

community supervision for six years. Through the Chief Disciplinary Counsel, the State Bar of Texas commenced compulsory discipline proceedings against Lock pursuant to Part VIII of the Texas Rules of Disciplinary Procedure. See TEX. R. DISCIPLINARY P. 8.01-.08, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A-1. After a hearing, BODA held that Lock, having been placed on probation for possession of a controlled substance without an adjudication of guilt, had been convicted of an intentional crime, as defined by disciplinary rule 1.06(O). BODA suspended Lock for the term of her criminal probation and held that if her criminal probation is revoked, she should be disbarred pursuant to Texas Rule of Disciplinary Procedure 8.06. Lock appealed to this Court, arguing that she is not subject to compulsory discipline because possession of a controlled substance is not a crime of moral turpitude, and therefore, on the facts of her case, she was not convicted of an intentional crime. We agree that under Texas' disciplinary scheme, Lock is not subject to compulsory discipline, but that her actions may be reviewed and sanctioned following the standard grievance procedures. We therefore reverse BODA's judgment and remand the case to BODA for further proceedings consistent with this opinion.

As the question before us is which of the two available disciplinary procedures is the appropriate way to review Lock's conduct, we begin with an overview of the disciplinary system. The Texas Rules of Disciplinary Procedure provide two procedures by which a licensed attorney may be disciplined: compulsory discipline, delineated in Part VIII, or the standard grievance procedures outlined in Parts II and III. See *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; in all other instances of alleged attorney misconduct, discipline is determined in the standard grievance process. *See generally* TEX. R. DISCIPLINARY P. Part II, Part III, Part VIII.

The salient distinction between the two procedures for purposes of this appeal is that the compulsory discipline process admits no discretion. Compulsory discipline for an intentional crime turns solely on the record of conviction, the criminal sentence imposed, and the factual determinations that the attorney is licensed to practice law in Texas and is the party adjudged guilty. *See* TEX. R. DISCIPLINARY P. 8.04, 8.05, 8.06. 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. *See* TEX. R. DISCIPLINARY P. 8.05, 8.06.

The standard grievance process, unlike the compulsory process, affords some discretion. In the standard grievance process the attorney has the opportunity to present the facts underlying the alleged misconduct. The reviewing body that hears the evidence and imposes sanctions – whether an investigatory or evidentiary panel or district court – may also consider any mitigating circumstances in determining the appropriate degree of discipline. *See* TEX. R. DISCIPLINARY P. 2.13, 2.17, 3.09, 3.10. In the standard grievance process, the rules permit the reviewing body to disbar the offending attorney, but also make available a range of lesser sanctions, including various types of suspension and reprimand. *See* TEX. R. DISCIPLINARY P. 1.06(T).

Apparently concluding that the elements of Lock’s crime satisfied the rules’ definition of an intentional crime, the Office of Chief Disciplinary Counsel invoked the compulsory discipline process

against Lock. Thereafter, BODA suspended Lock for the term of her probation. Whether compulsory discipline was the appropriate disciplinary procedure depends on the nature of Lock's offense, specifically, whether possession of a controlled substance is an intentional crime. *See* TEX. R. DISCIPLINARY P. 8.01. To hold that possession of a controlled substance is an "intentional crime," by definition BODA had to conclude that it is a "[s]erious [c]rime that requires proof of knowledge or intent as an essential element." TEX. R. DISCIPLINARY P. 1.06(O). Further, BODA concluded as a matter of law that Lock's crime qualified as a "serious crime" as that term is defined by rule 1.06(U). Under the disciplinary rules, "serious crime" means:

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.

TEX. R. DISCIPLINARY P. 1.06(U). Possession of a controlled substance is neither barratry nor a misdemeanor involving theft, embezzlement, or misappropriation of money or other property; BODA thus implicitly concluded that it is a felony involving moral turpitude. Therefore, to determine whether the Bar properly invoked the compulsory-discipline procedure against Lock, we must review its core conclusion that her crime was one of moral turpitude.

The conclusion that a particular crime involves moral turpitude is one 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). We review BODA's legal conclusions de novo. *Birdwell*, 20 S.W.3d at 687. We have also established that to determine whether a crime is an intentional crime, thus permitting the Bar to pursue the compulsory

discipline process, we look 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. *Duncan v. Board of Disciplinary Appeals*, 898 S.W.2d 759, 762 (Tex. 1995) (attorney convicted of misprision of felony not subject to compulsory discipline because BODA could not determine if the attorney committed an intentional crime without looking to the underlying facts); *In re Humphreys*, 880 S.W.2d 402, 406-07 (Tex. 1994) (attorney convicted of tax evasion subject to compulsory discipline because tax evasion is an intentional crime involving "deliberate greed and dishonesty and has a specific connection to a lawyer's fitness to practice").

