



F I L E D

Dec. 14, 2021

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

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

**IN THE MATTER OF
AARON MARK WESBROOKS,
STATE BAR CARD NO. 21191850**

§
§
§

CAUSE NO. 66186

PETITION FOR RECIPROCAL DISCIPLINE

TO THE BOARD OF DISCIPLINARY APPEALS:

Petitioner, the Commission for Lawyer Discipline, (hereinafter called “Petitioner”), brings this action against Respondent, Aaron Mark Wesbrooks, AKA Mark Doss Wesbrooks, (hereinafter called “Respondent”), showing as follows:

1. This action is commenced by Petitioner pursuant to Part IX of the Texas Rules of Disciplinary Procedure. Petitioner is also providing Respondent a copy of Section 7 of this Board’s Internal Procedural Rules, relating to Reciprocal Discipline Matters.
2. Respondent is a member of the State Bar of Texas and is licensed and authorized to practice law in Texas. Respondent may be served with a true and correct copy of this Petition for Reciprocal Discipline at Aaron Mark Wesbrooks, 4020 Vinalopo Drive, Austin, Texas 78738.
3. On or about October 16, 2020, a Complaint (Exhibit 1) was filed Before the Presiding Disciplinary Judge in a matter styled, *In the Matter of a Current Member of the State Bar of Arizona, Mark Doss Wesbrooks, Bar No. 018690, Respondent, PDJ 2020-9097, [State Bar File No. 19-2602]* alleging a violation of Rule 42, Ariz. R. Sup. Ct., ER 1.2, ER 1.3, ER 1.4, ER 1.5, and ER 1.15.

4. On or about May 28, 2021, an Agreement for Discipline by Consent (Exhibit 2) was entered Before the Presiding Disciplinary Judge in a case styled: *In the Matter of a Member of the State Bar of Arizona, Mark Doss Wesbrooks, Bar No. 018690, PDJ 2020-9097, (State Bar File Nos. 19-2602 and 20-2347)*, which states in pertinent part:

Respondent's admissions are being tendered in exchange for the form of discipline stated below and are submitted freely and voluntarily and not as a result of coercion or intimidation. For the purposes of these proceedings, Respondent conditionally admits that he violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.5(c) (solely with respect to engaging in services in furtherance of a legal malpractice action without a signed fee agreement), and 1.15(a), and (b)(1), and Rule 43(a), (b), (d) and (f), Ariz. R. Sup. Ct..

[...] Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanctions are appropriate: Reprimand with Probation for one (1) year. . .

5. On or about June 29, 2021, a Final Judgment and Order (Exhibit 3) was entered Before the Presiding Disciplinary Judge in a matter styled, *In the Matter of a Member of the State Bar of Arizona, Mark Doss Wesbrooks, Bar No. 018690, Respondent, PDJ 2020-9097, State Bar Nos. 19-2602 and 20-2347*, that states in pertinent part:

IT IS THEREFORE ORDERED Respondent MARK DOSS WESBROOKS, Bar No. 018690, is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent is placed on probation for a period of one (1) year. The terms of probation are as follows:

a) Trust Account Ethics Enhancement Program (TAEED): Respondent shall attend a half-day TAEED. Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within 10 days from the date of this Order, to schedule attendance at the next available class. Respondent shall be responsible for the cost of attending the program.

b) LOMAP (trust account records review): Respondent shall contact the State Bar Compliance Monitor at 602-340-7258, within 10 days from the date of service of this order. Respondent shall sign terms and conditions

of participation, which shall be incorporated herein. The terms and conditions will include submission of specified trust account records on a quarterly basis. Respondent shall be required to undergo a quarterly review of his trust accounts records and shall timely complete any follow-up deemed necessary as a result of those reviews. Respondent shall be responsible for any costs associated with LOMAP.

c) FEE ARBITRATION: Respondent shall initiate fee arbitration within 10 days of issue of this order. Respondent shall contact the Fee Arbitration Coordinator at (602) 340-7379 within 10 days from the date of this Order to obtain the forms necessary to participate in Fee Arbitration. Respondent shall file the necessary forms no later than 30 days from the date of receipt of the forms. Respondent shall have 30 days of the date of letter from the Fee Arbitration Coordinator to comply with the award entered in the Fee Arbitration proceeding.

d) Respondent shall commit no further violations of the Rules of Professional Conduct. If Respondent violates any of the terms of this agreement, the State Bar may bring further discipline proceedings.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses of the State Bar of Arizona in the amount of \$1,462.50, within 30 days from the date of this order. There are no costs or expenses incurred by the Office of the Presiding Disciplinary Judge in these proceedings.

