

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 14-06

In the Matter of the Petition to Amend
Supreme Court Rules 22.001(2), 22.02(6)(c),
22.03(1), 22.25(3), and 22.25(4)

FILED

APR 21, 2016

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On December 15, 2014, the Office of Lawyer Regulation (OLR), by OLR Director Keith Sellen, filed a rule petition asking the court to amend Supreme Court Rules (SCRs) 22.001(2), 22.02(6)(c), 22.03(1), 22.25(3), and 22.25(4) to afford the OLR more discretion in disciplinary matters when deciding whether to initiate formal investigations and how to dispose of grievances upon completion of an investigation. The OLR states that the petition was proposed in response to concerns expressed by this court in recent opinions that the OLR should exercise more discretion in cases of de minimus violations.

The court discussed this petition at open rules conference on January 20, 2015, and a majority of the court voted to schedule a

hearing.¹ On July 7, 2015, letters were sent to interested persons, seeking input, and to the petitioner, seeking responses to questions raised at the court's preliminary discussion. The OLR filed its response on July 29, 2015. The court has received written comments from Attorney and Referee J. Nicholas Schweitzer, Attorney Dean Dietrich, Attorney Michael Apfeld, the State Bar of Wisconsin, and Attorney Colleen D. Ball.

The court conducted a public hearing on the petition on Monday, September 21, 2015. The court discussed the matter at its December 4, 2015 open administrative rules conference, and voted unanimously to adopt the petition in concept. The court directed staff to revise the proposal to reflect the court's discussions. The court specifically directed inclusion of a policy statement and adopted some but not all of the suggestions received from interested parties. A revised draft order was circulated to the court on January 12, 2016, and was adopted by email vote. Therefore,

IT IS ORDERED that 21.02(1) of the Supreme Court Rules is amended as follow:

21.02(1) The office of lawyer regulation consists of the director, investigative and support staff, and staff counsel and retained counsel. The office receives and responds to inquiries and grievances relating to attorneys licensed to practice law or practicing law in Wisconsin and, when appropriate, investigates

¹ Justice Ann Walsh Bradley and Justice Michael J. Gableman would consider the matter without a public hearing. Justice N. Patrick Crooks voted in favor of scheduling a public hearing, but stated that he would have preferred to seek written comment before doing so.

allegations of attorney misconduct or medical incapacity, and may divert a matter to an alternatives to discipline program. The office is responsible for the prosecution of disciplinary proceedings alleging attorney misconduct and proceedings alleging attorney medical incapacity and the investigation of license reinstatement petitions. The office has discretion whether to investigate and to prosecute de minimus violations. Discretion permits the office to prioritize resources on matters where there is harm and to complete them more promptly.

IT IS FURTHER ORDERED that 22.001(2) of the Supreme Court Rules, the definition of "cause to proceed," is amended to read:

22.001 **(2)** "Cause to proceed" means a reasonable belief based on a review of an investigative report that an attorney has engaged in misconduct that warrants discipline or has a medical incapacity that may be proved by clear, satisfactory and convincing evidence.

IT IS FURTHER ORDERED that a Comment to 22.001(2) of the Supreme Court Rules is created to read:

Comment

In exercising its discretion, the office of lawyer regulation considers factors such as the de minimus nature of a violation, whether the attorney acknowledges the violation, whether the violation caused harm, whether the attorney has remediated any harm, and whether the violation is part of a pattern of misconduct or is repeated misconduct.

IT IS FURTHER ORDERED that 22.02(6)(c) of the Supreme Court Rules is amended to read:

22.02 **(6)** (c) Commence an investigation when there is sufficient information to support ~~an allegation~~ a possible finding of ~~possible misconduct or medical incapacity~~ cause to proceed.

IT IS FURTHER ORDERED that 22.03(1) of the Supreme Court Rules is amended to read:

22.03 **(1)** The director shall investigate any grievance that presents sufficient information to support ~~an allegation~~ a possible finding of ~~possible misconduct~~ cause to proceed.

IT IS FURTHER ORDERED that 22.25(3) of the Supreme Court Rules is amended to read:

22.25 **(3)** If the special investigator determines that there is not sufficient information to support ~~an allegation~~ a possible finding of ~~possible misconduct~~ cause to proceed, the special investigator may close the matter. The special investigator shall notify the grievant in writing that the grievant may obtain review by the special preliminary review panel of the closure by submitting a written request to the special investigator. The request for review must be received by the special investigator within 30 days after the date of the letter notifying the grievant of the closure. The special investigator shall send the request for review to the special preliminary review panel consisting of 4 lawyers and 3 public members appointed by the supreme court and having a quorum of 4 members. Members of the special preliminary review panel serve staggered 3-year terms. A member may serve not more than 2 consecutive 3-year terms. Upon a timely request by the grievant for additional time, the special investigator shall report the request to the chairperson of the special preliminary review panel, who may extend the time for

submission of additional information relating to the request for review. If the panel affirms the investigator's determination, the special preliminary review panel shall inform the grievant. The panel's decision affirming closure of the matter is final. If the panel does not concur in the investigator's determination, it shall direct the investigator to initiate an investigation of the matter.

