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8
9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 United States of America,
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13 Plaintiff,
14
15 v.
16 James R. Parker,
17
18 Defendant.

CR-10-757-01-PHX-ROS
**JOINT PROPOSED AMENDED
JURY INSTRUCTIONS**

17 The government and defendant, through undersigned counsels, submit the following Joint
18 Proposed Amended Jury Instructions.

19 Pursuant to this Court’s order, *Part I* below identifies all of the standard instructions that
20 the government and defendant propose should be given in this case if necessary. *Part II*
21 identifies the special instructions that the government and defendant proposing should be given
22 in this case. Finally, *Part III* is identified as a separate section, that contains disputed
23 instructions submitted by either the government or defendants. At the conclusion of each Part,
24 the full text of each requested instruction has been provided.¹

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27 ¹ The Court’s standing order, entitled “Jury Instructions,” provides as follows: “There
28 shall be one/joint submission of the jury instructions. The submission is to include joint
instructions as well as any additional instructions not yet agreed upon by the parties. One side
(continued...) ”

1 It should be noted that, depending on the proof at trial and any defenses raised, additional
2 instructions and revisions to previously-submitted instructions may be necessary. If so, the
3 government and defendants will submit additional instructions as specified in the Court's
4 standing order.

5 Respectfully submitted this 22nd day of May, 2012.

6 ANN BIRMINGHAM SCHEEL
7 Acting United States Attorney
8 District of Arizona

9 s/ Walter Perkel
10 PETER SEXTON
11 WALTER PERKEL
12 Assistant U.S. Attorneys

13 MICHAEL MINNS
14 ASHLEY ARNETT

15 s/ Michael Minns
16 Attorneys for James R. Parker

17 **Certificate of Service**

18 I hereby certify that on this date, I electronically transmitted the attached document to the
19 Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic
20 Filing to the following CM/ECF registrants: Michael Minns, Ashley Arnett, John McBee,
21 Michael Kimerer, and Joy Bertrand.

22 s/ Melody Karmgard
23 _____

24 ¹ (...continued)
25 shall be responsible for submitting all instructions in one email package. Unmodified Model
26 Jury Instructions are strongly encouraged and shall be used unless otherwise ordered by the
27 Court. The format is to be WP/Word compatible. All fonts and formatting are to be consistent
28 and in accordance with the local rules. . . . Instructions are to be e-mailed to chambers mailbox
at silver_chambers@azd.uscourts.gov."

1 **Section I: MODEL STIPULATED INSTRUCTIONS**

2 The United States of America and defendants request that the Court give the following
3 standard preliminary instructions from the Ninth Circuit Manual of Model Jury Instructions
4 (2010 revision), as it appeared on March 9, 2011 on the official web site for the United States
5 Courts for the Ninth Circuit (<http://www.ce9.uscourts.gov/courts.html>):

6 I. Preliminary Instructions

7 §1.1 Duty of Jury

8 §1.2 The Charge—Presumption of Innocence (as modified to fill in/omit
9 bracketed text)

10 §1.3 What is Evidence (as modified to include bracketed text)

11 §1.4 What is Not Evidence

12 §1.5 Direct and Circumstantial Evidence

13 §1.6 Ruling on Objections

14 §1.7 Credibility of Witnesses

15 §1.8 Conduct of the Jury

16 §1.9 No Transcript Available to the Jury

17 §1.10 Taking Notes

18 §1.11 Outline of Trial

19 §1.13 Separate Consideration for Each Defendant

20 II. Instructions in the Course of Trial

21 §2.1 Cautionary Instruction—First Recess

22 §2.2 Bench Conferences and Recesses

23 §2.4 Stipulations of Fact (if necessary)

24 §2.10 Other Crimes, Wrongs or Acts of Defendant (if necessary)

25 §2.11 Evidence for Limited Purpose (if necessary)

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1	III. <u>Standard Instructions at End of Case</u>
2	§3.1 Duties of Jury to Find Facts and Follow Law
3	§3.2 Charge Against Defendant Not Evidence—Presumption of Innocence
4	§3.3 Defendant’s Decision Not to Testify or
5	§3.4 Defendant’s Decision to Testify
6	§3.5 Reasonable Doubt—Defined
7	§3.6 What is Evidence (as modified to include bracketed text)
8	§3.7 What is Not Evidence
9	§3.8 Direct and Circumstantial Evidence
10	§3.9 Credibility of Witnesses
11	§3.10 Activities Not Charged
12	§3.12 Separate Consideration of Single Count- Multiple Defendants
13	§3.13 Separate Consideration of Multiple Counts—Multiple Defendants (if
14	necessary)
15	§3.16 Intent to Defraud—Defined (if necessary)
16	§4.1 Statement of Defendant (if necessary)
17	§4.3 Other Crimes, Wrongs, or Acts of Defendant (if necessary)
18	§4.6 Impeachment, Prior Conviction of Defendant (if necessary)
19	§4.8 Impeachment Evidence—Witness (if necessary)
20	§4.9 Testimony of Witness Involving Special Circumstances—Immunity,
21	Benefits, Accomplice, Plea (if necessary)
22	§4.14 Opinion Evidence, Expert Witness
23	§4.15 Summaries Not Received in Evidence
24	§4.16 Charts and Summaries in Evidence
25	§5.7 Deliberate Ignorance (if necessary)
26	§7.1 Duty to Deliberate

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1	§7.2	Consideration of Evidence
2	§7.3	Use of Notes
3	§7.4	Jury Consideration of Punishment
4	§7.5	Verdict Form
5	§7.6	Communication with Court

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7 The full text of these instructions is included below.

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Requested Instruction §1.1 - Duty of Jury

Jurors: You now are the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some preliminary instructions. At the end of the trial I will give you more detailed [written] instructions that will control your deliberations. When you deliberate, it will be your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. To the facts as you find them, you will apply the law as I give it to you, whether you agree with the law or not. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. Please do not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be—that is entirely up to you.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.1

GIVEN: _____
REFUSED: _____
MODIFIED: _____

1 Requested Instruction §1.2 - The Charge - Presumption of Innocence

2 This is a criminal case brought by the United States government. The government
3 charges defendant James R. Parker with four counts of Tax Evasion in violation of Title 26,
4 United States Code, Section 7201, and Title 18 United States Code Section 2.

5 The government further charges defendant James R. Parker with four counts of making
6 False Statements, in violation of Title 26, United States Code, Section 7206(1) and Title 18
7 United States Code Section 2.

8 The charges against the defendant are contained in the Indictment. The Indictment is
9 simply the description of the charges made by the government against the defendants. The
10 Indictment is not evidence and does not prove anything.

11 The defendants have pleaded not guilty to the charges, and are presumed innocent unless
12 and until the government proves the defendants' guilt beyond a reasonable doubt. In addition,
13 the defendants have the right to remain silent and never have to prove innocence or present any
14 evidence.

15 In order to help you follow the evidence, I will now give you a brief summary of the
16 elements of the crimes which the government must prove to make its case:

17 Defendant James R. Parker is charged in counts one through four of the Indictment with
18 attempting to evade and defeat the payment of income tax, interest and penalties for calendar
19 years 1997, 1998, 2001, and 2002, in violation of Section 7201 of Title 26 of the United States
20 Code.

21 In order for the defendant to be found guilty of these charges, the government must prove
22 each of the following elements beyond a reasonable doubt with respect to each count:

23 First, the defendant owed more federal income tax for the calendar years 1997, 1998,
24 2001, and 2002 than was paid by him for any income tax returns filed for those years;

25 Second, the defendant knew he owed more federal income tax than was paid by him for
26 any tax returns defendant filed for those years;

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1 Third, the defendant made an affirmative attempt to evade or did an affirmative act to
2 defeat the payment of income tax for any of those years; and

3 Fourth, in attempting to evade or defeat the payment of this income tax, the defendant
4 acted willfully.

5 Defendant James R. Parker, in counts five through eight of the Indictment, is charged
6 with the crime of False Statement, in violation of Title 26, United States Code, Section 7206(1)
7 and Title 18 United States Code Section 2.

8 In order for the defendant to be found guilty of that charge, the government must prove
9 each of the following elements beyond a reasonable doubt:

10 First, the defendant made and signed tax documents that the defendant knew contained
11 false information as to a material matter;

12 Second, the tax documents contained a written declaration that it was being signed subject
13 to the penalties of perjury; and

14 Third, in submitting the tax documents, the defendant acted willfully.

15 A matter is material if it had a natural tendency to influence, or was capable of
16 influencing, the decisions or activities of the Internal Revenue Service.

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18 Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010
19 ed.), Instruction 1.2 (as modified), and as it appeared on May 22, 2012
20 on the official web site for the United States Courts for the Ninth Circuit
(<http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim>)

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Requested Instruction §1.3 - What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which are received in evidence; and
- (3) any facts to which the parties agree.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 1.3

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Requested Instruction §1.4 - What is Not Evidence

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case:

- (1) statements and arguments of the attorneys;
- (2) questions and objections of the attorneys;
- (3) testimony that I instruct you to disregard; and
- (4) anything you may see or hear when the court is not in session even if what you

see or hear is done or said by one of the parties or by one of the witnesses.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.4

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Requested Instruction §1.5 - Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.5

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Requested Instruction §1.6 - Ruling on Objections

There are rules of evidence that control what can be received in evidence. When a lawyer asks a question or offers an exhibit in evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, or the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer would have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.6

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Requested Instruction §1.7 - Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.7

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Requested Instruction §1.8 - Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other

1 reference materials; and do not make any investigation or in any other way try to
2 learn about the case on your own.

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4 The law requires these restrictions to ensure the parties have a fair trial based on the same
5 evidence that each party has had an opportunity to address. A juror who violates these
6 restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would
7 require the entire trial process to start over]. If any juror is exposed to any outside information,
8 please notify the court immediately.

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10 Authority: Manual of Model Criminal Jury Instructions
11 for the Ninth Circuit (2010 ed.), Instruction 1.8

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Requested Instruction §1.9 - No Transcript Available to the Jury

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not have a written transcript of the trial. I urge you to pay close attention to the testimony as it is given.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.9

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Requested Instruction §1.10 - Taking Notes

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you from being attentive. When you leave court for recesses, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.10

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Requested Instruction §1.11 - Outline of Trial

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The government will then present evidence and counsel for the defendant may cross-examine. Then, if the defendant chooses to offer evidence, counsel for the government may cross-examine.

