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

IN THE MATTER OF	§	
JOHN O'NEILL GREEN	§	**CAUSE NO. 65862**
STATE BAR CARD NO. 00785927	§	

FIRST AMENDED 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 First Amended Motion for Entry of Judgment of Disbarment, showing as follows:

1. On May 23, 2022, Petitioner filed its Second Amended Petition for Compulsory Discipline against Respondent, John O'neill Green, (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's following conviction:

> On or about June 28, 2021, a Judgment in a Criminal Case was entered in Cause No. 3:18-cr-00356-S, styled *United States of America v. John O. Green*, in the United States District Court for the Northern District of Texas, Dallas Division, wherein Respondent was found guilty of Count 1 of the Indictment, filed July 18, 2018, Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371. Respondent was ordered to be committed to the custody of the Federal Bureau of Prisons for a term of six (6) months and, upon release, to be on supervised release for a term of three (3) years. Respondent was further ordered to pay a fine to the United States in the amount of $15,000.00 and restitution in the amount of $679,501.50.

2. On August 5, 2022, an Interlocutory Order of Suspension was entered by the Board of Disciplinary Appeals which provides in pertinent part, as follows:

> It is further ORDERED that this Order is interlocutory and that the Board retains jurisdiction to enter a final judgment when the appeal of the criminal conviction is final. See In the Matter of Mercier, 242 SW 3d 46 (Tex. 2007).

3. Following the appeal by Respondent of his criminal conviction in Cause No. 3:18-cr-00356-S, a Judgment (Exhibit 1) and Opinion (Exhibit 2) were issued by the United States Court of Appeals for the Fifth Circuit, on or about August 24, 2022, in Cause No. No. 21-10651, *United States of America, Plaintiff-Appellee v. John O. Green, Defendant-Appellant,* which affirmed the conviction and sentence.

4. Respondent filed a Petition for Writ of Certiorari on November 22, 2022, in Docket No. 22-508, styled *John O. Green v. United States*, in the United States Supreme Court. On January 23, 2023, the Supreme Court denied Respondent's Petition for Writ of Certiorari (Exhibit 3).

5. At the time of hearing of this cause, Petitioner expects to introduce a certified copy of the Judgment and Opinion issued by the United States Court of Appeals for the Fifth Circuit, and a certified copy of the letter and docket sheet showing the petition for writ of certiorari was denied by the Supreme Court of the United States.

6. Petitioner represents to the Board that the Judgment entered against Respondent, John O'neill Green, 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, 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

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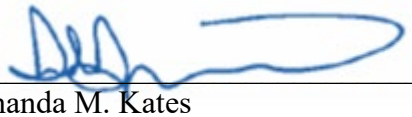


Amanda M. Kates
Bar Card No. 24075987

ATTORNEYS FOR PETITIONER

NOTICE OF HEARING

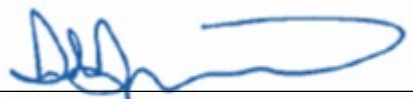
NOTICE IS HEREBY GIVEN that a trial on the merits of the First Amended Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day, will be held in the courtroom of the Supreme Court of Texas, Tom C. Clark Building, 14th and Colorado Streets, Austin, Texas, at **9:00 a.m. on the 28th day of July, 2023**. 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 to Respondent on this the 11th, day of May, as follows:

John O'neill Green
14658 N. Smith
Rathdrum, Idaho 83858
CMRRR #7022 0410 0002 8291 8028



Amanda M. Kates

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2022
Lyle W. Cayce
Clerk

No. 21-10651

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHN O. GREEN,

Defendant—Appellant,

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-356-3

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

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

Certified as a true copy and issued as the mandate on Sep 28, 2022

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

EXHIBIT
1

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2022
Lyle W. Cayce
Clerk

No. 21-10651

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHN O. GREEN,

Defendant—Appellant,

CONSOLIDATED WITH

No. 21-10672

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

THOMAS D. SELGAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CR-356

EXHIBIT
2

Before HIGGINBOTHAM, DENNIS, and GRAVES, *Circuit Judges*.

JAMES L. DENNIS, *Circuit Judge*:

Appellants Thomas Selgas ("Selgas") and John Green ("Green") were convicted by a jury of conspiracy to defraud the Internal Revenue Service ("IRS") by interfering with its lawful functions. *See* 18 U.S.C. § 371. Selgas was also convicted of evasion of payment of taxes. *See* 26 U.S.C. § 7201. On appeal, Selgas and Green both challenge the sufficiency of the evidence supporting their convictions and raise challenges to a number of jury instructions. Selgas also argues that his indictment was constructively amended, that he received ineffective assistance of counsel, and that the district court should have granted him a continuance. We AFFIRM.

I.

Selgas and his wife Michelle were partners in a company called MyMail, Ltd.[1] MyMail sued alleged patent infringers, which resulted in $11 million in settlement proceeds in 2005, of which MyMail received $6.8 million after attorney fees. In February 2006, MyMail's CPA filed tax forms reporting that Michelle Selgas received $1.559 million in ordinary business income and $1.091 million in distributions from MyMail, and Selgas received $117,187 in business income and a $82,000 distribution.

In late 2005, the Selgases had MyMail send $1 million by wire transfer to Dillon Gage, a precious metals dealer in Texas with whom Selgas had an account, and, as instructed by Selgas, Dillon Gage used the money to buy 7,090 quarter-ounce $10 Gold Eagle coins for Selgas. While the Gold Eagle coins have a nominal $10 face value, the actual value of the coins is much higher and is based on the price of gold.

