

STATE OF MICHIGAN
IN THE SUPREME COURT

COMPLAINT AGAINST:

Hon. Theresa M. Brennan
_____ /

MSC Case No. 157930
Formal Complaint No. 99

MEMORANDUM REGARDING COSTS

On June 28, 2019, this Court removed respondent Hon. Theresa Brennan from the judiciary. The Court also stated:

On the basis of the intentional misrepresentations and misleading statements in respondent's written responses to the [Judicial Tenure Commission] and during her testimony at the public hearing, we find respondent liable under MCR 9.205(B), in an amount subject to review by this Court, for the costs, fees, and expenses incurred by the commission in prosecuting the complaint.

The Court ordered the Commission to submit an itemized bill of costs. Accompanying this memorandum is the Commission's bill itemizing costs in the total amount of \$35,501.68.¹

After canvassing the costs portion of the Court's prior judicial discipline cases, the Commission believes it may be helpful for the Court to discuss the standard for assessing costs, both to resolve this case and as guidance in future cases brought before the Court on a Commission recommendation.

Before 2005 there was no provision in the court rules for assessing costs in judicial discipline cases. The Court sometimes approved costs when agreed to by the parties or not disputed, but held that the lack of explicit authority precluded assessing costs when a challenge was raised. *In re Noecker*, 472 Mich 1, 14-16 (2005).

¹ This amount is slightly less than the costs on the itemization that accompanied the examiner's opposition to respondent's objections to the Commission's recommendation. The difference is because the current itemization omits witnesses to whom checks were issued who apparently chose not to cash them.

In 2005 the Court amended MCR 9.205(B) to provide for respondent judges to pay the costs of “prosecuting the complaint” if they make a false statement.² The language is plain that if a judge engages in deceit the judge may be liable for the costs of prosecuting the entire complaint.³ The respondent engaging in deceit is the trigger that authorizes the Court to award costs. The costs that may be awarded are the costs of “the complaint.”

It is significant that Rule 9.205(B) does not relate the scope of costs to the scope of the deceit. That is, nothing in its language suggests that if a judge engages in deceit, the judge may be assessed the costs that are attributable only to the deceit or to prosecuting the deceit. Rather, the rule clearly states that engaging in deceit triggers an obligation to pay the costs of prosecuting “the complaint,” without limitation.

Thus, it appears to the Commission that the legal landscape on this issue is that if the Court determines the respondent was dishonest, and decides in its discretion that costs should be awarded, then the costs associated with prosecuting the entire case should be awarded. In taking this position, it bears noting, the Commission is not suggesting that costs be viewed as any kind of a sanction. Rather, the request for costs is simply a recognition that there is an actual expense to the taxpayers of the State of Michigan to prosecute ethical violations involving deceit perpetrated by a respondent judge.

In its case review for this memorandum, the Commission identified that this Court has awarded costs in six judicial discipline cases since the provision at issue was added to MCR

² It is not readily apparent why the obligation to pay costs is triggered only by making a false statement, and not by any other form of misconduct.

³ MCR 9.205(B) states in pertinent part:

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the Commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the Commission, the Commission’s investigators, the master, or the Supreme Court.

9.205(B). The results in those cases, discussed below, are why the Commission suggested at the beginning of this brief that it may be helpful for the Court to provide some guidance with respect to application of the rule.

- 1) In *In re Nettles-Nickerson*, 481 Mich 321, 323 (2008), the Court awarded less than 10% of the costs of prosecuting the complaint. The opinion notes that fraud was the basis, and was established, for two of the ten counts of the complaint. The opinion does not delve into how the Court arrived at the total costs awarded, nor whether the fact that fraud was the subject of 20% of the counts factored in the decision to award 10% of the costs.
- 2) In *In re Justin*, 490 Mich 394, 425 (2012), the Court ordered the Commission to submit a bill of costs in which it itemized the portion of the costs that could be attributed to respondent Justin's statements or conduct that gave rise to the liability for payment of costs. *Justin* does not explain why, in light of the language of the court rule, the Court sought itemization only of those costs related to the conduct that gave rise to liability for costs, rather than all the costs of prosecuting the complaint. The Commission itemized approximately \$23,800 in costs related to the false statements in its bill of costs. The Court ultimately awarded 30% of the requested amount. The opinion does not explain how the Court arrived at the 30% figure.⁴
- 3) In *In re James*, 492 Mich 553, 570 (2012), the Court directed the Commission to file an itemization of the costs incurred in prosecuting "the complaint." The

⁴ Respondent Justin objected to the Commission's itemization on the basis that it overstated the costs that were due to the fraudulent conduct, and argued that the costs were actually no more than 30% of the amount claimed by the Commission. This argument may have been the basis for the result.

