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

IN THE MATTER OF	**§**	
PERRY CORTESE	**§**	**CAUSE NO. 59813**
STATE BAR CARD NO. 00790508	**§**	

MOTION FOR ENTRY OF JUDGMENT OF DISBARMENT

TO THE HONORABLE BOARD:

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

1. On December 1, 2017, Petitioner filed its Petition for Compulsory Discipline against Respondent, Perry Cortese, (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's conviction in Case No. 8:15-cr-320-T-23TGW, styled *United States of America v. Perry Don Cortese*, in the United States District Court, Middle District of Florida, Tampa Division, wherein Respondent was found guilty of Conspiracy to Commit Mail and Wire Fraud in violation of 18 U.S.C. §§ 1341, 1343 and 1349 and Conspiracy to Commit Money Laundering in violation of 18 U.S.C. §§1956(a)(2)(A), 1956(a)(2)(B)(i) and 1956(h) and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 300 months, consisting of 240 months as to count one and 60 months as to count two, each count consecutive to the other, and ordered to pay $3,767,196.00 in restitution. Upon release from imprisonment, Cortese will be on supervised release for a term of 36 months.

2. On January 26, 2018, an Interlocutory Order of Suspension was entered by the Board of Disciplinary Appeals which provides in pertinent part, as follows:

> It is further ORDERED that this Order is interlocutory and that the Board retains jurisdiction to enter a final judgment when the appeal

of the criminal conviction is final. *In the Matter of Mercier*, 242 SW 3d 46 (Tex. 2007).

3. Following the appeal by Respondent of his criminal conviction in Case No. 8:15-cr-320-T-23TGW, on the charges of Conspiracy to Commit Mail and Wire Fraud in violation of 18 U.S.C. §§ 1341, 1343 and 1349 and Conspiracy to Commit Money Laundering in violation of 18 U.S.C. §§1956(a)(2)(A), 1956(a)(2)(B)(i) and 1956(h), an Opinion (Exhibit 1) was issued by the United States Court of Appeals for the Eleventh Circuit, on or about June 5, 2020, in Cause No. 17-14716, *United States of America, Plaintiff – Appellee v. Priscilla Ann Ellis, Perry Cortese, Defendants – Appellants,* which affirmed Respondent's conviction and sentence.

4. On or about June 5, 2020, a Judgment was issued as Mandate (Exhibit 2) by the United States Court of Appeals for the Eleventh Circuit, in Cause No. No. 17-14716, *United States of America, Plaintiff – Appellee v. Priscilla Ann Ellis, Perry Cortese, Defendants – Appellants,* which affirmed the convictions and sentences.

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

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

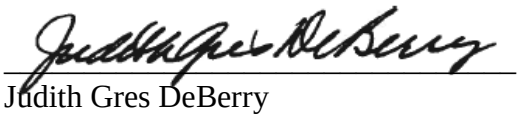
PRAYER

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

Respectfully submitted,

Seana Willing
Chief Disciplinary Counsel

Judith Gres DeBerry
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: jdeberry@texasbar.com



Judith Gres DeBerry
Bar Card No. 24075987
ATTORNEYS FOR PETITIONER

NOTICE OF REMOTE HEARING

Notice is hereby given that a trial on the merits of the Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day will be held on October 23, 2020, at 9:00 a.m. by remote appearance.

https://txcourts.zoom.us/j/93565582518

Meeting ID: 935 6558 2518
Topic: BODA En Banc Hearings
Time: October 23, 2020 09:00 AM Central Time (US and Canada)

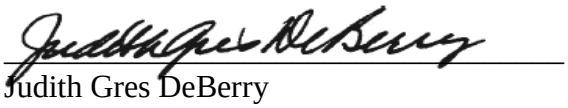
To join the Zoom trial by Video:	**To join the Zoom trial by Phone/Audio only:**
Go to: https://txcourts.zoom.us/j/93565582518 Join the meeting by typing in the Meeting ID: **935 6558 2518** To appear by video on Zoom, you will need to have an electronic device with an internet connection. You may use a smart phone, iPad/tablet, or webcam/built in camera with sound and video. You will also need to install the free Zoom App before the conference begins.	Dial by your location or find your local number: https://txcourts.zoom.us/u/al7C3LMNm One tap mobile +13462487799,,93565582518# US (Houston) +12532158782,,93565582518# US (Tacoma) Dial by your location +1 346 248 7799 US (Houston) +1 253 215 8782 US (Tacoma) +1 669 900 6833 US (San Jose) +1 301 715 8592 US (Germantown) +1 312 626 6799 US (Chicago) +1 929 205 6099 US (New York) Meeting ID: 935 6558 2518

Judith Gres DeBerry

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent via certified mail, return receipt requested #7020 1810 0000 7862 9171 on September 9, 2020, as follows:

Perry Cortese, #57791-380
FCI Bastrop
Federal Correctional Institution
P.O. Box 1010
Bastrop, Texas 78602



Judith Gres DeBerry

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14716

D.C. Docket No. 8:15-cr-00320-SDM-TGW-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PRISCILLA ANN ELLIS,
PERRY CORTESE,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(June 5, 2020)

Before JORDAN, TJOFLAT, and TRAXLER,* Circuit Judges.

PER CURIAM:

EXHIBIT 1

---

* The Honorable William B. Traxler, Jr., Senior United States Circuit Judge for the Fourth Circuit, sitting by designation.

Priscilla Ann Ellis and Perry Don Cortese, along with others, were charged with conspiracy to commit mail and wire fraud, *see* 18 U.S.C. § 1349, and conspiracy to launder money, *see* 18 U.S.C. § 1956(h). A jury convicted Ellis and Cortese on both counts. Ellis and Cortese appeal, raising challenges to their convictions and sentences. Finding no reversible error, we affirm.