After the evidence has been presented, [I will instruct you on the law that applies to the case and the attorneys will make closing arguments] [the attorneys will make closing arguments and I will instruct you on the law that applies to the case].

After that, you will go to the jury room to deliberate on your verdict.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.11

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Requested Instruction §1.13 - Separate Consideration for Each Defendant

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so, you must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 1.13

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Requested Instruction §2.1 - Cautionary Instruction - First Recess

We are about to take our first break. Remember, until the trial is over, do not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, and do not allow others to discuss the case with you. This includes discussing the case in Internet chat rooms or through Internet blogs, Internet bulletin boards, emails or text messaging. If anyone tries to communicate with you about the case, please let me know about it immediately. Do not read, watch, or listen to any news reports or other accounts about the trial or anyone associated with it, including any online information. Do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own. Finally, keep an open mind until all the evidence has been presented and you have heard the arguments of counsel, my instructions on the law, and the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to the [marshal] [bailiff] [clerk] to give to me.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.1

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Requested Instruction §2.2 - Bench Conferences and Recesses

From time to time during the trial, it may become necessary for me to take up legal matters with the attorneys privately, either by having a conference at the bench or, when necessary, by calling a recess.

We will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.2

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Requested Instruction §2.4 - Stipulations of Fact

The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.4

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Requested Instruction §2.10 -Other Crimes, Wrongs, or Acts of Defendant

You are about to hear evidence that the defendant committed other [crimes] [wrongs] [acts] not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose. [You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.]

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.10

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Requested Instruction §2.11 - Evidence for Limited Purpose

You are about to hear evidence that [describe evidence to be received for limited purpose]. I instruct you that this evidence is admitted only for the limited purpose of [describe purpose] and, therefore, you must consider it only for that limited purpose and not for any other purpose.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 2.11

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Requested Instruction §3.1 - Duties of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.1

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Requested Instruction §3.2 - Charge Against Defendant not Evidence - Presumption of Innocence - Burden of Proof

The indictment is not evidence. The defendant has pleaded not guilty to the charge[s]. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge[s] beyond a reasonable doubt.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.2

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Requested Instruction §3.3 - Defendant's Decision Not to Testify

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.3

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Requested Instruction §3.4 - Defendant's Decision to Testify

The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.4

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Requested Instruction §3.5 - Reasonable Doubt Defined

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.5

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Requested Instruction §3.6 - What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits received in evidence; and
- (3) any facts to which the parties have agreed.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.6

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Requested Instruction §3.7 - What is Not Evidence

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence, and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. [In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.]

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.7

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REFUSED: _____

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Requested Instruction §3.8 - Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.8

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Requested Instruction §3.9 - Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the witness's opportunity and ability to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.9

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Requested Instruction §3.10 - Activities Not Charged

You are here only to determine whether the defendant is guilty or not guilty of the charge[s] in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.10

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Requested Instruction §3.12 - Separate Consideration of Single Count—Multiple Defendants

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All the instructions apply to each defendant [unless a specific instruction states that it applies to only a specific defendant].

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 3.12

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Requested Instruction §3.13 - Separate Consideration of Multiple Counts—Multiple Defendants

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All the instructions apply to each defendant and to each count [unless a specific instruction states that it applies only to a specific [defendant] [count]].

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 3.13

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REFUSED: _____
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Requested Instruction §3.16 - Intent to Defraud—Defined

An intent to defraud is an intent to deceive or cheat.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 3.16

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Requested Instruction §4.1 - Statement of Defendant

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 4.1

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Requested Instruction §4.3 - Other Crimes, Wrongs, or Acts of Defendant

You have heard evidence that the defendant committed other [crimes] [wrongs] [acts] not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's [intent] [motive] [opportunity] [preparation] [plan] [knowledge] [identity] [absence of mistake] [absence of accident] and for no other purpose. [You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.]

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 4.3

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REFUSED: _____
MODIFIED: _____

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Requested Instruction §4.6 - Impeachment, Prior Conviction of Defendant

You have heard evidence that the defendant has previously been convicted of a crime.
You may consider that evidence only as it may affect the defendant's believability as a witness.
You may not consider a prior conviction as evidence of guilt of the crime for which the defendant
is now on trial.

Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 4.6

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REFUSED: _____
MODIFIED: _____

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Requested Instruction §4.8 - Impeachment Evidence—Witness

You have heard evidence that [name of witness], a witness, [specify basis for impeachment]. You may consider this evidence in deciding whether or not to believe this witness and how much weight to give to the testimony of this witness.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.8

GIVEN: _____
REFUSED: _____
MODIFIED: _____

Requested Instruction §4.9 - Testimony of Witness Involving Special Circumstances—Immunity, Benefits, Accomplice, Plea

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You have heard testimony from [name of witness], a witness who [received immunity. That testimony was given in exchange for a promise by the government that [the witness will not be prosecuted] [the testimony will not be used in any case against the witness]];

[received [benefits] [compensation] [favored treatment] from the government in connection with this case];

[[admitted being] [was alleged to be] an accomplice to the crime charged. An accomplice is one who voluntarily and intentionally joins with another person in committing a crime];

[pleaded guilty to a crime arising out of the same events for which the defendant is on trial. This guilty plea is not evidence against the defendant, and you may consider it only in determining this witness's believability].

For [this] [these] reason[s], in evaluating the testimony of [name of witness], you should consider the extent to which or whether [his] [her] testimony may have been influenced by [this] [any of these] factor[s]. In addition, you should examine the testimony of [name of witness] with greater caution than that of other witnesses.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.9

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Requested Instruction §4.14 - Opinion Evidence, Expert Witness

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.14

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Requested Instruction §4.15 - Summaries Not Received in Evidence

During the trial, certain charts and summaries were shown to you in order to help explain the evidence in the case. These charts and summaries were not admitted in evidence and will not go into the jury room with you. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.15

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REFUSED: _____
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Requested Instruction §4.16 - Charts and Summaries in Evidence

Certain charts and summaries have been admitted in evidence. Charts and summaries are only as good as the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 4.16

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Requested Instruction §5.7 - Deliberate Ignorance

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

- 1. was aware of a high probability that [e.g., drugs were in the defendant's automobile], and
- 2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that [e.g. no drugs were in the defendant's automobile], or if you find that the defendant was simply careless.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 5.7

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 REFUSED: _____
 MODIFIED: _____

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Requested Instruction §7.1 - Duty to Deliberate

When you begin your deliberations, elect one member of the jury as your [presiding juror] [foreperson] who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.1

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Requested Instruction §7.2 - Consideration of Evidence

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings [, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

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Authority: Manual of Model Criminal Jury Instructions
for the Ninth Circuit (2010 ed.), Instruction 7.2

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Requested Instruction §7.3 - Use of Notes

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.3

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Requested Instruction §7.4 - Jury Consideration of Punishment

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.4

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Requested Instruction §7.5 - Verdict Form

A verdict form has been prepared for you. [Explain verdict form as needed.] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [bailiff] that you are ready to return to the courtroom.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.5

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Requested Instruction §7.6 - Communication with Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [bailiff], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 7.6

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Section II: NON-MODEL STIPULATED INSTRUCTIONS

Government and defendants requests that the Court give the following non-model instructions:

1. Modified 9.37 - Attempt to Evade and Defeat "Payment" of Tax
2. False Statement - Statute
3. Modified 9.39 - False Statements - Elements

The text of these instructions follows below:

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1. Modified 9.37 - Attempt to Evade and Defeat “Payment” of Tax

Defendant James R. Parker is charged in counts one through four of the Indictment with attempting to evade and defeat the payment of income tax, interest and penalties for calendar years 1997, 1998, 2001, and 2002, in violation of Section 7201 of Title 26 of the United States Code.

In order for the defendant to be found guilty of these charges, the government must prove each of the following elements beyond a reasonable doubt with respect to each count:

First, the defendant owed more federal income tax for the calendar years 1997, 1998, 2001, and 2002 than was paid by him for any income tax returns filed for those years;

Second, the defendant knew he owed more federal income tax than was paid by him for any tax returns defendant filed for those years;

Third, the defendant made an affirmative attempt to evade or did an affirmative act to defeat the payment of income tax for any of those years; and

Fourth, in attempting to evade or defeat the payment of this income tax, the defendant acted willfully.

Authority: *Sansone v. United States*, 380 U.S. 343, 351 (1965); *United States v. Boulware*, 384 F.3d 794, 810 (9th Cir. 2004); *United States v. Marashi*, 913 F.2d 724, 735-36 (9th Cir. 1990); *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984).

Ninth Circuit Manual of Model Criminal Jury Instructions (2010 revision) 9.37 (as modified), and as it appeared on May 22, 2012 on the official web site for the United States Courts for the Ninth Circuit (<http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim>).

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2. False Statement - Statute

Title 26, United States Code, Section 7206(1) provides in part, that:

Any person who ... [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . [shall be guilty of an offense against the United States].

Authority: 26 U.S.C. § 7206(1)

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3. Modified 9.39 - False Statements - Elements

Defendant James R. Parker, in counts five through eight of the Indictment, is charged with the crime of False Statement, in violation of Title 26, United States Code, Section 7206(1) and Title 18 United States Code Section 2.

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant made and signed tax documents that the defendant knew contained false information as to a material matter;

Second, the tax documents contained a written declaration that it was being signed subject to the penalties of perjury; and

Third, in submitting the tax documents, the defendant acted willfully.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Authority: 26 U.S.C. § 7206(1)

Ninth Circuit Manual of Model Criminal Jury Instructions (2010 revision) 9.37 (as modified), and as it appeared on May 22, 2012 on the official web site for the United States Courts for the Ninth Circuit (<http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim>).

