

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.

Nos. 19-06, 19-07, 19-08, 19-09, 19-10, 19-11, and 19-12

**In the Matter of Amending Supreme Court Rules
Pertaining to Attorney Disciplinary
Proceedings in Regard to Supreme Court
Rules, chapters 10, 20, 21, 22, and 31
(OLR Procedure Review Committee)**

FILED

JUN 30, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

In 2016, the Wisconsin Supreme Court established the Office of Lawyer Regulation (OLR) Procedure Review Committee ("Committee").¹ The Committee was charged with examining the OLR procedures and structure and reporting to this court recommendations intended to increase the efficiency, effectiveness, and fairness of the OLR process. On March 13, 2019, the Committee filed nine administrative rule petitions asking the court to amend certain Supreme Court Rules (SCR) in furtherance of the Committee's mission.

¹ The Honorable Gerald P. Ptacek was appointed as the Committee's chair. The Committee included: Attorney Michael Apfeld, Mr. Mark Baker, Attorney Rick Esenberg, Attorney Ed Hannan, Attorney Amy Jahnke, Attorney Terry Johnson, Attorney Catherine LaFleur, Attorney Frank Lo Coco, University of Wisconsin Law School Professor Marsha Mansfield, Attorney David Meany, Attorney Jennifer Nashold, Attorney Joseph Ranney, Attorney Rod Rogahn, Attorney Jacquelynn Rothstein, the Honorable Carrie Schneider, Attorney Paul Schwarzenbart, Attorney Christopher Sobic, the Honorable David Wambach, and the Honorable Michael Waterman.

In addition to the extensive work of the Committee, the court benefitted from comments and testimony offered at the public hearings by Attorney Michael Ablan; Attorney Michael B. Apfeld; Mr. Mark Baker; Attorney Donald J. Christl, Board of Administrative Oversight; Attorney Dean R. Dietrich, on his own behalf and on behalf of the State Bar of Wisconsin Board of Governors; Ms. Elizabeth Esser; Attorney Stephen E. Kravit; Attorney Joseph M. Russell, Chair, Board of Administrative Oversight; Dr. Majid Sarmadi; Attorney Paul W. Schwarzenbart; Attorney Raymond E. Schrank, II; Attorney John Nicholas Schweitzer; Attorney David C. Rashid; and the OLR Director, Keith Sellen.

Rule Petitions 19-04 and 19-05

On June 26, 2019, following a June 6, 2019 public hearing and a closed administrative rules conference, the court issued an order granting Rule Petition 19-04 (Referee Training).² S. Ct. Order 19-04, 2019 WI 77 (issued June 26, 2019, eff. Jan. 1, 2020). The court opted to hold Rule Petition 19-05 (Referee Authority) in abeyance until further order of the court. S. Ct. Order 19-05 (issued June 26, 2019).³

Rule Petitions 19-06 and 19-07

On September 16, 2019, at a closed administrative rules conference following a public hearing, the court approved, in part, Rule Petition

² The Referee Training Subcommittee was chaired by Attorney Jacquelynn Rothstein.

³ The Referee Authority Subcommittee was chaired by the Honorable Gerald Ptacek. The court will revisit rule petition 19-05 after it has had an opportunity to evaluate the work of the new referee panel established and trained pursuant to rule petition 19-04.

19-06 (Reinstatements)⁴ and Rule Petition 19-07 (OLR Confidentiality).⁵ S. Ct. Order 19-06 (issued Oct. 10, 2019); S. Ct. Order 19-07, (issued Oct. 10, 2019).

Rule Petitions 19-08, 19-09, 19-10

On October 29, 2019, at a closed administrative rules conference following a public hearing, the court voted to approve, in part, two more of the Committee's proposals: Rule Petition 19-08 (OLR Process)⁶ and Rule Petition 19-09 (Enforcement of Orders)⁷. S. Ct. Order 19-08 (issued Dec. 18, 2019); S. Ct. Order 19-09 (issued Dec. 18, 2019). The court voted to deny Rule Petition 19-10 (Permanent Revocation), but voted to add a comment to clarify that revocation under SCR 21.16 is not permanent in Wisconsin.⁸ S. Ct. Order 19-10 (issued Dec. 18, 2019, Ziegler, J., dissenting). A working draft of the amendments was posted to the court's rules website.

Rule Petitions 19-11 and 19-12

On December 9, 2019, at a closed administrative rules conference following a public hearing, the court approved, in part, the final two

⁴ The OLR Reinstatement Subcommittee was chaired by Attorney Jacquelynn Rothstein.

⁵ The OLR Confidentiality Subcommittee was chaired by Attorney Joseph Ranney.

⁶ The OLR Process Subcommittee was chaired by Professor Marsha Mansfield.

⁷ The OLR Enforcement Subcommittee was chaired by Attorney Paul Schwarzenbart.

⁸ The Permanent Revocation Subcommittee was chaired by Attorney Jacquelynn Rothstein.

rule petitions: Rule Petition 19-11 (OLR Charging Process)⁹ and Rule Petition 19-12 (Reporting Misconduct).¹⁰ S. Ct. Order 19-11 (issued Dec. 18, 2019); S. Ct. Order 19-12 (issued Dec. 18, 2019). An updated working draft of the amendments was posted to the court's rules website.

At several closed administrative rules conferences in the spring of 2020, the court resolved certain outstanding questions regarding the various petitions. Therefore,

IT IS ORDERED that effective January 1, 2021:

SECTION 1. Consistent with the court's decision in the matter of rule petition 19-06, a Comment to Supreme Court Rule 10.03(6m) is created to read:

WISCONSIN COMMENT

Costs regarding the petition for reinstatement under subsection (6m)(b) may be assessed against the petitioner, as provided in SCR 22.24.

SECTION 2. Consistent with the court's decision in the matter of rule petition 19-06, a Comment to Supreme Court Rule 10.03(7) is created to read:

WISCONSIN COMMENT

Costs regarding the petition for readmission under subsection (7)(b) may be assessed against the petitioner, as provided in SCR 22.24.

