

SCR 22.16 Proceedings before a referee.

(1) The referee has the powers of a judge trying a civil action and shall conduct the hearing as the trial of a civil action to the court. The rules of civil procedure and evidence shall be followed. The referee shall obtain the services of a court reporter to make a verbatim record of the proceedings, as provided in SCR 71.01 to 71.03.

(2) The hearing shall be held in the county of the respondent's principal office or, in the case of a non-resident attorney, in the county designated by the director. The referee, for cause, may designate a different location.

(3) Unless otherwise provided by law or in this chapter, the hearing before a referee and any paper filed in the proceeding is public.

(4) (a) If in the course of the proceeding the respondent claims to have a medical incapacity that makes the defense of the proceeding impossible, the referee shall conduct a hearing and make findings concerning whether a medical incapacity makes defense of the proceeding impossible. The referee may order the examination of the respondent by qualified medical or psychological experts.

(b) All papers, files, transcripts, communications, and proceedings on the issue of medical incapacity shall be confidential and shall remain confidential until the supreme court has issued an order suspending the attorney's license to practice law, or has otherwise authorized disclosure.

(c) If the referee finds no medical incapacity that would make the defense of the proceeding impossible, the referee shall proceed with the misconduct action.

(d) If the referee finds that a medical incapacity makes the defense of the proceeding impossible, the referee shall file a report promptly with the supreme court. If the court disapproves the referee's finding, the court shall direct the referee to proceed with the misconduct action. If the court approves the referee's finding, the court shall abate the misconduct proceeding and suspend the respondent's license to practice law for medical incapacity until the court orders reinstatement of the attorney's license under SCR 22.36. Upon reinstatement, the court shall direct the referee to proceed with the misconduct action.

(5) The office of lawyer regulation has the burden of demonstrating by clear, satisfactory and convincing evidence that the respondent has engaged in misconduct.

(6) Within 30 days after the conclusion of the hearing or the filing of the hearing transcript, whichever is later, the referee shall file with the supreme court a report setting forth findings of fact, conclusions of law regarding the respondent's misconduct, if any,

and a recommendation for dismissal of the proceeding or the imposition of specific discipline.

(7) The referee shall file with the supreme court a recommendation as to the assessment of reasonable costs within 10 days after the parties' submissions regarding assessment of costs.

Comment

The court's general policy regarding assessment of costs in lawyer disciplinary matters is set forth in SCR 22.24.

Procedures for filing the statement on costs and objecting to a statement on costs are set forth in SCR 22.24 (2).

If the respondent does not object to the statement of costs then the referee's recommendation regarding costs shall be filed within 10 days of the deadline for filing an objection. If an objection is filed the recommendation shall be filed within 10 days after receiving the OLR's reply to the objection.

SCR 22.24 Assessment of costs.

(1) The supreme court may assess against the respondent all or a portion of the costs of a disciplinary proceeding in which misconduct is found, a medical incapacity proceeding in which it finds a medical incapacity, or a reinstatement proceeding and may enter a judgment for costs. The director may assess all or a portion of the costs of an investigation when discipline is imposed under SCR 22.09. Costs are payable to the office of lawyer regulation.

(1m) The court's general policy is that upon a finding of misconduct it is appropriate to impose all costs, including the expenses of counsel for the office of lawyer regulation, upon the respondent. In some cases involving extraordinary circumstances the court may, in the exercise of its discretion, reduce the amount of costs imposed upon a respondent.¹ In exercising its discretion regarding the assessment of costs, the court will consider the statement of costs, any objection and reply, ~~submissions of the parties,~~ the recommendation of the referee, and all of the following:

- (a) The number of counts charged, contested, and proven.
- (b) The nature of the misconduct.
- (c) The level of discipline sought by the parties and recommended by the referee.
- (d) The respondent's cooperation with the disciplinary process.
- (e) Prior discipline, if any.
- (f) Other relevant circumstances.

(2) In seeking the assessment of costs by the supreme court, the director shall file in the court, with a copy to the referee and the respondent, a statement of costs within 20 days after the filing of the referee's report or a SCR 22.21 or 22.34 (10) stipulation, together with a recommendation ~~to the court~~ regarding the costs to be assessed against the respondent. If an appeal of the referee's report is filed or the supreme court orders briefs to be filed in response to the referee's report, a supplemental statement of costs and recommendation regarding the assessment of costs shall be filed within 14 days after the appeal is assigned for submission to the court or the briefs ordered by the court are filed. The recommendation should explain why the particular amount of costs is being sought.

The respondent may file an objection to the statement of costs and recommendation within 21 days after service of the statement of costs. A respondent who objects to a statement of costs must explain, with specificity, the reasons for the objection and must state what he or she considers to be a reasonable amount of costs. The objection may include relevant supporting documentation.

¹ The court voted on the specific language in this sentence on 10/18/10.

~~The office of lawyer regulation may reply within 11 days of receiving the objection. Objection to a statement of costs [which may include relevant supporting documentation] shall be filed by motion within 21 days after service of the statement of costs. A respondent who objects to a statement of costs must explain, with specificity, the reasons for the objection and must state what he or she considers to be a reasonable amount of costs. The office of lawyer regulation may reply within 11 days of receiving the objection.~~

In proceedings before a referee the referee shall make a recommendation to the court regarding costs. The referee should explain the recommendation addressing the factors set forth in SCR 22.24(1m). The referee shall consider the submissions of the parties and the record in the proceeding. No further discovery or hearing is authorized. [The director has the burden of establishing by clear, satisfactory and convincing evidence the costs to be assessed.]²

(3) Upon the assessment of costs by the supreme court, the clerk of the supreme court shall issue a judgment for costs and furnish a transcript of the judgment to the director. The transcript of the judgment may be filed and docketed in the office of the clerk of court in any county and shall have the same force and effect as judgments docketed pursuant to Wis. Stat. ss. 809.25 and 806.16 (1997-98).

² This language was contained in the State Bar's proposal but was not specifically voted on by the court. OLR expresses deep concern about this language, noting, inter alia that this burden is not reflected in other aspects of the OLR rule. The Supreme Court Commissioners recommend deleting this language from the proposed rules.