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

IN THE MATTER OF	**§**	
RICHARD J. PLEZIA	**§**	**CAUSE NO. 68989**
STATE BAR CARD NO. 16072800	**§**	

MOTION FOR ENTRY OF JUDGMENT OF DISBARMENT

TO THE HONORABLE BOARD:

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

1. On February 28, 2024, the Commission filed its Petition for Compulsory Discipline against Respondent, Richard Plezia (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's following conviction:

> On or about October 4, 2023, a Judgment in a Criminal Case was entered in Cause No. 4:19-cr-00450-005, styled *United States of America v. Richard Plezia*, in the United States District Court Southern District of Texas, Houston Division, that states Respondent was found guilty of Count 1SS – Conspiracy to defraud the United States in violation of 18 U.S.C. § 371; Count 5SS – False Statement in violation of 18 U.S.C. § 1001(a)(2); Count 6SS – False Statement in violation of 18 U.S.C. § 1001(a)(2); and Count 7SS – Falsification of records in violation of 18 U.S.C. § 1519; on February 2, 2023. Respondent was ordered to be committed to the custody of the Federal Bureau of Prisons for a term of six months and one day with the term consisting of six (6) months and one (1) day as to each of Counts 1SS, 5SS, 6SS, and 7SS, to run concurrently, for a total term of six (6) months and one (1) day. Upon release from imprisonment, Respondent will be on supervised release for a term of 2 years. Respondent was further ordered to pay an assessment in the amount of $400.00 and a fine in the amount of $5,000.

2. On March 28, 2024 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. *In the Matter of Mercier*, 242 SW 3d 46 (Tex. 2007).

3. Following the appeal by Respondent of his criminal conviction in Cause No. 4:19-CR-00450-005, an Opinion (Exhibit 1) and Judgment issued as Mandate (Exhibit 2) was issued by the United States Court of Appeals for the Fifth Circuit, on or about August 22, 2024, in Cause No. No. 23-20483, *United States of America, Plaintiff-Appellee v. Richard Plezia, Defendant-Appellant,* which affirmed in part and vacated in part, and remanded the cause to the District Court for further proceedings in accordance with the opinion of the Court.

4. On September 4, 2024, an Amended Judgment in a Criminal Case (Exhibit 3) was entered in Cause No. 4:19-CR-00450-005, styled *United States of America v. Richard Plezia*, in the United States District Court Southern District of Texas, Houston Division, that states Respondent was found guilty of Count 1SS – Conspiracy to defraud the United States in violation of 18 U.S.C. § 371; Count 6SS – False Statement in violation of 18 U.S.C. § 1001(a)(2); and Count 7SS – Falsification of records in violation of 18 U.S.C. § 1519. Respondent was ordered to be committed to the custody of the Federal Bureau of Prisons for a term of six months and one day with the term consisting of six (6) months and one (1) day as to each of Counts 1SS, 6SS, and 7SS, to run concurrently, for a total of six (6) months and one (1) day. Upon release from imprisonment, Respondent will be on supervised release for a term of 2 years. Respondent was further ordered to pay an assessment in the amount of $300.00 and a fine in the amount of $5,000.

5. A true and correct copy of the Opinion, Judgment issued as Mandate by the United States District Court for the Fifth Circuit, and Amended Judgment in a Criminal Case issued the

by the United States District Court, Southern District of Texas, Houston Division, are attached hereto as Exhibits 1, 2, and 3, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. The Commission expects to introduce a certified copy of Exhibits 1 through 3 at the time of hearing of this cause.

6. The Commission represents to the Board that the Judgment entered against Respondent, Richard Plezia, has now become final. The Commission 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 the Commission seeks the entry herein.

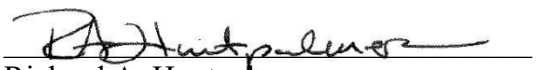
PRAYER

WHEREFORE, PREMISES CONSIDERED, the Commission prays, upon notice to Respondent, that the Board enter its order disbarring Respondent and for such other and further relief to which the Commission may be entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

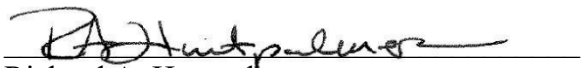
Richard A. Huntpalmer
Assistant Disciplinary Counsel
Office of the Chief Disciplinary Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711
Telephone: 512.427.1350
Telecopier: 512.427.4253
Email: richard.huntpalmer@texasbar.com



Richard A. Huntpalmer
Bar Card No. 24097857

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a trial on the merits of the Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day, will be held in the courtroom of the Supreme Court of Texas, Tom C. Clark Building, 14th and Colorado Streets, Austin, Texas, at **9:00 a.m. on the 25th day of April, 2025**. The hearing location and format (in-person vs virtual) are subject to change.

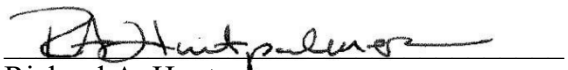


Richard A. Huntpalmer

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent for service on this the 5th day of March 2025, as follows:

Richard Plezia
2909 Hillcroft Street, Ste. 575
Houston, Texas 77057
Via Personal Service
and Email to rick@rplezialaw.com



Richard A. Huntpalmer

United States Court of Appeals for the Fifth Circuit

No. 23-20483

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICHARD PLEZIA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-450-5

Before HIGGINBOTHAM, STEWART, and HIGGINSON, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

Richard Plezia ("Plezia") challenges his convictions of conspiracy to defraud the United States, making false statements, and falsification of records in a federal investigation following a fifteen-day jury trial. He challenges the sufficiency of the evidence for some of the convictions, the district court's determination that the statute of limitations for one count of making false statements was equitably tolled, and the district court's decision to allow two witnesses to testify with the aid of prior recorded recollections. Because we agree with Plezia that equitable tolling of the statute of limitations in 18 U.S.C. § 3282 is not available, we VACATE Plezia's conviction under

Count Five and remand with instructions to dismiss Count Five with prejudice. However, the panel's agreement with Plezia ends there. With respect to every other assignment of error, we AFFIRM.

I. Factual Background

Plezia was a Houston-based personal injury attorney charged with conspiracy to defraud the United States through falsified reporting on tax returns to the Internal Revenue Service ("IRS"). The alleged falsified gains arise from barratry, the impermissible practice of attorneys soliciting clients that have not invited any contact with prospective counsel. The Government averred that Plezia conspired with a group of personal-injury attorneys and non-attorney case runners ("case runners") in Houston, Texas to unlawfully reduce the federal income taxes owed by Jeffrey Stern ("Stern"). The case runners were alleged to solicit clients for Stern—in violation of the Texas Penal Code and the Texas Disciplinary Rules of Professional Conduct ("TDRPC"). The charging instrument set out that Plezia worked with case runner Marcus Esquivel ("Esquivel") to aid Stern in reducing the income taxes he owed from 2011 through 2013. It alleged that Stern "funneled" illegal payments for soliciting and "running" cases to Esquivel by writing checks to Plezia—who subsequently wrote corresponding checks out to Esquivel's business entities. Stern would then deduct the amounts paid to Plezia as attorney "referral fees."

A. The Indictments and Pretrial Proceedings

In August 2019, Stern was arrested and charged with conspiracy to commit fraud against the United States, willfully filing a false tax return, and obstruction of justice. Stern pleaded guilty to the first two counts and agreed to pay over $4.35 million in restitution to the IRS and cooperate with the prosecution and investigation of other attorneys involved in the scheme. On August 6, 2019, the grand jury indicted Plezia on one count of conspiracy to

defraud the United States in violation of 18 U.S.C. § 371 ("Count One"). On January 18, 2022, the grand jury returned a Third Superseding Indictment adding two counts of making false statements to IRS agents in violation of 18 U.S.C. § 1001(a)(2) ("Counts Five and Six") and one count of falsifying records in violation of 18 U.S.C. § 1519 ("Count Seven").

