No. 14-17-00521-CV

In the Fourteenth Court of Appeals
Houston, Texas

Robert S. Bennett,
Appellant

v.

Commission for Lawyer Discipline,
Appellee

On Appeal from the 334th District Court
Harris County, Texas
Cause No. 2013-56866
Hon. Craig Smith, presiding

Brief of Commission for Lawyer Discipline

Linda A. Acevedo
Chief Disciplinary Counsel
Texas Bar No. 00829825
Timothy R. Bersch
Assistant Disciplinary Counsel
Texas Bar No. 02254500
COMMISSION FOR LAWYER DISCIPLINE
4801 Woodway Drive, Suite 315-W
Houston, Texas 77056
(713) 758-8200
(713) 758-8292 (fax)
linda.acevedo@texasbar.com
tim.bersch@texasbar.com

Robert M. (Randy) Roach, Jr.
Special Assistant Disciplinary Counsel
Texas Bar No. 16969100
Daniel W. Davis
Special Assistant Disciplinary Counsel
Texas Bar No. 24040767
ROACH & NEWTON, LLP
One Westchase Center
10777 Westheimer, Suite 212
Houston, Texas 77042
(713) 652-2800
(713) 652-2029 (fax)
rroach@roachnewton.com
ddavis@roachnewton.com

Oral Argument Requested

Identity of Parties and Counsel

In addition to parties and counsel listed in Bennett's brief, the Commission will be represented on this appeal by:

Robert M. (Randy) Roach, Jr.
Special Assistant Disciplinary Counsel
Texas Bar No. 16969100
Daniel W. Davis
Special Assistant Disciplinary Counsel
Texas Bar No. 24040767
ROACH & NEWTON, LLP
One Westchase Center
10777 Westheimer, Suite 212
Houston, Texas 77042
(713) 652-2800
(713) 652-2029 (fax)
rroach@roachnewton.com
ddavis@roachnewton.com

Table of Contents

Index of Authorities

Cases

Statutes and Rules

Other Authorities

Statement of the Case

Nature of the case	Disciplinary proceeding against Robert S. Bennett arising from his representation of Gary O. Land.[1] The Commission for Lawyer Discipline filed a disciplinary petition against Bennett alleging violations of Rules 1.15(d) and 3.02 of the Texas Disciplinary Rules of Professional Conduct.[2]
Initial trial court	The Texas Supreme Court appointed the Honorable Carmen Kelsey, Judge of the 289th District Court, Bexar County, Texas to preside.[3] The action was styled *Commission for Lawyer Discipline v. Robert S. Bennett*, Cause No. 2013-56866, in the 334th District Court, Harris County, Texas.[4] A three-day bench trial was held from March 17 to 19, 2014.[5]
Disposition	Judge Kelsey found that Mr. Bennett violated Rules 1.15(d) and 3.02, and ordered him disbarred as a result of his conduct.[6]
Prior appeal	Bennett appealed his disbarment in *Bennett v. Commission for Lawyer Discipline*, 489 S.W.3d 58 (Tex. App.—Houston [14th Dist.] 2016, no pet.). This Court affirmed the finding of a violation of Rule 3.02, reversed the finding of a violation of Rule 1.15(d), and remanded for reconsideration of the appropriate sanction.[7]

[1] CR1 15-17. The Commission will use the same record numbering convention used by Bennett. For ease of reference to the exhibits, the Commission will also provide page numbers within the electonic document.
[2] CR1 18.
[3] CR1 69; Texas Supreme Court Misc. Docket No. 13-9125 (Sept. 5, 2013).
[4] CR1 1.
[5] CR1 69.
[6] CR1 69-70.
[7] *Bennett*, 489 S.W.3d at 74-75.

Current trial court	The Texas Supreme Court appointed the Honorable Craig Smith, Judge of the 192nd Judicial District Court, Dallas County, Texas, to preside.[8] The action was styled *Commission for Lawyer Discipline v. Robert S. Bennett*, Cause No. 2013-56866, in the 334th District Court, Harris County, Texas.[9] The court was provided copies of the prior Clerk's Record and Reporter's Record, a one-day hearing was held on May 24, 2017.[10]
Disposition	Judge Smith ordered that Bennett be suspended for a period of two years, six months, and three days, including two years and three days of active suspension and six months of probated suspension.[11] Bennett was given credit for the two years and three days that he was not allowed to practice while he was disbarred.[12] The probation is set to expire December 31, 2017.[13]

[8] Texas Supreme Court Misc. Docket No. 16-9116 (Aug. 3, 2016).
[9] CR2 1.
[10] CR2 81-82.
[11] CR2 82.
[12] CR2 82.
[13] CR2 82.

Statement Regarding Oral Argument

Because this appeal concerns the authority of a trial court to sanction an attorney for a violation of the Texas Disciplinary Rules of Professional Conduct, and because Bennett's brief raises multifarious issues alleging no sanction is possible in this case, the Commission would welcome the opportunity for discourse regarding the Rules.

Issues Presented

I. The Court has already affirmed that the evidence is factually sufficient to find that a violation of Rule 3.02 occurred. Is that same evidence nevertheless factually insufficient to support a sanction?

II. Was the sanction imposed, two years and three days of active suspension already served plus six months of probation, so excessive as to constitute an abuse of discretion?

III. Did the Commission engage in "prosecutorial misconduct" by commenting on the evidence before the finder of fact?

Statement of Facts

I. The Bennett-Land attorney-client fee dispute

This Court has already accurately described the dispute between Bennett and his former client, Gary Land.[14] The Commission will briefly recite the pertinent facts in order to provide record citations.

Land hired Bennett to represent him to handle a commercial lawsuit in Amarillo, Texas[15] and to investigate a potential claim for civil rights violations by federal agents.[16] The fee agreement provided for a $50,000 retainer,[17] which Land paid.[18]

The fee agreement also contained several provisions governing any dispute between Land and Bennett, which provided that:

- "In order to facilitate a quick and inexpensive resolution of any disputes concerning this Agreement, the parties agree that any disputes arising out of the Agreement, whether contractual or tortuous [sic] in nature will be resolved by submission to binding arbitration pursuant to the rules of the Houston Bar Association Fee Dispute Committee."[19]

- "It is, nevertheless, Client's desire that this Fee Agreement provides for binding arbitration of any disputes between client and the Firm, and gives the Firm the authority to date the Consent to Arbitrate Form."[20]

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[14] *See Bennett v. Comm'n for Lawyer Discipline*, 489 S.W.3d 58, 63-65 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
[15] PX 1, p. 1 [6 RR1 elec. p. 2]; PX 2, p. 12 [6 RR1 elec. p. 15]; PX6, p. 1 [6 RR1 elec. p. 27]; PX 12, p. 8 [6 RR 1 elec. p. 63].
[16] PX 1, p. 1 [6 RR1 elec. p. 2]; PX 12, p. 8 [6 RR1 elec. p. 63].
[17] PX 2, p. 2 [6 RR1 elec. p. 9]; PX 6, p. 1 [6 RR1 elec. p. 27]; PX 12, p. 9 [6 RR1 elec. p. 64].
[18] PX 6, p. 1 [6 RR1 elec. p. 27]; PX 12, p. 9 [6 RR1 elec. p. 64]
[19] PX 2, p. 7 [6 RR1 elec. p. 10].
[20] PX 2, p. 8 [6 RR1 elec. p. 11].

