Sarfo v. Comm'n for Lawyer Discipline

Decided Feb 22, 2018

NO. 03-16-00554-CV

02-22-2018

Samuel Adjei Sarfo, Appellant v. Commission for Lawyer Discipline, Appellee

Melissa Goodwin, Justice

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT NO. D-1-GN-15-005898, HONORABLE JOSE A. LOPEZ, JUDGE PRESIDING
MEMORANDUM OPINION

Samuel Adjei Sarfo appeals from the district court's judgment of partially probated suspension from the practice of law in the State of Texas. Sarfo challenges the legal and factual sufficiency of the evidence to support the jury's findings that he violated the Texas Rules of Professional Conduct, *see* Tex. Disciplinary Rules Prof. Conduct R. 1.01(a), (b)(2), *reprinted in* Tex. Gov't Code, tit. 2, subtit. G, app. A, and the award of attorney's fees. He also challenges the jury charge, the sanctions imposed, and the extension of his active suspension. For the following reasons, we affirm the district court's judgment.

Background

The Commission for Lawyer Discipline (the Commission) filed a disciplinary action against Sarfo alleging professional misconduct based on a complaint that was filed against him by opposing counsel in a suit arising from an automobile accident (the complainant). *See* Tex. Rules *2 Disciplinary P. R. 1.06(W), *reprinted in* Tex. Gov't Code, tit. 2, app. A-1 (defining "professional misconduct" to include acts or omissions by attorney "that violate one or more of the Texas Disciplinary Rules of Professional Conduct"). The complainant represented the plaintiff in that case, and Sarfo represented the defendant.

According to the complainant, she was in settlement discussions with Sarfo's client's automobile liability insurance carrier when she filed suit on behalf of her client because the deadline for the applicable statute of limitations was approaching. She filed the suit a few days before the deadline and served Sarfo's client a few days later. She also served discovery requests on Sarfo's client with the original petition, including requests for admissions and interrogatories. Sarfo filed an answer on behalf of his client, raising the statute of limitations as an affirmative defense and asserting that the suit was "frivolous as it [was] patently based on a contrived or concocted injury and narrative by plaintiff." He, however, did not serve the answer on the complainant, answer the discovery requests, file a response to a pending motion for partial summary judgment, or otherwise respond to the complainant's communication attempts, and he did not provide notice of the suit to his client's automobile liability insurance carrier. Sarfo had represented his client in two other suits involving the same automobile accident and, in those suits, he had provided notice to his client's automobile liability insurance carrier.

During the early stages of the automobile accident suit, the complainant sent Sarfo a letter with a copy of *National Union Fire Insurance Company v. Crocker*, 246 S.W.3d 603 (Tex. 2008). In the

letter, she warned Sarfo that "[t]he failure to seek a defense may provide [his client's automobile liability insurance carrier] with grounds to avoid payment of any judgment that [the *3 plaintiff] may take against [Sarfo's] client" and that Sarfo was "run[ning] a significant risk of voiding his [client's] coverage and making [his client] personally liable for any judgment against him." Approximately a week after sending this letter to Sarfo, the complainant sent a letter to Sarfo's client's automobile liability insurance carrier, seeking its intervention in the suit. The insurance carrier eventually informed Sarfo that it was "taking up the case and defending it." The insurance carrier retained counsel, the insurance carrier's counsel was substituted for Sarfo, and the insurance carrier ultimately paid Sarfo's former client's policy limits of $30,000.

After the automobile accident suit concluded, the complainant filed a grievance against Sarfo, and the Commission filed the disciplinary action that is the subject of this appeal. The Commission alleged that Sarfo had accepted or continued legal employment in the automobile accident suit which he knew or should have known was beyond his competence. *See* Tex. Disciplinary Rules Prof. Conduct R. 1.01(a) (generally prohibiting lawyer from "accept[ing] or continu[ing] employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence"). The Commission also alleged that Sarfo frequently failed to carry out completely the obligations that he owed to his client in the automobile accident suit. *See id*. R. 1.01(b)(2) ("In representing a client, a lawyer shall not: . . . frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.").