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Section III: INSTRUCTIONS AS TO WHICH THE PARTIES DISAGREE

I. Government’s Requested Instructions (defendant objects)

- 1. “On or About”
- 2. Instruction §5.1- Aiding and Abetting
- 3. Tax Evasion - Statute
- 4. Existence of a Tax Deficiency
- 5. Affirmative Act - Defined
- 6. Substance over Form
- 7. Income Defined
- 8. Good Faith - Defined
- 9. Instruction 9.42 - Willfully Defined
- 10. §5.6 Knowingly—Defined

II. Defendants’ Requested Instructions (government objects)

- 11. Willfully Instruction No. 1
- 12. Good Faith Instruction No. 1
- 13. Good Faith Instruction No. 2
- 14. Good Faith Instruction No. 3
- 15. Good Faith Instruction No. 4
- 16. Good Faith Instruction No. 5 and Unlawful Intent to Defraud
- 17. Good Faith Instruction No. 6
- 18. Willfully Instruction No. 2
- 19. Instruction §5.5
- 20. Criminal v. Civil Tax Trial
- 21. Good Faith Instruction No. 7
- 22. Willfully Instruction No. 3
- 23. Nominee Instruction

- 1 24. Arizona Rules of Professional Conduct Ethical Rule 1.10 Imputation of Conflicts
- 2 of Interest
- 3 25. Arizona Rules of Professional Conduct Ethical Rule 1.8 Conflicts of Interest:
- 4 Current Client
- 5 26. Arizona Rules of Professional Conduct Ethical Rule 1.1 Competence
- 6 27. Arizona Rules of Professional Conduct Ethical Rule 1.6 Confidentiality of
- 7 Information
- 8 28. Arizona Rules of Professional Conduct Ethical Rule 1.7 Conflict of Interest
- 9 29. Arizona Rules of Professional Conduct Ethical Rule 1.4 Communication
- 10 30. Character of Defendant
- 11 31. Definition of a Trust

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1. "On or About"

The Indictment charges that the offenses were committed "on or about" certain dates. Although it is necessary for the United States to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged in the Indictment, it is not necessary for the United States to prove that the offenses were committed precisely on the dates charged.

Authority: Kevin F. O'Malley et al., 1A Federal Jury Practice and Instructions § 13.05 (5th ed. 2004) (as modified)

Defendants' objection: The alleged violations are covered by the Statute of Limitations. The charges in the indictment are exact dates. This is not a case where and "on or about" instruction is applicable. Unnecessary.

Government's response: Defendant is mistaken. The Indictment does use the "On or about" language. (See CR 1, ¶3, 7, 9-10, 12, 15-18.) The Indictment also uses phrases such as "As early as" and "Between" when referencing general time periods. (Id. 4, 5, 6, and 8.) The government submits that the instruction is entirely appropriate.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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2. Instruction §5.1 - Aiding and Abetting

A defendant may be found guilty of the crimes of Conspiracy, Mail Fraud, Wire Fraud, and Transactional Money Laundering, even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the specified crime was committed by someone;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of the specified crime; and

Third, the defendant acted before the crime was completed. It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the specified crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 5.1

Defendants' objection: Objection to instruction not applicable.

Government's response: The instruction may become relevant depending on whether defendant attempts to blame others, including his previous attorneys, for his criminal conduct. he instruction may still be appropriate.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

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3. Tax Evasion - Statute

Title 26, United States Code, Section 7201 provides in part, that:

Any person who willfully attempts in any manner to evade or defeat any income tax . . . [shall be guilty of an offense against the United States].

Authority: 26 U.S.C. § 7201

Defendants' objection: Objection to rewording of 26 USC 7201. The statute specifically states "shall be guilty of a felony" not "of an offense".

Government's response: The government does not object to using the language "shall be guilty of a felony." The government modified the instruction in the interest of justice.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

4. Existence of a Tax Deficiency

1
2 A tax due and owing may be ascertained in three ways: by the taxpayer reporting the
3 amount of tax due and owing; by the IRS examining the taxpayer and assessing the tax; or if the
4 taxpayer fails to file a return, and the government can prove a tax deficiency, the deficiency arises
5 on the date the return was due.

6 If the IRS did a tax examination of the defendant taxpayer, and assessed additional tax,
7 a certificate of assessment and payment is “adequate evidence” of a tax liability.

8 The government need not prove the specific amount of tax due for each calendar year
9 alleged in the Indictment. It makes no difference if the actual tax deficiency is more or less than
10 the amount charged as unreported in the Indictment. The government need only show that the
11 defendant willfully attempted to evade any tax during the years in question.

12

13 Authority: *United States v. Marashi*, 913 F.2d 724, 735-36 (9th Cir. 1990); *United*
14 *States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981); *United States v.*
Buckner, 610 F.2d 570, 573-74 (9th Cir. 1979).

15

16 Defendants’ objection: The clients are on trial for an alleged criminal violation not a civil
17 assessment of a tax deficiency. A civil decision has a lesser burden of proof. Jury isn’t
determining the tax deficiency or if one exists.

18 Government’s response: Defendant is mistaken. The government must provide each element of
19 the crime charged beyond a reasonable doubt. The crime of *Evasion of Payment* requires proof
20 that the defendant owed more federal income tax for the calendar years 1997, 1998, 2001, and
2002 than was paid by him for any income tax returns filed for those years. See Ninth Circuit
Manual of Model Criminal Jury Instructions (2010 revision) 9.37 (as modified).

21 This difference is what constitutes a “tax deficiency,” *United States v. Kayser*, 488 F.3d 1070,
22 1073 (9th Cir.2007); *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990). A deficiency
23 is defined as the amount by which the tax imposed by statute exceeds the sum of (1) the amount
of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus
any rebate previously received. 26 U.S.C. § 6211; *United States v. Bishop*, 264 F.3d 535 (5th Cir.
2001).

24

25 A certificate of assessments and payments is *prima facie* evidence of the asserted tax deficiency,
26 which may prove the tax due and owing. *United States v. Voorhies*, 658 F.2d 710, 713-15 (9th
Cir. 1981) (“In the absence of an administrative- or judicial-level contention by the taxpayer that
27 these assessments were invalid, the certificates of assessment were *prima facie* correct and
therefore adequate evidence of the amount of Voorhies’ tax liability.”); *United States v. Silkman*,

28

1 220 F.3d 935, 937 (8th Cir. S.D. 2000) ("[A]n assessment gives the taxpayer notice of the IRS's
2 position and an opportunity to contest the assessed deficiency by administrative appeal and civil
3 deficiency or refund litigation. When the taxpayer declines to invoke these procedures, the
4 assessment becomes final for purposes of the IRS's civil tax collection remedies."); *United States*
5 *v. Josephberg*, 562 F.3d 478, 489 (2d Cir. 2009) (upholding tax evasion conviction based on IRS
6 certificates of assessment, notices of deficiency sent to defendant, and tax court judgments.);
7 *United States v. Blood*, 806 F.2d 1218 (4th Cir. 1986) (upholding tax evasion conviction after
8 lower court allowed the government to read into evidence portions of prior tax court decisions.")

9 A certificate of assessment, however, is not necessary to show evasion of payment because the
10 deficiency "arises by operation of law." *Voorhies*, at 714-15; *United States v. Ellett*, 527 F.3d 38,
11 40 (2d Cir. 2008) ("A tax deficiency arises by operation of law the date a tax return is due but not
12 filed; no formal demand or assessment is required").

13 In the case when a taxpayer has filed a return and not paid the reported tax, the reporting of the
14 tax is a self-assessment of the tax due and owing. The existence of a tax due and owing is
15 established by the introduction of the return. *See Voorhies*, at 714-15; *Marashi*, 913 F.2d at
16 735-36.

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18 GIVEN: _____

19 REFUSED: _____

20 MODIFIED: _____

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5. Affirmative Act - Defined

A failure to act is not an attempt to evade one’s assessment or payment of taxes. But any affirmative act, “the likely effect of which would be to mislead or to conceal” one's tax liability or assets, is an attempt to evade taxes.

An affirmative “willful attempt” or act to evade or defeat income tax may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind, and any other conduct the likely effect of which would be to mislead or to conceal.

Other examples of affirmative acts of evasion of assessment or payment of tax include placing assets in the name of others, causing debts to be paid through and in the name of others, using bank accounts in the names of others, transacting business in cash or cashier’s checks, and paying other creditors instead of the government.

Authority: *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Pollen*, 978 F.2d 78, 88 (3d Cir. 1992); *United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992); *United States v. McGill*, 964 F.2d 222, 233 (3d Cir. 1992); *United States v. Masat*, 896 F.2d 88, 97 (5th Cir 1990); *United States v. Conley*, 826 F.2d 551, 553 (7th Cir. 1987); *United States v. Hook*, 781 F.2d 1166, 1169 (6th Cir. 1986); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir. 1987); *Cohen v. United States*, 297 F.2d 760, 762 (9th Cir. 1962).

Defendant’ objection: Redundant. Argumentative. If given requires an explanation that these actions maybe legally preferred.

Government’s response: The government must prove beyond a reasonable doubt that defendant made an affirmative attempt to evade or did an affirmative act to defeat the payment of income tax. See Ninth Circuit Manual of Model Criminal Jury Instructions (2010 revision) 9.37 (as modified). The government submits that the proposed instruction will be helpful to the jury, and is consistent with law.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

6. Substance over Form

Where an individual exercises complete dominion and control over income and its sources, the tax law generally attributes the income to the individual rather than to a nominal owner. The Tax Code taxes legal entities such as trusts and corporations separately from their owners. But if the entities lack economic substance or serve as the alter ego of an individual taxpayer who uses them to evade taxes, the tax burden falls on the individual taxpayer. This is a basic principle of federal income-tax law. Tax consequences flow from the substance rather than the form of a transaction, and defendant's actual control of the property, rather than what the records reflect, is what controls for federal tax purposes.

Therefore, a trust or corporation that lacks economic substance and has no purpose other than tax avoidance is not recognized for Federal tax purposes. Generally, the law will not recognize a trust for Federal tax purposes if the creator keeps substantially unfettered powers of disposition or beneficial enjoyment of trust property. Federal tax law will disregard such an entity for Federal tax purposes, even if it is valid under State law.

Authority: *Neely v. United States*, 775 F.2d 1092, 1094 (9th Cir.1985); *Zmuda v. Commissioner*, 731 F.2d 1417, 1421 (9th Cir.1984); *Hanson v. Commissioner*, 696 F.2d 1232 (9th Cir.1983); *United States v. Schmidt*, 935 F.2d 1440, 1447-49 (4th Cir.1991); *United States v. Noske*, 117 F.3d 1053, 1059 (8th Cir.1997); *United States v. Buttorff*, 761 F.2d 1056, 1061 (5th Cir.1985).