- "[T]he Client and Bennett agree that the arbitrator's decision in any such arbitration shall be binding, conclusive and non-appealable pursuant to the Rules and Regulations of the Houston Bar Association Fee Dispute Committee."[21]

- "Attorneys and Client agree that any dispute arising from the interpretation, performance, or breach of this Fee Agreement, including any claim of legal malpractice, but not including attorney disciplinary proceedings, shall be resolved by final and binding arbitration conducted in Houston, Texas, administered by [set forth method of arbitration]."[22]

A fee dispute arose, and Land formally terminated Bennett's representation in writing.[23] Land hired new counsel to represent him in the fee dispute.[24] Land filed an arbitration demand,[25] and Bennett consented to arbitration.[26]

After the arbitral hearing, the arbitration panel awarded Land the return of $27,500 in unearned fees.[27] Bennett filed a motion challenging the award,[28] but the arbitration panel denied his motion with a written opinion.[29] Land moved to confirm the arbitration award in the Harris County District Court,[30] and Bennett moved to vacate the award.[31] The district court confirmed the award.[32]

The allegation of misconduct that "unreasonably increases the costs or other

[21] PX 2, p. 8 [6 RR1 elec. p. 11].
[22] PX 2, p. 8 [6 RR1 elec. p. 11].
[23] PX 5, p. 1 [6 RR1 elec. p. 26].
[24] PX 6, p. 1 [6 RR1 elec. p. 27].
[25] PX 7, p. 1 [6 RR1 elec. p. 30].
[26] PX 8, p. 1 [6 RR1 elec. p. 34].
[27] PX 10, p. 2 [6 RR1 elec. p. 40].
[28] PX 11 [6 RR1 elec. p. 42].
[29] PX 12 [6 RR1 elec. p. 56].
[30] PX 13 [6 RR1 elec. p. 74].
[31] PX 14 [6 RR1 elec. p. 155].
[32] PX 20 [6 RR1 elec. p. 257].

burdens of the case or that unreasonably delays resolution of the matter"[33] was based on the following post-arbitration conduct by Bennett:

- Bennett appealed the confirmation of the arbitration award to the First Court of Appeals, arguing that the arbitration panel "exceeded its powers by creating evidence," "was influenced by the opinion that some of the services performed by Bob Bennett were 'not worthy of pursuit,'" and "denied Bob Bennett the right to cross-examine Gary Land on the third day of testimony."[34] The First Court of Appeals affirmed the District Court's confirmation of the arbitration award.[35] Bennett moved for rehearing and rehearing *en banc*,[36] and those motions were denied.[37]

- Bennett subsequently filed a petition for review with the Texas Supreme Court on an entirely new ground, arguing that the arbitration was void *ab initio* because Land was not mentally capable of entering a contract, and requesting that the Supreme Court "order that Gary Land's competency be determined prior to any further proceedings."[38] The Supreme Court denied Bennett's petition.[39]

- Meanwhile, Bennett filed a separate case in the Harris County District Court, accusing Mr. Land of fraud and seeking exemplary damages against him.[40] He subsequently non-suited that claim.[41]

- Meanwhile, Land requested an abstract of judgment and a writ of possession to enforce the judgment.[42] After the court issued a writ of execution,[43] Bennett claimed that his properties were exempt.[44] Land moved for receivership,[45] and

[33] TEX. DISP. R. PROF'L CONDUCT 3.02.
[34] PX 31, p. 5 [6 RR1 elec. p. 310].
[35] PX 37, p. 18 [6 RR1 elec. p. 385].
[36] PX 39 [6 RR1 elec. p. 387].
[37] PX 40 [6 RR1 elec. p. 398]; PX 41 [6 RR1 elec. p. 399].
[38] PX 46 pp. 9-10 [6 RR1 elec. pp. 461-62].
[39] PX 48, p. 4 [6 RR1 elec. p. 472].
[40] PX 22, pp. 3-4 [6 RR1 elec. pp. 264-65].
[41] PX 36 [6 RR1 elec. p. 364].
[42] PX 23 [6 RR1 elec. p. 267]; PX 24 [6 RR1 elec. p. 269].
[43] PX 25 [6 RR1 elec. p. 271].
[44] PX 25, Constable's Execution Return [6 RR1 elec. p. 273].
[45] PX 27 [6 RR1 elec. p. 282].

the District Court appointed a receiver.[46] Mr. Bennett moved for reconsideration of the appointment of a receiver arguing that he had converted Bob Bennett & Associates, PC into a PLLC and that it was therefore "not subject to seizure or attachment."[47] After the District Court denied Bennett's motion, Bennett appealed the order appointing a receiver.[48] Bennett eventually filed a deposit in lieu of supersedeas bond to prevent execution.[49]

Based on this conduct, Land filed a grievance against Bennett with the Commission for Lawyer Discipline.[50]

II. The disciplinary proceeding before Judge Kelsey

The Texas Supreme Court appointed Judge Carmen Kelsey Judge of the 289th District Court, Bexar County, Texas to preside over the disciplinary case.[51] The Commission presented its case through 53 uncontroverted documents, consisting of the fee agreement, arbitration filings, and court filings.[52] The Commission called no witnesses.[53] Bennett called various witnesses and testified on his own behalf.[54]

Judge Kelsey found that Bennett violated Texas Disciplinary Rule 1.15(d), which prohibits failing to refund an unearned retainer, and also violated Rule 3.02, which prohibits lawyers from unreasonably increasing the costs or unreasonably

[46] PX 29 [6 RR1 elec. p. 271].
[47] PX 30, p. 3 [6 RR1 elec. p. 301].
[48] PX 32 [6 RR1 elec. p. 326].
[49] PX 31 [6 RR1 elec. p. 329].
[50] CR1 8.
[51] CR1 69; Texas Supreme Court Misc. Docket No. 13-9125 (Sept. 5, 2013).
[52] *See* PX1-53 [6 RR1]; 2 RR1 49 (admitting those documents without objection).
[53] *See* 2 RR1 54 (resting as to misconduct without calling witnesses); 5 RR1 16 (resting as to sanction without calling witnesses).
[54] *See* Bennett's Brief, p. 5 ("Bennett called numerous witnesses and testified on his own behalf."), p. 40 ("Bennett called eight witnesses at the sanctions phase."), pp. 40-47 (summarizing testimony of Bennett and other witnesses).

delaying the resolution of litigation.[55] Judge Kelsey ordered that Bennett be disbarred.[56]

Bennett appealed his disbarment to this Court.[57] This Court affirmed the finding of a Rule 3.02 violation, reversed the finding of a Rule 1.15(d) violation, and remanded for reconsideration of the sanction.[58] Neither Bennett nor the Commission filed a petition for review with the Texas Supreme Court.

III. The disciplinary proceeding before Judge Smith

Judge Kelsey was no longer on the bench, and the Texas Supreme Court appointed Judge Craig Smith, of the 334th District Court, Harris County, Texas to preside.[59] Judge Smith reviewed the record of the prior proceeding, heard arguments of counsel for both parties, and was able to question Bennett at the hearing.[60] Judge Smith ordered that Bennett be suspended for a period of two years, six months, and three days, including two years and three days of active suspension and six months of probated suspension.[61] Bennett was given credit for the two years and three days that he was not allowed to practice while he was disbarred.[62] The probation is set to

[55] 4 RR1 117; CR1 69-70.
[56] 5 RR1 174-76; CR1 70.
[57] CR1 656.
[58] *Bennett*, 489 S.W.3d at 74-75.
[59] Texas Supreme Court Misc. Docket No. 16-9116 (Aug. 3, 2016).
[60] RR2 9 ("I've studied the file, and I am ready to move forward with this."), 38-40, 42, 48-49, 52 (questioning Bennett); CR2 81-82.
[61] RR2 60 ("I think that your 2-year-plus suspension is sufficient for the active part of the suspension. I'm going to give you an additional 6-month probated suspension."); CR2 82.
[62] CR2 82.

expire December 31, 2017.[63]

[63] CR2 82 ("The six (6) month period of probated suspension shall begin on July 1, 2017 and end on December 31, 2017.").

