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Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

November 22, 2022

To:

James E. Bartzen
Boardman & Clark LLP
P.O. Box 927
Madison, WI 53701-0927

Khaja M. Din
4518 North Kedzie Avenue
Chicago, IL 60625

Francis X. Sullivan
Kim M. Kluck
Heidi Johnson
Office of Lawyer Regulation
110 E. Main Street, Suite 315
Madison, WI 53703

Jeffrey A. Kremers
Referee

You are hereby notified that the Court has entered the following order:

No. 2020AP2165-D Office of Lawyer Regulation v. Khaja M. Din

We review the report and recommendation of Referee Jeffrey A. Kremers that Attorney Khaja M. Din receive, at most, a public reprimand for having committed one of the 14 counts of professional misconduct alleged in a complaint filed by the Office of Lawyer Regulation (OLR). After granting summary judgment in favor of the OLR on one of the counts and holding a three-day evidentiary hearing on the remainder, the referee concluded that the remaining counts should be dismissed because the OLR had not proven misconduct by clear, satisfactory, and convincing evidence. As for the sole count where the referee determined misconduct had occurred, the referee recommended that either no discipline, or at most a public reprimand, was warranted.

Neither the OLR nor Attorney Din has appealed from the referee's report and recommendation; thus, this court's review proceeds pursuant to Supreme Court Rule (SCR) 22.17(2).[1] We conclude the referee's findings of fact are supported by clear and convincing

[1] SCR 22.17(2) provides:

> If no appeal is filed timely, the supreme court shall review the referee's report; adopt, reject or modify the referee's findings and conclusions or remand the

evidence in the record, and we therefore adopt those findings. We also adopt the referee's legal conclusions that Attorney Din did not commit 13 of the 14 counts alleged in the OLR complaint. As for the remaining count, we agree with the referee that Attorney Din's conduct amounted to a de minimis rule violation, insufficient to warrant imposing discipline. We therefore dismiss the OLR's complaint, without costs.

Attorney Din was admitted to practice law in Wisconsin in 2007 and practices in the area of immigration law. He has been the subject of a disciplinary proceeding once before. In 2015, we publicly reprimanded Attorney Din for eight counts of misconduct in four client matters, all involving immigration law. His misconduct included collecting fees from clients, failing to provide useful work, and then refusing to refund any fees upon the client's request. See In re Disciplinary Proceedings Against Din, 2015 WI 4, ¶43, 360 Wis. 2d 274, 858 N.W.2d 654.

In this matter, Attorney Din's work in four client matters—again in the area of immigration law—are at issue.

In resolving the OLR's claims about these immigration matters, the referee was required to make a choice of law determination. This is so because SCR 20:8.5(b)(1) provides in part:

> (b) **Choice of Law.** In the exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise . . . .

Applying SCR 20:8.5(b)(1) to Attorney Din's conduct, the referee noted that all of the conduct occurred in connection with federal immigration court proceedings. Those proceedings are governed by professional standards promulgated by the Executive Office of Immigration Review ("EOIR"), a sub-agency of the Department of Justice that administers the immigration court system. See 8 C.F.R. § 1003.102 (setting forth professional standards). The referee reasoned that under the plain language of SCR 20:8.5(b)(1), these federal immigration professional rules apply to this case.

Upon review of SCR 20:8.5(b)(1), and in the absence of any argument from the parties to the contrary, we agree with the referee's choice of law determination. As noted, the plain language of SCR 20:8.5(b)(1) requires the application of the professional rules of the tribunal where the conduct occurred, unless the tribunal's own rules provide otherwise. It is undisputed that all of Attorney Din's conduct occurred in connection with federal immigration court proceedings, and there is no argument before us that any provision in the federal immigration professional rules would make them inapplicable in this matter. Because the referee's determination and the parties'

> matter to the referee for additional findings; and determine and impose appropriate discipline. The court, on its own motion, may order the parties to file briefs in the matter.

tacit agreement that the federal immigration professional rules are applicable appear to comport with SCR 20:8.5(b)(1), the court will apply those rules, and those rules alone, in resolving this matter. See SCR 20:8.5(b)(1), comment 4 (explaining, in pertinent part, that when a lawyer's conduct "relat[es] to a proceeding pending before a tribunal, the lawyer shall be subject *only* to the rules of the jurisdiction in which the tribunal sits . . . ") (emphasis added); see also id., comment 3 (explaining that subsection (b) "provid[es] that any particular conduct of a lawyer shall be subject to *only* one set of rules of professional conduct") (emphasis added).[2]

The OLR alleged that Attorney Din, through his conduct in four client matters, violated the following federal immigration professional rules:

- 8 C.F.R. § 1003.102(a)(1), which prohibits an attorney from charging or receiving, directly or indirectly, "any fee or compensation for specific services rendered for any person that shall be deemed to be grossly excessive."

