TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00083-CV

Craig A. Washington, Appellant

v.

Commission for Lawyer Discipline, Appellee

FROM THE DISTRICT COURT OF BASTROP COUNTY, 335TH JUDICIAL DISTRICT
NO. 29123, HONORABLE GEORGE WILLIAM GALLAGHER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The Commission for Lawyer Discipline brought a disciplinary action against appellant Craig A. Washington, an attorney, alleging that he violated several provisions of the Texas Disciplinary Rules of Professional Conduct. A jury found in favor of the Commission on each of the allegations, and the trial court imposed sanctions against Washington that included a four-year suspension from the practice of law with the first 18 months being an active suspension and the remaining 30 months being probated. After the trial court rendered its judgment, Washington filed a motion for new trial and a motion for a stay pending appeal. After a hearing on both motions, the trial court rendered an order denying the motion for a stay and motion for new trial but also modifying its previous judgment with regard to sanctions by reducing Washington's active suspension from 18 months to 12 months.[1] In appealing from the trial court's judgment and its

[1] In its order on Washington's requests for a stay and new trial, the trial court stated that "[t]he Motion for New Trial is GRANTED in part and DENIED in part" and then modified the

subsequent order, Washington raises five issues in which he challenges the exclusion of evidence, the trial court's denial of his motion for new trial, the jury charge, and the trial court's rulings with regard to his sanctions. We will affirm the trial court's judgment and its subsequent order.

BACKGROUND

The record shows that the Commission's lawsuit against Washington arose from Washington's representation of Michael Gobert and Gobert's minor sister, N.H. (the clients). Before Washington's representation began, the clients' mother had recently died suddenly after having transferred ownership of her home to her boyfriend. The maternal grandmother of the clients, Sherry Carter, hired Washington to file a lawsuit against the mother's boyfriend on behalf of the clients. She initially paid Washington $10,000 for his representation.

In September 2006, Washington filed suit on behalf of the clients, seeking rescission of the deed that had transferred ownership of the mother's home to her boyfriend.[2] The petition alleged that the deed was invalid and void because the mother "received no consideration or other benefit from [her boyfriend] for the conveyance," and the mother "lacked the mental capacity to execute, acknowledge and deliver [the] deed to [her boyfriend]." The case was eventually set for trial approximately three years later, on October 5, 2009. Before trial, the trial court issued a

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previous judgment regarding the imposition of sanctions. Although the trial court stated that it was granting the motion for new trial in part, the record shows that the trial court did not in fact grant a new trial but rather granted an oral motion to modify the judgment that was raised by Washington at the hearing on his requests for a stay and new trial. Neither party raises an issue about the modification.

[2] Due to N.H.'s legal status as a minor at that time, her father was named as a plaintiff on her behalf.

docket-control order that set forth several pretrial deadlines. Part of the order included a setting for a pretrial hearing on October 2, 2009, and stated that failure to attend the pretrial hearing could result in the dismissal of the case. Another portion of the order provided a deadline of 20 days before trial for all motions for continuance and further stated that "[a]ll motions for continuance MUST be filed and set for hearing on or before pretrial."

Washington also had a pending criminal case in a different county that was set on the same pretrial-hearing and trial dates as the clients' case. He did not request a continuance in either the criminal or the clients' case but instead attended the pretrial hearing and trial in the criminal proceeding. He testified in the disciplinary proceeding below that he did not believe he was required under the applicable rules to notify either court that he had a conflicting setting on those dates. He further testified that he did not believe he needed to file for a continuance, as he was unsure whether either of the cases would be picked for a jury trial from a full docket of cases set for those dates.

He also testified that when he attended the pretrial hearing in the criminal case on October 2, the parties picked a jury in that case to proceed to trial on October 5. He testified that he did not request a continuance in the clients' case at that point because the docket-control order indicated that he was required to file for a continuance at least 20 days before trial. In addition to his testimony that he did not file a motion for continuance in the clients' suit, he also testified that he conducted discovery in the case but did not file documents set forth in the docket-control order, including documents evidencing an agreement to conduct alternative-dispute resolution and documents listing the exhibits, witnesses, and deposition excerpts that he expected to offer at trial.

An email sent by an attorney in Washington's law office to another attorney on October 5, the date of trial in both cases, stated the following with respect to the clients' suit:

> I called the court coordinator this morning and told them Mr. Washington was starting a murder trial today (I also informed her we had spoke[n] to [opposing counsel] regarding this last wee[k]) and she said since no one was in court this morning nor Friday for pretrial, which is required, the case was being dismissed for want of prosecution.

