

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



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

IN THE MATTER OF §
MASON WILLIAM HERRING § **CAUSE NO. 69030**
STATE BAR CARD NO. 24071746 §

RESPONDENT’S BRIEF ON COMPULSORY DISCIPLINE

Respondent Mason William Herring files this Brief in Response to Petitioner the Commission for Lawyer Discipline’s Brief as requested by the Board of Disciplinary Appeals.

I. STATEMENT OF THE ISSUES

The Board of Disciplinary Appeals has asked the parties to submit briefs regarding whether Respondent’s convictions were (1) “Intentional” and “Serious” Crimes as defined in Texas Rule of Disciplinary Procedure 1.06 and (2) whether Respondent’s sentence was “fully probated” as that term is used in Texas Rule of Disciplinary Procedure 8.06, such that the Board has discretion to suspend Respondent’s license to practice law during the remainder of Respondent’s criminal probation.

II. STATEMENT OF FACTS

On February 2, 2024, Judgments of Conviction were entered finding Respondent guilty of Injury to a Child Under 15 and Assault of a Pregnant Person, both adjudged as third-degree felonies. Neither judgment contained an explicit finding of intentional conduct. Respondent’s ten-year concurrent sentences were fully probated, and he was ordered to spend 180 days in the county jail as a condition of his probation.

III. ARGUMENT AND AUTHORITIES

A. Respondent was Convicted of Crimes that Were not *Per Se* Intentional Crimes for the Purpose of Compulsory Discipline.

The Texas Rules of Disciplinary Procedure provide two procedures in which a lawyer is subject to discipline: Compulsory Discipline, delineated in Part VIII, or the standard grievance procedures outlined in Parts II and III. *In re Lock*, 54 S.W.3d 305, 306 (Tex. 2001); *In re Birdwell*, 20 S.W.3d 685, 687 (Tex. 2000). “Compulsory Discipline is reserved for when an attorney has been convicted of or received deferred adjudication for an ‘intentional crime,’ as that term is defined in the rules.

Compulsory Discipline under these facts must be based solely on the record of conviction and the criminal sentence imposed.¹ *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759, 762 (Tex. 1995). “Section 8 of the Texas Rules of Disciplinary Procedure provides for Compulsory Discipline only when a person has been convicted of an *Intentional Crime*, defined as “any Serious Crime that *requires proof of knowledge or intent as an essential element.*” *In re Caballero*, 272 S.W.3d 595, 597 (Tex. 2008), *citing* Texas Rule of Disciplinary Procedure 1.06 (emphasis added). Thus, even if a lawyer is convicted of a felony crime of moral turpitude (“Serious Crime”), unless an element of that conviction requires intent, the lawyer is not subject to Compulsory Discipline.

While Respondent concedes his convictions for Injury to a Child and Assault on a Pregnant Person are Serious Crimes under Texas Rule of Disciplinary Procedure 1.06(G)(G), a person can be convicted of those offenses without a finding that the conduct was intentional under Rule 1.06(V)—because the charges permit conviction for reckless (as opposed to intentional) conduct.

¹ *In re Lock*, 54 S.W.3d at 306-07. While Petitioner includes the Complaint and Indictments, those documents should not be considered when determining whether Compulsory Discipline is required.

When looking solely at the Judgments of Conviction and Sentence Imposed, they do not establish the intentional conduct required for Compulsory Discipline.

1. Respondent's Conviction for Injury to a Child Does Not *Per Se* Establish the Conviction for an Intentional Crime.

As stated above, the Board may only consider the Judgment of Conviction, and the sentence imposed. The elements of the crime of Injury of a Child Under 15 with Bodily Injury are: [a] person commits an offense if he intentionally, knowingly, ***recklessly, or with criminal negligence***, by act or intentionally, knowingly, or ***recklessly by omission***, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury. *See* Tex. Penal Code § 22.04(a)(1) (Emphasis added). An offense under § 22.04(a)(1) is a felony of the first degree when the conduct is committed intentionally or knowingly, and a second-degree felony when the conduct is engaged in recklessly. Tex. Penal Code § 22.04(e). An offense under Subsection (a) is a state jail felony when the person acts with criminal negligence. Tex. Penal Code § 22.04(g). As noted in Petitioner's Brief, when an offense is attempted and not completed, the charge is one category lower. *See* Tex. Penal Code § 15.01(a) – (b).