I. Background

Ellis is an Army veteran who lived in Harker Heights, Texas, during the relevant time period. Cortese is an attorney who lived in Little River, Texas. According to the evidence presented at trial, Ellis and Cortese were part of an international fraudulent scheme that began in 2012 and continued into 2015. The government's evidence, which included testimony from cooperating members of the conspiracy and from numerous victims, showed that the conspiracy had fraudulently obtained millions of dollars from scores of victims.

The conspiracy used different scams, but the heart of the operation involved duping victims into depositing counterfeit cashier's checks in their own bank accounts and then wiring the proceeds to shell companies and overseas bank accounts controlled by the conspirators before the counterfeiting was discovered. The conspirators used various methods to find their victims, such as emailing law firms or title companies to seek assistance in closing a real estate transaction or resolving a business dispute, sending out emails offering opportunities to work from

home, and using online dating services to trick women into perceived relationships and gain access to their bank accounts. Sometimes the conspirators simply hacked a victim's email account and used the victim's personal information to conduct wire transfers.

The operation was directed by Ikechukwu Amadi, a Canadian citizen and Nigerian national who used numerous aliases during the course of the conspiracy. Other members of the conspiracy included Akohomen Ighedoise, a Canadian citizen and Nigerian national; Muhammad Naji, a Jordanian national who lived in Tampa, Florida; Stacey Merritt, an Alaska resident; and Kenietta Johnson, who is Ellis's daughter and worked at a bank in Alexandria, Virginia.

Viewed in the light most favorable to the government, the evidence presented at trial showed that Ellis was deeply involved in the operation of the scheme. Amadi sent her information about counterfeit checks to be created, and Ellis worked with another co-conspirator (believed to be in South Africa) and Johnson to create and print the counterfeit checks used by the conspiracy. She brought her sister and her daughter into the scheme, recruited others to open bank accounts to be used by the conspirators, and gave instructions to other co-conspirators about where funds should be directed. Millions of dollars of fraudulent proceeds were routed through the bank account of a corporation she controlled.

Cortese's role in the conspiracies was somewhat more limited. One of his important functions was to intervene when necessary to "unfreeze" accounts that had been locked by banks because of suspicious transactions. Cortese worked closely with Ellis, and funds from many of the scams Ellis was involved in flowed through his law firm trust account. On one occasion, Ellis arranged for Cortese to fly to Utah to pick up cash from a woman who had been ensnared through one of the online-romance scams. Along with Ellis, Cortese recruited his paralegal to open bank accounts to be used by the conspiracy, and fraudulent proceeds were wired from those accounts into Cortese's law firm trust account and given to him in cash.

The operative indictment named Amadi, Ighedoise, Ellis, Cortese, Merritt, and Johnson as defendants, but the trial proceeded against only Ellis, Cortese, and Johnson.[1] Ellis represented herself at trial. Trial witnesses included Naji and Zoni Mullins, who was Cortese's paralegal, as well as numerous victims of the scams. On October 21, 2016, the jury convicted Ellis, Cortese, and Johnson of conspiracy to commit mail and wire fraud and conspiracy to launder money. (Johnson has not appealed her convictions.)

In January 2017, Ellis -- while incarcerated on the charges in this case -- conspired with others to create and pass more counterfeit checks. She needed cash

[1] Merritt pleaded guilty shortly before trial and testified for the government. At the time of the trial, the government was in the process of seeking extradition of Amadi and Ighedoise from Canada.

so she could hire a hitman to kill Naji's mother, Mullins, and Mullins's nine-year-old daughter in retaliation for their trial testimony. Based on that incident, Ellis was indicted on additional federal charges of using interstate commerce facilities in the commission of murder for hire and retaliating against a witness. Ellis was convicted of all charges arising from the murder-for-hire scheme several months before being sentenced in this case.[2]

Prior to the sentencing hearing in this case, the district court held an evidentiary hearing to determine the loss amount that would be attributed to the defendants. The court determined that Ellis and Cortese could reasonably have foreseen a total intended loss of $15,147,908.16 during the period they were involved with the conspiracy. After application of the loss-amount and other offense-level enhancements, Ellis's advisory sentencing range was 360-480 months. The district court found Ellis's conduct "incomprehensible," describing it as "evil and wicked, predatory." The court sentenced Ellis to 240 months on each count, to be served consecutively, for a total sentence of 480 months' imprisonment. Cortese's advisory sentencing range was 324-405 months. The court sentenced Cortese to a total of 300 months' imprisonment -- 240 months' imprisonment on the

[2] After the sentencing in this case, the district court in the murder-for-hire case sentenced Ellis to 65 years' imprisonment, with the sentence to run consecutive to the sentences in this case.

fraud conspiracy and a consecutive 60 months for the money-laundering conspiracy. Ellis and Cortese both appeal, raising challenges to their convictions and sentences.

II. Trial Issues

A. Venue

The defendants, who lived and worked in Texas, contend that the government failed to prove that venue was proper in the Middle District of Florida. We disagree.

The Constitution and the Federal Rules of Criminal Procedure require that criminal trials be held in the district where the crime was committed. *See United States v. Cabrales*, 524 U.S. 1, 6 (1998). "[T]he site of a charged offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Id.* at 5 (internal quotation marks omitted). "[I]n an action involving a conspiracy, . . . the offense has been committed in any district where any overt act was performed in furtherance of the conspiracy." *United States v. Bradley*, 644 F.3d 1213, 1253 (11th Cir. 2011).