IT IS FURTHER ORDERED that 22.25(4) (intro.) of the Supreme Court Rules is amended to read:

22.25**(4)** (intro.) If the special investigator determines that the information provided is sufficient to support ~~an allegation~~ a possible finding of possible misconduct cause to proceed, the special investigator shall conduct an investigation of the matter. Upon completion of the investigation, the special investigator shall do one of the following:

IT IS FURTHER ORDERED that the effective date of this order is July 1, 2016.

IT IS FURTHER ORDERED that the Comment to SCR 22.001 (2) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 21st day of April, 2016.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*concurring*). I join the court in affording the Office of Lawyer Regulation discretion in performing its tasks. The very decision whether a violation has occurred and the decision whether, when, and how to proceed with or close a case require the exercise of discretion.

¶2 The Director of OLR unfortunately views his and the OLR's staff's discretion as limited at most levels of the disciplinary process. See John S. Gleason and Jerome E. Larkin's report, Consultation with the Wisconsin Office of Lawyer Regulation (OLR) (July 21-23, 2014), disagreeing with the Director regarding his interpretation of the rules regarding discretion.² Accordingly, the rules should be amended.

¶3 My concerns with the order are directed at the language of the amendments.

- I would hope that SCR 21.02(1) is not read to limit OLR's discretion to the investigation and prosecution of de minimis violations and "to prioritize resources on matters where there is harm."
- I wonder whether the numerous amendments substituting the phrase "a possible finding of cause to proceed" for the phrase "an allegation of possible misconduct or medical incapacity" and adding the phrase "that warrants discipline" to the definition of "cause to

² Available on the court's website at <https://www.wicourts.gov/courts/offices/docs/gleasonlarkininitiatives.pdf>.

proceed" convey to a reader that the purpose of the changes is to give the director and staff more discretion at every level of the disciplinary process. The commentators at the public hearing stated that they did not understand that the import of this new language is to expand OLR's discretion until the Director of the OLR explained the draft at the public hearing.

- I am bothered by some of the references to "investigative reports" in SCR chapters 21 and 22. An investigative report is not defined. References to an investigative report may create interpretation problems.

For example, amended SCR 22.02(6)(c) provides that the director commences an investigation "when there is sufficient information to support a possible finding of cause to proceed" (emphasis added). The phrase "cause to proceed" is defined in amended SCR 22.001(2) to mean "a reasonable belief based on the review of an investigative report that an attorney has engaged in misconduct that warrants discipline or has a medical incapacity that may be proved by clear, satisfactory and convincing evidence" (emphasis added).

The draft seems circular. The director begins an investigation when a possible finding of cause to

proceed exists. Cause to proceed is based on the review of an investigative report.

¶4 In any event, I would prefer the court take a good, hard look at the issues addressed in Rule Petition 14-06 as part of an overall objective study of the processes and procedures of the component parts of the lawyer regulatory system rather than adopt proposals for change in a piecemeal fashion (especially in light of what I see as possible drafting glitches).

¶5 I proposed such a study committee in Rule Petition 15-01. I recommended that the court create a committee to review the functioning of the component parts of the lawyer regulatory system and the Rules of Professional Conduct for Attorneys. The court dismissed the Petition as part of an inventive ruse, namely that it was not a proper subject for a rule petition.³

¶6 The dismissal of Rule Petition 15-01 does not necessarily end the prospects for the appointment of a Committee. As was noted at the court's November 16, 2015 open conference and in the order dismissing Rule Petition 15-01, the dismissal of Petition 15-01 does not preclude the court from appointing a committee to fulfill the objectives of Petition 15-01.

¶7 Unfortunately, however, decisions about whether a committee will be established and the composition, mission, and

³ For a fuller explanation, please read the order dismissing Rule Petition 15-01 and my dissent, available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=158416>.

functioning of any such committee will be made behind closed doors. Lawyer discipline is of great importance to the courts, to the lawyers of the state, and to the public. Discussion about changing the lawyer discipline system should, in my opinion, be held in public.

¶8 I write separately here not only to express my apprehensions about the text of the order but also to repeat my commitment to keep the bench, the bar, and the public informed as best I can about what progress (or lack thereof) is made in the creation of a committee to review the functioning of the component parts of the lawyer regulation system and the Rules of Professional Conduct for Attorneys. As of this date, no progress has been made.

¶9 For the reasons set forth, I write separately.