Count One's allegations against Plezia are limited to his participation in redirecting checks to Esquivel. Count Five sets out that Plezia falsely told an IRS agent in Houston in December 2016 that he had never paid Esquivel any referral fees for clients in violation of the Texas bar rules. Count Six avers that Plezia made another materially false statement to IRS agents in September 2018 when he averred that any payments between him, Esquivel, and Stern were provided solely for the purpose of financing his ongoing benzene exposure toxic tort litigation against BP. Lastly, in Count Seven, the Government alleged that Plezia created a false document supporting or tracking the false statement he made in Count Six with the intent to impede a federal investigation under the jurisdiction of the IRS.

Plezia pleaded not guilty to all charges and proceeded to a jury trial on January 9, 2023. He moved to dismiss the entirety of the Third Superseding Indictment for constitutional violations. Plezia argued that the Government's delay in prosecuting all charges violated his Fifth and Sixth Amendment rights. He also filed a separate motion to dismiss Count Five as barred by the five-year statute of limitations in 18 U.S.C. § 3282 because it was filed over five years after the alleged false statement was made. He asserted that Count Five was filed five years and forty-two days after the alleged false statement was made even though the Government had all relevant information to charge him with that offense for at least three years before the Third Superseding Indictment. The Government opposed both motions and argued that the statute of limitations had been tolled due to the delays arising from its compliance with the district court's COVID orders

and from delays in processing Justice Department approvals during the pandemic. It further argued that the discovery of evidence of Plezia's involvement in Stern's scheme was hindered by COVID delays related to several steps of the investigation which prompted the addition of Count Five.

In April 2022, the district court held a pretrial hearing to address Plezia's motions to dismiss the indictment. With respect to his motion to dismiss the entire indictment, Plezia argued that he was prejudiced by the delay. The Government countered that it had adequately apprised Plezia of the charges against him at an April 2021 reverse proffer meeting. The Government attributed the delay in action between April 2021 and January 2022 to delays in seeking approval from the Department of Justice, Tax Division for the newly added charges in the indictment and a warrant to search Plezia's computer. The Government filed the indictment before fully analyzing the materials retrieved from Plezia's computer. The district court denied the motion because it did not "believe that the defendant has shown either that the [G]overnment acted for the bad purpose of gaining a tactical advantage" or "some other bad-faith purpose."

On his motion to dismiss Count Five due to the statute of limitations, Plezia asserted that the district court could not relax congressionally mandated statutes of limitations, even during the COVID-19 pandemic. He further argued that the Government also failed to act with the due diligence required to receive the benefit of equitable tolling. The Government contended that it relied on the district court's COVID-related orders tolling the statute of limitations. It further elaborated that, while COVID did not delay the Tax Division's approval of certain actions, it did delay the Government's debriefing of Stern which then provided the evidence that tied Plezia's conduct to the newly added charge in Count Five. The district court acknowledged the difficulty of analyzing the statute of limitations issue, noting that "[t]here is surprisingly scant case law on it." The district court

then denied the motion to dismiss Count Five because Plezia was apprised of the charges against him as early as April 2021.

B. The Trial

Trial began on January 9, 2023, and took place over four weeks with over thirty witnesses testifying. The prosecution opened its case by detailing how Stern adjusted the financing of his legal practice following an audit in 2010—allegedly by disguising payments to case runners by funneling payments through other attorneys and deducting those payments as referral fees on his tax returns. It averred that some attorneys implicated in Stern's scheme had no knowledge of this process and that some case runners would forge those attorneys' signatures before cashing the checks. On the other hand, some attorneys knew that they were receiving money from Stern to execute a kickback payment to a case runner, often also partaking in deducting any payments as referral fees or fees for other services. The Government argued that Plezia fell into the latter category of attorneys implicated in this underreporting scheme.

The prosecution called several witnesses during its case in chief. It first called IRS agent Loc Nguyen ("Nguyen") to testify about the investigation into Stern's law firm and properties from 2011 to 2013. Nguyen detailed the Stern's method of writing Plezia checks during that period, recording those funds as attorney referral fees in his business records, and then deducting those amounts from his taxable income. He stated that Stern's 2012 law firm ledgers indicated referral fee payments to Plezia in several large amounts. He noted that these types of fees are ordinarily claimed as deductions on a company's tax return and reduce the total tax liability. He further testified that Stern generated a 1099 tax form for referral fees paid to Plezia to document the payments, and in 2013, the amount totaled $143,000 in non-employee compensation to Plezia. Nguyen

maintained that Plezia's own accounting showed that Plezia would promptly issue a check redirecting funds received from Stern to Esquivel or his business entities from early 2011 to early 2013. He determined that Plezia's payments to Esquivel from 2011 to 2013 totaled over $500,000.

Stern then took the stand. Stern testified that he used case runners for a period of ten years—most frequently working with Esquivel, Fred Morris ("Morris"), and Lamont Ratcliff ("Ratcliff")—to solicit personal-injury clients. He further contended that he dealt with each case runner separately, never involving the case runners in each other's activities. He averred that he would pay his case runners about $1 million a year collectively and opted to disguise the payments by issuing checks to their closely held businesses or by redirecting the funds through another lawyer to give the appearance of a permissible referral fee amongst attorneys. He acknowledged that the disguised payments through other attorneys could easily be employed as deductible business expenses. He further testified that he knew that the use of paid case runners was illegal and prohibited by the professional conduct rules of the Texas State Bar. He admitted that he knew that the ethics rules only permitted the payment of referral fees to other attorneys for referring clients, and that the payment of referral fees to non-attorneys is categorically prohibited.

Stern asserted that he began paying Esquivel purportedly for advertising services for his law firm to conceal the case running payments. He stated that he purchased many cases from Esquivel over the course of two decades and would often pay Esquivel a set amount up front in addition to twenty percent of the attorney's fee exacted when the case resolved. He averred that following his audit in early 2011, he and Esquivel agreed to alter the method of concealing payments for case running services by funneling payments through Plezia. He further testified that Esquivel was also working for Plezia at the time. Stern further stated that at the time he began using

Plezia as a funnel, he had limited dealings with him. Stern stated that he never discussed the payment arrangement with Plezia because Esquivel told him that they would handle it privately.

Stern testified that Esquivel kept a ledger detailing the cases he referred to Stern, and reviewed the checks he issued to Plezia to demonstrate that each check was issued to pay Esquivel for his case running services. He contended that, when a case (routed through Plezia) was resolved, Stern would meet with Esquivel, show him the requisite documents as proof of resolution, and then issue a check to Plezia. He further averred that Esquivel would then run the check over to Plezia to issue a check back to Esquivel or his business entities. Stern explained that, after the IRS began investigating him for tax evasion in 2016, he took actions to cover up his dealings with Esquivel. He testified that he shredded documents and informed Plezia and Esquivel of the investigation in Fall 2016. He testified that Plezia informed him at a holiday party in December 2016 that he had been interviewed by IRS agents and that he refrained from directly answering their questions. Stern also recounted that Plezia met with his defense attorneys shortly after.

Stern further stated that other attorneys he worked with had claimed that they used funds from Stern to pay clients' medical bills instead of writing checks for case running services. Stern testified that Plezia was subpoenaed by the grand jury and responded to the subpoena by producing a letter dated August 24, 2010, from Plezia to Stern. At trial, Stern stated that he had "never seen that document before." The letter purported to set out "a proposal for the referral and fee agreement for the BP cases that" Plezia retained. The search warrant executed on Stern's law office turned up no documents related to the BP cases on the firm's computer systems. Stern testified that any checks from this period issued to Plezia were illegal kickbacks to be paid to Esquivel through Plezia. He further opined that it

would have been fairly obvious to someone in Plezia's position, given past dealings with Esquivel, that this was an illegal kickback scheme.

