

SUPREME COURT OF WISCONSIN

No. 13-12

In the matter of the Petition to Create Supreme Court Rule 22.21m Relating to Public Notice of Formal Investigations in the Public Interest.

FILED

JUN 24, 2014

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On August 28, 2013, the Board of Administrative Oversight and the Office of Lawyer Regulation (OLR) together filed a petition requesting that the court create Supreme Court Rule (SCR) 22.21m relating to public notice of formal investigation in the public interest. The new rule would establish a procedure authorizing the OLR to disclose the existence of a formal investigation into an attorney's possible misconduct or medical incapacity when such disclosure is required to protect the public.

The court discussed this petition at open rules conference on December 6, 2013, and voted to schedule a public hearing. A letter to interested parties was sent on December 16, 2013. The court received written responses from Mr. William J. "Jack" Keefe.

The court conducted a public hearing on the matter on February 24, 2014. OLR Director Keith Sellen presented the petition. Attorney Ed Hannan, Chair of the Preliminary Review Committee, also spoke in support of the petition. Attorney Dean R. Dietrich expressed concerns about the proposed rule, as drafted.

Mr. Sellen advised the court that the petition is the result of a recommendation made in a February 2012 report that reviewed aspects of the OLR system. At present, SCR 22.40 requires the OLR to maintain the confidentiality of pending disciplinary investigations. He advised the court that of the several hundred new grievances filed each year, a small number involve situations where the attorney's continuing practice of law presents a possibility of harm to unsuspecting individuals, such as the abandonment of a client's case or the loss of fees or property. Mr. Sellen acknowledged that public disclosure is a sensitive issue that requires a balance between the right of the public to know promptly of attorney misconduct and the right of an attorney who is the subject of a complaint to protection from public disclosure of grievances that may have no merit.

Mr. Sellen explained that the proposed rule offers a procedure by which the OLR could advise the public of a pending investigation in certain cases. He indicated that the rule would only be invoked in cases where there is an on-going or repeated pattern of misconduct or where the misconduct would likely result in revocation or a lengthy suspension. He responded to questions about whether existing rule provisions provide adequate protection of the public, such as SCR 22.21, which allows the temporary suspension of a lawyer's license to practice law where the lawyer's practice of law imposes a substantial risk of harm to individuals. Mr. Sellen opined that the proposed rule would fill a gap of the current rule. Mr. Sellen also responded to questions from the court about due process and privacy concerns.

Attorney Dean Dietrich expressed concern about the proposed rule, as drafted. He suggested the rule should be redrafted to include the more specific standards articulated by the OLR at the hearing. He expressed concerns about the court's role in reviewing such motions given the court will also likely be called to evaluate the case on the merits. Questions were raised about the applicable burden of proof.

The court discussed the petition in open administrative rules conference on May 27, 2014. Chief Justice Shirley S. Abrahamson stated she agreed with the concerns voiced by Attorney Dietrich and indicated she would return the petition to the petitioners for further refinement. Justice David T. Prosser acknowledged the petition has "core merit" but stated he shared several of the concerns raised during the public hearing. He also expressed interest in proceeding with a comprehensive review of the OLR. Chief Justice Abrahamson stated she would draft a proposal for such a review and invited suggestions from the court. She stated she would bring the proposal to the court for discussion in the fall of 2014.

The court generally agreed that the pending proposal requires refinement. The court discussed whether to return the petition to the OLR, table the petition pending further consideration of other OLR issues, or deny the petition. The court then voted 4:3 to deny the petition.¹

¹ Justices N. Patrick Crooks, Patience Drake Roggensack, Annette Kingsland Ziegler, and Michael J. Gableman voted to deny the petition. Chief Justice Shirley S. Abrahamson and Justices Ann Walsh Bradley and David T. Prosser opposed the vote to deny the petition. Chief Justice Abrahamson and Justice Bradley both indicated they would return the petition to the OLR for further refinement.

Therefore,

IT IS ORDERED that the petition to create Supreme Court Rule 22.21m is denied.

Dated at Madison, Wisconsin, this 24th day of June, 2014.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

