

SUPREME COURT OF WISCONSIN

No. 15-01

**In the Matter of the Review of the
Office of Lawyer Regulation**

FILED

DEC 21, 2015

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On February 6, 2015, then-Chief Justice Shirley S. Abrahamson filed a rule petition asking the court to create supreme court rules providing for review of the Rules of Professional Conduct for Attorneys and the organization, operation, and procedures of the lawyer discipline system, including the Office of Lawyer Regulation (OLR), District Committees, Preliminary Review Committee, Referees, and Board of Administrative Oversight (BAO). The petition also proposed creation of a Lawyer Regulation Review Committee to undertake the comprehensive review.

The court discussed this petition at an open administrative rules conference on February 26, 2015, and voted to schedule a public hearing in the fall of 2015. On July 7, 2015, a letter was sent to interested persons, seeking input. Comments were received from Attorney John Nicholas Schweitzer, Attorney Dean Dietrich, Mr. William H. Levit, Jr., Attorney Colleen D. Ball, and Attorney Robert G. Krohn.

The court conducted a public hearing on the petition on Monday, September 21, 2015. Justice Abrahamson, as petitioner, did not make a formal presentation to the court but, from the bench, made statements in support of the petition and directed questions to persons who appeared to speak on behalf of the petition. The court heard testimony from Ms. Claire Fowler; the Honorable Robert Kinney; the Honorable Charles Dykman; Attorney Dean Dietrich; Attorney Colleen Ball; and Rod Rogahn, Chair of the BAO. The OLR's director, Keith Sellen, was present.

At an open administrative rules conference on November 16, 2015, Justice Annette Kingsland Ziegler moved to discuss, together, three pending rule petitions: Petition 12-11, In the Matter of the Creation of a Judicial Code Review Committee; Petition 13-17, In the Matter of the Creation of Supreme Court Rules 60.001, 60.002, and 60.003 Relating to a Judicial Code Review Committee; and this petition. Justice Ziegler then moved for dismissal of these three petitions on the grounds that they are improper subject matter for a rules petition.¹ After some discussion, the court voted 5:2² to dismiss the petitions. The court expressly noted that its decision to dismiss the petitions did not preclude the court from appointing a committee to undertake a review of either the Office of Lawyer Regulation or the Wisconsin Judicial Code. Therefore,

¹ The motion was seconded by Justice Michael J. Gableman.

² Justices Shirley S. Abrahamson and Ann Walsh Bradley dissented.

IT IS ORDERED that rule petition 15-01, In the Matter of the Review of the Office of Lawyer Regulation, is dismissed.

Dated at Madison, Wisconsin, this 21st day of December, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). Rule Petition 15-01 proposes the creation of a Lawyer Regulation Review Committee to review the organization, operation, and procedures of the component parts of the lawyer regulation system (SCR ch. 21) and to review the Rules of Professional Conduct for Attorneys (SCR ch. 20).

¶2 Five justices have voted to dismiss Petition 15-01 on previously unheard-of grounds, namely that the subject matter of the Petition does not really create a rule.

¶3 The dismissals of this Petition and Rule Petitions 12-11 and 13-17 (which I discuss in separate dissents) are probably the first times in the history of rule making by this court that this inventive ruse has been used to terminate a proposal that several justices view as troublesome.

¶4 Rule Petition 15-01 was filed on February 6, 2015. The court discussed the Petition at an open rules conference on February 26, 2015, and voted unanimously to schedule a public hearing in the fall of 2015. The public hearing was held on September 21, 2015.

¶5 Written comments were solicited and received from several persons, all supportive of the Petition. At the public hearing, the court heard from several people involved in various aspects of the lawyer regulation system, all supporting the

basic thrust of the Petition.³ The following persons appeared and spoke in favor of Rule Petition 15-01.

¶6 Attorney John Nicholas Schweitzer, who serves as a referee for cases brought by the Office of Lawyer Regulation, filed his letter on August 13, 2015, in support of the concept of conducting a review of the rules and of the disciplinary system, "with an emphasis on the latter." He also spoke at the public hearing.

¶7 As to a review of the rules, Attorney Schweitzer stated that while teaching Professional Responsibility at the University of Wisconsin Law School, he has catalogued a number of rules he believes need amending. As to a review of the disciplinary system, he suggested that setting up a single review may be more beneficial than setting up a rule for regular review intervals. Finally, he suggested that the Lawyer Regulation Review Committee include a referee in its membership, along with two lawyers who have represented the OLR and two who have represented attorney respondents.