SECTION 3. Consistent with the court's decision in the matter of rule petition 19-12, Supreme Court Rule 20:1.8(h)(3) is amended to read:

⁹ The OLR Charging Process Subcommittee was chaired by Attorney Paul Schwarzenbart.

¹⁰ The OLR Reporting Misconduct Subcommittee was chaired by the Honorable Gerald Ptacek.

(3) make an agreement limiting ~~the client's~~ a person's right to report the lawyer's conduct to disciplinary authorities.

SECTION 4. Consistent with the court's decision in the matter of rule petition 19-12, the Comment to Supreme Court Rule 20:1.8(h) (3) is amended to read:

WISCONSIN COMMENT

This rule differs from the Model Rule in four respects. Paragraph (c) incorporates the decisions in *State v. Collentine*, 39 Wis. 2d 325, 159 N.W.2d 50 (1968), and *State v. Beaudry*, 53 Wis. 2d 148, 191 N.W.2d 842 (1971). Paragraph (f) adds a reference to an attorney retained at government expense and retains the "insurance defense" exception from prior Wisconsin law. But see SCR 20:1.2(e). Paragraph (h) prohibits a lawyer from making an agreement limiting ~~the client's~~ a person's right to report the lawyer's conduct to disciplinary authorities. Paragraph (j) (2) includes language from ABA Comment [19].

SECTION 5. Consistent with the court's decision in the matter of rule petition 19-12, the Comment to Supreme Court Rule 20:8.3 is amended to read:

WISCONSIN COMMENT

The change from "having knowledge" to "who knows" in SCR 20:8.3(a) and (b) reflects the adoption of the language used in the ABA Model Rule. See also SCR 20:1.0(g) defining "knows." The requirement under paragraph (c) that the lawyer consult with the client is not expressly included in the Model Rule. A lawyer who consults with a client pursuant to subsection (c) should not discourage a client from consenting to reporting a violation unless the lawyer believes there is a reasonable possibility that it would compromise the attorney-client privilege or

otherwise prejudice the client. Lawyers should also be mindful of the obligation not to use the threat of a report as a bargaining chip (see Wisconsin Ethics Opinion E-01-01) and the obligation not to seek to contractually limit a person from reporting professional misconduct. See SCR 20:1.8(h) (3).

SECTION 6. Consistent with the court's decision in the matter of rule petition 19-08, Supreme Court Rule 21.01(1) (bg) is created to read:

(1) (bg) Special investigators and the special preliminary review panel, provided in SCR 22.25.

SECTION 7. Consistent with the court's decision in the matter of rule petition 19-07, Supreme Court Rule 21.18(1) is amended to read:

(1) Information, an inquiry, or a grievance concerning the conduct of an attorney shall be communicated to the director within ~~10~~ six years after the person communicating the information, inquiry or grievance knew or reasonably should have known of the conduct, whichever is ~~later~~ earlier, or shall be barred from proceedings under this chapter and SCR chapter 22.

SECTION 8. Consistent with the court's decision in the matter of rule petition 19-07, Supreme Court Rule 21.18(2) is amended to read:

(2) The time during which a person who knew or should have known of the attorney's conduct is under a disability as provided in Wis. Stat. § 893.16 ~~(1997-98)~~ and the time during which the attorney acted to conceal the conduct from or mislead the person who knew or should have known of the conduct regarding the conduct are not part of the time specified in sub. (1).

SECTION 9. Consistent with the court's decision in the matter of rule petition 19-07, Supreme Court Rule 21.19 is amended to read:

SCR 21.19 Privileges, immunity. Communications with the director, staff of the office of lawyer regulation, a district committee, a special investigator, retained counsel, the preliminary review committee, and a special preliminary review panel alleging attorney misconduct or medical incapacity and testimony given in an investigation or proceeding under SCR ch. 22 are privileged, except as provided under SCRs 22.03, 22.21, 22.34 and 22.40. No lawsuit predicated on ~~these communications~~ any privileged or non-privileged communications referenced in this section may be instituted against any grievant or witness. The director, staff of the office of lawyer regulation, members of a district committee, special investigators, retained counsel, members of the preliminary review committee, members of a special preliminary review panel, referees, members of the board of administrative oversight, and persons designated by the director to monitor compliance with diversion agreements or with conditions imposed on the attorney's practice of law, shall be immune from suit for any conduct in the course of their official duties.

SECTION 10. Consistent with the court's decision in the matter of rule petition 19-08, Supreme Court Rule 22.02(2)(d) is amended to read:

(2)(d) Refer the matter to the director with a recommendation that the matter be investigated by staff, ~~or diverted,~~ or resolved by a consensual reprimand.

SECTION 11. Consistent with the court's decision in the matter of rule petition 19-11, Supreme Court Rule 22.02(4) is amended to read:

(4) The staff shall notify the grievant in writing that the grievant may obtain review by the director of the staff's closure of a matter under sub. (2)(c) by submitting to the director a written

request. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the closure. The director may, upon a timely request by the grievant for additional time, extend the time for submission of additional information relating to the request for review. If the director affirms the closure, the director shall provide to the grievant a brief written statement of reasons for affirmation. The decision of the director affirming the closure or referring the matter to staff for further evaluation is final, and there shall be no review of the director's decision.

SECTION 12. Consistent with the court's decision in the matter of rule petition 19-11, Supreme Court Rule 22.02(6)(a) is amended to read:

(6)(a) Close the matter for lack of an allegation of possible misconduct or medical incapacity or lack of sufficient information of cause to proceed. The director shall ~~notify~~ provide to the grievant written notice of the decision to close, accompanied by a brief written statement of reasons for the director's decision. The notice shall inform the grievant ~~in writing~~ that the grievant may obtain review by a preliminary review panel of the director's closure by submitting a written request to the director. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the closure. The director shall send the request for review to the chairperson of the preliminary review committee, who shall assign it to a preliminary review panel. Upon a timely request by the grievant for additional time, the director shall report the request to the chairperson of the preliminary review

committee, who may extend the time for submission of additional information relating to the request for review.