Summary of the Argument

What is not on appeal is that a panel of this Court has already conclusively determined that the evidence supported a finding that Bennett violated Texas Disciplinary Rule of Professional Conduct 3.02. In particular, this Court held that Bennett took a position that unreasonably increased the costs or other burdens of the case, and unreasonably delayed resolution of the matter. The only issue now on appeal is whether the sanction imposed on remand – suspension for a period of two years, six months, and three days, including two years and three days of active suspension and six months of probated suspension – is appropriate.

The two years and three days of active suspension has already been served because Bennett was not allowed to practice while he was disbarred, and the probationary period will have expired before briefing in this case is complete. The only reason this appeal is not moot is Bennett's contention that he is exempt from any sanction as a matter of law, so his record should be wiped clean.

Bennett has advanced no basis for this Court to render a judgment of no sanction. The record contains evidence, in the form of Bennett's own court filings, that he unreasonably increased costs and delays in his fee dispute with a former client. That same evidence that supported liability also supports the imposed sanction.

And Judge Smith did not abuse his broad discretion when he chose the sanction he found appropriate. He expressly considered the necessary statutory factors and took into account Bennett's continued insistence that everything he did

was justified. Rightfully concerned that Bennett would engage in the same conduct in the future, Judge Smith imposed a probationary period of six months in addition to the time already spent on suspension to ensure that Bennett would refrain from repeating his conduct for at least a short time.

Finally, the Commission did not engage in prosecutorial misconduct by portraying Bennett as a wrongdoer. The Commission was permitted to fairly comment on evidence before Judge Smith – evidence which all stemmed from the misconduct of Bennett himself. That Bennett had no reasonable basis for appeal was evident from the fee agreement that Bennett himself drafted. That Bennett nevertheless appealed and engaged in collateral litigation was evident from Bennett's own pleadings. That Bennett expressed no remorse or intention to reform his ways was evident from Bennett's own testimony and conduct at trial.

Argument

I. There is factually sufficient evidence that Bennett unreasonably increased the cost and delay of his fee dispute with his former client.

It is uncertain whether Bennett's first argument truly concerns factual sufficiency as opposed to legal sufficiency. Bennett labels it solely as factual sufficiency, and he recites only a factual sufficiency standard.[64] However, the only relief Bennett seeks is that this Court vacate and render a judgment of no sanction[65] – a remedy not permitted through a factual sufficiency review.[66] Bennett does not ask that this Court remand for a new assessment of sanction.[67] Even if Bennett's argument was correct, he could not obtain the relief he seeks through a factual sufficiency argument.[68]

If this Court were nevertheless to treat Bennett's argument as one regarding legal sufficiency, the standard requires that Bennett "must demonstrate on appeal that

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[64] *See* Bennett's Brief, pp. 9 (issue presented), 65-66 (standard of review), 67 ("THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUPPORT A 2 1⁄2 YEAR SUSPENSION.").

[65] *See* Bennett's Brief, p. 84 (prayer).

[66] *See Musallam v. Ali*, No. 02-16-00282-CV, 2017 WL 3298262, at *5 (Tex. App.—Fort Worth Aug. 3, 2017, pet. filed) ("Because the only relief he requests is that we render judgment in his favor, we construe his second issue as a legal-sufficiency challenge."); *Maynard v. Booth*, 421 S.W.3d 182, 183 (Tex. App.—San Antonio 2013, pet. denied) ("Kay requested only that this court reverse the trial court's judgment and render in her favor.... Therefore, we review the evidence only under a legal sufficiency standard."). *But see Advanced Personal Care, LLC v. Churchill*, 437 S.W.3d 41, 49 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("Although the Buyer has requested rendition rather than remand, remand is the relief to which it is entitled.").

[67] *See* Bennett's Brief, p. 84 (prayer).

[68] *See Glover v. Texas Gen. Indem. Co.*, 619 S.W.2d 400, 401-02 (Tex. 1981) ("If the court of civil appeals sustains the point finding the evidence factually insufficient, it must reverse the judgment of the trial court and remand for new trial.").

there is no evidence to support the adverse finding."[69] The evidence must be considered in the light most favorable to the finding, and every reasonable inference must be indulged in favor of the finding.[70] "The trier of fact is the sole judge of the witnesses' credibility and the weight to be given their testimony."[71]

Under either standard, Bennett cannot prevail. In fact, a panel of this Court has already finally resolved his arguments against him under either standard.[72]

A. This Court has already resolved the majority of Bennett's legal and factual issues against him.

Bennett's brief attempts to resurrect numerous arguments that have already been addressed and finally adjudicated by this Court. In the prior appeal, this Court addressed arguments such as interpretation of the fee agreement[73] and the sufficiency of the evidence supporting the finding that Bennett violated Rule 3.02.[74] Although Bennett treats those issues as live, he elected not to appeal this Court's prior opinion. Thus, the scope of the remand was not re-litigation of those issues, but rather simply "reconsideration of the appropriate sanction to be imposed on Bennett as a result of his violation of only Rule 3.02 of the Texas Disciplinary Rules of Professional Conduct."[75]

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[69] *Bennett*, 489 S.W.3d at 66.
[70] *Id.*
[71] *Id.*
[72] *See id.* at 72 ("We hold the evidence is legally and factually sufficient to support the trial court's second and third findings of fact and its second conclusion of law that Bennett violated Rule 3.02.").
[73] *See id.* at 69-70.
[74] *See id.* at 74.
[75] *See id.* at 75.

1. This Court has already held that Bennett's interpretation of the fee agreement was unreasonable.

Despite this Court's legal conclusion that Bennett's interpretation of the fee agreement was unreasonable,[76] Bennett continues to pursue that argument[77] and contends that he pursued a "legitimate appeal."[78] For the reasons this Court has already explained, the only reasonable interpretation of the fee agreement is that appellate review of the arbitration was waived by the parties:

- "First, Bennett's construction renders meaningless the provisions making an arbitration award conclusive and non-appealable and warning the client about loss of the right to appeal."[79] Bennett failed to offer any explanation that would give effect to language to terms such as: "the Client and Bennett agree that the arbitrator's decision in any such arbitration shall be binding, conclusive, and non-appealable."[80]

- "Second, Bennett's construction is not reasonable because it requires the insertion of additional language into the Agreement and the Fee Dispute Rules it references."[81]

- "Third, Bennett's construction is not reasonable because a lawyer has a duty to inform a client of all material facts, and this duty requires that the lawyer's fee agreement be clear."[82]

Thus, as a matter of law, there was no reasonable basis to conclude that

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[76] *See id.* at 69 ("We conclude that Bennett's proposed construction of the Agreement is not reasonable for several reasons.").
[77] *See, e.g.*, Bennett's Brief, pp. 13-15 (presenting Bennett's interpretation within the Statement of Facts), p. 81 ("Moreover, at worst, the contract was ambiguous as to the right to appeal.").
[78] *See id.* at 18.
[79] *Bennett*, 489 S.W.3d at 69 (citing *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 409 S.W.3d 221, 232 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Gastar Exploration Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.] 2013, pet. denied)).
[80] PX 2, p. 8 [6 RR1 elec. p. 11].
[81] *Bennett*, 489 S.W.3d at 69-70.
[82] *Id.* at 70.

