



FILED

Feb 21 2024

THE BOARD OF DISCIPLINARY APPEALS  
Appointed by the Supreme Court of Texas

**BEFORE THE BOARD OF DISCIPLINARY APPEALS  
APPOINTED BY  
THE SUPREME COURT OF TEXAS**

**IN THE MATTER OF** §  
**JAMES MORRIS BALAGIA** § **CAUSE NO. 65867**  
**STATE BAR CARD NO. 00783589** §

**MOTION FOR ENTRY OF JUDGMENT OF DISBARMENT**

TO THE HONORABLE BOARD:

COMES NOW, Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), and files this its Motion for Entry of Judgment of Disbarment, showing as follows:

1. On February 11, 2022, Petitioner filed its First Amended Petition for Compulsory Discipline against Respondent, James Morris Balagia, (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's following conviction:

On or about May 4, 2021, a Judgment in a Criminal Case was entered in Cause No. 4:16-CR-00176-ALM-KPJ(3), styled *United States of America v. James Morris Balagia*, in the United States District Court for the Eastern District of Texas, Sherman Division, wherein Respondent was adjudicated guilty of the following offenses:

Count 1, Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. § 1956(h) and (a);

Count 2, Obstruction of Justice and Aiding and Abetting, in violation of 18 U.S.C. § 1503 and § 1503(b)(3);

Count 3, Conspire, Endeavor, and Attempt To Violate The Kingpin Act, in violation of 21 U.S.C. § 1904(c)(2) and § 1906;

Count 4, Conspiracy To Commit Wire Fraud, in violation of 18 U.S.C. § 1349 and § 1343;

Count 5, Conspiracy to Obstruct Justice, in violation of 18 U.S.C. § 371.

Respondent was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 188 months as to counts 1, 3, and 4; 120 months as to count 2; 60 months as to count 5; with all terms running concurrently. Upon release from imprisonment, Respondent will be on supervised release for a term of three (3) years on each of Counts 1 through 5, all such terms to run concurrently. Respondent was further ordered to pay penalties of an assessment in the amount of \$500.00.

2. On May 6, 2022, an Interlocutory Order of Suspension was entered by the Board of Disciplinary Appeals which provides in pertinent part, as follows:

The Board retains jurisdiction to enter a final judgment in this matter when the criminal appeal is final. TEX. R. DISCIPLINARY P.R. 8.04-.05

3. Following the appeal by Respondent of his criminal conviction in Cause No. 4:16-CR-00176-ALM-KPJ(3), an Opinion dated February 6, 2023, (Exhibit 1) and a Judgment issued as Mandate on or about February 28, 2023, (Exhibit 2), were issued by the United States Court of Appeals for the Fifth Circuit, in Cause No. No. 21-40366, *United States of America, Plaintiff-Appellee v. James Morris Balagia, Defendant-Appellant*, which affirmed the judgment of the District Court.

4. A true and correct copy of the Opinion and Judgment issued as Mandate by the United States District Court for the Fifth Circuit, are attached hereto as Exhibits 1 and 2, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1 and 2 at the time of hearing of this cause.

5. Petitioner represents to the Board that the Judgment entered against Respondent, James Morris Balagia, has now become final. Petitioner seeks the entry of a judgment of disbarment. Attached hereto is a true and correct copy of the form of the proposed judgment of which Petitioner seeks the entry herein.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Petitioner prays, that the Board hear this case on submission without the necessity of a hearing and, upon notice to Respondent, that the Board enter its order disbarring Respondent and for such other and further relief to which Petitioner may be entitled.

Respectfully submitted,

**Seana Willing**  
Chief Disciplinary Counsel

**Amanda M. Kates**  
Assistant Disciplinary Counsel  
Office of the Chief Disciplinary Counsel  
State Bar of Texas  
P.O. Box 12487  
Austin, Texas 78711  
Telephone: 512.427.1350  
Telecopier: 512.427.4253  
Email: amanda.kates@texasbar.com



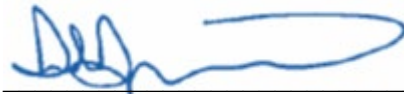
---

Amanda M. Kates  
Bar Card No. 24075987

ATTORNEYS FOR PETITIONER

**NOTICE OF HEARING**

NOTICE IS HEREBY GIVEN that a trial on the merits of the Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day, will be held in the courtroom of the Supreme Court of Texas, Tom C. Clark Building, 14th and Colorado Streets, Austin, Texas, at **9:00 a.m. on the 26th day of April, 2024**. The hearing location and format (in-person vs virtual) are subject to change based on conditions related to the COVID-19 pandemic. The Board of Disciplinary Appeals will notify the parties of any changes to the hearing location or format.



---

Amanda M. Kates

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing instrument has been sent for personal service on this the 21st, day of February, as follows:

James Morris Balagia  
Inmate Register No. 26998-078  
Beaumont Low FCI  
5560 Knauth Road  
Beaumont, TX 77705



---

Amanda M. Kates

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

February 6, 2023

Lyle W. Cayce  
Clerk

---

No. 21-40366

---

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JAMES MORRIS BALAGIA,

*Defendant—Appellant.*

---

Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 4:16-CR-176

---

Before ELROD, HAYNES, and WILLETT, *Circuit Judges.*

PER CURIAM:\*

A jury found James Morris Balagia guilty of five crimes related to his legal representation of various drug traffickers. Through appointed counsel on appeal, Balagia challenged: (1) the sufficiency of the evidence for four convictions; (2) the propriety of a jury instruction on willful ignorance; and (3) the length of his sentence. Balagia then moved to terminate his counsel, and his counsel withdrew. Proceeding *pro se*, he raised thirteen issues on

---

\* This opinion is not designated for publication. See 5TH CIR. R. 47.5.



No. 21-40366

appeal. For the reasons set forth below, we AFFIRM Balagia's convictions and accompanying sentences.<sup>1</sup>

I

Balagia worked as a police officer for ten years before obtaining his law degree and opening a criminal defense practice. Balagia promoted himself as the "DWI Dude" and mostly represented clients charged with drunk driving or marijuana possession. However, he also handled some federal cases involving drugs, money laundering, or both. The facts relevant for this appeal arise out of Balagia's involvement in two separate matters: (A) the McKeown case and (B) the Colombian drug-trafficking cases.

A

Jill McKeown was arrested for traveling interstate to buy large quantities of marijuana. The Drug Enforcement Agency seized \$50,000 in cash that she planned on using for the transaction. McKeown then retained Balagia as her criminal defense attorney. Balagia told McKeown that "he knew judges," "he knew prosecutors," and "it wasn't a problem" to get her charges dismissed. McKeown was surprised to hear a lawyer make such a claim.

Balagia's insinuations about his supposed ability to get McKeown's charges dropped ended up being unneeded, as she was placed on a pretrial diversion program. But she also wanted to seek return of the \$50,000 in seized funds. Balagia helped her prepare an affidavit wherein she stated that

---

<sup>1</sup> The factual summaries below are written with all reasonable inferences fairly raised by the evidence drawn in the light most favorable to the verdict. *United States v. Frye*, 489 F.3d 201, 207 (5th Cir. 2007). For this reason, phrases such as "Person testified that [assertion]" or "the evidence suggests that [assertion]" are omitted from the factual recitation.

No. 21-40366

she was merely an “innocent owner” of the money and that her possession of it was “not in violation of the law.” Balagia would later admit to the State Bar of Texas that he had reason to know these sworn statements were false.

Based on the statements in McKeown’s affidavit, the DEA told Balagia it would return the funds. But instead of providing the DEA with McKeown’s banking information, he supplied his own law office’s account numbers. He claimed this was to recoup unpaid legal fees. That was a lie. McKeown had already paid all fees owed. And rather than sharing the news of the DEA’s agreement with McKeown, Balagia sent her a letter through an intermediary asking, “[I]f we could at least get you back 9,000 or \$10,000, would you be happy with that?” Not knowing she was being swindled, McKeown agreed. Balagia then received the \$50,000 by wire and subsequently transferred \$9,500 to McKeown’s intermediary.<sup>2</sup>

## B

Balagia’s indictment also stems from activity he engaged in related to representing certain Colombian drug traffickers in a drug-importation case. In sum, Balagia accepted drug money from cocaine producers and distributors on the pretense that he and his team would bribe American law-enforcement and/or judicial officials to get their criminal charges dismissed.<sup>3</sup>

The three primary traffickers involved are Ordonez, Segundo, and Aldemar.<sup>4</sup> Segundo and Aldemar are brothers who controlled a Colombian

---

<sup>2</sup> He later returned another \$7,000 or \$7,500, but only “after the State Bar intervened.”

<sup>3</sup>The complete details are lengthy and complex, spanning over twenty pages of the United States’ principal brief. The factual recitation here has been edited for clarity and brevity.

<sup>4</sup> The traffickers’ full names are Hermes Alirio Casanova Ordonez, also known as “Megatron”; Segundo Villota-Segura; and Aldemar Villota-Segura.

No. 21-40366

cocaine lab that could produce 2,000 kilograms of cocaine each week (2,000 kilograms could be worth up to tens of millions of dollars). Before the prosecution began, Segundo and Aldemar's cocaine lab was, by some estimates, the largest in the world. Ordonez also produced cocaine in Colombia. All three traffickers were high-priority targets of United States law enforcement.

Those three men were among a group of other individuals who were indicted by a grand jury in Texas for offenses related to their importing of cocaine into the United States. Following that indictment, the Treasury Department's Office of Foreign Assets Control designated Ordonez, Segundo, and Aldemar as significant foreign narcotics traffickers under the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. § 1901 *et seq.* For an attorney in the United States to accept payments from an OFAC-designated person, the lawyer must get a case-specific license.<sup>5</sup> *See* 21 U.S.C. § 1904(c) ("Prohibited transactions").

1

The relevant facts begin with Balagia's representation of Ordonez and Segundo. A Colombian attorney introduced Ordonez and Segundo to Balagia. In agreeing to represent Ordonez and Segundo, Balagia promised to bribe federal officials to drop the charges. Balagia charged Ordonez \$700,000 for this, and he charged Segundo \$900,000. Balagia and the Colombian attorney agreed to split the fees between themselves and several others that were assisting.

---

<sup>5</sup> However, such a license is not difficult to procure. A lawyer can apply through OFAC's website, and OFAC almost always grants the request.



No. 21-40366

Using structured deposits of amounts all below \$10,000 (and spread across various states), Balagia began depositing funds received from Ordonez and Segundo. By the time he had deposited at least \$172,000, Balagia was explicitly informed by an Assistant United States Attorney that Ordonez and Segundo had been identified by OFAC and that Balagia would need a license to accept payments from them. Balagia ignored this information and continued his representation without a license. Sometime after that warning, Balagia and his assistants picked up cash in parking lots in Houston from carriers that were moving the money in paper bags. The paper-bag cash deliveries led to Balagia making bank-account deposits in the amounts of \$78,000; \$84,000; and \$42,300.

