David A. Piehler
Supreme Court Referee
September 11, 2026

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SEP 16 2026
CLERK OF SUPREME COURT
OF WISCONSIN

Mr. Samuel A. Christensen
Clerk of Supreme Court
110 E. Main St., #215
Madison, WI 53703

Re: OLR v. Hebl
Case No. 2025AP2691-D

Dear Mr. Christensen:

Enclosed is an order issued today in this matter.

Sincerely yours,

David A. Piehler

DAP:Enc.
XC (e-mail only): Thomas J. Laitsch, Esq.
James E. Bartzen, Esq.

FILED

SEP 16 2026

CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN IN SUPREME COURT

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST GARY A. HEBL, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,

CASE NO. 2025AP2691-D

Complainant;

GARY A. HEBL,

Respondent.

ORDER ON BURDEN OF PROOF REGARDING RESTITUTION

The Supreme Court Rules task the referee in a lawyer discipline case with creating a record that the Wisconsin Supreme Court can review to decide the case. SCR 21.08(3)(b) provides that a referee's duties include "To make written findings, conclusions, and recommendations, and to submit them to the supreme court for review and appropriate action." The court can then "adopt, reject or modify the referee's findings and conclusions or remand the matter to the referee for additional findings." SCR 22.17(2). The court has made it clear that an incomplete record should ordinarily result in a remand for further proceedings. *Disciplinary Proceedings Against DeLaduranty*, 2023 WI 17, ¶48, 406 Wis.2d 62, 985 N.W.2d 788. The court also identified the problems of additional delay and expense that arise from a remand. *Id.*, ¶49. The court has taken different approaches when faced with an inadequate record on the issue of restitution. In *Medical Incapacity Proceedings Against Muwonge*, 2017 WI 12 ¶¶22-27, 373 Wis.2d 173, 890 N.W.2d 575, the court ordered the parties to reach agreement on specific amounts of restitution to clients, or, failing that, to advise the court, which might refer the matter to a referee for determination of the amount. In *Disciplinary Proceedings Against Ruppelt*, 2017 WI 80 ¶38-39, 377 Wis.2d 441, 898 N.W.2d 473, the court remanded the matter to the referee for further proceedings on the issue of restitution. Neither of these cases dealt with the issue of which party bears the burden of proof on the issue of restitution. In *Disciplinary Proceedings Against Scholz*, 2025 WI 13, 415 Wis. 2d 474, 19 N.W.3d 550, the court strongly emphasized the importance of a clear record on the issue of restitution. *Id.* ¶¶61, 82-92. The court ultimately declined to remand for further findings, "reluctantly"

accepting the restitution recommended by OLR and the referee. The court discussed the concept of shifting the burden of proof regarding the amount of restitution to the respondent at ¶95, stating "[W]hen, due to poor recordkeeping or other conduct by an attorney, the OLR is unable to discern a reasonably ascertainable amount of restitution owed, the burden shifts to the attorney to establish what offset, if any, is appropriate in determining the amount of restitution owed to a particular individual." This shifting of the burden of proof is an exception to the usual rule in lawyer discipline cases, which places the burden of proof on OLR. SCRs 22.16(5) and 22.39(1).

OLR has indicated in its pre-hearing brief that it will seek restitution if it is determined that the respondent inappropriately charged an hourly rate applicable to legal services for performing non-legal services. Its brief states

> The Court recently admonished OLR to not abandon restitution simply because the attorney's actions made it difficult to calculate. In fact, the Court expressly shifted the burden in such circumstances to the attorney to prove what amount of fee had been earned:
>
> > We again remind the OLR that when, due to poor recordkeeping or other conduct by an attorney, the OLR is unable to discern a reasonable ascertainable amount of restitution owed, the burden shifts to the attorney to establish what offset, *if any*, is appropriate ion determining the amount of restitution owed to a particular individual.
> >
> > *Disciplinary Proceedings Against Scholz*, 2025 WI 14, ¶95, 415 Wis. 2d 474, 19 N.W.3d 550 (emphasis added).
>
> The recordkeeping Hebl made in his representation was not "poor" recordkeeping. The "other conduct" which makes it difficult for OLR to reasonably ascertain an amount of restitution is the fact that Hebl billed all of his services at his regular hourly rate. If Hebl had hired contractors or others to perform even some of the non-legal services, OLR would have some guidepost for the fair market value of those non-legal services. That did not occur, and the burden therefore shifts to Hebl to establish what the fair market value of the non-legal services is, should the referee conclude non-legal services were provided.

Respondent's attorney was asked to respond to this argument, specifically to address the question "[W]hat showing must OLR make to shift the burden of proof on the issue of the reasonable value of any services performed by Mr. Hebl to him and away from OLR?" In his September 10, 2026, letter respondent's counsel did not directly address this issue, indicating instead that "the issue in this case will be whether services are properly determined to be legal or non-legal," and that it is respondent's position that all services he performed were legal in nature. No alternative argument was offered in the case that the referee finds some of the services performed were non-legal in nature.

The shifting of the burden of proof expressed in *Scholz* is conditional, not absolute. The burden shifts if the respondent has created conditions that make OLR unable to discern a reasonable amount of restitution, not merely "difficult" as OLR argues. There is an equitable element to this logic, placing the burden on the party who has made the evidence unavailable. The court expressed this distinction in *Ruppelt* as whether the appropriate amount of restitution is "unknowable" versus "unknown." 2017 WI 80, ¶39. When considered this way, OLR's argument in favor of burden shifting falls short. The respondent certainly didn't obscure the correct hourly rate for non-legal services by not contracting for those services to be performed by another (nor does OLR argue that he had an obligation to do so). The proper charge rate for non-legal services is presumably knowable by the usual investigatory means of contacting appropriate contractors, determining the rates they would charge for non-legal services, and presenting such testimony at the hearing. Alternatively, a personal representative who has contracted for such services on behalf of a trust or estate may well be able to testify as to the rates charged for non-legal services. Such information is equally available to OLR as to the respondent. Since it is knowable, OLR is not unable to present such testimony. It is therefore inappropriate to shift the burden of proof to the respondent.[1]

To be complete, the record in this matter must contain evidence of the appropriate rate of charge for any services performed by the respondent that OLR claims were non-legal in nature. It is OLR's burden to offer this evidence. As the facts are presently understood, the burden does not shift to the respondent, because the relevant facts are knowable to OLR and can be developed and presented at hearing. If OLR wishes to maintain its claim that the burden shifts to the respondent, it must show not that it is difficult for OLR to determine the relevant information, but that it is entirely unable to do so because of the respondent's actions.

Dated this 11th day of September 2026.

David A. Piehler

David A. Piehler, Referee

[1] The parties might also stipulate to a rate for non-legal services. These examples are merely illustratory and are not meant to be prescriptive. A thoughtful advocate can likely develop other forms of proof.