Bennett had a right to appeal the arbitration award. By pursuing an appeal and collateral attack long after the arbitration award had become final,[83] Bennett unreasonably increased the costs or other burdens of the fee dispute and unreasonably delayed its resolution.[84]

2. This Court has already held that additional testimonial evidence was not necessary.

Despite this Court holding that the evidence admitted during the first proceeding was legally and factually sufficient to support the finding that Bennett violated Rule 3.02,[85] Bennett continues to argue that the documentary evidence was not sufficient.[86] The entire record from the first proceeding was before Judge Smith,[87] so he had, at a minimum, the same evidence that this Court held was legally and factually sufficient to conclude that Bennett unreasonably increased the costs or other burdens of the fee dispute and unreasonably delayed its resolution.[88]

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[83] *See* PX 12 & p. 17 [6 RR1 elec. p. 56, 73] (March 2, 2012 order denying modification of arbitration award); PX 22 [6 RR1 elec. p. 262] (Sept. 25, 2012 original petition); PX 31 [6 RR1 elec. p. 305] (Jan. 3, 2013 brief filed with the First Court of Appeals); PX 38 [6 RR1 elec. p. 386) (June 4, 2013 judgment from First Court of Appeals); PX 40, 41 [6 RR1 elec. p. 398, 399] (Aug. 5, 2013 orders denying rehearing and rehearing *en banc*); PX 46 [6 RR1 elec. p. 447] (Dec. 11, 2013 petition for review); PX 48, p. 4 [elec. p. 472] (Feb. 14, 2014 order denying petition).

[84] *See Bennett*, 489 S.W.3d at 71-72.

[85] *See id.* at 72.

[86] *See, e.g.*, Bennett's Brief, p. 5 ("The Commission called no witnesses, but rather submitted 53 documentary exhibits and rested."); p. 75 ("Without any direct evidence of improper motive, the Commission's only evidence was the cumulative existence of the documentation."); p. 81 ("Here, Bennett is accused of filing and delaying, with no evidence of his motive other than the documents themselves and the speculation of Bersch.").

[87] *See* CR2 81 ("After receiving the appointment to preside over this action, this Court was provided copies of the Clerk's Record and the Reporter's Record that were part of the appellate record in this case.").

[88] *See Bennett*, 489 S.W.3d at 71-72.

3. This Court has already held that the lack of a sanction in the fee dispute does not exonerate Bennett.

Despite this Court's holding that the denial of sanctions during Bennett's appeal against Land did not foreclose the possibility that Bennett violated Rule 3.02,[89] Bennett nevertheless continues to assert that the First Court of Appeals permitted his conduct.[90] As this Court noted, the First Court of Appeals did not find Bennett's appeal to be non-frivolous,[91] nor did it address the contract language prohibiting appeal.[92] Moreover, "the two proceedings do not involve the same parties, issues, or behavior."[93]

Although Bennett's briefing inappropriately attempts to re-litigate those issues, the Commission will focus on arguments that have not already been resolved against Bennett. That Bennett's conduct amounted to a violation of Rule 3.02 is not in question; the only issue on appeal is whether his conduct warranted the imposition of a sanction by Judge Smith.

B. Circumstantial evidence of intent is legally and factually sufficient to support the sanction.

Bennett argues that the Commission presented no direct evidence of malice or

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[89] *See id.* at 71.
[90] *See, e.g.*, Bennett's Brief, p. 37 ("Bennett showed that the First Court of Appeals held that the appeal was not frivolous."); p. 59 ("In a continued attempt to address the seriousness of the violation, Bennett referenced the First Court of Appeals decision 'stating that it was not a frivolous appeal.'").
[91] *See Bennett*, 489 S.W.3d at 71 ("It is possible that the court determined Bennett's appeal was frivolous, but decided, in the exercise of its discretion, not to impose sanctions under Rule 45.").
[92] *See id.* ("Nor did it address the question whether the parties' agreement prohibited the appeal, which evidently was not raised in that appeal.").
[93] *See id.*

improper purpose,[94] but the Disciplinary Rules of Professional Conduct do not establish a subjective intent requirement.[95] Rather, Rule 3.02 is premised on unreasonableness[96] – an objective standard.[97] Bennett's citation to examples in Rule 3.02 that concern intentional conduct[98] does not limit the scope of Rule 3.02 to only those enumerated examples. Limiting Rule 3.02 to intentional conduct would be contrary to Texas Supreme Court authority holding, in the context of Rule 3.06, that the public should be protected from not only intentional conduct, but also conduct that is objectively likely to have a negative effect.[99]

Moreover, Bennett cites no authority establishing that intent can only be presented through direct evidence. To the contrary, it is well-accepted that intent can be proven through circumstantial evidence.[100] As the Texas Supreme Court has

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[94] *See* Bennett's Brief, p. 69.

[95] *See* TEX. DISP. R. PROF'L CONDUCT 3.02 (providing only that "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.").

[96] *See id.*

[97] *See, e.g.*, *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 568 (Tex. 2016) (referring to "an objective reasonableness standard"); *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 833 (Tex. 2009) ("Under the evidence presented at trial, a reasonable and fair-minded jury would not be compelled to find, under an objective standard, that a reasonable person would know that injury to third parties would result from Gibbons' conduct."); *Freedom Newspapers of Tex. v. Cantu*, 168 S.W.3d 847, 854 (Tex. 2005) ("As we recently noted, the reasonable-reader standard is objective rather than subjective ....").

[98] *See* Bennett's Brief, pp. 68-69.

[99] *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 438-39 (Tex. 1998) ("It is consistent with the rule's purpose of protecting the jury system to construe it not only as prohibiting lawyers from intentionally causing forbidden effects such as harassment, but also as requiring them to refrain from communications that are objectively likely to have those effects.").

[100] *See, e.g.*, *Harris County Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 816 (Tex. 2016) ("Intent, in takings cases as in other contexts, may be proven by circumstantial evidence."); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant."); *Spoljaric v. Percival Tours, Inc.*,

noted, it is impractical to expect direct evidence of intent;[101] a defendant rarely admits to an improper state of mind.

Moreover, Bennett has not offered any explanation of how "[w]hile the evidence may be legally and factually sufficient of a 'violation,' it is not a preponderance of evidence for a sanction."[102] Nor has he cited any authority for the proposition that evidence can be sufficient to support a finding that he violated the disciplinary rules, yet insufficient to support imposition of any sanction. Such a rule would create an anomalous situation where a lawyer could act unethically without any consequence.

What the evidence showed was that Bennett increased the cost and delay of his fee dispute with his former client by: 1) appealing an arbitration award that he had told the former client would be "binding, conclusive, and non-appealable,"[103] 2) collaterally attacking that award through a fraud suit against his former client,[104] and 3) frustrating his former client's attempt to execute on that award.[105] That Bennett never admitted he was intentionally increasing the cost and delay by his tactics is irrelevant.

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708 S.W.2d 432 (Tex. 1986) ("Since intent to defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence.").

[101] *See, e.g.*, *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 622 (Tex. 2014) ("[I]n cases of fraud, '[i]t is not often that any kind of evidence but circumstantial evidence can be procured.'"); *Rankin v. Rankin*, 105 Tex. 451, 458, 151 S.W. 527, 530 (1912) ("[W]e realize that fraud is oftentimes very difficult to prove and is peculiarly a fact which must be established by circumstantial evidence.").

[102] *See* Bennett's Brief, p. 70.

[103] *See* PX 2, p. 8 [6 RR1 elec. p. 11]; *see also* PX 31 [6 RR1 elec. p. 305] (brief on appeal); PX 46 [6 RR1 elec. p. 447] (petition for review).

[104] *See* PX 22 [6 RR1 elec. p. 262].