At this point, Ordonez was arrested in Colombia by Colombian law enforcement. Balagia met with him and assured Ordonez not to worry because Balagia could still get the U.S. charges dropped. Instead, Balagia tricked Ordonez—a Spanish-language speaker—into signing a plea agreement written in English. Balagia then met with the same AUSA who provided him with the OFAC warning and presented the AUSA with the agreement. This struck the AUSA as “really odd” because Ordonez had not been extradited, which is when plea discussions usually begin.

At the same meeting, Balagia told the AUSA that Segundo wanted to cooperate too. The AUSA noted that timely cooperation would be helpful. However, Balagia’s promised cooperation never materialized, as Balagia always canceled the scheduled meetings shortly before they were to occur.

After months of failing to cooperate, Segundo was also arrested in Colombia. Balagia and his assistants went to Colombia to meet with him. Segundo expressed concerns that Balagia’s promises to bribe federal officials were not showing any results. One of Balagia’s associates said that thanks to

No. 21-40366

the money Segundo had provided, he “was able to pay four people . . . in Washington, D.C.” This was a lie. No bribery payments had been made.

However, Balagia continued his charade of carrying through his bribery promises. At the meeting, Balagia explained how the payments were allegedly going on. Balagia’s non-lawyer associate was the “meat in the sandwich” between Balagia and Segundo. Balagia told Segundo that using a non-lawyer associate as an intermediary would allow him to “stay very, very clean” as the payments were occurring. Balagia said, “it gives me the ability to close my ears sometimes, if I need to, and it protects all of us.” Balagia then left the room so that his non-lawyer associate could talk with Segundo and Balagia could “pretend to be deaf with some things,” like bribery proposals.

At that same meeting, Balagia or his associates told Segundo that he should provide 30 or so names to the DEA. However, the names were not to be real leads on identifying who was leading the cocaine operations in Colombia. They were to be people “already under investigation” or “picking out names just to pick them” so that Segundo could give the appearance of cooperating while gumming up the DEA’s investigation.

Ordonez was then extradited to the United States. Balagia hounded Ordonez for payment, saying that “the prosecutor has to see a fat wallet. If not, I can’t work it.” Ordonez seemed to realize that Balagia was not going to be able to get the charges removed, so he pleaded guilty. Balagia continued to say that he needed more money to help Ordonez get a lighter sentence. He told Ordonez, “We have a saying up here. Money talks. You know the rest of it?” Balagia also said that he could not obtain results for Ordonez until he was paid in full.

No. 21-40366

2

The second part of the relevant facts relates to Balagia's attempt to represent Aldemar, Segundo's brother. Following all the above events with Ordonez and Segundo, Aldemar made his initial appearance in the importation case. At that point, Balagia sought to recruit him as a client. Aldemar knew who Balagia was because Segundo had relayed the way that representation was going. Aldemar was not pleased with Balagia's treatment of his brother. Aldemar told the government that he would pretend to be interested in Balagia's services so he could record conversations with Balagia and his team.

Aldemar and an undercover agent (posing as an accountant for the cocaine operation) then met with Balagia and two of Balagia's associates. Aldemar recorded the conversations that occurred therein. The undercover agent asked Balagia if it was okay that all money Aldemar would use to pay him would be drug money. Balagia replied, "I have paperwork I have to fill out. That's on me." The undercover agent also stated that Balagia was "able to pay some people in Washington" on behalf of Segundo, which Balagia did not deny. And one of Balagia's associates said that he "might have been generous with some things, but — maybe an extra scoop of ice cream on a sundae."<sup>6</sup>

Following that meeting, the undercover agent followed Balagia and his associates outside and said, "[Y]ou understand what [Aldemar] was looking for, right? . . . [H]is understanding was basically like this money was given to the right people to get him off the charge. And that's what he was looking for." Balagia replied by saying it was nice to meet Aldemar and his accountant. Balagia then left, but one of Balagia's associates stayed to

---

<sup>6</sup> Filler words have been removed from this quotation.

No. 21-40366

continue talking to the undercover officer. In that further discussion, Balagia's associate told the undercover officer, "I don't have a problem with one word that you said."

Balagia agreed to represent Aldemar for \$1.2 million. The undercover agent who had been in the initial meeting agreed to meet one of Balagia's associates and make a \$300,000 down payment. The undercover agent gave Balagia's associate a bag with \$300,000 in cash. The associate took the bag, walked away, and was arrested. In his possession was a signed affidavit from Balagia wherein Balagia averred that Aldemar had hired him and that Balagia's firm employed the associate who had just been arrested for taking payment from the undercover agent.

## II

Based on the actions described above, a jury convicted Balagia of five crimes: Money-laundering conspiracy, 18 U.S.C. § 1956(h) (Count One); obstruction of justice, 18 U.S.C. § 1503 (Count Two); willful violation of the Kingpin Act, 21 U.S.C. §§ 1904(c) and 1906(a) (Count Three); wire-fraud conspiracy, 18 U.S.C. § 1349 (Count Four); and conspiracy to obstruct justice, 18 U.S.C. § 371 (Count Five). The district court sentenced Balagia to 188 months in prison, a special assessment of \$500, and supervised release for a term of 3 years.

In Balagia's first two briefs on appeal, which were submitted by appointed counsel, Balagia raised the following issues:

1. Whether the evidence was sufficient to sustain his convictions for Counts 2, 3, 4, and 5.
2. Whether the district court reversibly erred in giving a willful blindness instruction.
3. Whether the district court imposed an unreasonable sentence.

No. 21-40366

We then granted Balagia's motion to proceed *pro se*. He filed a second supplemental brief that raised 13 claims for relief, 11 of which bore no relation to the claims presented by his attorneys. Those issues, consolidated where possible, are as follows:

1. Whether the district court violated Balagia's qualified right to counsel of choice. (Issues 1 and 2).
2. Whether the district court abused its discretion in denying trial counsel's motions to continue. (Issues 3 and 5).
3. Whether the district court abused its discretion in declining to strike Agent Rennie's testimony after he said that he was not an expert. (Issue 4).
4. Whether the district court limited the impeachment of Anthony Felsing and, if so, whether it plainly erred. (Issue 6).
5. Whether the district court abused its discretion in its handling of alleged "jury misconduct." (Issues 7 and 8).
6. Whether the district court correctly calculated Balagia's advisory Guidelines range. (Issues 11 and 12).
7. Whether Balagia's prison term, which was nearly four years below the advisory range, was unreasonably severe. (Issue 13).
8. Whether Balagia shows any error in the forfeiture of his house and office. (Issues 9 and 10).

A

We first address the issues raised by Balagia through counsel.

1

Balagia argues that the record lacks sufficient evidence to sustain his convictions for obstructing justice, willfully violating the Kingpin Act, wire-

No. 21-40366

fraud conspiracy, and conspiracy to obstruct justice (Counts 2, 3, 4, and 5). Because Balagia fails to meet the high bar of showing that *no* rational jury could have found guilt beyond a reasonable doubt, we affirm. *United States v. Beacham*, 774 F.3d 267, 272 (5th Cir. 2014).

a

The convictions for obstructing justice and conspiring to obstruct justice are supported by similar evidence. On the substantive Count, the government was required to prove: “(1) that a judicial proceeding was pending; (2) that [Balagia] had knowledge of the judicial proceeding; and (3) that [Balagia] acted corruptly with the specific intent to influence, obstruct, or impede that judicial proceeding in its due administration of justice.” *United States v. Richardson*, 676 F.3d 491, 502 (5th Cir. 2012); 18 U.S.C. § 1503(a). The associated conspiracy claim requires a showing that Balagia joined an agreement between two or more people to pursue that unlawful objective and that Balagia possessed “the same degree of criminal intent as is necessary for proof of the underlying substantive offense.” *United States v. Fisch*, 851 F.3d 402, 407 (5th Cir. 2017) (quoting *United States v. Peterson*, 244 F.3d 385, 389 (5th Cir. 2001)).

The evidence recounted above shows that a reasonable jury could have found all those elements to have been proved beyond a reasonable doubt. Balagia knew that the United States had indicted 17 defendants, including Ordonez, Segundo, and Aldemar. Balagia’s promises to his clients to bribe federal officials ensured that those clients would not cooperate with the governmental investigation (as they previously had done) because, as the jury could infer, the clients would believe they were immune from normal prosecution and had no reason to cooperate. Not only did Balagia act corruptly by promising to bribe federal officials and defrauding his clients, he also devised a plan to affirmatively mislead the government by having

No. 21-40366

Segundo provide red-herring names to the DEA. All along the way, Balagia made agreements with his clients, his associates, and the Colombian attorney to further these unlawful objectives.

b

A reasonable jury could have delivered a guilty verdict for conspiracy to commit wire fraud. To prove that offense, the government had to show that “(1) two or more persons made an agreement to commit wire fraud; (2) the defendant knew the unlawful purpose of the agreement; and (3) the defendant joined in the agreement willfully, *i.e.*, with specific intent.” *United States v. Kuhrt*, 788 F.3d 403, 414 (5th Cir. 2015). Here, Balagia conspired with at least one or more of his associates and the Colombian attorney to defraud all four of McKeown, Ordonez, Segundo, and Aldemar.

Balagia’s handling of the partial return of McKeown’s seized funds is, itself, enough to sustain a conviction on this Count. In that matter, Balagia and his associate received all \$50,000 of McKeown’s funds from the DEA but misrepresented that information to McKeown and her representatives so that Balagia could fraudulently retain most of that money.

Balagia’s involvement in the Colombian drug trafficking case also gave rise to enough evidence to sustain his wire fraud conviction. The basis of that representation, for all three Colombian drug traffickers, was that Balagia would work with others to bribe federal officials and get the charges dropped. The lawyers and their teams would transmit messages over phone and receive money payments to be electronically deposited or transferred into their bank accounts. This is supported by audio recording, multiple witnesses’ testimony, and Balagia’s own admission that he was present for discussions with the defendants about paying people off (though Balagia claimed to have been “shocked” to hear that brought up during those meetings). Because the evidence shows that Balagia did not actually bribe

No. 21-40366

officials (which would have given rise to other forms of criminal liability), the evidence supports a conviction for conspiracy to defraud his clients on the basis of the false promise to engage in such bribery.

c

Evidence also supports Balagia's conviction for violating the Kingpin Act. That law prevents any United States person, including attorneys, from dealing with individuals identified by OFAC without obtaining the proper license. 21 U.S.C. § 1906(a)(1). The Act provides criminal penalties for failing to comply with that requirement. At no time did Balagia obtain or even seek a license to represent his OFAC-designated clients. The only question is whether this failure was willful. The jury had good reason to find it was.