The Commission's allegations of professional misconduct were tried to a jury. The complainant testified about her interactions with Sarfo, his conduct during the pendency of the automobile accident suit, and her reasons for filing a complaint against Sarfo. She testified that she *4 would not have filed a complaint "about the first bad thing," but she saw a "pattern of neglect, incompetence, and bad behavior." It was her opinion that Sarfo was incompetent, explaining:

> The adversarial system works well when both parties are represented competently, assertively, but within the bounds of ethical conduct, appropriate trial strategy, and, you know, we all have our own differences of how we approach cases, that's not wrong. But to take—as a trial strategy, that you're going to completely ignore discovery responses, that you're going to completely ignore efforts to cooperate, you're going to completely ignore established case law that says you're hurting your client if you take a particular trial approach, that to me was wrong.

Because Sarfo's actions were intentional, she testified about her concerns of the possible consequences to his client of his trial strategy of ignoring the discovery requests—i.e., deemed admissions and waived objections—and refusing to notify his client's automobile liability insurance carrier of the suit—i.e., jeopardizing liability coverage.[1] She also testified about an adverse ruling to Sarfo's client by the trial court after the insurance carrier's counsel was substituted to represent Sarfo's client. Counsel moved to designate a responsible third party, but it was too late to do so at that point, due in part to Sarfo's failure to respond to discovery requests. She further confirmed that Sarfo's client's insurance carrier ultimately settled the suit by paying 100% of policy limits. *5

[1] The complainant explained to the jury the risks of not notifying an insurance carrier of a pending suit as follows:

> Typically, a liability insurance policy will have in it a provision that the—their insured, their driver, has to turn the suit papers over to them and cooperate with them in providing a defense. And if the insured doesn't cooperate with their insurance company and doesn't turn the suit papers over, and give the insurance company an opportunity to defend, the insurance [company] then has the right to say, We're not going to pay. You didn't let us handle your defense and we're not going to pay for any judgment against you because we weren't in control.

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The admitted exhibits included pleadings and correspondence in the automobile accident suit and the two other cases concerning the automobile accident in which Sarfo had represented the same client, copies of continuing legal education courses that Sarfo had attended, and his answer to the complaint before the Commission. In the answer, Sarfo admitted that the automobile accident suit was filed before the expiration of the statute of limitations but explained that he asserted the defense of the statute of limitations because it was his "professional opinion that the suit might be effectively barred by the statute of limitations." He admitted that he "completely ignored" the letter from the complainant warning him of the risks of not notifying his client's insurance carrier concerning the automobile accident suit. He explained that the letter was "both offensive and condescending." He also admitted that he did not respond to the discovery requests or the complainant's phone calls. "As a procedural weapon," he explained that he "decided to ignore the phone calls and requests and thereby refused to commit further resources into what [he] had already determined to be a frivolous and vexatious lawsuit based on non-existent, contrived and concocted narrative."

After the district court denied Sarfo's motion for directed verdict and both sides closed, the district court submitted two questions to the jury, tracking the statutory language of subsections (a) and (b)(2) of disciplinary rule 1.01:

> Did Samuel Adjei Sarfo accept, or continue, employment in a legal matter for [his client] which he knew or should have known was beyond his competence?
>
> In representing [his client], did Samuel Adjei Sarfo frequently fail to carry out completely the obligations that he owed to [his client]?

*6 *See* Tex. Disciplinary Rules Prof. Conduct R. 1.01(a), (b)(2). The district court also provided definitions to the jury of "competence," "know," and "should know."[2] The jury answered "yes" to both questions. As the jury rose to be excused, Sarfo called out, "stupid people." The trial judge then admonished him, stating that "[i]t was extremely unprofessional, classless and uncalled for, for [Sarfo] to giggle or laugh as [the judge was] speaking to the jury in regards to their verdict." Sarfo replied that "[he could] laugh anytime he like[d], Your Honor" and that he was "always free to express [his] emotions." Sarfo thereafter filed a motion for judgment notwithstanding the verdict, which the district court denied.