- 8 C.F.R. § 1003.102(q)(2), which requires an attorney "to act with reasonable diligence and promptness in representing a client," including "complying with all time and filing limitations."

- 8 C.F.R. § 1003.102 (r) (3) and (4), which requires an attorney "to maintain communication with the client throughout the duration of the client practitioner relationship"—including, under subsection (3), "[k]eep[ing] the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation," and, under subsection (4), "[p]romptly comply[ing] with reasonable requests for information . . . ."

As noted above, Attorney Din's alleged misconduct arose out of his work in four client matters. In the first three matters, the OLR alleged that Attorney Din committed misconduct in representing A.A.K.; A.A.K.'s mother, M.K.; and A.A.K.'s sister, Ar.K.;[3] in connection with their individual immigration matters. In the fourth matter, the OLR alleged that Attorney Din committed misconduct in representing Au.K.[4] in connection with her attempt to establish

[2] We note that in its complaint, the OLR charged Attorney Din under both Wisconsin's professional rules and the federal immigration professional rules. We apply only the latter for the reasons explained above.

[3] The initials Ar.K. are being used for the name of the third individual to distinguish her from A.A.K.

[4] The initials Au.K. are being used for the name of the fourth individual to distinguish her from A.A.K.

permanent lawful residency. Counts 1-4 relate to A.A.K., counts 5-8 relate to Ar.K., counts 9-12 relate to M.K., and counts 13-14 relate to Au.K.

We turn now to the substance of the OLR's allegations against Attorney Din, and the referee's ensuing findings and conclusions. We group the claims by general subject matter.

- **Counts 1, 2, 5, 6, 9, and 10**

In Counts 1, 2, 5, 6, 9, and 10, the OLR alleged that Attorney Din failed to take appropriate meaningful action in A.A.K.'s, M.K.'s, and Ar.K.'s matters and failed to keep them reasonably informed, contrary to 8 C.F.R. § 1003.102 (q) (2) (Counts 1, 5, and 9) and 8 C.F.R. § 1003.102 (3) and/or (4) (Counts 2, 6, and 10).

A.A.K., M.K., and Ar.K. were noncitizens who were not legally in the United States, having overstayed their visas. Attorney Din accompanied A.A.K., M.K., and Ar.K. to meetings with Immigration and Customs Enforcement (ICE) officers, where they surrendered and were released. ICE then initiated removal proceedings against A.A.K., M.K., and Ar.K.

Title 8, United States Code, § 1229a authorizes an immigration court to "conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1). Section 1229 states that in removal proceedings under § 1229a, a written notice must be provided to a noncitizen containing certain categories of information, including the charges against the noncitizen and the statutory provisions alleged to have been violated, as well as "[t]he time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(D), (G)(i). This written notice is known as a "Notice to Appear." The Notice to Appear must be given to the noncitizen in person, or, "if personal service is not practicable, through service by mail . . . ." Id. at § 1229(a)(1), (2)(A).

We note that the Notice to Appear appears to be a critically important document in a removal proceeding. As the Seventh Circuit has explained:

> An alien cannot be ordered removed from the United States without notice and an opportunity to be heard. Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). The alien can waive his right to a removal hearing; he does so if having received notice of the hearing he decides to skip it; and in that case he can be ordered removed without a hearing—that is, ordered "in absentia" to be removed. Sabir v. Gonzales, 421 F.3d 456, 458 (7th Cir. 2005). But if he never received the notice, there is no waiver and so he is entitled to reopen the removal proceeding to enable him to contest removal. Id. at 458–59. That is, an order of removal in absentia "may be rescinded . . . upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) . . . of section 1229(a)." 8 U.S.C. § 1229a(b)(5)(C)(ii). Section 1229(a)(1) provides that "written notice . . . shall be

> given in person to the alien (or, if personal service is not practicable, through service by mail to the alien)."