In this case, venue in the Middle District of Florida was predicated on the actions of co-conspirator Naji, who cooperated with the government and testified at trial. Naji lived in Tampa, which is in the Middle District. Naji testified that he opened a bank account (in the name of a shell company) in Tampa and that the account was used to funnel the proceeds of various scams to accounts controlled by the co-conspirators. While living in Tampa, Naji recruited his girlfriend and others,

including prostitutes, to open accounts that were used by the conspiracy to launder fraudulent proceeds. Naji's testimony thus established that multiple overt acts in furtherance of the conspiracy took place within the Middle District of Florida.

The defendants insist, however, that venue cannot be established through Naji, because he cooperated with the government and therefore was no longer a member of the conspiracy. *See United States v. Wright*, 63 F.3d 1067, 1072 (11th Cir. 1995) ("[I]t takes at least two to conspire neither of which may be government agents or informers."). This argument is without merit. Although Naji eventually began cooperating with the government, the evidence presented at trial showed numerous overt acts that happened in Tampa *before* Naji began cooperating. *See United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004) (explaining that when considering a challenge to venue, this court must "view[] the evidence in the light most favorable to the government and mak[e] all reasonable inferences and credibility choices in favor of the jury verdict") (internal quotation marks omitted). That evidence was more than sufficient to establish that venue was proper, whether or not Ellis or Cortese had any personal connection with the Middle District of Florida. *See United States v. Matthews*, 168 F.3d 1234, 1246 (11th Cir. 1999) ("Where a conspiracy is concerned, venue is . . . proper in any district where an overt act was committed in furtherance of the conspiracy. The overt act need not be committed by a defendant in the case; the acts of accomplices and unindicted co-

conspirators can also expose the defendant to jurisdiction.") (citation and internal quotation marks omitted).

B. Sufficiency of the Evidence

The defendants contend that the government's evidence was insufficient to support their conspiracy convictions. We review the sufficiency of the evidence *de novo*. *See United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003). "The record is viewed in the light most favorable to the verdict, drawing all reasonable inferences and resolving all questions of credibility in favor of the government. Viewed in such a light, the verdict will be affirmed if a reasonable juror could conclude that the evidence establishes guilt beyond a reasonable doubt." *Id.*

1. Conspiracy to Commit Mail and Wire Fraud

To convict a defendant of conspiracy to commit mail or wire fraud, the government must prove "(1) a conspiracy to commit [mail or wire fraud]; (2) knowledge of the conspiracy; and (3) that [the defendant] knowingly and voluntarily joined the conspiracy." *United States v. Feldman*, 931 F.3d 1245, 1257 (11th Cir. 2019) (internal quotation marks omitted), *cert. denied*, 2020 WL 1668565 (U.S. Apr. 6, 2020).

a. Ellis

Ellis does not challenge the sufficiency of the evidence showing the existence of the conspiracy. Instead, Ellis argues that she was duped by other members of the

conspiracy and was an unwitting participant in the fraudulent schemes. Ellis contends that while she "may have *incidentally* participated in the schemes to defraud, no competent evidence existed to suggest that she *intentionally* participated in the frauds." Initial Brief of Ellis at 29-30. We disagree.

The government presented overwhelming evidence in the form of testimony, emails, and text messages showing Ellis's direct and substantial involvement in the conspiracy. She was in constant contact with Amadi through email, text, and phone calls. She was directly involved in the creation and deployment of the counterfeit cashier's checks and used her daughter to print the checks. Ellis and Cortese recruited Mullins to open new bank accounts to be used to receive and distribute proceeds from the conspiracy's schemes. Mullins opened the accounts, received wire transfers directed into the accounts by Ellis, and transferred the funds out of the account as instructed by Cortese and by Ellis. Mullins removed cash from the accounts and distributed it at the defendants' direction. On one occasion, Mullins followed instructions and withdrew cash, which she gave directly to Cortese and Ellis who were waiting at nearby Sam's Club. Millions of dollars of fraud proceeds flowed through the bank account of Vicken International Traders, a company Ellis controlled that conducted no apparent legitimate business. When she was arrested, Ellis told the agents that Vicken's bank account had been frozen four times because of suspicious activities.

The evidence described above does not paint the picture of a mere victim who unwittingly opened her bank accounts to fraudsters. Instead, the evidence was more than sufficient to permit a reasonable juror to conclude beyond a reasonable doubt that Ellis was a knowing, active participant in the conspiracy.

b. Cortese

Cortese also contends that the evidence was insufficient to show that he knowingly joined the conspiracy. He contends he served as Ellis's lawyer but had no knowledge that she was involved in fraudulent schemes.

Although Cortese's involvement in the conspiracy was not as extensive as Ellis's, the evidence nonetheless showed that it was significant. If a bank froze an account being used by a co-conspirator, Amadi connected the co-conspirator to Cortese for help in regaining access to the account. For example, when one of Naji's recruits (his girlfriend) had an account frozen, Naji initiated a conference call between his girlfriend, Amadi, Ellis, and Cortese to discuss the account, and Cortese touted his success in unfreezing accounts. And when Naji was arrested in 2015 on the charges in this case, Amadi directed Cortese to call Naji. When they talked, Cortese wanted information so Amadi could access an account controlled by Naji, because a $1.5 million transfer has just been made to that account. And, as discussed above, proceeds from various scams involving counterfeit checks created at Ellis's direction were transferred into Cortese's trust account; Cortese was directly involved

(along with Ellis) in bringing Mullins, his paralegal, into the scheme and directing the use of the accounts she opened; and Cortese, at Ellis's direction, flew to Utah to collect cash from a victim.