Although Plezia maintained that Stern represented that payments were legitimate third-party financing of Plezia's mass toxic tort action against BP, Stern disavowed ever making that representation. Plezia's BP case initially involved over 800 clients, and Stern had written $532,000 in checks from 2011 to 2013. Stern maintained that Esquivel orchestrated the deliveries of checks with Plezia. He also admitted that he had "no idea" what information Esquivel gave Plezia regarding the nature of the checks. Stern further asserted that only $424,000 of the $532,000 was paid to Plezia, with the remaining $108,000 deposited directly into Esquivel's accounts in 2013.

Stern's defense attorneys, David Gerger and Dean Blumrosen, also testified against Plezia. Gerger testified that he had interviewed Plezia during the course of representing Stern and kept extensive notes of their meeting. The Government then sought to admit the interview notes as business records and as recorded recollections under Federal Rule of Evidence 803(5) & (6). Plezia timely objected. The district court determined that it would be best for the Government to refresh the witness's recollection with the documents but not admit them into the record. However, because Gerger was still unable to adequately recall the 2016 interview with Plezia after reviewing the notes, the district court allowed the notes and their accompanying memoranda to be read into evidence over Plezia's objection.

The memorandum stated that Plezia sought Stern's aid to finance his BP litigation, and that while Plezia thought that they did not have a written agreement governing the fee schedule, he believed that they orally agreed upon Stern paying about $500,000. It further stated that Plezia arranged for Esquivel to do the "legwork" on the cases, coordinating with about 400 plaintiffs living close to the BP plant alleged to emit high levels of benzenes.

Id. Plezia explained that while Esquivel charged his expenses, plus a per client fee, the BP litigation was ultimately not profitable. The same was done with Blumrosen's notes from his interview with Plezia. Blumrosen testified, based on his notes, that Plezia reached out to Stern to inquire about financing before Esquivel did. Blumrosen further testified that Plezia failed to provide him with invoices from his dealings with Stern and Esquivel as promised during the meeting.

Over half a dozen employees from Plezia's and Stern's law firms also testified for the prosecution. This included other attorneys and law firm office managers and staff, including Stern's law firm's controller[1]—and all testified that they did not know that Stern had financed Plezia's BP litigation or whether Plezia paid Esquivel for his work on the BP litigation after early 2011. For instance, Plezia's legal assistant, Lilia Sosa, testified that in her six years working on the BP litigation with Plezia, she never saw Stern at case or client meetings or heard that Stern financed any of those cases. Stern's office controller, Robert Koenig, stated that after Stern's firm was audited in 2011, they began to send far more 1099 tax forms out to parties that they contracted with. Koenig further testified that if Plezia had received a 1099 form for services rendered, it would be clear that the funds described there would be income for Plezia and deductible business expenses for Stern. Stern's accountant, Stanley Toy, testified to the same.

Plezia's accountant, Marcus Dillon, testified that he was never informed that Stern's checks from 2011 to 2013 were "pass-through" payments to Esquivel for case referrals to Stern. Dillon further opined that Plezia filed "false" income tax returns during 2011, 2012, and 2013, because

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[1] An office controller is the individual responsible for issuing checks on the behalf of the firm..

he treated Stern's checks as income while also deducting the corresponding checks that he wrote to Esquivel out of those funds, as business expenses. Morris testified that he served as a case runner for attorney Roy Abner ("Abner") and Stern during that same period. He stated that he solicited clients for Abner in exchange for cash. Morris stated that he also solicited clients for Stern, using Abner as a middleman, but testified that he did not know Plezia or anything about his business. Morris further asserted that Plezia and Esquivel were not involved in or privy to any payment structures orchestrated by Stern and Abner. Another case runner in Stern's network, Ratcliff, similarly testified that after initially getting paid directly by Stern, he received "disguised" payments funneled through checks re-directed by attorney Deborah Bradley, an associate in Stern's law office. Ultimately, Ratcliff noted that he also did not know Plezia.[2]

Esquivel also took the stand and testified that he offered case running services to personal injury attorneys in Houston for three decades. He described his standard practices: he would purchase accident reports and then approach victims to get them to seek legal counsel. He stated that he was initially paid $500 for each case he referred to a personal injury attorney. He further testified that over time, he would receive a larger sum up front for referring commercial cases and would also receive a percentage of the attorney's fees collected after settlement. Esquivel stated that he set up nearly half a dozen businesses solely to collect case referral payments from Stern and other attorneys.

Esquivel further noted that while he made hundreds of thousands of dollars through referring cases, he never received a 1099 form from Stern.

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[2] The jury also heard from William Shepherd, a case runner that worked for Plezia from 2018 to 2021. He testified that Plezia would pay him for leads as a case runner by checks written to him personally or to one of his business entities.

Esquivel further corroborated Stern's testimony that, during the 2010s, they switched from making case running payments in cash to checks to "hide" illegal kickbacks for case running services and "use [the payments] as a deduction on [Stern's] tax returns." He testified that he first connected with Plezia in 2010 and that Plezia paid him in checks labeled as "website marketing expense[s]" even though he did not create a website for Plezia's firm. Esquivel further explained how he solicited clients for Plezia's BP litigation, marketing the cases as very lucrative at a town hall event. He noted that he referred most of the cases by November 2010, and that he received his last payment for services on the BP litigation from Plezia in early 2011.

Esquivel testified that Plezia only worked with attorney Dan Cartwright on the BP litigation, and that Stern did not provide financing and was not involved in any other way. Esquivel stated that after addressing the amounts that Stern owed him in early 2011 for prior underpaid case running services, they agreed to run the checks through Plezia. He stated that Plezia agreed to redirect payments from Stern to his business entities as a favor. Esquivel testified that he did not tell Plezia that the money was from BP litigation, which had wrapped up by that time, and he did not testify that he told Plezia the money was for any legitimate business endeavor. He further stated that he reviewed each check from Stern to Plezia, and that none were for the BP litigation, even where the deposit referenced BP.

Esquivel testified that Stern told him that he was under investigation in 2016. He further averred that they both purchased burner phones to communicate with each other after Esquivel was contacted by IRS Agent Robert Simpson ("Simpson"). He stated that they decided to conceal the payments by telling Simpson that they were designed to finance the BP litigation. He testified that Plezia was informed of the plan and did not object to the proposed cover-up.

Simpson testified that he interviewed Plezia on December 7, 2016, at a coffee shop in Houston and on September 28, 2018, via the telephone. Simpson recounted the December 7, 2016 meeting in which Plezia stated that the checks he received from Stern during the relevant period were likely related to his BP litigation. He noted that Plezia also told him that there were discrepancies in the dating of payments or checks dated in 2013, years after his BP litigation ended. Simpson further averred that Plezia informed him that Esquivel conducted investigative, marketing, and advertising work for his firm and that he never paid Esquivel any client referral fees.

Simpson alleged that he had not reviewed Stern's bank records before the December 2016 meeting, but that his review of the numerous transactions between Stern and Plezia raised suspicion of illegitimate payments being funneled through Plezia. In response to a grand jury subpoena, Plezia opted to turn over documents to Simpson for review in the Fall 2018. On September 28, 2018, Simpson interviewed Plezia a second time. Simpson testified that in that interview, Plezia mentioned an August 24, 2010 letter to Stern which set out that checks from Stern to Plezia were offered to finance his BP litigation. He testified that Plezia stated that any checks deposited to BelMark, a company owned by Esquivel, were issued for the purpose of paying clients' medical deposits as a result of Esquivel's investigative work on the BP case. Simpson also averred that—while Plezia told him twice during the September 2018 interview that Esquivel was responsible for paying medical deposits—other correspondence and records made clear that there were no medical deposits to be paid at the outset of the case.