Smykiene v. Holder, 707 F.3d 785, 786–87 (7th Cir. 2013).

ICE is not required to file the Notice to Appear with the immigration court within a particular time after the Notice has been served on the noncitizen. According to the testimony in this matter, ICE often takes more than a year to file a Notice to Appear with the immigration court after it has been served on a noncitizen. In some circumstances, ICE never files a Notice to Appear, in which case removal proceedings are simply never initiated.

A lawyer representing the noncitizen may only file a notice of appearance after ICE files the Notice to Appear with the immigration court. This filing restriction appears to exist because, until ICE files the Notice to Appear with the immigration court, the immigration court is not vested with jurisdiction, and thus removal proceedings have not yet officially begun. See 8 C.F.R. § 1003.14(a) (stating that "[j]urisdiction vests, and proceedings before an [i]mmigration [j]udge commence, when a charging document is filed with the [i]mmigration [c]ourt").

On occasion, a Notice to Appear served on a noncitizen will not include the time and place for the noncitizen's hearing before the immigration court. In those instances, the immigration court may send the noncitizen, by first class mail, a "Notice of Hearing," setting his or her hearing for a particular time and place. This initial hearing is known as a "Master Calendar Hearing."

Here, ICE officers served A.A.K., M.K., and Ar.K. with Notices to Appear at the time of their surrender, but these Notices to Appear did not state a specific date and time for their Master Calendar Hearings.[5] Attorney Din informed A.A.K., M.K., and Ar.K. that Notices of Hearing would be sent to their addresses, and that they should immediately forward any correspondence they received from the government to his office.

At all relevant times, EOIR maintained a toll-free number (hereafter, the "EOIR hotline") that noncitizens and attorneys may use to obtain information about the status of pending cases, including the date of future hearings. Both Attorney Din and the ICE officer that handled their surrender advised A.A.K., M.K., and Ar.K. that they could check the EOIR hotline to determine the status of their cases.

Attorney Din's law firm does not have a practice of checking the EOIR hotline to determine if ICE has filed a Notice to Appear with the immigration court, thereby formally initiating removal proceedings. In such situations, Attorney Din learns of the fact that a case has been initiated through the client's receipt of the Notice of Hearing.

[5] The United States Supreme Court has since held that a Notice to Appear that does not state a specific date, time, and place of a removal hearing is not valid. See Pereira v. Sessions, 138 S. Ct. 2105 (2018).

The immigration court mailed Notices of Hearing to A.A.K., M.K., and Ar.K., but they did not receive them. In A.A.K.'s case, a staff member at Attorney Din's firm checked the EOIR hotline for information on A.A.K.'s case numerous times, and each time was told that no hearing was scheduled. Eventually, however, the immigration court proceeded to hold Master Calendar Hearings for A.A.K., M.K., and Ar.K., none of whom appeared, nor did Attorney Din, as he was unaware that Master Calendar Hearing dates had been set. The immigration court ordered A.A.K., M.K., and Ar.K. removed in absentia.

As mentioned above, the OLR alleged in Counts 1, 2, 5, 6, 9, and 10 that Attorney Din failed to take appropriate meaningful action in A.A.K.'s, M.K.'s, and Ar.K.'s matters and failed to keep them reasonably informed.

The referee recommended that the court dismiss these counts. The referee reasoned that Attorney Din told A.A.K., M.K., and Ar.K. as much as he knew about their respective matters, and that he had no legal obligation to take any more action. It is undisputed that A.A.K., M.K., and Ar.K. did not receive the mailed Notices of Hearing, and thus did not and could not have let Attorney Din know about their Master Calendar Hearing dates. Moreover, the referee determined, the OLR failed to establish that Attorney Din had an obligation to routinely check the EOIR hotline for the status of their cases. The referee noted that Attorney Din has handled dozens of surrenders of noncitizens to ICE officials, and he relies on his clients to notify him when they have received a notice of hearing. He has never encountered a situation where the client was mailed a Notice of Hearing but did not receive and forward the Notice of Hearing to him. The referee therefore determined that the OLR failed to show by clear, satisfactory, and convincing evidence that Attorney Din's practice in this regard fell below professional standards.

