

**RESPONDENT SUSPENDED PENDING APPEAL OF CRIMINAL CONVICTION AND, IF  
AFFIRMED, DISBARRED**

Memorandum Opinion and Order Signed November 3, 2006.



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

**No. 38020**

**IN THE MATTER OF EUGENE X. MERCIER  
(State Bar Card No. 13946700)**

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**Petition for Compulsory Discipline**

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**Memorandum Opinion and Order**

**Heard En Banc September 29, 2006**

**COUNSEL:**

For Petitioner, Commission for Lawyer Discipline of the State Bar of Texas, Stephen A. Moyik, Assistant Disciplinary Counsel, Austin

For Respondent, Eugene X. Mercier, James R. Harris, Corpus Christi

## OPINION:

The only issue in this compulsory discipline case is whether this Board has the power to disbar an attorney convicted of an “Intentional Crime”<sup>1</sup> when the criminal sentence in the underlying case is fully probated.<sup>2</sup> Respondent attorney Eugene X. Mercier, convicted of barratry,<sup>3</sup> argues that the Texas Rules of Disciplinary Procedure and case law permit us to do nothing other than suspend his license to practice law for the term of the criminal probation set by the trial judge in the criminal case. Mercier offered no evidence during the compulsory hearing to persuade us that suspension, rather than disbarment, was the appropriate sanction, relying instead on his legal argument that we are powerless to impose any sanction more severe than suspension. This Board has previously disbarred compulsory respondents subject to compulsory discipline whose criminal sentences were fully probated, and those decisions were affirmed on appeal to the Supreme Court of Texas. Because Mercier has not persuaded us that those decisions were erroneous and because we find that disbarment is the appropriate sanction in this case, we hereby render judgment suspending Mercier’s license to

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<sup>1</sup> Rule 1.06T, TEX. R. OF DISCIPLINARY PROC. (“TRDP” or “Rule”) *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A-1 (Vernon 2005). “ ‘Intentional Crime’ means (1) any Serious Crime that requires proof of knowledge or intent as an essential element or (2) any crime involving misapplication of money or other property held as a fiduciary.” Rule 1.06Z defines “Serious Crime” 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.”

<sup>2</sup> For purposes of compulsory discipline, criminal sentences which are fully probated, defer adjudication of guilt, or impose community supervision are procedurally equivalent. TRDP Part VIII.

<sup>3</sup> Cause No. CR-3680-01-F styled *State of Texas v. Eugene X. Mercier* in the 332<sup>nd</sup> District Court of Hidalgo County, Texas; TEX. PEN. CODE Ann. § 38.12 (Vernon \_\_\_\_\_) (a state jail felony in this case).

practice law during the appeal of his criminal conviction and, in the event the conviction is affirmed, disbaring him.

### The Criminal Conviction

Texas attorneys convicted of “Intentional Crimes” are subject to compulsory discipline. TRDP Part VIII. The term “Intentional Crime” expressly includes barratry,<sup>4</sup> and Mercier concedes that this is a crime for which compulsory discipline is appropriate. A jury originally convicted Mercier of one count of conspiracy to commit barratry on June 14, 2002 and the trial court sentenced him to two (2) years confinement suspended for 5 (five) years of community supervision. The trial judge granted Mercier a new trial, signing a judgment acquitting him, after which the State appealed. The appellate court reversed the granting of the new trial and remanded the case for rendition of judgment on the jury’s verdict. *State of Texas v. Mercier*, 164 S.W.3d 799 (Tex. App.—Corpus Christi 2005, pet. ref’d). Following remand, the trial court reassessed the original punishment on Mercier’s motion and reduced the sentence to six (6) months confinement suspended for 2 (two) years of community supervision.<sup>5</sup> The criminal judgment also directed Mercier to surrender his law license and not practice for the term of the community supervision. Mercier again appealed the conviction, which appeal is still pending.

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<sup>4</sup> TRDP 1.06T and 1.06Z; additionally, TEX. PEN. CODE § 38.12 specifically references the Texas Rules of Disciplinary Procedure in pronouncing barratry a “serious crime.”

<sup>5</sup> *See supra* note 3.