SECTION 13. Consistent with the court's decisions in the matter of rule petitions 19-08 and 19-11, Supreme Court Rule 22.02(6)(d) is created to read:

(6)(d) Obtain the respondent's consent to the imposition of a public or private reprimand and proceed under SCR 22.09.

SECTION 14. Consistent with the court's decision in the matter of rule petition 19-08, Supreme Court Rule 22.03(4) is repealed and recreated to read:

(4)(a) If respondent fails fully and fairly to disclose all facts and circumstances pertaining to the alleged misconduct within the deadline established pursuant to par. (2), including any extension granted by the director or special investigator, or fails to cooperate in other respects with an investigation, the director or special investigator shall notify respondent by personal service that respondent's license to practice law will be automatically suspended unless, within 20 days after receiving such personal service, respondent:

1. Fully and fairly discloses all facts and circumstances pertaining to the alleged misconduct or otherwise cooperates with the investigation, to the reasonable satisfaction of the director or special investigator; or,

2. Submits evidence to the director or special investigator demonstrating, to the reasonable satisfaction of the director or special investigator, respondent's inability to disclose the facts and circumstances or otherwise cooperate with the investigation; or,

3. Files a motion with the supreme court showing cause why respondent's license to practice should not be suspended for willful failure to respond or cooperate with the investigation.

(b)1. If respondent satisfies the condition of par. (a) 1., the director or special investigator shall proceed with the investigation.

2. If respondent satisfies the condition of par. (a) 2., the director or special investigator may establish a new deadline for respondent to disclose fully and fairly all facts and circumstances or otherwise cooperate with the investigation. If respondent fails to disclose fully and fairly all facts and circumstances or otherwise cooperate with the investigation, to the reasonable satisfaction of the director or special investigator, before expiration of the deadline established pursuant to this par. 2, respondent's license to practice law is automatically suspended.

3. If respondent files a motion with the supreme court pursuant to par. (a) 3., the supreme court shall act upon respondent's motion, following its own procedures. All papers, files, transcripts, communications, and proceedings on the motion are confidential until the supreme court has acted upon the motion. If the supreme court grants respondent's motion, the record shall remain confidential. If the supreme court denies respondent's motion, the record shall become public information unless the supreme court, upon its discretion and for cause shown, directs otherwise.

(c)1. If respondent fails to satisfy any of par. (a) 1., 2., or 3., or fails to meet a deadline established pursuant to par. (b) 2., or if the supreme court rejects respondent's motion submitted pursuant to par. (b) 3., respondent's license is suspended and the director shall

promptly notify the state bar of Wisconsin, and all judges in the state of the suspension.

2. SCR 22.26(2) applies immediately upon suspension to a respondent whose license to practice law is suspended pursuant to this rule. If respondent's suspension hereunder extends beyond 30 days, SCR 22.26 in its entirety applies to the respondent beginning on the 31st day.

(d)1. Notwithstanding SCR 22.28, if, within 18 months of the date of suspension pursuant to SCR 22.03(4), a respondent whose license was suspended for failure to satisfy a condition of par. (a) 1. to 3., or failure to meet a deadline established pursuant to par. (b) 2., discloses fully and fairly all facts and circumstances pertaining to the alleged misconduct, or otherwise cooperates with the investigation, to the reasonable satisfaction of the director or special investigator, respondent's license to practice law shall be automatically reinstated. Upon reinstatement of a license pursuant to this subsection, the director or special investigator shall promptly notify all judges in the state of such reinstatement.

2. Respondent, following suspension of respondent's license pursuant to par. (4) and whose license was not automatically reinstated pursuant to par. (d) 1. above, may apply for reinstatement pursuant to SCR 22.28(3).

SECTION 15. Consistent with the court's decision in the matter of rule petition 19-07, Supreme Court Rule 22.03(5)(c) is created to read:

(5)(c) The director may, in the director's discretion, provide the respondent a copy of the grievance and of any information supplied by

the grievant that is not included in the grievance. In exercising such discretion, the director shall consider:

1. The grievant's interest in privacy.

2. The respondent's interest in being fully informed of the basis for the grievance and of any proceedings taken against him or her pursuant to the grievance.

3. Any effect that supplying or withholding a copy of the grievance and information supplied by the grievant may have upon the public interest.

SECTION 16. Supreme Court Rule 22.03(6) is amended to correct a typographical error to read:

(6) In the course of the investigation, the respondent's willful failure to provide relevant information, to answer questions fully, or to furnish documents and the respondent's misrepresentation in a disclosure are misconduct, regardless of the merits of the matters asserted in the grievance.

SECTION 17. Consistent with the court's decision in the matter of rule petition 19-11, Supreme Court Rule 22.05(1)(e) is created to read:

(1)(e) With the mutual consent of the attorney and the director to waive presentation of the matter to the preliminary review committee, proceed in any manner authorized by SCR 22.08(2).

SECTION 18. Consistent with the court's decision in the matter of rule petition 19-11, Supreme Court Rule 22.05(2) is amended to read:

(2) The If the director dismisses the matter under sub. (1), the director shall ~~notify~~ provide to the grievant ~~in writing~~ written notice of the decision to dismiss, accompanied by a brief written statement of reasons for the director's decision. The notice shall inform the

grievant that the grievant may obtain review by a preliminary review panel of the director's dismissal of a matter under sub. (1) by submitting to the director a written request. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the dismissal. The director shall send the request to the chairperson of the preliminary review committee, who shall assign it to a preliminary review panel. Upon a timely request by the grievant for additional time, the director shall report the request to the chairperson of the preliminary review committee, who may extend the time for submission of additional information relating to the request for review.