The district court instructed the jury that for this purpose, to "willfully" violate the act means "voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law." The evidence reveals that Balagia either knew that his clients were designated by OFAC or Balagia willfully avoided knowing that. First, Balagia was an experienced criminal defense attorney. Second, he received multiple notices from an AUSA that his clients were designated by OFAC and required additional paperwork to be represented. Third, even a cursory Google search of Balagia's clients' names reveals near the top of the search results that they have been designated as drug traffickers by OFAC. As the government argues, that is "willfulness on stilts."

2

Balagia also contends that the district court erred in instructing the jury on "deliberate ignorance." We review the district court's decision to do so for abuse of discretion. *Fisch*, 851 F.3d at 411. While it is true that the circumstances properly giving rise to such an instruction are "rare," *United*



No. 21-40366

*States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990), this is one such case where it was appropriate.

A district court may provide a deliberate-ignorance instruction when the evidence at trial raises two inferences: “(1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct.” *Id.* (quoting *United States v. Alvarado*, 838 F.2d 311, 314 (9th Cir. 1987)). Both inferences are raised here.

First, Balagia was subjectively aware of a high probability of illegal conduct. As he admitted at trial, he heard his associate telling Segundo that he had paid off four officials in Washington, D.C. And even though the bribes did not actually happen, Balagia’s hearing that comment would have put him on alert that it was highly likely something unlawful was occurring. *See United States v. Araiza-Jacobo*, 917 F.3d 360, 366 (5th Cir. 2019) (noting that subjective awareness “often overlaps with” actual knowledge).

Second, Balagia took steps to avoid gaining knowledge of what was really occurring in his representation of the Colombian drug traffickers. Balagia’s associate told Segundo, in Balagia’s presence, that the team’s tactics would be “messy,” that Balagia had to stay “clean.” Balagia’s associate said he would be the “meat in the sandwich” between Segundo and Balagia. As Balagia himself then told Segundo, running the representation this way would “give[] me the ability to close my ears sometimes.” The government correctly argues that “[c]onsciously closing one’s ears is the definition of deliberate ignorance.”

Because the evidence gives rise to both necessary inferences, the district court was within its discretion to instruct the jury on deliberate ignorance.

No. 21-40366

3

Balagia's final argument raised through counsel is that the district court "sentenced Balagia based upon an improperly calculated advisory Guidelines range that should have been multiple offense levels lower." Because the district court did not commit clear error, we affirm.

Using the 2018 Sentencing Guidelines, the probation office prepared a presentence report that calculated an offense level of 38, a criminal history category of I, and an imprisonment range of 235 to 293 months. The PSR also recommended a four-level leadership enhancement under U.S.S.G. § 3B1.1(a) and a two-level abuse-of-trust enhancement under U.S.S.G. § 3B1.3. The district court adopted the PSR's calculations but varied downward from the applicable range because of Balagia's age, lack of criminal history, good works, and family ties. The district court also wanted to avoid disparity between Balagia's sentence and the sentence of one of Balagia's associates, who did not receive a leadership enhancement but possibly should have. Without the four-level leadership enhancement, the Guidelines range was 151 to 188 months. The court imposed a term of 188 months.

Balagia makes three challenges to the district court's calculations. He disputes the sum of laundered funds, argues against the leadership enhancement, and rejects the abuse-of-trust enhancement. We review each of the district court's findings for clear error. *United States v. Tansley*, 986 F.2d 880, 884 (5th Cir. 1993) (value of laundered funds); *United States v. Alaniz*, 726 F.3d 586, 622 (5th Cir. 2013) (leadership); *United States v. Miller*, 607 F.3d 144, 147–48 (5th Cir. 2010) (abuse of trust). "A factual finding is not clearly erroneous if it is plausible in light of the record as a whole." *Alaniz*, 726 F.3d at 618 (quoting *United States v. Johnston*, 127 F.3d 380, 403 (5th Cir. 1997)).

No. 21-40366

First, the district court did not clearly err in determining the amount of funds laundered. Balagia's team charged or attempted to charge Ordonez, Segundo, and Aldemar a total of \$700,000; \$1,500,000; and \$300,000 for the "legal services" provided. Based on these numbers, the PSR calculated a total value of funds intended to be laundered at \$2.5 million. This total number, which came from Balagia's team's own proposed fees, is a "reasonable estimate." *Alaniz*, 726 F.3d at 623 (quoting commentary to Section 2B1.1). And adopting this method for calculating the sum of funds intended to be laundered fits within the district court's "broad discretion" in "determining value." *United States v. Tencer*, 107 F.3d 1120, 1137 (5th Cir. 1997).

Even if Balagia could dispute that he is singularly responsible for that sum of money intended to be laundered, it is important that Balagia was convicted of *conspiracy* to launder funds. In a conspiracy case, a district court can include in its calculations the actions of a coconspirator that were reasonably foreseeable and that were within the scope of the conspiracy. U.S.S.G. § 1B1.3(a). And for conspiracy prosecutions and sentencing, even the "intention of laundering the entire amount is enough for sentencing purposes." *Tansley*, 986 F.2d at 884. Regardless of whether the conspirators were adept enough at defrauding their clients to obtain the full amount sought, they still *conspired* to procure that amount of money. The conspiracy itself is a crime.

Second, the district court did not err in its leadership-enhancement calculations. Section 3B1.1 prescribes a four-level enhancement if "the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). Balagia's conspiracy involved more than five people. And he was undoubtedly a leader in the agreement. Taking the evidence in the light most favorable to the verdict, Balagia was the leader of a firm that was involved in

No. 21-40366

an organized attempt to defraud criminal defendants and accept their unlawfully obtained funds in contravention of the Kingpin Act. The law firm was Balagia's, and the employees followed Balagia's direction.

The commentary lists several factors bearing on the leadership-enhancement inquiry: "exercise of decision making authority"; "nature of participation"; "recruitment of accomplices"; "the claimed right to a larger share of" proceeds; "degree of participation in planning or organizing"; "nature and scope of the illegal activity"; and "degree of control and authority exercised over others." U.S.S.G. § 3B1.1 cmt. (n.4). We look at these factors as a whole. *United States v. Warren*, 986 F.3d 557, 568 (5th Cir. 2021). On balance, the evidence supports the district court's identification of Balagia as a leader in the crime for sentencing-enhancement purposes.

Third, the district court did not err in applying an abuse-of-trust enhancement. Section 3B1.3 prescribes a two-level enhancement if "the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." An abuse-of-trust enhancement is warranted if the defendant (1) "occupied a position of trust," and (2) used it "to significantly facilitate the commission or concealment of the offense." *United States v. Ollison*, 555 F.3d 152, 165 (5th Cir. 2009).

We have routinely held that attorneys occupy a position of trust, so the first requirement is satisfied. *See, e.g., United States v. Harrington*, 114 F.3d 517, 519 (5th Cir. 1997). "The integrity of our judicial system inextricably is intertwined with the integrity of our trial lawyers. Consequently, it cannot be gainsaid that lawyers occupy a position of public trust." *Id.*

The second requirement is satisfied too. Balagia used his position as an attorney to significantly facilitate the commission of his offense because

No. 21-40366

the very premise of Balagia's operation was that Balagia would recruit McKeown and the Colombian drug traffickers as clients in his capacity as a lawyer. *Cf.* U.S.S.G. § 3B1.3 cmt. (n.1) ("This adjustment . . . applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.").

Here are just two examples of culpable actions Balagia undertook while purporting to act as his client's faithful attorney. Balagia accepted the DEA's repayment of McKeown's seized funds and fraudulently withheld a portion from her. And as counsel for Ordonez and Segundo, Balagia accepted client payments made on false assurances of dismissal while pocketing their funds instead. The facts recounted above provide numerous additional examples that the district court could have relied on in determining that Balagia abused his position of trust to significantly facilitate his criminal behavior. As such, the district court committed no clear error in its calculations.

## B

After moving to withdraw his second court-appointed counsel, Balagia raised a litany of additional, difficult-to-construe issues in his *pro se* supplemental brief. Normally, we apply a liberal standard in construing the arguments briefed by defendants who elect to proceed *pro se* in a direct criminal appeal. *United States v. Diehl*, 775 F.3d 714, 719 (5th Cir. 2015). That duty flows from the principle that a litigant should "not suffer simply because he did not attend law school or find a suitable attorney." *Id.* (citation

No. 21-40366

omitted). Here, however, the *pro se* defendant did in fact go to law school.<sup>7</sup> We therefore do not accord his briefing the advantage of liberal construction. *Olivares v. Martin*, 555 F.2d 1192, 1194 n.1 (5th Cir. 1977).

Normally, we consider an appellant to have abandoned “all issues not raised and argued in its *initial* brief on appeal.” *Cousin v. Trans Union Corp.*, 246 F.3d 359, 373 n.22 (5th Cir. 2001) (citation omitted). We retain discretion to consider any arguments Appellant raises after that point. *Id.* While we do not consider as waived the 11 additional issues Appellant raises in his third supplemental brief (submitted *pro se*), we do not accord them the liberal construction typically provided to *pro se* litigants. Because none have merit, we dispose quickly of each argument below.

1 & 2

In Balagia’s first and second issues for review, he argues that the district court violated his Sixth Amendment right to counsel by preventing him from using his counsel of choice. As Balagia admits, his first-preferred counsel was disqualified after being suspended from practice in the Eastern District of Texas for disciplinary reasons. Balagia’s second-preferred counsel could not represent Balagia because she had breast cancer. She moved to withdraw her representation after the trial had already been continued for months to accommodate her medical condition. The court then appointed another counsel (who joined a second counsel who had previously been appointed co-counsel to Balagia’s second-preferred lawyer).

We review for abuse of discretion the district court’s decision to disqualify Balagia’s first counsel and the district court’s denial of an

---

<sup>7</sup> Not only that, but he testified that his LSAT score was “in the top one and a half percent of the nation” and that his attendance at the University of Texas School of Law was funded by a “full scholarship for academics.”

No. 21-40366

additional medical-related continuance for Balagia's second-preferred counsel. *United States v. Dinitz*, 538 F.2d 1214, 1219–20 & n.7 (5th Cir. 1976) (*en banc*) (disqualification); *United States v. Hughey*, 147 F.3d 423, 431 (5th Cir. 1998) (denial of continuance). Although criminal defendants do have a “qualified right to retain counsel of the defendant’s own choosing,” this right is not limitless. *Hughey*, 147 F.3d at 428. The district court did not abuse its discretion in managing the trial as it did, which resulted in Balagia’s having two separately appointed, competent co-counsel.