[2] The jury charge defined the terms "competence," "know," and "should know" as follows:

> "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill and training reasonably necessary for the representation of the client.
>
> "Know" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.
>
> "Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

The district court proceeded to a sanctions hearing. The Commission called its attorney who participated as the second chair during the jury trial and Sarfo by deposition. In his deposition, Sarfo testified that it was "good strategy" to ignore discovery in the absence of a motion to compel and that he had ignored discovery in other cases. The Commission's second chair attorney testified that she observed Sarfo turn toward the jurors and say "stupid people" when they were filing out of the courtroom, call the Commission's lead trial attorney a "stupid, ugly bitch," and spit at the *7 lead trial attorney twice. The Commission's lead trial attorney also testified about the Commission's incurred attorney's fees and expenses.

The Commission's exhibits admitted during the sanctions hearing included orders and motions in other cases in which Sarfo participated and correspondence between Sarfo and the Commission's lead trial attorney during the pendency of the disciplinary action, including an email with an attached letter from Sarfo to the lead trial attorney. In the email, Sarfo stated that he would "be happy to read [the letter] aloud in open court." In the letter, Sarfo called the lead trial attorney "the worst lawyer [he had] ever seen," a "diminutive and unskilled attorney," "clueless," and "a complete disgrace and a stigma to a learned profession and a noble calling." He concluded the letter by wishing her "[g]ood luck" in her "very miserable and fruitless life."

Sarfo also disparaged and was disrespectful to the assigned judge and a court reporter during the pendency of the disciplinary action. For example, Sarfo wrote to the court reporter, "You will do better next time if you choose not to conflate your duty to transcribe coherently with your penchant to include superfluous extra segmentals and patent errors merely to satiate your whims and caprices." Sarfo's statements to the assigned judge included telling the judge that the judge was prejudiced and that he had made "ridiculous" lectures and rulings.

Following the sanctions hearing, the district court entered a judgment of partially probated suspension. The court found that: (i) Sarfo's acts, omissions, and conduct constituted violations of the Texas Disciplinary Rules of Professional Conduct; (ii) as to each violation, Sarfo had committed professional misconduct; and (iii) the appropriate sanction was suspension from the practice of law for a period of one year, with fifteen days of active suspension and the remaining *8 days probated upon specified terms and conditions. The court also ordered Sarfo to pay "reasonable and necessary attorney's fees and expenses of litigation in the amount of $15,000" as an additional sanction. Sarfo filed a notice of appeal and a motion to suspend enforcement of the judgment, which the district court denied.[3]

> [3] Several months later, the district court entered a nunc pro tunc judgment of partially probated suspension. The changes to the judgment are not at issue in this appeal.

Analysis

Sufficiency of the Evidence to Support the Jury Findings

In his first two issues, Sarfo challenges the sufficiency of the evidence to support the jury's findings of disciplinary rule violations. The jury found that Sarfo accepted or continued employment in a legal matter for his client which he knew or should have known was beyond his competence; and that, in representing his client, he frequently failed to carry out completely the obligations that he owed to his client.

Standard of Review

When an appellant challenges the legal sufficiency of the evidence to support a finding on which he did not have the burden of proof at trial, as is the case here, the appellant must demonstrate on appeal that: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of
9 the vital fact. *See City of Keller* *9 *v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005) (citing Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362-63 (1960)); *McIntyre v. Commission for Lawyer Discipline*, 169 S.W.3d 803, 806 (Tex. App.—Dallas 2005, pet. denied) (describing legal sufficiency standard of review).

