

IN THE SUPREME COURT OF TEXAS

=====
No. 07-0484
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IN THE MATTER OF ROLANDO CABALLERO

=====
ON APPEAL FROM THE BOARD OF DISCIPLINARY APPEALS
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Argued April 2, 2008

JUSTICE WILLETT, joined by JUSTICE MEDINA, dissenting.

Like the Court, I would attempt to harmonize Rules 8.05 and 8.06 of the Rules of Disciplinary Procedure and give meaning to each.¹ However, the Court sees discretion where I see only mandatory options for discipline. Because I believe the Court's attempt to harmonize the relevant rules and rulings strikes a discordant note, I respectfully dissent.

The parties do not dispute that the compulsory discipline rules apply. Rule 8.05, titled "Disbarment," provides that the Board of Disciplinary Appeals (BODA) "shall" disbar an attorney who is convicted of, or has accepted probation for, an Intentional Crime. The use of "shall" makes the Rule mandatory and "imposes a duty."²

¹ See *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870-71 (Tex. 2007) (per curiam); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

² TEX. GOV'T CODE § 311.016(2); *In re Gen. Elec. Co.*, ___ S.W.3d ___, ___ (Tex. 2008).

The only exception mentioned in Rule 8.05 is Rule 8.06, titled “Suspension.” Rule 8.05 states that the attorney “shall be disbarred unless” BODA, “under Rule 8.06, suspends his or her license to practice law.” As we observed in *Sanchez v. Board of Disciplinary Appeals*, “Rule 8.05 mandates disbarment for a final conviction . . . except when Rule 8.06 applies.”³ Rule 8.06 sets out the exception by providing that if the attorney’s sentence is “*fully* probated” (emphasis added), BODA *shall* suspend the attorney “during the term of probation.”⁴ We have so observed: BODA “is required to disbar an attorney” under Rule 8.05 “who is convicted of an intentional crime and whose sentence is not *fully* probated.”⁵ Like Rule 8.05, Rule 8.06 is mandatory by its terms.

I would reconcile the rules, and honor the mandatory “shall” used in both, by holding that when mandatory discipline is warranted, Rule 8.06 applies if the sentence is fully probated, and Rule 8.05 applies if the attorney’s sentence is less-than-fully probated. Which is to say, BODA must disbar under Rule 8.05 if the attorney is sentenced to jail or to a combination of jail and probation, and BODA must suspend under Rule 8.06 (up to the length of the probated sentence) if the sentence is *fully* probated. Because Caballero’s sentence was fully probated, I would hold that BODA was only authorized to suspend his license.

³ 877 S.W.2d 751, 751 (Tex. 1994).

⁴ Rule 8.06 also applies where the attorney receives “probation through deferred adjudication.” Deferred adjudication is imposed in lieu of further prosecution to a conviction that can be punished by a term of incarceration, and hence is always “fully probated” in the sense that the defendant receives no jail time so long as he complies with the terms of the deferred adjudication. *See, e.g.*, TEX. CRIM. PROC. CODE art. 42.12, § 5 (providing for community supervision in lieu of further proceedings to adjudicate guilt under deferred adjudication procedure).

⁵ *In re Ament*, 890 S.W.2d 39, 41 n.2 (Tex. 1994) (emphasis added).

The plain language of the rules supports this result, and so does our prior precedent. In *Sanchez*, the Court held that Rule 8.05 mandates disbarment “except when Rule 8.06 applies,” and it did “not apply to Sanchez because his sentence, a fine of \$500, was not probated.”⁶ Later that same year, in *In re Ament*, we noted that the relevant disciplinary rules previously gave discretion to disbar an attorney who received a fully probated sentence, but under Rule 8.06, “[t]he provision providing for discretionary, additional punishment *is omitted*.”⁷ We described this omission as the “one, crucial” change in the rule.⁸ Today the Court re-inserts that omitted discretion.

Seven years after *Sanchez*, we observed in *In re Lock* that the mandatory language of the two rules should be applied according to the nature of the sentence without regards for details that would ordinarily inform a discretionary review: “An attorney guilty of an intentional crime must be either suspended or disbarred—*depending solely on whether the attorney’s criminal sentence was probated*—without regard for any collateral matters, and without any consideration or inquiry into the facts of the underlying criminal case.”⁹

In that case we seemed to reject the view that BODA has discretion to either disbar or suspend a lawyer regardless of whether the sentence was fully probated. The Court today would allow language in Rule 8.05 concerning disbarment to confer discretion over suspension when the rule actually governing suspension leaves no room for such discretion. The more natural reading is

⁶ 877 S.W.2d at 751-52.

⁷ 890 S.W.2d at 40-41 (emphasis in original).

⁸ *Id.* at 41.

⁹ 54 S.W.3d 305, 306-07 (Tex. 2001) (emphasis added).

that Rule 8.05 requires disbarment “unless” Rule 8.06 applies, at which point suspension is required. This construction comports with our analysis in *Sanchez*, *Ament*, and *Lock* and harmonizes the plain language of both rules.¹⁰

I understand the Court’s desire to grant BODA flexibility, but my reading of the rules and our pertinent precedent compels me to respectfully dissent.

Don R. Willett
Justice

OPINION DELIVERED: December 19, 2008

¹⁰ The Court’s decision also leads to a strange gap in discipline. *Ament* held that the suspension period for a fully probated sentence under Rule 8.06 is limited to the period of probation. 890 S.W.2d at 41. As the Court expresses no interest in disturbing the holding of *Ament*, I take it to hold today that BODA can now disbar an attorney receiving a short, fully probated sentence, such as the five-minute probated sentence at issue in *Ament*, or else impose a suspension limited to the term of probation. Meanwhile, a suspension longer than the term of probation, but nevertheless short of disbarment, is disallowed. I find this result strained and unnecessary under the language of the relevant rules.