- **Counts 4, 8, and 12**

The OLR alleged in counts 4, 8, and 12 that A.A.K., M.K., and Ar.K. contacted another attorney for a second opinion on their immigration matters, and that this attorney asked Attorney Din to provide a copy of their files. The OLR alleged that Attorney Din failed to do so, contrary to 8 C.F.R. §1003.102(r) (4) (duty to respond to a client's reasonable request for information) and 8 C.F.R. §1003.102(q)(2) (duty to act with reasonable diligence and promptness).[6]

The referee recommended that the court dismiss these counts. The referee noted that although successor counsel never received the requested file materials, no record evidence called into question the truthfulness of the testimony of Attorney Din's staff member, who testified that she prepared the materials, addressed them to successor counsel, and placed them in the spot where

[6] In its complaint, the OLR brought Counts 4, 8, and 12 under SCR 20:1.16(d) (duty to return client papers and property upon termination of representation). In its post-hearing brief, the OLR explained that in the event that the referee finds that the federal immigration professional rules are applicable—and, as noted above, the referee did so, and we agree—then Attorney Din's failure to provide the files to successor counsel should be viewed as a claimed violation of 8 C.F.R. §1003.102(r) (4) and 8 C.F.R. §1003.102(q)(2).

the mail carrier picked up the office mail. The referee therefore determined that the OLR failed to show by clear, satisfactory, and convincing evidence that Attorney Din's conduct in this regard fell below professional standards.

- **Count 3**

The OLR alleged in Count 3 that Attorney Din charged an excessive fee for the work he did for A.A.K. in violation of 8 C.F.R. § 1003.102(a)(1) (prohibiting the charging of a "grossly excessive" fee). Summarized, the referee described Attorney Din's work for A.A.K. as follows.

As mentioned above, A.A.K. was in the country illegally, having overstayed his visa. Attorney Din informed A.A.K. that he would represent him in surrendering to ICE and in removal proceedings that would follow that surrender, including preparing an application for withholding or deferral of removal pursuant to the Convention Against Torture (CAT). An applicant is eligible for withholding or deferral of removal pursuant to the CAT if the applicant can "establish that it is more likely than not that he or she would be tortured if removed." 8 C.F.R. § 1208.16(c)(2). To constitute torture, the act "must be specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. § 1208.18(a)(5).

If a CAT application is granted, the applicant is ordered removed, but the removal order is stayed. Rodriguez-Molinero v. Lynch, 808 F.3d 1134, 1135-36 (7th Cir. 2015). Attorney Din informed A.A.K. that CAT relief was a possibility for him given that A.A.K. was a member of a sect in his native country that had been subject to persecution in that country.

Attorney Din also informed A.A.K. that he might be able to successfully apply for asylum. To be eligible for asylum, a noncitizen is required to establish that he or she is an alien unwilling or unable to return home "because of . . . a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Although asylum applications must be filed within one year after entering the United States and this deadline had long since passed for A.A.K., Attorney Din advised A.A.K. that he might still be able to satisfy an exception to the time limit by raising a claim for asylum "based on changed country conditions arising in the country of nationality." 8 U.S.C. § 1229a(c)(7)(C)(i), (ii).

As mentioned above, Attorney Din accompanied A.A.K. to an ICE facility to surrender to ICE. As also mentioned above, the immigration court later conducted a hearing in absentia and ordered A.A.K. removed to his native country. However, A.A.K. was not removed from the United States, and A.A.K. had no further contact with ICE following the entry of the removal order.

After the immigration court ordered A.A.K. to be removed in absentia, Attorney Din's firm began preparing A.A.K.'s CAT application and the argument regarding changed country conditions that would be needed to support an asylum application. Attorney Din's staff member communicated with A.A.K. to develop the background information needed to support these

materials, and also conducted internet research and collected newspaper articles showing attacks against A.A.K.'s sect in his native country. Attorney Din then reviewed and edited the material collected and prepared by his staff member. He also conducted his own internet research, and monitored news in Urdu and English in order to add to the materials collected by his staff member. Attorney Din's staff member also met personally with A.A.K. at the law firm in order to work on preparing a declaration that would accompany the CAT application. Ultimately, however, Attorney Din's firm never filed an asylum or CAT application on A.A.K.'s behalf, in part because A.A.K. declined several requests to come into the firm to review in detail and sign his draft CAT application.

Attorney Din charged a flat fee of $10,000 for his representation of A.A.K. A.A.K. ultimately paid Attorney Din's firm a total of $9,000 in fees—an amount the OLR alleged was excessive.