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[1] As we must, we present the facts in the light most favorable to the guilty verdict. *See United States v. Oti*, 872 F.3d 678, 685 n.1 (5th Cir. 2017).

In April 2006, Selgas and Green—his lawyer—orchestrated an effort, along with MyMail partner Bob Derby, to amend MyMail's tax forms "based on the current laws of a constitutional $." According to Selgas and Green, "Federal Reserve Notes are valueless pieces of paper" and "lawful money" is instead measured by the "constitutional value" of a dollar, which is 371 ¼ grains of silver. The practical effect of employing this theory was to significantly underreport the amount of income that MyMail and the Selgases actually received. However, it is well-established that discounting the face value of money, i.e. Federal Reserve Notes, received as income based on the theory that the value of a dollar is tied to a specific weight of gold or silver "is not a legal method" of reducing taxes owed. *Mathes v. Comm'r of Internal Revenue*, 576 F.2d 70, 71 (5th Cir. 1978). "Congress has made the Federal Reserve note the measure of value in our monetary system . . . and has defined Federal Reserve notes as legal tender for taxes . . . . Taxpayers' attempt to devalue the Federal Reserve notes they received as income is, therefore, not lawful under the laws of the United States." *Id.* (internal citations and footnote omitted).

MyMail's CPA refused to amend the tax returns in line with Selgas and Green's so-called "constitutional dollar" or "lawful dollar" theory because the CPA thought it was "not a sustainable position before the IRS." Selgas and Green found another accountant to amend the forms. MyMail's amended tax form reported gross receipts for MyMail of $729,846 instead of $6.8 million; a distribution of $117,079 to Michelle Selgas instead of $1.091 million; and a distribution of $8,798 to Selgas instead of $82,000.

In 2006, Selgas filed a "Statement to the Internal Revenue Service," drafted by Green, for tax year 2005 instead of an income tax return. The Statement included an explanation of the "lawful dollar" theory; reported that the Selgases received $178,640 in "lawful dollars" but denied that this

was "income"; and reported the Selgases' expenses in Federal Reserve Note dollars. By using the discredited "lawful dollar" theory, the Statement significantly understated the Selgases' actual income. Unlike a tax return, the Statement was not signed under penalty of perjury, although it purported to include a declaration pursuant to 28 U.S.C. § 1746, which provides a method for making unsworn declarations. At trial, an IRS witness testified that the 2005 Statement was not a valid tax return.

In due course, the IRS audited MyMail's 2005 taxes and disallowed the amended return that incorporated the "lawful dollar" theory. MyMail unsuccessfully challenged the adjustment in district court, and this court affirmed on appeal, stating that "courts have long held such arguments" as Selgas and Green's theory "are frivolous." *MyMail Ltd. v. Comm'r of I.R.S.*, 498 F. App'x 388 (5th Cir. 2012) (citing *Mathes*, 576 F.2d at 70–71; *Juilliard v. Greenman (The Legal Tender Cases)*, 110 U.S. 421, 448 (1884)).

Owing unpaid taxes for 1997–2002 and 2005, the Selgases engaged in a pattern of behavior that concealed their income and assets from IRS collection efforts.[2] For example, the Selgases did not keep money in bank accounts in their own names. Instead, from 2007 through at least 2017, the Selgases deposited more than $857,000 into Green's client trust accounts, and Green paid the Selgases' expenses and credit card bills out of his trust accounts. In 2008, the Selgases sold their home in Garland, Texas and

[2] Selgas and Michelle previously litigated their 1997–2002 tax liabilities in Tax Court and were represented by Green. The Tax Court ruled for the IRS. Selgas appealed the decision regarding his 2002 taxes to this court, which affirmed. *Selgas v. Comm'r of Internal Revenue*, 475 F.3d 697 (5th Cir. 2007). After the Tax Court ruled against them, Green referred the Selgases to an accountant to prepare belated tax returns for those years. The new returns not only showed no taxes due, but also requested refunds. The IRS initially processed the returns, but later adjusted them to conform with the Tax Court rulings that the Selgases had unpaid tax liability.

bought a new home in Athens, Texas, paying the $385,000 purchase price with 1,667 $10 Gold Eagle coins. Green represented the Selgases in both transactions. The buyer of the Garland home refused to pay in gold coins, so Selgas and Green had the title company send the buyer's payment directly to Dillon Gage to be converted into gold coin. They also attempted to get the Athens house assessed for property taxes purposes based on the purported "constitutional lawful money" dollar price of $16,670 instead of the actual purchase price. In 2012, Selgas sold the Athens house for $8,400 "lawful money" to a trust controlled by a family member.

In May 2014, IRS Revenue Officer Jonathan Daniel was assigned to collect the Selgases' tax deficiencies. After running into difficulty contacting the Selgases, Daniel contacted Green at the post office box listed on the Selgases' IRS power of attorney form. Neither Selgas nor Green responded to multiple letters Daniel sent. In January 2015, Daniel found retirement accounts for the Selgases funded with gold coins, but Selgas withdrew the coins from the accounts before Daniel could seize them. Daniel contacted Green again in July 2015 to request financial information. This time, Green responded that the Selgases had already paid their taxes and requested additional information from Daniel, but otherwise did not respond to Daniel's requests. Daniel eventually located the Athens residence (an initial search of property records was unsuccessful because the title had been transferred to the trust), and he contacted Selgas and Green to advise them that it would be seized. Daniel did not learn that the Selgases putt money in Green's trust accounts, and he was ultimately never able to collect any money to satisfy the Selgases' tax debt.