¶8 Attorney Dean Dietrich filed a letter on August 14, 2015, requesting the opportunity to address the court at the public hearing on this matter. He appeared and stated that, having appeared as respondent's counsel in disciplinary matters, he agrees with conducting a review of the lawyer disciplinary

³ Speakers did have suggestions for change, including adding to the membership of the committee and dividing the committee into two committees, one for review of the operation of the lawyer regulation system and one for review of the Rules of Professional Conduct for Attorneys.

system. He suggested that an aspect of the review could be a survey or request for written comment from practitioners and others involved in the disciplinary system. He also suggested that because another petition involving OLR discretion (Rule Petition 14-06) is outstanding, it may be appropriate to appoint a committee to conduct "some type of regular review of the process and procedure used by the Officer of Lawyer Regulation to address lawyer discipline," the members of which should include a Supreme Court Justice, a referee, a representative from the OLR, and several respondent's counsel and OLR counsel.

¶9 Attorney William H. Levit, Jr., former Chair of the District 2 Board of Attorneys Professional Responsibility (1993-94) and the first Chair of the Board of Administrative Oversight (2001-06), wrote in support of the petition by letter dated August 28, 2015. He stated that he is "well situated to comment on Rule Petition 15-01," given his experience with both the current lawyer discipline system and the regulatory scheme it replaced.

¶10 Attorney Colleen D. Ball filed a letter dated August 28, 2015, in support of the Petition and spoke at the public hearing on her own behalf. She has been an attorney for 24 years and has served as an OLR district committee investigator for eight years. She agreed that "some sort of broad, objective review of the procedures and practices of Wisconsin's lawyer regulation system is necessary in order to protect the public from harm." She discussed a case that involved serious complaints against an attorney but did not

proceed with any urgency at the OLR. Attorney Ball queried why, when it was publicly known that the lawyer's other professional license had been revoked for fraud and the lawyer had been federally indicted for fraud, no one invoked SCR 22.21. This provision authorizes an immediate temporary suspension of the lawyer's license to stop ongoing harm to the public. Wisconsin's existing lawyer regulation system malfunctioned in this case, in Attorney Ball's view, and she urged the court to review and reform the operations of the lawyer regulation system.

¶11 Attorney Robert G. Krohn filed comments by e-mail dated September 10, 2015. He stated that he has served as retained counsel for the OLR over several years and that his relationship with the OLR "has been very positive." However, he offered a few suggestions related to the timing of reinstatement petitions. He noted, "A suspension for greater than six months requires a formal reinstatement procedure. Unfortunately, the process greatly extends the actual time of suspension beyond what was originally ordered." He believes this is unfair to the suspended attorney.

¶12 Attorney Rod Rogahn, then-Chair of the Board of Administrative Oversight, supported Petition 15-01 at the public hearing.

¶13 Attorney Michael B. Apfeld has served on Godfrey and Kahn's Ethics and Loss Committee for over 30 years and serves on the State Bar Ethics Committee. Writing in his individual capacity in a letter dated September 11, 2015, he concurred that

periodic evaluation of the lawyer regulation system is needed and wrote of the "widespread belief among members of the bar and the general public that some reform of the system is necessary." He added that a review of the Rules of Professional Conduct for Attorneys is "both necessary and desirable [because] the practice of law is changing and the Rules of Professional Conduct for Attorneys must adapt to meet those changes."

¶14 Attorney Matthew F. Anich, in a letter dated September 15, 2015, wrote in support of Petition 15-01. He has served as retained counsel for the Board of Attorneys Professional Responsibility and the Office of Lawyer Regulation. He offered a suggestion about changing the time period for filing referee reports.

¶15 In sum, the Petition was very well received in written comments and public appearances. No one objected to the creation of a committee to perform the two functions outlined in the Petition.

¶16 Nevertheless, on November 16, 2015, after treating the Petition as a valid rule petition for almost a year, requesting written comments, and holding a public hearing, five justices voted to dismiss the Petition based on what I consider a subterfuge.

¶17 First I'll address the ploy these five justices use to dismiss the Petition. Then I'll discuss the genesis of the Petition and the underlying reasons for the dismissal of Rule Petition 15-01.

¶18 The ploy: The five justices claim that the Petition does not present a proper subject for a rule.

¶19 Nevertheless, neither Justice Annette Ziegler (the movant to dismiss the Petition) nor Justice Michael Gableman, who seconded the motion, nor any other justice even attempted to respond to my question asking how a "rule" is to be defined so that we can test the Petition against the definition.

¶20 Definitions of the word "rule" exist and might be applied to the Petition. The Petition fits all the definitions of creating a rule.