- Commission itemized approximately \$82,000 in costs. The Court awarded \$16,500. The opinion does not contain an analysis of how that award amount was determined.
- 4) In *In re Adams*, 494 Mich 162, 187 (2013), the complaint was based entirely on deceit and misrepresentation. The Court ordered respondent to pay costs of \$8,498.40. Because all the charges were based on deceit, the amount was 100% of both the costs of prosecuting the complaint and the costs attributable to prosecuting the false statements. Like the previous cases, *Adams* has no analysis of Rule 9.205(B).
 - 5) In *In re McCree*, 495 Mich 51, 87 (2014), the complaint charged that respondent committed various types of misconduct, some of which involved deceit. The Commission itemized costs of prosecuting the complaint (not merely the costs of prosecuting the deceit) in the amount of \$11,945.17. The Court assessed costs that were \$300 less than the itemized amount.⁵ Similar to the *James* opinion, the opinion does not contain an analysis of how that award amount was determined.
 - 6) In *In re Simpson*, 500 Mich 533, 572 (2017), the complaint charged respondent with three acts of misconduct, only one of which was misrepresentation. The Court ordered respondent to pay the full costs of prosecuting the complaint. Like the other cases identified above, there was no analysis as to how the amount of the cost award was arrived at.

⁵ The difference may be due to a typographical error. There is nothing obvious in the record that accounts for the \$300 discrepancy.

For the reasons stated above, the Commission believes the clear language of Rule 9.205(B) provides for assessing all costs related to the prosecution of the entire complaint. The Court's more recent cases – *Simpson* and *McCree* (for all practical purposes), and perhaps *Adams* –are examples of the Court awarding the costs associated with prosecution of the entire complaint. In contrast, the earlier cases appear not to have been governed by the language of the rule; rather, and without stating why, they deviated from it. Because those cases are inconsistent with the language of the rule, and offer no rationale for the inconsistency, the Commission believes they should not impact the analysis of allowable costs in this or future cases.

The attached itemization includes all such costs that the Commission has traditionally itemized.⁶ Because some of the Court's early costs precedents suggest it may be prudent to try to allocate costs between those attributed to respondent's deceit and those not so attributed, an attempt to do that follows.

First, it is important to note, the Commission would argue that it is somewhat arbitrary to apportion the costs of any complaint between prosecuting deceit and prosecuting whatever is the balance of the complaint. There are several reasons for this:

- Absent the deceit and its attendant (and typically severe) consequences, it is possible that the entire matter might have been resolved without a formal hearing, thereby obviating *all* costs. There is no way to measure the likelihood of that.
- One element of costs is the expense of producing witnesses, but the witnesses who prove deceit are often not single-purpose witnesses. They would have to be called even if deceit were the only charge; conversely, they would have to be called even if deceit were not an issue.

⁶ The text at p 8 of this memorandum further explains which costs are and are not included in the attached itemization.

- A main driver of the cost of prosecuting a complaint is the master's time. There is no way to measure the amount of extra time a hearing takes in order to establish deceit, because the witness examination that establishes deceit is typically part and parcel of the overall witness examination. Similarly, there is no way to divine how much of a master's time was due to evaluating and writing about deceit, as opposed to evaluating and writing about the case as a whole.
- Another main driver of the cost of prosecuting a complaint is the expense of transcript preparation. In an unusually simple case, it might be possible to separate the transcript that pertains to deceit from the transcript that pertains to everything else. This case was not such a case. Respondent's deceit permeated the entire case.
- A simple case may consist of only two issues – perhaps deceit and ex parte communication. Based on those two charges, one might say deceit is 50% of such a case. However, that conclusion is based only on the superficial fact that deceit is 50% of the charges. The superficial fact ignores that one of the issues may be complex and the other simple, in which case a 50/50 split would not be logical. Although the superficial approach is inadequate, it is very hard to determine, in any objective way, a more meaningful percentage of costs to attribute to each issue. The calculation then becomes even more uncertain in a case such as this one, which involves multiple issues of differing complexity.

For all of these reasons, the Commission suggests that except in rare cases the division of costs between proving deceit and proving everything else will be quite arbitrary. Quite apart from the language of Rule 9.205(B), the arbitrariness of apportioning costs is a strong reason not

to adopt apportionment as the standard, absent some compelling reason. The Commission suggests there is no such reason.

