SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL COHEN, *et al.*	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action No.: 2018 CA 006284 M**
	:	**Judge Florence Y. Pan**
MEDSTAR WASHINGTON HOSPITAL CENTER	:	**Next Event: Close of Discovery**
	:	**Date: TBD**
	:	
Defendant.	:	
	:	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STRIKE DECLARATION OF PATRICK MALONE

MWHC's motion takes extreme and unfounded positions and should be denied for reasons set out below. This matter concerns what would be a reasonable monetary sanction to deter the pattern of discovery misconduct engaged in by defense counsel in this case, and thus case law involving non-punitive awards of attorney fees in statutory fee-shifting cases does not apply. The Malone declaration conservatively and fairly justifies the monetary sanction proposed here. The objections raised by defense counsel raise no substantial issues and should be overruled.

1. **There is no *per se* requirement of contemporaneous daily time records to support a discovery sanction of reasonable attorney fees.**

MWHC's counsel paints too broadly when they contend that "contemporaneous, complete time records are required to support an award of attorneys' fees," Motion at 1, and that therefore, "this Court cannot award the fees requested and should strike the Declaration in its entirety." Motion at 4, para. 6.

The cases do not support that as a hard-and-fast requirement, especially in the context of attorney fees as a discovery sanction in a case lacking a fee-shifting statute for the prevailing

party (such as civil rights and FOIA). Of the two D.C. Circuit cases cited by the defendant, *Weisberg v. Webster*, 242 U.S. App. D.C. 186, 749 F.2d 864 (1984) and *National Association of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319 (D.C. Cir. 1982), only *Weisberg* involved a discovery sanction, in favor of an in-house federal government attorney who won dismissal of a plaintiff's FOIA lawsuit as a discovery sanction. The appellate court's discussion of the fee affidavit of the government's trial counsel, Mr. LaHaie, made it clear that the government counsel's fee affidavit was based on reconstructed time records; the government's brief in the appeal, as quoted by the appeals court, made that plain. (And, of course, it's no surprise that an in-house government lawyer would not have hourly billing records.) The *Weisberg* court did NOT say that reconstructed time affidavits violate the rule from the *National Association of Concerned Veterans* case. The court remanded to the trial court for reconsideration because: "While all of this information is very helpful in deciding whether this documentation satisfies *Concerned Veterans*, unfortunately none of this was before the District Court." 749 F.2d at 873.

The case that preceded *Weisberg*, which MWHC relies on, *National Association of Concerned Veterans*, concerned fee-shifting statutes entitling the prevailing plaintiff to obtain fees from the losing defendant (FOIA and Title VII). That is completely different from the present context because counsel in a fee-shifting case know that attorneys' fees are awarded to the prevailing party and therefore maintain contemporaneous time records as a regular part of their practice. In the present context, plaintiffs' counsel is a personal injury attorney who works nearly always on a contingent fee basis, has no need for and does not anticipate needing contemporaneous time/billing records, and therefore does not maintain such.

The general rule is less sweeping and more nuanced than MWHC makes out. Contemporaneous daily time records are preferred, but when there are good reasons for not

having them, and when there are other indicia of reasonableness, there is no *per se* requirement of daily time records. In the following cases, courts have exercised their discretion to award attorney's fees without contemporaneous time sheets: *In re City of N.Y.*, No. CV-03-6049, 2011 U.S. Dist. LEXIS 152728, 63-71(E.D.N.Y. Dec. 2, 2011) (noting "the court should not deny [the attorney] any award by strictly applying the rule…his law practice is entirely devoted to personal injury work, an area of practice, where time records are rarely kept by plaintiff's counsel."); *Monaghan v. SZS 33 Assocs., Ltd. P'ship*, 154 F.R.D. 78, 83-85 (S.D.N.Y. 1994) (holding that, due to a contingency fee arrangement, the lack of contemporaneous time records was not unreasonable and it was within the court's equitable power to award attorney's fees); *Cates v. Chiang*, 213 Cal. App. 4th 791, 821 (2013) (stating that as long as there is adequate information to reach reasonable estimates of the work performed, the reconstruction of time records may be permissible); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 44 (2008) (holding that contemporaneous time records are not required and "[t]he court may award fees based on time estimates for attorneys who do not keep time records").