¶21 One: Supreme Court Rule 98.01 defines "rule" for purposes of chapter 98, entitled "Adoption and Publication of Supreme Court Rules," as follows: "'Rule' means an SCR rule or a supreme court rule under section 751.12 of the statutes."

¶22 Section 98.01(3) defines "SCR" and "SCR rules" as follows: "'SCR' or 'SCR rule' means a supreme court rule not adopted under section 751.12 of the statutes and which is contained within SCR chapters 10 to 99." The Petition was proposed as an SCR rule to be placed within SCR chapters 10 to 99.

¶23 Two: "Rule petition" and "rule" are defined in rule proposals dated November 28, 2012, January 23, 2013, and August 2, 2013, submitted by Justice Patience Roggensack amending Rule Petition 12-01.⁴ Rule Petition 15-01 fits into

⁴ Rule proposals submitted by Justice Patience D. Roggensack are available at <http://www.wicourts.gov/scrules/1201.htm>.

this definition of "rule" in Rule Petition 12-01 (in the original and as amended) without any difficulty.

¶24 Justice Patience Roggensack's proposal defines "rule petition" as follows:

1.02(5) "Rule petition" consists of a petition to create, amend or repeal a rule, a supporting memorandum, and a cover sheet.

¶25 Justice Patience Roggensack's proposal defines "rule" as follows:

1.02(4) "Rule" includes the following categories of rules promulgated by the supreme court:

(a) Rule relating to pleading, practice and procedure that does not affect a substantive right of parties.

(b) Rule relating to the administration of the courts.

(c) Rule relating to regulatory matters, including governance of the State Bar, admission to the State Bar, governance of lawyers, and governance of judges (emphasis added).

¶26 Rule Petition 15-01 fits within this definition of "rule." The rule proposed in Petition 15-01 relates to a regulatory matter, namely the governance of lawyers.

Rule Petition 12-01 was filed in the form of a report by the Wisconsin Supreme Court Advisory Committee on Rule Procedure. This committee, of which both Justice Patience Roggensack and I were members, reviewed and provided recommendations on the court's rule making process. Included in the report was a section defining various words and phrases. Justice Patience Roggensack filed her own proposals in response to Rule Petition 12-01 to amend some of the procedures proposed by the Advisory Committee; Justice Patience Roggensack accepted the substance of the definition of "rule" and "rule petition" in the Advisory Committee's report.

¶27 Three: A definition of "rule" adopted by the legislature for agency rule-making is informative. That definition is as follows:

Wis. Stat. § 227.01(13). "Rule" means a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" includes a modification of a rule

¶28 The Petition at issue easily fits into the legislative definition of a rule.

¶29 If these three definitions of "rule" (as well as common sense) are not convincing that the five justices are way off-base in their objections to the Petition as not being a proper subject for a rule, consider the following.

¶30 Numerous court committees have been created by a rule and appear in the Supreme Court Rules (SCRs). These committees were created at least since 1990 (and some earlier), including, for example, the Supreme Court Finance Committee (SCR 70.125); the Planning and Policy Advisory Committee (SCR 70.14); the Wisconsin Lawyers' Fund for Client Protection (SCR 12.04); the Public Interest Legal Services Fund Board (SCR 13.01-.02); the Access to Justice Commission (SCR ch. 14); the OLR Preliminary Review Committee (SCR 21.07); the OLR Board of Administrative Oversight (SCR 21.10); the Board of Bar Examiners (SCR chs. 30-31); the Judicial Education Committee (SCR ch. 32); the Municipal Judge Education Committee (SCR ch. 33); the Judicial

Conduct Advisory Committee (SCR ch. 60 Appendix); and the Security and Facilities Committee (SCR 68.05).

¶31 If the Petition's subject matter is not the proper subject of a rule, what is?

¶32 I turn now to the genesis of Petition 15-01 and the reasons underlying the dismissal of the Petition

¶33 The Petition has its genesis in various court discussions about the OLR and the Rules of Professional Conduct. The prospect of a comprehensive review of the OLR has been raised by various members of the court in rules proceedings, in closed conference discussions on pending disciplinary cases, and in opinions issued in lawyer discipline cases.