The referee recommended the dismissal of this count. The referee noted that although the OLR's expert opined that Attorney Din's work was worth at most $3,000, the OLR's expert had never handled a case that involved a surrender to ICE authorities, as occurred in A.A.K.'s case. Nor had A.A.K. ever demanded a refund from Attorney Din for any unused portion of the flat fee. Thus, the referee reasoned, there was no clear, satisfactory, and convincing evidence that the value of the work Attorney Din performed for A.A.K. fell below the $9,000 that A.A.K. paid him.

- **Counts 7 and 11**

The OLR alleged in Counts 7 and 11 that Attorney Din failed to have a written fee agreement with M.K. and Ar.K. As mentioned above, M.K. and Ar.K. are A.A.K.'s mother and sister, respectively, and they, like A.A.K., had overstayed their visas. During A.A.K.'s surrender process, an ICE officer questioned A.A.K. about his mother's and sister's whereabouts. Attorney Din advised A.A.K. to cooperate regarding his mother and sister so as to help ensure that A.A.K. would be released on his own recognizance. Attorney Din agreed to assist in the surrender of A.A.K.'s mother and sister because if A.A.K. wasn't cooperative with respect to his mother and sister, there was a significantly greater likelihood that A.A.K. would be incarcerated.

Attorney Din considered this assistance in surrendering A.A.K.'s mother and sister to be part of his representation of A.A.K. Attorney Din accompanied M.K. and Ar.K. to an ICE facility for their surrender to ICE authorities. M.K. and Ar.K. were each personally served with a Notice to Appear during their surrender. Neither Notice to Appear specified a date and time for their hearing, but rather stated that the hearing date and time were "to be set." ICE authorities informed M.K. and Ar.K. that a Notice of Hearing would be sent to their address by mail, and that a Notice of Hearing might not be sent for a year.

M.K. and Ar.K. did not execute a retainer agreement with Attorney Din's firm at that time, and the firm did not agree to represent them further in their removal proceedings.

After their surrender, Attorney Din told M.K. and Ar.K. that they would receive Notices of Hearing in the mail, and that when they received them, they should make an appointment to execute a fee agreement and pay the agreed fees if they wished to retain him to represent them.

As noted above, the immigration court sent Notices of Hearing to M.K. and Ar.K., but they did not receive them. The immigration court then entered an order of removal in absentia with respect to M.K.

Subsequently, M.K. and Ar.K. met in person with Attorney Din. During this meeting, Attorney Din asked M.K. and Ar.K. if they had received notices of hearings, and they said no. Attorney Din conducted an intake at that time and told M.K. and Ar.K. that he would charge $10,000 to process one case for M.K. and Ar.K., so long as Ar.K. was under age 21 and not married. Otherwise, the charge would be $10,000 per case. M.K. and Ar.K. did not sign any fee agreement and never paid anything to Attorney Din or his firm.

As mentioned above, the OLR alleged that Attorney Din committed misconduct by failing to have a written fee agreement with M.K. and Ar.K. in place.

The referee recommended the dismissal of these counts. The referee noted, first, that there is no federal immigration professional rule requiring a written fee agreement, and second, that even if Wisconsin's professional rules applied, no attorney-client relationship existed between Attorney Din and M.K. or Ar.K., and thus no requirement for a written fee agreement existed.

- **Counts 13 and 14**

The OLR alleged in Counts 13 and 14 that Attorney Din failed to timely file a document on behalf of Au.K., and failed to failed to keep her informed as to the status of her case, in violation of 8 C.F.R. § 1003.102(q) (2) (duty to act with reasonable diligence and promptness) and 8 C.F.R. § 1003.102(r)(3) (duty to keep the client reasonably informed).

Au.K. is a native of a foreign country. In 2002, while in the United States on a visa, Au.K. married an American citizen. Au.K claimed her spouse was abusive. Au.K. sought immigration benefits as an abused spouse of a U.S. citizen under the Violence Against Women Act ("VAWA"). That proceeding was handled by a lawyer other than Attorney Din, whom Au.K. maintains did not represent her properly.

Au.K. executed a flat fee retainer agreement for Attorney Din's firm to represent her to re-file a VAWA petition. Attorney Din's firm prepared a VAWA petition along with extensive supporting documentation. The government denied this petition, as it determined that Au.K. did not establish that she was battered or subject to extreme cruelty, and that she had not entered into the marriage in good faith.

