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BEFORE THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF:	)	
	)	CAUSE NO. 19S-DI-156
CURTIS T. HILL, JR.	)	

DISCIPLINARY COMMISSION'S RESPONSE TO RESPONDENT'S OBJECTION TO ITEMIZED STATEMENT OF COSTS

Comes now the Disciplinary Commission of the Indiana Supreme Court, by counsel, and submits its response to the Respondent's Objection to the Itemized Statement of Costs.

Public Not Financially Responsible for Respondent's Misconduct

Indiana Admission and Discipline Rule 23, Section 21(a) states:

> If the Supreme Court imposes discipline or other sanction, including a sanction for contempt, the Supreme Court may issue an order that the respondent pay the costs and expenses of the proceeding. The Executive Director shall prepare an itemized statement of expenses allocable to each case, including: (1) expenses incurred by the Disciplinary Commission in the course of an investigatory, hearing or review procedures under this Rule; (2) costs attributable to the services of the hearing officer; and (3) a fee of two hundred fifty dollars ($250) payable to the Supreme Court Clerk, as reimbursement for the processing of all papers in connection with the proceeding. Proceedings for the collection of the costs taxed against the respondent may be initiated by the Executive Director on the Supreme Court's order approving expenses and costs.

The purpose of the above rule is to make sure the person who engaged in misconduct bears the financial burden associated with such misconduct and that the public does not bear it. To the best of our knowledge, the actual costs and expenses have already been paid from Court funds.[1] Thus, any reduction to the obligation of the Respondent to reimburse those funds

[1] Disciplinary Commission costs are paid from funds produced by attorney registration fees. All other costs associated with the adjudication of attorney discipline are paid primarily from tax-payer derived funds.

automatically shifts the burden to the public and members of the Bar, contrary to the purpose of the rule.

The Proceedings

The gravamen of this disciplinary action is that Respondent engaged in conduct that constituted battery on four women. Respondent denied the conduct alleged by the victims. At no time during the investigation, the prehearing stage or during the adjudication did Respondent acknowledge the conduct as alleged or that his conduct constituted a violation of Rule 8.4(b) or 8.4(d) the Rules of Professional Conduct. Thus, the proof of such conduct was required to be placed before the Court through a full adjudication.

After hearing all of the evidence over a period of four days, the Hearing Officer determined by clear and convincing evidence Respondent committed the four acts of battery, that he retaliated against the victims, and that he refused to acknowledge the misconduct. The Court found the Respondent committed the multiple acts of battery and imposed a sanction against him.

As the volumes contained in the Court's records show, the investigation, discovery, case administration and adjudication were extensive and contested at every turn. Respondent made choices, as was his right to do, to challenge the allegations, but the fact he made such choices should not shift the burden of costs to the public. At any time, Respondent could have acknowledged his misconduct.

Respondent's Comparative Sanction Argument

Respondent argues that because the Commission sought a sanction (after the hearing) that was far greater than that ultimately issued, Respondent should pay only a fraction of the costs of the case. Without establishing any cause-and-effect between the costs incurred and the sanction

received, Respondent makes a mathematical calculation between the sanction suggested by the Commission in its post-hearing briefs and the Court's ultimate order of a 30-day suspension. Using numbers of days as the basis of the mathematical calculation, and adding 365 extra days as a reinstatement factor, Respondent claims that his sanction was only 2.7 % of what the Commission requested. Therefore, he asserts, the costs should be reduced.

The Respondent's premise is flawed for many reasons, not the least of which is that the sanction arguments were made after the hearing and had absolutely nothing to do with the costs incurred or the purpose of Admis.Disc.R. 23, Sec. 21. If Respondent's logic were followed, the taxing of costs would depend in large part on the Commission's ability to exactly predict the ultimate sanction in any case, which of course, is an impossibility. Thus, if the Commission were to guess wrong, according to Respondent's premise, and ask for a greater sanction than the court imposed, the public must bear the difference in percentage of days of sanction, which would render Admis.Disc.R. 23, Sec. 21 fairly meaningless.

Admis.Disc.R. 23, Sec. 21 does not create a taxing rule based upon the sanction imposed and does not contemplate some sliding scale based upon the arguments of the parties. The very idea that the burden of costs slides up and down based upon sanction arguments made to the Court is difficult to contemplate rationally and should be easily rejected. The taxing decision is made solely on whether there is a finding of misconduct. Since the misconduct of the Respondent was proved, he bears the burden of costs. No mathematical formula based on legal arguments to the Court is needed to make this determination.

False Premise

In an attempt to create a rationale that the arguments the parties made regarding sanction should somehow dictate how the costs are allocated, Respondent stated to the Court in his

objection that he would have resolved the case, but for the Commission's "extreme" sanction demand. At paragraph 11, he stated:

> It is simply impossible to achieve an agreed resolution in a discipline case when the Commission's posture on sanction is so extreme. A respondent finding himself in those circumstances faces a grim choice: acquiesce in the Commission's extreme position or contest the matter at a hearing. The respondent chose the latter option and in doing so obtained a result that was 2.7% of the sanction urged by the Commission to the Hearing Officer.