Closer to home, the D.C. Court of Appeals approved a reduction of fees sought by a prevailing tenants association in an administrative proceeding before the D.C. Rental Housing Commission. The case is *Hampton Courts Tenants Ass'n v. D.C. Rental Housing Commission,* 599 A.2d 1113 (D.C. 1991). In that case, the fee application from Hampton Courts contained several broad and vague entries, such as noted in footnote 12 of the opinion: "The entry claimed 40 hours of compensation for 'Research for Appellant's Brief of Motion for Summary Reversal,' without any more elaboration or description, and was simply dated 'February 21-17 [sic].' Likewise, the RHC noted a single entry for the period March 30-April 8, covering 30 hours described simply as drafting the brief and three motions." The court concluded, in words

directly applying to an administrative agency, but also relevant when the fee issue is before a court: "Since the question whether hours are unreasonably charged obviously depends on the individual facts of the case, the task of attending to each claimed category of hours is uniquely the agency's and the results of such review singularly within the ken and the discretion of the agency." 599 A.2d at 1117. In a later case, *Tenants of 710 Jefferson St. v. D.C. Rental Housing Comm.*, 123 A.3d 170 (D.C. 2015), the Court of Appeals approved use of the "Laffey Matrix" in setting reasonable hourly rates and held that the Housing Commission abused its discretion in reducing the hours requested by the Legal Aid Society, finding that the description of time spent was sufficiently detailed. *Id.*, 123 A.3d at 189 & n.25. Those time entries are comparable to Malone's in this case.

Another case showing there is no *per se* rule striking attorney fee requests for lack of contemporaneous time sheets comes from the U.S. Supreme Court. In a case that the D.C. Court of Appeals in *Hampton Roads* called "foundational" (599 A.2d at 1115), the Supreme Court reduced an attorney's fee award by 30 percent because of failure to keep contemporaneous time records and the attorney's inexperience. *Hensley v. Eckerhart*, 461 U.S. 424, 438 n. 13 (1983). But the high Court did not invoke the kind of sweeping *per se* requirement of daily billing records that MWHC seeks here. Rather, the rule is that it all depends on the facts of the case.

2. The Malone fee declaration was reasonable and conservative.

MWHC's motion to strike shows no awareness of the extent of its counsel's deposition misconduct that required a 45-page brief for the plaintiffs to place before this Court, with the time that writing such a brief necessarily required. Nor does it acknowledge the invalidity of the motion for protective order that it filed, argued and lost, leading the Court to offer to plaintiffs sanctions in the form of attorneys' fees and costs. MWHC now raises no challenge to plaintiff's

count that Ms. Deese uttered at least 38 speaking objections and 25 instructions not to answer. Instead, MWHC's first specific objection to the attorney fee declaration is that the brief had too many block quotations and that those duplicated the highlighted transcript and were thus unnecessary. (Motion at para. 7-a.) Yet comparison of the brief with the highlighted transcript will show that the brief contains only a small sampling of the many dozens of violations of the rules of deposition conduct, and that only in the annotated transcript attached as Exhibit 1 to the motion were the rule violations laid out in any comprehensive fashion. There was no time-wasting duplicativeness.

The second objection (Motion at para. 7-b) concerns alleged clerical work performed at lawyer hourly rates. Yet the Malone fee declaration made clear that he was seeking no fee at all for the work of his colleagues, only for his own work. Malone did no clerical work and seeks no fees for clerical work by staff.

Objection No. 3 (Motion at para. 7-c) complains about time spent obtaining comments from colleagues and the client. On such a substantial matter, the undersigned submits to the contrary that he would have been greatly remiss in not seeking the perspective of other experienced attorneys on the motion, not to mention his client Mr. Cohen, all of whom had valuable comments that helped improve the brief. Such is a regular part of the practice of law.

Objection No. 4 (Motion at para. 7-d) asserts that too much time was spent reviewing Dr. Jelinek's transcript. The objection combines time on two separate dates – Oct. 16 of 2.0 hours and Oct. 18 of 2.5 hours – and says the total time of 4.5 hours was too much for a 2.5-hour deposition. We disagree. A lot of that time was spent re-reading the transcript and sorting out the different rules violations that occurred.

Objection No. 5 (Motion at para. 7-e) makes various complaints about the time entry for the day the brief was filed, but doesn't speak to the actual description in the declaration, which was, "Oct. 31, 2019: 1.5 hours: Final proofreading, correlation of exhibits, check exhibit numbering." We stand by the description and the necessity for the time involved, which cannot be delegated to clerks who don't always understand the substance of the motion.

Objections Nos. 6 and 7 (Motion at para. 7-f and 7-g) concern videographer and transcript fees. Given the pervasive nature of defense counsel's misconduct, plaintiffs believe the entire amounts involved should be assessed against the defendant. Also, plaintiffs will incur the cost of video and stenographer fees for the re-do of the deposition, so there is no double-counting here.

Objection No. 8 (Motion at para. 7-h) mischaracterizes the entry for Oct. 15. The actual entry was: "Oct. 15, 2019: 2.5 hours: Read treatise on deposition misconduct, have law clerk pull cited caselaw, read key cases." The declaration sufficiently supports the time claimed. All cases discussed or quoted in our sanctions motion were read before inclusion in the brief.

Objection No. 9 (Motion at para. 7-i) jumps back in time to the June 12 entry of 1.0 hour for reading and outlining responsive points to the defendant's motion for protective order. MWHC contends the one hour is excessive because plaintiffs later filed an amended notice of deposition. The objection makes no sense and picks nits.