6. Copies of the Complaint, Agreement for Discipline by Consent, and the Final Judgment and Order entered in case styled: *In the Matter of a Member of the State Bar of Arizona, Mark Doss Wesbrooks, Bar No. 018690, Respondent*, in Case No. PDJ 2020-9097, State Bar File Nos. 19-2602 and 20-2347, are attached hereto as Petitioner's Exhibits 1, 2, and 3, and are made a part hereof for all intents and purposes as if the same was copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits 1, 2, and 3, at the time of hearing of this cause.

7. Petitioner prays that, pursuant to Rule 9.02, Texas Rules of Disciplinary Procedure, that this Board issue notice to Respondent, containing a copy of this Petition with exhibits, and an order directing Respondent to show cause within thirty (30) days from the date of the mailing of the notice, why the imposition of the identical discipline in this state would be unwarranted. Petitioner further prays that upon trial of this matter that this Board enters a judgment imposing

discipline identical with that imposed by the State Bar of Arizona and that Petitioner have such other and further relief to which it may be entitled.

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Luis J. Marín
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: 512.427.4167
Email: lmarin@texasbar.com



Luis J. Marín
Bar Card No. 24108702

ATTORNEYS FOR PETITIONER

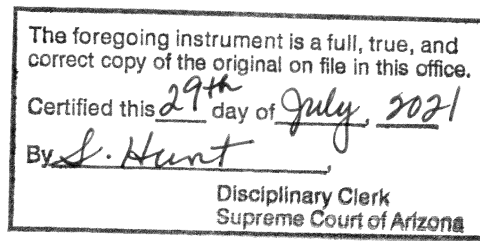
CERTIFICATE OF SERVICE

I certify that upon receipt of the Order to Show Cause from the Board of Disciplinary Appeals, I will serve a copy of this Petition for Reciprocal Discipline and the Order to Show Cause on Aaron Mark Wesbrooks, by personal service.

Aaron Mark Wesbrooks
4020 Vinalopo Drive
Austin, Texas 78738



Luis J. Marín



FILED
10/16/2020
/s/ BRANDI ENSIGN

Kelly J. Flood, Bar No. 019772
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone (602)340-7272
Email: LRO@staff.azbar.org

BEFORE THE PRESIDING DISCIPLINARY JUDGE

**IN THE MATTER OF A CURRENT
MEMBER OF THE STATE BAR OF
ARIZONA,**

MARK DOSS WESBROOKS,
Bar No. 018690,

Respondent.

PDJ 2020-9097

COMPLAINT

[State Bar No. 19-2602]

Complaint is made against Respondent as follows:

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on December 16, 1997.

COUNT ONE (File no. 19-2602/Kirchners)



2. Norma and Cedric Kirchner originally retained Danny Adelman to handle a personal injury action against a nail salon for injuries sustained by Norma when she slipped and fell in the salon on January 22, 2016.

3. Adelman filed suit in July of 2016, and the case was proceeding in superior court, while Norma continued to have various treatments and procedures.

4. In December of 2017, Adelman informed the Kirchners he was leaving private practice and told them that they would need to retain successor counsel. The Kirchners requested that Adelman convey a \$250,000 settlement demand to the defendant, and a February 1, 2018 email from Adelman to the Kirchners states that he did so.

5. In March of 2018, The Kirchners met with Respondent, and gave him the file they obtained from Adelman. The Kirchners initially thought Respondent would accept the case at \$350 per hour to “make a few phone calls” to try to settle the case. On March 20, 2018, The Kirchners received a proposed fee agreement that called for a 40% contingency. The Kirchners were confused by this, so they did not immediately sign the agreement.

6. The Kirchners had a call with Respondent on April 9, 2018, and Respondent told them they must sign the agreement so that he could convey a

\$250,000 Offer of Judgment to the defendant, but he promised he would be “fair” and not charge 40%. Respondent also said he already had a demand letter ready to send to Adelman regarding a claim for alleged malpractice.

7. The Kirchners signed Respondent’s fee agreement for the personal injury matter on April 10, 2018.

8. On May 7, 2018, Respondent told them that the defendants’ carrier had agreed to their \$250,000 demand. On May 25, 2018, the Kirchners endorsed the check, and requested an accounting from Respondent. They estimated he had worked a total of 18 business days from receipt of the file to receipt of the check.

9. On June 7, 2018, Respondent provided the Kirchners a Settlement Distribution Sheet showing that Respondent was retaining ~\$100,000. Respondent forwarded two checks to the Kirchners of \$5,000 each, then another one for \$61,636.35.