In the context of attorney discipline, we have consistently held that 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. See *Birdwell*, 20 S.W.3d at 688; *Duncan*, 898 S.W.2d at 761; *Humphreys*, 880 S.W.2d at 408. Therefore, under the analysis we established in *Humphreys* and *Duncan*, we look solely to the elements of Lock's crime to determine if those elements involve any of the kinds of acts or characteristics encompassed within our definition of moral turpitude. The 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. See TEX. HEALTH & SAFETY CODE § 481.115(a). Because 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, simple possession of a controlled substance, without the intent to distribute or sell, must reflect adversely on a lawyer's fitness generally.

As we explained in *Humphreys*, quoting from the comment to rule 8.4 (“Misconduct”) of the American Bar Association’s Model Rules of Professional Conduct, not all crimes implicate fitness to practice law: “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.” 880 S.W.2d at 407. The corresponding comments to Texas Disciplinary Rule of Professional Conduct 8.04 make the same distinction between personal and professional responsibility:

4. Many kinds of illegal conduct reflect adversely on fitness to practice law. However, some kinds of offenses carry no such implication. Traditionally in this state, the distinction has been drawn in terms of “serious crimes” and other offenses. . . . These Rules continue that distinction by making only those criminal offenses either amounting to “serious crimes” or having the salient characteristics of such crimes the subject of discipline. . . .

5. 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 his fitness for the practice of law, as “fitness” is defined in these Rules. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations that legitimately could call a lawyer’s overall fitness to practice into question.

TEX. DISCIPLINARY R. PROF’L CONDUCT 8.04 cmts. 4, 5, *reprinted in* TEX. GOV’T CODE, tit. 2, subtit.

G app. A (TEX. STATE BAR R. art. X, § 9).

The Rules of Professional Conduct define “fitness” as

denot[ing] 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. This 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. We 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. The Rules of Disciplinary Procedure clearly limit compulsory discipline to, among other specified crimes, "any felony involving moral turpitude." By contrast, the Rules Governing Admission to the Bar dictate that anyone convicted of or who receives deferred adjudication for "a felony" is "conclusively deemed not to have present good moral character and fitness," and must wait five years after the completion of any sentence or period of probation before filing a declaration of intent to study law or application to take the bar exam. TEX. R. GOVERN. BAR ADM'N IV(d). While we could change the disciplinary rules to likewise say that an attorney should be professionally answerable by compulsory discipline for any crime or any felony, we are not permitted to judicially read the current express limitation, "involving moral turpitude," out of the disciplinary rules. 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.

Other jurisdictions have held that possession of a controlled substance is a crime of moral turpitude, but those jurisdictions do not have a comparable compulsory discipline procedure and engage in review of the underlying facts and other collateral matters to determine the appropriate sanction. *See, e.g., Florida Bar v. Kaufman*, 531 So. 2d 152 (Fla. 1988) (considering attorney's rehabilitation efforts in determining length of license suspension); *In re Stults*, 644 N.E.2d 1239 (Ind. 1994) (looking to circumstance of multiple arrests in deciding length of suspension); *In re Gooding*, 917 P.2d 414 (Kan. 1996) (considering mitigating circumstances and remedial actions in determining appropriate discipline); *In re Shunk*, 847 S.W.2d 789 (Mo. 1993) (reviewing mitigating facts and remedial actions in determining to suspend license, rather than disbar attorney); *State ex rel. Oklahoma Bar Ass'n v. Denton*, 598 P.2d 663 (Okla. 1979) (exercising discretion in determining length of license of suspension); *In re Hopp*, 376 N.W.2d 816 (S.D. 1985) (considering underlying facts and collateral matters in adopting recommendation of ninety-day license suspension). These decisions, in which the courts considered the underlying facts, are thus inapposite in light of Texas' unique compulsory discipline process. We are simply not permitted under our current rules to consider any underlying facts or mitigating circumstances in a compulsory discipline proceeding. And we cannot say without looking to the underlying facts whether Lock's fitness to practice law is implicated by her crime.