The court officially dismissed the clients' suit for want of prosecution nine days later, on October 14, 2009. That same day, Washington filed a motion to reinstate the case, which was denied by the trial court. Washington filed an appeal from the trial court's denial of his motion to reinstate, and the appeals court affirmed the trial court's decision, stating the following:

> [I]n considering the entire history of the case, including, but not limited to, the length of time the case was on file, the extent of activity in the case, whether a trial setting had been arranged, and whether reasonable excuses for delay existed in order to determine whether [the clients'] counsel was diligent in prosecuting its case, we note that: (1) this case was originally filed in September 2006, and had been on file for over three years at the time it was scheduled to go to trial; (2) there was no dispute that counsel received notice of the pretrial hearing and trial setting; (3) the docket control order irrefutably stated that failure to attend pretrial may result in dismissal of the case; and (4) prior to the trial setting, counsel failed to file any pretrial motions within stated deadlines and failed to provide witness and deposition lists, proposed jury questions, or a list of discovery exhibits as required by the control order. [The clients] provide no explanation for these omissions. Although they represent that counsel gave a reasonable explanation or excuse for his failure to appear for the pretrial hearing and trial, the record reflects that no motion for continuance was timely filed pursuant to the court's docket control order or that the judge was ever informed of the scheduling conflict. [The clients] have failed to cite, and we have been unable to locate any case law stating that the trial court abused its discretion by denying [the clients'] motion for reinstatement under similar circumstances. Based on these facts we cannot conclude [the clients] were diligent in prosecuting the case.

In re N.T.H., 327 S.W.3d 329, 331 (Tex. App.—El Paso 2010, no pet.).

Carter and Gobert testified that they did not learn of the dismissal, the motion for reinstatement, or the resolution of the appeal until 2012, when they discovered information pertaining to the proceedings through their own internet searches. They testified that until that time, they believed the case was still pending. Specifically, Carter testified that she was searching the internet for information on her daughter's home one day when she saw that the home was listed for sale. She testified that Washington had previously told her that the house could not be sold while it was the subject of litigation, so she then went to Washington's office on June 26, 2012, and asked him about the status of the house. She testified that he "let [her] know that his staff was taking care of everything, was on top of everything." After she left his office, she did further research on the internet and saw that the house had been sold the previous March. She testified that she was "shocked" and immediately returned to Washington's office to "show him what [she] had discovered." She testified that "he looked real shocked" and promised to contact a real-estate professional who could help him with the case. She testified that Washington did not get in contact with her again after that and that she did not tell Gobert about what she learned because she was hoping Washington would have good news about the case. She testified that Washington never told her that the case had been dismissed, that a motion to reinstate had been denied, or that he filed an appeal.

Carter further testified that sometime after June 2012, Gobert called her and told her he had discovered information about the case on the internet. He directed her to a web site that he found. The link was to the court-of-appeals' decision affirming the trial court's denial of the motion

to reinstate the clients' case. Carter testified that Gobert was "very upset about it" and angry with her for not telling him the house had been sold. Gobert testified that Washington did not tell him that Washington had missed a court date; that a pretrial hearing and a trial had been set for October 2, 2009, and October 5, 2009, respectively; that the case was dismissed; that a motion to reinstate was filed; or that an appeal was filed until after Gobert confronted Washington with the appeals-court decision.

Gobert filed a complaint with the State Bar of Texas, and the Commission ultimately filed suit against Washington in district court,[3] alleging that Washington violated the following rules of the Texas Disciplinary Rules of Professional Conduct: 1.01(b)(1) (neglecting a legal matter entrusted to him), 1.03(a) (failing to keep a client reasonably informed about the status of a case and promptly comply with reasonable requests for information), 1.15(d) (failing to take several required steps upon termination of representation), and 8.04(a)(3) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1), 1.03(a), 1.15(d), 8.04(a)(3).[4] The case was tried to a jury, and the jury found that Washington violated each of the rules alleged by the Commission. Washington requested that the jury decide his sanctions, but the trial court denied his request. After a hearing to the bench on sanctions, the trial court assessed a four-year suspension from the practice of law, with the first 18 months being an

[3] Rule 2.15 of the Texas Rules of Disciplinary Procedure allows a respondent lawyer in a disciplinary proceeding to choose between a district-court proceeding or an administrative proceeding for the adjudication of the Commission's allegations against him. *See* Tex. R. Disciplinary P. 2.15, *reprinted in* Tex. Gov't Code tit. 2, subtit. G app. A-1.

[4] *Reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. A.

active suspension and the remaining 30 months being probated. The trial court also ordered that Washington pay attorney's fees in the amount of $24,693.74.

Washington filed a motion for a stay of the trial court's judgment pending appeal and a motion for new trial. After a hearing on the motions in which numerous character and other witnesses testified on behalf of Washington, the trial court denied the motion for a stay and denied the motion for new trial but modified its previous judgment with respect to its ruling on sanctions and, among other things, reduced Washington's active suspension from 18 months to 12 months. This appeal followed.