3

Balagia’s third issue for review is whether the district court erred in denying Balagia’s additional motions for continuance because that made Balagia “not ready for trial.” “We review the denial of a motion for continuance for abuse of discretion.” *United States v. Barnett*, 197 F.3d 138, 144 (5th Cir. 1999). Balagia’s single-paragraph argument on this point does not identify the required “‘specific and compelling’ or ‘serious’ prejudice” needed to secure reversal. *Id.* (quoting *United States v. Krout*, 66 F.3d 1420, 1436 (5th Cir. 1995)).

4

Balagia’s fourth issue for review objects to the district court’s refusal to strike certain expert testimony. “We can overturn the ruling only if it was ‘manifestly erroneous.’” *United States v. Lee*, 966 F.3d 310, 322 (5th Cir. 2020) (quoting *Kuhrt*, 788 F.3d at 418). “Even then, as is true for other evidentiary issues, the government can salvage the convictions by proving any error was harmless.” *Id.*

The testimony in question was from an FBI Agent who spoke about money laundering. The witness stated he was familiar with “money laundering techniques and transmission of currency including structuring techniques.” At some later point, the Agent said on the stand that he was

No. 21-40366

not an expert on whether a hypothetical fact scenario would violate statutes criminalizing money laundering. A witness's disclaiming of expertise in one area does not prevent the district court judge from identifying the witness as an expert with regard to other testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). Thus, the district court did not err in making its own independent determination of the witness's qualifications. And any error was harmless, as the record contains voluminous transcripts of testimony on which a reasonable jury could have reached the same result.

5

Balagia's fifth issue for review argues that the district court's denial of his motion for continuance violated his Sixth Amendment right to adequate counsel because it left 19 days for trial preparation. This argument fails. *See United States v. Lewis*, 476 F.3d 369, 387 (5th Cir. 2007) (10 days between appointment and trial).

6

Balagia's sixth issue is that the trial court wrongfully prevented him from impeaching a witness. This issue is unreviewable as Balagia made no objection at trial and there is no written record of any decision by the district court to limit impeachment. *Parliament Ins. Co. v. Hanson*, 676 F.2d 1069, 1074 (5th Cir. 1982).

7

Balagia's seventh issue asserts that the district court erred in denying a mistrial after a man was removed from the audience for allegedly making threatening motions at the jury. Balagia argues both that the district court's removing of the man and the court's subsequent increase in security tainted the trial:



No. 21-40366

This created a visual and psychological appearance that there was a distinct barrier in the courtroom with the jury, prosecution table and prosecution audience/spectators side of the courtroom and a separate side consisting of the defense table and defense spectators/family/friends/supporters. There was a good side and a bad side for the jury to pick from and you can guess which side I was sitting on.

Balagia's argument as to the removal being improper fails because at trial he consented to the removal. And his argument about the prejudice of creating a "good side" and "bad side" fails to specifically identify any specific harm suffered. The adversarial nature of courtroom proceedings is a feature, not a bug, of criminal prosecution. *See Jones v. Davis*, 890 F.3d 559, 571 (5th Cir. 2018).

8

Balagia's eighth issue for review asserts that the district court also erred in not granting a mistrial based on allegedly disruptive activity during trial. The second disruption (after the first disruption caused by the threatening motions) was an anonymous caller who claimed to be the husband of a juror. The caller said that the jurors feared if they did not convict Balagia, they would face retribution from the Colombian drug traffickers. The district court determined that the caller was an uninvolved outsider attempting to assist Balagia by creating circumstances that would lead to a mistrial.

We review the district court's decision for abuse of discretion. *United States v. Kelley*, 140 F.3d 596, 608. Because Balagia does not show that the district court failed to address "a colorable showing that an extrinsic influence was actually made on the jury," the district court committed no error, reversible or otherwise. *Id.*

No. 21-40366

9 & 10

Balagia's ninth and tenth issues for review relate to an interlocutory motion for sale of his house and office. First, he says his appointed counsel who handled the motion was not qualified. He cites no law in support of this complaint. Nor is it clear what law he could cite. The issue is not presented as an ineffective assistance of counsel claim, and no alternative theory of relief is provided either. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014). Accordingly, this claim fails.

Second, Balagia argues that the court erred in allowing the forfeiture of his office building because the value of unlawful, commingled funds could not justify sale of the entire building. Again, he cites no law under which such a complaint is legally cognizable.

11 & 12

Balagia's eleventh and twelfth issues restate the arguments previously made by Balagia's counsel that the district court erred in calculating his sentences. For the reasons discussed previously, this argument fails. *See supra* Section II.A.3.

13

Balagia's thirteenth, and final, issue for review is that the district court erred in making Balagia's sentence excessively severe. Balagia points to 18 U.S.C. § 3553, but he cites no cases nor makes any explanation in law as to how the sentence was unreasonably severe. He notes that he "has missed his son's wedding, his son's swearing in as a member of the State Bar of Texas as a licensed attorney, and the graduation ceremony from the University of Texas School of Law." These are the normal incidents of being incarcerated. They do not show that his sentence was unlawfully severe.

No. 21-40366

Balagia also argues that it was unusually severe to force him to forfeit certain property related to his crimes. Whether Balagia's property was forfeitable was a fact question presented to the jury. The jury decided that Balagia's office had the "required connection" to his offenses but that his house did not. However, Balagia was also required to forfeit \$1.5 million in cash proceeds. When that sum could not be located, the district court ordered Balagia to forfeit his house as a substitute asset. The district court held a hearing on Balagia's motion to reconsider the preliminary order of forfeiture and the government's motion for interlocutory sale. The defense said that Balagia no longer had any interest in either property. The court asked the defense for confirmation that "you're agreeing to the interlocutory sale" of the house and office. Defense counsel said yes. The court then entered an order authorizing interlocutory sale of both properties. There is no error to reverse.

\* \* \*

Having reviewed all issues raised by Balagia's multiple counsel and then later in his *pro se* brief, we find no reversible error in any part of Balagia's convictions or related sentences. As such, we AFFIRM.



A True Copy  
Certified Mar 09, 2023

*Style W. Cayce*  
Clerk, U.S. Court of Appeals, Fifth Circuit

**United States Court of Appeals**

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

February 28, 2023

Mr. David O'Toole  
Eastern District of Texas, Sherman  
101 E. Pecan Street  
Federal Building  
Room 216  
Sherman, TX 75090-0000

RECEIVED

MAR 13 2023

Chief Disciplinary Counsel  
State Bar of Texas

By: \_\_\_\_\_

No. 21-40366 USA v. Balagia  
USDC No. 4:16-CR-176-3

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

*Rebecca L. Leto*

By: \_\_\_\_\_  
Rebecca L. Leto, Deputy Clerk  
504-310-7703

cc w/encl:  
James Morris Balagia  
Mr. Stephan Edward Oestreicher Jr.  
Ms. Heather Harris Rattan



A True Copy  
Certified Mar 09, 2023

*Lyle W. Cayce*  
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

February 6, 2023

Lyle W. Cayce  
Clerk

---

No. 21-40366

---

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JAMES MORRIS BALAGIA,

*Defendant—Appellant.*

---

Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 4:16-CR-176-3

---

Before ELROD, HAYNES, and WILLETT, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.



A True Copy  
Certified Mar 09, 2023

*Lyle W. Cayce*  
Clerk, U.S. Court of Appeals, Fifth Circuit

**BEFORE THE BOARD OF DISCIPLINARY APPEALS  
APPOINTED BY  
THE SUPREME COURT OF TEXAS**

<b>IN THE MATTER OF</b>	§	
<b>JAMES MORRIS BALAGIA</b>	§	<b>CAUSE NO. 65867</b>
<b>STATE BAR CARD NO. 00783589</b>	§	

**JUDGMENT OF DISBARMENT**

On the 26th day of April, 2024, the Board of Disciplinary Appeals considered the Motion for Entry of Judgment of Disbarment filed in the above case by Petitioner, Commission for Lawyer Discipline of the State Bar of Texas, against Respondent, James Morris Balagia. The Board finds that:

- (1) The Board retains jurisdiction to enter a final judgment in this matter. TEX. R. DISCIPLINARY P.R. 8.04-.06.
- (2) On May 6, 2022, the Board of Disciplinary Appeals entered an Interlocutory Order of Suspension, finding that On or about May 4, 2021, a Judgment in a Criminal Case was entered in Cause No. 4:16-CR-00176-ALM-KPJ(3), styled *United States of America v. James Morris Balagia*, in the United States District Court for the Eastern District of Texas, Sherman Division, wherein Respondent was adjudicated guilty of the following offenses: Count 1, Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. § 1956(h) and (a); Count 2, Obstruction of Justice and Aiding and Abetting, in violation of 18 U.S.C. § 1503 and § 1503(b)(3); Count 3, Conspire, Endeavor, and Attempt To Violate The Kingpin Act, in violation of 21 U.S.C. § 1904(c)(2) and § 1906; Count 4, Conspiracy To Commit Wire Fraud, in violation of 18 U.S.C. § 1349 and § 1343; Count 5, Conspiracy to Obstruct Justice, in violation of 18 U.S.C. § 371.

Respondent was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 188 months as to counts 1, 3, and 4; 120 months as to count 2; 60 months as to count 5; with all terms running concurrently. Upon release from imprisonment, Respondent will be on supervised release for a term of three (3) years on each of Counts 1 through 5, all such terms to run concurrently. Respondent was further ordered to pay penalties of an assessment in the amount of \$500.00.

- (3) In the Interlocutory Order of Suspension, the Board found that Respondent was convicted of an Intentional Crime as defined by Texas Rule of

Disciplinary Procedure (TRDP) 1.06(V) and a Serious Crime as defined by TRDP 1.06(GG).

- (4) The United States Court of Appeals for the Fifth Circuit affirmed Respondent's conviction and sentence on or about February 6, 2023, in an appeal styled *United States of America, Plaintiff-Appellee, vs. James Morris Balagia, Defendant-Appellant*, No. 21-40366.
- (5) Petitioner filed its Motion for Entry of Judgment of Disbarment on or about February \_\_\_, 2024, and served same on Respondent in accordance with TEXAS RULE OF DISCIPLINARY PROCEDURE 8.05.
- (6) Respondent's conviction, for which he was sentenced in the United States District Court for the Eastern District of Texas, Sherman Division, has become final and is not subject to further appeal. BODA INTERNAL PROCEDURAL RULE 6.02(a).
- (7) Petitioner's Motion for Entry of Judgment of Disbarment shall be granted. TEX. R. DISCIPLINARY P.R. 8.05.

### **DISBARMENT**

The Board has determined that disbarment of Respondent is appropriate. It is, therefore, accordingly, **ORDERED, ADJUDGED, and DECREED** that Respondent, James Morris Balagia, State Bar No. 00783589, be and hereby is **DISBARRED** from the practice of law in the State of Texas, and his license to practice law in this state be and hereby is revoked.