Precisely because we are not permitted under our current disciplinary rules to consider any underlying facts in a compulsory discipline proceeding, and because the Rules of Disciplinary Procedure

limit compulsory discipline to felonies involving moral turpitude, the assertions in the dissenting opinion are likewise inapposite. In particular, every case cited in the dissenting opinion may be distinguished in that the attorney's conduct involved more than simple possession, the jurisdiction does not have a comparable compulsory procedure that looks only at the elements of the crime in determining which disciplinary procedure to follow, or the ultimate tribunal looks at the underlying facts to determine the appropriate sanction.¹ In other words, the jurisprudence of almost every state court with an opinion on the issue is that

¹ See *In re Rivkind*, 791 P.2d 1037 (Ariz. 1990) (taking into account all the circumstances of felony cocaine possession conviction and the attorney's subsequent rehabilitation efforts in reducing term of suspension); *People v. Stauffer*, 858 P.2d 694 (Colo. 1993) (disbarring an attorney convicted of felony possession of cocaine, when that was only one of many disciplinary violations, including practicing law while suspended); *Florida Bar v. West*, 550 So. 2d 462 (Fla. 1989) (automatic three-year suspension for possession of cocaine reduced to eighteen months based on collateral matters including admission of wrongdoing and efforts at drug rehabilitation); *Florida Bar v. Kaufman*, 531 So. 2d 152 (Fla. 1988) (approving consent judgment for one-year suspension for felony possession of cocaine; considered factors such as attorney's rehabilitation efforts in determining appropriate length of suspension); *In re Stults*, 644 N.E.2d 1239 (Ind. 1994) (reviewing facts and collateral matters before imposing six-month suspension on attorney who pleaded guilty to possession of cocaine and, in a separate incident, DWI); *In re Thomas*, 472 N.E.2d 609 (Ind. 1985) (review of suspension following prosecutor's guilty plea to charge of marijuana possession involved "an examination of the Respondent's conduct in toto"); *In re Shunk*, 847 S.W.2d 789 (Mo. 1993) (reviewing mitigating facts and remedial actions by attorney in determining to suspend license, rather than disbar attorney convicted of possessing cocaine); *In re Pleva*, 525 A.2d 1104 (N.J. 1987) (looking at all the facts and circumstances surrounding attorney's conviction for possession of cocaine, hashish, and marijuana in upholding a six-month suspension); *In re Kinnear*, 522 A.2d 414 (N.J. 1987) (looking at all of the facts and circumstances surrounding the attorney's guilty plea to distribution and possession of cocaine in upholding suspension for less than period of probation); *Oklahoma Bar Ass'n v. Wright*, 792 P.2d 1171 (Okla. 1990) (looking to facts and circumstances in imposing two-year suspension following conviction for possessing and distributing cocaine); *State ex rel. Oklahoma Bar Ass'n v. Denton*, 598 P.2d 663 (Okla. 1979) (court exercised discretion in determining appropriate length of suspension following attorney's conviction for possession of marijuana); *In re Floyd*, 492 S.E.2d 791 (S.C. 1997) (imposing twelve-month suspension on attorney who pleaded guilty to possession of heroin and violating a law that made it illegal to obtain a controlled substance from more than one doctor without telling the doctor about the other prescription; the crime involving prescriptions was held to involve dishonesty, fraud, deceit, or misrepresentation); *In re Holt*, 451 S.E.2d 884 (S.C. 1994) (indefinitely suspending an attorney's license when that license had previously been temporarily suspended; attorney was found to have possessed cocaine, and was indicted and sentenced to prison for five years for felony DUI after killing someone in an accident in which he was driving drunk and under the influence of cocaine); *In re Gibson*, 393 S.E.2d 184 (S.C. 1990) (attorney consented to disbarment following one conviction for possession of cocaine and second conviction for possession of cocaine and heroin); *In re Jeffries*, 500 N.W.2d 220 (S.D. 1993) (reducing sanction for use of marijuana and cocaine from disbarment to suspension and emphasizing that facts and circumstances of each case must be considered in assessing sanctions); *In re Hopp*, 376 N.W.2d 816 (S.D. 1985) (after extensive review of facts and other circumstances, approving ninety-day suspension when attorney admitted to possession of cocaine); *In re Willis*, 371 N.W.2d 794 (S.D. 1985) (after extensive

possession of a controlled substance may or may not be a crime of moral turpitude, depending on the circumstances. And our compulsory discipline rules prohibit consideration of the circumstances. We may change the rules, but until we do so we are constrained to follow those rules and the analysis we established in *Humphreys* and *Duncan*.² How other lawyers fared under different disciplinary systems in other jurisdictions simply does not help us answer the question before us in this case, which is not whether Lock should be disciplined, but which procedure the Bar should follow in pursuing that discipline.