In contrast, when challenging the factual sufficiency of the evidence supporting an adverse finding on which the appellant did not have the burden of proof at trial, the appellant must demonstrate that there is insufficient evidence to support the adverse finding. *McIntyre*, 169 S.W.3d at 806; *see Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (describing factual sufficiency standard of review). When reviewing a factual sufficiency challenge, we consider and weigh all of the evidence in support of and contrary to the finding and only set aside a finding "if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust." *McIntyre*, 169 S.W.3d at 806 (citing *Bellino v. Commission for Lawyer Discipline*, 124 S.W.3d 380, 385 (Tex. App.—Dallas 2003, pet. denied)).

Disciplinary Rule 1.01(a)

In his first issue, Sarfo argues that the evidence was insufficient to support a violation of disciplinary rule 1.01(a), which addresses the requirement of competent representation. *See* Tex. Disciplinary Rules Prof. Conduct R. 1.01(a). Relevant to this appeal, a "lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence." *Id.*; *see id.*, cmt. 1 (defining "'[c]ompetence' in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation" and explaining that "[c]ompetent representation contemplates
10 appropriate application by the lawyer of *10 that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client").

As support for his contention that the evidence was insufficient, Sarfo separately addresses his acts or omissions in the automobile accident suit that formed the bases of the Commission's allegations. For example, he argues that he was not required to file a response to the motion for partial summary judgment when no hearing was set and argues that there is no rule that compels an insured to turn over a lawsuit to its insurance carrier or that prohibits an insured client from hiring his own attorney. He also focuses on his representation of the same client in the two other suits that concerned the same automobile accident to argue that "there was no showing, by a preponderance of the evidence, that [he] knew or should know that he was incompetent." In both of those cases, he notified the client's automobile liability insurance carrier. And he focuses on the complainant's admissions that she had already been in communication with the insurance carrier

and provided it with a copy of the petition and on her alleged motives for taking certain actions in the automobile accident suit, such as serving discovery requests and filing the motion for summary judgment. According to Sarfo, the complainant took these actions as a "'procedural weapon' to move her case along" and to "pressure" him to turn the case over to his client's insurance carrier.

The jury, however, could have credited the complainant's testimony at trial concerning Sarfo's "pattern" of conduct in the automobile accident suit and her opinion that he was incompetent based on the totality of his combined actions and omissions in the suit. Sarfo's complained-of actions and omissions in the automobile accident suit included asserting a meritless defense; failing to serve opposing counsel with the answer; failing
11 to respond to discovery; failing *11 to seek the designation of a possible responsible third party; failing to notify his client's insurance carrier of the suit; and asserting that the plaintiff's suit was "frivolous as it [was] patently based on a contrived or concocted injury and narrative by plaintiff."

The exhibits also contained written explanations by Sarfo concerning his conduct in representing his client in the automobile accident suit. He explained that he intentionally ignored discovery, refused to communicate with opposing counsel, and refused to notify his client's insurance carrier of the suit as part of his trial strategy. Sarfo's defensive strategy was to do nothing, including ignoring opposing counsel's communication attempts, primarily based on his assertion that the suit against his client was frivolous and his position that the complainant was improperly pressuring him to turn the case over to his client's insurance carrier. Sarfo, however, failed to present any evidence to support his assertions that the suit against his client was frivolous or to otherwise dispute that the complainant's client was injured in the automobile accident. Ultimately his client's insurance carrier took over the defense and settled with the complainant's client for policy limits.

The complainant also provided Sarfo with a copy of *National Union Fire Insurance Company v. Crocker* in the early stages of the automobile accident suit, warning him that "[t]he failure to seek a defense may provide [his client's insurance carrier] with grounds to avoid payment of any judgment that [the plaintiff] may take against [Sarfo's] client" and that Sarfo was "run[ning] a significant risk of voiding his [client's] coverage and making [his client] personally liable for any judgment against him." In *Crocker*, the Texas Supreme Court made clear that, even if the insurance carrier has actual notice of a covered suit, it does not have a duty to defend its insured
12 unless the *12 insured properly and timely notifies the insurance carrier of the suit. *See* 246 S.W.3d at 609-10 (explaining that "[i]nsurers owe no duty to provide an unsought, uninvited, unrequested, unsolicited defense" in context of suit to collect on default judgment against insured and even though insurer had actual knowledge of suit).