In July 2018, a grand jury charged Selgas and Green with conspiracy to defraud the United States by impeding and obstructing the IRS in violation of 18 U.S.C. § 371 (Count One). Selgas was also charged with income tax

evasion for years 1998–2002 and 2005, in violation of 26 U.S.C. § 7201 (Count Two).[3] At the final pre-trial conference on January 6, 2020—the day before jury selection was set to begin—Selgas made an oral motion to substitute counsel Charles McFarland for counsel Franklyn Mickelsen and sought a six-to-eight-week continuance so that McFarland could prepare for trial. The district court denied the motion for continuance, but allowed McFarland to act as lead counsel with Mickelsen assisting. After an eight-day jury trial, Selgas and Green were found guilty as charged.

II.

Because Selgas and Green preserved their sufficiency-of-the-evidence challenges by moving for a judgment of acquittal, our review is *de novo*. FED. R. CRIM. P. 29(a); *United States v. Frye*, 489 F.3d 201, 207 (5th Cir. 2007). This court will uphold the jury's verdict if a rational trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). We review the evidence, both direct and circumstantial, as well as all reasonable inferences from that evidence, in the light most favorable to the verdict. *Id.* In doing so, we do not reweigh the evidence or assess the credibility of witnesses, as this is the responsibility of the jury. *Id.*

Constructive amendment claims are typically reviewed *de novo*, *United States v. Jara-Favela*, 686 F.3d 289, 299 (5th Cir. 2012), and challenges to jury instructions are reviewed for abuse of discretion and are subject to harmless error review, *United States v. Johnson*, 990 F.3d 392, 398 (5th Cir. 2021). However, objections not raised before the trial court are reviewed for

[3] Michelle Selgas was also charged in Count One with conspiracy and in Count Three with income tax evasion. The district court granted a judgment of acquittal to Michelle prior to submission of the case to the jury.

plain error. *Puckett v. United States*, 556 U.S. 129, 134–35 (2009). If (1) there is an "error," (2) that is "clear or obvious," and (3) that error "affected the appellant's substantial rights," then (4) we have discretion to remedy the error if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 135.

"Denial of a continuance is within the discretion of the trial judge and will not be reversed absent a clear abuse of discretion." *United States v. Silva*, 611 F.2d 78, 79 (5th Cir. 1980) (citation omitted).

III.

Selgas and Green raise six issues on appeal. Both Selgas and Green claim that the evidence was insufficient to support their conspiracy-to-defraud convictions and challenge the district court's failure to give certain jury instructions. Selgas also claims that the evidence was insufficient to sustain his tax evasion conviction; challenges the district court's denial of his request for a continuance; claims that the district court constructively amended the indictment's tax evasion count; and claims that he received ineffective assistance of counsel. We consider each issue in turn and reject them all.

A.

First, Selgas asserts that the district court erred by denying his eve-of-trial request for a continuance. Selgas claims that the lack of a continuance prevented his new co-counsel from preparing for trial, and thus effectively denied him the right to counsel of his choice. We disagree.

"Generally, a district court's refusal to continue a case to accommodate an attorney brought in at the last minute is not an abuse of discretion." *United States v. Pollani*, 146 F.3d 269, 272 (5th Cir. 1998) (citations omitted). When deciding motions to substitute counsel, "trial

courts have 'wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar.'" *United States v. Neba*, 901 F.3d 260, 265 (5th Cir. 2018) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)). Considerations of fairness include "(1) whether a continuance would be required; (2) whether the party's concerns were based on anything of a factual nature; (3) whether the party requested substitution of counsel late in the case; and (4) whether a continuance could compromise the availability of key witnesses." *Id.* (internal quotation marks and citations omitted).

Selgas moved to substitute counsel and sought a six-to-eight-week continuance on the day before trial. The district court denied the motion for a continuance, but permitted substitute counsel McFarland to represent Selgas and act as lead counsel, with Mickelsen assisting. The district court explained that it was "balancing the right of counsel of choice against the needs of fairness and the demands of the Court's calendar." It noted that other parties in the case opposed the continuance, that the parties had already subpoenaed witnesses who might not be available post-continuance, that other civil and criminal matters were pending on the court's docket, that the substitution of counsel was based on "a strategy issue" and not a factual matter, and that Selgas requested the substitution and continuance late in the case, on the day before trial. This was a reasonable balancing of the competing interests identified in *Neba*. The district court's denial of Selgas's last-minute continuance request was not an abuse of discretion, and Selgas was not denied the counsel of his choice.

B.

Next, Selgas argues that the district court's jury instruction on the elements of income tax evasion under 26 U.S.C. § 7201 constructively amended the indictment. Although Selgas asserted in his opening brief that

our review is *de novo*, our review is for plain error because Selgas did not object to the jury instructions in the district court until his Rule 33 motion for a new trial and thus did not preserve the issue for appeal. *See United States v. Chaker*, 820 F.3d 204, 213 (5th Cir. 2016) (reviewing unpreserved claim for plain error); *United States v. Gevorgyan*, 886 F.3d 450, 457 (5th Cir. 2018) (reviewing issue first raised in new trial motion for plain error).