Following the prosecution's close of its case, Plezia moved for a judgment of acquittal. He argued that the evidence was insufficient to sustain his 18 U.S.C. § 371 conspiracy charge and the charge of making false statements arising from his meeting with Simpson in December 2016. The district court denied the motion. Plezia then called several witnesses and

even took the stand himself. He called Mikal Watts, a personal injury attorney, as an expert witness opining on toxic tort cases like Plezia's BP litigation. Watts explained that while there are ethical ways to acquire clients in personal injury cases, the method of "barratry" or "case-running" is broadly considered unethical. However, Watts testified that the rules prohibiting those methods are "[g]enerally not enforced in" Texas. He further testified that Plezia was aware of the Texas barratry statute and the disciplinary rules provision prohibiting client solicitation and sharing attorney's fees with non-attorneys.

Plezia testified that he never discussed case running with Esquivel and had never paid Esquivel for any cases. He stated that he did not learn of Esquivel's case running affairs until he was indicted. He further asserted that it was not typical to use case runners in his practice and that while several case investigators he knew turned out to be case runners, they either denied it when he asked them previously or concealed such activity from him. He further testified that a few weeks after he began working with Esquivel, Esquivel told him that Stern would finance his remaining BP benzene cases. Plezia averred that he then prepared the August 2010 letter after that conversation. He did note that the letter stated that it was sent "via facsimile" but did not contain a signature and fax number. Plezia explained that he was often out of the office during that time period and that, while he would not have been there to see the fax sent after dictating it, correspondence would have been faxed when he dictated it, and he knew that Stern received the letter because he started getting checks for BP expenses from Stern.

Plezia asserted that he received invoices from Esquivel, but on cross-examination, Plezia admitted that the documents he alleges he received looked different than Esquivel's invoices to other attorneys. He also admitted on cross that despite what the August 2010 letter said about using Stern's

payments to cover medical expenses, he never had to pay any medical expenses or deposits for his BP litigation clients.

Plezia subsequently renewed his motion for judgment of acquittal and moved for a new trial which the district court denied on September 14, 2023. Ultimately, the jury convicted Plezia on all counts. He renewed his motion after the verdict, challenging the sufficiency of the evidence on all four counts. The district court denied the motion. At sentencing, the district court sentenced Plezia to six months and one day in prison, followed by two years of supervised release. He timely appealed. On October 24, 2023, the district court granted Plezia's motion for release on bond during the pendency of his appeal.

II. Discussion

Plezia raises five assignments of error on appeal. He argues that (1) the district court abused its discretion in tolling the statute of limitations for Count Five; (2) there was insufficient evidence to sustain his § 371 conspiracy conviction in Count One; (3) the Government failed to adduce any evidence of venue to sustain Count Six; (4) the Government failed to meet its burden of proof as to his § 1519 conviction in Count Seven; and (5) the district court abused its discretion in allowing Blumrosen and Gerger to read from their notes from witness interviews with Plezia. We address each in turn, beginning with the equitable tolling issue.

a. Equitable Tolling of Count Five

On appeal, Plezia contends only that equitable tolling is not available under § 3282 and does not argue that, if equitable tolling were available, its invocation would have been an abuse of discretion. As the Government agrees, our review of this contention is de novo. *See United States v. McMillan*, 600 F.3d 434, 443-44 (5th Cir. 2010) ("We review the district court's fact findings in relation to the statute of limitations for clear error and

its legal conclusions de novo." (internal citation and italics omitted)). "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Toussie v. United States*, 397 U.S. 112, 114 (1970). Section 3282 sets out the general statute of limitations for federal, non-capital offenses. It provides that:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282. Congress has expressly provided for the extension or tolling of criminal statutes of limitations for the Government to obtain evidence of an offense from a foreign country, 18 U.S.C. § 3292, during wartime, 18 U.S.C. § 3287, and during periods where a fugitive flees from justice, 18 U.S.C. § 3290, among other occurrences. Absent from this list of exceptions is any word from Congress providing that a global health crisis suspends a criminal statute of limitations.

In support of its argument that equitable tolling applies to § 3282, the Government cites the Third Circuit's decisions in *United States v. Midgley*, 142 F.3d 174 (3d Cir. 1998), and *United States v. Terlingo*, 327 F.3d 216 (3d Cir. 2003). In *Midgley*, the Third Circuit confronted the question of whether equitable tolling applied to allow the reinstatement of charges dismissed under the defendant's plea agreement after an intervening change in Supreme Court precedent. *See id.* at 181. The *Midgley* panel noted, in dicta, that the Third Circuit had "observed that criminal statutes of limitations are subject to tolling," *id.* at 178, but one case it cited for the proposition addressed one of the express exceptions we have cited above, *see United States v. Levine*, 658 F.2d 113, 120 (3d Cir. 1981) (acknowledging that statutes

of limitations may be tolled for fugitives), and the other case was a civil case emphasizing the rights that a civil statute of limitations protects by analogy to criminal statutes of limitations, *see Powers v. Southland Corp.*, 4 F.3d 223, 233 (3d Cir. 1993). In *Midgley*, the panel ultimately declined to toll the statute of limitations to allow the reinstatement of the dismissed charges. 142 F.3d at 179. In *Terlingo*, the Third Circuit tolled the time limit to allow the district court to impose criminal restitution post-conviction more than ninety days after sentencing. *See* 327 F.3d at 222.

The general premise gleaned from the Third Circuit's determinations in *Terlingo* and *Midgley* is that post-conviction time limits in criminal cases may be subject to equitable tolling. *See* 327 F.3d at 222; 142 F.3d at 177–78. This general premise cannot be applied to override the Supreme Court's statement that "a defendant's right to a fair trial would be prejudiced" by undue delay of the trial beyond the period of limitation prescribed for the charge against him. *United States v. Marion*, 404 U.S. 307, 322 (1971). Thus, the Government's arguments and the facts of this case do not eclipse the plain language of § 3282. *See Toussie*, 397 U.S. at 114–15 (noting that the statute of limitations is an expression of Congress's will to limit a charged individual's exposure to criminal prosecution to the time period which it prescribes).

Here, the Government alleges that Plezia made materially false statements to Simpson at an in-person interview on December 7, 2016. Plezia was first charged with this offense in the Third Superseding Indictment on January 22, 2022. Thus, the charge was brought over five years after the alleged offense was committed. Because the applicable statute of limitations is five years and Congress has provided no express grant to suspend it based on a global pandemic, the district court erred in denying Plezia's motion to dismiss Count Five of the Third Superseding Indictment. Thus, we vacate Plezia's conviction under Count Five.

b. Sufficiency of the Evidence for Count One

Plezia also challenges the sufficiency of the evidence to sustain his 18 U.S.C. § 371 conspiracy conviction. We review an appropriately preserved sufficiency of the evidence claim de novo. *United States v. Brannan*, 98 F.4th 636, 638 (5th Cir. 2024). We are limited to reviewing the evidence "in the light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Shum*, 493 F.3d 390, 391 (5th Cir. 2007). Notably, a court's review of a jury verdict is "highly deferential." *United States v. McNealy*, 625 F.3d 858, 870 (5th Cir. 2010). To sustain a conviction under 18 U.S.C. § 371, the Government must prove three elements: "(1) an agreement between two or more people 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 conspirators in furtherance of the conspiracy's objective." *United States v. Porter*, 542 F.3d 1088, 1092 (5th Cir. 2008) (citing 18 U.S.C. § 371).

Plezia raises three arguments as to the insufficiency of the evidence supporting his § 371 conviction: (1) insufficient evidence as to an agreement to illegally reduce Stern's tax liability, (2) insufficient evidence that Plezia knew that the case running sums were not truly tax-deductible under 26 U.S.C. § 162(c)(2), and (3) a conspiracy variance claim. We begin first with his argument as to the agreement.

i. Agreement

Plezia argues that there is no evidence that he "specifically intended to obstruct the IRS's lawful functions concerning Stern's taxes." But Plezia can point to no binding precedent that requires this evidence in order to sustain a § 371 conviction. His argument also fails to account for the

established principle that "[a]n agreement may be inferred from concert of action, voluntary participation may be inferred from a collection of circumstances, and knowledge may be inferred from surrounding circumstances." *United States v. Chon*, 713 F.3d 812, 818–19 (5th Cir. 2013). At the outset, we note that this court has long held that "[d]irect evidence of a conspiracy is unnecessary; each element *may be inferred from circumstantial evidence*." *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994) (emphasis added). Based on our close review of the record, we conclude the jury was presented with sufficient circumstantial evidence from various sources suggesting that Plezia tacitly agreed to join in an illegal enterprise to underreport taxable income.