[105] *See* PX 25, Constable's Execution Return [6 RR1 elec. p. 273]; PX 30, p. 3 [6 RR1 elec. p. 301].

Two trial judges and this Court have been able to determine from his pleadings alone that his conduct was sanctionable.[106]

C. The equal inference rule does not prevent a finding of intent.

Bennett argues that the equal inference rule makes it impossible to impose any sanction because he offered alternative explanations for his conduct.[107] As discussed above, Bennett seeks to impose an intent requirement that does not exist within Rule 3.02. As also discussed above, this Court has already determined that no reasonable person could have interpreted Bennett's fee agreement as permitting his appeal,[108] undercutting Bennett's argument that his alternative explanations are reasonable. Apart from that holding, Bennett's argument misapplies the equal inference rule.

Under the equal inference rule, "the trier of fact may draw inferences, but only reasonable and logical ones."[109] "When circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred."[110] "Thus, in cases with only slight circumstantial evidence, something else must be found in the record to corroborate the probability of the

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[106] *See Bennett*, 489 S.W.3d at 72 ("We hold the evidence is legally and factually sufficient to support the trial court's second and third findings of fact and its second conclusion of law that Bennett violated Rule 3.02.").
[107] *See* Bennett's Brief, p. 71 ("But the evidence supporting each of his inferences supports an equal inference of a reasonable purpose.").
[108] *See Bennett*, 489 S.W.3d at 69 ("We conclude that Bennett's proposed construction of the Agreement is not reasonable for several reasons.").
[109] *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997).
[110] *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984).

fact's existence or non-existence."[111]

The equal inference rule does not preclude a fact-finding in every situation where the parties offer differing inferences. As the Texas Supreme Court has recognized, "[c]ircumstantial evidence often requires a fact finder to choose among opposing reasonable inferences."[112] "Properly applied, the equal inference rule is but a species of the no evidence rule, emphasizing that when the circumstantial evidence is so slight that any plausible inference is purely a guess, it is in legal effect no evidence."[113] For example, if a case turns on whether a ratchet adaptor was sold before or after a particular date, and there is no evidence either way, the equal inference rule would apply.[114]

Judge Smith had before him the fee agreement that Bennett himself drafted providing that any arbitration would be "binding, conclusive and non-appealable"[115] in order to further the "promptness of decisions resulting from such proceedings."[116] Judge Smith also had before him Bennett's own pleadings contrary to those representations.[117] It was not a "mere guess" that Bennett was unreasonably increasing the cost and delay of the fee dispute.

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[111] *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001).
[112] *Id.*
[113] *Id.*
[114] *See id.* (discussing *Litton Indus. Products*, 668 S.W.2d 319).
[115] *See* PX 2, p. 8 [6 RR1 elec. p. 11].
[116] *See* PX 1, p. 8 [6 RR1 elec. p. 11].
[117] *See, e.g.*, PX 22 [6 RR1 elec. p. 262] (original petition); PX 31 [6 RR1 elec. p. 305] (brief on appeal); PX 46 [6 RR1 elec. p. 447] (petition for review).

Moreover, the fact finder is permitted to consider the party's credibility.[118] Evaluation of a party's credibility would be particularly appropriate when the inference relates to the party's own mental state. Here, Judge Smith was able to weigh Bennett's credibility at trial and to consider whether it was "equally likely" that Bennett had a "reasonable purpose"[119] for his multitudinous filings, rather than making it unreasonably costly and time-consuming for Bennett's former client to obtain a rightful refund of an overcharged fee.

D. The statutory factors support the sanction imposed.

Bennett also argues that there is no evidence supporting the statutory factors that must be considered when imposing a sanction for violation of the Rules of Professional Conduct.[120] Although consideration of the factors is mandatory,[121] not every factor needs to be satisfied to support a sanction.[122] The record reflects that Judge Smith expressly considered all of the factors.[123]

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[118] *Lozano*, 52 S.W.3d at 148-49.
[119] *See* Bennett's Brief, p. 71 ("But the evidence supporting each of his inferences supports an equal inference of a reasonable purpose.").
[120] *See* Bennett's Brief, pp. 75-79.
[121] *See* TEX. R. DISC. P. 3.10 ("In determining the appropriate Sanctions, the court shall consider ...."). An additional factor, the Respondent's disciplinary record, is admissible but not included in the mandatory factors. *See id.*
[122] *See Thawer v. Comm'n for Lawyer Discipline*, 523 S.W.3d 177, 188 (Tex. App.—Dallas 2017, no pet.) ("A court is not required to find that every Rule 3.10 factor has been satisfied before ordering a sanction."); *Eureste v. Comm'n For Lawyer Discipline*, 76 S.W.3d 184, 201-02 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (discussing only six of the twelve statutory factors).
[123] *See* CR2 82 ("After considering ... applicable law, specifically including the factors set forth in Rule 3.10 of the Texas Rules of Disciplinary Procedure for a court to consider in determining sanctions ...."); RR2 20 *et seq.* (discussion of factors by the Commission).

1. Judge Smith was rightly concerned about repetition of the misconduct.

As required, Judge Smith considered the possibility that Bennett would repeat his misconduct in the future.[124] In particular, Judge Smith considered whether Bennett expressed any form of contrition or remorse,[125] noting that:

> I think you are lacking in self awareness. I truly do, Mr. Bennett. I am trying to communicate to you how this bench has looked at this case, reviewed the evidence, reviewed the file, and I still don't see any remorse, except, "I'm sorry I didn't put 'may' in there."[126]

The failure of an attorney to appreciate his wrongdoing can itself "raise[] some concern as to whether he even now recognizes the severity of his offense."[127] In the criminal analogue to avoidance of repetition – future dangerousness – lack of remorse is frequently used to show that the defendant is likely to engage in the conduct in the future.[128] As the Court of Criminal Appeals has explained, remorse is a sense of guilt

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[124] *See* TEX. R. DISC. P. 3.10(G) (listing "The avoidance of repetition"); *see also* TEX. R. DISC. P. 3.10(E) (listing "The assurance that those who seek legal services in the future will be insulated from the type of Professional Misconduct found").

[125] Bennett's argument that consideration of remorse was impermissible will be addressed in Issue III, below.

[126] RR2 44; *see also* RR2 61 ("I think he's failed to fully acknowledge, at least until today, the impropriety of his actions.").

[127] *See Rocha v. State Bar of Tex.*, No. 04-95-00158-CV, 1996 WL 364823, at *10 (Tex. App.—San Antonio July 3, 1996, writ denied).

[128] *See, e.g.*, *Cole v. State*, No. AP-76,703, 2014 WL 2807710, at *1 (Tex. Crim. App. June 18, 2014) ("A lack of remorse or evidence that a defendant planned to kill again may likewise support a finding of future dangerousness."); *Ex Parte Williams*, No. AP-76,455, 2012 WL 2130951, at *15 (Tex. Crim. App. June 13, 2012) ("Remorse can be mitigating because it shows that the defendant has changed—which is a core issue in the future-dangerousness inquiry."); *Randolph v. State*, 353 S.W.3d 887, 891-92 (Tex. Crim. App. 2011) ("Prosecutors often argue at the punishment phase of trial that a defendant is not deserving of leniency or a probated sentence because he has not taken responsibility for his actions, shown remorse, or both."); *Trevino v. State*, 991 S.W.2d 849, 854 (Tex. Crim. App. 1999) ("Finally, future dangerousness can be inferred from evidence showing a lack of remorse and/or indicating an expressed willingness to engage in future violent acts."); *Rachal v. State*,

for one's actions,[129] and Judge Smith was presented with ample evidence that Bennett believes he has done nothing wrong.[130]

That Smith was concerned with the danger of repetition is evident in the sanction he imposed – the suspension already served, plus six month's of probation.[131] Had Judge Smith been certain that there was no danger of repetition, there would have been no need to impose a probationary period during which Bennett would have to prove he could avoid repetition.