Because Selgas failed to meaningfully address all four prongs of plain-error review either in his opening brief or in reply, his constructive amendment challenge fails. Even if we were to find an error that was clear or obvious, Selgas has not shown that any error affected his substantial rights or that we should exercise our discretion to correct any such error. *See United States v. Broussard*, 669 F.3d 537, 553 (5th Cir. 2012) ("To affect the defendant's substantial rights, the defendant must demonstrate that the error affected the outcome of the district court proceedings."); *United States v. Escalante-Reyes*, 689 F.3d 415, 425 (5th Cir. 2012) ("Additionally, we do not view the fourth prong as automatic if the other three prongs are met."); *United States v. Phillips*, 477 F.3d 215, 221–23 (5th Cir. 2007) (rejecting constructive amendment challenge on plain-error review for failure to show effect on substantial rights).

C.

Next, Selgas and Green challenge the sufficiency of the evidence supporting their conspiracy-to-defraud convictions. To convict a defendant of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, the Government is required to prove beyond a reasonable doubt: "(1) an agreement between two or more persons to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the members of the conspiracy in furtherance of the objective of the conspiracy."

United States v. Peterson, 244 F.3d 385, 389 (5th Cir. 2001) (citation omitted). Appellants claim that the Government failed to prove all three elements, but their argument is largely premised on an unfounded theory about what it means to interfere with the lawful government functions of the IRS.

Section 371 criminalizes two types of conspiracies against the United States, making it a felony "*either* to commit any [substantive] offense against the United States, *or* to defraud the United States[.]" 18 U.S.C. § 371 (emphasis added). "To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The unlawful objective of Selgas and Green's conspiracy was to defraud the United States "by impeding, impairing, obstructing or defeating the lawful function of the Internal Revenue Service in the ascertainment, computation, assessment, or collection of income taxes."

Selgas and Green raise essentially identical arguments, relying on language in *Hammerschmidt* and *United States v. Haga*, 821 F.2d 1036 (5th Cir. 1987). In *Hammerschmidt,* the Court stated that "a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it" does not fall within the scope of the statute. 265 U.S. at 188. Similarly, in *Haga*, our court stated that a conspiracy to defraud "requires a showing of more than completely external interference with the working of a governmental program or disregard for federal laws," and that "the essence of the conspiracy must at least involve a showing of more than inadvertent contact with a governmental agency or incidental infringement of government regulations." 821 F.2d at 1041.

Both Selgas and Green claim that they did not interfere with the IRS's lawful functions because the Government did not prove that the IRS followed administrative procedures concerning the assessment and collection of taxes—in other words, that the IRS's tax assessment and tax collection effort as to Selgas were not "lawful." Specifically, they claim that Selgas paid his taxes for tax years 1998–2002 and that he had no tax deficiency for 2005 because the IRS had not followed certain administrative and statutory procedures, and therefore they did not interfere with the IRS's lawful functions. Green also seems to argue that the IRS acted outside of its delegated authority altogether.

Appellants' arguments lack merit. First, to the extent that appellants appear to argue at times that the Government had to prove that a lawful government function was *actually* interfered with or obstructed, such an argument is contrary to black-letter law that "[t]he central feature of a conspiracy is the agreement," not whether the object of the agreement was achieved. *United States v. Sanders*, 952 F.3d 263, 274 (5th Cir. 2020); *see Unites States v. Booty*, 621 F.2d 1291, 1297 (5th Cir. 1980) ("Possibility of success is not a requisite element of a criminal conspiracy under 18 U.S.C. § 371").

More importantly, however, appellants' suggestion that the object of the conspiracy was nothing more than "mere external interference" with the IRS is belied by evidence that the object was to actually interfere. Viewed in the light most favorable to the verdict, the evidence at trial showed that Selgas and Green conspired to, *inter alia*, amend MyMail's tax return in order to misrepresent and underreport its income; submit Statements that similarly misrepresented and underreported Selgas's income; and conceal Selgas's money and assets from IRS collection efforts through the use of Green's trust accounts and by transferring Selgas's house to a trust

controlled by a relative. In other words, Selgas and Green did not merely advocate for their tax theories or protest the IRS's policies and efforts, but instead conspired to put their theories into practice with the goal of directly impacting the IRS's "ascertainment, computation, assessment, or collection of income taxes."[4]

Contrary to Selgas and Green's arguments, the IRS's compliance with its own administrative procedures is not relevant to whether the "object" or "essence" of the defendants' conspiracy was to interfere with its lawful functions; proof of an administratively-determined tax deficiency is not an element of the offense; and the Government does not need to specify or prove in a minutely-detailed fashion that interference with a particular statute or procedure was the goal of the conspiracy, but can instead define the object of interference at a higher level of generality. *See United States v. Clark*, 139 F.3d 485, 489 (5th Cir. 1998) (defining "lawful function of the IRS" as "collecting taxes").