Stern and Esquivel directly testified as to the how their scheme of kicking back illegal referral fees to non-attorneys was conducted. Esquivel testified that Plezia did not object to the payment scheme when he was told what the checks were for. His testimony that Plezia worked with case runners for his own practice provides further circumstantial evidence that he understood that ill-gotten gains would be excluded from taxable income *somewhere* in the chain of transactions as a result of his participation in this scheme. The jury was entitled to assign minimal weight to Plezia's testimony that he never worked with case runners and that he was never told that the purpose behind the payments was illegal because the testimony of several other witnesses contradicted his testimony and prior representations to IRS agents. *See United States v. Stacey*, 896 F.2d 75, 78 (5th Cir. 1990) (quoting *United States v. Holbert*, 578 F.2d 128, 130 (5th Cir. 1978)).

Plezia's argument partially relies on the Eleventh Circuit's analysis from *United States v. Kottwitz*, 614 F.3d 1241 (11th Cir. 2010). In *Kottwitz*, the court held that, to sustain a § 371 conviction, the prosecution must demonstrate "that each alleged conspirator knew that the scheme would culminate in the filing of false tax returns." 614 F.3d at 1265. However, the

Kottwitz court also noted that the purpose of filing false tax returns need not be the only object of the conspiracy and that the prosecution may prove the existence of common goals through circumstantial evidence. *Id.*; *see also United States v. Hough*, 803 F.3d 1181, 1188–89 (11th Cir. 2015) (holding same). It is possible on this record that a rational jury could have concluded through the circumstantial evidence presented that Plezia, Stern, and Esquivel shared common goals, including the underreporting of illicit income. Our review of a jury's verdict is "highly deferential." *United States v. Fisch*, 851 F.3d 402, 406 (5th Cir. 2017). Given this deference to the jury's verdict, we conclude that Plezia has failed to demonstrate that a rational jury could not find that he joined in a conspiracy with the goal of reducing Stern's reported taxable income in violation of § 371.

ii. Scienter

Plezia also argues that the Government "failed to prove beyond a reasonable doubt that" Plezia knew that any funneled payments to Esquivel were non-deductible as illegal kickbacks under 26 U.S.C. § 162(c)(2). We are unpersuaded. Section 162 provides that no individual may deduct as a business expense any direct or indirect kickback payment prohibited by a "generally enforced" state law "subject[ing] the payor to criminal penalty *or the loss of a license or privilege to engage in a trade or business.*" *Id.* § 162(c)(2) (emphasis added). Based on our review of the record, the jury was presented with sufficient evidence supporting its conclusion that Plezia likely knew that the sums paid to him were not deductible under § 162.

Dillon, Plezia's accountant, testified that he thought that Plezia's checks to Esquivel's companies were business expenses. He further testified that if he had known that the sums that Plezia paid to Esquivel were for illegal case referral fees, he believed those sums should not have been reported as legal fee income from Stern *or* as an "advertising expense for the law firm"

provided by Esquivel. Several witnesses also testified that anyone could discern that a certain sum would be deducted from receiving a 1099 form that the issuer or payor could likely seek to deduct those sums paid as business expenses on their income tax forms.

Plezia alternatively argues that the Texas Penal Code § 38.12 and Rules 5.04 and 7.03 of the TDRPC are not "generally enforced" state laws that bar the deduction of kickback sums. This argument also fails. IRS regulations further explain that the "generally enforced" provisions of § 162(c)(2) sets out a presumption that a state law is generally enforced, but that presumption may be overcome "if it is never enforced or the only persons normally charged . . . are infamous or those whose violations are extraordinarily flagrant." 26 C.F.R. § 1.162-18(b)(3). Furthermore, the Supreme Court of Texas has made clear that an attorney who violates the TDRPC may be disbarred, have his license suspended, or be reprimanded under the bar's standard grievance procedure. *See In re Caballero*, 272 S.W.3d 595, 597 (Tex. 2008); *In re Lock*, 54 S.W.3d 305, 307 (Tex. 2001). The reviewing body for such grievances may be a district court or a disciplinary body within the bar. TEX. R. DISCIPLINARY P. 2.13–.18; 3.09–.10; *In re Mercier*, 242 S.W.3d 46, 47 (Tex. 2007) (per curiam). As the Government notes, this dual enforcement system that carries penalties up to and including disbarment qualifies as a generally enforced state law that is enforced regardless of whether violations are "infamous or . . . extraordinarily flagrant." *See* 26 C.F.R. § 1.162-18(b)(3).

While Plezia and Watts testified for the defense that what Plezia did was immoral, but not routinely enforced by disbarment or jailtime, the jury also heard from Stern, Morris, Moncriff, both Stern's and Plezia's accountants, and Esquivel, who all testified to the fact that the relevant TDRPC and Texas Penal Code provisions carry the force of law. On appeal, Plezia points to no evidence, statistics, or prior cases that demonstrate that

the jury's decision to reject his evidence offered at trial resulted from unreasonable inferences to merit overturning the jury's verdict. *See United States v. Umawa Oke Imo*, 739 F.3d 226, 235 (5th Cir. 2014) (holding that the court must view the evidence and all reasonable inferences in the light most favorable to the jury's verdict). For these reasons, we hold that a rational jury could have found beyond a reasonable doubt that Plezia joined in a conspiracy with an object of unlawfully reducing reported taxable income for those involved in the scheme. *See id.*

iii. Variance Claim

Plezia's last argument as to Count One is a variance claim challenging the sufficiency of the evidence supporting the jury's finding that Plezia and numerous other defendants were members of the same conspiracy. *See United States v. Fields*, 72 F.3d 1200, 1210 (5th Cir. 1996). Essentially, we are presented with the question of whether the evidence at trial was sufficient to demonstrate a single broad conspiracy "wheel" orchestrated by Stern as the "hub" and with Esquivel and Plezia as one "spoke." *See United States v. Richerson*, 833 F.2d 1147, 1152–53 (5th Cir. 1987). While "counting the number of conspiracies proved is a difficult exercise," this court has stated the relevant factors are "(1) the existence of a common goal, (2) the nature of the scheme[,] and (3) overlapping of participants in the various dealings." *Id.* at 1153 (citing *United States v. Tilton*, 610 F.2d 302, 307 (5th Cir. 1987)). We have further noted that the first criteria of a "common goal" is incredibly broad such that a "common goal is shown when the alleged co-conspirators all sought 'personal gains' through some participation in a broad conspiracy scheme." *United States v. Beacham*, 774 F.3d 267, 273 (5th Cir. 2014).