SECTION 19. Consistent with the court's decision in a closed administrative rules conference on January 22, 2020, Supreme Court Rule 22.09(2) is amended to read:

(2) The director shall request the appointment of a referee by providing in confidence to the clerk of the supreme court the names of the grievant and respondent, the address of the respondent's principal office, and the date of the consent agreement. ~~The clerk or deputy clerk of the supreme court shall select an~~ available referee shall be selected from the panel provided in SCR 21.08, based on the location of the respondent's principal office. The chief justice or, in his or her absence, the chief justice's delegee shall appoint the referee ~~selected by the clerk or deputy clerk~~. The director shall submit the agreement, accompanied by the respondent's public and private disciplinary history, to the appointed referee for review and approval. The director shall send a copy of the agreement to the grievant. The grievant may submit a written response to the director within 30 days after being

notified of the agreement, and the director shall submit the response to the referee. The respondent and the director may submit comments to the referee regarding the grievant's response. The agreement, the grievant's response, and the comments of the respondent and director shall be considered by the referee in confidence.

SECTION 20. Consistent with the court's decision on rule petition 19-11, Supreme Court Rule 22.10(4) is amended to read:

(4) *Diversion agreement.* If the attorney agrees to diversion to an alternatives to discipline program, the terms of the diversion shall be set forth in a written agreement between the attorney and the director. The agreement shall specify the program to which the attorney is diverted, the general purpose of the diversion, the manner in which the attorney's compliance with the program is to be monitored, and the requirement, if any, for payment of restitution or costs. ~~If the diversion agreement is entered into after the director has reported the matter to the preliminary review committee, pursuant to SCR 22.06(1), the agreement shall be submitted for approval to the preliminary review panel to which the matter has been assigned. If the preliminary review panel rejects the agreement, the matter shall proceed as otherwise provided in this chapter.~~

SECTION 21. Consistent with the court's decision on rule petition 19-11, Supreme Court Rule 22.10(7) is amended to read:

(7) *Breach of a diversion agreement.* ~~(a)~~ If the director has reason to believe that the attorney has breached a diversion agreement entered into prior to a report of the matter to the preliminary review committee, pursuant to SCR 22.06(1), the attorney shall be given the opportunity to respond, and the director parties may modify the

diversion agreement or the director may, in the director's sole discretion, terminate the diversion agreement and proceed with the matter as otherwise provided in this chapter.

SECTION 22. Consistent with the court's decision on rule petition 19-11, Supreme Court Rule 22.10(7)(b) and (c) are repealed.

SECTION 23. Consistent with the court's decision on rule petition 19-11, Supreme Court Rule 22.11(2) is renumbered 22.11(2)(a) and amended to read:

(2)(a) The ~~Except as provided in sub. (b) or (c), the~~ complaint shall set forth only those facts and misconduct allegations for which the preliminary review panel determined there was cause to proceed. and The complaint may set forth the discipline or other disposition sought. ~~Facts and misconduct allegations arising under SCR 22.20 and SCR 22.22 may be set forth in a complaint without a preliminary review panel finding of cause to proceed.~~

SECTION 24. Consistent with the court's decision on rule petition 19-11, SCR 22.11(2)(b) and (c) are created to read:

(b) A complaint may set forth facts and misconduct allegations arising under SCR 22.20 and SCR 22.22 without a preliminary review panel finding of cause to proceed.

(c) A complaint may set forth facts and misconduct allegations without a preliminary review panel finding of cause to proceed if presentation to the preliminary review committee is waived under SCR 22.05(1)(e).

SECTION 25. Consistent with the court's decision on rule petition 19-06, Supreme Court Rule 22.12(1) is amended to read:

(1) The director may file with the complaint a stipulation of the director and the respondent to the facts, conclusions of law regarding misconduct, and discipline to be imposed, together with a memorandum in support of the stipulation. The respondent may file a response to the director's memorandum within 14 days of the date of filing of the stipulation. The supreme court may consider the complaint and stipulation without the appointment of a referee, in which case the supreme court may approve the stipulation, reject the stipulation, or direct the parties to consider specific modifications to the stipulation.

SECTION 26. Consistent with the court's decision in a closed administrative rules conference on January 22, 2020, Supreme Court Rule 22.13(3) is amended to read:

(3) Except as provided in SCR 22.12, upon receipt of proof of service of the complaint, ~~the clerk or deputy clerk of the supreme court shall select~~ an available referee shall be selected from the panel provided in SCR 21.08, based on the location of the respondent's principal office. The chief justice or, in his or her absence, the chief justice's delegee shall issue an order appointing the referee ~~selected by the clerk or deputy clerk~~ to conduct a hearing on the complaint.

SECTION 27. Consistent with an amendment to Supreme Court Rule, Chapter 71, S. Ct. Order 19-01, 2019 WI 44 (issued April 22, 2019, eff. July 1, 2019), Supreme Court Rule 22.16(1) is amended to read:

(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~~ Chapter 71.

SECTION 28. A Comment to Supreme Court Rule 22.16 is created to read:

COMMENT

Wis. Stat. ch. 785 defines "contempt" and provides that a "court of record" may find a person in contempt and impose sanctions. A referee presiding over a lawyer disciplinary proceeding is not a "court of record." See also *In re Disciplinary Proceedings Against Strasburg*, 217 Wis. 2d 318, 577 N.W.2d 1 (1998) (setting forth procedure to address contempt scenario in disciplinary proceeding).

SECTION 29. Consistent with the court's decision on rule petition 19-09, Supreme Court Rule 22.185 is created to read:

SCR 22.185 Enforcement of Disciplinary Orders.

(1) The supreme court, on its own motion, upon the motion of the director, or upon the motion of a special investigator acting under SCR 22.25 filed in the disciplinary proceeding in which an order was issued, may enforce any disciplinary order where the respondent has failed to substantially comply with the order.

(2) Upon filing of a motion under sub. (1), the supreme court may order the respondent to show cause why the relief requested in the motion should not be granted. Within the time set forth in the order, the respondent shall have the right to file with the supreme court a written response to the order to show cause, and respondent shall serve a copy of such response on the director, or special investigator. The

director, or special investigator, may file a reply memorandum within 10 days after filing of the response.