Reviewing the evidence in the light most favorable to the verdict, a rational juror could have found that the elements of § 371 were established beyond a reasonable doubt. The existence of an agreement, as well as a

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[4] Any reliance on *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979), is unavailing, as the case is clearly distinguishable. *Porter* concerned an alleged scheme to defraud Medicare. *Id.* at 1050-52. This court reversed defendants' conspiracy-to-defraud convictions because their scheme interfered with no laws or regulations whatsoever: the Government alleged that the doctors involved in the scheme were prohibited from receiving certain fees, but, when pressed by the court, could identify no law or regulations that in fact prohibited such a fee arrangement. *Id.* at 1057. Instead of interfering with a lawful government function, the Government claimed vaguely that "it was defrauded of its right to have the Medicare program conducted honestly and fairly." *Id.* at 1056. Here, by contrast, the Government alleged that Selgas and Green conspired to interfere with "the ascertainment, computation, assessment, or collection of income taxes," which are clearly lawful government functions.

defendant's knowledge of its objective and intent to join, can be established by circumstantial evidence alone. *Sanders*, 952 F.3d at 273; *United States v. Schmick*, 904 F.2d 936, 941 (5th Cir. 1990). "For the evidence to sustain the conviction, it is not necessary that the evidence show an express or formal agreement; evidence of 'a tacit understanding is sufficient.'" *United States v. Aubin*, 87 F.3d 141, 145 (5th Cir. 1996) (quoting *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975)). "The actions and the surrounding circumstances must be incriminating enough to warrant a finding that the Government proved the existence of an agreement beyond a reasonable doubt." *United States v. Ganji*, 880 F.3d 760, 768 (5th Cir. 2018) .

The evidence at trial showed that Green represented Selgas before the Tax Court such that both men knew that the Tax Court had ruled that Selgas had unpaid tax liability; Green testified that he knew about Selgas's "extensive battle with the IRS" from the outset of their relationship and that Selgas introduced him to the "lawful dollar" theory; Green helped Selgas prepare and file the Statements that underreported his income using the unsupportable "lawful dollar" theory; the two worked together to convince MyMail to amend its Form 1065 in line with their theory; both knowing that Selgas owed taxes, Selgas put his money into Green's trust accounts instead of using bank accounts in his own name; and Green paid Selgas's living expenses out of the trust accounts. From this evidence, a rational jury could have found beyond a reasonable doubt that Selgas and Green had an agreement to defraud the IRS and that each had knowledge of the conspiracy's object as well as intent to join in it.

"An overt act is an act performed to effect the object of a conspiracy . . . . Though the act need not be of a criminal nature, it must be done in furtherance of the object of the conspiracy." *United States v. Pomranz*, 43 F.3d 156, 160 (5th Cir. 1995). The evidence of overt acts at trial was

voluminous, and included, *inter alia*, bank records documenting dozens of deposits and withdrawals of Selgas's money into and out of Green's accounts; emails between Selgas, Green, and MyMail partners about amending the Form 1065; Statements prepared by Green that misreported Selgas's income based on the discredited "lawful dollar" theory; and evidence of Green's efforts to frustrate IRS Agent Daniel's attempts to collect Selgas's outstanding tax liabilities. From this evidence a rational jury could find that an overt act was performed in furtherance of the object of the conspiracy.

D.

Next, Selgas challenges the sufficiency of the evidence supporting his conviction for tax evasion. Title 26 U.S.C. § 7201 penalizes "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof." "The elements of tax evasion are: (1) willfulness; (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax." *United States v. Bolton*, 908 F.3d 75, 89 (5th Cir. 2018) (cleaned up). Selgas claims that the Government failed to prove any of the three elements. We disagree.

Selgas mainly focuses on the tax deficiency element, which is also referred to in the caselaw as a "tax due and owing." *See United States v. Schafer*, 580 F.2d 774, 777 (5th Cir. 1978). Selgas argues first that he in fact owed no taxes for 1998-2002, and that the jury was convinced otherwise "[t]hrough the use of false information/evidence." Selgas in effect urges this court to reweigh the evidence, which we will not do, as it is contrary to the standard of review. *Jackson*, 443 U.S. at 319. Instead, viewing the evidence in the light most favorable to the verdict, we conclude that a rational jury could have found that Selgas owed taxes for the relevant years. For example, the jury saw IRS records showing unpaid tax liability.

As to his 2005 tax liability, Selgas argues that he did not have a "tax deficiency" as a matter of law because the Government did not prove that the IRS followed "statutory provisions" related to the assessment of taxes.[5] The Government contends that Selgas's argument is "meritless." Similar to Selgas, the defendant in *United States v. Nolen* maintained that "a formal administrative tax assessment" was necessary to prove evasion of payment under § 7201. 472 F.3d 362, 378 (5th Cir. 2006). Our court, without need to settle the matter definitively because the case was resolved on other grounds, nonetheless concluded that "the weight of authority favors [the] view that an assessment is *not* required to prove attempted evasion of payment under § 7201." *Id.* at 379–80 (quoting *United States v. Farnsworth*, 456 F.3d 394, 403 (3d Cir. 2006)).

We agree with *Nolen* and are persuaded that the weight of authority establishes that a formal assessment is one piece of evidence that *may* prove the existence of a tax deficiency or a tax due and owing, but is not a requirement. *See Farnsworth*, 456 F.3d at 401–03 (collecting cases); *United States v. Silkman*, 156 F.3d 833, 837 (8th Cir. 1998) (rejecting "theory that proof of a valid assessment is essential" and explaining that "while an assessment *may* be used to prove a tax deficiency . . . an assessment is not a necessary element of a payment evasion charge"); *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992) (rejecting argument that "in order to prosecute and convict under section 7201, the Internal Revenue Service must make an assessment of taxes owed and make a demand for payment" so long as existence of tax deficiency is proven); *United States v. Voorhies*, 658 F.2d

[5] The jury was instructed that "to prove that [Selgas] attempted to evade the payment of a tax, the Government does not need to prove that the IRS formally assessed, or determined, the amount of tax due and owing." On appeal, Selgas does not challenge that portion of the jury instructions.