## Sanction

To support his position that we have no choice but to suspend him for the remainder of his community supervision and lack the power to disbar him, Mercier relies on Rule 8.06, which provides that “[i]f an attorney’s sentence upon conviction of an [sic] Serious Crime is fully probated, or if an attorney receives probation through deferred adjudication in connection with a Serious Crime, the attorney’s license to practice law shall be suspended during the term of probation.” TRDP 8.06. Rule 8.06 does not limit punishment to temporary suspension; rather, it merely says that an attorney placed on probation cannot practice during that probation. He also cites *In re Lock*, 54 S.W.3d 305 (Tex. 2001) and *In re Ament*, 890 S.W.2d 39 (Tex. 1994) (per curiam) as compelling this result. This Board has previously addressed this issue in *In re Filippov*, BODA Case No. 30611 (January 22, 2004; <http://www.txboda.org/PDFs/Filippov%20Opinion.pdf>) *aff’d*, No. 04-0151 (Tex. June 18, 2004), and we incorporate that analysis here.

### Texas Rules of Disciplinary Procedure 8.05 and 8.06

As we stated in *Filippov*, Rule 8.06 cannot be read in isolation, and Mercier’s argument ignores the interplay between Rules 8.06 and 8.05. Mercier reads Rule 8.06 in a manner that ignores the discretion afforded us by Rule 8.05, which Rule makes available the sanction of suspension in addition to disbarment in certain cases. Rule 8.05 expressly provides that the Board “shall” disbar an attorney convicted of an Intentional Crime, “with or without an adjudication of guilt,” *unless* the Board suspends the attorney’s license pursuant to Rule 8.06. When read together, the rules require that we reject Mercier’s contention that we have no choice but to suspend his license. The directive in Rule 8.06 acts to limit the permissible range of discipline to either suspension or disbarment, as

compared to the full range of sanction available in fact-based grievance matters. The directive in Rule 8.06 does not limit the permissible sanction to suspension only.

To interpret a statute or rule, one may not read words, phrases, or clauses in isolation; rather, one must examine the entire act, each part of which is presumed to be effective. *Meritor Automotive Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89 (Tex. 2001) (if statute is unambiguous, the court will adopt interpretation supported by plain meaning of terms); *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988) (the disciplinary rules have the force and effect of statutes). Rule 8.05 acknowledges our discretion to suspend *or* disbar an attorney who has received probation with or without an adjudication of guilt. Mercier's reading of Rule 8.06 to remove that discretion would result in a necessarily distorted reading of Rule 8.05 that does not give all the words in that rule their plain meaning. Giving the words of both rules their plain meaning makes disbarment an available sanction in all compulsory cases, as it should be. A respondent attorney who has received probation with or without an adjudication of guilt and is, therefore, eligible for suspension, may attempt to mitigate the seriousness of his crime and, as a result, urge us to conclude that suspension, rather than disbarment, is the appropriate sanction.

Mercier's interpretation of Rule 8.06 is also inconsistent with the reinstatement provisions of the disciplinary procedural rules. TRDP 11.01 expressly applies to an attorney seeking reinstatement who has been "disbarred or resigned in lieu of discipline by reason of conviction of or having been placed on probation without an adjudication of guilt for an Intentional Crime . . . ." The term "Intentional Crime" occurs solely in the context of compulsory discipline. Read plainly, then, TRDP 11.01 also indicates that an attorney may be disbarred after having been subjected to probation without an adjudication of guilt.

*Lock and Ament*

Neither of the compulsory discipline cases Mercier cites support his contention that suspension is the maximum sanction we may impose in this matter. In *Lock*, the sole question before the Supreme Court was whether possession of a controlled substance was an Intentional Crime for purposes of compulsory discipline. *In re Lock*, 54 S.W.3d at 307. This Board had suspended Ms. Lock for the term of her criminal probation, and the nature of the sanction that we could impose was not at issue. Although the Supreme Court discussed permissible sanctions in compulsory discipline matters to contrast them with fact-based grievance matters,<sup>6</sup> it did not address the issue that Mercier now raises.

The only issue in *Ament* was the time for which we could suspend an attorney. *In re Ament*, 890 S.W.2d at 39. The judge in the criminal trial had placed Ament on probation for five minutes, which he successfully completed before leaving the courtroom following the conclusion of the criminal hearing. Not inclined to retroactively suspend Ament for five minutes, we suspended his license for one year. The Supreme Court held that the phrase “during the term of such probation” in Rule 8.06 restricted any compulsory suspension to the actual period of probation; it then modified the judgment accordingly, and affirmed our decision as modified.