Attorney Din's firm and Au.K. entered into a subsequent retainer agreement to prosecute an appeal of this decision. This appeal was ultimately dismissed based on Au.K.'s lack of

credibility because of false statements on an I-9 form (used to verify the identity and employment authorization of individuals hired for employment in the United States), her forgery of her ex-husband's signature on a tax return, and her alteration of a tax return that she submitted to the U.S. Citizenship and Immigration Services (USCIS) to support the claim that her marriage was indeed entered into in good faith.

A VAWA petitioner may seek reconsideration of the dismissal of an appeal from a denied petition. Motions for reconsideration must be received by USCIS within 33 days of the date of the dismissal of the appeal—a January 3, 2017 deadline in this case. On December 6, 2016, Attorney Din's firm mailed a letter to Au.K. informing her that her appeal had been denied and enclosing a copy of the decision. Attorney Din did not recommend a motion for reconsideration.

A few days before a reconsideration motion was due, the paralegal assigned to the case told Au.K. that she would prepare a motion for reconsideration. The paralegal was not authorized to make this commitment to Au.K., and the paralegal did not inform Attorney Din that she had told Au.K. that she would prepare a motion for reconsideration. To be timely, the motion for reconsideration would have to be mailed by Friday, December 30, 2016, since the law firm was closed Saturday, December 31, January 1 (a Sunday), and January 2 (a federal and state holiday). Attorney Din was traveling the last week of 2016 and was completely unaware of the discussion between the paralegal and Au.K.

The paralegal, who was working remotely at the time, prepared a motion for reconsideration and e-mailed it to the law firm's staff late in the day on Sunday, January 1, 2017, when the office was closed. By this point, the time to timely mail the motion had passed.

Attorney Din did not learn that a motion for reconsideration had been prepared until Tuesday, January 3, 2017, when he returned to the office. He then signed the motion for reconsideration and mailed it to USCIS. Eventually the motion for reconsideration was denied, and Attorney Din met with Au.K. to discuss options with her.

As mentioned, the OLR alleged that Attorney Din committed misconduct by failing to timely file the motion for reconsideration (Count 13), and by failing to keep Au.K. informed as to the status of her case (Count 14). The referee sided with the OLR on Count 13 given that Attorney Din's firm unquestionably missed the motion deadline. But the referee recommended the dismissal of Count 14, as the referee did not find credible Au.K.'s testimony regarding Attorney Din's supposed failure to keep her informed about her case.

In sum, then, following summary judgment briefing and a lengthy evidentiary hearing, which included testimony from 11 witnesses and the admission of 65 exhibits, the referee concluded that the OLR had proven only one of its 14 counts of alleged misconduct.

The referee then considered the appropriate discipline. In its complaint, the OLR sought a five-month suspension. The referee reasoned that, in light of the findings and conclusions summarized above, no disciplinary sanction was warranted. If the court disagreed with that

recommendation, however, then the referee suggested that a private reprimand was the maximum penalty that would be appropriate.

As to costs, the OLR has filed a statement of costs totaling $48,501.88 as of June 28, 2022. The referee has not provided his opinion on the appropriateness of these costs, other than to note that his own fees and charges ($7,333.28) are reasonable. In its statement of costs, the OLR writes:

> [I]n this proceeding, after granting OLR summary judgment on one misconduct count, Referee Kremers filed a report recommending that the remaining 13 charged misconduct counts be dismissed. While OLR does not agree with the referee's assessments and conclusions, they are largely based on and couched in terms of credibility determinations. OLR is not filing an appeal. If at the close of this proceeding the Court does not find any misconduct, then OLR of course does not seek any cost assessment. SCR 22.24(1). If the Court finds Attorney Din committed misconduct, OLR has chosen to seek a cost assessment of at least $1,000, or other amount chosen by the Court, against him.

Attorney Din has filed a response to the OLR's statement on costs, asserting that no costs should be imposed in this matter. Attorney Din argues that he should not be required to pay costs based on a single misconduct count that "resulted from a former employee's unauthorized agreement to prepare a motion for reconsideration at literally the 11th hour, without informing Attorney Din that she had done so," and for which the referee recommended no disciplinary sanction.

We turn first to the referee's findings of fact and conclusions of law. Because neither party appealed from the referee's report, there are no challenges to any of the referee's findings of fact. We also do not find that any of the findings of fact are clearly erroneous, and we therefore adopt them.