If the Court concludes that apportionment is ever appropriate, this is not the case in which to apportion because:

- Count XVI alleged that respondent destroyed evidence, so is clearly deceit-based.
- Count IV charged that respondent did not disqualify herself from her own divorce. Respondent made false statements about that on multiple occasions: at the time she failed to disqualify herself; during a divorce deposition a few weeks later; and during the Commission's investigation. Her failure to disqualify is a blend of deceit and other misconduct.
- Counts I and V concerned respondent's relationship with Sean Furlong. She was deceitful about several aspects of that relationship, both when it was first raised during the *Kowalski* trial and again when it was raised in the Commission's investigation. Establishing respondent's deceit required proving the relationship, which was essentially the same evidence that was required to prove that respondent had a relationship she should have disclosed during *Kowalski*.
- Count II concerned respondent's relationship with attorney Shari Pollesch. Respondent was deceitful about aspects of that relationship as well, both during a court proceeding and during the Commission's investigation. The relationship charges are a blend of deceit and other misconduct.
- Counts XIII (with three subparts), XIV (with two subparts), and XVII (with sixteen subparts), charged respondent with lying in various contexts, usually under oath. Those counts were clearly deceit-based.

- Counts XI and XII concerned respondent's use of her staff for personal errands and for campaign work. During the investigation respondent was deceitful about both. Proving respondent's deceit required proving the facts showing that respondent used her staff in this way.

As the examiner noted during oral argument, respondent's deceit permeated nearly every aspect of this proceeding. Sixteen of the twenty witnesses the examiner called were relevant to address it. The witnesses who were relevant to respondent's deceit tended to be the witnesses who were on the stand the longest. The only allegations in this case for which deceit was *not* a significant factor were Counts VII (improper conduct during depositions), IX and X (treating counsel with disrespect), and XV (persistent discourtesy toward others).⁷ With the caveat that any effort to apportion expenses between prosecuting respondent's deceit and prosecuting the non-deceit portion of the case is inherently and highly arbitrary, it is probably fair to say that it was necessary to prove at least 80% of the case in order to establish the deceit and pertinent context.

The Commission believes the Court's guidance would be helpful not only to decide whether apportionment is the standard under MCR 9.205(B), but also to define the scope of allowable "costs." Nothing in the rule defines the word. There is no judicial discipline corollary to MCR 9.128, which defines costs in attorney discipline proceedings.

The costs the examiner itemized to the Commission in this case, which were the costs the Commission approved, and which, for that reason, are the costs identified in the attached itemization, are only those the Commission has traditionally itemized: witness fees, transcript fees, the master's fees, and the fees for having an outside contractor convert exhibits into

⁷ Count seven required no witnesses and was very simple.

electronic form in accordance with preserving the record of the proceedings. Other than tradition, there was no reason to restrict the costs of prosecution to these items. The itemization does not include anything for the cost of staff travel to interview witnesses or the necessary and substantial cost of hiring outside counsel to advise the Commission once the formal complaint was filed. It does not include anything for the hundreds of hours of Commission staff time required to prosecute the complaint after it was filed. It also does not include anything for the costs of investigating the misconduct (permitted in attorney discipline proceedings under MCR 9.128(B)(2)); not the hundreds of hours of staff time required to investigate the allegations of misconduct that resulted in the complaint, nor the pre-complaint costs of travel and obtaining witness statements.⁸ The Commission points this out to make clear that the itemized costs are only a small fraction of the total actual cost of prosecuting the complaint, and to show why it might be helpful for the Court to define “costs” in the judicial discipline context to provide guidance in this and future cases.⁹

⁸ While it is true that the staff time invested in this case did not directly result in any increased salary expense, it is also true that working on respondent’s case incurred a huge opportunity cost. As a result of the time spent on this case, the staff was delayed in addressing many other cases that deserved investigation. The Commission staff is a scarce resource, and the opportunity cost makes clear that the time staff spend prosecuting a complaint is not somehow “free” to the Commission.

In addition, working on this case contributed, in significant part, to the backlog of cases that prompted the Commission to hire contract attorneys. Those contract attorneys *are* an additional expense necessitated in part by the time spent working on this case.

⁹ New MCR 9.202(B)), which takes effect on September 1, is identical to current MCR 9.205(B). Therefore, the Court’s guidance will remain helpful after the new rules take effect.

RELIEF REQUESTED

For the reasons stated in this brief, the Commission asks that the Court assess costs of prosecuting the complaint in the amount of \$35,501.68. Alternatively, if the Court determines that only those costs related to prosecuting deceit should be assessed, the Commission asks that the Court assess costs in the amount of \$28,000.¹⁰

Respectfully submitted,



HON. MONTE BURMEISTER
Chairperson
Judicial Tenure Commission

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Dated: July 23, 2019

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¹⁰ Eighty percent of the total cost of prosecuting the complaint is actually \$28,401.34. Since it is a somewhat of an estimate to say that 80% of the costs are attributable to proving deceit, it seems we should not seek 80% of total costs to the penny. The \$28,000 we request instead is intended to reflect that this is an approximation at best.