Cortese may not have known all of the members of the conspiracy, and he may not have profited from the conspiracy as much as other members, but those points are largely irrelevant to our inquiry on appeal. *See, e.g., United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994) ("Guilt [on a conspiracy charge] may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy."). In our view, the evidence recounted above was plainly sufficient to support the jury's verdict. *See United States v. Knowles*, 66 F.3d 1146, 1154 (11th Cir. 1995) ("For sufficiency purposes, the evidence need not exclude every reasonable hypothesis of innocence; rather, the question is whether a reasonable trier of fact, when choosing among reasonable constructions of the evidence, could have found the defendant guilty beyond a reasonable doubt.") (footnotes and internal quotation marks omitted); *Perez-Tosta*, 36 F.3d at 1557 ("Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances.") (internal quotation marks omitted).

2. Conspiracy to Commit Money Laundering

To convict Ellis and Cortese under 18 U.S.C. § 1956(h), "the Government needed to prove two elements . . . : (1) an agreement between two or more persons to commit a money-laundering offense; and (2) knowing and voluntary participation in that agreement by the defendant." *United States v. Feldman*, 936 F.3d 1288, 1307 (11th Cir. 2019) (internal quotation marks omitted). "An essential element of money laundering conspiracy is that the defendant knew that the funds involved in the transactions represented the proceeds of unlawful activity." *Id.* (internal quotation marks omitted). In this case, the government alleged two money-laundering offenses as the objects of the conspiracy: money laundering to promote the carrying-on of the conspiracy, *see* 18 U.S.C. § 1956(a)(1)(A)(i), and money-laundering to conceal the source of the funds, *see id.* § 1956(a)(1)(B)(i).

The defendants do not argue that the evidence was insufficient to establish the existence of a money-laundering conspiracy, but again argue that they did not knowingly participate in the conspiracy. We disagree.

As discussed above, the government's evidence showed that Ellis was involved in the creation of the counterfeit checks and in directing the accounts through which the fraudulent proceeds would flow. She recruited Mullins to open accounts and instructed her to open them as business accounts, which would draw less scrutiny from the banks. Ellis provided other co-conspirators with documents (created by Amadi) purporting to show a legitimate purpose for the wire transfers

into Mullins's account. Ellis knew that bank accounts used by the conspiracy were being closed for fraud, and she worked with Cortese to try to regain access to these accounts. We have no difficulty finding this evidence sufficient to show Ellis's knowledge of the fraudulent origins of the funds and her knowing participation in the money-laundering conspiracy.

The evidence was likewise sufficient to support Cortese's conviction. Like Ellis, Cortese knew that banks were recalling wire transfers and rejecting counterfeit checks, and he intervened to try to unfreeze accounts being used by the conspiracy. Amadi connected Cortese with other conspirators when bank accounts were frozen for fraudulent activity. Cortese received fraudulent proceeds into his trust account, and he transferred the funds out as directed, sometimes to overseas accounts. Cortese worked with Ellis to bring Mullins into the scheme and pushed her to open more accounts than she was willing to do. He informed Mullins when wire transfers would appear in her accounts, and he gave her instructions on how the funds should be transferred out of the account. Cortese also advised Mullins on how to interact with the banks so as not to raise questions. From this evidence, a reasonable juror could easily conclude that Cortese knew that the funds were the proceeds of fraudulent activity and that he knowingly participated in the money-laundering conspiracy.

III. Sentencing Issues

A. Loss Amount

For fraud-based offenses, the Sentencing Guidelines provide for an increase in the offense level based on the amount of loss that resulted from the fraud. *See* U.S.S.G. § 2B1.1(b)(1). After conducting an evidentiary hearing, the district court determined that the intended loss of the conspiracy was $15,147,908.16, and that the full amount was reasonably foreseeable to both Ellis and Cortese. The loss amount included $9,288,241.36 of fraudulently obtained funds that were actually wire-transferred into accounts used by the conspiracy, and $5,859,666.80 in counterfeit checks that were received by victims but not cashed. The loss amount as calculated by the district court increased the defendants' offense level by 20 levels. *See* U.S.S.G. § 2B1.1(b)(1)(K).

On appeal, Ellis and Cortese both challenge the district court's loss calculation and contend that they should not be held responsible for the full $15 million in intended loss found by the district court. "We review a loss-amount determination for clear error and must affirm the finding by the district court if it is plausible in light of the record viewed in its entirety." *United States v. Whitman*, 887 F.3d 1240, 1248 (11th Cir. 2018) (internal quotation marks omitted), *cert. denied*, 139 S. Ct. 1276 (2019).

The Sentencing Guidelines direct the sentencing court when calculating the loss amount to consider "all acts and omissions committed, aided, abetted,

counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). For conspiracy offenses, the court must also take into account "all acts and omissions of others that were . . . (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity" and occurred in the commission of or preparation for the offense or to avoid detection of or responsibility for the offense. *Id.* § 1B1.3(a)(1)(B). Because "[t]he scope of the activity jointly undertaken by the defendants is not necessarily the same as the scope of the entire conspiracy," *United States v. Petrie*, 302 F.3d 1280, 1290 (11th Cir. 2002), the sentencing court "must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake and then consider the conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant." *Id.* (internal quotation marks omitted).

In our view, the district court's loss determination is firmly supported by the evidence presented at trial and at the evidentiary hearing. *See United States v. Baldwin*, 774 F.3d 711, 727 (11th Cir. 2014) ("The district court may make factual findings regarding loss based on trial evidence, undisputed statements in the Presentence Investigation Report . . . , or evidence presented at the sentencing hearing.").

The district court adopted the government's proposed loss amount, and that amount was a conservative estimate of the total intended losses. Although the government believed that Ellis joined the conspiracy sometime in 2011 or 2012, the government's calculation included only losses occurring after October 2013, the point by which Cortese and Johnson both had joined the conspiracy.