DISCUSSION

In five issues on appeal, Washington contends that: (1) the trial court erred in excluding evidence of his character for truthfulness, (2) the trial court erred in failing to grant his motion for new trial based on the jury's consideration of inadmissible evidence, (3) the trial court erred in overruling his objections to the jury charge, (4) the cumulative effect of the trial court's errors requires reversal, and (5) the trial court erred in denying his jury demand for the sanctions phase of trial and in assessing excessive sanctions. We will address each issue below.

Character Evidence

In his first issue, Washington contends that the trial court erred in sustaining the Commission's objection to character-witness testimony he proffered from several witnesses during the jury trial on the Commission's allegations. After the trial court sustained the objection to the witnesses, Washington made an offer of proof that included one witness's testimony and the parties'

stipulation that Washington had several other character witnesses who would provide "substantially similar testimony about Washington's character and reputation for truth and veracity, honesty and plain dealing."

We review the admission or exclusion of evidence under an abuse-of-discretion standard. *Southwestern Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 721 (Tex. 2016); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995); *ICON Benefit Adm'rs II, L.P. v. Abbott*, 409 S.W.3d 897, 906 (Tex. App.—Austin 2013, pet. denied). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). Even if an appellant establishes error, appellate courts reverse a judgment based on an erroneous evidentiary ruling only if the error probably resulted in an improper judgment. Tex. R. App. P. 44.1; *Owens-Corning Fiberglass Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). To determine whether evidentiary error probably resulted in the rendition of an improper judgment, an appellate court reviews the entire record. *See Bennett v. Comm'n for Lawyer Discipline*, 489 S.W.3d 58, 73 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Here, the witness proffered by Washington in his offer of proof testified outside the presence of the jury that she was an attorney and had known Washington for "five to seven years." She testified that she had been licensed as an attorney for five years and that she had worked for Washington for about three years, starting in law school and ending a year after she received her law license. She further testified that her opinion of Washington's character for truth and veracity was "very good" and that he had a reputation for being a "very truthful, honest individual." She testified

that she knew "several hundred" attorneys because she had worked for attorneys for many years even before law school and that Washington had a "very good" reputation in the legal community. When asked about her opinion as to his "character for honesty and plain dealing," she testified that "[h]e has very high integrity, honesty, and all of the others" and that "attorneys and clients and regular folks all have a very—most everybody I know all thinks highly of him. Thinks highly of his integrity, his honesty, veracity." After the witness's testimony, the parties stipulated that Washington had a "series of other individuals" who "would provide substantially similar testimony."

On appeal, Washington argues that the trial court erred in excluding the witnesses. In response, the Commission asserts that even if the trial court so erred, Washington cannot show that the error, if any, probably resulted in an improper judgment as is required for reversal. We agree with the Commission. As stated above, the Commission alleged, and the jury found, that Washington committed the following acts in violation of the rules of disciplinary conduct: (1) neglecting a legal matter entrusted to him, (2) failing to keep a client reasonably informed about the status of a case and promptly comply with reasonable requests for information, (3) failing to take several required steps upon termination of representation, and (4) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The evidence presented by the Commission to support all of its allegations included documents about the clients' case and testimony from Carter, Gobert, and Washington. We begin with the trial court's docket-control order, which was admitted into evidence in the trial court. Specifically, the docket-control order set the case for trial on October 5, 2009, and stated the following, in relevant part:

[T]he following Discovery Control Plan shall apply to this case unless modified by the Court.

. . . .

30 DAYS PRIOR TO TRIAL	MEDIATION/ALTERNATIVE DISPUTE RESOLUTION By this date, the parties must (1) file an agreement for mediation stating the name of an agreed mediator and the date of the same, or (2) file an agreement for other ADR with date of same.

. . . .

20 DAYS BEFORE TRIAL	CONTINUANCE/SETTLEMENT All motions for continuance MUST be filed and set for hearing on or before pre-trial.
14 DAYS PRIOR TO TRIAL	EXHIBITS/DEPOSITIONS A list of the exhibits and witnesses and the depositions the party expects to offer during trial . . . are due by this date.

PRE-TRIAL CONFERENCE DOCKET CALL

PRE-TRIAL HEARINGS WILL BE HEARD THE FRIDAY BEFORE TRIAL AT 9:30 A.M.
FAILURE TO ATTEND PRE-TRIAL MAY RESULT IN THE DISMISSAL OF THE CASE.
(1) Jury questions, definitions and instructions for use in preparing the Court's charge must be filed at this time . . . (2) All motions for continuances will be heard at this time.

