

Memorandum

SUPREME COURT OF WISCONSIN
COMMISSIONERS OFFICE



DATE: September 23, 2013

TO: Wisconsin Supreme Court
Attention: Deputy Clerk - Rules

FROM: Supreme Court Commissioners Nancy A. Kopp, David W. Runke, and Mark A. Neuser¹

SUBJECT: Rule Petition 13-04 Petition to amend rules relating to referees in the Lawyer Regulation System

Attorney regulatory matters are assigned to the Supreme Court Commissioners for analysis and reporting to the court. Internal Operating Procedure (IOP) IIB5. In addition, the commissioners provide formal training to referees. SCR 21.11(4). The commissioners have collectively reviewed hundreds of reports filed by dozens of referees. We believe these facts place the commissioners in a unique position to analyze and comment on Rule Petition 13-04. Our office generally does not submit formal comments to pending rule petitions, but we feel that the potential effect of Rule Petition 13-04 on the attorney regulatory system in this state requires us to provide the court with our conclusions.

We strongly oppose the proposal that the court appoint no more than four referees to serve on a permanent panel and that all matters be assigned to one of those four referees to

¹ Because Commissioner Julie A. Rich is directly assisting the court with Rule Petition 13-04, she has not been asked to sign onto this memorandum.

the extent they are available. If in the future the court finds it necessary to appoint additional referees, we would support giving preference to appointing reserve judges and attorneys with substantial trial experience.

Rule petition 13-04 states, "[r]elying on a small number [of referees] provides advantages of quality, efficiency, and uniform application of disciplinary standards and procedures." The petition also asserts that "the standardization achieved by relying on a smaller number [of referees] is expected to result in a more efficient litigation process and Supreme Court review process." In addition, the petitioners say they expect the proposed rule to have a beneficial fiscal impact. We believe that the current system, under which a larger group of referees is available for appointment, has served the court, the legal profession, and the public well and should not be changed. We doubt that creating a permanent pool of four referees will result in any of the benefits mentioned in the petition, and we believe such a change could actually result in additional cost and could potentially weaken the attorney regulatory system.

Approximately 50 OLR complaints are now pending in the supreme court. A half dozen or so are recent filings where a referee has not yet been appointed. The remaining matters have been assigned to approximately 20 referees. If four referees were assigned to handle most or all pending cases, that would mean each of them would be responsible for ten active files. That would seem to equate to a full-time or nearly full-time

workload per referee, at least for substantial stretches of time.

Upon service of the complaint, the clerk of this court selects a referee from the panel provided in SCR 21.08, based on availability and geographic proximity to the respondent's principal office. SCR 22.13(3). Hearings are held in the county of the respondent's principal office or, in the case of a non-resident attorney, in the county designated by the OLR director. The referee, for cause, may designate a different location. SCR 22.16(2). If four referees handled all cases filed, they would potentially have to travel to all 72 counties. It seems likely that mileage expenses for referees (and potentially hotel and meal allowances) would increase significantly. While the referee could possibly designate that the hearing be held in the county where the referee is located to reduce the referee's travel costs, it is questionable whether the convenience of the referee would satisfy the "for cause" requirement of SCR 22.16(2), particularly if substantial inconvenience and increased travel time and expense for the respondent and his or her counsel would result if proceedings were moved to the referee's county.

Within 10 days after notice of appointment of the referee, the OLR director and the respondent may each file a motion for substitution of the referee. SCR 22.13(4). One timely motion filed by each party shall be granted as a matter of right. Id. With a permanent panel of four referees, if both the OLR director and the respondent exercise their right to file a motion for substitution, the panel of available permanent

referees would be reduced to only two. Moreover, the two referees who would have been removed from the case likely would have been the two closest to the respondent attorney's county. This could regularly result in a Milwaukee-based reserve judge or attorney serving as the referee in a disciplinary proceeding held in Eagle River or Superior, or a LaCrosse-based individual serving in a proceeding held in Racine.

The commissioners do not share the petitioners' apparent belief that the current method of appointing referees has led to systemic problems in quality, efficiency or uniform application of disciplinary standards and procedures. In our opinion, while there are clearly variations in the helpfulness and thoroughness, the overall quality of referee reports we have reviewed has been quite good. To the extent that a few referees could better manage cases or provide a more thoroughly reasoned report, the answer would seem to be to remove those referees from the panel - not to dismantle and reconstitute the entire referee system. To the extent we have observed delays in the resolution of disciplinary matters, the greatest delay in most cases appears to have occurred during the OLR's investigatory stage of the proceedings. In our experience referees are issuing their reports within a reasonable time frame in the vast majority of cases.

The commissioners also do not share the petitioners' expressed concern about a lack of uniform application of disciplinary rules. It is important to keep in mind that it is the supreme court that promulgates and interprets the Rules of

Professional Conduct for Attorneys. It is also the supreme court that ultimately determines attorney misconduct and imposes discipline. SCR 21.09. Findings of fact made by a referee are affirmed unless clearly erroneous. Conclusions of law are reviewed de novo. See In re Disciplinary Proceedings Against Eisenberg, 2004 WI 14, ¶ 5, 269 Wis. 2d 43, 675 N.W.2d 747. The court may impose whatever sanction it sees fit regardless of the referee's recommendation. See In re Disciplinary Proceedings Against Widule, 2003 WI 34, ¶ 44, 261 Wis. 2d 45, 660 N.W.2d 686.

The commissioners and the court spend a significant amount of time reviewing and discussing each attorney regulatory matter that comes before them. Referees' reports and recommendations are never rubber stamped. Moreover, we do not view "standardization" of referees' reports as necessarily being a positive thing. We feel that the diversity of the thought process that results from a larger group of referees submitting reports helps spur more thoughtful discussion about the cases once they reach the court.

We note that in their September 17, 2013 submission responding to an inquiry about how the court should select the four permanent referees, the petitioners recommend that the court should advertise for candidates and refer candidates to a panel consisting of one justice, one attorney who regularly represents the OLR in lawyer regulation cases, and one attorney who represents respondents in such matters. The commissioners feel that the selection of referees should be entirely up to the

court and that it would be inappropriate for counsel for either the OLR or respondent attorneys to play any part in the selection process.

In conclusion, the commissioners believe that, in general, the current referee appointment system is meeting the court's needs. We strongly oppose the proposal that the court appoint no more than four referees to serve on a permanent panel and that all matters be assigned to one of those four referees to the extent they are available. If in the future the court finds it necessary to appoint additional referees, we would support giving preference to appointing reserve judges and attorneys with substantial trial experience.

We appreciate the opportunity to comment on this pending rules petition. We would be happy to provide any additional information the court might request.