Moreover, the losses included in the calculations were not the losses of the entire conspiracy during that time frame, but only those that could be connected in some manner to the defendants. For example, Ellis was involved in the creation of every counterfeit check, and $2,600,000 in fraudulent proceeds flowed through her Vicken Traders account. Ellis and Cortese were connected to the accounts controlled by co-conspirator Naji through the evidence of their Amadi-directed attempts to unfreeze the account opened by Naji's girlfriend and Cortese's efforts to get account information from Naji after Naji was arrested. Cortese was connected to the $580,000 loss caused by a romance scheme when he traveled – at Ellis's direction – to Utah to retrieve from the victim the money returned to her by the bank after it closed the account. Ellis gave instructions on transferring out proceeds to other co-conspirators, and accounts controlled by Cortese and Ellis received wire transfers from accounts controlled by other co-conspirators.

Given the level of the defendants' involvement in the conspiracy and the connections between the defendants and the loss amount asserted by the government,

the district court did not err in concluding that Ellis and Cortese each could reasonably foresee that their jointly undertaken criminal activity would involve the full intended loss amount of $15,147,908.16. *See Whitman*, 887 F.3d at 1248 (explaining that a defendant's "mere awareness that he was part of a larger scheme is alone insufficient . . . , [b]ut actions that suggest that the defendant was actively involved in a criminal scheme permit the inference that the defendant agreed to jointly undertake that scheme) (internal quotation marks omitted).[3]

B. Other Offense-Level Enhancements

1. Ellis

Ellis challenges the district court's application of a two-level enhancement under U.S.S.G. § 2B1.1(b)(10) for using sophisticated means in the fraud offenses while also applying a two-level enhancement for engaging in sophisticated money laundering under U.S.S.G. § 2S1.1(b)(3). She contends that application of both enhancements was impermissible double-counting, and she also argues that the sophisticated money-laundering enhancement is not factually supported. We find no error.

[3] The defendants contend that the district court failed to make sufficiently specific findings about the scope of conduct agreed to by the defendants. Even assuming the court's findings were not sufficient, reversal is not required because the record amply supports the district court's findings. *See Petrie*, 302 F.3d at 1290 ("[A] sentencing court's failure to make individualized findings regarding the scope of the defendant's activity is not grounds for vacating a sentence if the record support the court's determination with respect to the offense conduct, including the imputation of others' unlawful acts to the defendant.").

"Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States v. Matos-Rodriguez*, 188 F.3d 1300, 1309 (11th Cir. 1999) (internal quotation marks omitted). As Ellis recognizes, the district court applied the § 2B1.1(b)(10) enhancement because of the use of sophisticated means in the commission of the fraud, *see* U.S.S.G. § 2B1.1(b)(10)(C), but also because "a substantial part of a fraudulent scheme was committed from outside the United States," *id.* § 2B1.1(b)(10)(B). The enhancement under § 2B1.1 thus addresses the harm caused by international fraud schemes, while the enhancement under § 2S1.1 addresses the very different harm caused by sophisticated money laundering schemes. *See* U.S.S.G. § 2S1.1(b)(3) (enhancement applies if the defendant was convicted under 18 U.S.C. § 1956 and "the offense involved sophisticated laundering"); *id.* cmt. n.5(A) ("'[S]ophisticated laundering' means complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense."). And because the enhancements are premised on different conduct, the Guidelines do not prohibit application of both. *See* U.S.S.G. § 2S1.1 cmt. n.5(B) (stating that the sophisticated laundering enhancement should not be applied if "the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is *the only conduct* that forms the basis for

application of subsection (b)(3) of this guideline") (emphasis added). The district court therefore did not err by applying the § 2B1.1 and 2S1.1 enhancements. *See United States v. Stevenson*, 68 F.3d 1292, 1294 (11th Cir. 1995) (per curiam) ("We presume that the Commission intended to apply separate guideline sections cumulatively unless specifically directed otherwise.").

As to Ellis's argument that the sophisticated laundering enhancement was not factually warranted, we note that the evidence before the district court showed that the defendants laundered their funds using fictitious transactions, shell corporations, and offshore accounts. The district court therefore did not err in applying the enhancement. *See* U.S.S.G. § 2S1.1 cmt. n.5(A) ("Sophisticated laundering typically involves the use of (i) fictitious entities; (ii) shell corporations; (iii) two or more levels (i.e., layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate; or (iv) offshore financial accounts.").

Ellis also contends the district court erred by concluding that she qualified as a manager or supervisor and applying a three-level enhancement under U.S.S.G. § 3B1.1. We disagree.

The enhancement applies "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b). For the

enhancement to apply, "the defendant need only manage or supervise one other participant in the criminal activity. However, a section 3B1.1 enhancement cannot be based solely on a finding that a defendant managed the assets of a conspiracy, without the defendant also managing or exercising control over another participant." *United States v. Sosa*, 777 F.3d 1279, 1301 (11th Cir. 2015) (citation and internal quotation marks omitted). The evidence in this case established that Ellis supervised the creation of the counterfeit checks and gave direction to multiple conspirators and participants, including Cortese, Johnson, and Mullins. The district court therefore did not err in applying the enhancement. *See id.* at 1300 ("We review for clear error . . . a district court's decision to impose an aggravating-role increase . . . . Under the deferential standard of clear-error review, we will not disturb a district court' findings unless we are left with a definite and firm conviction that a mistake has been committed.") (citations and internal quotation marks omitted).

2. Cortese

Cortese contends that the district court erred by concluding that Cortese used a special skill and applying a two-level enhancement under U.S.S.G. § 3B1.3. We find no error.

The enhancement applies "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. "'Special skill'

refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." *Id.* cmt. n.4.

