

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



F I L E D
10/17/22

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

**IN THE MATTER OF
PHILLIP WAYNE HAYES
STATE BAR CARD NO. 24012803**

§
§
§

CASE NO. 67002

**RESPONDENT’S PLEA TO THE JURISDICTION, AND IN THE ALTERNATIVE,
ORIGINAL ANSWER TO THE COMMISSION FOR LAWYER DISCIPLINE’S PETITION
FOR COMPULSORY DISCIPLINE**

TO THE BOARD OF DISCIPLINARY APPEALS:

COMES NOW Respondent, PHILLIP WAYNE HAYES, (“Respondent” or “Mr. Hayes”) and files this Plea to the Jurisdiction and Original Answer to the COMMISSION FOR LAWYER DISCIPLINE’S (“Petitioner” or “CFLD”) Petition for Compulsory Discipline, and would respectfully show the Board of Disciplinary Appeals (“BODA”) the following:

I. PLEA TO THE JURISDICTION

1. Respondent denies that BODA has jurisdiction over this matter pursuant to Rule 6.01 of the BODA Internal Procedure Rules. Specifically, because Phillip Wayne Hayes (“Hayes”) was not convicted of an “Intentional Crime” as defined in Rule 1.06(V) and 1.06(GG) of the Texas Rules of Disciplinary Procedure, BODA lacks jurisdiction to issue compulsory discipline and CFLD’s Petition for Compulsory Discipline must be dismissed.

II. ARGUMENT

2. BODA does not have jurisdiction to hear a compulsory discipline action against Hayes. First, Hayes pleaded guilty to a misdemeanor offense, which is not a “Serious Crime” or “Intentional Crime” as defined by the Texas Rules of Disciplinary Procedure. Furthermore, solicitation of prostitution is not a crime of moral turpitude *per se*. Because Hayes was not convicted

of an Intentional or Serious Crime, compulsory discipline is improper, and BODA lacks jurisdiction to discipline Hayes.

A. BECAUSE HAYES WAS CONVICTED OF A MISDEMEANOR, COMPULSORY DISCIPLINE IS IMPROPER.

3. For compulsory discipline, Hayes must have been convicted of an “Intentional Crime,” which requires that the attorney commit a “Serious Crime that requires proof of knowledge or intent as an essential element.” *See* TEX. R. DISCIPLINARY P. 1.06(V). Under Rule 1.06(GG), “Serious Crime” is defined as:

barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes.

See id. at 1.06(GG).

4. Solicitation of prostitution is not barratry, nor is it a misdemeanor involving theft, embezzlement, or misappropriation of money or other property. Consequently, for solicitation of prostitution to be a “Serious Crime,” it must either be (1) a felony involving moral turpitude or (2) that Hayes conspired or solicited another to commit a felony involving moral turpitude.

5. Again, Hayes was prosecuted under, and sentenced to, a misdemeanor.¹ In fact, the Petition for Compulsory Discipline confirms this, stating in paragraph 4 that Hayes “pleaded guilty to Solicitation of prostitution / other payor, a Class A misdemeanor.” The definition of a “Serious Crime” is “any *felony* involving moral turpitude.” *Id.* at 1.06(GG) (emphasis added). Because Hayes’ offense was a *misdemeanor*, this compulsory disciplinary proceeding must be dismissed.

6. Moreover, prostitution (which is the offense any co-conspirator would be charged with in conjunction with Hayes) is not a felony in Texas. Under section 43.02 of the Texas Penal Code, an

¹ The underlying case against Hayes proceeded as a Class A misdemeanor under section 12.44(b) of the Texas Penal Code. Consequently, the only offense Hayes could have been convicted of was a misdemeanor—never a felony. *See* TEX. PENAL CODE § 12.44.

offense for prostitution is a Class B misdemeanor, and escalates to a Class A misdemeanor for a third offense. TEX. PENAL CODE § 43.02(c). Therefore, Hayes did not (and could not) solicit or conspire with someone to commit a felony of moral turpitude because, like Hayes' offense, prostitution is only a misdemeanor.

7. Because Hayes did not commit a felony, nor did he solicit or conspire with anyone to commit a felony, he cannot be found responsible for committing a felony of moral turpitude. Consequently, the CFLD cannot bring a petition for compulsory discipline, and BODA does not have jurisdiction to hear this matter.