(3) The supreme court may decide the motion upon the submissions of the parties, or may refer the matter to the referee appointed in the proceeding, who shall promptly conduct a hearing and file a report with the supreme court containing findings of fact, conclusions of law, and a recommendation for disposition of the motion. Unless otherwise directed by the supreme court, the referee shall follow the procedures in SCR 22.15 and SCR 22.16, and may conduct the hearing by telephone. A report issued by the referee is reviewable under SCR 22.17.

(4) Upon the submissions of the parties, or upon receipt of the report of the referee, the supreme court shall decide the motion, and may either deny or dismiss the motion, or issue such orders as are necessary to enforce the order.

(5) Nothing in this rule shall:

(a) Limit the authority of the director, or a special investigator, to initiate an investigation or proceeding for misconduct or medical incapacity under these rules.

(b) Limit the constitutional, statutory, or inherent authority of the supreme court to enforce an order issued in a disciplinary proceeding.

SECTION 30. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.21(2) is amended to read:

(2) Before entering an order suspending an attorney's license under sub. (1), the supreme court shall order the attorney to show cause why the license to practice law should not be suspended temporarily. The attorney shall file with the supreme court a written response to

the order and serve a copy of the response on the director within the time set forth in the order. The director, or special investigator acting under SCR 22.25, may file a memorandum in support of or in opposition to the temporary license suspension within 10 days after the attorney's response is filed. ~~All~~ Except as provided in sub. (2m) and (3), SCRs 22.03, 22.34 and 22.40, all papers, files, transcripts, communications, and proceedings, including those pertaining to investigations, shall be confidential and shall remain are confidential until the supreme court has issued an order to show cause.

SECTION 31. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.21(2m) is created to read:

(2m) Following the issuance of the order to show cause under sub. (2), the motion under sub. (1), and the order to show cause are public information, except as follows:

(a) The name of the special investigator or any person alleging that the attorney committed an act of misconduct.

(b) Medical information regarding the attorney who is the subject of the order to show cause.

(c) Financial information regarding the attorney who is the subject of the order to show cause, or of any person alleging the attorney committed an act of misconduct, if the financial information is unrelated to the order to show cause.

(d) Information that is subject to legal privilege, including the attorney-client privilege, unless such privilege is waived in writing by the person or persons holding such privilege.

(e) As otherwise expressly provided in this chapter or by law or by order of the supreme court.

SECTION 32. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.21(3) is amended to read:

(3) *Filing of complaint.* The director, or a special investigator acting under SCR 22.25, shall file the complaint in the disciplinary proceeding within 4 months of the effective date of the temporary suspension imposed under this section, or shall show cause why the temporary suspension should continue. The respondent attorney may file a response with the supreme court within 10 days of service. The statement of cause to continue the temporary suspension and the attorney's response are public information, subject to the same exceptions set forth in sub. (2m) (a) to (e). Reinstatement under this section shall not terminate any misconduct investigation or disciplinary proceeding pending against the attorney.

SECTION 33. Supreme Court Rule 22.23(2) is amended to read:

(2) The director shall send notice of a public reprimand or a license suspension or revocation to the state bar of Wisconsin ~~and to a newspaper of general circulation in each county in which the attorney maintained an office for the practice of law.~~

SECTION 34. Consistent with the court's decision on rule petition 19-09, Supreme Court Rule 22.24(1) is amended to read:

(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,~~ or a motion to enforce an order issued in a disciplinary 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.

SECTION 35. Consistent with the court's decision on rule petition 19-08, Supreme Court Rule 22.25(3) is amended to read:

(3) If the special investigator determines that there is not sufficient information to support ~~a possible finding of cause to proceed an allegation of possible misconduct,~~ 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,~~ as described in sub. (3m). 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.

SECTION 36. Consistent with the court's decision on rule petition 19-08, Supreme Court Rule 22.25(3m) is created to read:

(3m) The special preliminary review panel consists 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 not serve more than 2 consecutive 3-year terms.

SECTION 37. Consistent with the court's decision on rule petition 19-08, Supreme Court Rule 22.25(4) is amended to read:

(4) If the special investigator determines that the information provided is sufficient to support ~~a possible finding of cause to proceed an allegation of misconduct~~, the special investigator shall conduct an investigation of the matter. Upon commencing an investigation, the special investigator shall notify the respondent of the matter being investigated unless in the opinion of the special investigator the investigation of the matter requires otherwise. The respondent shall fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct with 20 days after being served by ordinary mail a request for a written response. The special investigator may allow additional time to respond. Except in limited circumstances when good cause is shown and a response summary is more appropriate, the special investigator shall provide the grievant a copy of the respondent's response and the opportunity to comment in writing on the respondent's response. Following receipt of the response, the special investigator may conduct further investigation and may compel the respondent to answer questions, furnish documents, and present information deemed relevant to the investigation. In the course of the investigation, the

respondent's willful failure to provide relevant information, to answer questions fully, or to furnish documents and the respondent's misrepresentation in a disclosure are misconduct, regardless of the matters asserted in the grievance. Upon completion of the investigation, the special investigator shall do one of the following:

SECTION 38. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.26(4) is created to read:

(4) Except as provided in SCRs 22.03, 22.21, 22.34 and 22.40, all papers, files, transcripts, and communications with the office of lawyer regulation regarding an attorney's compliance with a suspension or revocation order are to be held in confidence. The director may disclose relevant information in a motion for enforcement pursuant to SCR 22.185, or in reinstatement and readmission proceedings pursuant to Chapter 10, Chapter 31, or this chapter.

SECTION 39. Consistent with the court's decision on rule petition 19-08, a Comment to Supreme Court Rule 22.26 is created to read:

COMMENT

SCR 22.26 has been applied to administrative suspensions. In re Disciplinary Proceedings Against Scanlan, 2006 WI 38, 290 Wis. 2d 30, 712 N.W.2d 877.