We also adopt the referee's conclusions of law. A significant number of the misconduct counts in this matter hinge on whether Attorney Din had an independent duty to regularly monitor the EOIR hotline, which he undisputedly did not do, instead relying on his clients to inform him when they were served with a Notice of Hearing. Although Attorney Din's methods in this regard might not be considered the best practice, we agree with the referee that Attorney Din did not clearly, satisfactorily, and convincingly engage in professional misconduct under this set of facts.

The referee wrote—and, importantly, no party before us disputes—that:

> Simply put OLR has failed to show any obligation on Din's part to check the [EOIR hotline]. . . . The system created by The Department of Justice with respect to EOIR proceedings was so deeply flawed it would be unfair in the extreme to place the responsibility for correcting its own flaws on Din.

The record bears out the flawed nature of the EOIR hotline referenced by the referee. In particular, the record shows that whether case information is available on the EOIR hotline

depends heavily on the timing of events outside of the noncitizen's or his or her attorney's control. If, for example, ICE has not filed the Notice to Appear with the immigration court—and as this record shows, significant lapses may occur between the service of a Notice to Appear on a noncitizen and the filing of that notice with the immigration court—there will be no record of proceedings on the EOIR hotline. In addition, if an immigration court has entered an order of removal in absentia—which as seen in this case might occur without the noncitizen's or his or her attorney's knowledge—the EOIR hotline likewise may contain no information.

Thus, there seems to be no dispute on the record before us that the EOIR hotline may, at any given time, be missing hearing information for a meaningful number of noncitizens. As did the referee, we decline to hold that Attorney Din was under a professional obligation to habitually check this flawed system.

Most of the remaining counts hinge on the referee's credibility determinations that were adverse to the OLR's case. The referee credited the testimony of Attorney Din's staff member that she mailed requested file materials to successor counsel, although these file materials apparently never made their way to successor counsel. The referee was unpersuaded by the OLR's expert's opinion that Attorney Din's work for A.A.K. was not worth the amount collected. The referee credited Attorney Din's testimony that he did not agree to represent M.K. or Ar.K. The referee was unconvinced by Au.K.'s testimony that Attorney Din's firm did not keep her informed about her case. Because this case comes before us without an appeal, we have no reason to doubt these credibility determinations, and we adopt the conclusions of law that flow from them.

As for the one count for which the referee found misconduct (Count 13—duty to act with reasonable promptness under 8 C.F.R. § 1003.102(q)(2)), we agree with the referee that Attorney Din's single missed deadline, in attempting to file a motion for reconsideration of the denial of Au.K.'s VAWA petition, does not justify the imposition of legal consequences. In support of his recommendation, the referee pointed out that Attorney Din never told Au.K. that he would file a motion for reconsideration; that Attorney Din's paralegal told Au.K. that she would prepare a motion for reconsideration without Attorney Din's knowledge and while Attorney Din was traveling and out of the office; that Attorney Din returned to the office on the day the motion was due; and that he filed it one day late hoping that USCIS in its discretion would allow it. The referee wrote that under these circumstances, "no penalty should be applied," or at the very most, "nothing beyond a private reprimand is warranted." We adopt the referee's first option. It is true that 8 C.F.R. § 1003.102(q)(2) requires a lawyer to comply "with all time and filing limitations," and that Attorney Din violated this rule by missing a single deadline by a single day. But this court has discretion whether to impose discipline, see SCR 21.16, and we conclude that imposing a disciplinary sanction under the circumstances presented here is unwarranted.

Having found no misconduct on 13 of the 14 counts brought by the OLR, and no misconduct worthy of discipline on the remaining count, we dismiss the OLR's complaint, and we impose no costs on Attorney Din. See In re Disciplinary Proceedings Against Merry, 2014 WI 30, ¶23, 353 Wis. 2d 644, 847 N.W.2d 174 (dismissing OLR complaint after determining the single

instance of misconduct that occurred was a de minimis one, insufficient to warrant imposing discipline and attendant costs).[7]

Based on the foregoing,

IT IS ORDERED that the Office of Lawyer Regulations' complaint is dismissed, without costs.

Sheila T. Reiff
Clerk of Supreme Court

[7] In light of our decision to dismiss the OLR's complaint in its entirety, we do not address the restitution requests in the OLR's complaint, which sought restitution of fees paid by A.A.K. and Au.K to Attorney Din.