

Memorandum

SUPREME COURT OF WISCONSIN
COMMISSIONERS OFFICE



DATE: September 26, 2013

TO: Supreme Court of Wisconsin
Attn: Deputy Clerk - Rules

FROM: Supreme Court Commissioners Nancy A. Kopp, David W. Runke, and Mark A. Neuser¹

SUBJECT: Rule Petition 13-05 Petition to Establish a Procedure for Enforcement of Supreme Court Disciplinary Orders

The Supreme Court Commissioners review and report to the court with respect to every disciplinary proceeding, including matters where a respondent attorney has been alleged to have failed to comply with a disciplinary decision issued by the court. The commissioners, therefore, have considerable experience with the procedures used to resolve attorney disciplinary proceedings. In addition, given the role of the commissioners, our office has no interest that would benefit one side or the other with respect to the possible adoption of Rule Petition 13-05.

As the court noted in In re Disciplinary Proceedings Against Lister, 2012 WI 102, 343 Wis. 2d 532, 817 N.W.2d 867, there currently are no provisions in the court's rules governing (1) the ability of the Office of Lawyer Regulation (OLR) to file a motion in the original disciplinary proceeding to impose

¹ Because Commissioner Julie A. Rich is directly assisting the court with Rule Petition 13-05, she has not been asked to sign onto this memorandum.

sanctions on an attorney for failing to comply with a prior disciplinary decision or (2) the procedure by which such a motion should be filed and resolved. Both the Board of Attorneys Professional Responsibility (BAPR) and the OLR, however, have filed such motions on occasion in the past, which has required the court to develop an ad hoc procedure in the context of a pending case. In Lister, therefore, the court directed the OLR to file a rule petition proposing such a procedure.

We, the commissioners identified above, support the concept of adopting a rule that would create a procedure for filing and resolving motions concerning a respondent attorney's failure to comply with a disciplinary order of the court. We believe, however, that Rule Petition 13-05 as filed contains a number of significant flaws and should be modified before being adopted by the court.

As an initial matter, the opening sentence of the text of proposed Rule 22.18(m)(1) would authorize the OLR or a special investigator to file a motion "for contempt or enforcement." We do not think it is advisable to include motions for contempt within this rule. There are already well-developed rules and procedures in the law for contempt motions, which can fall within several different categories. Neither the petitioners' supporting memorandum nor the proposed rule explains how this body of existing law would interact with the new procedure established by the proposed rule. It would be confusing to bring contempt motions within the coverage of the

proposed rule when that proposed rule does not address how the new procedure would relate to existing contempt law. Removing contempt motions from the scope of the proposed rule would not eliminate the court's contempt powers in attorney disciplinary proceedings. The court's contempt powers and the OLR's ability to bring contempt motions would remain, as expressed in subsection (5) of the proposed rule.

There also does not appear to be a compelling need to base the new procedure for enforcement of this court's disciplinary orders on the court's contempt powers. This court has inherent authority to enforce its judgments and orders and to regulate the practice of law. This inherent authority is a sufficient basis, by itself, to support the procedure envisioned by the proposed rule.

In addition, we believe that a motion for enforcement of a prior disciplinary decision filed in the same disciplinary proceeding should be used in only limited circumstances. We are concerned that the creation of this procedure would lead to a substantial increase in these types of motions, which would increase the workload of the court and the costs borne by the respondent attorney, without a significant benefit to the public.

We believe that enforcement motions under the proposed rule should be limited to situations where the attorney has willfully failed to comply with the terms of a prior disciplinary order. In a reinstatement proceeding where the OLR argued that an attorney should not be granted reinstatement due

to his failure to pay the costs imposed in the prior disciplinary order, this court noted the distinction between intentionally or willfully choosing to disobey this court's orders and being unable to comply. See, e.g., In re Disciplinary Proceedings Against Widule, 2012 WI 63, ¶27, 341 Wis. 2d 493, 817 N.W.2d 822. ("There is a difference, however, between choosing to disobey this court's orders to pay costs and being unable to do so because of a lack of funds.") Because the referee found that Attorney Widule had earned insufficient income to make payments toward the cost award, this court concluded that his failure to pay the previously ordered costs was not willful and did not prevent his reinstatement. The proposed rule, however, contains no limitation on when an enforcement motion could be filed. Under the proposed rule, the OLR could file a motion against a respondent attorney, like Attorney Widule, because the attorney had failed to pay costs as ordered, regardless of whether the failure to pay was a willful disobedience of the court. The invocation of the court's powers and the use of the "machinery" of the lawyer regulation system, with the resulting expenses, should be limited to cases where the OLR has cause to believe that the attorney's failure to comply with a prior disciplinary order is willful.¹

¹ This would be analogous to SCR 22.03(4), which authorizes the OLR to file a motion for a temporary suspension against an attorney who willfully fails to cooperate with a grievance investigation.