2. Judge Smith rightly considered the harm to Bennett's former client.

Judge Smith also considered the harm Bennett caused to his former client.[132] Bennett's argument concerning the harm to his former clients consists entirely of: "Months of litigation and a delay in resolving the fee dispute. That's it."[133] Bennett's cursory dismissal of the loss to his former client is curious in light of the fact that the Rule he violated was drafted specifically to prevent such unreasonable cost and delay.[134] It is difficult to conceive how this factor could not *per se* weigh against an

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917 S.W.2d 799, 806 (Tex. Crim. App. 1996) ("Evidence indicated that appellant was without regret or remorse for any of the killings.").

[129] *Randolph*, 353 S.W.3d at 892 (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED 1529 (2nd ed. 1983)).

[130] This steadfast refusal to acknowledge any wrong-doing, despite this Court's affirmance of a Rule 3.02 violation, also impacts "[t]he conduct of the Respondent during the course of the Committee action." *See* TEX. R. DISC. P. 3.10(j).

[131] *See* CR2 82; RR2 62 ("[Y]ou need to watch your P's and Q's anyway.").

[132] *See* TEX. R. DISC. P. 3.10(C) (listing "The loss or damage to clients").

[133] Bennett's Brief, p. 76.

[134] *See* TEX. DISC. R. PROF'L CONDUCT 3.02 ("In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.").

attorney found to have violated Rule 3.02.

Judge Smith was also aware of the disparate positions that Bennett and his former client were in with respect to the litigation:

> And a law license is so empowering. It gives you the keys to every courthouse in this state. It is – it so empowers a lawyer, that you are the envy of most every other member of the public. And you can do good with that power, or you can abuse that power.[135]

Other courts have also noted the power that a law license gives an attorney in a dispute with a former client:

> The lawyer, by virtue of the nature of our calling, is endowed with a lot of privileges and perhaps the most awesome power that we have is the right to bring the ordinary citizen into the legal system. To us sometimes that seems like a rather casual thing, but to the person who is assaulted by the legal process and subjected to all of the stress, inconvenience, and expense, and horror that can be unleashed upon them by the misuse of the process, it is a terribly frightening thing. It is a destructive thing, not only to the administration of justice, but it's destructive to society.[136]

There is no reason to believe that Bennett's former client shared Bennett's casual disregard of his unreasonable litigation tactics, such as suing his former client for fraud.[137]

Moreover, the additional time and cost spent was disproportionate to both the amount in dispute ($27,500 in unearned advance payments that Bennett was required

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[135] RR2 59.
[136] *Rocha*, 1996 WL 364823, at *10 (quoting J. Clawson).
[137] *See* PX 22, pp. 3-4 [6 RR1 elec. p. 264-65] (suing Land for fraud and seeking "actual damages, exemplary damages, court costs, and all other relief").

to refund[138]) and the time that the dispute should have taken to resolve (the seven months between the arbitration demand and final award[139]).[140] Instead of taking seven months, the dispute took twenty-seven months.[141]

3. Judge Smith rightly considered how Bennett's conduct would be viewed from outside the legal community.

Among the factors Judge Smith considered were the "damage to the profession"[142] and the "maintenance of respect for the legal profession."[143] Bennett argues that he is the real victim here, and that this Court should hold the Commission at fault for seeking to sanction him.[144] However, Bennett fails to appreciate how the world at large would view what has occurred.

Attorneys are in a fiduciary relationship with their clients, and fee agreements

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[138] *See* 6 RR1 Pl. Exh. 10, p. 2 (elec. p. 40). Bennett takes issue with the use of the term "refund" with regard to this award, because the arbitration panel did not use that term. *See* Bennett's Brief, pp. 30-31. However, the panel noted that "Gary Land seeks the return of $35,000 of the $50,000 that he has previously paid to Respondents" and awarded him $27,500 of that amount. *See* 6 RR1 Pl. Exh. 10, p. 2 (elec. p. 40). It is hard to see how the term "refund" is an unfair characterization or Bennett being required to return $27,500 of the amount Land has previous paid him. *See MHI P'ship, Ltd. v. City of League City*, 525 S.W.3d 370, 379 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (quoting BLACK'S LAW DICTIONARY 1307 (8th ed. 2004) as "defining 'refund' as 'the return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from earnings'")).

[139] *See* PX 7, p. 2 [6 RR1 elec. p. 31] (Sept. 5, 2011 arbitration demand); PX 12 & p. 17 [6 RR1 elec. p. 56, 73] (March 2, 2012 order denying modification of arbitration award).

[140] This disproportionality also impacts "[t]he nature and degree of the Professional Misconduct for which the Respondent is being sanctioned." *See* TEX. R. DISC. P. 3.10(a).

[141] *See* PX 7, p. 2 [6 RR1 elec. p. 31] (Sept. 5, 2011 arbitration demand); PX 48, p. 4 [elec. p. 472] (Feb. 14, 2014 order denying petition).

[142] *See* TEX. R. DISC. P. 3.10(D).

[143] *See* TEX. R. DISC. P. 3.10(I).

[144] *See* Bennett's Brief, p. 76 ("The Conduct of Disciplinary Counsel and the bringing of this case has caused more damage to the profession than Bennett's conduct even at its worst."); p. 78 ("Failing to remedy the injustice below is likely to cause disrespect for the profession.").

are particularly sacrosanct.[145] In his fee agreement, Bennett convinced his client to agree to arbitrate any fee dispute,[146] justifying the waiver of judicial rights as saving time and money.[147] After Bennett lost a fee dispute in arbitration,[148] he unreasonably increased the time and expense of the dispute through both appeal and a collateral suit,[149] contrary to the provisions in his own fee agreement[150] and the Rules of Professional Conduct.[151] After a complaint was filed, the Commission sought to hold Bennett accountable.[152]

If Bennett's conduct is excused by a holding that no sanctionable conduct occurred as a matter of law, it would send two very negative messages: 1) lawyers cannot be trusted by their clients, and 2) the legal community cannot police its own.

4. Judge Smith rightly considered whether a sanction could deter others.

Judge Smith also considered the deterrent effect of the sanction on others.[153] Bennett discounts the deterrent effect of any sanction, "whether severe or light," because lawyers will still engage in "Rambo tactics."[154] The alternative Bennett seeks,

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[145] *See Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 450 (Tex. 2011) ("Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized.").
[146] *See* PX 2, p. 7-8 [6 RR1 elec. p. 10-11].
[147] *See, e.g.*, PX 2, p. 7 [6 RR1 elec. p. 10] (claiming the procedure would be "quick and inexpensive").
[148] *See* PX 10, p. 2 [6 RR1 elec. p. 40]; PX 12, p. 16 [6 RR1 elec. p. 71].
[149] *See* PX 22 [6 RR1 elec. p. 262] (original petition); PX 31 [6 RR1 elec. p. 305] (appeal brief); PX 46 [6 RR1 elec. p. 447] (petition for review).
[150] *See* PX 2, p. 7-8 [6 RR1 elec. p. 10-11].
[151] *See* TEX. DISP. R. PROF'L CONDUCT 3.02.
[152] Bennett's complaints about the Commission's conduct are discussed in Section III, below.
[153] *See* TEX. R. DISC. P. 3.10(H).
[154] *See* Bennett's Brief, p. 77.

however, is no sanction whatsoever.[155] Logically, some sanction is more of a deterrent than no sanction, even if the wrongful conduct still occurs.[156]

5. The lack of additional complaints does not negate the appropriateness of a sanction.

Bennett argues that he had a clean disciplinary history and that witnesses testified that they had not been aggrieved by him.[157] However, the absence of evidence of additional wrongdoing does not render other supporting evidence insufficient.[158]

Whether it is the legal sufficiency or factual sufficiency standard that is applied, there was enough evidence from which Judge Smith could impose a sanction against Bennett. This Court has already concluded that the evidence supported a finding that Bennett violated Rule 3.02, and it then remanded for imposition of a sanction. It would be anomalous to find that the same evidence cannot now support a sanction.[159] Moreover, the Rules of Disciplinary Procedure actually provide that a sanction is

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[155] *See* Bennett's Brief, p. 79.