710, 714 (9th Cir. 1981) (rejecting argument that "existence of a tax deficiency" for purposes of § 7201 requires a "final administrative determination of tax liability" and explaining that a "deficiency arises by operation of law" because tax is due and owed on date return must be filed regardless of availability of subsequent administrative procedures); *United States v. Hogan*, 861 F.2d 312, 315–16 (1st Cir. 1988) (holding that "no formal assessment was necessary" where a "tax due and owing" was established); *United States v. Dack*, 747 F.2d 1172, 1174–75 (7th Cir. 1984) (explaining that "tax assessment proceedings are civil in nature and are not normally a prerequisite to criminal liability" such that proof of "validly assessed tax" is only required "when the crime charged is one of evading the payment of taxes *that have been assessed in civil proceedings*" as a matter of fact (emphasis added)).

Selgas's argument to the contrary is premised on a misunderstanding of language in a Seventh Circuit case, *United States v. England*, that "there is no real distinction to be drawn between a 'tax due and owing' and a tax validly assessed." 347 F.2d 425, 430 & n.10 (7th Cir. 1965). The defendant in *England* had been convicted of evading the *assessment* of income taxes some years prior to being charged with evading the *payment* of those assessed taxes. *Id.* at 427–28. Based on the previous evasion-of-assessment conviction, the district court instructed the jury that the previous tax assessments were valid as a matter of law. *Id.* at 429–30. Equating "a tax validly assessed" with the "tax due and owing" element of tax evasion, the Seventh Circuit reversed because the existence of a tax due and owing is a matter of fact that must be found by a jury. *Id.* at 430 & n.10. Viewed in context, the language from *England* that Selgas relies on does not bear the weight that he places upon it because it refers to the particulars of that case, not a general rule to be applied in all tax evasion cases. The Seventh Circuit itself has stated as much,

subsequently holding in *United States v. Dack* that "*England* did not define a valid tax assessment as a necessary element of tax evasion in every case," but rather "stands only for the proposition that where, under a peculiar set of facts, a valid tax assessment is a necessary element, the court cannot instruct the jury to find that element as a matter of law." 747 F.2d at 1174.

In this case, the existence of a "tax deficiency" or a "tax due and owing" was properly given to the jury, and, regarding the 2005 tax year, we conclude that the evidence was sufficient for a reasonable jury to find that Selgas had tax due and owing. Viewed in the light most favorable to the verdict, the evidence showed that Selgas received more than $1 million in income from MyMail in 2005; that he did not file a valid tax return and instead filed a Statement that misreported receipt of $178,640 in "lawful dollars" but denied that this was "income"; and that he did not pay the tax on his substantial unreported income. This evidence was clearly sufficient for the jury to find the existence of a tax deficiency beyond a reasonable doubt.

Turning to the other elements, willfulness is "a voluntary, intentional violation of a known legal duty." *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989). Evidence of willfulness "is ordinarily circumstantial, since direct proof is often unavailable." *Id.* (citation omitted). "Circumstantial evidence in this context may consist of . . . 'any conduct, the likely effect of which would be to mislead or to conceal.'" *Id.* (quoting *Spies v. United States*, 317 U.S. 492, 499 (1943)) (internal citations omitted); *see also United States v. Herrera*, 559 F.3d 296, 300–02 (5th Cir. 2009) (holding that jury could infer willfulness from acts of concealment, including transferring money to another's bank account and putting property in another's name via quitclaim deed). And an affirmative act of tax evasion can be "any conduct, the likely effect of which would be to mislead or to conceal," so long as "the tax-

evasion motive plays any part in such conduct." *Spies*, 317 U.S. at 499. "By way of illustration," such conduct includes, as relevant here, "concealment of assets or covering up sources of income, [and] handling of one's affairs to avoid making the records usual in transactions of the kind." *Id.*

Viewed in the light most favorable to the verdict, the evidence showed that Selgas failed to report a substantial amount of income; influenced MyMail to amend its tax return to underreport how much income it distributed to the Selgases; converted at least $1 million of income into gold coins; purchased a house with gold coins and transferred it to a trust controlled by a relative; and hid his income in Green's trust accounts and used the concealed funds to pay his living expenses for at least a decade, including during the years that IRS Agent Daniel was contacting Selgas and Green, as Selgas's IRS power-of-attorney, in an attempt to collect Selgas's unpaid tax liabilities. Based on the forgoing evidence, a reasonable jury could find beyond a reasonable doubt both willfulness and an affirmative act of evasion.

E.

Next, both appellants assert that the district court plainly erred in not giving certain jury instructions. Both correctly concede that review is for plain error. *See United States v. Dupre*, 117 F.3d 810, 816 (5th Cir. 1997) ("[P]roposed [jury] instructions do not preserve error on appeal, absent an objection specific to the counts at issue."). Selgas submitted thirty jury instructions. However, at the charge conference neither Selgas nor Green requested any of the instructions be given or objected to their exclusion. On appeal, Selgas argues that the district court erred in failing to give submitted instructions 9–13, 26, and 28. Green argues the same regarding instructions 6, 10–13, and 26. All of appellants' challenges to the jury instructions fail.