Another exhibit admitted at trial was a copy of the general rules applicable to the court in which the clients' case had been filed. The rules provided that when an attorney was assigned to two different courts on the same date, "[i]t [was] the duty of the attorney to call the affected Judge's attention to all dual settings as soon as [the attorney] . . . kn[e]w," and that

"[i]nsofar as practicable, Judges should attempt to agree on which case has priority, otherwise the following priorities shall be observed by the Judges of the respective Courts: [listing types of cases, beginning with criminal cases]."

Washington testified that he did not: (1) attend the pretrial hearing, (2) attend the trial setting, (3) file a motion for continuance, (4) conduct mediation or file a document pertaining to mediation or another type of alternative-dispute resolution, or (5) file a list of witnesses, exhibits, or depositions that he intended to offer at trial. He testified that someone in his office notified the court in the clients' case on October 2 that he had a conflict, but the email he referenced as evidence of the notification showed that the notification occurred on October 5, the date of trial. He also testified that he did not believe he was required to notify the court of the conflicting setting. Carter testified that Washington never told her during the pendency of the case that the case had been dismissed, that a motion to reinstate had been denied, or that he filed an appeal. She testified that he mentioned "a hearing that he didn't make it to," but that he never spoke to her about the possibility of mediation or informed her about court dates. She further testified that she did not know about the sale of her daughter's house until she discovered the information in an internet search. She testified that when she then asked Washington about the status of the house on June 26, 2012—nearly three years after the case was dismissed—Washington still did not tell her the case had been dismissed but instead told her that he was "taking care of everything" and that he would make contact with a real-estate professional to help with the case. She also testified that she requested a copy of the case file from Washington in 2008 and received it but then requested it again several times in subsequent years and did not receive it.

Gobert testified that Washington did not speak to him about the possibility of mediation and never informed him about the pretrial date, hearing date, dismissal of the case, filing and denial of the motion to reinstate, or the appeal and its disposition until after Gobert confronted Washington with the appellate-court decision three years after the case was dismissed. He testified that he "would have been there representing [him]self" if he had known about the trial date. He also testified that he requested case documents from Washington during the pendency of the case but did not receive any.

Given the nature of the allegations and the evidence presented at trial, the excluded testimony of the character witnesses would have been irrelevant. *See* Tex. R. Evid. 401. The issue here was not whether Washington was generally an honest person; the issue was whether the evidence showed that he violated several provisions of the disciplinary rules in *the clients' case*. Although Washington provided explanations for his failure to attend court proceedings or file documents in the case—stating that he did not believe he was required to conduct mediation or file a motion for continuance, for example—he does not dispute that he failed to do those things. Further, although he testified that he notified Carter upon learning that the case had been dismissed, he did not testify that he notified Gobert or N.H.'s father, who were the named plaintiffs in the suit. In addition, although he testified that he told Carter and Gobert in person about the trial date, he did not directly contradict the allegation that he misled Carter after the case was dismissed, nor did he testify that he informed Gobert about the dismissal and subsequent events in the case. Even when specifically asked by his counsel about his communications with Carter after the dismissal, he did not directly answer the question:

Counsel: Did you ever tell [Carter] that the—there were no problems with the case, everything was going smoothly, even though the case had been dismissed and you appealed it?

Washington: There were problems with this case from the beginning. From day one there were—and I told her what the problems were.

Washington further argues that a former jury member's testimony at his motion for new trial shows that the exclusion of the character witnesses was harmful. Specifically, he argues that the former jury member's testimony that she and some other jury members did not find Gobert credible shows that evidence of Washington's good character for truthfulness would have likely tipped the scales and changed the jury's verdict. However, the jury member who testified at Washington's motion for new trial was one of two members who voted in favor of Washington, and her testimony shows only that the jury did its job as the sole judge of the credibility of the evidence and still found in favor of the Commission. *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) (jury is sole judge of credibility of witnesses and weight to be given to their testimony). As we have detailed above, Washington's own testimony provides evidence supporting the allegations against him.

Given all of the evidence presented at trial supporting findings that Washington violated the alleged rules of disciplinary conduct—including the admission of the docket-control order and Washington's own testimony that he did not do several of the things set forth in the order as well as his lack of testimony refuting several of the allegations—and given the irrelevance of the excluded evidence to the alleged violations at issue, we conclude that Washington has not shown that the exclusion of the character-witness testimony probably resulted in an improper judgment. *See*

Reliance Steel & Aluminum Co. v. Sevcik, 267 S.W.3d 867, 873 (Tex. 2008) (in evaluating whether harm was caused by admission or exclusion of evidence, courts look to role evidence played in context of trial and whether evidence was "crucial to a key issue"); *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000) (to show that error resulted in improper judgment, complaining party must show that judgment turns on evidence at issue). Accordingly, we overrule this issue.