The record before the district court was sufficient to support the conclusion that Cortese acted as an attorney when advising victims whose accounts had been frozen and when negotiating with the banks to reopen the accounts. His status as an attorney and his assurances helped lull the victims into believing that nothing was amiss, which helped conceal the fraud for as long as possible. Under these circumstances, we cannot say the district court clearly erred in finding that Cortese used his skills as an attorney when committing the offenses. *See United States v. De La Cruz Suarez*, 601 F.3d 1202, 1219 (11th Cir. 2010) ("The district court's legal interpretation of the term 'special skills' is reviewed *de novo*, but whether the defendant possesses a special skill under § 3B1.3 of the Sentencing Guidelines is a factual finding reviewed for clear error.").

C. Reasonableness of Sentence

Finally, Ellis and Cortese both challenge the reasonableness of their sentences. We review the reasonableness of a sentence for an abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. Irey*, 612 F.3d 1160, 1188 (11th Cir. 2010) (en banc). A district court abuses its discretion if it fails to consider "relevant factors that were due significant weight"; if it "gives significant

weight to an improper or irrelevant factor"; or if it otherwise "commits a clear error of judgment in considering the proper factors." *Irey*, 612 F.3d at 1189 (internal quotation marks omitted).

1. Ellis

Ellis contends that the district court failed to properly consider the 18 U.S.C. § 3553(a) factors. She argues that the facts do not support the court's view of the nature of the offense, that the court gave too much weight to her lack of remorse and her actions in the murder-for-hire case, and that the court ignored all mitigating factors.

We find no procedural or substantive error in the court's sentence. The record reveals that the district court properly considered the § 3553(a) factors and their relevance to the sentencing decision. The court considered the scope of the conspiracy and the damage caused to its victims, as well as Ellis's lack of remorse for her conduct and its effect on the victims. *See* 18 U.S.C. § 3553(a)(1) (requiring sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"); *id.* § 3553(a)(2)(A) (sentence imposed should "reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment for the offense"). And, contrary to Ellis's argument, the court also properly considered Ellis's actions in the murder-for-hire scheme, as the charges in that case involved retaliation against witnesses in this case and were

relevant to Ellis's personal characteristics, the need for deterrence, and the need to protect the public from future crimes. *See* 18 U.S.C. §§ 3553(a)(1); (2)(B)-(C). While Ellis disagrees with the weight the district court placed on the deterrence factor, a sentencing court is permitted to weigh one factor more heavily than others. *See United States v. Shaw*, 560 F.3d 1230, 1237 (11th Cir. 2009) ("The district court must evaluate all of the § 3553(a) factors when arriving at a sentence, but is permitted to attach great weight to one factor over others.") (citation and internal quotation marks omitted). The court did not explicitly address any mitigating factors, but those factors were spelled out in the presentence investigation report, which the district court adopted and showed its familiarity with during the sentencing hearing. Accordingly, the record reveals that the district court properly considered the relevant facts within the framework of § 3553(a).

Although the 40-year sentence imposed in this case is severe, we cannot say that the sentence is "outside the range of reasonable sentences dictated by the facts of the case." *United States v. Goldman*, 953 F.3d 1213, 1222 (11th Cir. 2020). The sentence falls within the Guidelines advisory range, and it accomplishes the district court's goal of protecting society from an unrepentant criminal who had inflicted financial ruin on numerous victims and was willing to use violence against those who exposed her crimes. *See United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) ("The decision about how much weight to assign a particular

sentencing factor is committed to the sound discretion of the district court.") (internal quotation marks omitted); *Irey*, 612 F.3d at 1189–90 ("In reviewing the reasonableness of a sentence, we must, as the Supreme Court has instructed us, consider the totality of the facts and circumstances."). Accordingly, we reject Ellis's claim that the district court imposed an unreasonable sentence. *See Irey*, 612 F.3d at 1191 ("We may set aside a sentence only if we determine, after giving a full measure of deference to the sentencing judge, that the sentence imposed truly is unreasonable.").

2. Cortese

Cortese contends that his 300-month sentence is substantively unreasonable. He argues that a significantly shorter sentence is warranted because his role in the conspiracy was limited and his financial gain was minimal.

We disagree. Although Cortese's involvement in the conspiracy was not as extensive as Ellis's, it was still extensive. As previously outlined, Cortese intervened as necessary to try to convince banks to unfreeze accounts being used to funnel conspiracy proceeds and to soothe the fears of the victims whose accounts had been frozen. He personally recruited Mullins to open more accounts to be used for the benefit of the conspiracy and gave her instructions on how to disburse the fraudulent proceeds that appeared in her account. Regardless of the extent of his personal financial gain, Cortese knowingly and directly participated in a long-

running conspiracy that stole millions of dollars from its victims. The district court had before it all of the mitigation evidence, and weighed that evidence against the facts of the crime and the other § 3553 factors to arrive at a below-Guideline sentence of 300 months. Given the record before us, we see no clear error of judgment by the district court in sentencing Cortese. *See United States v. Langston*, 590 F.3d 1226, 1237 (11th Cir. 2009) ("We do not reweigh relevant factors nor do we remand for re-sentencing unless the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence outside the range of reasonable sentences.").

Cortese also complains about the extent to which a sentence for fraud is driven by the loss-amount determination. Cortese contends that the amount of intended loss is not a good proxy for a defendant's culpability, and he argues that application of the steep loss-amount enhancements under the Guidelines leads to irrational sentences. Whatever the merits of this argument, it is a policy argument that provides no basis for reversal of the sentence imposed in this case. The district court considered the facts and the statutory sentencing factors and arrived at a sentence that we have found to be reasonable. That the application of the loss-amount enhancement might lead to an unreasonable sentence in another case does not affect the reasonableness of the sentence imposed in this case.