10. The Kirchners tried to communicate with Respondent numerous times after that. They claim that Respondent rebuffed and then ignored them. From June until August of 2018, the Kirchners sent numerous emails asking for an accounting, imploring Respondent to honor his promise to be “fair,” and describing all of their struggles to reach him and their need for the money.

11. In September of 2018, the Kirchners continued to plead with Respondent to give them the balance of their money. Respondent responded by outlining how he was going to continue to work on their case to put it into a better position to bring a malpractice case against Adelman.

12. The Kirchners, however, did not sign a fee agreement with or retain Respondent to pursue a malpractice case against Adelman.

13. The Kirchners continued to complain to Respondent from October 2018 until May of 2019 that he was not being responsive to their questions, that they did not understand what else there was for him to work on, and they wanted the balance of their money.

14. The Kirchners first contacted the State Bar in December of 2019, and continued to assert that they were still owed money by and had not received an accounting from Respondent. Intake Bar Counsel asked Respondent to provide an accounting for the Kirchners' matter. On December 11, 2019, Respondent said that he was "generating a draft" of services for the Kirchners' case, but he did not provide it.

15. Because Respondent failed to further respond, on February 19, 2020, he was formally screened by Bar Counsel. Respondent's March 30, 2020 response

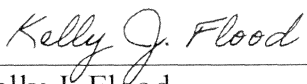
failed to include an accounting, and did not include the vast majority of emails from the Kirchners in which they pleaded for him to respond, provide an accounting, and give them the balance of their funds.

16. On June 2, 2020, and again on June 16 and 18, Bar Counsel asked for an accounting and copies of the cancelled checks to the Kirchners to confirm what he had provided to them. Respondent promised that he would, but he did not provide the information until after the State Bar recommended that the Attorney Discipline Probable Cause Committee issue an order of probable cause, and had subpoenas issued to both Respondent and Wells Fargo, for his trust account records.

17. Respondent violated Rule 42, Ariz. R. Sup. Ct., ER 1.2, ER 1.3, ER 1.4, ER 1.5, and ER 1.15.

DATED this 16th day of October, 2020.

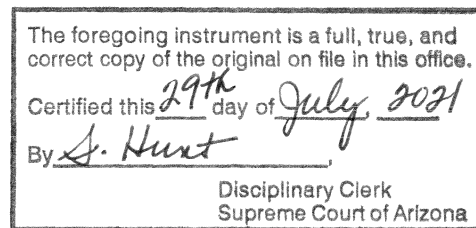
STATE BAR OF ARIZONA



Kelly J. Flood
Staff Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 16th day of October, 2020.

by: Jennifer Smith
KJF:js



Kelly J. Flood, Bar No. 019772
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone (602) 340-7272
Email: LRO@staff.azbar.org

Nancy A. Greenlee, Bar No. 010892
821 E. Fern Drive North
Phoenix, Arizona 85014-3248
Telephone (602) 264-8110
Email: nancy@nancygreenlee.com
Respondent's Counsel

BEFORE THE PRESIDING DISCIPLINARY JUDGE

**IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,**

**MARK DOSS WESBROOKS,
Bar No. 018690,**

Respondent.

PDJ 2020-9097

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

(State Bar File Nos. 19-2602 and 20-2347)

The State Bar of Arizona, and Respondent Mark Doss Wesbrooks who is represented in this matter by counsel, Nancy A. Greenlee, hereby submit their Agreement for Discipline by Consent pursuant to Rule 57(a), Ariz. R. Sup. Ct. A

probable cause order in State Bar No. 19-2602 was entered on August 31, 2020. A formal complaint was filed on October 16, 2020. Respondent voluntarily waives the right to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections, or requests which have been made or raised, or could be asserted thereafter, if the conditional admissions and proposed form of discipline is approved.

This Agreement and stipulations made herein are for purposes of resolving the disciplinary action brought by the State Bar of Arizona against Respondent, and only as stipulations and admissions made in resolution of such matter. In this regard, a civil case is pending in the Superior Court for Maricopa County, Arizona, between Complainants, Cedric and Norma Kirchner (the “Kirchners”) and Respondent, in which there are disputed facts being litigated. Negotiated stipulations and agreements made herein relate only to the PDJ matter herein, and do not operate as any admission of fact regarding disputed matters in such civil case, which should be adjudicated between the parties based on evidence in such civil proceedings. In this regard, statements made herein are the product of settlement negotiations and should be afforded the protected privilege of Ariz. R. Civ. Evid. 408 with respect to civil proceedings involving parties other than the State Bar of Arizona and Respondent.

Pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct., notice of this agreement was provided to the complainants, Cedric and Norma Kirchner by email on May 28, 2021. Complainants have been notified of the opportunity to file a written objection to the agreement with the State Bar within five (5) business days of bar counsel's notice. Copies of Complainants' objections, if any, have been or will be provided to the presiding disciplinary judge.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.5(c) (solely with respect to engaging in services in furtherance of a legal malpractice action without a signed fee agreement), and 1.15, and Rule 43, Ariz. R. Sup. Ct. Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: **Reprimand with Probation** terms of which are set forth in Sanctions below. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding, within 30 days from the date of this order. If costs are not paid within the 30 days interest will begin to accrue at the legal rate.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit A.

¹ Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

FACTS

GENERAL ALLEGATIONS

1. Respondent was licensed to practice law in Arizona on December 16, 1997.

COUNT ONE (File no. 19-2602/ Kirchner)

2. Norma and Cedric Kirchner originally retained Danny Adelman to handle a personal injury premise liability action against a nail salon for injuries sustained by Norma when she slipped and fell in the salon on January 22, 2016.

3. Adelman filed suit in July of 2016, against the commercial tenant, Diva Nails, LLC (“Diva”), but elected not to sue the commercial landlord or tile installer of the subject premises. The case against Diva was proceeding in superior court, while Norma continued to have various treatments and procedures.

4. On February 23, 2017, the Kirchners filed a Chapter 13 Bankruptcy Case No. 2:17-bk-01620, in which Respondent served as Kirchners’ counsel. The Bankruptcy Court entered an Order that the personal injury claim was property of the bankruptcy estate, and appointed Adelman & German, PLC, as special counsel to the Chapter 13 Trustee. The bankruptcy court order required that no settlement occur without bankruptcy court approval, and that net proceeds would be for the

benefit of the bankruptcy estate (creditors). Over the next approximately one year, Respondent served as bankruptcy counsel for the Kirchners. The Kirchners were familiar with Respondent's extensive personal injury practice and trial experience.

5. In late 2017, Adelman informed the Kirchners he was leaving private practice and told them that they would need to retain successor counsel. At that time, the court had scheduled a 7-day jury trial to commence on October 8, 2018.

6. On March 29, 2018, the Kirchners advised that they had signed a "transfer letter" transferring their file from Adelman to Attorney Michael Hertzog. Hertzog would not agree to file a Notice of Appearance in the civil case, but agreed to undertake negotiations in an attempt to settle the case. Hertzog communicated that he would not be available to serve as counsel for the October 8, 2018 jury trial. After transitioning their file to Attorney Hertzog, the Kirchners were informed that \$125,000.00 was the highest amount that Diva's insurance carrier would agree for settlement of the case. Although the Kirchners thought that settlement amount was too low, they agreed to the settlement, authorizing Hertzog to communicate an acceptance. Thereafter, Hertzog communicated to the Kirchners that he was not comfortable completing the settlement given the likelihood of Kirchner's ongoing

matters with creditors that might require the filing of additional bankruptcy proceedings.

7. Upon Attorney Herzog's withdrawal from representation, the Kirchners sought to retain Respondent to take over the case in a manner which would include the filing of a Notice of Appearance and announcement that Respondent would be available for the scheduled jury trial. In March of 2018, the Kirchners met with Respondent, and gave him the file they obtained from Adelman/Herzog. On April 10, 2018, the Kirchners signed the Fee Agreement for Respondent to take over the personal injury case.

8. Respondent entered an appearance in the personal injury case and advised opposing counsel and the court that he would be ready for the October 2018 jury trial. Respondent undertook to provide amended disclosures including details regarding economic damages that had not been analyzed and disclosed through prior attorney's disclosure statements. Respondent filed a Rule 68 Offer of Judgment to settle the case for \$249,999.00, which was delivered on April 12, 2018. Within days, Respondent received Diva's Rule 68 Offer of Judgment to settle both Norma's and Cedric's claim for a total of \$125,000.00

9. On May 9, 2018, in a phone call between counsel, Diva's counsel informed that, in light of new developments in the case since Respondent took over, State Farm was agreeable to an acceptance of Respondent's \$250,000.00 Offer of Judgment.

10. On May 9, 2018, Diva also filed an Acceptance of the April 12, 2018 Offer of Judgment. Diva delivered a settlement check and release, which the Kirchner's approved and signed. On May 25, 2018, the Kirchners endorsed the check.