SECTION 40. For purposes of renumbering, Supreme Court Rule 22.29(4m) is renumbered as Supreme Court Rule 22.29(4) (m).

SECTION 41. Consistent with the court's decision on rule petition 19-06, Supreme Court Rule 22.29(4x) is created to read:

(4x) At the time that the petitioner serves a copy of the petition for reinstatement on the director, the petitioner shall also submit to the director a completed reinstatement questionnaire.

SECTION 42. Consistent with the court's decision on rule petition 19-06, a Comment to Supreme Court Rule 22.29(4x) is created to read:

COMMENT

A blank copy of the reinstatement questionnaire may be obtained from the office of lawyer regulation. The questionnaire is used by the office of lawyer regulation to assist in its investigation. The questionnaire is not to be filed with the court.

SECTION 43. Consistent with the court's decision on rule petition 19-06, Supreme Court Rule 22.30 is repealed and recreated to read:

SCR 22.30 Reinstatement Procedure.

(1) Promptly following the filing of the petition for reinstatement, the director shall publish a notice on the website of the office of lawyer regulation, and in an official publication of the state bar of Wisconsin. The director may publish the notice in a newspaper of general circulation in counties in which the petitioner resided or maintained an office for the practice of law prior to suspension or revocation.

(2) The notice shall contain all of the following:

(a) The name of the petitioner, the date on which the petition for reinstatement was filed, the case number assigned to the petition, a brief statement of the nature and date of suspension or revocation, and the matters required to be proved for reinstatement.

(b) The office of lawyer regulation will be investigating the eligibility of the petitioner for reinstatement.

(c) This notice is the only published notice regarding the petition for reinstatement.

(d) Interested persons may submit written comments regarding the petitioner and the reinstatement petition, the address (physical and electronic) to which written comments may be submitted, and the deadline for submitting written comments, which shall be 60 days following the date on which the petitioner for reinstatement was filed. All formal written comments regarding the petition shall be forwarded to a referee, if any, and to the supreme court.

(e) Individuals may request that notice of any reinstatement hearing regarding the petition be sent to an address they provide to the office of lawyer regulation.

(f) Individuals who provide their address and ask to have notice of a reinstatement hearing will have a notice of a reinstatement hearing sent to them at the address provided.

(g) The office of lawyer regulation may contact individuals who submit written comments to obtain further information.

(h) Upon completion of the investigation, the director will file with the court a response to the petition stating either that the director does not oppose reinstatement and will negotiate a stipulation with the petitioner, which will be considered by the supreme court without the appointment of a referee or that the director opposes reinstatement and a referee will be appointed and a reinstatement hearing take place.

(i) Information regarding the status of the petition and any hearing will be available on the website of the office of lawyer regulation.

(3) Within 75 days after the filing of the petition, the board of bar examiners shall determine the attendance and reporting requirements

of the petitioner, as required by SCR 31.06, and file with the court a report regarding the petitioner's compliance. Upon motion of the board of bar examiners or the petitioner for good cause shown, the court may grant the board of bar examiners an extension of time to complete the assessment of compliance and file the report regarding compliance. Failure of the petitioner to prove compliance within the time allowed, including any extension thereof, may subject the petition to immediate dismissal.

(4) Within 75 days after the filing of the petition, the director shall investigate the eligibility of the petitioner for reinstatement and shall file with the court a response to the petition stating whether the petitioner has demonstrated to the director satisfaction of all of the criteria for reinstatement or the director opposes the petition. Except as provided in SCRs 22.03, 22.21, 22.34 and 22.40, all papers, files, transcripts, and communications with the office of lawyer regulation regarding the investigation are to be held in confidence. Papers filed in the reinstatement proceeding are public, except where expressly provided otherwise in this chapter, by court order, or by law. Upon motion of the director or the petitioner for good cause shown, the court may grant the director an extension of time to complete the investigation and file the response to the petition.

(5) (a) If the director's response states that the petitioner has demonstrated to the director satisfaction of all of the criteria for reinstatement, the director and the petitioner shall prepare and file a stipulation containing all facts and conclusions of law necessary to satisfy the standards for reinstatement, identifying all conditions to be imposed on the petitioner or the petitioner's practice of law

following reinstatement, and requesting that the court reinstate the petitioner's license to practice law in this state. The director shall also file a memorandum in support of the stipulation, which shall include a discussion of any material issue potentially adverse to the petition and an explanation as to why the director concludes that the issue does not prevent reinstatement. At the time of filing the stipulation and memorandum, the director shall also file with the court all formal written comments that have been received regarding the petition. The petitioner may file a response to the director's memorandum within 14 days of the date of filing of the stipulation.

(b) The supreme court shall consider the petition and stipulation without the appointment of a referee. The court may approve the stipulation, adopt the stipulated facts and conclusions of law, and reinstate the petitioner's license to practice law in Wisconsin; the court may reject the stipulation and refer the petition to a referee for a hearing and consideration under sub. (6) as if no stipulation had been filed; or the court may direct the parties to consider modifications to the stipulation.

(c) If the supreme court directs the parties to consider specific modifications to the stipulation, the parties may, within 20 days of the date of the order, file a revised stipulation, in which case the supreme court may approve the revised stipulation, adopt the stipulated facts and conclusions of law, and reinstate the petitioner's license to practice law in Wisconsin; or the court may reject the stipulation and refer the petition to a referee for a hearing and consideration under sub. (6) as if no stipulation had been filed. If the parties do not file a revised stipulation within 20 days of the date of the order or

if the parties so request in writing, a referee shall be appointed and the petition shall be referred to the referee for a hearing and consideration under sub. (6) as if no stipulation had been filed.

(d) A stipulation rejected by the supreme court has no evidentiary value and is without prejudice to the petitioner's prosecution of the petition for reinstatement or the director's response to the petition.