We further believe that motions should be brought under this new procedure only where there is either a substantial ongoing violation or a pattern of substantial violations of a prior disciplinary order. We do not believe that minor or technical violations should result in what may end up as another miniature disciplinary proceeding, with the need for the reappointment of a referee and the accompanying costs. The type of enforcement motions contemplated by the proposed rule should be reserved for situations where the respondent attorney's refusal to obey a disciplinary order is a substantial violation.

Moreover, the rationale provided by the OLR for bringing these types of motions is the need for a more expedited procedure to stop an attorney's disobedience and to impose a relatively swift sanction that will ensure the attorney's future compliance. That is the proffered benefit allegedly obtained in exchange for the proposed truncated procedure provided to the respondent attorney. That rationale, however, really applies only where there is an ongoing violation or a repeating pattern of violations (i.e., where there is a clear threat of ongoing or future violations). If the respondent attorney violated the court's order just one time or even a couple of times, but the violations are now ended, why is there a need to shorten the disciplinary process? The violation is now over. Imposing a sanction quickly is not needed to end the violation because it has already been ended by the respondent attorney. If the rationale underlying the proposed rule is to impose a swift

sanction to force an attorney to comply with a disciplinary decision, then motions under the rule should be limited to situations where there is an ongoing violation or a demonstrated pattern of violations such that there is a high likelihood that the attorney will engage in additional future violations. If there is not a significant and imminent threat of additional future violations, it would seem that the OLR could simply follow its normal procedure for seeking discipline due to an attorney's misconduct (i.e., filing a complaint in a new disciplinary case).

Turning to the actual procedure proposed in the rule petition, we believe that due process and efficient processing of these motions require additional provisions, especially at the beginning of the procedure when the court will need to determine whether to refer the motion to a referee.

First, because a motion under the proposed rule could result in taking away an attorney's livelihood and because the court will need to determine if there are any factual disputes, some additional requirements for the initial motion are necessary. We recommend that the motion be required to contain numbered factual allegations. Any factual allegations in the motion that cannot be supported by the existing record in the disciplinary proceeding or by judicial notice should be supported by affidavits and attached authenticated documents. Since the court is being asked to base an order potentially taking away a person's livelihood on the allegations in the motion without an adversarial evidentiary hearing, the contents

of the affidavits and the attached documents should be admissible under the rules of evidence, just as proceedings on initial disciplinary complaints are subject to the rules of evidence. See SCR 22.16(1)

The motion should not simply be a barebones claim that the respondent attorney failed to comply, with the details to be filled in later. The attorney deserves notice of precisely what actions or inactions constituted violations of the court's disciplinary order. This is especially important when the alleged violations relate to conditions involving substance abuse or mental health issues. Those conditions at times can be subject to interpretation, and whether certain actions are sufficient to meet those conditions is not always clear. The respondent attorney needs to know the precise alleged shortcomings in order to prepare a response to the motion. The court needs to know the precise alleged violations to determine if the allegations allege actual violations of its order and to assess whether there are genuine disputes of material fact that will require referring the matter to a referee.

Conversely, the rule should also require that the respondent attorney must identify which specific allegations or parts thereof he/she disputes. Again, this is necessary for the court to determine whether fact-finding by a referee must take place before the court can issue a final decision. Absent a showing of good cause, any factual allegation that is not disputed by the respondent attorney should be treated as

admitted. This will ensure that such motions are referred to referees only when there is a genuine issue of fact.

The proposed rule also does not explicitly specify what should be the burden of proof and who should bear it, although the proposed rule does contain a general reference to the referee following SCRs 22.15 and 22.16.² Disobedience of a supreme court order is recognized as professional misconduct in the rules. SCR 20:8.4(f). As with other allegations of misconduct contained in initial complaints, we believe the rule should explicitly state that the OLR as the moving party should bear the burden of proving claims of willful disobedience of disciplinary orders by evidence that is clear, satisfactory and convincing. See SCR 22.16(5).

Finally, the proposed rule simply states that the court may assess the costs of the enforcement proceeding against the respondent attorney. The proposed rule does not refer to the general provision regarding the assessment of costs or otherwise explain on what basis the court should determine whether to assess costs. In recent situations where the court has addressed motions to impose sanctions for violating a disciplinary order, the court has followed its general rule for assessing costs in initial disciplinary proceedings, SCR 22.24. See, e.g., In re Disciplinary Proceedings Against LeSieur, 2013

² Under the proposed rule, only some motions for enforcement will be referred to referees for fact-finding. The reference to referees following SCRs 22.15 and 22.16 therefore would not apply to motions that the court decides without referral to a referee.

WI 39, ¶42, 347 Wis. 2d 190, 832 N.W.2d 67 ("We find no reason to depart from our general practice of requiring a respondent attorney, whose conduct caused the OLR to bring this proceeding, to pay the full costs of the proceeding."); Lister, 343 Wis. 2d 532, ¶27 ("Accordingly, consistent with our general policy, we require Attorney Lister to pay the full costs of this motion proceeding."). In order to provide notice to the respondent attorney, we recommend that the rule clarify that the court will be following the provisions of SCR 22.24 in deciding whether to impose costs.