We note, however, that permitting the Bar to exercise the discretion afforded by the standard grievance process would likely result in the sanctions imposed under our disciplinary system being consistent with the sanctions imposed in other jurisdictions for the same conduct. For example, even in those jurisdictions that view possession of a controlled substance as a crime of moral turpitude, in which one would expect the strongest sanction of disbarment to be imposed, the typical sanction is a suspension for a particular term, and the length of the term depends on the facts and any mitigating or aggravating circumstances. *See, e.g., Kaufman*, 531 So. 2d at 154 (imposing one-year suspension following felony conviction for possession of cocaine and methaqualude tablets); *Stults*, 644 N.E.2d at 1242 (imposing six-month suspension following felony conviction for cocaine possession); *Gooding*, 917 P.2d at 420

review of facts and other circumstances, approving 180-day suspension following attorney's admission of use and purchase of cocaine); *In re Berk*, 602 A.2d 946 (Vt. 1991) (imposing a six-month suspension when the only charge was possession of cocaine, but facts showed attorney was "soliciting and conspiring to purchase, possess and distribute cocaine").

²With regard to *Santos v. Board of Disciplinary Appeals*, No. D-3523, 36 TEX. SUP. CT. J. 1000 (June 16, 1993), the dissenting opinion expresses the view that our order affirming BODA's judgment in that case created binding precedent. It did not. All we issued in that case was an order. We did not write an opinion or establish an "authoritative interpretation." Moreover, the case was resolved in 1993, before we decided *Humphreys* or *Duncan*, in which for the first time we delineated the proper intentional-crime analysis under our rules.

(imposing two-year suspension following felony conviction for cocaine possession); *Shunk*, 847 S.W.2d at 792 (imposing indefinite suspension with leave to seek reinstatement in six months for felony conviction of cocaine possession); *Denton*, 598 P.2d at 664-65 (two-year suspension following conviction for marijuana possession); *Wright*, 792 P.2d at 1171-72 (two-year suspension following conviction for distributing cocaine); *Hopp*, 376 N.W.2d at 818 (ninety-day suspension following misdemeanor conviction and admission of repeated cocaine use). Similarly under Texas' standard grievance process, the sanction imposed will depend on the facts and other circumstances, and can include suspension or disbarment.

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. Thus, Lock is not subject to compulsory discipline. Instead, Lock's misconduct should be reviewed and sanctioned under the standard grievance procedures. Our holding does not mean that an attorney who has pleaded guilty to possession of a controlled substance is immune from discipline or will necessarily receive the least possible sanction; we rely on the Bar to impose appropriate discipline, including suspension or disbarment when the facts so warrant, to protect the public from impaired attorneys, and to improve the reputation and integrity of the legal profession. However, the venue for that discipline is the standard grievance process.

Our position is further supported by the existence of the Texas Lawyers' Assistance Program. Among other things, TLAP provides peer intervention and rehabilitation to practicing attorneys whose professional performance is impaired because of chemical dependency. This service is available not only

to lawyers who take part voluntarily, but also to lawyers who have been referred by family, friends, or other members of the bar. Impaired attorneys may participate in the program without being subject to disciplinary action. In fact, TLAP receives referrals from the State Bar's disciplinary system, but TLAP will not intervene in any disciplinary action, nor will it report an impaired lawyer to the disciplinary authorities. Therefore, it would be inconsistent for us to hold that possession of a controlled substance is a crime of moral turpitude, which means by definition that an attorney is categorically unfit to practice law, when the State Bar, under our ultimate supervision, sponsors a program to assist attorneys in overcoming addiction while the attorneys continue to practice law.

In light of these considerations, we hold that an attorney convicted of or receiving deferred adjudication for possession of a controlled substance must be disciplined in the standard grievance process, where the underlying facts and any collateral circumstances can yield the appropriate sanction. We reiterate that our holding does not mean that a lawyer's possession or use of drugs should go undisciplined. Rather, a licensed Texas attorney convicted of or receiving deferred adjudication for possession of a controlled substance should be sanctioned in the standard grievance process. Accordingly, we reverse BODA's judgment and remand the case to BODA for further proceedings consistent with this opinion.

Deborah G. Hankinson
Justice

OPINION DELIVERED: June 21, 2001