Here, there is ample evidence for the jury to reasonably infer that Plezia, Esquivel, and Stern "shared the common goal of deriving personal gain through" concealing illegal case runner payments. *See id.* at 273–74. As

to the second factor, we have said that a single conspiracy is inferred "where the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect or to the overall success of the venture." *United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995). That element is arguably satisfied here as the jury could reasonably infer that the performance of one "spoke" of the "wheel," *i.e.*, Plezia's and Esquivel's successful, undetected funneling of case running payments, inured to Stern's benefit. The jury could also infer from the evidence that the scheme furthered the case running relationships that Stern had with other involved case runners and attorneys and netted more illicit tax-exempt income. Thus, the jury could reasonably conclude that the nature of the scheme here also indicates a single conspiracy. *See Beacham*, 774 F.3d at 274. The last factor also weighs in favor of supporting the jury's finding of a single conspiracy. We have stated that the overlap of participants factor carries "no requirement that every member must participate in every transaction to find a single conspiracy." *Morris*, 46 F.3d at 416. However, Plezia's argument that his lack of knowledge of the others involved in the case is insufficient to demonstrate that the jury irrationally found one broad conspiracy here. This is especially so in light of this court's consistent precedent that each member need not participate in every transaction in the conspiracy. *See United States v. Shows Urquidi*, 71 F.4th 357, 381–82 (5th Cir. 2023).[3]

Notably, Plezia did not request a multiple conspiracy jury instruction which would have explicitly directed the jury to acquit if they found that he was involved in a conspiracy other than the *conspiracy charged in the indictment*. *See Beacham*, 774 F.3d at 274. ("The district court instructed the

[3] The Government's theory, which the jury accepted here, has been approved as demonstrating a significant overlap, even where the participants work through a single "key man" or "hub" of the "wheel." *See Richerson*, 833 F.2d at 1154 (quotation omitted).

jury that if it found that a defendant was in a conspiracy but not in the conspiracy alleged in the indictment, then it must acquit."). We have consistently held that where a jury finds that a single conspiracy exists, we owe extreme deference to the jury's verdict. *See id.* Viewing the evidence in the light most favorable to the verdict, we conclude that the evidence was sufficient for the jury to find that Plezia knowingly participated in a single conspiracy to defraud the United States through the underreporting of income and concealment of illegal case running kickback payments.

c. Evidence of Venue to Sustain Count Six

Plezia seeks to overturn his second 18 U.S.C. § 1001 conviction based on insufficient evidence that he made materially false statements while within the Southern District of Texas. Notably, the Government "need only show the propriety of venue by a preponderance of the evidence, not beyond a reasonable doubt." *United States v. Strain*, 396 F.3d 689, 692 & n.3 (5th Cir. 2005). A defendant "must assert a challenge to venue prior to trial if the indictment or circumstances known to the defendant make such a challenge apparent." *Rodriguez-Lopez*, 756 F.3d at 430 (citing *United States v. Carreon–Palacio*, 267 F.3d 381, 392 (5th Cir. 2001)). This court has also previously determined that "[i]f a venue challenge is not apparent before trial, a defendant must bring a claim of improper venue to the district court's attention at the close of the United States' evidence." *United States v. Rodriguez-Lopez*, 756 F.3d 422, 430 (5th Cir. 2014).

Here, the Government asserts that Plezia has waived his objection to venue because he did not raise the issue until after trial. We agree. *See United States v. Rodriguez-Lopez*, 756 F.3d 422, 430 (5th Cir. 2014) ("A defendant waives his right to contest venue on appeal, however, when his motion for acquittal fails to put the court and the United States on notice of the challenge to venue."). Although Plezia concedes that he did not raise the issue of venue

until after trial and that, under our circuit precedent, he has waived the challenge on appeal, he argues that our precedent is incorrect and that we should review his challenge under a plain error standard of review.

Assuming arguendo we were to apply a plain error standard of review to Plezia's venue challenge, his claim would still fail. For insufficient evidence of a venue element to rise to the level of plain error, there must have been a "manifest miscarriage of justice." *United States v. Phillips*, 477 F.3d 215, 219 (5th Cir. 2007). Plezia has not demonstrated a manifest miscarriage of justice here. 18 U.S.C. § 3237 provides that, except where prescribed by statute, "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be *inquired of and prosecuted* in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237. And as we have long held, "a jury may infer venue from circumstantial evidence in the record as a whole." *Id.* (citing *United States v. White*, 611 F.2d 531, 534–35 (5th Cir. 1980)).

In this case, all of Plezia's conduct occurred in Houston, Texas, and Simpson testified that he and Plezia met in person for their first interview at a coffee shop in Houston. Furthermore, Simpson worked out of the IRS's offices in Houston and all of his investigative work occurred within the Southern District of Texas. The jury was entitled to infer that Plezia had made the false statement while within the district from the evidence and testimony adduced at trial. *See id.* Based on this record, the jury reasonably concluded that Plezia was in the Southern District of Texas when the false statements about Plezia's BP litigation financing agreement with Stern were made during the September 28, 2018 phone interview. Thus, he cannot demonstrate a manifest miscarriage of justice meriting the reversal of his § 1001 conviction based on venue under even a plain error standard of review.

d. Obstruction of a Federal Investigation in Count Seven

Plezia further argues that his conviction for obstruction of a federal investigation under 18 U.S.C. § 1519 was supported by insufficient evidence. Because Plezia preserved this argument, we review the issue de novo. *See Brannan*, 98 F.4th at 638. He argues that the Government failed to satisfy its burden on the jurisdictional element of § 1519 because he submitted the alleged fabricated records used in support of his conviction at the request of the grand jury, which is not a federal agency or department contemplated by § 1519. In *United States v. McRae*, we described that § 1519 criminalizes three instances where a defendant acts with intent to obstruct any investigation—formal or informal—within the jurisdiction of a federal agency:

> (1) when a defendant acts directly with respect to the investigation or proper administration of any matter, that is, a pending matter, (2) when a defendant acts in contemplation of any such matter, and (3) when a defendant acts in relation to any such matter.

702 F.3d 806, 837 (5th Cir. 2012) (citations omitted). We have further held that to sustain a § 1519 conviction, the defendant need not know that the investigation is ongoing or even imminent. *See United States v. Moore*, 708 F.3d 639, 649 (5th Cir. 2013). Section 1519 provides that:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or *in relation to* or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (emphasis added). We have held that the clause "any matter within the jurisdiction of any department or agency of the United States"

prescribes a jurisdictional relationship "between the United States and the matter being obstructed." *McRae*, 702 F.3d at 835.

Previously, both the Supreme Court and this court have broadly interpreted the statutory language "in relation to" or "relating to" based on its common use. *See Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992); *United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007) (citing *Morales*, 504 U.S. at 383). In *United States v. Moore*, 71 F.4th 392, 399 (5th Cir. 2023), the panel incorporated circuit and Supreme Court precedent to read 18 U.S.C. § 2251(a) as prohibiting the sexual exploitation of a minor, broadly. The *Moore* panel noted that the ordinary meaning of "relating to" means "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Id.* at 400 (citations omitted) (cleaned up). In affirming the defendant's child exploitation conviction, the panel further stated that the phrase "relating to the sexual exploitation of children" is read in a broad sense to mean "any criminal sexual conduct involving children." *Id.* at 400.

Applying the ordinary meaning of the statute's "in relation to" clause here, we conclude that § 1519 criminalizes obstructive acts germane to or arising from a federal agency's investigation. We further hold that Plezia's submission of a false record to Simpson falls within § 1519's ambit because the grand jury's request did "pertain," "stand in some relation," or "have bearing or concern," to the IRS's investigation. *See id.* This conclusion accords with those of the Eighth and Eleventh Circuits, which have read § 1519's "in relation to" language in this manner and denied arguments that false records either produced at the request of the grand jury or discovered through the execution of a search warrant do not qualify as obstructive conduct under § 1519. *See United States v. Hoffman-Vaile*, 568 F.3d 1335, 1343 (11th Cir. 2009); *United States v. Yielding*, 657 F.3d 688, 710–14 (8th Cir.

2011). We hold that the jury properly found that Plezia obstructed a federal investigation in violation of 18 U.S.C. § 1519.

e. Blumrosen's and Gerger's Testimony

A district court's decision to admit or reject evidence offered at trial is reviewed for abuse of discretion where appropriately preserved. *O'Malley v. U.S. Fidelity & Guar. Co.*, 776 F.2d 494, 500 (5th Cir. 1985). A misapplication of law generally constitutes an abuse of discretion. *See RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 859 (5th Cir. 2010). Where this court holds that the district court abused its discretion in its evidentiary ruling, the district court's determination will not be reversed unless the appellant identifies that the challenged ruling affected the appellant's substantial rights. *E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 763 (5th Cir. 2018).