Respondent's statement that he made a decision to have a hearing based upon the Commission's sanction position is false and any implication that the Commission had provided Respondent a sanction position prior to the hearing is false. The Commission never discussed its sanction position with Respondent. The Commission had not formulated or expressed any sanction position until it submitted its post-hearing brief to the Hearing Officer, which was based upon its assessment of the complete record of evidence that had been presented.[2]

Any resolution contemplated by the parties is governed by Admis.Disc.R. 23, Sec. 12.1(b). A fundamental element of entering into such an agreed resolution is the requirement that a respondent admit the material allegations of fact and violations. Admis.Disc.R.23, Sec. 12.1(b)(3)(iii). In this case, Respondent had publicly denied the allegations he had engaged in offensive touching or grabbing of the four women, and the denial was made long before the Disciplinary Commission investigation began. Respondent denied the allegations in an investigation by the Inspector General, in his response to the Commission when its investigation began, in his answer to the Disciplinary Complaint, in the pretrial discovery, and during his testimony in the final hearing of this case. It would be wrong to assume the Commission would not have considered a less severe sanction for an agreement made before the hearing. Acceptance

[2] On October 21, 2020, the Commission sent an email to Respondent's counsel requesting that the false implication be corrected. Respondent's counsel informed the Commission the statement would not be changed.

of responsibility and admissions of the conduct are important factors in the consideration of an appropriate sanction. However, no settlement discussion ever occurred in which Respondent agreed to admit to those material allegations. Therefore, no agreement regarding those acts could have occurred. Since no agreement regarding the material facts as alleged in the Disciplinary Complaint was contemplated, no sanction regarding any such agreement was contemplated. Respondent's implied assertion that he would have entered into a Conditional Agreement (implying he would have then admitted the conduct he had otherwise continuously denied)) but for the Commission's sanction position is unsupportable.

Respondent's claim that he faced a "grim" choice because of any sanction position of the Commission and thus had to have a full adjudication is also unsupportable because he did not need the Commission's agreement to admit the charges or to argue for a particular sanction. Had he chosen to do so, Respondent could have submitted a "consent to discipline" under Admis.Disc.23, Sec. 17.1. However, as with Conditional Agreements, a consent to discipline also requires admissions of the material facts which, as we have already seen, Respondent denied over and over, including during his testimony at the final hearing.

Simply put, the costs of the matter were not increased because of pressure from the Disciplinary Commission, and the post-hearing arguments of the Commission regarding sanction had no bearing on the costs of matter. Respondent's decision to challenge the testimony of the victims and other witnesses was a voluntary choice and the public should not pay the bill simply because he made an unsuccessful decision.

Other Objections to Itemized Expenses

In his objection, Respondent asks that he not be taxed for certain expense items submitted by both the Commission and the Hearing Officer.

Commission's Expenses

The only part of the Commission's bill that Respondent objects to is an expense for two nights of hotel charges for October 20, 2019 and October 21, 2019. The hearing of this matter began on October 21, 2019. The hotel room charges were made because Commission counsel used the hotel rooms as a private and secure base for final preparation for its presentation of its case in chief, which greatly reduced the need for travel and other distractions. The use of such private setting facilitated last-minute witness consultation and other details that were necessary for the matter. Having a private and secure setting for such preparation was a reasonable expense, as were the deposition costs, travel for witnesses, and other costs associated with this entire case. Such expenses are normal and usual for large, complex presentations of evidence. That the Respondent would have chosen alternatives is not relevant to whether costs should be taxed to the Respondent, whose own actions caused the case to occur.

Hearing Officer Expenses

The vast majority of Respondent's objections to specific costs are related to time incurred by former Supreme Court Justice Hon. Myra Selby, the Hearing Officer in this case.

All Things Necessary

The Hearing Officer's responsibilities are set out in Admission and Discipline Rule 23, Section 13. Section 13(c)(4) provides, among other things, that the Hearing Officer shall "do all things necessary and proper to carry out their responsibilities under this Rule." In this case, the Hearing Officer dealt with legal challenges to the proceedings, administrative issues, logistics, discovery disputes, third party discovery, security issues and a myriad of other matters including the presentation of evidence, the analysis and deliberation of the facts and the law, the drafting of orders and, eventually, the final Hearing Officer's report. None of the Hearing Officer's time and

efforts would have occurred, nor those of the Commission, but for the fact that the Respondent, the Attorney General of the State, committed battery on four women, retaliated against them, attempted at every stage to stop the disciplinary proceedings, and refused to acknowledge his conduct. Thus, the costs associated with the case land squarely on the Respondent and no one else. Notwithstanding, Respondent objects to being taxed on the following:

- Motion to Quash

Respondent asserts that the 14 hours listed by the Hearing Officer in dealing with a motion to quash from the Inspector General should not be taxed to Respondent. Respondent admits in his objection that he issued a subpoena to the Inspector General to get evidence in this case. He admits the Inspector General moved to quash the subpoena. Respondent claims the motion to quash was without merit, but there is no specific finding that the motion was frivolous. It was simply denied after a hearing and briefing. The Inspector General argued that she had obligations of confidentiality and would not reveal certain information unless the Court directed her to do so. Ultimately, the Court made such an order. None of those procedures would have occurred but for the Respondent's conduct against the four victims. The actions of the Hearing Officer certainly were necessary and proper to carry out her responsibilities in the case and therefore, should be taxed pursuant to Admis.Disc.R 23, Section 21.

