhelming evidence supports a finding that, in a meeting with Schultz, Mrs. Uriostegui stated that she could not see her attacker's face.

As an initial matter, it would be irrelevant for the "preponderance of the evidence" to demonstrate a fact contrary to the judgment. The standard of review in this appeal is substantial evidence. TEX. RULES DISCIPLINARY P. R. 2.24. Thus, the Board must affirm a finding if it is supported by anything more than a mere scintilla of evidence. *Tex. Dep't of Pub. Safety v. Cuellar*, 58 S.W.3d 781, 783 (Tex.App.—San Antonio 2001, no pet.). And as Schultz acknowledges in his brief (Appellant's Br. 22), *even if* the evidence preponderated against the judgment, it would not necessarily mean there is a lack of *substantial evidence* to support it.

Not only is there *substantial* evidence to support the judgment, the evidence actually shows the opposite of Schultz's position. At the writ hearing on March 2, 2012, Schultz testified as follows:

> Amador: Outside from other indicators, my question to you is, you knew before February 13, 2012 that Maria had not seen the face of the assailant on the evening on May 7th, 2012 [sic], correct?
>
> Schultz: That's a fair statement by what – the way she identified her attacker, sure.

(Pet. Ex. 7 (transcript pg. 61)).

Moreover, Schultz has never disputed that Mrs. Uriostegui admitted to the prosecution team (including Schultz) that she identified her husband as the attacker based solely on his smell, the appearance of the bottom of his boot, and the stature of his shadow. The obvious and undeniable implication is that she did not see her attacker's face or otherwise identify him by his physical appearance. Equally obvious and undeniable is the potential value of this information to the defense.

In addition to Schultz's own admissions regarding the identification, other witnesses testified that Mrs. Uriostegui told Schultz she did not see her attacker's face. Araceli Botello, the translator who facilitated Schultz's meetings with Mrs. Uriostegui, testified unequivocally in the evidentiary hearing that Mrs. Uriostegui told Schultz she did not see her attacker's face and Araceli translated the statement so that Schultz could understand it (RR 208-12, 221-24). Likewise, Forrest Beadle, Schultz's co-counsel in the Uriostegui prosecution, admitted that during his and Schultz's pretrial meeting with Mrs. Uriostegui on January 11, 2012, Araceli translated Mrs. Uriostegui's statement that she could not identify her

attacker by face (Pet. Ex. 7 (transcript pg. 94)).

In his brief, Schultz claims that three witnesses – Forrest Beadle, Ashley Rittenmeyer, and Veronica Brunner – joined Schultz's testimony regarding his supposed failure to hear Mrs. Uriostegui's statement. Appellant's Br. 23. The record does not bear out Schultz's claims about the three witnesses, only one of whom (Ashley Rittenmeyer) actually testified at the evidentiary hearing. Her testimony was inconclusive:

> Q: Anytime during that meeting, did the complainant, Ms. Uriostegui, say, I didn't see the attacker's face?
>
> A: Not that I remember.
>
> Q: If she'd said that, would you have noticed, do you think?
>
> A: I would think so.

(RR 267). Similarly, neither Ms. Brunner nor Mr. Beadle supported Schultz's claim.[12]

In the final analysis, abundant evidence supports the judgment. The record soundly refutes Schultz's efforts to show otherwise.

[12] Ms. Brunner's only statements of record were made at the writ hearing, during which she testified that she was not present at the January 11th meeting when Mrs. Uriostegui discussed her identification of the attacker (Pet. Ex. 7 (pg. 39)). And as discussed above, Mr. Beadle's testimony at the writ hearing contradicted Schultz's claim that Mrs. Uriostegui never said to the prosecution that she didn't see her attacker's face (Pet. Ex. 7 (transcript pg. 94)).

IV. The Evidentiary Panel properly construed Rule 3.04(a).

In his next issue, Schultz argues that the evidence is insufficient to show that he possessed the requisite intent for a violation of Rule 3.04(a). This issue focuses on the proper construction of the rule.