11. On June 7, 2018, Respondent provided the Kirchners a Settlement Distribution Sheet showing that Respondent was retaining \$89,999.41 of net proceeds pending resolution of liens. Within the first 14 days of deposit of the gross settlement check to Respondent's IOLTA Trust Account, Respondent delivered two checks to the Kirchners: one on June 7, 2018 for \$5,000.00, and another on June 15, 2018 for \$61,636.35, along with a Settlement Disbursement Sheet setting forth calculations of attorney fees of \$99,999.60, and that costs, disbursements, and net proceeds would be held in the Trust Account.

12. In September of 2018, the Kirchners pleaded with Respondent to give them the balance of all net moneys held. Respondent responded by informing of the

status of the Medicare lien and Medicare's set-aside requirements. The Kirchners were provided an updated Schedule of Settlement Disbursement reflecting payment of the negotiated Medicare lien and which included a third disbursement check, holding back only amounts to cover costs and prior attorneys' disputed cost lien. Through additional written correspondence, Respondent outlined matters related to the court allowing the commercial landlord to be joined to the suit, and that if the court dismissed the landlord / premise-owner out of the case finding claims to be time-barred, that this would serve as the basis for a legal malpractice case against prior attorneys and their firm. The letter also informed them that if the court denied the then-joined commercial landlord's efforts to be dismissed from the case, that such a successful mitigation would nullify any potential legal malpractice claim.

13. Although presented with a draft fee agreement to pursue a legal malpractice case, proposing a representation on a contingent fee basis with a required cost deposit, the Kirchners did not sign and return the proposed fee agreement.

14. On March 26, 2019, Respondent disbursed to the Kirchners all remaining funds held, thereafter holding back only the disputed cost lien amount of \$10,070.76 asserted by former attorneys. (This amount was later distributed in

accordance with the Kirchners' agreement made with their former attorneys without Respondent's involvement.)

15. On April 29, 2019, the Superior Court entered judgment in favor of the commercial landlord / premise owner on the affirmative defense of statute of limitation, which first caused the prospective legal malpractice claims to become ripe.

16. Despite the Kirchners not having signed the legal malpractice fee agreement, on May 2, 2019, Respondent took action on the Kirchners' behalf regarding the malpractice case by sending a notice of claim letter to Kirchner's prior attorneys.

17. As the Kirchners did not return the proposed signed fee agreement for the legal malpractice case, Respondent communicated, by letter, his decision not to move forward with any legal malpractice action, advising the Kirchners of important deadlines regarding their legal malpractice claim.

18. The Kirchners first contacted the State Bar in December of 2019, and continued to assert that they were still owed money and had not received an accounting from Respondent. Intake Bar Counsel asked Respondent to provide an accounting for the Kirchners' matter. On December 11, 2019, Respondent said that

he was “generating a draft” of services for the Kirchners’ case for the Bar, but he did not provide it.

19. Because Respondent failed to further respond, on February 19, 2020, a screening investigation commenced. Respondent’s March 30, 2020 response failed to include an accounting.

20. On June 2, 2020, and again on June 16 and 18, Bar Counsel asked for an accounting and copies of the cancelled checks to the Kirchners to confirm what he had provided to them. Respondent promised that he would, but he did not, provide the information until after the State Bar recommended that the Attorney Discipline Probable Cause Committee issue an order of probable cause, and had subpoenas issued to both Respondent and Wells Fargo, for his trust account records.

21. A Trust Account Examiner reviewed Respondent’s trust account records, and identified various issues regarding Respondent’s handling of the Kirchners’ settlement proceeds, including but not limited to the fact that Respondent still retained \$10,070.76 that the Kirchners’ prior counsel, Danny Adelman, claimed was the subject of his lien for reimbursement of costs.

22. Respondent retained these disputed funds until January of 2021, when Adelman, through his attorneys, and the Kirchners agreed that Mr. Adelman would

receive \$5,000 as reimbursement for costs, and the Kirchners would receive the balance.

COUNT TWO (File no. 20-2347/Trust Account)

23. The Trust Account Examiner identified additional issues with Respondent's trust account beyond those associated with the Kirchners. The issues include the failure to maintain adequate and accurate trust account records, utilizing unorthodox internal accounting methods, bypassing the trust account by utilizing the operating account, commingling, maintaining an inappropriate level of administrative funds, and failure to properly train and supervise staff regarding the trust account, which, in some instances unrelated to the Kirchners, resulted in temporary misappropriation of funds.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and are submitted freely and voluntarily and not as a result of coercion or intimidation. For purposes of these proceedings, Respondent conditionally admits that he violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.5(c) (solely with respect to engaging in services in furtherance of a legal

malpractice action without a signed fee agreement), and 1.15(a) and (b)(1), and Rule 43(a), (b), (d) and (f), Ariz. R. Sup. Ct.