Finally, Cortese argues that the abuse-of-discretion standard we apply to sentencing appeals is unconstitutional. Noting that appellate courts may presume the reasonableness of a within-Guidelines sentence, *see Rita v. United States*, 551 U.S. 338, 341 (2007), Cortese contends that the abuse-of-discretion standard has been applied in a way to effectively prevent criminal defendants from ever successfully rebutting the presumption. In Cortese's view, the abuse-of-discretion standard "gives too much deference and is too forgiving," such that "[d]istrict courts are effectively immune from appellate review." Initial Brief of Cortese at 48.

This argument is without merit. The Supreme Court has directed that the abuse-of-discretion standard governs the reasonableness review of sentences imposed under advisory Guidelines. *See Gall*, 552 U.S. at 51 ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard."). The case law from this circuit is consistent with that directive. *See, e.g., United States v. Gomez*, 955 F.3d 1250, 1255 (11th Cir. 2020) ("We review the reasonableness of the district court's sentences for an abuse of discretion, employing a two-step process."). If Cortese believes we have misapplied that standard when reviewing his sentence, he may raise that issue in a petition for review with the Supreme Court, and he may urge that Court to consider fashioning a new standard. But this panel may not abandon the abuse-of-discretion standard merely because Cortese disagrees

with the standard and believes it has been misapplied in other cases. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) (per curiam) ("Under the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court.") (internal quotation marks omitted).

IV. Conclusion

To summarize, we conclude that venue was proper in the Middle District of Florida because co-conspirator Naji committed acts in furtherance of the conspiracy within the Middle District and that the evidence was sufficient to support Ellis's and Cortese's convictions for conspiracy to commit mail and wire fraud and conspiracy to commit money laundering. We find no error in the district court's calculation of the intended loss amount attributable to the defendants or the court's application of the other challenged offense-level enhancements, and we reject the defendants' claims that their sentences are substantively unreasonable. Accordingly, we hereby affirm the convictions and sentences of Ellis and Cortese.

AFFIRMED.

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Eleventh Circuit
By: _____ Date: 8.20.26
Deputy Clerk
Atlanta, Ga.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

June 05, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14716-AA
Case Style: USA v. Priscilla Ellis
District Court Docket No: 8:15-cr-00320-SDM-TGW-3

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call T. L. Searcy, AA at (404) 335-6180.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 17-14716

District Court Docket No.
8:15-cr-00320-SDM-TGW-3

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

PRISCILLA ANN ELLIS,
PERRY CORTESE,

Defendants - Appellants.

Appeals from the United States District Court for the
Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: June 05, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna H. Clark

EXHIBIT
2

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Eleventh Circuit
By: _____ Date: 8.26.20
Deputy Clerk
Atlanta, Ga.

INTERNAL PROCEDURAL RULES

BOARD OF DISCIPLINARY APPEALS

Current through June 21, 2018

Contents

INTERNAL PROCEDURAL RULES

Board of Disciplinary Appeals

Current through June 21, 2018

I. GENERAL PROVISIONS

Rule 1.01. Definitions

(a) "BODA" is the Board of Disciplinary Appeals.

(b) "Chair" is the member elected by BODA to serve as chair or, in the Chair's absence, the member elected by BODA to serve as vice-chair.

(c) "Classification" is the determination by the CDC under TRDP 2.10 or by BODA under TRDP 7.08(C) whether a grievance constitutes a "complaint" or an "inquiry."

(d) "BODA Clerk" is the executive director of BODA or other person appointed by BODA to assume all duties normally performed by the clerk of a court.

(e) "CDC" is the Chief Disciplinary Counsel for the State Bar of Texas and his or her assistants.

(f) "Commission" is the Commission for Lawyer Discipline, a permanent committee of the State Bar of Texas.

(g) "Executive Director" is the executive director of BODA.

(h) "Panel" is any three-member grouping of BODA under TRDP 7.05.

(i) "Party" is a Complainant, a Respondent, or the Commission.

(j) "TDRPC" is the Texas Disciplinary Rules of Professional Conduct.

(k) "TRAP" is the Texas Rules of Appellate Procedure.

(l) "TRCP" is the Texas Rules of Civil Procedure.

(m) "TRDP" is the Texas Rules of Disciplinary Procedure.

(n) "TRE" is the Texas Rules of Evidence.

Rule 1.02. General Powers

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

Rule 1.03. Additional Rules in Disciplinary Matters

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

Rule 1.04. Appointment of Panels

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

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

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

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

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

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

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

(4) Exceptions.

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

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

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

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

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

(5) Format. An electronically filed document must:

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

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

(iii) not be locked.

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

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

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

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

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

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

Rule 1.06. Service of Petition

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

Rule 1.07. Hearing Setting and Notice

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

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

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

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

Rule 1.08. Time to Answer

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

Rule 1.09. Pretrial Procedure

(a) **Motions.**

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

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

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

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

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

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

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

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

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

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

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

(1) marked;

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

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

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

Rule 1.10. Decisions

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

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

(1) as required by the TRDP; and

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

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

Rule 1.11. Board of Disciplinary Appeals Opinions

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

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

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

Rule 1.12. BODA Work Product and Drafts

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

Rule 1.13. Record Retention

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

Rule 1.14. Costs of Reproduction of Records

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

Rule 1.15. Publication of These Rules

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

II. ETHICAL CONSIDERATIONS

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

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

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

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

Rule 2.02. Confidentiality

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

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

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

Rule 2.03. Disqualification and Recusal of BODA Members

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

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

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

III. CLASSIFICATION APPEALS

Rule 3.01. Notice of Right to Appeal

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

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

Rule 3.02. Record on Appeal

BODA must only consider documents that were filed with the CDC prior to the classification decision. When a notice of appeal from a classification decision has been filed, the CDC must forward to BODA a copy of the grievance and all supporting documentation. If the appeal challenges the classification of an amended grievance, the CDC must also send BODA a copy of the initial grievance, unless it has been destroyed.

