



Supreme Court of Wisconsin

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Hon. Randy R. Koschnick
Director of State Courts

Sheila T. Reiff
Clerk of Supreme Court

October 10, 2019

Attorney Joseph Russell, Chair
Board of Administrative Oversight
110 East Main Street, Suite 315
Madison, WI 53701

Re: OLR Restitution Policy

Dear Attorney Russell:

On behalf of the court, I write to request the assistance of the Board of Administrative Oversight (Board) pursuant to SCR 21.10(2)(f).

On September 16, 2019, the Wisconsin Supreme Court conducted a public hearing on Rule Petition 19-06 which proposed certain amendments to the rules governing reinstatement of a lawyer's license to practice law following suspension or revocation. During the hearing, in response to a question from the court, the Honorable Gerald Ptacek, Chair of the Office of Lawyer Regulation (OLR) Procedures Review Committee, noted that the Committee had not evaluated the OLR's policy with respect to when it recommends a restitution order. The court has determined that it would benefit from a review of the OLR's restitution policy and requests the Board of Administrative Oversight undertake that review and advise the court if it concludes this policy should be revised.

Presently, the OLR's stated policy is that it seeks restitution only when: 1) the grievant's or respondent's rights in a collateral proceeding will not likely be prejudiced; 2) the

funds to be restored do not constitute incidental or consequential damages; 3) the funds to be restored were in the respondent lawyer's direct control; and 4) there is a reasonably ascertainable amount. See e.g., In re Disciplinary Proceedings Against Carranza, 2014 WI 121, 358 Wis. 2d 522, 855 N.W.2d 683; In re Disciplinary Proceedings Against Boyd, 2010 WI 41, 324 Wis. 2d 688, 782 N.W.2d 718. Compare In re Medical Incapacity Proceedings Against Muwonge, 2017 WI 12, 890 N.W.2d 575, 373 Wis.2d 173.


In particular, the court would like the Board to evaluate whether the OLR should continue its policy of declining to seek restitution when the record does not demonstrate a "reasonably ascertainable amount." Is this appropriate when the respondent attorney's conduct may be the reason an amount cannot be ascertained, such as in Carranza, where the attorney failed to prepare a final accounting? Who should carry the burden to show a "reasonably ascertainable" amount when the amount of restitution is in dispute? Should the OLR's policy reflect the approach employed in the Muwonge case, where this court ordered restitution, but further ordered that the restitution amount could be offset if the lawyer could establish the value of legal services the lawyer actually performed?

As you are aware, the court is considering a number of rule petitions filed by the OLR Procedure Review Committee. The court hopes to complete its review of these petitions and issue a final order reflecting changes to the OLR rules before the end of this term. Therefore, the court would appreciate receiving your analysis and recommendation by January 17, 2020, so the court could seek written comment and conduct a public hearing on the restitution issue, if warranted.

If you have questions or concerns, please contact Julie Anne Rich, the court's commissioner who handles administrative rules matters, at (608) 261-6642 or julie.rich@wicourts.gov.

On behalf of the court, we appreciate your assistance in this matter.

Sincerely,


Patience Drake Roggensack
Chief Justice

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cc: Justice Ann Walsh Bradley
Justice Annette Kingsland Ziegler
Justice Rebecca Grassl Bradley
Justice Daniel Kelly
Justice Rebecca Frank Dallet
Justice Brian K. Hagedorn
Keith L. Sellen, Director, OLR
Judge Gerald Ptacek, Chair, OLR Procedure Review Committee
Julie Anne Rich, Supreme Court Commissioner