Because the disciplinary rules have the same force and effect as statutes, principles of statutory construction apply. *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008). The primary rule of statutory construction is that a court must try to interpret a statute in a way that gives effect to the statute's intent, and the statute's intent should be determined first and foremost according to the ordinary meaning of the statute's language. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008); *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). "If the statutory text is unambiguous, a court must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results." *Tex. Dep't of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004) (citation omitted).

Rule 3.04(a), in pertinent part, states that "[a] lawyer shall not unlawfully obstruct a party's access to evidence." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.04(a). The language is straightforward and unambiguous. On its face, it prohibited Schultz from impeding the defense's ability to obtain information that could be used in court to ascertain the truth of the state's

accusation that the defendant was the attacker.[13] The defense clearly could have used information regarding the nature of Mrs. Uriostegui's identification to cross-examine her and test the reliability of the identification.

Moreover, Schultz misled the defense by responding to their discovery requests as if he was providing all relevant unprivileged information. By ostensibly providing full discovery, he perpetuated the defense's mistaken belief that he had turned over any and all exculpatory evidence. *See State v. Doyle*, 2010 UT App 351, 245 P.3d 206, 211, *cert. denied*, 251 P.3d 245 (Utah 2011) (acknowledging prosecutor's "serious misconduct," including his violation of Utah counterpart to Rule 3.04(a) by responding to defense counsel's discovery requests as if he had provided all requested evidence, thereby misleading the defense).

Two provisions of law – Rule 3.09(d) and the *Brady* standard – imposed a legal duty for Schultz to disclose the evidence at issue. Schultz's failure to abide by these legal duties made his conduct "unlawful."[14] Importantly, the prosecution's duty to disclose evidence under *Brady* and Rule 3.09(d) provided the only practical means for the defense to obtain information regarding the nature of

[13] Merriam-Webster defines "obstruct" as "to hinder from passage, action, or operation: impede." *Merriam-Webster.com*. Merriam-Webster, 2015. Web. 16 June 2015. It defines "access" as "freedom or ability to obtain or make use of something." *Id.* And it defines "evidence" as "something legally submitted to a tribunal to ascertain the truth of a matter." *Id.*

[14] Schultz concedes that a violation of *Brady's* disclosure requirements would constitute the type of "unlawful" conduct prohibited by the Rule 3.04(a). Appellant's Br. 24.

Mrs. Uriostegui's identification of the attacker. Therefore, disclosure by the prosecution was the only available route to this critical information.

Schultz argues that the Board should graft a "knowing" standard onto Rule 3.04(a). Appellant's Br. 24-25. Schultz's argument is not persuasive because the rule does not include any reference to a knowing standard. If the Supreme Court had intended for the rule to incorporate a knowing standard, it easily could have used the word "knowingly" in the rule (as it did in Rule 3.04(d)). Instead, the language used by the Court demonstrates that to prove a violation of the rule, the Commission need only prove that an attorney's obstruction of another party's access to evidence was "unlawful." *See, e.g.*, *People v. Head*, 332 P.3d 117, 131 (O.P.D.J. Colo. 2013) (discussing Colorado Rule 3.4(a), the relevant portion of which is identical to Texas Rule 3.04(a), and stating that "[t]his rule carries with it no culpable mental state"); *State of Oklahoma ex rel. Okla. Bar Ass'n v. Miller*, 2013 OK 49, 309 P.3d 108, 120 (finding that although the respondent attorney's conduct "may not have been willful or active concealment, his actions did result in violations of obstructing access to evidence, timely disclosure of evidence, and conduct which was prejudicial to the administration of justice").