Evidence of License Suspension

In his second issue, Washington contends that the trial court erred in denying his motion for new trial based on the jury's receipt and consideration of a document that had not been admitted into evidence during the trial. We review a trial court's denial of a motion for new trial for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). To warrant a reversal on this issue, Washington must show that the jury's receipt of the document probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a); *First Emps. Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983).

The document at issue is an affidavit of the clerk of the Texas Supreme Court certifying that Washington was a licensed attorney in the state of Texas. The Commission offered the exhibit at the outset of trial to establish that the trial court had jurisdiction over the case. In addition to certifying that Washington was a licensed attorney, the affidavit also included the following information:

> The records further show [that Washington] was suspended from the active rolls for non-payment of the Texas Attorney Occupation Tax and/or associated penalties or interest and was reinstated on the following dates respectively:

SUSPENDED	REINSTATEMENT GRANTED
April 1, 1996	April 16, 1996

At the time the exhibit was offered, Washington objected to the admission of the above-quoted portion and asked that it be redacted. The Commission agreed to redact the referenced portion, and the trial court stated that it would admit the exhibit for purposes of the record only. At the hearing on Washington's motion for new trial, the former jury member referenced earlier in this opinion testified that the exhibit ended up in the jury room with the admitted exhibits and that the jury viewed the entire exhibit.

On appeal, the Commission argues that Washington cannot show that the jury's review of the document probably resulted in an improper judgment. In support of his argument to the contrary, Washington points to further testimony from the former jury member. Specifically, the former jury member testified that "as a result of that information [about Washington's previous suspension], a juror made a stunning derogative statement regarding age and ability." She testified that the statement the other jury member made was to the effect that "people like" Washington, "after working almost 40 years in his position, . . . tend to get old and cocky or arrogant, set in their ways, and they don't take care—or they don't do their job the way they should because they've been doing it this way for so long." She further testified that Washington's prior suspension was mentioned again during the jury's deliberations and that she believed it had an impact on the jury's deliberations.

Assuming error in the jury's receipt of the document showing Washington's previous suspension, we conclude that Washington has not shown that the error probably resulted in an

improper judgment. The information about the previous suspension showed that the suspension occurred 18 years earlier, that it was only 15 days long, and that it was entirely unrelated to Washington's job performance and was instead related to a failure to pay an occupation tax. As we stated above, the issue in this case is whether Washington violated the disciplinary rules in his handling of the clients' case, and there is considerable evidence, including Washington's own testimony, supporting the jury's findings in the Commission's favor. Given the evidence in support of the jury's verdict and the remoteness of the previous suspension, Washington has not shown that the jury's consideration of the previous suspension probably caused rendition of an improper judgment. *See Reliance Steel*, 267 S.W.3d at 873; *Able*, 35 S.W.3d at 617. Accordingly, we overrule this issue.

Jury Charge

In his third issue, Washington asserts that the trial court erred in overruling his objections to the jury charge. We review complaints of error in the jury charge under an abuse-of-discretion standard. *See Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006); *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000); *Niemeyer v. Tana Oil & Gas Corp.*, 39 S.W.3d 380, 387 (Tex. App.—Austin 2001, pet. denied). To reverse a judgment based on a claimed error in the jury charge, a party must also show that the error probably resulted in the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a)(1); *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002); *Niemeyer*, 39 S.W.3d at 387.

Here, in a pretrial hearing, Washington's counsel objected to the jury charge proffered by the Commission, complaining that the charge did not include definitions for terms such as

"deceit" and "dishonesty." The Commission argued that the stated terms did not need to be defined because they had commonly understood meanings. The trial court agreed with the Commission and overruled Washington's objections. On appeal, Washington argues that the jury charge "entirely failed to define the applicable legal standard by which the jury was to evaluate [his] conduct." He makes the following specific complaints about the charge: (1) that it asked the jury whether Washington kept Carter and Gobert "reasonably informed about the status of a matter" but did not provide a basis for the jury "to know what level of information was reasonable," (2) that it asked the jury whether Washington "'promptly complied with reasonable requests for information' but provided no guidance as to what was prompt and what was reasonable," (3) that it asked the jury whether Washington, upon termination of his representation of Gobert, failed to surrender papers to which Gobert was entitled but did not define the types of papers to which Gobert would be entitled or explain when the representation terminated, and (4) that it did not include questions that addressed "the disputed factual issues in the case, like whether Washington informed Gobert and [Carter] about the upcoming trial setting, dismissal, and motion to reinstate."