In summary, we generally support the concept of creating a rule that sets forth a more streamlined procedure by which the OLR may bring a motion to enforce a prior disciplinary order or to impose sanctions on an attorney who has disobeyed such a disciplinary order. We believe, however, that such a rule should be based solely on the court's inherent power to regulate the practice of law in this state and to enforce its decisions and orders. We further believe that the rule needs to make clear that such motions may be brought only when there is cause to believe that a respondent attorney is willfully engaging in an ongoing substantial violation of a prior disciplinary order or has engaged in a pattern of substantial violations of a prior disciplinary order. We also recommend that additional requirements be added to the proposed procedure that will provide adequate notice of the alleged violations to the respondent attorney and that will allow the court to determine whether it can decide the motion based on the parties'

written filings or whether the motion needs to be referred to a referee for fact-finding.

To assist the court in considering the rule petition, we are attaching as Exhibit 1 to this memorandum a redlined version of the proposed rule that contains suggested edits consistent with the recommendations we have made here.

We appreciate the opportunity to comment on this pending rules petition. We would be happy to provide any additional information the court might request.

Petition to Establish a Procedure for Enforcement of Supreme Court Disciplinary Orders
Commissioners' Response Appendix 1
(Creation of Supreme Court Rule 22.18m)

SCR 22.18m Enforcement of disciplinary orders.

~~(1)~~ (1) The director, or a special investigator acting under SCR 22.25, may seek enforcement of a disciplinary order of the supreme court by filing a motion for ~~contempt~~ enforcement in the underlying disciplinary proceeding. Such motions may be filed only when there is cause to believe that a respondent attorney is willfully engaging in ongoing conduct or has willfully engaged in a pattern of conduct that constitutes a substantial violation of a prior disciplinary order of the court or when there is cause to believe that a respondent is willfully failing to comply or has engaged in a pattern of willfully failing to comply with a substantial condition imposed on the respondent attorney in a prior disciplinary order of the court.

~~(1m)~~ (1m) The motion shall identify the disciplinary order of the supreme court, describe with specificity the reasons for seeking enforcement, and state with specificity the relief requested. All factual allegations in support of the motion shall be stated with specificity in the motion in numbered paragraphs. Any factual allegation in the motion that cannot be supported by the existing record in the disciplinary proceeding or by judicial notice shall be supported by affidavit and attached authenticated documents that shall be filed with the motion. In order to be considered by the court, the averments in such affidavits and the contents of all such documents shall be admissible under the rules of evidence.

~~(2)~~ (2) Upon receipt of the motion filed under sub. (1), the supreme court shall order the ~~respondent attorney~~ to show cause why the relief requested in the motion should not be granted. The ~~respondent attorney~~ shall file with the supreme court a written response to the order and serve a copy of the response on the director, or special investigator, within the time set forth in the order. The written response shall identify with specificity each factual allegation or part thereof in the motion which the respondent disputes. Absent a subsequent showing of good cause, any factual allegation or part thereof in the motion which is not disputed by the respondent shall be deemed to be admitted by the respondent for purposes of the motion. For each allegation which the respondent disputes, the respondent's response shall affirmatively set forth the respondent's position regarding the subject matter of the allegation. Any affirmative factual allegation in the response that cannot be supported by the existing record in the disciplinary proceeding or by judicial notice shall be supported by affidavit and attached authenticated documents that shall be filed with the response. In order to be considered by the court, the averments in such affidavits and the contents of all documents shall be admissible under the rules of evidence. The director, or special investigator, may file a memorandum in reply to the response of the attorney.

~~(2m)~~ (2m) The office of lawyer regulation or the special investigator has the burden of demonstrating by clear, satisfactory and convincing evidence that the respondent has engaged in misconduct by willfully disobeying or willfully failing to comply with a substantial term or condition of a prior disciplinary order of the court.

(3) The supreme court may decide the motion upon the submissions of the parties, or may refer the matter to a referee, who shall 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.

(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 disciplinary order, including the imposition of sanctions identified in SCR 21.16(1m). The supreme court may assess the costs of the enforcement proceeding against the attorney, and shall follow the provisions of SCR 22.24 and case law interpreting that rule in determining whether to assess costs.

(5) Nothing in this rule shall limit the authority of the director, or a special investigator, to initiate an investigation or proceeding for misconduct or medical incapacity under these rules; or shall limit the constitutional, statutory, or inherent authority of the supreme court.

N.B. In order to avoid confusion, the paragraph numbering in the original proposed rule has been retained, and any additional paragraphs have been inserted with an "m" following the number of the preceding paragraph (e.g., "1m", "2m", etc.). If any these additional paragraphs are adopted by the court in the final rule, the paragraphs should be renumbered to follow in sequence.