[156] Applying Bennett's argument to other contexts, there should be no liability for fraud because people have not stopped committing fraud, and no punishment for murder because people have not stopped committing murder.

[157] *See* Bennett's Brief, p. 76 ("Peyman Momeni testified that he never felt a need to be insulated from Bennett or protected from him at any time."); *id.* ("So did Anthony Graves."); p. 79 ("Bennett had a clean disciplinary record for 30 years.").

[158] *See State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 659 (Tex. 1994) ("The sanction of disbarment does not turn on whether an attorney has engaged in a single act, as opposed to repeated and systematic pattern, of misconduct."); *Eureste*, 76 S.W.3d at 202 (rejecting an argument that "the sanction of suspension is unduly harsh because he has assisted many clients and his streamlined office procedures may have maximized client benefits").

[159] To the contrary, the Rules of Disciplinary Procedure allow for imposition of a sanction with no additional evidence, leaving it to the trial court's discretion whether to conduct an additional hearing. *See* TEX. R. DISC. P. 3.10 ("The trial court may, in its discretion, conduct a separate hearing and receive evidence as to the appropriate Sanctions to be imposed.").

mandatory upon finding of a violation – "the court shall determine the appropriate Sanction or Sanctions to be imposed."[160]

[160] *See* TEX. R. DISC. P. 3.09.

II. Judge Smith did not abuse his discretion by imposing a sanction of time served on suspension plus six months of probation.

Separate from arguing that the evidence was factually insufficient to support any sanction, Bennett argues that Judge Smith abused his discretion by imposing a sanction of two years and three days of active suspension plus six months of probation.[161] Although Bennett confuses the issue with various arguments discussed elsewhere,[162] the crux of Bennett's complaint is that lower penalties have been imposed on other attorneys who have violated Rule 3.02.

This Court has already rejected the comparative approach to the imposition of sanctions.[163] Nor do the Rules impose any sentencing guideline.[164] Rather, "the trial court has broad discretion to determine whether an attorney guilty of professional misconduct should be reprimanded, suspended, or disbarred."[165] "An appellate court should only reverse the trial court's decision if an abuse of discretion is shown."[166] "A court abuses its discretion only when it acts in an unreasonable and arbitrary manner,

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[161] *See* Bennett's Brief, pp. 79-81.

[162] *See, e.g.*, Bennett's Brief, p. 79 ("It should have found the evidence presented insufficient under Rule 3.10") (duplicative with Issue I); p. 81 ("None of the filings was sanctioned.") (rejected in *Bennett*, 489 S.W.3d at 70-71); p. 81 ("Moreover, at worst, the contract was ambiguous as to the right to appeal.") (rejected in *Bennett*, 489 S.W.3d at 69-70).

[163] *See Eureste*, 76 S.W.3d at 202 (upholding disbarment even though "Eureste cite[d] cases in which attorneys who committed allegedly more egregious conduct than Eureste received lighter sentences."); *see also Rocha*, 1996 WL 364823, at *10 (rejecting "Rocha's argument that his misconduct was not so egregious in light of actions taken by other attorneys in which lesser sanctions were imposed").

[164] *See* TEX. R. DISC. P. 1.06(Z) (enumerating possible sanctions); 3.10 (leaving determination of appropriate sanction to the trial court).

[165] *Kilpatrick*, 874 S.W.2d at 659.

[166] *Eureste*, 76 S.W.3d at 202.

or when it acts without reference to any guiding principles."[167]

Judge Smith expressly followed the guiding principles, namely the statutory factors to be considered when imposing a sanction.[168] Bennett cites two disciplinary cases in which a lower sanction was imposed, but in both cases, the trial court's determination of the appropriate sanction was unchanged.[169] Bennett also cites three discovery sanction cases, but it is uncertain what comparative use those cases would serve since license suspension or disbarment was not a possibility.[170]

In fact, Judge Smith could have imposed disbarment, as Judge Kelsey initially determined based on the same conduct.[171] The San Antonio Court of Appeals has held that disbarment is not an excessive remedy for unreasonable fee disputes with a former client "undertaken as a means of revenge."[172] That Court rejected the same comparative argument that Bennett makes here.[173] Instead, disbarment was upheld when the judgment reflected that each of the statutory factors was considered.[174]

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[167] *Id.*
[168] *See id.* ("We find that in imposing the sanctions, the trial court did not act in an unreasonable and arbitrary manner or without reference to any guiding principles. To the contrary, the record shows the trial court considered the relevant factors outlined in Texas Rule of Disciplinary Procedure 3.10.").
[169] *See Daves v. Comm'n For Lawyer Discipline*, 952 S.W.2d 573 (Tex. App.—Amarillo 1997, pet. denied) (not even challenging degree of sanction); *Favaloro v. Comm'n for Lawyer Discipline*, 13 S.W.3d 831, 841 (Tex. App.—Dallas 2000, no pet.) (sanction challenged by Commission).
[170] *See* Bennett's Brief, p. 80-81 (citing *In re Vossdale Townhouse Ass'n, Inc.*, 302 S.W.3d 890, 895 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *In re Terminix Int'l, Co.*, 131 S.W.3d 651, 654 (Tex. App.—Corpus Christi 2004, no pet.); *Graham v. Dallas Indep. Sch. Dist.*, No. 3:04-CV-2461-B, 2006 WL 507944, at *2-4 (N.D. Tex. Jan. 10, 2006)).
[171] *See* 5 RR1 174-76; CR1 70.
[172] *See Rocha*, 1996 WL 364823, at *1, 9.
[173] *See id.* at *9.
[174] *See id.*

Bennett has not shown that Judge Smith abused his discretion by imposing a sanction of time already served on active suspension plus six months of probation after considering the evidence and each of the statutory factors.[175] The active suspension had already been served, and Judge Smith could not alter the past. The six months of additional probation would have no effect on Bennett's practice unless he violated a rule in the meantime, and it appears that probation will have been successfully served by the time briefing in this case is completed. The sanction imposed was not so excessive as to amount to an abuse of discretion, even though Bennett would have this Court impose no sanction and wipe his disciplinary record clean.[176]

[175] *See* CR2 82 ("After considering the evidence, stipulations, and argument of counsel from the trial; the rulings made by Judge Kelsey; the Mandate issued by the 14th Court of Appeals; the argument of counsel from the May 24, 2017 hearing; and applicable law, specifically including the factors set forth in Rule 3.10 of the Texas Rules of Disciplinary Procedure for a court to consider in determining sanctions, ...")

[176] *See* Bennett's Brief, p. 84 (praying that this Court "(1) VACATE the lower court's judgment and (2) RENDER a judgment of no sanction.").