The Judgment of Conviction fails to identify the section of the statute under which Respondent was convicted. The Judgment does not state that Respondent acted intentionally or knowingly in the commission of Injury to a Child—and a person can be convicted of this offense without a finding of intent. In determining whether Compulsory Discipline is mandated, the Board should not consider the Indictment or Criminal Complaint, which are accusations but not evidence or proof of any offense.² As set out above, Serious Injury to a Child under Texas Penal Code

² The Commission's submission of the Criminal Complaint and Indictments was inappropriate given the limited nature of the evidence to be considered by the Board.

§ 22.04 is a first-degree felony if intentional or knowing and a second-degree felony if committed recklessly. Under Texas Penal Code § 15.01, a conviction for an attempted crime reduces the offense by one level. While not explicitly set out in the Judgment, Respondent's conviction for a third-degree felony allows the conclusion that Respondent plead guilty to reckless injury to a child (a second-degree felony) reduced by one degree. Because a person can be convicted of this crime without a finding of intentional conduct, Compulsory Discipline is inapposite.

2. Respondent's Conviction for Assault on a Pregnant Person is not *per se* an Intentional Crime.

Respondent is not subject to Compulsory Discipline unless he was convicted of an Intentional Crime that requires proof of knowledge or intent as an essential element. Tex. R. Disciplinary P. 1.06(V). Petitioner only addresses the first element of the definition of an Intentional Crime – whether Assault on a Pregnant Person is a Serious Crime involving moral turpitude – and ignores whether the crime *per se* is intentional. The Board may only consider the elements of the statute and the judgment in determining whether a crime is intentional. *Lock*, 54 S.W.3d at 306; *Birdwell*, 20 S.W.3d at 687.

The elements of the crime of Assault of a Pregnant Person are the person intentionally, knowingly, *or recklessly* caused bodily injury to another, including the person's spouse. Tex. Penal Code § 22.01(a)(1) (Emphasis added). An offense under § 22.01(a)(1) is a Class A misdemeanor, except that the offense is a third-degree felony if committed against a person the actor knows is pregnant at the time of the offense. Tex. Pen. Code § 22.01(b)(8). The statute does not require intentional conduct for conviction and no such finding is in the Judgment of Conviction. Thus, the Court could have found that Respondent acted recklessly. Because there was no finding of intentionality, Respondent is not subject to compulsory discipline for this conviction.

Based on the foregoing, the Judgments of Conviction and Sentence fail to establish that Respondent was convicted of intentional crimes and Compulsory Discipline is not applicable.

B. A Term of Incarceration May Be Included as a Condition of a Fully Probated Sentence.

Alternatively, Respondent is eligible for suspension at the Board's discretion. When a conviction for an Intentional Crime is fully probated, the Board retains the authority to suspend an offender for the term of probation under Rule 8.06 of the Texas Rules of Disciplinary Procedure as opposed to disbarment under Rule 8.05. *In re Caballero*, 272 S.W. 3d at 598; *In re Mercier*, 242 S.W.3d 46, 47 (Tex. 2007). With no citation to authority, Petitioner contends that the Respondent's sentence is not fully probated because "Respondent was ordered to 180 days in the County Jail as a condition of his community supervision. Ergo, Respondent's punishment is not fully probated as Respondent was incarcerated for a period of time." Petitioner's Brief, p. 11. However, it is well-established that incarceration as a condition of probation does not prevent the imposition of a discretionary suspension under Rule 8.06.

The plain language of the Judgment of Conviction states that confinement is a condition of probation. The Board of Disciplinary Appeals has held that a six-month confinement as a condition of probation does not prevent a finding that the sentence was fully probated. *In the Matter of Marc D. Murr*, Cause No. 31958, 2004 TX Bd of Discip. App LEXIS 11 (October 4, 2004). In *Murr*, the defendant received a fully probated sentence, was placed on probation for five years, and was ***incarcerated for six months as a condition of probation***. The Board regardless found he was eligible for suspension under Rule 8.06 because "(4) Respondent's criminal sentence was fully probated." The same is true here.