Viewing the evidence under the appropriate standards of review, we hold that Sarfo has not demonstrated that there was no evidence or insufficient evidence to support the jury's finding that Sarfo accepted or continued employment in a legal matter for his client which he knew or should have known was beyond his competence. *See McIntyre*, 169 S.W.3d at 806. Thus, we conclude that the evidence was legally and factually sufficient to support that Sarfo's conduct constituted a violation of disciplinary rule 1.01(a). *See id*. We overrule his first issue.

Disciplinary Rule 1.01(b)(2)

In his second issue, Sarfo argues that none of the facts alleged or evidence adduced at trial was sufficient to support a violation of disciplinary rule 1.01(b)(2), which prohibits an attorney from "frequently fail[ing] to carry out completely the obligations that the lawyer owes to a client or clients." *See* Tex. Disciplinary Rules Prof. Conduct R. 1.01(b)(2). He argues that he "reviewed the lawsuit and found it to be frivolous

and possibly fraudulent" and that he and his client "therefore made a professional judgment to diligently and zealously defend it." He also focuses on the statement in the comment to rule 1.01 that "[a] lawyer who acts in good faith is not subject to discipline." *See id*. R. 1.01, cmt. 7. The full sentence in comment 7 to rule 1.01 that includes this statement, however, reads: "A lawyer who acts in good faith is not subject to discipline, under these provisions for an isolated inadvertent or unskilled act or omission, tactical error, or error
13 of *13 judgment." As detailed above, the evidence here was not limited to an isolated act, omission, or error. The jury could have considered the totality of Sarfo's representation of his client in the automobile accident suit to conclude that he "frequently fail[ed] to carry out completely the obligations that [he] owe[d] to [his] client."

Viewing the evidence under the appropriate standards of review, we hold that Sarfo has not demonstrated that there was no evidence or insufficient evidence to support the jury's finding that, in representing his client, he frequently failed to carry out completely the obligations that he owed to his client. *See McIntyre*, 169 S.W.3d at 806. Thus, we conclude that the evidence was legally and factually sufficient to support that Sarfo's conduct constituted a violation of disciplinary rule 1.01(b)(2). *See id*. We overrule his second issue.

Jury Charge

In his third issue, Sarfo argues that the instructions in the jury charge were defective "insofar as they did not track the statutory language of attorney incompetence, nor set out the statutory obligations in the attorney-client relationship" and that he properly preserved error. He argues that the instructions to the jury should have included portions of the comments to rule 1.01. *See* Tex. Disciplinary Rules Prof. Cond. R. 1.01, cmts 1-4.

Sarfo, however, failed to preserve this issue for our review. "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." Tex. R. Civ. P. 278; *see also* Tex. R. App. P. 33.1(a), 44.1(a)(1). "A request by either party for any questions, definitions, or
14 instructions shall be made separate and *14 apart from such party's objections to the court's charge." Tex. R. Civ. P. 273. Sarfo did not prepare a draft jury charge or otherwise submit proposed definitions or instructions to the district court. Thus, he did not preserve this issue for our review. *See Washington v. Commission for Lawyer Discipline*, No. 03-15-00083-CV, 2017 WL 1046260, at *8 (Tex. App.—Austin Mar. 17, 2017, pet. denied) (mem. op.). On this basis, we overrule his third issue.

Sanctions

In his fourth and fifth issues, Sarfo argues that the sanctions imposed on him constituted an abuse of discretion and that the judgment was illegal on its face because the sanctions were excessive, not directly related to the alleged offensive conduct, and did not remedy any prejudice caused to the innocent party. According to Sarfo, the district court "did not clearly articulate the offensive conduct for which [he] was sanctioned"; "the only facts established that [he] failed to respond to complainant's discovery requests and motion for partial summary judgment"; and that, even if these facts were misconduct, the sanctions did not relate to them or remedy any prejudice caused to the innocent party.