Defendants' objection: Argumentative. Not supported by case law.

Government's response: A central issue in this case will be whether different nominee entities, including a trust created by defendant, were in fact true and separate legal entities, or whether defendant exercised and retained dominion and control over them. As a matter of law, a trust is invalid for federal income tax purposes if (1) the trustor retains the same relationship to the property both before and after the trust is established, or (2) the trustee does not have independent control over the property in the trust, or (3) the beneficiary did not receive an economic interest in the property. 26 U.S.C. §§ 671-677; Treas. Reg. § 1.671-1 et seq; *Zmuda v. Commissioner*, 79 T.C. 714, 720-722 (1982), aff'd, 731 F.2d 1417 (9th Cir. 1984); *Markosian v. Commissioner*, 73 T.C. 1235 (1980); *Hanson v. Commissioner*, T.C. Memo 1981-675 (1981), aff'd, 696 F.2d 1232 (9th Cir. 1983).

1 GIVEN: _____

2 REFUSED: _____

3 MODIFIED: _____

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7. Income Defined

The term “income” is a broad concept that includes any economic gain from whatever source. The essence of income is the accrual of some gain, profit, or benefit to the taxpayer.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services, or dealings in property. The tax is also levied upon profits earned from any business, regardless of its nature -- legal or illegal - and from interest, dividends, rents and the like. In short, the term “gross income” means all income from whatever source unless it is specifically excluded by law.

Authority: 26 U.S.C. § 61; *Commissioner v. Wilcox*, 327 U.S. 404 (1946).

Defendants’ objection: Objection to wording of US Code Section 61. Section 61 reads “...gross income means all income from whatever source derived....”

Government’s response: Pursuant to 26 U.S.C. § 61, “. . . gross income means all income from whatever source derived, including (but not limited to) the following” The above instruction is appropriate because it accurately defines income as any “economic gain from whatever source,” which is consistent with the concept of income that is contained in the definition of “gross income.”

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MODIFIED: _____

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8. Good Faith - Defined

The good faith of the defendant is a complete defense to the charges of tax evasion because good faith is simply inconsistent with the intent required to commit that violation.

If a person acts without reasonable grounds for belief that his conduct is lawful, it is for you to decide whether that person has acted in good faith in order to comply with the law or whether that person has willfully violated the law. In determining whether or not the government has proven that the defendant committed tax evasion of payment, or whether the defendant acted in good faith, you must consider all of the evidence received in the case bearing on the defendant’s state of mind.

The burden of proving good faith does not rest with the defendant because the defendant has no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that the defendant acted willfully. If the evidence in the case leaves you with a reasonable doubt as to whether the defendant acted in good faith or acted willfully in committing tax evasion, you must find the defendant not guilty of that violation.

Authority: Devitt, Blackmar and O’Malley, Federal Practice and Instructions, (4th Ed. 1990) §56.26 [The Good Faith Defense] (Modified); *Cheek v. United States*, 498 U.S. 192 (1991).

Defendants’ objection: *Defendant did not submit reason for this objection.*

Government’s response: Although defendant has not submitted a reason for this objection, the government respectfully submits that this instruction is fair especially in light of defendant’s anticipated defense that he relied upon the advice of counsel. The government also believes that this single instruction is more appropriate than the seven *Good Faith* instructions proposed by defendant.

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REFUSED: _____

MODIFIED: _____

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9. Requested Instruction §9.42 - Willfully-Defined

In order to prove that the defendant acted “willfully,” the government must prove beyond a reasonable doubt that the defendant knew federal tax law imposed a duty on [him] [her], and the defendant intentionally and voluntarily violated that duty.

[A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if [his] [her] understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that [he] [she] was complying with the law.]

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 9.42

Defendants’ objection: Defendant wants to include third paragraph. *See* page 81.

Government’s response: The government submits that the above Ninth Circuit model jury instruction is fair, appropriate, and accurately and concisely reflects the law.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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10. Instruction §5.6 - Knowingly—Defined

An act is done knowingly if the defendant is aware of the act and does not [act] [fail to act] through ignorance, mistake, or accident. [The government is not required to prove that the defendant knew that [his] [her] acts or omissions were unlawful.] You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Authority: Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.), Instruction 5.6

Defendants’ objection: Objection to second sentence (not appropriate in this case). The government is required to prove that the defendant knew his acts or omissions were unlawful. The second sentence of this instruction should not be given where an element of the offense requires the government to prove that the defendant knew that what the defendant did was unlawful. *See United States v. Santillan*, 243 F.3d 1125, 1129 (9th Cir.2001) (violation of Lacey Act); *United States v. Turman*, 122 F.3d 1167, 1169 (9th Cir.1997) (money laundering case).

Government’s response: The government consents to the removal of the second sentence, but believes that the remainder of the instruction is appropriate.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

1 11. Willfully Instruction No. 1

2 The government has the burden of proving that James Parker and Jacqueline L. Parker
3 acted "knowingly" and "willfully" in this case. The word "willfully," as that term is used in the
4 Indictment and in these instructions, means that the act was done voluntarily and intentionally
5 and not because of mistake or accident. The word "knowingly," as that term is used in the
6 Indictment and in these instructions, means that the act was done voluntarily and intentionally
7 and not because of mistake or accident.

8 The proliferation of statutes and regulations has sometimes made it difficult for the
9 average citizen to know and comprehend the extent of the duties and obligations imposed by the
10 tax laws. Congress has accordingly softened the impact of the common-law presumption by
11 making specific intent to violate the law an element of certain federal criminal tax offenses.
12 Congress did not intend that a person, by reason of a bona fide misunderstanding as to his
13 liability for the tax, or as to his duty to make a return, should become a criminal by his mere
14 failure to measure up to the prescribed standard of conduct.

15 Willfulness means a voluntary, intentional violation of a known legal duty. A defendant
16 acted "willfully" if the law imposed a duty on him, he knew of the duty, and he voluntarily and
17 intentionally violated that duty. A defendant's conduct is not "willful" if it resulted from
18 negligence, inadvertence, accident, mistake or reckless disregard for the requirements of law,
19 or resulted from a good faith misunderstanding that he was not violating a duty that the law
20 imposed on him. If you have a reasonable doubt as to whether the defendant acted willfully, you
21 must acquit him.

22 A defendant does not act "willfully" if he believes in good faith that he is acting within
23 the law or that his actions comply with the law, even though the belief turns out to be incorrect
24 or wrong. Having the burden to prove the defendant acted willfully as charged, the government
25 must prove the defendant did not believe in good faith that his actions were lawful. Defendant's
26 good faith belief that the tax laws did not impose a duty on him do not have to be objectively

1 reasonable in order to be considered by you. A good faith misunderstanding of the law or a good
2 faith belief that one is not violating the law negates willfulness, whether or not the claimed belief
3 or misunderstanding is objectively reasonable. The burden of proving good faith does not rest
4 with the defendant because a defendant does not have an obligation to prove anything in the
5 case.

6 Therefore, if you find that the defendant actually believed what he was doing was in
7 accord with tax laws, then you must conclude that the defendant did not act willfully. An honest
8 but irrational belief by the defendant that he owed no legal duty would negate the required
9 element of willfulness.

10
11 Authority: *Cheek v United States*, 498 U.S. 192, 201 (1991); *United States v*
12 *Ambort*, 405 F.3d 1109, ___ (10th Cir. 2005); *United States v Pflum*, F.3d __,
13 150 Fed.Appx. 840, 2005 WL2476245 (10th Cir. 2005) (UNPUBLISHED).
United States v Murdock 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. *United*
States v Bishop, 412 U.S. 346 (1973).

14
15 Government's Objection: The government objects to the definition of "knowingly" in the first
16 paragraph. The government objects to the entire second paragraph as dicta from *Cheek v United*
17 *States*, 498 U.S. 192, 199-200 (1991). Portions of the third paragraph simply restate in substance
18 the Ninth Circuit Model Instruction § 9.42, and much of the language in the second and third
paragraph is repetitive, redundant, and confusing. The government objects to the fourth
paragraph as it contains the phrases, "actually believed" and "honest but irrational belief," which
is different than the standard set in *Cheek*: a "good faith belief" need not be "objectively
reasonable." *Id.* at 202-03 (emphasis added).

19 The Ninth Circuit's Model Instruction §9.42 is more appropriate which states that, "[a] defendant
20 who acts on a good faith misunderstanding as to the requirements of the law does not act
willfully even if his understanding of the law is wrong or unreasonable."

21
22 Defendant's Response: The defense has submitted numerous versions of a willfulness
23 instruction. The most critical defense element of the charges is willfulness. Because of the
24 importance of the willful instruction in this particular case the model rules need further
explanation. The Government and Defense could not agree on the elaboration so the Defense
submitted different versions of a willfulness instruction knowing not all of them would be
accepted.

25 The Government also objects to the instruction on "knowingly". Knowingly is a distinct and
26 separate word in the statute and requires a definition. The definition supplied by the Defense
has been used in cases all over the United States.

1 The Government gives no reason for its objection to this definition of knowingly, nor does it
offer its own.

2 Both knowing and willful conduct is required to commit a tax crime.
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7 GIVEN: _____

8 REFUSED: _____

9 MODIFIED: _____

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1 12. Good Faith Instruction No. 1

2 The Burden is on the Government to negate the defendants' claim that he or she had a
3 good faith belief that he or she was not violating the tax law.