¶34 The current lawyer regulation system was established 15 years ago. Since then, several lawyer discipline opinions⁵

⁵ See, e.g., OLR v. Winkel, 2015 WI 68, ¶55-56, 363 Wis. 2d 786, 866 N.W.2d 642 (Abrahamson, C.J., concurring); OLR v. Kratz, 2014 WI 31, ¶¶98-104, 353 Wis. 2d 696, 851 N.W.2d 219 (Prosser, J., concurring in part & dissenting in part); OLR v. Johns, 2014 WI 32, ¶¶68-76, 353 Wis. 2d 746, 847 N.W.2d 179 (Abrahamson, C.J., dissenting); OLR v. Osicka, 2014 WI 33, ¶¶34-38, 353 Wis. 2d 656, 847 N.W.2d 343 (Abrahamson, C.J., concurring); id., ¶¶40-58 (Prosser, J., dissenting); OLR v. Osicka, 2014 WI 34, ¶¶35-39, 353 Wis. 2d 675, 847 N.W.2d 333 (Abrahamson, C.J., concurring); id., ¶¶41-54 (Prosser, J., dissenting).

and rule petitions⁶ have raised issues relating to the Rules of Professional Conduct for Attorneys and the functioning of the lawyer discipline system, including the time for initiating and completing discipline cases; OLR's discretion in charging, dismissing charges, and diversion; the use of OLR's scarce resources to enforce minor violations of the Rules; allowing respondent lawyers to appear before the Preliminary Review Committee; the possible disbanding of the Preliminary Review Committee inasmuch as over 90% of the OLR's recommendations are accepted by the Preliminary Review Committee; and the bifurcation of proceedings before the referee into hearings on the alleged violation of the Rules and on the recommended sanctions.

¶35 Probably the court's most extensive "on the record" discussion of the OLR occurred on October 25, 2013. On that date, the court conducted lengthy public hearings on two administrative rules matters: (1) Petition 13-04, In the Matter

⁶ See, e.g., Rule Petition 13-04 (petition of OLR's Board of Administrative Oversight and State Bar of Wisconsin to amend the rules relating to referees in the lawyer regulation system); Rule Petition 13-05 (relating to enforcement of supreme court disciplinary orders); Rule Petition 13-06 (petition of OLR's Board of Administrative Oversight and State Bar of Wisconsin relating to stipulations in lawyer disciplinary proceedings); Rule Petition 13-12 (petition of OLR's Board of Administrative Oversight relating to public notice of formal investigations); Rule Petition 14-06 (OLR's petition relating to exercise of discretion by OLR director and staff); Rule Petition 14-07 (OLR's petition relating to electronic banking procedures for trust accounts). Rule petitions are available online at <http://www.wicourts.gov/scrules/supreme.htm>.

of the Petition For Amendment to Rules Relating to Referees in the lawyer regulation system, filed May 22, 2013 jointly by Kevin Klein, State Bar President; Rod Rogahn, Chair, Board of Administrative Oversight; and Keith Sellen, Director, Office of Lawyer Regulation; and (2) Petition 13-05, In the Matter of the Petition to Establish a Procedure for Enforcement of Supreme Court Disciplinary Orders, filed May 29, 2013 jointly by Kevin Klein, State Bar President; Rod Rogahn, Board of Administrative Oversight Chairperson; and Keith Sellen, Director, Office of Lawyer Regulation.⁷

¶36 Justices Ann Walsh Bradley, N. Patrick Crooks, David T. Prosser, and I, and Keith Sellen, Director of OLR, expressed support for an objective, impartial review of OLR practices and procedures.⁸

¶37 More recently, at an open rules conference on January 20, 2015, Justice David T. Prosser commented that he favored a "top down" review of the OLR, and Justice Ann Walsh Bradley stated she did as well. These comments were made as the court voted to schedule public hearings in two pending OLR rule petitions: Petition 14-06 (Petition to Amend Supreme Court Rules 22.001(2), 22.02(6)(c), 22.03(1), 22.25(3), and 22.25(4)

⁷ The court completed Petition 13-04 by order dated July 6, 2015, granting a technical amendment and denying the request to limit the number of referees to four. Petition 13-05 remains pending.

⁸ See Johns, 353 Wis. 2d 746, ¶71 (Abrahamson, C.J., dissenting).

relating to OLR discretion) and Petition 14-07 (Petition for Amendment to Rules Relating to Electronic Banking).

¶38 On February 5, 2015, I mentioned the need for and possibility of a comprehensive review of the lawyer regulation system at oral argument in OLR v. Winkel, 2015 WI 68, 363 Wis. 2d 786, 866 N.W.2d 642, and wrote on that issue in my concurring opinion.

¶39 Others have recognized the need for a review as well. In 2011, Rod Rogahn, Chair of the Board of Administrative Oversight, appointed a committee to explore suggested changes in the operation of the lawyer regulation system. Some of the proposals in the committee's 2012 report⁹ resulted in rule petitions.