We note at the outset that Washington did not raise the same arguments with the trial court that he now raises on appeal. For an issue to be preserved for appeal, the party raising the issue must first raise it with the trial court and give the trial court the opportunity to consider and rule on the alleged error. *See* Tex. R. App. P. 33.1(a); *Burbage v. Burbage*, 447 S.W.3d 249, 257 (Tex. 2014); *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817, 829 (Tex. 2012). Further, "[f]ailure 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. Requests for questions, definitions, and

instructions must be tendered separate and apart from objections to the charge. *Id.* R. 273. Although a transcript of the pretrial hearing in which the jury charge was discussed suggests that Washington filed a proposed charge, Washington does not point to any place in the record where a written request for certain questions, definitions, or instructions is located, nor have we found one in our own search of the record. For all of these reasons, Washington has failed to preserve this issue for our review, and we therefore overrule it. *See* Tex. R. App. P. 33.1(a); Tex. R. Civ. P. 273, 278; *Bayer Corp. v. DX Terminals, Ltd.*, 214 S.W.3d 586, 602–03 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Cumulative Effect of Alleged Errors

Washington argues that the cumulative effect of the previous alleged errors merits reversal even if no single error was harmful. A reviewing court may reverse a lower-court judgment under the cumulative-error doctrine when the record shows a number of instances of error that together can warrant reversal even though each error by itself might not be sufficient. *See University of Tex. at Austin v. Hinton*, 822 S.W.2d 197, 205 (Tex. App.—Austin 1991, no writ). To show cumulative error, an appellant must show based on the record as a whole that if it were not for the alleged errors, the jury would have rendered a verdict favorable to him. *See Rhey v. Redic*, 408 S.W.3d 440, 462 (Tex. App.—El Paso 2013, no pet.); *Town E. Ford Sales, Inc. v. Gray*, 730 S.W.2d 796, 810 (Tex. App.—Dallas 1987, no writ).

Washington's argument focuses only on the errors alleged in his first two issues: the trial court's exclusion of his character witnesses and the jury's consideration of his previous suspension. He contends that the combination of these two alleged errors "create[d] a profoundly misleading impression about [his] credibility and capacity as a lawyer." We have already determined

above that even assuming the trial court erred in both instances, each of the alleged errors was harmless given the considerable evidence presented at trial supporting the jury's affirmative findings on the Commission's allegations and given the irrelevance of the evidence at issue. For the same reasons, we reach the same conclusion when considering the alleged errors in combination. Both the character witnesses and the previous suspension were irrelevant to the issue before the jury, which was whether Washington violated the disciplinary rules with respect to the clients' case, and the Commission presented extensive evidence to support the jury's affirmative findings. Thus, Washington has not shown that the jury would have rendered a different verdict if not for the alleged errors, and we overrule this issue. *See Rhey*, 408 S.W.3d at 462; *Town East*, 730 S.W.2d at 810.

Sanction

Washington raises two arguments regarding the sanctions phase of his trial: (1) that the trial court improperly denied his jury demand for the sanctions phase and (2) that the trial court assessed an excessive sanction. We will address each argument separately below.

A. Denial of Jury Demand

Before trial, Washington filed an "Invocation of Right to Jury Trial," asking for a jury to decide "all aspects" of his case, including any sanction assessed. The Commission filed an objection to the request for a jury for the sanctions phase, and the trial court sustained the objection. At a pretrial hearing, Washington again asserted his request for a jury to decide both the trial on the merits and the sanctions phase, and the trial court again denied the request. On appeal, Washington contends that the trial court erred in denying his request for a jury to determine his sanctions. In

response, the Commission argues that the Texas Rules of Disciplinary Procedure specifically state that the court, not the jury, must determine a respondent's sanctions in a disciplinary proceeding.

The Texas Rules of Disciplinary Procedure govern the attorney-disciplinary process and are to be treated as statutes. *See* Tex. R. Disciplinary P. 1.02; *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008) (citing *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988)). Thus, we must review the trial court's construction of the rules de novo, and we must interpret the rules in accordance with the rules of statutory construction. *See Commission for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 835 (Tex. 2012); *In re Caballero*, 272 S.W.3d at 599; *O'Quinn*, 763 S.W.2d at 399; *Rodgers v. Comm'n for Lawyer Discipline*, 151 S.W.3d 602, 614 (Tex. App.—Fort Worth 2004, pet. denied). Accordingly, whenever possible, we look to the plain meaning of the words used in the rules. *See Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016); *Rodgers*, 151 S.W.3d at 614. We also generally look to the entire rule, not to isolated portions, and when considering the interplay of more than one rule, we consider the rules within the broader scheme rather than individually. *See Janvey*, 487 S.W.3d at 572; *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008); *Rodgers*, 151 S.W.3d at 614.

The rules of disciplinary procedure addressing the imposition of sanctions state the following, in relevant part:

> If the trial court fails to find from the evidence in a case tried without a jury, or from the verdict in a jury trial, that the Respondent's conduct constitutes Professional Misconduct, the court shall render judgment accordingly. If the court finds that the Respondent's conduct does constitute Professional Misconduct, *the court shall* determine the appropriate Sanction or Sanctions to be imposed.