CONDITIONAL DISMISSALS

The State Bar has agreed to dismiss allegations regarding violations of ERs 1.2, 1.3, 1.4, and 1.5(a) and (b).

RESTITUTION

The parties agree that State Bar fee arbitration is the appropriate means of addressing the fee dispute with the Kirchners.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanctions are appropriate: Reprimand with Probation for one (1) year, **the terms of probation which will consist of:**

1. TAEPP: Respondent shall attend a half-day Trust Account Ethics Enhancement Program (TAEPP). Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within 10 days from the date of service of this Order, to schedule attendance at the next available class. Respondent will be responsible for the cost of attending the program.

2. FEE ARBITRATION: Respondent shall initiate fee arbitration within 10 days of the anticipated order approving this consent agreement. Respondent shall contact the Fee Arbitration Coordinator at (602) 340-7379 within 10 days from the date of service of this Order to obtain the forms necessary to participate in Fee Arbitration. Respondent shall file the necessary forms no later than 30 days from the date of receipt of the forms. Respondent shall have 30 days of the date of letter from the Fee Arbitration Coordinator to comply with the award entered in the Fee Arbitration proceeding.
3. Respondent shall commit no further violations of the Rules of Professional Conduct. If Respondent violates any of the terms of this agreement, the State Bar may bring further discipline proceedings.

NON-COMPLIANCE WITH PROBATION

If Respondent fails to comply with any of the foregoing probation terms and the State Bar of Arizona receives information thereof, Bar Counsel shall file a notice of noncompliance with the Presiding Disciplinary Judge, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether Respondent breached a term of probation and, if so,

to recommend an appropriate sanction. If the State Bar alleges that Respondent failed to comply with any of the foregoing terms the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

If Respondent violates any of the terms of this agreement, the State Bar may bring further discipline proceedings.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter.

In determining an appropriate sanction, the Court considers the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Standard* 3.0.

The parties agree that the following *Standard 4.1* is the appropriate *Standard* given the facts and circumstances of this matter: *Standard 4.13* provides that a

Reprimand is generally appropriate when a lawyer is negligent in handling client property and causes injury or potential injury. Here, Respondent retained a portion of client settlement funds as a cost deposit, in anticipation of a legal malpractice case without the required signed fee agreement with the clients. As a consequence, Respondent retained these funds held for costs for six months before finally disbursing these funds to the clients. Respondent also held prior counsel's disputed cost lien amount of \$10,070.76 for over two years, until prior counsel and the clients settled the issue.

In addition, overall, Respondent failed to properly supervise management of his trust account, including keeping adequate records, and failing to supervise deposit transactions which, in some instances, resulted in temporary misappropriation of funds, and temporary commingling.

The duty violated

Respondent's conduct violated his duty to the clients and the profession.

The extent of the actual or potential injury

There was actual harm to the clients, and potential harm to the profession, the legal system, and the public.

Aggravating and mitigating circumstances

The presumptive sanction is Reprimand. The parties conditionally agree that the following aggravating and mitigating factors should be considered:

In aggravation:

- a) 9.22(d) multiple offenses: Respondent violated multiple ethical rules in connection with his handling of the Kirchners' settlement funds, and his overall mismanagement of his trust account.
- b) 9.22(h) vulnerability of victim: The Kirchners are elderly and had the need to receive their funds in an expedited manner.
- c) 9.22(i) substantial experience in the practice of law. Respondent was admitted to practice in 1997.

In mitigation:

- a) 9.32(a) absence of a prior disciplinary record;
- b) 9.32(b) absence of dishonest or selfish motive; and
- c) 9.32(l) remorse. Mr. Wesbrooks takes great care and pride in ensuring that his clients are satisfied with the outcomes of their cases. He strives to make sure they understand why their case resulted in a particular outcome, and that the clients feel as if Mr. Wesbrooks was fighting his hardest for them. He is greatly saddened and apologetic that the Kirchners were unhappy with the result and

their representation. Mr. Wesbrooks also recognizes trust account management and supervision problems that led to deviations from the exact requirements of Rule 43. Mr. Wesbrooks regrets these shortfalls and will undertake steps to assure precise compliance in the future.

Discussion

The presumptive sanction should be a **Reprimand with Probation**.

Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. In re *Peasley*, 208 Ariz. 27 (2004). Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of Reprimand with Probation and the imposition of costs and expenses. A proposed form of order is attached hereto as Exhibit B.