B. SOLICITATION OF PROSTITUTION IS NOT A CRIME OF MORAL TURPITUDE *PER SE*.

8. Again, the crime Hayes was convicted of was a misdemeanor, not a felony. The inquiry should end there, and this compulsory disciplinary proceeding should be dismissed. However, even under the controlling authority from the Texas Supreme Court, solicitation of prostitution does not constitute a crime of moral turpitude *per se*.

9. Whether a particular crime involves moral turpitude is a question of law. *See In re Thacker*, 881 S.W.2d 307, 309 (Tex.1994); *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980). “[T]o determine whether a crime is an Intentional Crime, thus permitting the Bar to pursue the compulsory discipline process, [the Supreme Court] look[s] solely to the elements of the crime, and not to any collateral matters, such as an attorney’s record of service and achievement, or to the underlying facts of the criminal case.” *In re Lock*, 54 S.W.3d 305 (Tex. 2001) (citing *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759, 762 (Tex.1995)).

10. Moreover, the Supreme Court has consistently held that, in the context of attorney discipline, “crimes of moral turpitude must involve dishonesty, fraud, deceit, misrepresentation, or deliberate violence, or must reflect adversely on an attorney's honesty, trustworthiness, or fitness as an attorney.” *Id.* at 308 (citations omitted). Therefore, under the Supreme Court’s analysis, BODA is

to “look solely to the elements of [Hayes’] crime to determine if those elements involve any of the kinds of acts or characteristics encompassed within our definition of moral turpitude.” *Id.*

In *In re Lock*, the Supreme Court of Texas set forth the controlling analysis for a case like the one at bar. In *Lock*, the Court considered whether the possession of cocaine—which is a felony offense—was an “Intentional Crime” and more specifically, whether it was a crime involving moral turpitude. In its guiding analysis, the Texas Supreme Court first noted the elements for the offense of possession of cocaine: “[t]he elements of the applicable criminal statute are that the defendant knowingly or intentionally possessed a controlled substance listed in Texas Health & Safety Code § 481.102.” *Id.* (citing TEX. HEALTH & SAFETY CODE § 481.115(a)). The Texas Supreme Court then reasoned, “[b]ecause the elements of this crime do not involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or reflect adversely on an attorney’s honesty or trustworthiness, to fall under our definition of moral turpitude, possession of cocaine, must reflect adversely on a lawyer’s fitness generally.” *Id.*

11. As the comments to Rule 8.04 of the American Bar Association’s Model Rules of Professional Conduct states: “Many kinds of illegal conduct reflect adversely on fitness to practice law...However, some kinds of offense carry no such implication...Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable ***only for offenses that indicate lack of those characteristics relevant to law practice.***” TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04 cmts. (emphasis added). The Texas Supreme Court succinctly summarized the comments: “not all crimes implicate fitness to practice law.” *Lock*, 54 S.W.3d at 308.

12. This raises the question of what crimes do, and what crimes do not, implicate fitness to practice law. The Texas Disciplinary Rules of Professional Conduct define “fitness” as:

denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

TEX. DISCIPLINARY R. PROF'L CONDUCT terminology; *see also Lock*, 54 S.W.3d at 308–09. As the Texas Supreme Court stated in *Lock*, “[t]his definition of fitness plainly contemplates that some review of particular facts or a course of conduct may be necessary before one can conclude that an attorney should be professionally answerable for a particular offense or pattern of offenses.” *Lock*, 54 S.W.3d at 309. As a result, the Texas Supreme Court noted, “[w]e simply cannot determine whether an attorney’s conduct reveals ‘a persistent inability to discharge, or unreliability in carrying out, significant obligations’ without looking to the facts of the case.” *Id.* (citations omitted). Ultimately, the Texas Supreme Court would go on to conclude:

We recognize that possession of a controlled substance may adversely affect a lawyer’s ability to practice honestly and effectively. However, keeping in mind the aspects of fitness to practice highlighted above, and the fact that we determine if a crime is one of moral turpitude by looking solely to the elements of the offense, we cannot say that the elements of *Lock*’s offense mandate the legal conclusion that ***every attorney guilty of that offense is categorically unfit to practice law***...Because we would need to examine the circumstances surrounding *Lock*’s possession of a controlled substance to determine if she were unfit to practice law, ***which we are prohibited from doing under the compulsory discipline rules***, we cannot conclude that possession of a controlled substance is a crime of moral turpitude per se.”

Id. at 309, 311 (emphasis added).