¶40 In 2014, OLR Director Keith Sellen consulted with John S. Gleason, Of Counsel for the Colorado Supreme Court Office of Attorney Regulation Counsel, and Jerome E. Larkin of the Supreme Court of Illinois' Attorney Registration and Disciplinary Commission, seeking ways to improve the management and operation of OLR. Their report provides nine key recommendations for change and has already prompted the filing of rule petitions.¹⁰ The creation of a Lawyer Regulation Review Committee as proposed by Petition 15-01 would allow for further review of the lawyer regulation system.

⁹ See <http://www.wicourts.gov/courts/offices/docs/olrstudyreport.pdf>.

¹⁰ See <http://www.wicourts.gov/courts/offices/docs/gleasonlarkininitatives.pdf>.

¶41 The various discussions of the justices in closed conference, in lawyer discipline cases, and in open conferences, and reviews of the operations of the lawyer discipline system are the genesis of this Petition.

¶42 This Petition enables the court to facilitate an impartial, objective review of the lawyer discipline system and the Rules of Professional Conduct for Attorneys in a comprehensive manner rather than piecemeal in opinions and rules.

¶43 I turn now to the underlying reasons for the dismissal of Rule Petition 15-01.

¶44 Although several of the justices, indeed a majority of the justices, have, over the years, expressed concern in opinions and in open conference about the operation of the lawyer regulation system and the need for an overall review of the system, unfortunately some justices seem more comfortable addressing these issues in private. They prefer to conduct quasi-legislative public business behind closed doors, contrary to the longstanding principles of open government in Wisconsin.

¶45 My concern is that some justices may dislike the Petition because they want a significant say about who will serve on the Committee and they want control over the work of the Committee. It seems to me that if we are to engender public trust and confidence in the lawyer regulation system, we need to avoid the appearance of patronage, as well as the perception that the justices are controlling the work of the Committee.

¶46 It is important for the court and the public to hear the voices of the public and the voices of persons not under the court's control or beholden to the court or any justice.

¶47 The court need not fear a runaway Committee. The court retains the ultimate say about what changes will be made to the lawyer regulation system and the Rules of Professional Responsibility for Attorneys.

¶48 The dismissal of this Petition does not necessarily end the prospects for the appointment of a Committee. As was noted at the November 16, 2015 open conference, the dismissal of the Petition does not preclude the court from appointing a committee to fulfill the objectives of the Petition.

¶49 Nevertheless, decisions about whether a Committee will be established, the composition of the Committee, and how the Committee will function will unfortunately be made behind closed doors.

¶50 Lawyer discipline is of great importance to the court, to the lawyers in the state, and the public. I will try to keep the bench, the bar, and the public generally informed as best I can about what progress (or lack thereof) is made in the appointment of a Committee or revisions to the Wisconsin Rules of Professional Conduct. I intend to seek, as much as I can, open discussion of improvement of OLR procedures and practices and the Rules of Professional Conduct.

¶51 On December 14, 2015, the court discussed at open conference Rule Petition 13-05, relating to enforcement of supreme court lawyer disciplinary orders and asked Justice

Prosser to propose a redraft rather than deny the entire petition. Rule Petition 13-05 has been the subject of a public hearing and redraft and has been pending since 2013.

¶52 The court also discussed at open conference on December 14, 2015, electronic banking procedures for trust accounting, but did not address the confusing definitions of "advanced fees," "flat fees," and "retainers." They may be the subject of another petition for another day.

¶53 Public hearings have been scheduled for January 22, 2016, and February 23, 2016, on Rule Petition 15-03, which was filed on June 30, 2015 by the State Bar of Wisconsin to amend 15 rules and comments of the Rules of Professional Conduct. See Rule Petition 15-03 (on the court website). The purpose of Petition 15-03 is stated as proposing significant amendments to the substantive disciplinary rules for lawyers "to modernize Wisconsin's Rules of Professional Conduct for Attorneys and keep pace with changes to the ABA Model Rules." The Petition is more than 60 double-spaced typed pages, accompanied by a 21-page double-spaced supporting memorandum. The drafting Committee was appointed by the State Bar and was composed only of attorneys—no public members.

¶54 I prefer the court take a good hard look at the numerous difficult issues as part of an overall objective study rather than this piecemeal approach. The court's piecemeal approach to review of the operations of OLR and of the Rules of Professional Conduct for Attorneys may very well be incomplete and lead to inconsistencies and confusion.

¶55 For the reasons set forth, I dissent from the dismissal of Rule Petition 15-01.

¶56 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