Plezia contends that the district court abused its discretion by allowing Blumrosen and Gerger to read from their interview notes because the notes contained inadmissible hearsay. Even if the decisions to allow Gerger and Blumrosen to testify with the aid of their notes were error, it constitutes harmless error. The overwhelming amount of evidence outside of Gerger's and Blumrosen's testimony—spanning a fifteen-day trial—suggests that any error suffered was harmless. *See, e.g.*, *United States v. Judon*, 567 F.2d 1289, 1294–95 (5th Cir. 1978) (holding that a clear error to admit a document under Rule 803(5) would not require a new trial "because the proof of guilt on this case was so overwhelming that this latter evidentiary error would be harmless beyond a reasonable doubt"). This court has held that alleged evidentiary errors in such circumstances constitute harmless error where there is substantial evidence tending to prove guilt from a voluminous record. *See United States v. Greenlaw*, 84 F.4th 325, 352 (5th Cir. 2023); *United States v. Skilling*, 638 F.3d 480, 488 (5th Cir. 2011). Thus, we hold that the district

court's decisions to allow Gerger and Blumrosen to testify with the aid of their interview notes does not require overturning Plezia's convictions.

III. Conclusion

For the foregoing reasons, we VACATE Plezia's judgment of conviction as to Count Five because the statute of limitations had run and remand with instructions to dismiss Count Five with prejudice. We AFFIRM Plezia's judgments of conviction as to all other Counts appealed.

United States Court of Appeals
for the Fifth Circuit

No. 23-20483

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICHARD PLEZIA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CR-450-5

Before HIGGINBOTHAM, STEWART, and HIGGINSON, *Circuit Judges*.

J U D G M E N T

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 IN PART and VACATED IN PART, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

EXHIBIT
2

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

Certified as a true copy and issued as the mandate on Sep 13, 2024

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

AO 245C (Rev. 09/19) Amended Judgment in a Criminal Case
Sheet 1

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS
Holding Session in Houston

UNITED STATES OF AMERICA

v.

RICHARD PLEZIA

AMENDED JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 4:19CR00450-005

USM NUMBER: 99027-479

Christopher L Tritico

Brent Evan Newton
Defendant's Attorney

Date of Original Judgment: September 14, 2023
(Or Date of Last Amended Judgment)

THE DEFENDANT:

☐ pleaded guilty to count(s).

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) *1SS, 6SS, and 7SS on February 2, 2023. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to defraud the United States	09/28/2018	1SS
*			
18 U.S.C. § 1001(a)(2)	False Statement	09/28/2018	6SS
18 U.S.C. § 1519	Falsification of records	09/28/2018	7SS

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 22, 2024
Date of Imposition of Judgment

Signature of Judge

LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

September 4, 2024
Date

EXHIBIT
3

DEFENDANT: **RICHARD PLEZIA**
CASE NUMBER: **4:19CR00450-005**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 6 months and 1 day.

This term consists of SIX (6) MONTHS and ONE (1) DAY as to each of Counts 1SS,*, 6SS and 7SS, to run concurrently, for a total of SIX (6) MONTHS and ONE (1) DAY.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant be designated to a facility in or near El Reno, Oklahoma.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on 1/19/2024

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **RICHARD PLEZIA**
CASE NUMBER: **4:19CR00450-005**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: 2 years.
This term consists of TWO (2) YEARS as to each of Counts 1SS, *, 6SS and 7SS, to run concurrently, for a total of TWO (2) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests, thereafter, as determined by the court.
   - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.
14. If restitution is ordered, the defendant must make restitution as ordered by the Judge and in accordance with the applicable provisions of 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663A and/or 3664. The defendant must also pay the assessment imposed in accordance with 18 U.S.C. § 3013.
15. The defendant must notify the U.S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: **RICHARD PLEZIA**
CASE NUMBER: **4:19CR00450-005**

SPECIAL CONDITIONS OF SUPERVISION

You will be monitored by the form of location monitoring technology indicated below for a period of SIX (6) months, and you must follow the rules and regulations of the location monitoring program. You must pay the costs of the program, if financially able.

☒ Location monitoring technology at the discretion of the probation officer. (The court emphasized the least restrictive monitoring possible.)
☐ Radio Frequency (RF) Monitoring
☐ GPS Monitoring (including hybrid GPS)
☐ Voice Recognition.

This form of location monitoring technology will be used to monitor the following restriction on your movement in the community:

☐ **Curfew**: You are restricted to your residence every day from to .
☒ **Home Detention**: You are restricted to your residence at all times except for employment; education; religious services;
medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other
activities as preapproved by the officer.
☐ **Home Incarceration**: You are restricted to your residence at all times except for medical necessities and court appearances or other activities specifically approved by the Court.
☒ You must comply with the following condition(s):
You must complete 200 hours of community service at a facility or organization that works with special needs children. The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.

DEFENDANT: **RICHARD PLEZIA**
CASE NUMBER: **4:19CR00450-005**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment[1]	JVTA Assessment[2]
TOTALS	$300.00*	$	$5,000	$	$

A $100 special assessment is ordered as to each of Counts 1SS, *, 6SS and 7SS, for a total of *$300.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss[3]	Restitution Ordered	Priority or Percentage
	$	$	

☐ See Additional Restitution Payees.

TOTALS	$	$	

☐ Restitution amount ordered pursuant to plea agreement $_____

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

1 Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
2 Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
3 Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **RICHARD PLEZIA**
CASE NUMBER: **4:19CR00450-005**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $_____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after the date of this judgment; or

D ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 61010
Houston, TX 77208

No payment is ordered/required while in custody. Any balance remaining after release from imprisonment shall be paid in monthly installments of $300 to commence 60 days after release to a term of supervision.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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

IN THE MATTER OF	**§**	
RICHARD PLEZIA	**§**	**CAUSE NO. 68989**
STATE BAR CARD NO. 16072800	**§**	

JUDGMENT OF DISBARMENT

On the 25th day of April, 2025, the Board of Disciplinary Appeals considered the Motion for Entry of Judgment of Disbarment filed by Petitioner, the Commission for Lawyer Discipline, in the above-styled and numbered compulsory discipline case. The Board finds that:

(1) The Board retains jurisdiction to enter a final judgment in this matter. TEX. RULES DISCIPLINARY P. R. 8.04- 06.

(2) On March 28, 2024, the Board of Disciplinary Appeals entered an Interlocutory Order of Suspension, finding that Respondent was convicted of an Intentional Crime as defined by Texas Rule of Disciplinary Procedure 1.06(V) and a Serious Crime as defined by Texas Rule of Disciplinary Procedure 1.06(GG).

(3) On or about October 4, 2023, a Judgment in a Criminal Case was entered in Cause No. 4:19-cr-00450-005, styled *United States of America v. Richard Plezia*, in the United States District Court Southern District of Texas, Houston Division, that states Respondent was found guilty of Count 1SS – Conspiracy to defraud the United States in violation of 18 U.S.C. § 371; Count 5SS – False Statement in violation of 18 U.S.C. § 1001(a)(2); Count 6SS – False Statement in violation of 18 U.S.C. § 1001(a)(2); and Count 7SS – Falsification of records in violation of 18 U.S.C. § 1519; on February 2, 2023.

(4) Respondent was ordered to be committed to the custody of the Federal Bureau of Prisons for a term of six months and one day with the term consisting of six (6) months and one (1) day as to each of Counts 1SS, 5SS, 6SS, and 7SS, to run concurrently, for a total term of six (6) months and one (1) day. Upon release from imprisonment, Respondent will be on supervised release for a term of 2 years. Respondent was further ordered to pay an assessment in the amount of $400.00 and a fine in the amount of $5,000.

(5) The United States Court of Appeals for the Fifth Circuit affirmed in part and vacated in part Respondent's conviction and sentence, and remanded

the cause to the District court for further proceedings by Opinion and Judgment issued as Mandate on or about August 22, 2024, in the appeal styled *United States of America, Plaintiff-Appellee v. Richard Plezia, Defendant-Appellant,* Case No. 23-20483.