- Andrew Straw Motion to Intervene

The Hearing Officer billed 3.4 hours to deal with a motion to intervene filed by suspended attorney Andrew Straw. Although Straw had filed a grievance in the matter, he was neither a party nor a witness and had no official standing. However, Straw's motion could not have existed but for the fact of the Respondent having engaged in misconduct and the Hearing Officer certainly had to take necessary and proper steps in dealing with the matter.

Admis.Disc.R. 23, Sec. 21 contemplates the Respondent bear the costs associated with the necessary and proper expenses in the matter.

- Admis.Disc.R. 22

Respondent's assertion is that the time the Hearing Officer used to analyze or deal with the allegations surrounding Rule 22 should not be taxed to him because the Hearing Officer did not find such violation and the Commission did not challenge that conclusion. Respondent's argument misses the point. Counting the number of rule violations found to have been violated is not relevant to whether costs should be taxed. What matters is whether the Respondent engaged in misconduct and whether the costs were proper. Clearly the Hearing Officer had an obligation to deal with the issue and, since the Respondent engaged in misconduct, Admis.Disc.R. 23, Section 21 contemplates that he, and not the public, bear the costs.

- Ellen Pactor Consultation

The Hearing Officer billed 5.4 hours for consultation with an Ice Miller employee named Ellen Pactor. Respondent argues that the appointment of a Hearing Officer is a personal appointment and not an appointment of a firm. Admis.Disc.R. 23, Sec. 13(c)(4) grants the obligation or authority to the Hearing Officer to do all things "necessary and proper" to carry out her duties. If it was necessary for the Hearing Officer to consult with a colleague or others in order to take the appropriate action, including administrative tasks to perform their duty, then she would be fulfilling the provisions of Sec. 13(c)(4). We cannot expect Hearing Officers to operate in a vacuum. They may need assistance to prepare orders, do legal research or even seek expertise of others. Such acts are not only reasonable, but necessary for Hearing Officers to perform their duty. Unless Respondent has evidence that the consultation was wasteful or for some reason improper, the Hearing Officer's time should be taxed to the Respondent.

- Dealing with Media

Respondent asserts that the Hearing Officer's time in dealing with media-related issues is unwarranted and he should not be taxed for that time. In his argument, Respondent blames the victims for what he calls the "media circus." In fact, there was no "circus" because the Hearing Officer thoughtfully and carefully controlled the media in a way that maintained the integrity of the proceeding. The fact that there was public interest in this case had nothing to do with the acts of the victims. Rather, the public interest was due to the fact that the Attorney General of the State of Indiana was accused of (and later found to have committed) battery against four women.

One would expect and desire the public to have an interest in whether a lawyer in an elected official position had engaged in misconduct. Disciplinary proceedings are open to the public for that very reason. Thus, dealing with media issues was a necessary and proper responsibility and would not have occurred but for the misconduct of the Respondent. Therefore, the costs associated should be taxed to him and not to the public.

Commission's Position on Taxing Costs Related to This Case

As stated at the beginning of this response, the purpose of Admis.Disc.R. 23, Sec. 21 is to make sure that the costs associated with the investigation and adjudication of a discipline case are not borne by the public (or the Bar). Rather, they are to be borne by the person who engaged in the misconduct. Although there have been rare occasions when the Court has reduced the amount taxed to a respondent, those occasions were when significant misconduct was not found and that is certainly not the case here. First, the facts supporting the material allegations were proved and four counts of criminal battery by the Attorney General were significant violations of the rules. There were many factors that went into the Court's sanction determination, but none

of those factors suggest the misconduct was not significant or the Commission's decision to bring a disciplinary action was not the correct decision.

In addition, had the Respondent simply accepted responsibility for his improper actions as soon as they were known, the likelihood of significant Court resources or Hearing Officer time being expended would be very low. It is the Respondent's right to challenge the evidence and deny allegations. However, that choice was made knowing that if the evidence proved the allegations were true, which it did, the costs would be borne by the Respondent. The fact that choices are made that can have negative consequences is not a reason for shifting the financial burden of this case from the person who caused it to the public.

WHEREFORE,

The Commission submits for all the reasons stated that the Respondent should be taxed all charges set forth in the Itemized Statement and that no reduction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served via the Supreme Court e-filing system, this 23rd day of October 2020, upon:

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