It is further **ORDERED, ADJUDGED, and DECREED** that Respondent, James Morris Balagia, is prohibited from practicing law in Texas, holding himself out as an attorney at law, performing any legal service for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "attorney," "counselor at law", "counselor," "esquire," "Esq.," or "lawyer."

It is further **ORDERED** Respondent, James Morris Balagia, shall immediately notify each of his current clients, if any, in writing of this disbarment. In addition to such notification, Respondent is **ORDERED** to return any files, papers, unearned monies, and other property, if any, which belongs to clients and former clients and is in Respondent's possession or control, to the respective clients or former clients or to another attorney at the client's or former client's request, within thirty (30) days of the date of this judgment.

It is further **ORDERED** that Respondent, James Morris Balagia, shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414 Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that all current clients have been notified of Respondent's disbarment and that all files, papers, monies, and other property belonging to all clients and former clients have been returned as ordered herein. If Respondent should be unable to return any files, papers, monies, or other property requested by any client or former client, Respondent's affidavit shall state with particularity the efforts made by Respondent with respect to each particular client and the cause of his inability to return to said client any files, papers, monies, or other property.

It is further **ORDERED** that Respondent, James Morris Balagia, shall, on or before thirty (30) days from the signing of this judgment by the Board, notify in writing each and every justice of the peace, judge, magistrate, administrative judge or officer, and chief justice of each and every court or tribunal in which Respondent has any matter pending, if any, of the terms of this judgment, the style and cause number of the pending matter(s), and the name, address and telephone number of the client(s) Respondent is representing.

It is further **ORDERED** that Respondent, James Morris Balagia, shall file with the State Bar of Texas, Chief Disciplinary Counsel's Office, P.O. Box 12487, Austin, TX 78711-2487 (1414



Colorado St., Austin, TX 78701) within thirty (30) days of the signing of this judgment by the Board, an affidavit stating that each and every justice of the peace, judge, magistrate, administrative judge or officer, and chief justice has received written notice of the terms of this judgment.

It is further **ORDERED** that Respondent, James Morris Balagia, shall immediately surrender his Texas law license and permanent State Bar Card to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P. O. Box 12487, Austin, Texas 78711, for transmittal to the Clerk of the Supreme Court of Texas.

It is further **ORDERED** that this Judgment of Disbarment shall be made a matter of public record and that notice of this disciplinary action shall be published in the *Texas Bar Journal*.

Signed this \_\_\_\_\_ day of \_\_\_\_\_ 2024.

---

CHAIR PRESIDING

# INTERNAL PROCEDURAL RULES

## BOARD OF DISCIPLINARY APPEALS

*Current through June 21, 2018*

### Contents

<b>I. GENERAL PROVISIONS</b> .....	<b>1</b>
Rule 1.01. Definitions.....	1
Rule 1.02. General Powers .....	1
Rule 1.03. Additional Rules in Disciplinary Matters.....	1
Rule 1.04. Appointment of Panels .....	1
Rule 1.05. Filing of Pleadings, Motions, and Other Papers.....	1
Rule 1.06. Service of Petition .....	2
Rule 1.07. Hearing Setting and Notice .....	2
Rule 1.08. Time to Answer .....	2
Rule 1.09. Pretrial Procedure .....	2
Rule 1.10. Decisions .....	3
Rule 1.11. Board of Disciplinary Appeals Opinions.....	3
Rule 1.12. BODA Work Product and Drafts .....	3
Rule 1.13. Record Retention.....	3
Rule 1.14. Costs of Reproduction of Records.....	3
Rule 1.15. Publication of These Rules.....	3
<b>II. ETHICAL CONSIDERATIONS</b> .....	<b>3</b>
Rule 2.01. Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases.....	3
Rule 2.02. Confidentiality.....	4
Rule 2.03. Disqualification and Recusal of BODA Members .....	4
<b>III. CLASSIFICATION APPEALS</b> .....	<b>4</b>
Rule 3.01. Notice of Right to Appeal .....	4
Rule 3.02. Record on Appeal.....	4
<b>IV. APPEALS FROM EVIDENTIARY PANEL HEARINGS</b> .....	<b>4</b>
Rule 4.01. Perfecting Appeal.....	4
Rule 4.02. Record on Appeal.....	5
Rule 4.03. Time to File Record.....	6
Rule 4.04. Copies of the Record .....	6
Rule 4.05. Requisites of Briefs .....	6
Rule 4.06. Oral Argument.....	7
Rule 4.07. Decision and Judgment .....	7
Rule 4.08. Appointment of Statewide Grievance Committee.....	8
Rule 4.09. Involuntary Dismissal.....	8
<b>V. PETITIONS TO REVOKE PROBATION</b> .....	<b>8</b>
Rule 5.01. Initiation and Service.....	8
Rule 5.02. Hearing.....	8

<b>VI. COMPULSORY DISCIPLINE</b> .....	<b>8</b>
Rule 6.01. Initiation of Proceeding .....	8
Rule 6.02. Interlocutory Suspension .....	8
<b>VII. RECIPROCAL DISCIPLINE</b> .....	<b>9</b>
Rule 7.01. Initiation of Proceeding .....	9
Rule 7.02. Order to Show Cause.....	9
Rule 7.03. Attorney’s Response.....	9
<b>VIII. DISTRICT DISABILITY COMMITTEE HEARINGS</b> .....	<b>9</b>
Rule 8.01. Appointment of District Disability Committee .....	9
Rule 8.02. Petition and Answer .....	9
Rule 8.03. Discovery .....	9
Rule 8.04. Ability to Compel Attendance.....	10
Rule 8.05. Respondent’s Right to Counsel .....	10
Rule 8.06. Hearing.....	10
Rule 8.07. Notice of Decision.....	10
Rule 8.08. Confidentiality.....	10
<b>IX. DISABILITY REINSTATEMENTS</b> .....	<b>10</b>
Rule 9.01. Petition for Reinstatement .....	10
Rule 9.02. Discovery .....	10
Rule 9.03. Physical or Mental Examinations .....	10
Rule 9.04. Judgment .....	10
<b>X. APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS</b> .....	<b>11</b>
Rule 10.01. Appeals to the Supreme Court.....	11

# INTERNAL PROCEDURAL RULES

## Board of Disciplinary Appeals

*Current through June 21, 2018*

### I. GENERAL PROVISIONS

#### Rule 1.01. Definitions

- (a) “BODA” is the Board of Disciplinary Appeals.
- (b) “Chair” is the member elected by BODA to serve as chair or, in the Chair’s absence, the member elected by BODA to serve as vice-chair.
- (c) “Classification” is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a “complaint” or an “inquiry.”
- (d) “BODA Clerk” is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.
- (e) “CDC” is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.
- (f) “Commission” is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.
- (g) “Executive Director” is the executive director of BODA.
- (h) “Panel” is any three-member grouping of BODA under TRDP 7.05.
- (i) “Party” is a Complainant, a Respondent, or the Commission.
- (j) “TDRPC” is the Texas Disciplinary Rules of Professional Conduct.
- (k) “TRAP” is the Texas Rules of Appellate Procedure.
- (l) “TRCP” is the Texas Rules of Civil Procedure.
- (m) “TRDP” is the Texas Rules of Disciplinary Procedure.
- (n) “TRE” is the Texas Rules of Evidence.

#### Rule 1.02. General Powers

Under TRDP 7.08, BODA has and may exercise all the powers of either a trial court or an appellate court, as the case may be, in hearing and determining disciplinary proceedings. But TRDP 15.01 [17.01] applies to the enforcement of a judgment of BODA.

#### Rule 1.03. Additional Rules in Disciplinary Matters

Except as varied by these rules and to the extent applicable, the TRCP, TRAP, and TRE apply to all disciplinary matters before BODA, except for appeals from classification decisions, which are governed by TRDP 2.10 and by Section 3 of these rules.

#### Rule 1.04. Appointment of Panels

- (a) BODA may consider any matter or motion by panel,

except as specified in (b). The Chair may delegate to the Executive Director the duty to appoint a panel for any BODA action. Decisions are made by a majority vote of the panel; however, any panel member may refer a matter for consideration by BODA sitting en banc. Nothing in these rules gives a party the right to be heard by BODA sitting en banc.

- (b) Any disciplinary matter naming a BODA member as Respondent must be considered by BODA sitting en banc. A disciplinary matter naming a BODA staff member as Respondent need not be heard en banc.

#### Rule 1.05. Filing of Pleadings, Motions, and Other Papers

- (a) **Electronic Filing.** All documents must be filed electronically. Unrepresented persons or those without the means to file electronically may electronically file documents, but it is not required.

- (1) Email Address. The email address of an attorney or an unrepresented party who electronically files a document must be included on the document.

- (2) Timely Filing. Documents are filed electronically by emailing the document to the BODA Clerk at the email address designated by BODA for that purpose. A document filed by email will be considered filed the day that the email is sent. The date sent is the date shown for the message in the inbox of the email account designated for receiving filings. If a document is sent after 5:00 p.m. or on a weekend or holiday officially observed by the State of Texas, it is considered filed the next business day.

- (3) It is the responsibility of the party filing a document by email to obtain the correct email address for BODA and to confirm that the document was received by BODA in legible form. Any document that is illegible or that cannot be opened as part of an email attachment will not be considered filed. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from BODA.

- (4) Exceptions.

- (i) An appeal to BODA of a decision by the CDC to classify a grievance as an inquiry is not required to be filed electronically.

- (ii) The following documents must not be filed electronically:

- a) documents that are filed under seal or subject to a pending motion to seal; and

- b) documents to which access is otherwise restricted by court order.

- (iii) For good cause, BODA may permit a party to file other documents in paper form in a particular case.

- (5) Format. An electronically filed document must:

- (i) be in text-searchable portable document format (PDF);
- (ii) be directly converted to PDF rather than scanned, if possible; and
- (iii) not be locked.

(b) A paper will not be deemed filed if it is sent to an individual BODA member or to another address other than the address designated by BODA under Rule 1.05(a)(2).

(c) **Signing.** Each brief, motion, or other paper filed must be signed by at least one attorney for the party or by the party pro se and must give the State Bar of Texas card number, mailing address, telephone number, email address, and fax number, if any, of each attorney whose name is signed or of the party (if applicable). A document is considered signed if the document includes:

- (1) an “/s/” and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or
- (2) an electronic image or scanned image of the signature.

(d) **Paper Copies.** Unless required by BODA, a party need not file a paper copy of an electronically filed document.

(e) **Service.** Copies of all documents filed by any party other than the record filed by the evidentiary panel clerk or the court reporter must, at or before the time of filing, be served on all other parties as required and authorized by the TRAP.