"The judgment of a trial court in a disciplinary proceeding may be so light, or so heavy, as to constitute an abuse of discretion." *Olsen v. Commission for Lawyer Discipline*, 347 S.W.3d 876, 888 (Tex. App.—Dallas 2011, pet. denied) (citing *State Bar v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994)). A trial court, however, "has broad discretion to determine the consequences of professional misconduct." *Id*.; *see Minnick v. State Bar*, 790 S.W.2d 87, 92 (Tex. App.—Austin 1990, writ denied) (explaining that "punishment to be

assessed [against attorney] was a matter 'addressed to the sound discretion of the trial court'"). "We may not overrule the trial court's decision unless the trial court acted unreasonably or in an arbitrary manner, without reference to guiding rules or principles." *Olsen*, 347 S.W.3d at 888 (citing *Landerman v. State Bar*, 247 S.W.3d 426, 433 (Tex. App.—Dallas 2008, pet. denied)).

Factors that courts consider to determine the appropriate sanction for professional misconduct are:

> A. The nature and degree of the Professional Misconduct for which the Respondent is being sanctioned;
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> B. The seriousness of and circumstances surrounding the Professional Misconduct;
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> C. The loss or damage to clients;
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> D. The damage to the profession;
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> E. The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found;
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> F. The profit to the attorney;
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> G. The avoidance of repetition;
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> H. The deterrent effect on others;
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> I. The maintenance of respect for the legal profession;
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> J. The conduct of the Respondent during the course of the Committee action;
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> K. The trial of the case; and
>
> L. Other relevant evidence concerning the Respondent's personal and professional background.

Tex. Rules Disciplinary P. R. 3.10, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G, app. A-1. The trial court, however, is not required to find that every factor has been satisfied before ordering sanctions. *See Olsen*, 347 S.W.3d at 888.

The district court found that the appropriate sanction for Sarfo's violations of the disciplinary rules was suspension from the practice of law in the State of Texas for one year, with fifteen days of active suspension and 350 days of probated suspension under specified terms and conditions. The district court further ordered that Sarfo would remain actively suspended until the date of compliance with the specified terms and conditions or the end of the entire suspension period, whichever occurred first. The terms and conditions included notifying his current clients of the suspension. Sarfo also was ordered to complete ten hours of continuing legal education in the area of civil trial rules and four hours in the area of ethics within sixty days following the end of the active suspension period, submit a "professional letter of apology" to the Commission's lead trial attorney by a certain date, and pay the Commission for attorney's fees and expenses by certain dates.

Sarfo argues that he was "punished because he did not help to 'move along' opposing counsel's case" in the automobile accident suit. He also continues to assert that the complainant "filed a phony lawsuit to maintain her client's case" and that neither the profession nor his client suffered any damage. He further asserts that, as far as he is concerned, he conducted himself well during the trial and cites his clean disciplinary record prior to this suit. The district court, however, was well within its discretion to impose a partially probated one-year suspension with terms and conditions based on Sarfo's violations of the disciplinary rules. *See* Tex. Rules Disciplinary P. R. 1.06(Z) (listing range of available sanctions for professional misconduct, including suspension

for term certain and probation of suspension "upon such reasonable terms as are appropriate under the circumstances").

Here, the evidence before the district court included evidence of Sarfo's professional misconduct during his representation of his client in the automobile accident suit and his conduct during the Commission's disciplinary action. *See id*. P. R. 3.10(A), (I), (K) (including factors of nature and degree of professional misconduct, maintenance of respect for legal profession, and conduct of respondent during trial among relevant factors for courts to consider in determining appropriate sanction for professional misconduct). The evidence was undisputed that Sarfo intentionally placed his client at risk of judgment against the client personally in the automobile accident suit by refusing to notify his client's automobile liability insurance carrier, despite admittedly knowing how to do so, and by refusing to comply with the rules of civil procedure, such as intentionally ignoring requests for admission and interrogatories.[4] Sarfo also verbally insulted the judge, the jury, and opposing counsel, including spitting at opposing counsel, during the
18 pendency *18 of the disciplinary action,[5] and he continued to refuse to comply with the rules of civil procedure, such as refusing to provide a privilege log during the pendency of the Commission's disciplinary action despite being subject to an order compelling him to do so.