4 Good Faith Reliance on a qualified accountant is a defense to willfulness in cases of tax
5 fraud.

6
7 Authority: *United States v. Moran*, 493 F.3d 1002(9th Cir. 2007); *United States v.*
8 *Powell*, 955 F.2d 1206, (9th Cir. 1992)

9 Government's Objection: The Ninth Circuit in *Moran* held that excluding the defendant's
10 testimony as to the advice she received from financial and legal experts was an abuse of
11 discretion. That does not mean that this statement of law should be added as a jury instruction.
12 Moreover, defendants, to this day, have not provided proof to support the submission of this
13 affirmative defense. Furthermore, even if this Court were to accept a jury instruction that deals
14 with a "good faith reliance on an accountant," defendant's instructions are incomplete. A
15 defendant who is claiming a good faith reliance on the advice of a tax professional must
16 demonstrate the following: 1) Before taking action, (2) he in good faith sought the advice of an
17 attorney whom he considered competent, (3) for the purpose of securing advice on the
18 lawfulness of his possible future conduct, (4) made a full and accurate report to his attorney of
19 all material facts which the defendant knew, and (5) acted strictly in accordance with the advice
20 of his attorney who had been given a full report. *United States v. Cheek*, 3 F.3d 1057, 1061 (7th
21 Cir. 1993); *see also United States v Bishop*, 291 F.3d 1100, 1106-07 (9th Cir. 2002) ("There was no
22 evidence to support their claim that they relied on professional advice after full disclosure of
23 relevant facts); *United States v. Kenney*, 911 F.2d 315, 322 (9th Cir. 1990) ("In order to qualify
24 for an advice of counsel instruction the appellant must show that there was full disclosure to the
25 attorney of all material facts, and that he relied in good faith on the attorney's recommended
26 course of conduct.") Defendant must show that he sought advice regarding the lawfulness of
27 future conduct. *United States v. Polytarides*, 584 F.2d 1350, 1352-53 (4th Cir. 1978) (no error
28 to reject reliance defense when evidence shows illegal acts before advice was sought).

19 Defendant's Response: The defense has submitted numerous versions of a good faith instruction.
20 One of the most critical defense elements of the charges is good faith. Because of the
21 importance of the Good Faith instruction in this particular case the model rules need further
22 explanation. The Government and Defense could not agree on the elaboration so the Defense
23 submitted different versions of a good faith instruction knowing not all of them would be
24 accepted.

23 The Government's objection states no law (except for the inclusion of the Bishop instruction
24 which preceded Moran by five years). Defendants have not provided any proof because the trial
25 has not started. Evidence begins when the trial starts. This instruction has been commonly
26 given all over the United States. The asserting that it is confusing is absurd.

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GIVEN: _____

REFUSED: _____

MODIFIED: _____

13. Good Faith Instruction No. 2

Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness, which is an essential part of the charges. The burden of proof is not on the Defendant to prove good faith since the Defendant has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted with specific intent to defraud as charged in the indictment.

One, who expresses an honestly held opinion or an honestly formed belief, is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken.

Authority: *United States v Cheek*, 498 U.S. 192 (1991)

Government’s Objection: The government objects to the use of “intent to defraud,” which is not an element of the crime. The use of “fraudulent intent” is also misleading. In addition, language discussing the “burden of proof” is redundant and repeats language found in other instructions.

Defendant’s Response: The defense has submitted numerous versions of a good faith instruction. One of the most critical defense elements of the charges is good faith. Because of the importance of the Good Faith instruction in this particular case the model rules need further explanation. The Government and Defense could not agree on the elaboration so the Defense submitted different versions of a good faith instruction knowing not all of them would be accepted.

Tax Evasion (the felony) as opposed to non-filing (a misdemeanor) requires an overt act of deception. An instruction on intent is required. Good Faith is a complete defense. The obtuse theory of the government claims evasion not through a false filing but through fraudulent instruments concealing assets. The Government objects without offering any instruction specific to their theory of prosecution on Good Faith that handles this.

GIVEN: _____

REFUSED: _____

MODIFIED: _____

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14. Good Faith Instruction No. 3

An honest but irrational belief by the defendant that a deduction on a tax return was legal would negate the required element of willfulness.

Authority: *United States v Cheek*, 498 U.S. 192 (1991)

Government's Objection: The government objects to "honest but irrational belief," which as discussed above, is different than a "good faith belief" need not be "objectively reasonable" standard. *Cheek v United States*, 498 U.S. 192, 201-203 (1991) (emphasis added). The Ninth Circuit's Model Instruction §9.42 is more appropriate which states that, "[a] defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or unreasonable." Moreover, the instruction is repetitive. The use of "deduction" is also not relevant to this case and it seems that defendant is attempting to "create" a new instruction that merely repeats the same language found in previous instructions, which is also not appropriate.

Defendant's Response: The instruction is repetitive if all other defense instructions are granted. The defense does not know in advance what instructions the court will accept or reject and so, in an early submission, prior to the evidence, the defendant must submit, repetitive instructions. There are numerous acceptable defense good faith instructions. This is one of them.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

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15. Good Faith Instruction No. 4

If you find that the defendant actually believed what she was doing was in accord with tax laws, then you must conclude that the defendant did not act willfully.

An honest but irrational belief by the defendant that she owed no legal duty would negate the required element of willfulness.

Authority *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Ambort*, 405 F.3d 1109, _ (10th Cir. 2005) - Modified

Government's Objection: The government objects to this instruction for the same reasons previously discussed. The government objects to the "honest but irrational belief" language which, as discussed above, is different than the standard used in *Cheek*: a "good faith belief" need not be "objectively reasonable." *Cheek v United States*, 498 U.S. 192, 201-203 (1991). The instruction is redundant and repeats Instructions 10, 11, and 12. It seems that defendant is attempting to overwhelm the jury with variations of the same instruction.

Defendant's Response: The Government has also objected to 10, 11, and 12. So the Government in spirit simply wont agree to any effective good faith instruction. If the court agrees that would constitute error. This instruction is also accepted all over the United States. The defendant is entitled to instructions on Good Faith. Good Faith need not be rational or "objectively reasonable".

GIVEN: _____
REFUSED: _____
MODIFIED: _____

1 16 Good Faith Instruction No. 5

2 One element that the government must prove beyond a reasonable doubt is that the
3 defendant had the unlawful intent to defraud. Evidence that the defendant in good faith followed
4 the advice of counsel would be inconsistent with such an unlawful intent. Unlawful intent has
5 not been proved if the defendant, before acting, made full disclosure of all material facts to an
6 attorney, received the attorney's advice as to the specific course of conduct that was followed,
7 and reasonably relied on that advice in good faith.

8 In order to rely on a good faith defense, the defendant must in fact have some "belief;"
9 either that her own understanding was correct or that she in good faith relied on the tax advice
10 of a qualified tax professional.

11
12 Authority: *See Manual of Model Criminal Jury Instructions for the Ninth Circuit* (2010
13 ed.) §5.9. *See United States v. Bishop*, 291 F.3d 1100 (9th Cir.2002).

14 Government's Objection: This instruction is not appropriate in a criminal tax case. As discussed
15 above, "unlawful intent to defraud" is not an element of the crime charged. The government
objects to the use of this phrase as confusing and misleading.

16 In addition, the government objects to the use of "relied on...tax advice of a qualified tax
17 professional" for the same reasons discussed above on page 75. Moreover, the second paragraph
18 contained in defendant's instruction contains language that is not part of the cited jury
19 instruction, §5.9. As stated above, even if this Court were to accept a jury instruction that deals
20 with a "good faith reliance on the advice of tax professional," defendant's instructions are
21 incomplete. A defendant who is claiming a good faith reliance on the advice of a tax
22 professional must demonstrate the following: 1) Before taking action, (2) he in good faith sought
the advice of an attorney whom he considered competent, (3) for the purpose of securing advice
on the lawfulness of his possible future conduct, (4) made a full and accurate report to his
attorney of all material facts which the defendant knew, and (5) acted strictly in accordance with
the advice of his attorney who had been given a full report. *United States v. Cheek*, 3 F.3d 1057,
1061 (7th Cir. 1993).

23 Defendant's Response: The defense has submitted numerous versions of a good faith instruction.
24 One of the most critical defense elements of the charges is good faith. Because of the
25 importance of the Good Faith instruction in this particular case the model rules need further
explanation. The Government and Defense could not agree on the elaboration so the Defense
submitted different versions of a good faith instruction knowing not all of them would be
accepted.

26 See Response to Instruction 12 Objection.

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GIVEN: _____

REFUSED: _____

MODIFIED: _____

17. Good Faith Instruction No. 6

2 Good faith of a Defendant is a complete defense to the charges of the indictment because
3 good faith is simply inconsistent with willfulness. The burden of proving good faith does not
4 rest with any Defendant because the Defendants have no obligation to prove anything to you.
5 The government has the burden of proving to you beyond a reasonable doubt that each
6 Defendant acted willfully.

7 A good faith belief is one which is honest and genuinely held. If a Defendant believes
8 in good faith that he or she has done all that the law requires, he or she lacks the required
9 criminal intent and cannot be found guilty of a crime. This is true regardless of how
10 unreasonable the beliefs are so long as the beliefs were held in good faith.

11 Good faith reliance on an accountant or professional tax advisor is a complete defense to
12 willfulness in cases of tax fraud and evasion.

13 If the evidence in the case leaves you with a reasonable doubt as to whether a given
14 Defendant acted willfully or in good faith, you must acquit that Defendant.

15
16 Authority: *Cheek v. United States*, 498 U.S. 192,203-07 (1991); *United States v.*
17 *Bishop*, 291 F.3d 1100 (9th Cir. 2002); *United States v. Gravich*, 152 F.3d
18 930 (Table), 1998 WL 416049, *1 (9th Cir. (Cal.) 1998) (unpublished
19 opinion); 1A Kevin F. O'Malley, et al., *Federal Jury Practice and*
Instructions: Criminal §19.06 (5th ed. 2000); LR.C. Regs.
1.6662-4(g)(4)(i)(A)(3).

20 Government's Objection: The government objects to any language not found in the
21 government's proposed instruction as being redundant, misleading, and confusing. (*See supra*,
government's proposed instruction No. 8. Good Faith - Defined)

22 Defendant's Response: The defense has submitted numerous versions of a good faith instruction.
23 One of the most critical defense elements of the charges is good faith. Because of the
24 importance of the Good Faith instruction in this particular case the model rules need further
25 explanation. The Government and Defense could not agree on the elaboration so the Defense
submitted different versions of a good faith instruction knowing not all of them would be
accepted.