(6) (a) If the director opposes the petition for reinstatement, an available referee shall be selected from the panel provided in SCR 21.08, based on the location of the petitioner's place of residence. The chief justice or, in his or her absence, the chief justice's delegee shall issue an order appointing the referee to conduct a hearing and prepare a report on the petition for reinstatement.

(b) The referee shall have the powers of a judge trying a civil action and shall conduct the proceedings regarding the petition pursuant to the rules of civil procedure, except where these rules provide a different procedure.

(c) Following the appointment of a referee, the parties shall file all papers and pleadings with the supreme court and serve a copy on the referee.

(d) Following the appointment of a referee, the director shall transfer to the referee all formal written comments regarding or in response to the petition. The director shall also provide the referee with a list of all individuals who requested notice of the hearing on the petition.

(e) The referee shall establish a schedule for proceedings and a hearing on the petition, which hearing shall be held at the earliest feasible date.

(f) At least 20 days prior to the hearing, the director shall provide written notice of the date, time, and location of the hearing to all individuals who requested notice of the hearing on the petition. If the hearing is rescheduled, the director shall provide written notice of the date, time, and location of the rescheduled hearing to all individuals who requested notice of the hearing on the petition. The director shall advise the referee that the director has complied with this notice requirement.

(g) The reinstatement hearing shall be public.

(h) The referee shall appoint a person to act as the court reporter to make a verbatim record of the proceedings as provided in SCR, Chapter 71.

(i) The petitioner and the director or a person designated by the director shall appear at the hearing. The petitioner may be represented by counsel.

(j) The referee shall conduct the hearing as the trial of a civil action to the court. The hearing shall be conducted pursuant to the rules of civil procedure, but the rules of evidence shall not apply, and the referee may consider any relevant information presented. The director, petitioner, and interested persons may present information in support of or in opposition to reinstatement.

COMMENT

Wis. Stat. ch. 785 defines "contempt" and provides that a "court of record" may find a person in contempt and impose sanctions. A referee presiding over a lawyer disciplinary proceeding is not a "court of record." See also *In re Disciplinary Proceedings Against Strasburg*,

217 Wis. 2d 318, 577 N.W.2d 1 (1998) (setting forth procedure to address contempt scenario in disciplinary proceeding).

SECTION 44. Consistent with the court's decision on rule petition 19-06, Supreme Court Rule 22.31 is repealed.

SECTION 45. Consistent with the court's decision on rule petition 19-06, Supreme Court Rule 22.305 is created to read:

SCR 22.305 Standard for Reinstatement. At all times relevant to the petition, the petitioner has the burden of demonstrating, by clear, satisfactory, and convincing evidence, all of the following:

(1) That he or she has the moral character to practice law in Wisconsin.

(2) That his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive of the public interest.

(3) That his or her representations in the petition, including the representations required by SCR 22.29(4)(a) to (m) and 22.29(5), are substantiated.

(4) That he or she has complied fully with the terms of the order of suspension or revocation and with the requirements of SCR 22.26.

SECTION 46. Consistent with the court's decision on rule petition 19-06, a Comment to SCR 22.33 is created to read:

COMMENT

Costs regarding the petition for reinstatement may be assessed against the petitioner, as provided in SCR 22.24.

SECTION 47. Consistent with the court's decision in a closed administrative rules conference on January 22, 2020, Supreme Court Rule 22.34(10) is amended to read:

(10) The petition may be accompanied by a stipulation of the director and the respondent to a suspension or to the imposition of conditions on the respondent's practice of law. The supreme court may consider the petition and stipulation without the appointment of a referee. If the supreme court approves the stipulation, it shall issue an order consistent with the stipulation. If the supreme court rejects the stipulation, ~~the clerk or deputy clerk of the supreme court shall select~~ an available referee shall be selected from the panel provided in SCR 21.08, based on the location of the respondent's place of residence⁷. The chief justice or, in his or her absence, the chief justice's delegee shall issue an order appointing the referee ~~selected by the clerk or deputy clerk~~, and the matter shall proceed as a petition filed without a stipulation. A stipulation rejected by the supreme court has no evidentiary value and is without prejudice to the respondent's defense of the proceeding or the prosecution of the petition.

SECTION 48. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.34(12) is amended to read:

(12) All papers, files, transcripts, communications and proceedings, including those pertaining to investigations, shall be confidential and shall remain confidential ~~until the supreme court has issued an order revoking, suspending indefinitely, or imposing conditions on the attorney's license to practice law, except as provided in sub. (12m) and except~~ that acknowledgement that a proceeding is pending and notification to another court before which a similar petition is pending may be made when considered necessary by the

director and that any publication the supreme court considers necessary may be made.

SECTION 49. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.34(12m) is created to read:

(12m) Following the issuance by the supreme court of an order revoking, suspending indefinitely, or imposing conditions on the attorney's license to practice law, the petition and all papers relating to the petition that are filed with the supreme court are public information, except as expressly provided in this chapter, by court order, or by law.

SECTION 50. Consistent with the court's decision in a closed administrative rules conference on January 22, 2020, Supreme Court Rule 22.36(5) is amended to read:

(5) Following the investigation, the petition shall be submitted to a referee. ~~The clerk or deputy clerk of the supreme court shall select an~~ available referee shall be selected from the panel provided in SCR 21.08, based on the location of the respondent's place of residence, and the chief justice or, in his or her absence, the chief justice's delegee shall issue an order appointing the referee ~~selected by the clerk or deputy clerk~~ to review the petition.

SECTION 51. Consistent with the court's decision on rule petition 19-09, Supreme Court Rule 22.38 is amended to read:

SCR 22.38 Standard of proof. Allegations of misconduct in a complaint, allegations of medical incapacity in a petition, allegations of noncompliance with an order of the supreme court issued in a disciplinary proceeding, and character and fitness to practice law shall be established by evidence that is clear, satisfactory and convincing.