"A jury instruction must: (1) correctly state the law, (2) clearly instruct the jurors, and (3) be factually supportable." *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018) (citation omitted). "Trial judges have substantial latitude in tailoring their instructions if they fairly and adequately cover the issues presented in the case," and failure to give a requested instruction is error "only when the failure to give a requested instruction serves to prevent the jury from considering the defendant's defense." *United States v. Masat*, 948 F.2d 923, 928 (5th Cir. 1991). "Error in a charge is plain only when, considering the entire charge and evidence presented against the defendant, there is a likelihood of a grave miscarriage of justice." *United States v. McClatchy*, 249 F.3d 348, 357 (5th Cir. 2001) (internal quotation marks and citation omitted). "Jury instruction error 'does not amount to plain error unless it could have meant the difference between acquittal and conviction.'" *Fairley*, 880 F.3d at 208 (quoting *McClatchy*, 249 F.3d at 357).

To begin, we note that appellants' briefing includes many conclusory statements and fails to meaningfully address all four components of plain error review as to all challenged jury instructions. To the extent their arguments are not forfeited for inadequate briefing, however, Selgas and Green have failed to show plain error. Even if we were to assume that appellants' proposed instructions were correct statements of the law (which the Government contests), neither appellant has shown that failure to give the instructions constitutes an error that was clear or obvious, or that any error affected their substantial rights or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" such that we should exercise our discretion to remedy the error. *Puckett*, 556 U.S. at 135; *see also United States v. Stockman*, 947 F.3d 253, 260 (5th Cir. 2020) (explaining that "controlling authority on point" or "closely analogous precedent" is needed to show "clear or obvious" error).

First, Selgas's and Green's briefing regarding instructions 9-13 and Green's briefing regarding instruction 26 wholly fail to address all four components of plain error, and are rejected without further comment. Next, Selgas's argument that the omission of instruction 26 (his proposed definition of a "*Beard* return"[6]) and instruction 28 (his proposed definition of a "tax deficiency") "blinded the jury to Selgas's defense" that he was "rel[ying] on the law and the IRS's legal duties" and "incapacitate[d] the jury from determining whether [he] had a good faith defense that he was complying with the law" also fails. Selgas has not shown that failure to give either instruction was clear or obvious error that affected his substantial rights. And, contrary to his argument, Selgas in fact presented his good faith defense to the jury, and the jury was properly instructed on the definition of "good faith," told that "good faith" was "a complete defense to the charges" because it was inconsistent with the mental state of willfulness, and told that it was the Government's burden to prove that defendants acted with the requisite mental state.

Finally, Green argues that failure to give instruction 6, which purported to define "What a Conspiracy to Defraud Is and Is Not," impaired his "*Haga* defense." The district court's instructions on the conspiracy

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[6] Selgas argues that his 2005 Statement was a "*Beard* return" that self-assessed his tax liability. *See Beard v. Commissioner*, 82 T.C. 766, 777–79 (1984). "In *Beard v. Comm'r.*, the United States Tax Court also examined the question of when a document may be said to constitute a valid tax return for statute-of-limitations purposes. The *Beard* court held that, in order for a document to be considered a return, 'there must be sufficient data to calculate tax liability; . . . the document must purport to be a return; . . . there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and . . . the taxpayer must execute the return under penalties of perjury.'" *United States v. Davis*, 603 F.3d 303, 306–07 (5th Cir. 2010) (quoting *Beard*, 82 T.C. at 777) (internal citation omitted). Selgas's Statement was not a "reasonable attempt to satisfy the requirements of the tax law," and the IRS contested that it was executed under penalty of perjury.

count were based on the Fifth Circuit pattern jury instruction and correctly stated the law. *See United States v. Cessa*, 856 F.3d 370, 376 (5th Cir. 2017) (explaining that district court does not err in using pattern instruction which correctly states the law). Green cites no controlling authority requiring his preferred instruction to be given and therefore cannot show a clear or obvious error. *See Stockman*, 947 F.3d at 260. And he fails to explain how the absence of his proposed instruction prevented him from presenting his defense or otherwise affected his substantial rights, or why we should exercise our discretion under prong four. Green has not shown plain error.

F.

Last, we consider Selgas's claim that he received ineffective assistance of counsel in violation of his Sixth Amendment rights. This claim faces two hurdles on direct appeal. First, Selgas did not raise it until his motion to reconsider the district court's denial of his Rule 33 motion for a new trial. Claims of ineffective assistance are reviewed *de novo*. However, arguments raised for the first time in a motion for reconsideration are reviewed on direct appeal for plain error.[7] Second, we usually do not consider IAC claims on direct review: "This court will consider [IAC] claims on

[7] In his opening brief to this court, Selgas asserts that he is entitled to *de novo* review because his IAC claim was brought to the district court's attention "in his Rule 33 and Rule 29 motions." This is not so. As the district court correctly noted in its order denying Selgas's motion for reconsideration, and as our review of the record confirms, the IAC claim was not included in the initial Rule 29 or Rule 33 motions, but rather was first raised in the motion for reconsideration. In his reply brief, Selgas again misrepresents the record, asserting that his IAC claim was presented to the district court "twice," both in his motion for reconsideration and in his supporting brief. As the motion and brief were submitted to the district court at the same time and in conjunction with each other, it is misleading to claim that the issue was presented "twice." Such material misrepresentations are not appreciated, and we admonish counsel to act with the utmost candor in future appearances before this court or any court.