Respondent offers three additional arguments that despite the imposition of incarceration as a condition of probation, Respondent's sentence was still fully probated. In construing a statute

or regulation the primary objective is to give effect to the drafter's intent. *In re A.R.G.*, 645 S.W.3d 789, 795 (Tex. App.—San Antonio 2022, no pet.); see also *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Courts rely on the plain meaning of the text as expressing intent unless a different meaning is supplied by definition or is apparent from the context, or the plain meaning leads to absurd results. *In re A.R.G.*, 645 S.W.3d at 795. It is presumed the drafter chose its words carefully intending all words to have meaning and for none of them to be useless. *In re C.J.N.S.*, 540 S.W.3d 589, 591 (Tex. 2018).

Likewise, the construction of words in a judgment is analogous to statutory construction. The plain meaning of the phrase “condition of probation” indicates that the period of incarceration is *not* separate from the ten-year probationary period but a condition within that period which Respondent must comply with to remain on probation. Incarceration as a “condition of probation” thus preserves the Board’s discretion to suspend a respondent for the term of his probated sentence.

The State Bar of Texas website provides:

[Compulsory Discipline] proceedings are filed with the Board of Disciplinary Appeals. The criminal judgment or order of deferred adjudication is conclusive evidence of the attorney’s guilt of the commission of the crime. ... ***Where the sentence includes any period of incarceration other than as a condition of probation***, the lawyer shall be disbarred. Where the criminal sentence is fully probated, BODA has the discretion to either suspend for the period of criminal probation or disbar the attorney. Appeals from compulsory discipline decisions are to the Supreme Court of Texas.³ (Emphasis added).

Additionally, articles in the Texas Bar Journal addressed a period of incarceration as a condition of probation and concluded such incarceration did not require disbarment. In one article, Dawn Miller, at the time Chief Disciplinary Counsel for the State Bar of Texas, stated:

³ <https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemwithanAttorney/GrievanceEthicsInfo1/OtherDisciplinary.htm>

If the lawyer receives any period of incarceration *other than as a condition of probation*, the lawyer will be disbarred. If the lawyer receives a fully probated criminal sentence, case law indicates that BODA has the discretion to either suspend the lawyer's law license for the period of criminal probation as originally assessed or to disbar the lawyer. Disbarment under those circumstances is rare.⁴ (Emphasis added).

In 2013, BODA Chairman Clark Lea similarly opined on the issue and concluded: “A term of incarceration imposed solely as a condition of an otherwise fully probated sentence does not, however, require disbarment.”⁵

Thus, based on BODA precedent, the plain language of the Judgments, information on the State Bar’s website, and articles in the Texas Bar Journal, Respondent’s sentence is fully probated regardless of the term of incarceration as a condition of probation, and the Board has discretion to consider suspension for the duration of his probation.

IV. CONCLUSION

While Respondent plead guilty to Injury to a Child and Assault of a Pregnant Person, the underlying criminal statutes permit conviction for these offenses without a finding of an Intentional Crime. Further, the Judgments of Conviction do not establish that Respondent was convicted of an Intentional Crime. Because Compulsory Discipline requires conviction of an Intentional Crime, it is not available under these facts.

In the alternative, because Respondent’s incarceration as a condition of probation did not alter his sentence from being fully probated, BODA has discretion to suspend Respondent’s license for the term of his probation as opposed to disbaring him.

⁴ *The Criminally Prosecuted Lawyer: The Profession’s Dilemma*, 64 Tex. B. J. 74 (Jan. 2001); see also *The Texas Grievance System: Texas Attorney Grievance Process: An Overview of the System*, 65 Tex. B. J. 716 (Sept. 2002).

⁵ *Feature: The Tribunal*, 76 Tex. B. J. 1059 (Sept. 2013).

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent via electronic service on August 29, 2024 to

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