SECTION 52. Consistent with the court's decision on rule petition 19-07, Supreme Court Rule 22.40(1) is amended to read:

~~(1) Prior to the filing of a misconduct complaint, medical incapacity petition, or petition for temporary license suspension~~
Except as otherwise provided in this chapter, all papers, files, transcripts, and communications in any matter relating to an allegation of attorney misconduct, an investigation pursuant to SCR Chapters 10, 22, and 31, and monitoring compliance with conditions, suspension, or revocation imposed by the supreme court, involving the office of lawyer regulation are to be held in confidence by the director and staff of the office of lawyer regulation, the members of the district committees, special investigators, the members of the special preliminary review panel, and the members of the preliminary review committee. Following the filing of a complaint or petition, the proceeding and all papers filed in it are public, except where expressly provided otherwise in this chapter, by court order, or by law.

SECTION 53. Consistent with the court's decision on rule petition 19-06, a Comment to SCR 31.11(1m) is created to read:

COMMENT

Costs regarding the petition for reinstatement under subsection (1m) may be assessed against the petitioner, as provided in SCR 22.24.

SECTION 54. Consistent with the court's decision on rule petition 19-06, a Comment to SCR 31.11(4) is created to read:

COMMENT

Costs regarding the petition for reinstatement under subsection (4) may be assessed against the petitioner, as provided in SCR 22.24.

IT IS FURTHER ORDERED that the rules amended pursuant to this order shall apply to all grievances pending or filed on or after the effective date of this order; and to disciplinary, medical incapacity, reinstatement or motion for enforcement proceedings commenced after January 1, 2021.

IT IS FURTHER ORDERED that the Comments to SCRs 10.03(6m)(b), 10.03(7)(b), 22.26, 22.29(4x), 22.305 and 31.11 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rules.

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 website. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 30th day of June, 2020.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 PATIENCE DRAKE ROGGENSACK, C.J. (*dissenting in part to the court's decision on Rule Petition 19-08*). The supreme court convened the Office of Lawyer Regulation (OLR) Procedure Review Committee to study the structure of the OLR and its procedures and to make recommendations for improvement. The Review Committee studied OLR's structure and operations and lawyer disciplinary structures and operations of other jurisdictions for more than a year. The Review Committee then made numerous recommendations to the supreme court as rule petitions. In Rule Petition 19-08, the Review Committee recommended discontinuance of OLR District Committees.

¶2 The court discussed this recommendation; had a public hearing on it; and initially, held its decision in abeyance on whether to discontinue District Committees.

¶3 On February 19, 2020, a supreme court commissioner sent a memorandum to the justices identifying the outstanding issues in regard to the Review Committee's rule petition recommendations. My judicial assistant created a chart of outstanding issues from the commissioner's memorandum. I asked the justices to indicate their positions on those issues, using the chart, in advance of our court conference scheduled for March 16, 2020. No further discussion was had on the fate of the District Committees. A majority of justices voted to retain the OLR District Committees.

¶4 In advance of our March 16 conference, I requested that Keith Sellen, Director of OLR, attend the conference to facilitate the court's discussion of OLR matters. Mr. Sellen appeared as requested.

¶5 Mr. Sellen explained why he agreed with the Review Committee's recommendation that the District Committees be discontinued. First, he said that the OLR had "no meaningful work" for the District Committees to do. He explained that investigation of grievances by committee was ineffective and uneven among the District Committees. OLR currently uses professionals to do grievance investigations, creating a more even approach to investigations throughout the state. This change has significantly reduced the time required to complete investigations.

¶6 Second, the rules under which OLR operates have changed significantly since the District Committees were formed. For example, in 1999, the court decided to institute the Preliminary Review Committee (PRC). SCR 21.07 established the PRC as a 14-member committee, consisting of 9 lawyers and 5 public members, appointed by the supreme court. The PRC reviews investigations of alleged misconduct or medical incapacity that the Director presents and makes the initial adjudication on whether there is cause to proceed.

¶7 Since 2000, the OLR has employed centralized intake, which has reduced matters that go to formal investigation. During intake, the use of diversion programs is now available. They afford increased ethics education and review. The OLR also has a temporary suspension procedure for attorneys who do not cooperate in grievance investigations, which was not available when non-cooperation was referred to the District Committees. In 2016, the court enacted a rule that granted OLR discretion to dismiss

de minimis matters. Very small matters had been referred to District Committees; there is no need to do that now.

¶8 In addition, the court created the Board of Administrative Oversight (BAO). It monitors the fairness, productivity, effectiveness, and efficiency of the OLR. SCR 21.10(2)(a). The BAO has 12 members, 8 lawyers and 4 public members appointed by the supreme court. The BAO assesses the public's and the bar's perception of the integrity of the OLR. SCR 21.10(2)(c). The PRC confers periodically with the BAO about the operation of the PRC. SCR 21.07(3)(c). As Director Sellen explained, because of the changes in the structure of the OLR through supreme court rules, there is no longer "any meaningful work" for District Committees to do.

¶9 I am opposed to requesting public members and lawyers to give of their time to committees that have no meaningful work to do. The supreme court seeks volunteers to maintain its many committees, most of which are comprised of lawyers and public members. In the past few years, lawyers and public members who have volunteered and been chosen to serve on District Committees and have had no disciplinary matters to address. For example, RCH, a man whom I recruited to volunteer for service to the court, was appointed to the District Committee that includes Dane County. During his entire term of service, the District Committee did not have one disciplinary matter to investigate or review.

¶10 We rely on volunteers for all our many committees. I am opposed to the court requesting volunteers for District Committees that we are not using due to the court's prior changes to the OLR's

structure. District Committee volunteers start out enthusiastic, but end up disappointed. Furthermore, the court could use those volunteers for committees where there is ample work to do and often too few volunteers to fill all the committee positions.

¶11 Accordingly, I agree with the Review Committee's recommendation to discontinue OLR District Committees, and I dissent from the court's decision to retain them.

¶12 I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and BRIAN HAGEDORN join this dissent.