Tex. R. Disciplinary P. 3.09 (emphasis added).

> The trial court may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanctions to be imposed . . . In determining the appropriate Sanctions, the court shall consider [several enumerated factors].

Id. R. 3.10

Given the plain language in the applicable rules—namely that "the court *shall* determine the appropriate [sanctions] to be imposed" and that the trial court "*shall* consider" several factors "in determining the appropriate [s]anctions"—we conclude that the rules assign the task of imposing sanctions to the trial court, not the jury, in attorney-disciplinary proceedings. (Emphases added.) One of our sister courts reached the same conclusion when it quoted the same provisions quoted above and stated that "[w]hat is unmistakenly clear, and highly significant, is that when a respondent attorney elects a jury trial, the jury may only render a verdict on whether the attorney has committed acts of misconduct. The jury is not permitted to determine sanctions." *In re Caballero*, 441 S.W.3d 562, 570 (Tex. App.—El Paso 2014, no pet.).

Washington raises several arguments in opposition to this interpretation of the rules. In one argument, he asserts that he was entitled to a jury in the sanctions phase because the disciplinary rules incorporate the Texas Rules of Civil Procedure as long as there is not a variance in the disciplinary rules. *See* Tex. R. Disciplinary P. 3.08(B) ("Except as varied by these rules, the Texas Rules of Civil Procedure apply."). The problem with this argument is that the above-quoted language in the disciplinary rules does provide a variance from the rules of civil procedure by plainly stating that the trial court *shall* determine appropriate sanctions and *shall* consider several factors in doing so. *See id.* R. 3.09, 3.10. Further, Washington was entitled to and received a jury trial regarding the issue of whether he violated the disciplinary rules.

Washington also argues that denying him a jury in the sanctions phase violated section 81.077 of the Texas Government Code, which states that "[t]he supreme court may not adopt or promulgate any rule abrogating the right of trial by jury of an accused attorney in a disbarment action in the county of the residence of the accused attorney." *See* Tex. Gov't Code § 81.077(a). However, once again, Washington received a jury trial on the merits of the case, and the disciplinary rules therefore do not abrogate his right to a jury trial. Rather, the rules simply provide that the trial court must decide sanctions.

He further argues that rule 3.06 of the rules of disciplinary procedure provides a respondent attorney with the right to a jury trial. Rule 3.06 states that "[i]n a Disciplinary Action, either the Respondent or the Commission shall have the right to a jury trial upon timely payment of the required fee and compliance with [provisions of the rules of civil procedure]." Tex. R. Disciplinary P. 3.06. However, read in combination with rules 3.08 and 3.10, this provision provides that a respondent attorney is entitled to a jury trial on the merits of the case but must have sanctions imposed by the trial court. *See id.* R. 3.06, 3.08, 3.10.

Washington also states that "at least one court has held that denial of a jury on [the sanctions] issue constituted error" and cites to *Hanners v. State Bar of Tex.*, 860 S.W.2d 903, 910–11 (Tex. App.—Dallas 1993, writ dism'd). In *Hanners*, the trial court rendered a default judgment against a respondent attorney after the attorney did not appear at a disciplinary proceeding against him. *Id.* at 905. The default judgment disbarred the attorney, ordered him to pay restitution to victims, and ordered him to pay attorney's fees to the State Bar of Texas. *Id.* at 907. One of the arguments the attorney raised on appeal was that he was entitled to a jury trial on the amount of restitution and attorney's fees because the amounts were unliquidated damages, which implicated

rule 243 of the Texas Rules of Civil Procedure.[5] *Id.* at 910. The appeals court held that it "ha[d] found no provision of the [disciplinary rules] which disallows a jury under the facts of this case" and that it "construe[d] the [disciplinary rules] as preserving the right to a jury trial as provided for by the common law and by the rules of civil procedure." *Id.* at 911. The court held that the attorney was entitled to a jury trial on the issue at the time that he made the request and paid the fee but that he waived his right to have the jury consider the issue when he failed to appear for trial. *Id.*

We first note that Washington does not argue that rule 243 entitled him to a jury trial regarding the amount of attorney's fees assessed against him. Rather, he cites to *Hanners* only for the proposition that the rules of civil procedure apply to disciplinary proceedings unless the disciplinary rules conflict, and that the disciplinary rules do not conflict on this issue. To the extent that the court in *Hanners* held that respondent attorneys in disciplinary proceedings were entitled to a jury trial on sanctions because no provisions of the disciplinary rules prevented it, we respectfully disagree. As we have explained above, rule 3.09 of the disciplinary rules plainly states that the trial court "shall" determine the appropriate sanction to be imposed.[4] *See* Tex. R. Disciplinary P. 3.09. We are therefore not persuaded by Washington's argument.