#### **Rule 1.06. Service of Petition**

In any disciplinary proceeding before BODA initiated by service of a petition on the Respondent, the petition must be served by personal service; by certified mail with return receipt requested; or, if permitted by BODA, in any other manner that is authorized by the TRCP and reasonably calculated under all the circumstances to apprise the Respondent of the proceeding and to give him or her reasonable time to appear and answer. To establish service by certified mail, the return receipt must contain the Respondent’s signature.

#### **Rule 1.07. Hearing Setting and Notice**

(a) **Original Petitions.** In any kind of case initiated by the CDC’s filing a petition or motion with BODA, the CDC may contact the BODA Clerk for the next regularly available hearing date before filing the original petition. If a hearing is set before the petition is filed, the petition must state the date, time, and place of the hearing. Except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the hearing date must be at least 30 days from the date that the petition is served on the Respondent.

(b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the

request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.

(c) **Setting Notices.** BODA must notify the parties of any hearing date that is not noticed in an original petition or motion.

(d) **Announcement Docket.** Attorneys and parties appearing before BODA must confirm their presence and present any questions regarding procedure to the BODA Clerk in the courtroom immediately prior to the time docket call is scheduled to begin. Each party with a matter on the docket must appear at the docket call to give an announcement of readiness, to give a time estimate for the hearing, and to present any preliminary motions or matters. Immediately following the docket call, the Chair will set and announce the order of cases to be heard.

#### **Rule 1.08. Time to Answer**

The Respondent may file an answer at any time, except where expressly provided otherwise by these rules or the TRDP, or when an answer date has been set by prior order of BODA. BODA may, but is not required to, consider an answer filed the day of the hearing.

#### **Rule 1.09. Pretrial Procedure**

##### **(a) Motions.**

(1) Generally. To request an order or other relief, a party must file a motion supported by sufficient cause with proof of service on all other parties. The motion must state with particularity the grounds on which it is based and set forth the relief sought. All supporting briefs, affidavits, or other documents must be served and filed with the motion. A party may file a response to a motion at any time before BODA rules on the motion or by any deadline set by BODA. Unless otherwise required by these rules or the TRDP, the form of a motion must comply with the TRCP or the TRAP.

(2) For Extension of Time. All motions for extension of time in any matter before BODA must be in writing, comply with (a)(1), and specify the following:

- (i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;
- (ii) if an appeal has been perfected, the date when the appeal was perfected;
- (iii) the original deadline for filing the item in question;
- (iv) the length of time requested for the extension;
- (v) the number of extensions of time that have been granted previously regarding the item in question; and

(vi) the facts relied on to reasonably explain the need for an extension.

(b) **Pretrial Scheduling Conference.** Any party may request a pretrial scheduling conference, or BODA on its own motion may require a pretrial scheduling conference.

(c) **Trial Briefs.** In any disciplinary proceeding before BODA, except with leave, all trial briefs and memoranda must be filed with the BODA Clerk no later than ten days before the day of the hearing.

(d) **Hearing Exhibits, Witness Lists, and Exhibits Tendered for Argument.** A party may file a witness list, exhibit, or any other document to be used at a hearing or oral argument before the hearing or argument. A party must bring to the hearing an original and 12 copies of any document that was not filed at least one business day before the hearing. The original and copies must be:

- (1) marked;
- (2) indexed with the title or description of the item offered as an exhibit; and
- (3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

All documents must be marked and provided to the opposing party before the hearing or argument begins.

#### **Rule 1.10. Decisions**

(a) **Notice of Decisions.** The BODA Clerk must give notice of all decisions and opinions to the parties or their attorneys of record.

(b) **Publication of Decisions.** BODA must report judgments or orders of public discipline:

- (1) as required by the TRDP; and
- (2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.

(c) **Abstracts of Classification Appeals.** BODA may, in its discretion, prepare an abstract of a classification appeal for a public reporting service.

#### **Rule 1.11. Board of Disciplinary Appeals Opinions**

(a) BODA may render judgment in any disciplinary matter with or without written opinion. In accordance with TRDP 6.06, all written opinions of BODA are open to the public and must be made available to the public reporting services, print or electronic, for publishing. A majority of the members who participate in considering the disciplinary matter must determine if an opinion will be written. The names of the participating members must be noted on all written opinions of BODA.

(b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in

the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.

(c) A BODA determination in an appeal from a grievance classification decision under TRDP 2.10 is not a judgment for purposes of this rule and may be issued without a written opinion.

#### **Rule 1.12. BODA Work Product and Drafts**

A document or record of any nature—regardless of its form, characteristics, or means of transmission—that is created or produced in connection with or related to BODA’s adjudicative decision-making process is not subject to disclosure or discovery. This includes documents prepared by any BODA member, BODA staff, or any other person acting on behalf of or at the direction of BODA.

#### **Rule 1.13. Record Retention**

Records of appeals from classification decisions must be retained by the BODA Clerk for a period of at least three years from the date of disposition. Records of other disciplinary matters must be retained for a period of at least five years from the date of final judgment, or for at least one year after the date a suspension or disbarment ends, whichever is later. For purposes of this rule, a record is any document, paper, letter, map, book, tape, photograph, film, recording, or other material filed with BODA, regardless of its form, characteristics, or means of transmission.

#### **Rule 1.14. Costs of Reproduction of Records**

The BODA Clerk may charge a reasonable amount for the reproduction of nonconfidential records filed with BODA. The fee must be paid in advance to the BODA Clerk.

#### **Rule 1.15. Publication of These Rules**

These rules will be published as part of the TDRPC and TRDP.

## **II. ETHICAL CONSIDERATIONS**

#### **Rule 2.01. Representing or Counseling Parties in Disciplinary Matters and Legal Malpractice Cases**

(a) A current member of BODA must not represent a party or testify voluntarily in a disciplinary action or proceeding. Any BODA member who is subpoenaed or otherwise compelled to appear at a disciplinary action or proceeding, including at a deposition, must promptly notify the BODA Chair.

(b) A current BODA member must not serve as an expert witness on the TDRPC.

(c) A BODA member may represent a party in a legal malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

## **Rule 2.02. Confidentiality**

(a) BODA deliberations are confidential, must not be disclosed by BODA members or staff, and are not subject to disclosure or discovery.

(b) Classification appeals, appeals from evidentiary judgments of private reprimand, appeals from an evidentiary judgment dismissing a case, interlocutory appeals or any interim proceedings from an ongoing evidentiary case, and disability cases are confidential under the TRDP. BODA must maintain all records associated with these cases as confidential, subject to disclosure only as provided in the TRDP and these rules.

(c) If a member of BODA is subpoenaed or otherwise compelled by law to testify in any proceeding, the member must not disclose a matter that was discussed in conference in connection with a disciplinary case unless the member is required to do so by a court of competent jurisdiction

## **Rule 2.03. Disqualification and Recusal of BODA Members**

(a) BODA members are subject to disqualification and recusal as provided in TRCP 18b.

(b) BODA members may, in addition to recusals under (a), voluntarily recuse themselves from any discussion and voting for any reason. The reasons that a BODA member is recused from a case are not subject to discovery.

(c) These rules do not disqualify a lawyer who is a member of, or associated with, the law firm of a BODA member from serving on a grievance committee or representing a party in a disciplinary proceeding or legal malpractice case. But a BODA member must recuse him or herself from any matter in which a lawyer who is a member of, or associated with, the BODA member's firm is a party or represents a party.

## **III. CLASSIFICATION APPEALS**

### **Rule 3.01. Notice of Right to Appeal**

(a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule.

(b) To facilitate the potential filing of an appeal of a grievance classified as an inquiry, the CDC must send the Complainant an appeal notice form, approved by BODA, with the classification disposition. The form must include the docket number of the matter; the deadline for appealing; and information for mailing, faxing, or emailing the appeal notice form to BODA. The appeal notice form must be available in English and Spanish.

### **Rule 3.02. Record on Appeal**

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and

all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

## **IV. APPEALS FROM EVIDENTIARY PANEL HEARINGS**

### **Rule 4.01. Perfecting Appeal**

(a) **Appellate Timetable.** The date that the evidentiary judgment is signed starts the appellate timetable under this section. To make TRDP 2.21 [2.20] consistent with this requirement, the date that the judgment is signed is the "date of notice" under Rule 2.21 [2.20].

(b) **Notification of the Evidentiary Judgment.** The clerk of the evidentiary panel must notify the parties of the judgment as set out in TRDP 2.21 [2.20].

(1) The evidentiary panel clerk must notify the Commission and the Respondent in writing of the judgment. The notice must contain a clear statement that any appeal of the judgment must be filed with BODA within 30 days of the date that the judgment was signed. The notice must include a copy of the judgment rendered.

(2) The evidentiary panel clerk must notify the Complainant that a judgment has been rendered and provide a copy of the judgment, unless the evidentiary panel dismissed the case or imposed a private reprimand. In the case of a dismissal or private reprimand, the evidentiary panel clerk must notify the Complainant of the decision and that the contents of the judgment are confidential. Under TRDP 2.16, no additional information regarding the contents of a judgment of dismissal or private reprimand may be disclosed to the Complainant.

(c) **Filing Notice of Appeal.** An appeal is perfected when a written notice of appeal is filed with BODA. If a notice of appeal and any other accompanying documents are mistakenly filed with the evidentiary panel clerk, the notice is deemed to have been filed the same day with BODA, and the evidentiary panel clerk must immediately send the BODA Clerk a copy of the notice and any accompanying documents.

(d) **Time to File.** In accordance with TRDP 2.24 [2.23], the notice of appeal must be filed within 30 days after the date the judgment is signed. In the event a motion for new trial or motion to modify the judgment is timely filed with the evidentiary panel, the notice of appeal must be filed with BODA within 90 days from the date the judgment is signed.

(e) **Extension of Time.** A motion for an extension of time to file the notice of appeal must be filed no later than 15 days after the last day allowed for filing the notice of appeal. The motion must comply with Rule 1.09.

## **Rule 4.02. Record on Appeal**

(a) **Contents.** The record on appeal consists of the evidentiary panel clerk's record and, where necessary to the appeal, a reporter's record of the evidentiary panel hearing.

(b) **Stipulation as to Record.** The parties may designate parts of the clerk's record and the reporter's record to be included in the record on appeal by written stipulation filed with the clerk of the evidentiary panel.

### **(c) Responsibility for Filing Record.**

#### **(1) Clerk's Record.**

(i) After receiving notice that an appeal has been filed, the clerk of the evidentiary panel is responsible for preparing, certifying, and timely filing the clerk's record.

(ii) Unless the parties stipulate otherwise, the clerk's record on appeal must contain the items listed in TRAP 34.5(a) and any other paper on file with the evidentiary panel, including the election letter, all pleadings on which the hearing was held, the docket sheet, the evidentiary panel's charge, any findings of fact and conclusions of law, all other pleadings, the judgment or other orders appealed from, the notice of decision sent to each party, any postsubmission pleadings and briefs, and the notice of appeal.