26 The Government's objection to this instruction is that if they did not offer it - it is redundant.

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GIVEN: _____

REFUSED: _____

MODIFIED: _____

18. Willfully Instruction No. 2

2 An act is done willfully if done voluntarily and intentionally with the purpose of violating
3 a known legal duty.

4 Willfulness, as construed in criminal tax cases, requires the Government to prove that the
5 law imposed a duty on the defendant, that the defendant knew of this duty, and that he
6 voluntarily and intentionally violated that duty.

7 An act is done willfully, as used in these instructions, if it is done voluntarily and
8 intentionally with the purpose of violating a known legal duty. The conduct of a Defendant is
9 not willful if the Defendant acted through negligence, inadvertence, justifiable excuse, mistake,
10 or a good-faith misunderstanding of the law.

11
12 Authority: *Cheek v. United States*, 498 U.S. 192, 203-07 (1991); *United States v.*
13 *Bishop*, 291 F.3d 1100 (9th Cir. 2002); *United States v. Pins/d*, 121 F.3d 718
14 (Table), 1997 WL 453730, *1 (9th Cir. (Or.) 1997) (unpublished opinion);
United States v. Barnes, 46 F.3d 1146 (Table), 1994 WL725210, *2 (9th
15 Cir. (Nev.) 1994) (unpublished opinion).

16 Government's Objection: The government objects to any language not found in the government's
17 proposed instruction as being redundant. (*See supra*, government's proposed instruction No. 8.
Good Faith - Defined))

18 Defendant's Response: The defense has submitted numerous versions of a willfulness instruction.
19 The most critical defense element of the charges is willfulness. Because of the importance of
20 the willful instruction in this particular case the model rules need further explanation. The
21 Government and Defense could not agree on the elaboration so the Defense submitted different
22 versions of a willfulness instruction knowing not all of them would be accepted.

23 The Government's objection to this instruction is that if they did not offer it - it is redundant.

24 GIVEN: _____

25 REFUSED: _____

26 MODIFIED: _____

1 19. Instruction §5.5

2 As the Supreme Court has observed, "willful" is a word of "many meanings" and "its
3 construction [is] often . . . influenced by its context." Ratzlaf v. United States, 510 U.S. 135, 141
4 (1994). Accordingly, Ninth Circuit cases have defined "willful" in different terms depending on
5 the particular crime charged. See, e.g., United States v. Easterday, 564 F.3d 1004, 1006 (9th Cir.)
6 (for the crime of failure to pay employee payroll taxes, "willful" defined as "a voluntary,
7 intentional violation of a known legal duty"), cert. denied, 130 S. Ct. 490 (2009); United States
8 v. Awad, 551 F.3d 930, 939 (9th Cir.) (in health care fraud case, a "willful" act is one undertaken
9 with a "bad purpose" with knowledge that the conduct was unlawful), cert. denied, 129 S. Ct.
10 2748 (2009); United States v. Reyes, 577 F.3d 1069, 1080 (9th Cir.2009) (in a prosecution for
11 securities fraud willfully means "intentionally undertaking an act that one knows to be wrongful;
12 'willfully' in this context does not require that the actor know specifically that the conduct was
13 unlawful," quoting United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir.2004) (emphasis in
14 original)); United States v. Karaouni, 379 F.3d 1139, 1142 (9th Cir.2004) (in a prosecution for
15 falsely claiming United States citizenship, "willful" misrepresentation was defined as one made
16 voluntarily and deliberately). As the meaning of "willfully" necessarily depends on particular
17 facts arising under the applicable statute, the Committee has not provided a generic instruction
18 defining that term. In the context of tax crimes, however, see Instruction 9.42
19 (Willfully-Defined).

20 Authority: *See* Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010
21 ed.) §5.5

22 Government's Objection: This instruction is not appropriate in light of the model Ninth Circuit
Instruction §9.42.

23 Defendant's Response: The model instruction is useful but does not encompass all possible needs.
24 The existence of a model instruction does not eliminate the need for the court's careful review of
case specific instructions.

1 GIVEN: _____

2 REFUSED: _____

3 MODIFIED: _____

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20. Criminal v. Civil Tax Trial

The counts in the Indictment allege that Parker committed federal criminal tax evasion. There is a significant difference between a civil tax trial and a criminal tax trial. The purpose of a civil tax trial is the assessment of taxes and collection of money. The purpose of a criminal tax trial is to determine whether an individual willfully violated a criminal statute. Whether or not Parker is found guilty of criminal tax evasion, he must still pay civil taxes.

Authority: *See United States v. Christo*, 614 F.2d 486 (5th Cir. 1980) (regulatory violations were included in the indictment and throughout trial, so a jury instruction should have been given that the defendant was on trial for the criminal section at issue rather than merely regulatory violations)

Government’s Objection: The government objects. This instruction is not relevant to this case, and seems to be designed to encourage jury nullification. *United States v. Christo*, 614 F.2d 486 (5th Cir. 1980) does not support the proposed instruction. The facts in *Christo* can be distinguished; the government in *Christo* charged a civil regulatory violation to prove criminal conduct.

Defendant’s Response: Counsel has been trying these cases for over three decades. Counsel has never seen these theories of prosecution before. This case deals with the evaluation of a Tax Court Compromise and the defendant's impressions of that agreed compromise and further efforts to compromise the tax obligation under statute. This is the only instruction dealing with this unique prosecution theory of its case. If no instruction on the difference is given this will be an issue of first impression. Neither side has apparently found a criminal tax case on point

GIVEN: _____
REFUSED: _____
MODIFIED: _____

1 21. Good Faith Instruction No. 7

2 One of the issues in this case is whether the defendant acted in "good faith." "Good faith"
3 is a complete defense to the charge of income tax evasion if it is inconsistent with willfulness,
4 which is an element of the charge.

5 A person acts in "good faith" when he has an honestly held belief, opinion, or
6 understanding that he is following the law, even though the belief, opinion, or understanding turns
7 out to be inaccurate, erroneous, or mistaken. A good faith belief can even be unreasonable or
8 irrational.

9 A good faith belief can be formed by relying and acting upon the advice of a professional,
10 such as a qualified accountant, certified public accountant, attorney, or other expert. Parker
11 would not be "willfully" doing wrong if, before taking any action with regard to the alleged
12 offense, he consulted in good faith with someone and relied on their advice.

13 Whether Parker acted in good faith for the purpose of seeking advice concerning questions
14 about Parker was in doubt, and whether Parker made a full and complete report to those
15 individuals, and whether Parker acted strictly in accordance with the advice received, are all
16 questions for you to determine.

17 Evidence that the defendant acted in good faith may be considered by you, together with
18 all the other evidence, in determining whether or not he acted willfully. In other words, if you
19 find that Mr. Parker acted in good faith, then you must find him not guilty.

20 The burden of proof is not on Parker to prove good faith, of course, since Parker has no
21 burden to prove anything. The Government must establish beyond a reasonable doubt that Parker
22 acted knowingly and willfully as charged in the indictment.

23
24 Authority: See Manual of Model Criminal Jury Instructions for the Eighth Circuit (2009
25 ed.) § 9.05 (Good Faith: Income Tax & Fraud Cases) & § 9.05 (Theory of
26 Defense); Third Circuit Pattern Jury Instructions § 5.07 (Good Faith
27 Defense); *United States v. Cheek*, 498 U.S. 192 (1991) ("The general rule
28 that ignorance of the law or a mistake of law is no defense to criminal
prosecution is deeply rooted in the American legal system. ... [However,

1 the] proliferation of statutes and regulations has sometimes made it difficult for
 2 the average citizen to know and comprehend the extent of the duties and
 3 obligations imposed by the tax laws. Congress has accordingly softened the
 4 impact of the common-law presumption by making specific intent to violate
 5 the law an element of certain federal criminal tax offenses. ... Willfulness,
 6 as construed by our prior decisions in criminal tax cases, requires the
 7 Government to prove that the law imposed a duty on the defendant, that the
 8 defendant knew of this duty, and that he voluntarily and intentionally
 9 violated that duty." Further the defendant can have an "irrational belief" that
 10 is "unreasonable."); *United States v. Brooks*, 174 F.3d 950, 955 (8th Cir.
 11 1999) (explaining that to negate the element of willfulness, a defendant may
 12 show a "good faith belief" that he or she did not violate the law); *United S*
 13 *tates v. Masat*, 948 F.2d 923, 930 (5th Cir. 1991) (reliance on a
 14 professional); *United States v. Pomponio*, 563 F.2d 659, 662 (4th Cir. 1977)
 15 (reliance on accountant's interpretation of the tax laws); *United States v.*
 16 *Moran*, 493 F.3d ___, 1013 (___) (explaining that defendant's were entitled
 17 to a new trial because the trial court refused to allow one of the defendants
 18 to testify about her good faith reliance); ___ *Ross*, 487 U.S. 81, ___;
 19 *United States v. Harrold*, 796 F.2d 1275 (10th Cir. 1986) (defendant is not
 20 willful if consulted in good faith and followed the advice of an attorney,
 21 CPA or expert).

22 Government's Objection: This is the defendant's seventh Good Faith instruction. The government
 23 objects to much of the language as redundant and repetitive, and for all the same reasons as
 24 described above in previous objections. The government submits that defendant's proposed
 25 language pertaining to defendant's reliance on the advice of counsel is confusing and incomplete.

26 Defendant's Response: The defense has submitted numerous versions of a good faith instruction.
 27 One of the most critical defense elements of the charges is good faith. Because of the importance
 28 of the Good Faith instruction in this particular case the model rules need further explanation. The
 Government and Defense could not agree on the elaboration so the Defense submitted different
 versions of a good faith instruction knowing not all of them would be accepted.

See previous responses regarding Good Faith.

23 GIVEN: _____

24 REFUSED: _____

25 MODIFIED: _____

22. Willfully Instruction No. 3

In order to prove that the defendant acted "willfully," the government must prove beyond a reasonable doubt that the defendant knew federal tax law imposed a duty on [him] [her], and the defendant intentionally and voluntarily violated that duty.

A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if [his] [her] understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that [he] [she] was complying with the law.

Willfulness, as construed...in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

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Authority: See Manual of Model Criminal Jury Instructions for the Ninth Circuit (2010 ed.) § 9.42. Modified. See Also *Cheek v. United States*, 498 U.S. 192, 201 (1991).

Government's Objection: The government objects to the third paragraph of the instruction as repetitive. The first two paragraphs track the language in 9.42. The last paragraph comes directly from the Comment section in the Ninth Circuit Model Instruction.