In any event, Schultz's conduct was knowing, not merely negligent.[15] The

[15] A "knowing" standard in the disciplinary rules "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." TEX. DISCIPLINARY RULES PROF'L CONDUCT TERMINOLOGY.

record demonstrates that he was aware that Mrs. Uriostegui did not see her attacker's face well before the defense entered a plea and the punishment trial took place. He was also aware that her prior testimony, as well as multiple police reports, failed to reveal the limited nature of her identification. And finally, he testified at the writ hearing that *Brady* required the disclosure (Pet. Ex. 7 (transcript pg. 61-62)).

Nevertheless, Schultz did not disclose the information, which, as the defendant's lawyer unambiguously testified, was critical to the defense (RR 57-58). His failure left the defense with the mistaken belief that the victim's identification of the defendant was unassailable. If Schultz did not know that he was failing to comply with his obligations under both *Brady* and Rule 3.09(d), it was only because he deliberately closed his eyes to facts that he had a duty to see. And any lack of awareness of the victim's inability to view her attacker's face resulted from purposeful ignorance. Under the circumstances, he cannot be absolved of his failure to abide by the ethical obligations imposed by Rule 3.04(a).

V. Schultz cannot show that Rule 3.04(a) is void for vagueness.

Schultz must bear a heavy burden to succeed in his argument that Rule 3.04(a) is void for vagueness. He must show that the rule's language is so vague that it "exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct," requires "men of common

intelligence [to] guess at what is required," or gives rise to "a substantial risk of miscalculation by those whose acts are subject to regulation." *Tex. Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970). And as Schultz acknowledges in his brief, because the rule applies only to lawyers, it must be analyzed according to whether an ordinary lawyer could comprehend its meaning. Appellant's Br. 28.

Rule 3.04(a) is not vague. As discussed above, its plain language prohibits a lawyer from acting in a manner that (1) is inconsistent with a requirement of law and (2) impedes his adversary's ability to obtain or use information that could be presented in court to test the truth of his position. And in addition to the plain language of the rule, the comments provide further information to explain its application.

At no point in the proceedings below did Schultz claim that Rule 3.04(a) is vague or that he did not understand its application. Because he failed to raise it, there is nothing in the record to support his belated complaint regarding vagueness. And he cannot raise it for the first time on appeal. *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 681 (Tex.App.—San Antonio 1998, no pet.). Even a constitutional claim must be raised in the trial court before it may be considered on appeal. *Id.*

VI. The disciplinary system plays an especially important role in preventing prosecutorial misconduct, and the judgment in this case appropriately reflects that role.

A prosecutor's ethical duty to disclose evidence is separate and distinct from his other legal obligations, including those imposed by *Brady* and its progeny. As the American Bar Association has explained, a prosecutor's ethical duty is "more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome." ABA Formal Opinion 09-454, at 3 (July 9, 2009).

The disciplinary system necessarily plays a critical role in addressing prosecutorial shortcomings. In *Imbler v. Pachtman*, the United States Supreme Court afforded prosecutors absolute immunity from civil liability for conduct within the scope of their duties in initiating and pursuing criminal prosecutions. 424 U.S. 409 (1976). The Court recognized that its decision might "leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Id*. at 427. But the Court reasoned that "the immunity of prosecutors from liability . . . does not leave the public powerless to deter misconduct or punish that which occurs" because "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an

association of his peers." *Id.* at 428-429. More recently in *Connick v. Thompson*, the Supreme Court again relied on the assumption that prosecutors are deterred from committing misconduct due to their susceptibility to "professional discipline, including sanctions, suspension, and disbarment." 563 U.S.---, 131 S.Ct. 1350, 1362-63 (2011).

Texas decisions likewise recognize the magnitude of a prosecutor's ethical responsibilities:

> 'It shall be the primary duty of prosecutors . . . not to convict, but to see that justice is done.' This overriding duty falls upon the prosecutor in his capacity as the State's representative in criminal matters. As trustee of the State's interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and the jury may properly render justice.