> 4 The trial judge admonished Sarfo concerning his "strategy" not to notify his client's automobile liability insurance carrier:
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> > You know, given the rules now . . . this uncooperative provision[] that they have in their insurance contracts . . . your client got—you got lucky, not because of you, but because . . . [the complainant] knew that those provisions of the law exist. Otherwise your client would have been subject to a pretty bad summary—I mean, a pretty bad judgment potentially.
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> > So in any event, yes, rolling a dice for a client is their call. Rolling the dice by a lawyer for their client is not their call. Strategy is one thing, but outright taking the risk for no reason is—is not the equivalent of strategy.

> 5 During the sanctions hearing, the trial judge expressed his concern with Sarfo's conduct directed at the Commission's counsel, by stating that "it was absolutely appalling and disgusting to hear . . . some of the personal attacks to a fellow colleague and lawyer who is merely doing her job."

Given the factors that courts consider to determine an appropriate sanction for professional misconduct and the evidence before the district court, we conclude that the district court did not abuse its discretion in its assessment of sanctions against Sarfo. *See Olsen*, 347 S.W.3d at 888; *see also Washington*, 2017 WL 1046260, at *11-12. We overrule his fourth and fifth issues.

Active Suspension Beyond Two Weeks

In his sixth issue, Sarfo argues that he could not be "actively suspended beyond two weeks without any due process." The probation of Sarfo's suspension was contingent upon his compliance with specified terms and conditions in the judgment, and his primary complaint appears to be the term and condition that extended the period of

his active suspension if he failed to make an ordered payment of $5,000 for attorney's fees before the expiration of his active suspension period.[6] As support for his position that he could not be actively suspended beyond two weeks, Sarfo cites rule 3.12 of the Rules of Disciplinary Procedure. Rule 3.12, however, does not apply here; it addresses restitution when the respondent attorney's conduct involves the misapplication of
19 funds. *19 *See* Tex. Rules Disciplinary P. R. 3.12. Sarfo was not ordered to pay restitution based on the misapplication of funds.

> 6 In the judgment, Sarfo was ordered to make the first payment of $5,000 "before the expiration of the fifteen (15) day active portion of the suspension period." The judgment then provided: "Should [Sarfo] fail to timely make the first payment, [Sarfo] shall remain actively suspended until the date of compliance or until the end of the entire suspension period, whichever occurs first."

Pursuant to the regulatory scheme, courts are required to enjoin a respondent attorney from practicing law during a period of suspension that is not stayed. *See id*. R. 3.11. ("In any judgment of . . . suspension that is not stayed, . . . the court shall enjoin the Respondent from practicing law or from holding himself or herself out as an attorney eligible to practice law during the period of . . . suspension."). The regulatory scheme also provides a suspended attorney with a procedure for seeking a stay of a judgment of suspension pending appeal. *See id*. R. 3.14 (stating that suspension remains in effect pending appeal unless suspension is stayed and providing procedure for seeking stay of suspension). Under the procedure for seeking a stay, Rule 3.14 creates a rebuttable presumption that a suspended attorney's continued practice of law will threaten the welfare of his clients or the public and places the burden of proof on the suspended attorney to rebut the presumption in order to stay suspension on appeal. *Wade v. Commission for Lawyer Discipline*, 961 S.W.2d 366, 373 (Tex. App.—Houston [1st Dist.] 1997, no writ). Sarfo then had the opportunity to seek a stay from enforcement of the judgment, including the ordered payment of attorney's fees.