III. There is no evidence of "prosecutorial misconduct."

Finally, Bennett argues that the Commission engaged in prosecutorial misconduct.[177] Prosecutorial misconduct has no general test, but is rather examined on a case-by-case basis.[178] "When faced with issues of prosecutorial misconduct, "the ultimate aim of the process must be fundamental fairness.""[179]

At the outset, there are three procedural deficiencies with Bennett's argument. First, Bennett cites no authority in support of applying a prosecutorial misconduct standard when there is no prosecutor.[180] Second, Bennett's own authority states that if prosecutorial misconduct occurred he would be "entitled to a new trial"[181] – relief he has not requested. Third, Bennett failed to object on the basis of prosecutorial misconduct at trial.[182] And substantively, Bennett fares no better.

A. The Commission did not misquote the fee agreement.

Bennett argues that the first trial, before Judge Kelsey, "was tainted when Bersch misquoted the contract, making it seem like Bennett did not even have a good

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[177] *See* Bennett's Brief, pp. 81-83.
[178] *Stahl v. State*, 749 S.W.2d 826, 830-31 (Tex. Crim. App. 1988).
[179] *Benefield v. State*, 389 S.W.3d 564, 570-71 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd) (quoting *Ex parte Adams*, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989)).
[180] *Compare* Bennett's Brief, p. 82 ("Appellant understands that this is not a criminal case. But it is analogous to one, even if it is 'civil' in nature because it is punitive."), *with* TEX. R. DISC. P. 3.08(A) ("Disciplinary Actions are civil in nature.").
[181] *See* Bennett's Brief, p. 82 (quoting *Rogers v. State*, 725 S.W.2d 350, 359-60 (Tex. App.—Houston [1st Dist.] 1987, no pet.)).
[182] *See Manning v. State*, No. 14-16-00483-CR, 2017 WL 4018231, at *7 (Tex. App.—Houston [14th Dist.] Sept. 12, 2017, no pet. h.) ("The proper method of preserving error in cases of prosecutorial misconduct is by objecting on specific grounds, then by requesting an instruction to disregard, and then by moving for a mistrial.").

faith argument supporting appeal."[183] Bennett does not provide any citation or further argument, making it impossible to determine whether the contract was ever misquoted. Bennett also has not explained how any misquoting could not have been corrected, especially since the fee agreement was in evidence.[184]

It is possible that Bennett is referring not to any actual misquotation, but rather to the Commission offering an interpretation that the fee agreement waived his right to appeal. If so, the "prosecutorial misconduct" in offering that interpretation of the fee agreement could not have been erroneous, since this Court made a *de novo* determination that agreed with the Commission.[185]

B. The Commission was entitled to comment on the evidence at trial.

Bennett also argues that the Commission committed prosecutorial misconduct by commenting on his lack of remorse.[186] In particular, Bennett contends that: "In criminal cases, creating a false impression about lack of remorse in a closing argument has been ruled reversible error."[187] However, Bennett presents an incomplete picture of criminal law.

A prosecutor is only prohibited from commenting on a lack of remorse when it

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[183] *See* Bennett's Brief, p. 81.
[184] See PX 1 [6 RR1 elec. p. 2].
[185] *See Bennett*, 489 S.W.3d at 69 ("We conclude that Bennett's proposed construction of the Agreement is not reasonable for several reasons.").
[186] *See* Bennett's Brief, p. 82 ("Moreover, Bersch misrepresented that Bennett had never expressed remorse.").
[187] Bennett's Brief, p. 82.

implicates a defendant's Fifth Amendment right not to testify.[188] A prosecutor is free to comment based on the evidence presented at trial.[189] This freedom includes remarking on the defendant's remorse.[190] And Bennett certainly testified at trial.[191] Any comment by the Commission based on that testimony was not improper, much less reversible prosecutorial misconduct.

This is not the case for Texas courts to adopt a civil analogue to prosecutorial misconduct. Even if there was a compelling reason to do so, the procedural and substantive deficiencies here would prevent it from being effective because Bennett's trial was not fundamentally unfair.

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[188] *See Randolph*, 353 S.W.3d at 892 ("Similarly, a comment on the defendant's failure to show remorse is generally not proper if the defendant testifies at the guilt stage and presents some defense, but does not testify at the punishment phase."); *Snowden v. State*, 353 S.W.3d 815, 823-24 (Tex. Crim. App. 2011) ("Therefore, the prosecutor's remark about the appellant's lack of remorse in the courtroom was an objectionable comment on the appellant's failure to testify because it highlighted for the jury the appellant's failure to take the stand and claim present remorse."); *Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004) ("A comment by the prosecutor on a defendant's failure to show remorse can sometimes be a comment on his failure to testify.").

[189] *See Jordan v. State*, 646 S.W.2d 946, 948 (Tex. Crim. App. 1983) ("A prosecuting attorney is permitted in his argument to draw from the facts in evidence all inferences which are reasonable, fair, and legitimate, but he may not use jury argument to get before the jury, either directly or indirectly, evidence which is outside the record.").

[190] *See Snowden*, 353 S.W.3d at 824 (acknowledging "a legitimate argument that invited the jury to draw an inference of lack of remorse at the time of the offense, an inference that could reasonably be derived from the evidence at trial"); *Garcia*, 126 S.W.3d at 924 ("However, when such prosecutorial comments are supported by testimony presented to the jury during the trial, they are considered a proper summation of the evidence.").

[191] *See* Bennett's Brief, p. 20 ("Bennett called numerous witnesses and testified on his own behalf."); p. 57 ("This Court can recall that in the sanctions phase Bennett testified that he was well aware that he 'shouldn't do' what he had done").

Conclusion and Prayer

Accordingly, this Court should affirm the sanction imposed by the trial court. Bennett has failed to establish that his sanction was unsupported by the evidence, excessive, or obtained as a result of prosecutorial misconduct.

Respectfully submitted,

/s/ Robert M. (Randy) Roach, Jr.
Robert M. (Randy) Roach, Jr.
Special Assistant Disciplinary Counsel
Texas Bar No. 16969100
Daniel W. Davis
Special Assistant Disciplinary Counsel
Texas Bar No. 24040767
ROACH & NEWTON, LLP
One Westchase Center
10777 Westheimer, Suite 212
Houston, Texas 77042
(713) 652-2800
(713) 652-2029 (fax)
rroach@roachnewton.com
ddavis@roachnewton.com

Linda A. Acevedo
Chief Disciplinary Counsel
Texas Bar No. 00829825
Timothy R. Bersch
Assistant Disciplinary Counsel
Texas Bar No. 02254500
COMMISSION FOR LAWYER DISCIPLINE
4801 Woodway Drive, Suite 315-W
Houston, Texas 77056
(713) 758-8200
(713) 758-8292 (fax)
linda.acevedo@texasbar.com
tim.bersch@texasbar.com

Counsel for Commission for Lawyer Discipline

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/s/ Robert M. (Randy) Roach, Jr.
Robert M. (Randy) Roach, Jr.

Certificate of Service

On December 20, 2017, a copy of this brief was electronically served on Appellant:

Robert S. Bennett
Texas State Bar No. 02150500
BOB BENNETT
ATTORNEY AT LAW
405 Main St., Suite 310
Houston, Texas 77002
(713) 225-6000
(713) 225-6001 (fax)
bob@bennettlawfirm.com

Jeffrey D. Wagnon
WAGNON LAW GROUP, P.L.L.C.
Texas State Bar No. 20661600
504 E. 27th Street
Bryan, Texas 77803
(979) 450-0004
(888) 272-1590 (fax)
jeff@wagnonlaw.com

/s/ Robert M. (Randy) Roach, Jr.
Robert M. (Randy) Roach, Jr.