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[5] Rule 243 states: "If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket." Tex. R. Civ. P. 243.

[4] The rule in effect at the time of *Hanners* was substantially similar to the current rule. The former rule stated: "If the court shall find that the respondent's conduct does constitute professional misconduct, the court shall determine whether the respondent shall be reprimanded or suspended from practice . . . or disbarred and the court shall enter a judgment accordingly." Tex. State Bar R., art. X, § 23(A) (1991).

B. Sanction

Washington contends that the trial court's assessment of sanctions was excessive "given the voluminous evidence of Washington's exemplary reputation." The sanctions assessed here—taking into account the trial court's judgment and its order revising the judgment—included, among other things, the payment of attorney's fees to the Texas State Bar; a four-year suspension from the practice of law with the first 12 months being an active suspension and the remaining 36 months being probated; the appointment of a "caretaker" to take charge of Washington's case files and ensure that Washington complied with orders to notify clients and other attorneys about his suspension; and additional continuing legal education.

We review the sanctions imposed on an attorney for professional misconduct under an abuse-of-discretion standard. *See State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994); *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 234–35 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In determining the appropriate sanctions in attorney-disciplinary proceedings, the trial court considers: (1) the nature and degree of the professional misconduct for which the attorney is being sanctioned; (2) the seriousness of and circumstances surrounding the professional misconduct; (3) the loss or damage to clients; (4) the damage to the profession; (5) the assurance that those who seek legal services in the future will be insulated from the type of professional misconduct found; (6) the profit to the attorney; (7) the avoidance of repetition; (8) the deterrent effect on others; (9) the maintenance of respect for the legal profession; (10) the conduct of the Respondent during the course of the disciplinary proceedings; (11) the trial of the case; (12) other relevant evidence concerning the attorney's personal and professional background; and (13) the attorney's disciplinary record. Tex. R. Disciplinary P. 3.10.

Here, the trial of the case included extensive evidence—including the testimony of Gobert, Carter, and Washington, as well as documentary evidence of the dismissal of the clients' case—supporting a finding that Washington violated the disciplinary rules with respect to the clients' case. The evidence also showed that the clients suffered substantial loss as a result of the violations. Specifically, after Carter paid Washington $10,000, the clients' case was dismissed before they had a trial, and they were therefore not given the opportunity to try to recover the home and belongings of their deceased mother.

During the sanctions phase of the case, the Commission also presented evidence of Washington's previous criminal and disciplinary history. Specifically, two men testified about an incident that occurred when they were teenagers in which Washington fired gunshots at their car while they were in it. They testified, and exhibits admitted into evidence showed, that Washington was charged with aggravated assault for the incident and that he ultimately entered into a plea agreement with the State in which he was put on probation and ordered, among other things, to pay restitution to one of the victims. Testimony and evidence further showed that Washington then filed a civil suit against the men, alleging claims of trespass and assault by threat and seeking $600,000 in damages against each of them. The men filed a countersuit, and the case went to a jury trial. A final judgment from the case showed that the jury found in favor of the men, and the trial court ordered Washington to pay them damages. The men testified that Washington filed an appeal and that they eventually vacated the judgment by agreement while the appeal was pending because of the time, money, and mental toll it would require to continue the case.

Washington's disciplinary record was also admitted into evidence during the sanctions phase and included the following previous findings of five separate violations committed

by Washington: accepting a fee and performing no meaningful legal services for a client, failing to adequately safeguard the interests of a client, allowing the statute of limitations to run after being retained in a case, withdrawing from representing a client but failing to file a motion to withdraw before the trial court accepted the client's guilty plea, and failing to file an amended appellate brief or argue a client's case after being retained to do so.

At the sanctions hearing and at a hearing on Washington's motion for new trial and motion for stay pending appeal, Washington presented several witnesses who testified as to his good character, honesty, and trustworthiness. Although the witnesses presented by Washington were numerous and all spoke highly of him and his reputation, given the factors for the trial court's consideration and the other evidence presented at the trial and at the sanctions hearing—including evidence of Washington's violation of the disciplinary rules in the clients' case, resulting in serious consequences for the clients; his violation of disciplinary rules in several previous cases; and his criminal conduct and subsequent civil suit against people whom the State and a jury deemed victims of the crime—we conclude that the trial court did not abuse its discretion in its assessment of sanctions against Washington. *See Kilpatrick*, 874 S.W.2d at 659; *Curtis*, 20 S.W.3d at 234–35. We therefore reject this argument.

C. Conclusion Regarding Sanctions Phase

Having rejected both of Washington's arguments with respect to the sanctions phase of his trial, we overrule this issue.

CONCLUSION

We affirm the trial court's judgment dated January 8, 2015, and its order dated March 12, 2015.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: March 17, 2017