Defendant's Response: The defense has submitted numerous versions of a willfulness instruction. The most critical defense element of the charges is willfulness. Because of the importance of the willful instruction in this particular case the model rules need further explanation. The Government and Defense could not agree on the elaboration so the Defense submitted different versions of a willfulness instruction knowing not all of them would be accepted.

See previous responses regarding Willfulness.

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GIVEN: _____

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REFUSED: _____

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MODIFIED: _____

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23. Nominee Instruction

The definition of a nominee is one designated to act for another as a representative in a limited sense.

Authority: West's Legal Thesaurus/Dictionary Special Deluxe Edition by: William Statsky.

Government's Objection: Defendant's proposed definition is limited. Black's Law Dictionary defines "nominee" as:

One designated to act for another in his or her place. One designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of action for another, in representation of another, or as the grantee of another. Black's Law Dictionary, Special Deluxe Fifth Edition, 1979 (citing to *Schuh Trading Co. v. Commissioner*, 95 F.2d 404, 411 (7th Cir. 1938)).

The Webster's Online Dictionary provides that a:

A nominee is an individual or entity, which acts on behalf of a beneficial owner. Most often the nominee pretends to be the owner of an entity, asset, or transaction to provide a veil of secrecy as to the beneficial owner's involvement. Many offshore entities provide nominee services whereby they will provide a nominee to act as owner of your arrangement but generally will not act unless instructed to by the beneficial owner. <http://www.websters-online-dictionary.org/definitions/nominee>

Title 26 of the United States Code, does not define the term "nominee." However, in the context of nominee liens, this Circuit discussed the use of nominee liens upon property held in the name of others, who were found to be the "alter ego" of the taxpayer. *Nelson v. United States*, 1991 U.S. App. LEXIS 20737 (9th Cir. Aug. 29, 1991); see also *Higgins v. Smith*, 308 U.S. 473, 475 (U.S. 1940) ("In this case the jury was instructed to find whether these sales by the taxpayer ... were actual transfers of property out of Mr. Smith and into something that existed separate and apart from him or whether they were to be regarded as simply a transfer by Mr. Smith's left hand, being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all."); *Griffiths v. Commissioner*, 308 U.S. 355, 357-358 (U.S. 1939) ("We cannot too often reiterate that taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed -- the actual benefit for which the tax is paid. And it makes no difference that such command may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency. A given result at the end of a straight path, this Court said ... is not made a different result because reached by following a devious path ... Taxes cannot be escaped by anticipatory arrangements and contracts however skillfully devised ... by which the fruits are attributed to a different tree from that on which they grew. What Lay gave, Griffiths in reality got, and on that he must be taxed.") (internal citations and quotations omitted)

1 Defendant's Response: The Defense definition as offered is preferable and short.

2 No objection is made to add the Government's first definition by Blacks. The Webster online
3 proffer is not acceptable. It is not a legal authority like West or Blacks, and the "definition" is
4 argumentative.

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GIVEN: _____

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REFUSED: _____

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1 24. Arizona Rules of Professional Conduct Ethical Rule 1.10
2 Imputation of Conflicts of Interest

3 (a) While lawyers are associated in a firm, none of them shall knowingly represent a client
4 when any one of them practicing alone would be prohibited from doing so by Arizona Rules of
5 Professional Conduct, unless the prohibition is based on a personal interest of the prohibited
6 lawyer and does not present a significant risk of materially limiting the representation of the client
7 by the remaining lawyers in the firm.

8 (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from
9 thereafter representing a person with interests materially adverse to those of a client represented
10 by the formerly associated lawyer and not currently represented by the firm, unless:

11 1. the matter is the same or substantially related to that in which the formerly associated
12 lawyer represented the client; and

13 2. any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is
14 material to the matter.

15 (c) A disqualification prescribed by this Rule may be waived by the affected client under the
16 conditions stated in ER 1.7.

17 (d) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall
18 knowingly represent a person in a matter in which that lawyer is disqualified under ER 1.9 unless:

19 (1) the matter does not involve a proceeding before a tribunal in which the personally
20 disqualified lawyer had a substantial role;

21 (2) the personally disqualified lawyer is timely screened from any participation in the matter
22 and is apportioned no part of the fee therefrom; and

23 (3) written notice is promptly given to any affected former client to enable it to ascertain
24 compliance with the provisions of this Rule.

25
26 Authority: Ariz. Rules of Prof'l Conduct R. 1.10 (2011)

1 Government's Objection: The government objects to the inclusion of this instruction as irrelevant,
2 and submits that it will only further confuse and mislead the jury. The government is not aware
3 of any ethical violations, nor has defendant disclosed his reasons for requesting this instruction.
This Court has already precluded the introduction of expert testimony with regards to ethics. (CR
127, 133-34.)

4 Defendant's Response: Defense disagrees with the Government's assessment of the court's ruling.
5 Counsel believes the court ruled this specifically had to be handled with Court instructions and not
6 an expert. Many of defendant's reasons were shared on the record in the hearing and apparently,
7 although jury-selection has started, shared with the witness referred to who is under the
8 sequestration rule. Defense does agree that an expert would help to explain the rule - but a record
has been made, the expert has been excluded. Ethics instructions will come from the bench, as
ordered, unless this Honorable Court changes its ruling. Counsel believes it is generally not
probative to reargue past motions and does not intend to do so at this point. The court gave
counsel adequate opportunity to argue the issue, made a considered thoughtful decision and ruled.

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REFUSED: _____
MODIFIED: _____

1 25. Arizona Rules of Professional Conduct Ethical Rule 1.8
2 Conflicts of Interest: Current Client

3 a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an
4 ownership, possessory, security or other pecuniary interest adverse to a client unless:

5 (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable
6 to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably
7 understood by the client;

8 (2) the client is advised in writing of the desirability of seeking and is given a reasonable
9 opportunity to seek the advice of independent legal counsel on the transaction; and

10 (3) the client gives informed consent, in a writing signed by the client, to the essential terms
11 of the transaction and the lawyer's role in the transaction, including whether the lawyer is
12 representing the client in the transaction.

13 b) A lawyer shall not use information relating to representation of a client to the disadvantage
14 of the client unless the client gives informed consent, except as permitted or required by these
15 Rules.

16 c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift,
17 or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer
18 any substantial gift unless the lawyer or other recipient of the gift is related to the client. For
19 purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent
20 or other relative or individual with whom the lawyer or the client maintains a close, familial
21 relationship.

22 d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate
23 an agreement giving the lawyer literary or media rights to a portrayal or account based in
24 substantial part on information relating to the representation.

25 e) A lawyer shall not provide financial assistance to a client in connection with pending or
26 contemplated litigation, except that:

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1 (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may
2 be contingent on the outcome of the matter; and

3 (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on
4 behalf of the client.

5 f) A lawyer shall not accept compensation for representing a client from one other than the
6 client unless:

7 (1) the client gives informed consent;

8 (2) there is no interference with the lawyer's independence of professional judgment or with
9 the client-lawyer relationship; and

10 (3) information relating to representation of a client is protected as required by ER 1.6.

11 g) A lawyer who represents two or more clients shall not participate in making an aggregate
12 settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as
13 to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed
14 by the client. The lawyer's disclosure shall include the existence and nature of all the claims or
15 pleas involved and of the participation of each person in the settlement.

16 h) A lawyer shall not:

17 (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice
18 unless the client is independently represented in making the agreement;

19 (2) make an agreement prospectively limiting the client's right to report the lawyer to
20 appropriate professional authorities; or

21 (3) settle such allegations, claims, or potential claims with an unrepresented client or former
22 client unless that person is advised in writing of the desirability of seeking and is given a
23 reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

24 i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of
25 litigation the lawyer is conducting for a client, except that the lawyer may:

26 (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

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1 (2) contract with a client for a reasonable contingent fee in a civil case.

2 j) A lawyer shall not have sexual relations with a client unless a consensual sexual
3 relationship existed between them when the client-lawyer relationship commenced.

4 k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a)
5 through (i) that applies to any one of them shall apply to all of them.

6 l) A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not
7 represent a client in a representation directly adverse to a person who the lawyer knows is
8 represented by the other lawyer except upon consent by the client after consultation regarding the
9 relationship.

10

11 Authority: Ariz. Rules of Prof'l Conduct R. 1.8 (2011)

12

13 Government's Objection: The government objects to the inclusion of this instruction for the same
14 reasons previously submitted. The government believes that defendant's requested ethics
15 instructions (instructions 24-29) will only confuse and mislead the jury. The government is not
16 aware of any ethical violations, nor has defendant disclosed his reasons for requesting this
17 instruction. This Court has already precluded the introduction of expert testimony with regards to
18 ethics. (CR 127, 133-34.)

16

17 Defendant's Response: Defense disagrees with the Government's assessment of the court's ruling.
18 Counsel believes the court ruled this specifically had to be handled with Court instructions and not
19 an expert. Many of defendant's reasons were shared on the record in the hearing and apparently,
20 although jury-selection has started, shared with the witness referred to who is under the
21 sequestration rule. Defense does agree that an expert would help to explain the rule - but a record
22 has been made, the expert has been excluded. Ethics instructions will come from the bench, as
23 ordered, unless this Honorable Court changes its ruling. Counsel believes it is generally not
24 probative to reargue past motions and does not intend to do so at this point. The court gave
25 counsel adequate opportunity to argue the issue, made a considered thoughtful decision and ruled.

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23 GIVEN: _____

24 REFUSED: _____

25 MODIFIED: _____

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26. Arizona Rules of Professional Conduct Ethical Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Authority: Ariz. Rules of Prof'l Conduct R. 1.1 (2011)

Government's Objection: The government objects to the inclusion of this instruction for the same reasons previously submitted. The government believes that defendant's requested ethics instructions (instructions 24-29) will only confuse and mislead the jury. The government is not aware of any ethical violations, nor has defendant disclosed his reasons for requesting this instruction. This Court has already precluded the introduction of expert testimony with regards to ethics. (CR 127, 133-34.)