The Supreme Court of Texas has consistently affirmed our decisions in compulsory cases disbarring attorneys who have received criminal sentences of probation, with or without adjudications of guilt.<sup>7</sup> It is critical for us to have the discretion to disbar attorneys in Mercier’s position because,

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<sup>6</sup> In fact-based grievance matters, the full range of disciplinary sanctions is available. TRDP 1.06Y.

<sup>7</sup> The following decisions, in addition to *In re Filippov*, have been affirmed without opinion: *In re Goldberg* (Case No. 02-0853, *aff’d* 03/06/03; BODA Case No. 25747) (Goldberg’s



if we did not, such an attorney could simply ignore the Bar's compulsory action, knowing that the harshest possible sanction he could receive would be a suspension of his law license for the period of his probation. This would be true even where the attorney returns to the disciplinary system with a second felony conviction for an Intentional Crime, as does Mercier, so long as each criminal sentence is fully probated.

#### Mercier's Prior Disciplinary Record

Mercier also objected to the offer by the Commission of his prior disciplinary record to support its request that he be disbarred.<sup>8</sup> Mercier argued that Rules 8.04 and 8.05 prohibit us from considering evidence of his prior discipline.

This Board previously has held that either party to a compulsory discipline action may seek to aggravate or mitigate sanction. *Filippov*. Although we cannot examine the underlying facts or circumstances of the criminal conviction to assess anew an attorney's guilt or innocence or to determine whether the crime is one involving moral turpitude *per se*, we may consider evidence in mitigation or aggravation of the sanction to be imposed when both suspension and disbarment are available. We consider such factors as whether the crime was directly related to the attorney's practice

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sentence for aggregate theft probated); *In re Raynor* (Case No. 02-0435, *aff'd* 09/26/02; BODA Case No. 25458) (Raynor placed on deferred adjudication for misapplication of fiduciary property); *In re Hartley* (Case No. 95-0511, *aff'd* 10/27/95; BODA Case No. 06052) (Hartley's sentence for bribery probated).

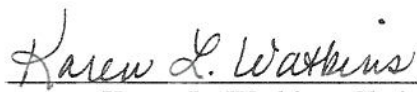
<sup>8</sup> These include an agreed judgment of public reprimand (2006) imposed by a Nueces County District Court; an agreed judgment of public reprimand (1999) imposed by a Nueces County District Court; an agreed judgment of private reprimand (1999) imposed by a State Bar of Texas grievance committee; an agreed judgment of fully probated six-month suspension (1995) imposed by a Nueces County District Court; an agreed judgment of partially probated suspension (three years active suspension and four years probated) (1991) based on a theft conviction imposed by a Nueces County District Court; and a judgment of private reprimand (1988) imposed by a State Bar grievance committee.


of law, the conduct of the attorney during the compulsory proceeding, whether the attorney has complied with the terms and conditions of his probation, the attorney's efforts at rehabilitation, if applicable, the attorney's credibility under oath, whether the attorney accepts responsibility for his past actions, and any prior discipline imposed on the attorney. Therefore, Mercier's objection to the admission of his prior disciplinary history is overruled.

Mercier's present conviction and extensive disciplinary history underscore the wisdom of allowing this Board the discretion to disbar an attorney-respondent in a compulsory matter. Mercier's first discipline occurred only eight months after he was licensed, and Mercier has continued to violate the ethical standards throughout his legal career. He is the only attorney ever to have come before this Board with felony convictions for both theft and barratry, two crimes expressly identified by the disciplinary system as Serious Crimes. Under such circumstances, and in the absence of any mitigating evidence from Mercier, we have no doubt that disbarment is the appropriate sanction in this case if Mercier's criminal conviction for barratry is affirmed.

We order Mercier's license suspended immediately pending the outcome of the appeal of his criminal conviction, and, in the event the conviction is affirmed, that he be disbarred.

**IT IS SO ORDERED.**

  
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Karen L. Watkins, Chair

  
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Paul D. Clote, Vice Chairman



*William D. Greenhill*

William D. Greenhill

*Robert Flowers*

Robert Flowers

*Yolanda de León*

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Clement H. Osimetha

*Jose I. Gonzalez-Falla*

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*Thomas E. Pitts*

Thomas E. Pitts

*Carol E. Prater*

Carol E. Prater

*Alice A. Brown*

Alice A. Brown

*Charles L. Smith*

Charles L. Smith

BODA Member Ben Selman recused.