13. The Texas Supreme Court’s analysis laid out in *Lock* is controlling on the question of whether the crime at issue here, solicitation of prostitution, has an inherently adverse effect on a lawyer’s ability to practice law honestly and effectively, regardless of the underlying facts. Accordingly, we first look to the elements of solicitation of prostitution: “A person commits an offense if the person knowingly offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person or another.” TEX. PENAL CODE 43.021. First, it again must be noted that Hayes was convicted of a misdemeanor, while the crime charged in *Lock* was a felony. But similar to the elements of the more serious offense at issue in *Lock*—possession of cocaine—the elements of solicitation of prostitution do not involve dishonesty, fraud, deceit, misrepresentation, deliberate violence, or reflect adversely on an attorney’s honesty or

trustworthiness. Therefore, to fall under the definition of a crime involving moral turpitude, solicitation of prostitution, must reflect adversely on a lawyer's fitness inherently or categorically.

14. While solicitation of prostitution may reflect adversely on some attorneys' fitness, it does not reflect adversely on *every* attorney's fitness. Consequently, like possession of cocaine, solicitation of prostitution does not categorically reflect adversely on an attorney's fitness to practice law. Without looking into the facts of the underlying criminal proceeding, as is prohibited in a compulsory disciplinary proceeding (as noted in *Lock*), it is impossible to know whether the Hayes' conviction for solicitation of prostitution represents a "*persistent inability* to discharge, or unreliability in carrying out, significant obligations." See *Lock*, 54 S.W.3d at 309 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT terminology) (emphasis added).

15. In other words, as in *Lock*, one cannot say that the elements of solicitation of prostitution mandate the legal conclusion that *every attorney guilty of that offense is categorically unfit to practice law*. *Lock*, 54 S.W.3d at 309. To determine whether an attorney guilty of solicitation of prostitution is unfit to practice law necessitates an examination of the circumstances and the individual attorney's fitness—which is expressly prohibited by the Texas Supreme Court in *Lock*. Consequently, because BODA would need to examine the circumstances surrounding Hayes' case and his fitness to practice law, BODA *cannot* conclude that the offense of solicitation of prostitution is a crime of moral turpitude *per se*. Accordingly, compulsory discipline is improper and BODA does not have jurisdiction to address the CFLD's Petition for Compulsory Discipline.

III. ANSWER

Subject to the above Plea to the Jurisdiction, Respondent Phillip Wayne Hayes answers the CFLD's Petition for Compulsory Discipline as follows.

16. Respondent admits the allegations contained in Paragraphs 3, 4, and 6 of CFLD'S Petition for Compulsory Discipline.

17. Respondent denies the allegations contained in Paragraphs 8 and 9 of CFLD’S Petition for Compulsory Discipline.

18. Paragraphs 1, 2, 5, and 7 of CFLD’S Petition for Compulsory Discipline contain either arguments or legal conclusions to which no response from Respondent is required.

19. Respondent denies that he should be subject to any compulsory disciplinary action.

20. Respondent denies that Petitioner is entitled to attorneys’ fees or costs associated with this disciplinary proceeding.

IV. DEFENSES

Subject to the above Plea to the Jurisdiction, Respondent Phillip Wayne Hayes asserts the following defenses to the allegations in the CFLD’s Petition for Compulsory Discipline.

21. The Petition for Compulsory Discipline should be dismissed or denied because there is no jurisdiction for this compulsory disciplinary proceeding.

22. The Petition for Compulsory Discipline should be dismissed or denied because Respondent was not convicted of an “Intentional Crime” (as this term is defined in Rule 1.06(V) and 1.06(GG) of the Texas Rules of Disciplinary Procedure).

23. In the alternative, if there were jurisdiction for this compulsory disciplinary proceeding, disbarment is improper under Rules 8.05 and 8.06 of the Texas Rules of Disciplinary Procedure because Hayes’ sentence was fully probated.

PRAYER

Respondent asks that the Board of Disciplinary Appeals to dismiss Petitioner’s Petition for Compulsory Discipline in its entirety because it lacks jurisdiction to hear a compulsory discipline proceeding based on the underlying allegations, or, in the alternative, to deny the relief sought in Petitioner’s Petition for Compulsory Discipline; award Respondent all reasonable and necessary

attorneys' fees and litigation expenses associated with this proceeding; and award Respondent such other relief as BODA deems just and equitable.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been delivered as indicated below to counsel of record on this 18th day of October 2022 to:

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