(6) On or about August 22, 2024, the Fifth Circuit issued its Mandate affirming in part and vacating in part Respondent's conviction and sentence, and remanded the case to the District Court for further proceedings.

(7) On September 4, 2024, an Amended Judgment in a Criminal Case was entered in Cause No. 4:19-cr-00450-005, styled *United States of America v. Richard Plezia*, in the United States District Court Southern District of Texas, Houston Division, that states Respondent was found guilty of Count 1SS – Conspiracy to defraud the United States in violation of 18 U.S.C. § 371; Count 6SS – False Statement in violation of 18 U.S.C. § 1001(a)(2); and Count 7SS – Falsification of records in violation of 18 U.S.C. § 1519.

(8) Respondent was ordered to be committed to the custody of the Federal Bureau of Prisons for a term of six months and one day with the term consisting of six (6) months and one (1) day as to each of Counts 1SS, 6SS, and 7SS, to run concurrently, for a total of six (6) months and one (1) day. Upon release from imprisonment, Respondent will be on supervised release for a term of 2 years. Respondent was further ordered to pay an assessment in the amount of $300.00 and a fine in the amount of $5,000.

(9) Petitioner filed its Motion for Entry of Judgment of Disbarment on or about February 28, 2025, and served same on Respondent in accordance with TEXAS RULE OF DISCIPLINARY PROCEDURE 8.05.

(10) Respondent's conviction, for which he was sentenced in the United States District Court for the Southern District of Texas, Houston Division, has become final and is not subject to further appeal. BODA INTERNAL PROCEDURAL RULE 6.02(a).

(11) Petitioner's Motion for Entry of Judgment of Disbarment shall be granted. TEX. RULES 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, Richard Plezia, State Bar No. 16072800, be and hereby is DISBARRED from the practice of law in the State of Texas, and his license to practice law in this state be and hereby is revoked.

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

It is further **ORDERED** Respondent, Richard Plezia, shall immediately notify each of his current clients, if any, in writing of his 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, Richard Plezia, 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, 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, Richard Plezia, shall, on or before thirty (30)

days from the signing of this judgment, 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, Richard Plezia, 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, Richard Plezia, shall immediately surrender his Texas law license and permanent State Bar Card to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P. O. Box 12487, Austin, Texas 78711, for transmittal to the Clerk of the Supreme Court of Texas.

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

Signed this _____ day of _____ 2025.

_____
CHAIR PRESIDING

The Board of Disciplinary Appeals

Appointed by the Supreme Court of Texas

Internal Procedural Rules

(effective September 24, 2024)

Mailing Address:
P.O. Box 12426
Austin TX 78711

1414 Colorado, Suite 610
Austin TX 78701

Tel: 512 427-1578
FAX: 512 427-4130
website: txboda.org

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through September 24, 2024

Contents

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Current through September 24, 2024

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.

(c) BODA may, upon decision of the Chair, conduct any business or proceedings—including any hearing, pretrial conference, or consideration of any matter or motion—remotely.

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 or a complaint is not required to be filed electronically.

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

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

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

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

(5) Format. An electronically filed document must:

(i) be in text-searchable portable document format (PDF);

(ii) be directly converted to PDF rather than scanned, if possible; and

(iii) not be locked.

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

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

(1) an "/s/" and name typed in the space where the signature would otherwise appear, unless the document is notarized or sworn; or

(2) an electronic image or scanned image of the signature.

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

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

Rule 1.06. Service of Petition

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

Rule 1.07. Hearing Setting and Notice

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

(b) **Expedited Settings.** If a party desires a hearing on a matter on a date earlier than the next regularly available BODA hearing date, the party may request an expedited setting in a written motion setting out the reasons for the request. Unless the parties agree otherwise, and except in the case of a petition to revoke probation under TRDP 2.23 [2.22], the expedited hearing setting must be at least 30 days from the date of service of the petition, motion, or other pleading. BODA has the sole discretion to grant or deny a request for an expedited hearing date.

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

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

Rule 1.08. Time to Answer

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

Rule 1.09. Pretrial Procedure

(a) **Motions.**

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

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

(i) if applicable, the date of notice of decision of the evidentiary panel, together with the number and style of the case;

(ii) if an appeal has been perfected, the date when the appeal was perfected;

(iii) the original deadline for filing the item in question;

(iv) the length of time requested for the extension;

(v) the number of extensions of time that have been granted previously regarding the item in question; and

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

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

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

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

(1) marked;

(2) indexed with the title or description of the item offered as an exhibit; and

(3) if voluminous, bound to lie flat when open and tabbed in accordance with the index.

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

Rule 1.10. Decisions

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

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

(1) as required by the TRDP; and

(2) on its website for a period of at least ten years following the date of the disciplinary judgment or order.

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

Rule 1.11. Board of Disciplinary Appeals Opinions

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

(b) Only a BODA member who participated in the decision of a disciplinary matter may file or join in a written opinion concurring in or dissenting from the judgment of BODA. For purposes of this rule, in hearings in which evidence is taken, no member may participate in the decision unless that member was present at the hearing. In all other proceedings, no member may participate unless that member has reviewed the record. Any member of BODA may file a written opinion in connection with the denial of a hearing or rehearing en banc.

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

Rule 1.12. BODA Work Product and Drafts

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

Rule 1.13. Record Retention

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

Rule 1.14. Costs of Reproduction of Records

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

Rule 1.15. Publication of These Rules

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

II. ETHICAL CONSIDERATIONS

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

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

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

(c) A BODA member may represent a party in a legal

malpractice case, provided that he or she is later recused in accordance with these rules from any proceeding before BODA arising out of the same facts.

Rule 2.02. Confidentiality

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

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

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

Rule 2.03. Disqualification and Recusal of BODA Members

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

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

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

III. CLASSIFICATION APPEALS

Rule 3.01. Notice of Right to Appeal

(a) If a grievance filed by the Complainant under TRDP 2.10 is classified as an inquiry, the CDC must notify the Complainant of his or her right to appeal as set out in TRDP 2.10 or another applicable rule. If a grievance is classified as a complaint, the CDC must notify both the Complainant and the Respondent of the Respondent's 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. For a grievance classified as a complaint, the CDC must send the Respondent an appeal notice form, approved by BODA, with notice of 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 not consider documents or other submissions that the Complainant or Respondent filed with the CDC or BODA after the CDC's classification. 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.

Rule 3.03. Disposition of Classification Appeal

(a) BODA may decide a classification appeal by doing any of the following:

(1) affirm the CDC's classification of the grievance as an inquiry and the dismissal of the grievance;

(2) reverse the CDC's classification of the grievance as an inquiry, reclassify the grievance as a complaint, and return the matter to the CDC for investigation, just cause determination, and further proceedings in accordance with the TRDP;

(3) affirm the CDC's classification of the grievance as a complaint and return the matter to the CDC to proceed with investigation, just cause determination, and further proceedings in accordance with the TRDP; or

(4) reverse the CDC's classification of the grievance as a complaint, reclassify the grievance as an inquiry, and dismiss the grievance.

(b) When BODA reverses the CDC's inquiry classification and reclassifies a grievance as a complaint, BODA must reference any provisions of the TDRPC under which BODA concludes professional misconduct is alleged. When BODA affirms the CDC's complaint classification, BODA may reference any provisions of the TDRPC under which BODA concludes professional misconduct is alleged. The scope of investigation will be determined by the CDC in accordance with TRDP 2.12.

(c) BODA's decision in a classification appeal is final and conclusive, and such decision is not subject to appeal or reconsideration.

(d) A classification appeal decision under (a)(1) or (4), which results in dismissal, has no bearing on whether the Complainant may amend the grievance and resubmit it to the CDC under TRDP 2.10.

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 [TRDP] 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.