Although Sarfo filed a motion to suspend enforcement of the judgment, he failed to provide evidence to rebut the presumption that his continued practice of law posed a continuing threat to the welfare of his clients or the public. Thus, the district court did not err in denying his motion to suspend enforcement of judgment. *See id*. (concluding that rebuttable presumption in rule 3.14 was not denial of due process); *see*, *e.g.*,
20 *University of Tex. Med. Sch. of Hous. v. Than*, *20 901 S.W.2d 926, 930 (Tex. 1995) ("Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). In short, Sarfo has not cited, and we have not found, authority that would support his position that due process prohibited the district court from ordering that the probation of his suspension was contingent on his compliance with specified terms and conditions. We overrule his sixth issue.[7]

> 7 To the extent that Sarfo complains about letters from the Commission and the display of his name on the Commission's website after the district court entered its judgment, we expressly do not consider these complaints as they are not properly before us. *See* Tex. R. App. P. 34.1 (addressing contents of appellate record); *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 892 (Tex. App.—Austin 2010, pet. denied) ("We are limited to the appellate record provided."); *Burke v. Insurance Auto Auctions Corp.*, 169 S.W.3d 771, 775 (Tex. App.—Dallas 2005, pet. denied) (noting that documents that are cited in brief and attached as appendices generally may not

be considered by appellate courts if they are not properly included in record on appeal). --------

Attorney's Fees

In his seventh issue, Sarfo argues that the evidence is insufficient to support the sanction of attorney's fees because the Commission's evidence failed to adequately address the relevant factors for determining the reasonableness of the Commission's attorney's fees as set out by the Texas Supreme Court in *Arthur Andersen & Company v. Perry Equipment Corporation*, 945 S.W.2d 812, 818 (Tex. 1997), and disciplinary rule 1.06(X), *see* Tex. Rules Disciplinary P. R. 1.06(X) (listing relevant factors that may be considered in determining reasonableness of attorney's fees). As previously stated, we review sanctions imposed on an attorney for professional misconduct for abuse of discretion. *See McIntyre*, 169 S.W.3d at 806.

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The district court awarded the Commission a judgment of $15,000 for reasonable and necessary attorney's fees and expenses of litigation. *See* Tex. Rules Disciplinary P. R. 1.06(Z) (authorizing ancillary sanction of payment of reasonable attorney's fees and direct expenses associated with proceedings). Sarfo was ordered to pay $5,000 before the expiration of the active suspension period, a second $5,000 within 30 days before the expiration of the one-year suspension period, and a final $5,000 on the last day of the suspension, but the district court also provided that Sarfo was not required to make the final payment if he had complied with the terms of the judgment.

During the sanctions hearing, the Commission's lead trial attorney testified that the Commission had incurred reasonable attorney's fees and expenses in the amount of $23,904.38. She testified about the number of hours that she and the other Commission attorney had spent on the case and their respective hourly rates and experience. She further testified that the Commission only charged for one of them being in court, even though they were both there. The Commission's exhibits included a detailed chart of counsel's activities with corresponding amounts of time.

Sarfo argues that counsel's documented activities were mostly "unnecessary" or "needless" and that the fees were "far higher than the fees customarily assessed under coterminous cases." Sarfo, however, did not present controverting evidence during the sanctions hearing to support a finding that the amount of the Commission's attorney's fees was unreasonable. Given the attorney's testimony and the documented account of counsel's activities, we conclude that the district court did not abuse its discretion when it ordered Sarfo to pay attorney's fees and expenses in the amount of $15,000 to the Commission as an additional sanction. *See Olsen*, 347 S.W.3d at 890; *McIntyre*, 169 S.W.3d at 806. We overrule Sarfo's seventh issue. *22

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Conclusion

Having overruled Sarfo's issues, we affirm the district court's judgment.

/s/_____

Melissa Goodwin, Justice Before Chief Justice Rose, Justices Pemberton and Goodwin Affirmed Filed: February 22, 2018