Duggan v. State, 778 S.W.2d 465, 468 (Tex.Crim.App. 1989); *see also Rodriguez v. State*, 644 S.W.2d 200, 209 (Tex.Crim.App. 1982) (noting that prosecutorial misconduct disserves "the proper ends of justice" and diminishes the integrity of the legal system).

The importance of the standards governing a prosecutor's ethical obligations demands that any tribunal reviewing the application of those standards recognize their pivotal role in the legal system. Misconduct by a prosecutor can lead to dire consequences, such as wrongful imprisonment or, as here, the inability to hold a

guilty party accountable for a serious crime.[16]

Prosecutorial misconduct may warrant severe disciplinary sanctions. Or, as here, the circumstances of the misconduct may support the imposition of lesser sanctions. In either case, the disciplinary rules should be applied as the Evidentiary Panel applied them here – based on their plain language without incorporating unwritten and unintended standards that will render them ineffective in carrying out their vital role. As Schultz acknowledges in his brief, the Board's decision on this issue of first impression is important "because it will fundamentally affect not only this matter's outcome, but will also affect prosecutor's daily actions and interactions with defense attorneys."

[16] An alarming number of exonerations in the United States in recent years resulted from official misconduct. Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations* (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf, at 66. "The most common serious form of official misconduct is concealing exculpatory evidence from the defendant and the court." *Id.* at 67.

CONCLUSION AND PRAYER

For these reasons, the Commission prays that the Board affirm the judgment of the District 14-3 Evidentiary Panel of the State Bar of Texas.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Board of Disciplinary Appeals Internal Procedural Rules, the foregoing brief on the merits contains approximately 7,576 words (total for all sections of brief that are required to be counted), which is less than the total words permitted by the Board's Internal Procedural Rules. Counsel relies on the word count of the computer program used to prepare this petition.

/s/ Cynthia Canfield Hamilton
CYNTHIA CANFIELD HAMILTON

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing brief of Appellee, the Commission for Lawyer Discipline has been served on Appellant by and through his attorneys of record Mr. Robert R. Smith and Mr. Ritch Roberts III, by email to rsmith@fhsulaw.com and rroberts@fhsulaw.com on the 25th day of June 2015.

/s/ Cynthia Canfield Hamilton
CYNTHIA CANFIELD HAMILTON

NO. 55649

Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas

WILLIAM ALLEN SCHULTZ,
APPELLANT

V.

COMMISSION FOR LAWYER DISCIPLINE,
APPELLEE

On Appeal from the Evidentiary Panel
For the State Bar of Texas District 14-3
No. D0121247202

APPENDIX TO BRIEF OF APPELLEE COMMISSION FOR LAWYER DISCIPLINE

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TO THE HONORABLE BOARD OF DISCIPLINARY APPEALS:

The Commission for Lawyer Discipline attaches the following document in support of the foregoing brief:

APPENDIX 1: Judgment of Probated Suspension (CR 235-38)

Appendix 1

BEFORE THE DISTRICT 14 GRIEVANCE COMMITTEE
EVIDENTIARY PANEL 14-3
STATE BAR OF TEXAS

COMMISSION FOR LAWYER DISCIPLINE, Petitioner	§	
V.	§	D0121247202
WILLIAM ALLEN SCHULTZ, Respondent	§	

JUDGMENT OF PROBATED SUSPENSION

Parties and Appearance

On October 15, 2014, came to be heard the above styled and numbered cause. Petitioner, Commission for Lawyer Discipline, appeared by and through its attorney of record and announced ready. Respondent, WILLIAM ALLEN SCHULTZ, Texas Bar Number 00794609, appeared in person and through attorney of record and announced ready.

Jurisdiction and Venue

The Evidentiary Panel 14-3 having been duly appointed to hear this complaint by the chair of the Grievance Committee for State Bar of Texas District 14, finds that it has jurisdiction over the parties and the subject matter of this action and that venue is proper.