direct appeal only in 'rare cases' in which the record allows a reviewing court to 'fairly evaluate the merits of the claim.'" *United States v. Aguilar*, 503 F.3d 431, 436 (5th Cir. 2007) (quoting *United States v. Partida*, 385 F.3d 548, 568 (5th Cir. 2004)). Typically, "a § 2255 motion is the preferred method for raising a claim of ineffective assistance of counsel." *United States v. Gordon*, 346 F.3d 135, 136 (5th Cir. 2003) (citing *Massaro v. United States*, 538 U.S. 500 (2003)). We cannot consider Selgas's IAC claim on direct appeal because the record does not fairly allow for an evaluation of the merits, and thus deny it without prejudice to Selgas raising his claim on collateral review. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014).

IV.

For the forgoing reasons, Selgas's and Green's convictions and sentences are AFFIRMED.

Certified as a true copy and issued as the mandate on Sep 28, 2022

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

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 23, 2023

Mr. Lowell H. Becraft, Jr.
403C Andrew Jackson Way
Huntsville, AL 35801

Re: John O. Green
v. United States
No. 22-508

Dear Mr. Becraft:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

A True copy SCOTT S. HARRIS
Test:
Clerk of the Supreme Court of the United States
By Danny Becker
Deputy

EXHIBIT
3

Search documents in this case: Search

No. 22-508

Title:	**John O. Green, Petitioner** **v.** **United States**
Docketed:	November 30, 2022
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(21-10651)
Decision Date:	August 24, 2022

DATE	PROCEEDINGS AND ORDERS
Nov 22 2022	Petition for a writ of certiorari filed. (Response due December 30, 2022) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Dec 30 2022	Waiver of right of respondent United States to respond filed. **Main Document**
Jan 04 2023	DISTRIBUTED for Conference of 1/20/2023.
Jan 23 2023	Petition DENIED.

A True copy SCOTT S. HARRIS
Test:
Clerk of the Supreme Court of the United States
By Danny Bickell
Deputy

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

IN THE MATTER OF	**§**	
JOHN O'NEILL GREEN	**§**	**CAUSE NO. 65862**
STATE BAR CARD NO. 00785927	**§**	

JUDGMENT OF DISBARMENT

On the ____ day of _____, 2023, the Board of Disciplinary Appeals considered the First Amended 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, John O'neill Green. 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 August 5, 2022, the Board of Disciplinary Appeals entered an Interlocutory Order of Suspension, finding that on or about June 28, 2021, a Judgment in a Criminal Case was entered in Cause No. 3:18-cr-00356-S, styled *United States of America v. John O. Green*, in the United States District Court for the Northern District of Texas, Dallas Division, wherein Respondent was found guilty of Count 1 of the Indictment, filed July 18, 2018, Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371. Respondent was ordered to be committed to the custody of the Federal Bureau of Prisons for a term of six (6) months. Respondent is ordered that upon release from imprisonment, to be on supervised release for a term of 3 years. Respondent was further ordered to pay a fine to the United States in the amount of $15,000.00 and restitution in the amount of $679,501.50.

(3) The United States Court of Appeals for the Fifth Circuit affirmed Respondent, John O'neill Green's, conviction and sentence on or about August 24, 2022.

(4) Respondent filed a Petition for Writ of Certiorari on November 22, 2022, in Docket No. 22-508, styled *John O. Green v. United States*, in the United States Supreme Court. On January 23, 2023, the Supreme Court denied Respondent's Petition for Writ of Certiorari.

(5) Petitioner filed its First Amended Motion for Entry of Judgment of Disbarment on or about _____, and served same on

Respondent in accordance with TEXAS RULE OF DISCIPLINARY PROCEDURE 8.05.

(6) Respondent's conviction for the commission of an Intentional Crime as defined by TEXAS RULE OF DISCIPLINARY PROCEDURE 1.06(V) and for a Serious Crime as defined by TEXAS RULE OF DISCIPLINARY PROCEDURE 1.06(GG), for which he was sentenced in the United States District Court for the Northern District of Texas, Dallas Division, has become final and is not subject to further appeal. BODA INTERNAL PROCEDURAL RULE 6.02(a).

(7) Petitioner's First Amended 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, John O'neill Green, State Bar No. 00785927, be and he is hereby DISBARRED from the practice of law in the State of Texas, and his license to practice law in this state be and is hereby revoked.

It is further **ORDERED, ADJUDGED**, and **DECREED** that Respondent, John O'neill Green, 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," "counselor," or "lawyer."

It is further **ORDERED** Respondent, John O'neill Green, shall immediately notify each of his current clients 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, John O'neill Green, 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, John O'neill Green, 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, John O'neill Green, 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, John O'neill Green, 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 a certified copy of the Second Amended Petition for Compulsory Discipline on file herein along with a copy of this Final Judgment of Disbarment be sent to the Chief Disciplinary Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

Signed this _____ day of _____ 2023.

_____
CHAIR PRESIDING

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through June 21, 2018

Contents

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 himor 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[1]) 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.

[1] 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.