(iii) If the clerk of the evidentiary panel is unable for any reason to prepare and transmit the clerk's record by the due date, he or she must promptly notify BODA and the parties, explain why the clerk's record cannot be timely filed, and give the date by which he or she expects the clerk's record to be filed.

#### **(2) Reporter's Record.**

(i) The court reporter for the evidentiary panel is responsible for timely filing the reporter's record if:

- a) a notice of appeal has been filed;
- b) a party has requested that all or part of the reporter's record be prepared; and
- c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.

(ii) If the court reporter is unable for any reason to prepare and transmit the reporter's record by the due date, he or she must promptly notify BODA and the parties, explain the reasons why the reporter's record cannot be timely filed, and give the date by which he or she expects the reporter's record to be filed.

### **(d) Preparation of Clerk's Record.**

(1) To prepare the clerk's record, the evidentiary panel clerk must:

- (i) gather the documents designated by the parties'

written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);

(ii) start each document on a new page;

(iii) include the date of filing on each document;

(iv) arrange the documents in chronological order, either by the date of filing or the date of occurrence;

(v) number the pages of the clerk's record in the manner required by (d)(2);

(vi) prepare and include, after the front cover of the clerk's record, a detailed table of contents that complies with (d)(3); and

(vii) certify the clerk's record.

(2) The clerk must start the page numbering on the front cover of the first volume of the clerk's record and continue to number all pages consecutively—including the front and back covers, tables of contents, certification page, and separator pages, if any—until the final page of the clerk's record, without regard for the number of volumes in the clerk's record, and place each page number at the bottom of each page.

(3) The table of contents must:

(i) identify each document in the entire record (including sealed documents); the date each document was filed; and, except for sealed documents, the page on which each document begins;

(ii) be double-spaced;

(iii) conform to the order in which documents appear in the clerk's record, rather than in alphabetical order;

(iv) contain bookmarks linking each description in the table of contents (except for descriptions of sealed documents) to the page on which the document begins; and

(v) if the record consists of multiple volumes, indicate the page on which each volume begins.

(e) **Electronic Filing of the Clerk's Record.** The evidentiary panel clerk must file the record electronically. When filing a clerk's record in electronic form, the evidentiary panel clerk must:

(1) file each computer file in text-searchable Portable Document Format (PDF);

(2) create electronic bookmarks to mark the first page of each document in the clerk's record;

(3) limit the size of each computer file to 100 MB or less, if possible; and

(4) directly convert, rather than scan, the record to PDF, if possible.

(f) **Preparation of the Reporter's Record.**

(1) The appellant, at or before the time prescribed for



perfecting the appeal, must make a written request for the reporter's record to the court reporter for the evidentiary panel. The request must designate the portion of the evidence and other proceedings to be included. A copy of the request must be filed with the evidentiary panel and BODA and must be served on the appellee. The reporter's record must be certified by the court reporter for the evidentiary panel.

(2) The court reporter or recorder must prepare and file the reporter's record in accordance with TRAP 34.6 and 35 and the Uniform Format Manual for Texas Reporters' Records.

(3) The court reporter or recorder must file the reporter's record in an electronic format by emailing the document to the email address designated by BODA for that purpose.

(4) The court reporter or recorder must include either a scanned image of any required signature or "/s/" and name typed in the space where the signature would otherwise

(6<sup>1</sup>) In exhibit volumes, the court reporter or recorder must create bookmarks to mark the first page of each exhibit document.

(g) **Other Requests.** At any time before the clerk's record is prepared, or within ten days after service of a copy of appellant's request for the reporter's record, any party may file a written designation requesting that additional exhibits and portions of testimony be included in the record. The request must be filed with the evidentiary panel and BODA and must be served on the other party.

(h) **Inaccuracies or Defects.** If the clerk's record is found to be defective or inaccurate, the BODA Clerk must inform the clerk of the evidentiary panel of the defect or inaccuracy and instruct the clerk to make the correction. Any inaccuracies in the reporter's record may be corrected by agreement of the parties without the court reporter's recertification. Any dispute regarding the reporter's record that the parties are unable to resolve by agreement must be resolved by the evidentiary panel.

(i) **Appeal from Private Reprimand.** Under TRDP 2.16, in an appeal from a judgment of private reprimand, BODA must mark the record as confidential, remove the attorney's name from the case style, and take any other steps necessary to preserve the confidentiality of the private reprimand.

<sup>1</sup> So in original.

#### **Rule 4.03. Time to File Record**

(a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless

a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.

#### **(b) If No Record Filed.**

(1) If the clerk's record or reporter's record has not been timely filed, the BODA Clerk must send notice to the party responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days. The BODA Clerk must send a copy of this notice to all the parties and the clerk of the evidentiary panel.

(2) If no reporter's record is filed due to appellant's fault, and if the clerk's record has been filed, BODA may, after first giving the appellant notice and a reasonable opportunity to cure, consider and decide those issues or points that do not require a reporter's record for a decision. BODA may do this if no reporter's record has been filed because:

(i) the appellant failed to request a reporter's record; or

(ii) the appellant failed to pay or make arrangements to pay the reporter's fee to prepare the reporter's record, and the appellant is not entitled to proceed without payment of costs.

#### **(c) Extension of Time to File the Reporter's Record.**

When an extension of time is requested for filing the reporter's record, the facts relied on to reasonably explain the need for an extension must be supported by an affidavit of the court reporter. The affidavit must include the court reporter's estimate of the earliest date when the reporter's record will be available for filing.

(d) **Supplemental Record.** If anything material to either party is omitted from the clerk's record or reporter's record, BODA may, on written motion of a party or on its own motion, direct a supplemental record to be certified and transmitted by the clerk for the evidentiary panel or the court reporter for the evidentiary panel.

#### **Rule 4.04. Copies of the Record**

The record may not be withdrawn from the custody of the BODA Clerk. Any party may obtain a copy of the record or any designated part thereof by making a written request to the BODA Clerk and paying any charges for reproduction in advance.

#### **Rule 4.05. Requisites of Briefs**

(a) **Appellant's Filing Date.** Appellant's brief must be filed within 30 days after the clerk's record or the reporter's record is filed, whichever is later.

(b) **Appellee's Filing Date.** Appellee's brief must be filed

within 30 days after the appellant's brief is filed.

**(c) Contents.** Briefs must contain:

- (1) a complete list of the names and addresses of all parties to the final decision and their counsel;
- (2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;
- (3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;
- (4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;
- (5) a statement, without argument, of the basis of BODA's jurisdiction;
- (6) a statement of the issues presented for review or points of error on which the appeal is predicated;
- (7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;
- (8) the argument and authorities;
- (9) conclusion and prayer for relief;
- (10) a certificate of service; and
- (11) an appendix of record excerpts pertinent to the issues presented for review.

**(d) Length of Briefs; Contents Included and Excluded.**

In calculating the length of a document, every word and every part of the document, including headings, footnotes, and quotations, must be counted except the following: caption, identity of the parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of the jurisdiction, signature, proof of service, certificate of compliance, and appendix. Briefs must not exceed 15,000 words if computer-generated, and 50 pages if not, except on leave of BODA. A reply brief must not exceed 7,500 words if computer-generated, and 25 pages if not, except on leave of BODA. A computer generated document must include a certificate by counsel or the unrepresented party stating the number of words in the document. The person who signs the certification may rely on the word count of the computer program used to prepare the document.

**(e) Amendment or Supplementation.** BODA has discretion to grant leave to amend or supplement briefs.

**(f) Failure of the Appellant to File a Brief.** If the appellant fails to timely file a brief, BODA may:

- (1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's

failure to timely file a brief;

(2) decline to dismiss the appeal and make further orders within its discretion as it considers proper; or

(3) if an appellee's brief is filed, regard that brief as correctly presenting the case and affirm the evidentiary panel's judgment on that brief without examining the record.

**Rule 4.06. Oral Argument**

**(a) Request.** A party desiring oral argument must note the request on the front cover of the party's brief. A party's failure to timely request oral argument waives the party's right to argue. A party who has requested argument may later withdraw the request. But even if a party has waived oral argument, BODA may direct the party to appear and argue. If oral argument is granted, the clerk will notify the parties of the time and place for submission.

**(b) Right to Oral Argument.** A party who has filed a brief and who has timely requested oral argument may argue the case to BODA unless BODA, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

- (1) the appeal is frivolous;
- (2) the dispositive issue or issues have been authoritatively decided;
- (3) the facts and legal arguments are adequately presented in the briefs and record; or
- (4) the decisional process would not be significantly aided by oral argument.

**(c) Time Allowed.** Each party will have 20 minutes to argue. BODA may, on the request of a party or on its own, extend or shorten the time allowed for oral argument. The appellant may reserve a portion of his or her allotted time for rebuttal.

**Rule 4.07. Decision and Judgment**

**(a) Decision.** BODA may do any of the following:

- (1) affirm in whole or in part the decision of the evidentiary panel;
- (2) modify the panel's findings and affirm the findings as modified;
- (3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or
- (4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:
  - (i) the panel that entered the findings; or
  - (ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.

**(b) Mandate.** In every appeal, the BODA Clerk must issue a mandate in accordance with BODA's judgment and send it to the evidentiary panel and to all the parties.

#### **Rule 4.08. Appointment of Statewide Grievance Committee**

If BODA remands a cause for further proceedings before a statewide grievance committee, the BODA Chair will appoint the statewide grievance committee in accordance with TRDP 2.27 [2.26]. The committee must consist of six members: four attorney members and two public members randomly selected from the current pool of grievance committee members. Two alternates, consisting of one attorney and one public member, must also be selected. BODA will appoint the initial chair who will serve until the members of the statewide grievance committee elect a chair of the committee at the first meeting. The BODA Clerk will notify the Respondent and the CDC that a committee has been appointed.

#### **Rule 4.09. Involuntary Dismissal**

Under the following circumstances and on any party's motion or on its own initiative after giving at least ten days' notice to all parties, BODA may dismiss the appeal or affirm the appealed judgment or order. Dismissal or affirmance may occur if the appeal is subject to dismissal:

- (a) for want of jurisdiction;
- (b) for want of prosecution; or
- (c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time.

### **V. PETITIONS TO REVOKE PROBATION**

#### **Rule 5.01. Initiation and Service**

(a) Before filing a motion to revoke the probation of an attorney who has been sanctioned, the CDC must contact the BODA Clerk to confirm whether the next regularly available hearing date will comply with the 30-day requirement of TRDP. The Chair may designate a three-member panel to hear the motion, if necessary, to meet the 30-day requirement of TRDP 2.23 [2.22].