Objection No. 10 (Motion at para. 7-j) says all time for preparing the reply brief was "unreasonable and duplicative" of the opening brief. To the contrary, the reply brief is an important way of distilling the key issues in dispute on a motion. A total of six hours over three days was claimed, and is fully justified.

Objection No. 11 (Motion at para. 7-k) says no fee should be allowed for the estimated time of 2.5 hours to re-depose the 30(b)(6) witness and Dr. Hwang. The estimate is reasonable and should stand. In fact, this is an undercalculation, particularly when considering the amount of time that will go into preparing for the deposition. None of this time would be needed but for the misconduct of defense counsel.

Objection No. 12 (Motion at para. 7-l) cites the *Hampton Courts* case discussed above to contend that an "across the board" reduction should be made. The facts of that case are quite different, with, as noted, individual time entries of 40 hours in one instance and 30 hours in another and only a few general words of description of work done over multiple days.

Objection No. 13 (Motion at para. 7-m) says plaintiffs used the wrong hourly rate on the Laffey matrix. Defense counsel asks that the rate be stepped back to the 2018-2019 rate rather than the 2019-2020 rate. Defense counsel misreads the matrix. It says at the top that the years extend from June 1 to May 31. So the 2019-2020 column runs from June 1, 2019 to May 31, 2020. All of the time requested in this case occurred after June 1, 2019 and so the hourly rate requested of $637 is the right one.

The above discussion shows that the objections individually range from plainly wrong and frivolous to nitpicky and trivial. Taken together, do the objections amount to anything? We say no. Undersigned counsel stands by the concluding statement in paragraph 9 of his declaration: "I am certain that all the times set out here are conservative understatements of the actual time involved, and as described above, I left out all my staff's time."

The defendant's motion also is silent about the many items of Malone firm time necessitated by defendant's frivolous motion for protective order and its counsel's deposition misconduct that were not requested for reimbursement as part of a reasonable sanction. This

Court at the August 12 hearing said that attorney fees for the time spent opposing the motion for protective order were justified, yet the Malone declaration seeks only 3.75 hours for time in June and August on that motion, and omits the many hours required to prepare the 21-page brief that plaintiffs filed on June 25, 2019 opposing the motion, time that plaintiffs' counsel would be entitled to recover in the form of attorneys' fees if they so requested.

Opposing this motion to strike added still more hours, also not requested for reimbursement. Plaintiffs' counsel therefore has exercised very conservative "billing judgment" in omitting many hours from the fee request. But we stand by our request for a reasonable monetary sanction of $44,913.75 in addition to the other equitable relief spelled out in our proposed order, which the Court at the December 20 hearing said that it was prepared to sign.

3. Deterrence of discovery misconduct is an important reason for granting the requested monetary sanction.

MWHC's latest motion fits a pattern of litigation conduct that has wasted many hours of the Court's and opposing counsel's time. MWHC's counsel repeatedly takes extreme positions – in this motion, asking the Court to "strike the Declaration in its entirety" (Motion at 4 and proposed order), and in its original motion for protective order, seeking to bar any deposition at all of its spokesperson under Rule 30(b)(6). In various other motions, it has denied vociferously what it ultimately conceded, that whatever radiologist consulted by the surgeon Dr. Hwang was an employee of MWHC. The current motion also has a tone-deaf feature akin to much of defense counsel's argument at the December 20 hearing, in which, for example, she blamed plaintiff's counsel for the exchange early in Dr. Jelinek's deposition in which she interrupted a single innocuous question three times and then instructed the witness not to answer the question about how many radiologists were currently working in his department. (See motion for sanctions brief at pp. 32-34 which excerpts the relevant transcript.)

This continuing pattern shows that defense counsel doesn't appreciate the seriousness of her misconduct and deserves to be personally sanctioned to deter both her and other attorneys from being tempted to cross the line. *See Edwards v. Climate Conditioning Corp.,* 942 A.2d 1148 (D.C. 2008), where the court affirmed sanctions against a party's attorney and said:

> Discovery sanctions under Rule 37 (b) are intended to be punitive as well as compensatory and to serve as a general, as well as a specific, deterrent. Sanctions are levied to penalize the offending party, to prevent it from profiting by its misconduct, and to enforce compliance, as well as to compensate the injured party. Sanctions also are meant to deter other litigants from engaging in discovery abuses in other cases.

Id. at 1154. As this Court said at the August hearing, on the Court's philosophy of "rigorously enforcing" the fee-shifting provisions of Rule 37: "I have an institutional interest in doing so." (Aug. 12 hearing tr. at 30.)

Conclusion

The monetary sanction of $44,913.75 documented in the Malone declaration is conservative, reasonable and fully justified for imposition by the Court on defendant's counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2019 the foregoing was served on the following *via* the Court's electronic filing system:

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