IV. APPEALS FROM EVIDENTIARY PANEL HEARINGS

Rule 4.01. Perfecting Appeal

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

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

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

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

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

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

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

Rule 4.02. Record on Appeal

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

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

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

(1) Clerk's Record.

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

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

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

(2) Reporter's Record.

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

a) a notice of appeal has been filed;

b) a party has requested that all or part of the reporter's record be prepared; and

c) the party requesting all or part of the reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter.

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

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

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

(i) gather the documents designated by the parties' written stipulation or, if no stipulation was filed, the documents required under (c)(1)(ii);

(ii) start each document on a new page;

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

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

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

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

(vii) certify the clerk's record.

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

(3) The table of contents must:

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

(ii) be double-spaced;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[1] So in original.

Rule 4.03. Time to File Record

(a) **Timetable.** The clerk's record and reporter's record must be filed within 60 days after the date the judgment is signed. If a motion for new trial or motion to modify the judgment is filed with the evidentiary panel, the clerk's record and the reporter's record must be filed within 120 days from the date the original judgment is signed, unless a modified judgment is signed, in which case the clerk's record and the reporter's record must be filed within 60 days of the signing of the modified judgment. Failure to file either the clerk's record or the reporter's record on time does not affect BODA's jurisdiction, but may result in BODA's exercising its discretion to dismiss the appeal, affirm the judgment appealed from, disregard materials filed late, or apply presumptions against the appellant.

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

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

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

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

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

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

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

Rule 4.04. Copies of the Record

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

Rule 4.05. Requisites of Briefs

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

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

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

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

(1) a complete list of the names and addresses of all parties to the final decision and their counsel;

(2) a table of contents indicating the subject matter of each issue or point, or group of issues or points, with page references where the discussion of each point relied on may be found;

(3) an index of authorities arranged alphabetically and indicating the pages where the authorities are cited;

(4) a statement of the case containing a brief general statement of the nature of the cause or offense and the result;

(5) a statement, without argument, of the basis of BODA's jurisdiction;

(6) a statement of the issues presented for review or points of error on which the appeal is predicated;

(7) a statement of facts that is without argument, is supported by record references, and details the facts relating to the issues or points relied on in the appeal;

(8) the argument and authorities;

(9) conclusion and prayer for relief;

(10) a certificate of service; and

(11) an appendix of record excerpts pertinent to the issues presented for review.

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

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

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

(1) dismiss the appeal for want of prosecution, unless the appellant reasonably explains the failure, and the appellee is not significantly injured by the appellant's failure to timely file a brief;

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

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

Rule 4.06. Oral Argument

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

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

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided;

(3) the facts and legal arguments are adequately presented in the briefs and record; or

(4) the decisional process would not be significantly aided by oral argument.

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

Rule 4.07. Decision and Judgment

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

(1) affirm in whole or in part the decision of the evidentiary panel;

(2) modify the panel's findings and affirm the findings as modified;

(3) reverse in whole or in part the panel's findings and render the decision that the panel should have rendered; or

(4) reverse the panel's findings and remand the cause for further proceedings to be conducted by:

(i) the panel that entered the findings; or

(ii) a statewide grievance committee panel appointed by BODA and composed of members selected from the state bar districts other than the district from which the appeal was taken.

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

Rule 4.08. Appointment of Statewide Grievance Committee

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

Rule 4.09. Involuntary Dismissal

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

(a) for want of jurisdiction;

(b) for want of prosecution; or

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

V. PETITIONS TO REVOKE PROBATION

Rule 5.01. Initiation and Service

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

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

Rule 5.02. Hearing

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

VI. COMPULSORY DISCIPLINE

Rule 6.01. Initiation of Proceeding

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

Rule 6.02. Interlocutory Suspension

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

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

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

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

(i) BODA may proceed to decide the motion without a hearing if the attorney does not file a verified denial within ten days of service of the motion; or

(ii) BODA may set the motion for a hearing on the next available hearing date if the attorney timely files a verified denial.

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

VII. RECIPROCAL DISCIPLINE

Rule 7.01. Initiation of Proceeding

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

Rule 7.02. Order to Show Cause

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

Rule 7.03. Attorney's Response

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

VIII. DISTRICT DISABILITY COMMITTEE HEARINGS

Rule 8.01. Appointment of District Disability Committee

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

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

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

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

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

Rule 8.02. Petition and Answer

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

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

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

Rule 8.03. Discovery

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

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

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

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

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

Rule 8.04. Ability to Compel Attendance

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

Rule 8.05. Respondent's Right to Counsel

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

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

Rule 8.06. Hearing

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

Rule 8.07. Notice of Decision

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

Rule 8.08. Confidentiality

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

IX. DISABILITY REINSTATEMENTS

Rule 9.01. Petition for Reinstatement

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

(b) The petition must include the information required by TRDP 12.06. If the judgment of disability suspension contained terms or conditions relating to misconduct by the petitioner prior to the suspension, the petition must affirmatively demonstrate that those terms have been complied with or explain why they have not been satisfied. The petitioner has a duty to amend and keep current all information in the petition until the final hearing on the merits. Failure to do so may result in dismissal without notice.

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

Rule 9.02. Discovery

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

Rule 9.03. Physical or Mental Examinations

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

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

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

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

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

Rule 9.04. Judgment

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

X. APPEALS FROM BODA TO THE SUPREME COURT OF TEXAS

Rule 10.01. Appeals to the Supreme Court

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

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

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