Professional Misconduct

The Evidentiary Panel, having considered all of the pleadings, evidence, stipulations, and argument, finds Respondent has committed Professional Misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.

Findings of Fact

The Evidentiary Panel, having considered the pleadings, evidence and argument of counsel, makes the following findings of fact and conclusions of law:

1. Respondent is an attorney licensed to practice law in Texas and is a member of the State Bar of Texas.
2. Respondent maintains his principal place of practice in Denton County, Texas.
3. Respondent, as lead prosecutor in an aggravated assault matter, unlawfully obstructed another party's access to evidence.
4. Respondent, as lead prosecutor in an aggravated assault matter, failed to timely disclose to the defense all evidence or information known to him that tended to negate the guilt of the accused or mitigated the offense.

Conclusions of Law

The Evidentiary Panel concludes that, based on foregoing findings of fact, the following Texas Disciplinary Rules of Professional Conduct have been violated: 3.04(a) and 3.09(d).

Sanction

The Evidentiary Panel, having found that Respondent has committed professional misconduct, heard and considered additional evidence regarding the appropriate sanction to be imposed against Respondent. After hearing all evidence and argument and after having considered the factors in Rule 2.18 of the Texas Rules of Disciplinary Procedure, the Evidentiary Panel finds that the proper discipline of the Respondent for each act of Professional Misconduct is a Probated Suspension.

Accordingly, it is ORDERED, ADJUDGED and DECREED that Respondent be suspended from the practice of law for a period of six months, with the suspension being fully probated pursuant to the terms stated below. The period of probated suspension shall begin on October 15, 2014, and shall end on April 14, 2015.

Terms of Probation

It is further ORDERED that during all periods of suspension, Respondent shall be under the following terms and conditions:

1. Respondent shall not violate any term of this judgment.
2. Respondent shall not engage in professional misconduct as defined by Rule 1.06(W) of the Texas Rules of Disciplinary Procedure.
3. Respondent shall not violate any state or federal criminal statutes.
4. Respondent shall keep the State Bar of Texas Membership Department notified of current mailing, residence and business addresses and telephone numbers.
5. Respondent shall comply with Minimum Continuing Legal Education requirements.
6. Respondent shall comply with Interest on Lawyers Trust Account (IOLTA) requirements.
7. Respondent shall promptly respond to any request for information from the Chief Disciplinary Counsel's Office in connection with any investigation of any allegations of professional misconduct.
8. Respondent shall make contact with the Chief Disciplinary Counsel's Offices' Compliance Monitor at 877-953-5535, ext. 1334 and Special Programs Coordinator at 877-953-5535, ext. 1323, not later than seven (7) days after receipt of a copy of this judgment to coordinate Respondent's compliance.

Probation Revocation

Upon information that Respondent has violated a term of this judgment, the Chief Disciplinary Counsel may, in addition to all other remedies available, file a motion to revoke probation pursuant to Rule 2.23 of the Texas Rules of Disciplinary Procedure with the Board of Disciplinary Appeals ("BODA") and serve a copy of the motion on Respondent pursuant to Tex.R.Civ.P. 21a.

BODA shall conduct an evidentiary hearing. At the hearing, BODA shall determine by a preponderance of the evidence whether Respondent has violated any term of this Judgment. If BODA finds grounds for revocation, BODA shall enter an order revoking probation and placing Respondent on active suspension from the date of such revocation order. Respondent shall not be given credit for any term of probation served prior to

revocation.

It is further ORDERED that any conduct on the part of Respondent which serves as the basis for a motion to revoke probation may also be brought as independent grounds for discipline as allowed under the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure.

Publication

This suspension shall be made a matter of record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.

Other Relief

All requested relief not expressly granted herein is expressly DENIED.

SIGNED this 24th day of October, 2014.

EVIDENTIARY PANEL 14-3
DISTRICT NO. 14
STATE BAR OF TEXAS

Deborah Ann Kernan
District 14-3 Presiding Member