DATED this 28th day of May 2021

STATE BAR OF ARIZONA

/s/Kelly J. Flood
Kelly J. Flood
Staff Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

DATED this _____ day of May, 2021.

Mark D. Wesbrooks
Respondent

DATED this _____ day of May, 2021.

Nancy A. Greenlee
Counsel for Respondent

DATED this _____ day of May 2021

STATE BAR OF ARIZONA

Kelly J. Flood
Staff Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

DATED this 22nd day of May, 2021.

Mark D. Wesbrooks
Respondent

DATED this 28th day of May, 2021.

Nancy A. Greenlee
Counsel for Respondent

Approved as to form and content

/s/Maret Vessella
Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 28th day of May, 2021.

Copy of the foregoing mailed/emailed
this 28th day of May, 2021, to:

Nancy A. Greenlee
821 E. Fern Drive North
Phoenix, AZ 85014-3248
Email: nancy@nancygreenlee.com
Respondent's Counsel

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

by: /s/Jackie Brokaw
KJF/jlb

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona
Mark Doss Wesbrooks, Bar No. 018690, Respondent

File No. 19-2602

Administrative Expenses

The Supreme Court of Arizona has adopted a schedule of administrative expenses to be assessed in lawyer discipline. If the number of charges/complainants exceeds five, the assessment for the general administrative expenses shall increase by 20% for each additional charge/complainant where a violation is admitted or proven.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.

General Administrative Expenses for above-numbered proceedings

\$1,200.00

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Additional Costs

08/11/20	Wells Fargo-Evidence Retrieval	\$ 87.50
03/26/21	Alliance-Deposition of Mark Doss Wesbrooks	\$ 175.00

Total for additional costs	<u>\$ 262.50</u>
----------------------------	------------------

<u>TOTAL COSTS AND EXPENSES INCURRED</u>	<u>\$ 1,462.50</u>
--	--------------------

EXHIBIT B

BEFORE THE PRESIDING DISCIPLINARY JUDGE

**IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,**

**MARK DOSS WESBROOKS,
Bar No. 018690,**

PDJ 2020-9097

**FINAL JUDGMENT AND
ORDER**

State Bar No. 19-2602 and 20-2347

The Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent pursuant to Rule 57(a), Ariz. R. Sup. Ct., accepts the parties' proposed agreement.

Accordingly:

IT IS ORDERED that Respondent, **Mark Doss Wesbrooks**, is **Reprimanded** for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent is placed on probation for a period of one (1) year. The terms of probation are:

- a) TAEPP: Respondent shall attend a half-day Trust Account Ethics Enhancement Program (TAEPP). Respondent shall contact the State Bar

Compliance Monitor at (602) 340-7258, within 10 days from the date of service of this Order, to schedule attendance at the next available class. Respondent will be responsible for the cost of attending the program.

- b) FEE ARBITRATION: Respondent shall initiate fee arbitration within 10 days of issue of this order. Respondent shall contact the Fee Arbitration Coordinator at (602) 340-7379 within 10 days from the date of service of this Order to obtain the forms necessary to participate in Fee Arbitration. Respondent shall file the necessary forms no later than 30 days from the date of receipt of the forms. Respondent shall have 30 days of the date of letter from the Fee Arbitration Coordinator to comply with the award entered in the Fee Arbitration proceeding.
- c) Respondent shall commit no further violations of the Rules of Professional Conduct. If Respondent violates any of the terms of this agreement, the State Bar may bring further discipline proceedings.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$ 1,462.50, within 30 days from the date of service of this Order.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings in the amount of _____, within 30 days from the date of service of this Order.

DATED this _____ day of May, 2021.

Margaret H. Downie, Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk of the Office of the Presiding Disciplinary Judge of the Supreme Court of Arizona this _____ day of May, 2021.

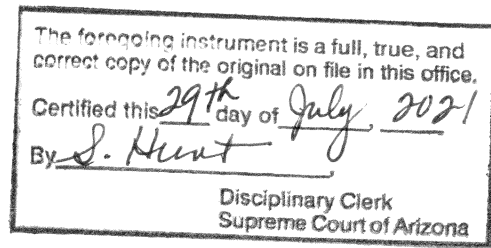
Copies of the foregoing mailed/emailed this _____ day of May, 2021, to:

Nancy A. Greenlee
821 E. Fern Drive North
Phoenix, Arizona 85014-3248
Email: nancy@nancygreenlee.com
Respondent's Counsel

Kelly J. Flood
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266

Email: LRO@staff.azbar.org
Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

by:_____



BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

MARK DOSS WESBROOKS,
Bar No. 018690

Respondent.