Defendant's Response: Defense disagrees with the Government's assessment of the court's ruling. Counsel believes the court ruled this specifically had to be handled with Court instructions and not an expert. Many of defendant's reasons were shared on the record in the hearing and apparently, although jury-selection has started, shared with the witness referred to who is under the sequestration rule. Defense does agree that an expert would help to explain the rule - but a record has been made, the expert has been excluded. Ethics instructions will come from the bench, as ordered, unless this Honorable Court changes its ruling. Counsel believes it is generally not probative to reargue past motions and does not intend to do so at this point. The court gave counsel adequate opportunity to argue the issue, made a considered thoughtful decision and ruled.

GIVEN: _____
REFUSED: _____
MODIFIED: _____

1 27. Arizona Rules of Professional Conduct Ethical Rule 1.6 Confidentiality of Information

2

3 (a) A lawyer shall not reveal information relating to the representation of a client unless the client
4 gives informed consent, the disclosure is impliedly authorized in order to carry out the
5 representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER
6 3.3(a)(3).

7 (b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary
8 to prevent the client from committing a criminal act that the lawyer believes is likely to result in
9 death or substantial bodily harm.

10 (c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information
11 necessary to prevent the crime.

12 (d) A lawyer may reveal such information relating to the representation of a client to the extent
13 the lawyer reasonably believes necessary:

14 (1) to prevent the client from committing a crime or fraud that is reasonably certain to result in
15 substantial injury to the financial interests or property of another and in furtherance of which the
16 client has used or is using the lawyer's services;

17 (2) to mitigate or rectify substantial injury to the financial interests or property of another that
18 is reasonably certain to result or has resulted from the client's commission of a crime or fraud in
19 furtherance of which the client has used the lawyer's services;

20 (3) to secure legal advice about the lawyer's compliance with these Rules;

21 (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer
22 and the client, to establish a defense to a criminal charge or civil claim against the lawyer based
23 upon conduct in which the client was involved, or to respond to allegations in any proceeding
24 concerning the lawyer's representation of the client; or

25 (5) to comply with other law or a final order of a court or tribunal of competent jurisdiction
26 directing the lawyer to disclose such information.

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1 (6) to prevent reasonably certain death or substantial bodily harm.

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3 Authority: Ariz. Rules of Prof'l Conduct R. 1.6 (2011)

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5 Government's Objection: The government objects to the inclusion of this instruction for the same
6 reasons previously submitted. The government believes that defendant's requested ethics
7 instructions (instructions 24-29) will only confuse and mislead the jury. The government is not
8 aware of any ethical violations, nor has defendant disclosed his reasons for requesting this
9 instruction. This Court has already precluded the introduction of expert testimony with regards to
10 ethics. (CR 127, 133-34.)

11 Defendant's Response: Defense disagrees with the Government's assessment of the court's ruling.
12 Counsel believes the court ruled this specifically had to be handled with Court instructions and not
13 an expert. Many of defendant's reasons were shared on the record in the hearing and apparently,
14 although jury-selection has started, shared with the witness referred to who is under the
15 sequestration rule. Defense does agree that an expert would help to explain the rule - but a record
16 has been made, the expert has been excluded. Ethics instructions will come from the bench, as
17 ordered, unless this Honorable Court changes its ruling. Counsel believes it is generally not
18 probative to reargue past motions and does not intend to do so at this point. The court gave
19 counsel adequate opportunity to argue the issue, made a considered thoughtful decision and ruled.

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22 GIVEN: _____

23 REFUSED: _____

24 MODIFIED: _____

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1 28. Arizona Rules of Professional Conduct Ethical Rule 1.7 Conflict of Interest

2 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation
3 involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

4 (1) the representation of one client will be directly adverse to another client; or

5 (2) there is a significant risk that the representation of one or more clients will be materially
6 limited by the lawyer's responsibilities to another client, a former client or a third person or by a
7 personal interest of the lawyer.

8 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a
9 lawyer may represent a client if each affected client gives informed consent, confirmed in writing,
10 and:

11 (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent
12 representation to each affected client;

13 (2) the representation is not prohibited by law; and

14 (3) the representation does not involve the assertion of a claim by one client against another client
15 represented by the lawyer in the same litigation or other proceeding before a tribunal.

16 Authority: Ariz. Rules of Prof'l Conduct R. 1.7 (2011)

17 Government's Objection: The government objects to the inclusion of this instruction for the same
18 reasons previously submitted. The government believes that defendant's requested ethics
19 instructions (instructions 24-29) will only confuse and mislead the jury. The government is not
20 aware of any ethical violations, nor has defendant disclosed his reasons for requesting this
instruction. This Court has already precluded the introduction of expert testimony with regards to
ethics. (CR 127, 133-34.)

21 Defendant's Response: Defense disagrees with the Government's assessment of the court's ruling.
22 Counsel believes the court ruled this specifically had to be handled with Court instructions and not
23 an expert. Many of defendant's reasons were shared on the record in the hearing and apparently,
24 although jury-selection has started, shared with the witness referred to who is under the
sequestration rule. Defense does agree that an expert would help to explain the rule - but a record
25 has been made, the expert has been excluded. Ethics instructions will come from the bench, as
ordered, unless this Honorable Court changes its ruling. Counsel believes it is generally not
probative to reargue past motions and does not intend to do so at this point. The court gave
counsel adequate opportunity to argue the issue, made a considered thoughtful decision and ruled.

1 GIVEN: _____

2 REFUSED: _____

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1 29. Arizona Rules of Professional Conduct Ethical Rule 1.4 Communication

2 (a) A lawyer shall:

3 (1) promptly inform the client of any decision or circumstance with respect to which the client's
4 informed consent, as defined in ER 1.0(e), is required by these Rules;

5 (2) reasonably consult with the client about the means by which the client's objectives are to be
6 accomplished;

7 (3) keep the client reasonably informed about the status of the matter;

8 (4) promptly comply with reasonable requests for information; and

9 (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer
10 knows that the client expects assistance not permitted by the Rules of Professional Conduct or
11 other law.

12 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make
13 informed decisions regarding the representation.

14 (c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

15 Authority: Ariz. Rules of Prof'l Conduct R. 1.4 (2011)

16
17 Government's Objection: The government objects to the inclusion of this instruction as irrelevant,
18 and submits that it will only further confuse and mislead the jury. The government is not aware
19 of any ethical violations, nor has defendant disclosed his reasons for requesting this instruction.
(This Court has already precluded the introduction of expert testimony with regards to ethics. (CR
127, 133-34.)

20 Defendant's Response: Defense disagrees with the Government's assessment of the court's ruling.
21 Counsel believes the court ruled this specifically had to be handled with Court instructions and not
22 an expert. Many of defendant's reasons were shared on the record in the hearing and apparently,
23 although jury-selection has started, shared with the witness referred to who is under the
24 sequestration rule. Defense does agree that an expert would help to explain the rule - but a record
has been made, the expert has been excluded. Ethics instructions will come from the bench, as
ordered, unless this Honorable Court changes its ruling. Counsel believes it is generally not
probative to reargue past motions and does not intend to do so at this point. The court gave
counsel adequate opportunity to argue the issue, made a considered thoughtful decision and ruled.

1 GIVEN: _____

2 REFUSED: _____

3 MODIFIED: _____

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30. Character of Defendant

You have heard evidence of the defendant's character for [e.g., truthfulness, peacefulness, honesty, etc.]. In deciding this case, you should consider that evidence together with and in the same manner as all the other evidence in the case.

Authority: Former Instruction 4.4 in the MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (2003)

Government's Objection: The Ninth Circuit no longer recommends a jury instruction for the "Character of Defendant." The Comment provides that "[t]he Committee believes that the trial judge need not give an instruction on the character of the defendant when such evidence is admitted under Fed. R. Evid. 404(a)(1) because it adds nothing to the general instructions regarding the consideration and weighing of evidence. See *United States v. Katterman*, 60 F.3d 576, 579 (9th Cir.1995) (refusal of trial court to instruct on character of defendant was not plain error where "the district court instructed the jury to 'consider all of the evidence introduced by all parties,' to 'carefully scrutinize all the testimony given,' and to consider 'every matter in evidence which tends to show whether a witness is worthy of belief.'"); see also FED. R. EVID. 404(a)(1).

Defendant's Response: The instruction may be given. The Court may decline to give it too, if the issue is correctly covered reading the instructions from the four corners. In the case of willful and/or knowing conduct character is more important than a case which does not do so. Katterman was apparently a drug dealer. "Katterman did not timely object to the jury instructions and he raises this argument for the first time on appeal. Therefore we review the district court's ruling for plain error." See *United States v. Katterman*, 60 F.3d 576, 579 (9th Cir. 1995). The holding was that the 9th Circuit did not find plain error. In Parker we request the instruction now and will object if it is not given.

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REFUSED: _____
MODIFIED: _____

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31. Trusts

trust, n. - The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party(the beneficiary).

Authority: Black's Law Dictionary 9th Edition

Government’s Objection: The government submits that additional jury instructions regarding the definition of a trust may unnecessarily complicate the case, and confuse the jury. However, should this Court decide to use defendant’s above definition, the government submits that the definition is inadequate, and would seek that the following be added:

- For a trust to be valid, it must involve specific property, reflect the settlor’s intent, and be created for a lawful purpose. Black’s Law Dictionary, 3rd Pocket Edition (2006).
- A trust can be created for any purpose which is not illegal, and which is not against public policy. *Collins v. Lyon, Inc.*, 181 Va. 230, 246 (Va. 1943).
- The four essential elements of a valid trust include: (1) A designated beneficiary; (2) a designated trustee; (3) a fund or property sufficiently designated and identified to enable title to pass to the trustee; and (4) the actual delivery of the fund or property to the trustee with the intention of passing legal title to such trustee. *City Bank Farmers' Trust Co. v. Charity Organization Soc.*, 238 A.D. 720, 722 (N.Y. App. Div. 1933)

Moreover, should this Court decide to provide this instruction, the government submits that the government’s proposed instruction number 6 found on page 66 (labeled 6. Substance over Form) should also be read to the jury. The government reserves its right to modify its response based on the evidence at trial.

Defendant's Response: Defense has no objection to the first two Government additions, but the third proffer is too long and too complicated.

GIVEN: _____
REFUSED: _____
MODIFIED: _____