(b) Upon filing the motion, the CDC must serve the Respondent with the motion and any supporting documents in accordance with TRDP 2.23 [2.22], the TRCP, and these rules. The CDC must notify BODA of the date that service is obtained on the Respondent.

#### **Rule 5.02. Hearing**

Within 30 days of service of the motion on the Respondent, BODA must docket and set the matter for a hearing and notify the parties of the time and place of the hearing. On a showing of good cause by a party or on its own motion, BODA may continue the case to a future hearing date as circumstances require.

### **VI. COMPULSORY DISCIPLINE**

#### **Rule 6.01. Initiation of Proceeding**

Under TRDP 8.03, the CDC must file a petition for compulsory discipline with BODA and serve the Respondent in accordance with the TRDP and Rule 1.06 of these rules.

#### **Rule 6.02. Interlocutory Suspension**

(a) **Interlocutory Suspension.** In any compulsory proceeding under TRDP Part VIII in which BODA determines that the Respondent has been convicted of an Intentional Crime and that the criminal conviction is on direct appeal, BODA must suspend the Respondent's license to practice law by interlocutory order. In any compulsory case in which BODA has imposed an interlocutory order of suspension, BODA retains jurisdiction to render final judgment after the direct appeal of the criminal conviction is final. For purposes of rendering final judgment in a compulsory discipline case, the direct appeal of the criminal conviction is final when the appellate court issues its mandate.

(b) **Criminal Conviction Affirmed.** If the criminal conviction made the basis of a compulsory interlocutory suspension is affirmed and becomes final, the CDC must file a motion for final judgment that complies with TRDP 8.05.

(1) If the criminal sentence is fully probated or is an order of deferred adjudication, the motion for final judgment must contain notice of a hearing date. The motion will be set on BODA's next available hearing date.

(2) If the criminal sentence is not fully probated:

- (i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or
- (ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.

(c) **Criminal Conviction Reversed.** If an appellate court issues a mandate reversing the criminal conviction while a Respondent is subject to an interlocutory suspension, the Respondent may file a motion to terminate the interlocutory suspension. The motion to terminate the interlocutory suspension must have certified copies of the decision and mandate of the reversing court attached. If the CDC does not file an opposition to the termination within ten days of being served with the motion, BODA may proceed to decide the motion without a hearing or set the matter for a hearing on its own motion. If the CDC timely opposes the motion, BODA must set the motion for a hearing on its next available hearing date. An order terminating an interlocutory order of suspension does not automatically reinstate a Respondent's license.

## VII. RECIPROCAL DISCIPLINE

### Rule 7.01. Initiation of Proceeding

To initiate an action for reciprocal discipline under TRDP Part IX, the CDC must file a petition with BODA and request an Order to Show Cause. The petition must request that the Respondent be disciplined in Texas and have attached to it any information concerning the disciplinary matter from the other jurisdiction, including a certified copy of the order or judgment rendered against the Respondent.

### Rule 7.02. Order to Show Cause

When a petition is filed, the Chair immediately issues a show cause order and a hearing notice and forwards them to the CDC, who must serve the order and notice on the Respondent. The CDC must notify BODA of the date that service is obtained.

### Rule 7.03. Attorney's Response

If the Respondent does not file an answer within 30 days of being served with the order and notice but thereafter appears at the hearing, BODA may, at the discretion of the Chair, receive testimony from the Respondent relating to the merits of the petition.

## VIII. DISTRICT DISABILITY COMMITTEE HEARINGS

### Rule 8.01. Appointment of District Disability Committee

(a) If the evidentiary panel of the grievance committee finds under TRDP 2.17(P)(2), or the CDC reasonably believes under TRDP 2.14(C), that a Respondent is suffering from a disability, the rules in this section will apply to the de novo proceeding before the District Disability Committee held under TRDP Part XII.

(b) Upon receiving an evidentiary panel's finding or the CDC's referral that an attorney is believed to be suffering from a disability, the BODA Chair must appoint a District Disability Committee in compliance with TRDP 12.02 and designate a chair. BODA will reimburse District Disability Committee members for reasonable expenses directly related to service on the District Disability Committee. The BODA Clerk must notify the CDC and the Respondent that a committee has been appointed and notify the Respondent where to locate the procedural rules governing disability proceedings.

(c) A Respondent who has been notified that a disability referral will be or has been made to BODA may, at any time, waive in writing the appointment of the District Disability Committee or the hearing before the District Disability Committee and enter into an agreed judgment of indefinite disability suspension, provided that the Respondent is competent to waive the hearing. If the Respondent is not represented, the waiver must include a statement affirming that the Respondent has been advised of the right to appointed counsel and waives that right as well.

(d) All pleadings, motions, briefs, or other matters to be filed with the District Disability Committee must be filed with the BODA Clerk.

(e) Should any member of the District Disability Committee become unable to serve, the BODA Chair must appoint a substitute member.

### Rule 8.02. Petition and Answer

(a) **Petition.** Upon being notified that the District Disability Committee has been appointed by BODA, the CDC must, within 20 days, file with the BODA Clerk and serve on the Respondent a copy of a petition for indefinite disability suspension. Service must comply with Rule 1.06.

(b) **Answer.** The Respondent must, within 30 days after service of the petition for indefinite disability suspension, file an answer with the BODA Clerk and serve a copy of the answer on the CDC.

(c) **Hearing Setting.** The BODA Clerk must set the final hearing as instructed by the chair of the District Disability Committee and send notice of the hearing to the parties.

### Rule 8.03. Discovery

(a) **Limited Discovery.** The District Disability Committee may permit limited discovery. The party seeking discovery must file with the BODA Clerk a written request that makes a clear showing of good cause and substantial need and a proposed order. If the District Disability Committee authorizes discovery in a case, it must issue a written order. The order may impose limitations or deadlines on the discovery.

(b) **Physical or Mental Examinations.** On written motion by the Commission or on its own motion, the District Disability Committee may order the Respondent to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. Nothing in this rule limits the Respondent's right to an examination by a professional of his or her choice in addition to any exam ordered by the District Disability Committee.

(1) **Motion.** The Respondent must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.

(2) **Report.** The examining professional must file with the BODA Clerk a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the CDC and the Respondent.

(c) **Objections.** A party must make any objection to a request for discovery within 15 days of receiving the motion by filing a written objection with the BODA Clerk. BODA may decide any objection or contest to a discovery motion.

#### **Rule 8.04. Ability to Compel Attendance**

The Respondent and the CDC may confront and cross-examine witnesses at the hearing. Compulsory process to compel the attendance of witnesses by subpoena, enforceable by an order of a district court of proper jurisdiction, is available to the Respondent and the CDC as provided in TRCP 176.

#### **Rule 8.05. Respondent's Right to Counsel**

(a) The notice to the Respondent that a District Disability Committee has been appointed and the petition for indefinite disability suspension must state that the Respondent may request appointment of counsel by BODA to represent him or her at the disability hearing. BODA will reimburse appointed counsel for reasonable expenses directly related to representation of the Respondent.

(b) To receive appointed counsel under TRDP 12.02, the Respondent must file a written request with the BODA Clerk within 30 days of the date that Respondent is served with the petition for indefinite disability suspension. A late request must demonstrate good cause for the Respondent's failure to file a timely request.

#### **Rule 8.06. Hearing**

The party seeking to establish the disability must prove by a preponderance of the evidence that the Respondent is suffering from a disability as defined in the TRDP. The chair of the District Disability Committee must admit all relevant evidence that is necessary for a fair and complete hearing. The TRE are advisory but not binding on the chair.

#### **Rule 8.07. Notice of Decision**

The District Disability Committee must certify its finding regarding disability to BODA, which will issue the final judgment in the matter.

#### **Rule 8.08. Confidentiality**

All proceedings before the District Disability Committee and BODA, if necessary, are closed to the public. All matters before the District Disability Committee are confidential and are not subject to disclosure or discovery, except as allowed by the TRDP or as may be required in the event of an appeal to the Supreme Court of Texas.

### **IX. DISABILITY REINSTATEMENTS**

#### **Rule 9.01. Petition for Reinstatement**

(a) An attorney under an indefinite disability suspension may, at any time after he or she has been suspended, file a verified petition with BODA to have the suspension terminated and to be reinstated to the practice of law. The petitioner must serve a copy of the petition on the CDC in the manner required by TRDP 12.06. The TRCP apply to a reinstatement proceeding unless they conflict with these rules.

(b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension

contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.

(c) Disability reinstatement proceedings before BODA are not confidential; however, BODA may make all or any part of the record of the proceeding confidential.

#### **Rule 9.02. Discovery**

The discovery period is 60 days from the date that the petition for reinstatement is filed. The BODA Clerk will set the petition for a hearing on the first date available after the close of the discovery period and must notify the parties of the time and place of the hearing. BODA may continue the hearing for good cause shown.

#### **Rule 9.03. Physical or Mental Examinations**

(a) On written motion by the Commission or on its own, BODA may order the petitioner seeking reinstatement to submit to a physical or mental examination by a qualified healthcare or mental healthcare professional. The petitioner must be served with a copy of the motion and given at least seven days to respond. BODA may hold a hearing before ruling on the motion but is not required to do so.

(b) The petitioner must be given reasonable notice of the examination by written order specifying the name, address, and telephone number of the person conducting the examination.

(c) The examining professional must file a detailed, written report that includes the results of all tests performed and the professional's findings, diagnoses, and conclusions. The professional must send a copy of the report to the parties.

(d) If the petitioner fails to submit to an examination as ordered, BODA may dismiss the petition without notice.

(e) Nothing in this rule limits the petitioner's right to an examination by a professional of his or her choice in addition to any exam ordered by BODA.

#### **Rule 9.04. Judgment**

If, after hearing all the evidence, BODA determines that the petitioner is not eligible for reinstatement, BODA may, in its discretion, either enter an order denying the petition or direct that the petition be held in abeyance for a reasonable period of time until the petitioner provides additional proof as directed by BODA. The judgment may include other orders necessary to protect the public and the petitioner's potential clients.

## **X. APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS**

### **Rule 10.01. Appeals to the Supreme Court**

(a) A final decision by BODA, except a determination that a statement constitutes an inquiry or a complaint under TRDP 2.10, may be appealed to the Supreme Court of Texas. The clerk of the Supreme Court of Texas must docket an appeal from a decision by BODA in the same manner as a petition for review without fee.

(b) The appealing party must file the notice of appeal directly with the clerk of the Supreme Court of Texas within 14 days of receiving notice of a final determination by BODA. The record must be filed within 60 days after BODA's determination. The appealing party's brief is due 30 days after the record is filed, and the responding party's brief is due 30 days thereafter. The BODA Clerk must send the parties a notice of BODA's final decision that includes the information in this paragraph.

(c) An appeal to the Supreme Court is governed by TRDP 7.11 and the TRAP.