PDJ 2020-9097

FINAL JUDGMENT AND ORDER

State Bar Nos. 19-2602 and 20-2347

FILED JUNE 29, 2021

After an order issued requesting modification, the Presiding Disciplinary Judge accepted the parties' amended agreement for discipline by consent submitted pursuant to Rule 57(a), Ariz. R. Sup. Ct.

IT IS THEREFORE ORDERED Respondent, MARK DOSS WESBROOKS, Bar No. 018690, is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent is placed on probation for a period of one (1) year. The terms of probation are as follows:

- a) Trust Account Ethics Enhancement Program (TAEEP): Respondent shall attend a half-day TAEEP. Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within 10 days from the date of

this Order, to schedule attendance at the next available class. Respondent shall be responsible for the cost of attending the program.

b) LOMAP (trust account records review): Respondent shall contact the State Bar Compliance Monitor at 602-340-7258, within 10 days from the date of service of this order. Respondent shall sign terms and conditions of participation, which shall be incorporated herein. The terms and conditions will include submission of specified trust account records on a quarterly basis. Respondent shall be required to undergo a quarterly review of his trust accounts records and shall timely complete any follow-up deemed necessary as a result of those reviews. Respondent shall be responsible for any costs associated with LOMAP.

c) FEE ARBITRATION: Respondent shall initiate fee arbitration within 10 days of issue of this order. Respondent shall contact the Fee Arbitration Coordinator at (602) 340-7379 within 10 days from the date of this Order to obtain the forms necessary to participate in Fee Arbitration. Respondent shall file the necessary forms no later than 30 days from the date of receipt of the forms. Respondent shall have 30 days of the date of letter from the Fee Arbitration Coordinator to comply with the award entered in the Fee Arbitration proceeding.

d) Respondent shall commit no further violations of the Rules of Professional Conduct. If Respondent violates any of the terms of this agreement, the State Bar may bring further discipline proceedings.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses of the State Bar of Arizona in the amount of \$1,462.50, within 30 days from the date of this order. There are no costs or expenses incurred by the Office of the Presiding Disciplinary Judge in these proceedings.

DATED this 29th day of June, 2021.

Margaret H. Downie

Margaret H. Downie

Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 29th day of June, 2021, to:

Nancy A. Greenlee
821 E. Fern Drive North
Phoenix, Arizona 85014-3248
Email: nancy@nancygreenlee.com
Respondent's Counsel

Kelly J. Flood
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

by: MSmith

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through June 21, 2018

Contents

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

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

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Current through June 21, 2018

I. GENERAL PROVISIONS

Rule 1.01. Definitions

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

Rule 1.02. General Powers

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

Rule 1.03. Additional Rules in Disciplinary Matters

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

Rule 1.04. Appointment of Panels

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

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

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

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

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

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

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

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

- (4) Exceptions.

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

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

- a) documents that are filed under seal or subject to a pending motion to seal; and
- b) documents to which access is otherwise restricted by court order.

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

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

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

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

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

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

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

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

Rule 1.06. Service of Petition

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

Rule 1.07. Hearing Setting and Notice

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

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

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

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

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

Rule 1.08. Time to Answer

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

Rule 1.09. Pretrial Procedure

(a) Motions.

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

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

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

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

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

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

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

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

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

Rule 1.10. Decisions

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

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

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

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

Rule 1.11. Board of Disciplinary Appeals Opinions

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

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

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

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

Rule 1.12. BODA Work Product and Drafts

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

Rule 1.13. Record Retention

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

Rule 1.14. Costs of Reproduction of Records

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

Rule 1.15. Publication of These Rules

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

II. ETHICAL CONSIDERATIONS

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

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

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

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

Rule 2.02. Confidentiality

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

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

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

Rule 2.03. Disqualification and Recusal of BODA Members

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

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

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

III. CLASSIFICATION APPEALS

Rule 3.01. Notice of Right to Appeal

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

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

Rule 3.02. Record on Appeal

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

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

IV. APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01. Perfecting Appeal

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

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

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

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

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

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

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

Rule 4.02. Record on Appeal

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

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

(c) Responsibility for Filing Record.

(1) Clerk's Record.

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

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

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

(2) Reporter's Record.

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

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

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

(d) Preparation of Clerk's Record.

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

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

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

(ii) start each document on a new page;

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

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

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

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

(vii) certify the clerk's record.

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

(3) The table of contents must:

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

(ii) be double-spaced;

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

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

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

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

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

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

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

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

(f) Preparation of the Reporter's Record.

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

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

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

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

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

(6¹) 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.