
SUPPORTING MEMORANDUM**19-**

In the matter of CREATING Supreme Court Rules 22.02 (6)(d), 22.05 (1)(e), and 22.11 (2)(b) and (c), REPEALING Supreme Court Rule 22.10 (7)(b) and (c), AMENDING Supreme Court Rules 22.02 (4) and (6)(a), 22.05 (2), and 22.10 (4) and RENUMBERING AND AMENDING Supreme Court Rules 22.10 (7)(a) and 22.11 (2), relating to the charging process in attorney disciplinary proceedings.

The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, and Paul Schwarzenbart, Chair of the Subcommittee on Charging Process, respectfully petition the court to amend Supreme Court Rules by creating Supreme Court Rules 22.02 (6)(d), 22.05 (1)(e), and 22.11 (2)(b) and (c), repealing Supreme Court Rule 22.10 (7)(b) and (c), amending Supreme Court Rules 22.02 (4) and (6)(a), 22.05 (2), and 22.10 (4) and renumbering and amending Supreme Court Rules 22.10 (7)(a) and 22.11 (2).

SUPREME COURT SUPERINTENDING AUTHORITY

The subject matter of the proposed rule changes falls within the power of the Wisconsin Supreme Court to regulate the practice of law in the state and protect the public from misconduct by persons practicing law in Wisconsin, pursuant to the constitutional responsibility to exercise superintending and administrative authority over all courts. The recommended procedural changes do not abridge the substantive rights of any participant in the attorney disciplinary process.

INTRODUCTION and BRIEF HISTORY

In 2016 the Wisconsin Supreme Court established a committee to review the Office of Lawyer Regulation (OLR) Procedures (Committee). The Honorable Gerald Ptacek was appointed as the Committee's chair. The Committee examined OLR procedures holistically and established its mission to review OLR procedures and structure, and to report to the Wisconsin Supreme Court recommendations that would increase the efficiency, effectiveness, and fairness of the OLR process.

The Committee established four subcommittees: the Charging Process subcommittee focused on OLR charging decisions, the Referees subcommittee focused on the appointment, training, and performance of referees assigned to disciplinary matters, the Confidentiality subcommittee focused on balancing the rights of respondent attorneys and the rights of complainants and the public at large, and the Process subcommittee focused on the procedural aspects of the disciplinary process.

This Petition (Charging Process Petition 1) is brought by the Charging Process subcommittee (Subcommittee); it has been endorsed by the Committee and it seeks to improve the procedures by promoting openness, balancing the interests of the public, the profession, and the respondent attorney, and streamlining procedures toward a fair and prompt resolution.

DISCUSSION

The Subcommittee, in its focus on the OLR charging process, identified as areas of inquiry the desirability of early charging decisions that may include diversion and education and/or monitoring of attorneys accused of certain violations, a determination of whether a form of “plea bargaining” or “consent agreements” is appropriate and desirable in OLR cases, and whether and how the OLR should exercise discretion in bringing or pursuing charges.

The Charging Process Petition 1 ask the Supreme Court to amend its Rules to require the OLR Director (Director), when he or she closes or dismisses a matter opened by OLR after it receives a grievance, to provide the grievant with a written explanation for the decision. The Subcommittee determined that these changes reflect our state’s commitment to, and tradition of, open government, and may also promote public confidence in the attorney disciplinary process by providing more information to the grievant.

The Subcommittee considered at length the current Rules governing diversion agreements for attorneys facing disciplinary action. The Subcommittee supports the intentions behind the diversion program, and its recommendations reflect the Subcommittee’s interest in the program’s continued success. Consideration was given to whether the Rule, as currently structured, sufficiently provides an incentive for performance of the agreement, because the attorney’s material and unjustified breach merely results in re-opening the matter for possible imposition of discipline, delaying resolution.

After carefully considering the OLR’s track record of success with diversion agreements, the Subcommittee concluded that modifying the Rule to provide adverse consequences for a breach was unnecessary and possibly counterproductive. However, Charging Process Petition 1 does request the Supreme Court amend its Rules so that allegations of a breach of a diversion agreement are not addressed by the Preliminary Review Committee (PRC). The proposed changes reflect the Subcommittee’s determination that diversion agreements should be regarded as a tool to be used in the Director’s discretion and not as one that confers substantive rights.

The Charging Process Petition 1 also contains provisions that the Subcommittee hopes will reduce potential costs and delays in the disciplinary process, as well as provide satisfactory outcomes for the public, the profession, and the respondent attorney. The petition requests the Supreme Court to amend its Rules to allow a respondent attorney to waive, at any stage of the proceeding, submission of the matter to the PRC for a probable cause determination. The Subcommittee would like to note that this change was not sought or recommended by the OLR, but the Subcommittee includes this recommendation as part of its intention to reduce costs and increase efficiency without sacrificing due process or substantive rights of the respondents.

Additionally, the Subcommittee requests that the Director be allowed additional discretion to enter into a consent reprimand agreement prior to conducting an investigation. This requested amendment furthers the Subcommittee's intention to make the disciplinary procedure as efficient as appropriate, without compromising the integrity of the process or impeding on the procedural or substantive rights of the participants.

DISCUSSION OF EACH PROPOSED RULE CHANGE IN CHARGING PROCESS PETITION 1

Petition Section 1. SCR 22.02 (4) is amended to read:

22.02 (4) The staff shall notify the grievant in writing that the grievant may obtain review by the director of the staff's closure of a matter under sub. (2)(c) by submitting to the director a written request. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the closure. The director may, upon a timely request by the grievant for additional time, extend the time for submission of additional information relating to the request for review. If the director affirms the closure, he or she shall provide to the grievant a brief written statement of reasons for affirmation. The decision of the director affirming the closure or referring the matter to staff for further evaluation is final, and there shall be no review of the director's decision.

Discussion. Under current Rule, if OLR staff determines, after its preliminary evaluation of a grievance, that the matter does not present sufficient information of cause to proceed, it may close the matter. Current Rule requires OLR staff to notify the grievant that he or she may ask the Director to review the closure; the Director's decision to affirm the closure is final and not subject to review.

The proposed amendment requires the Director to inform the grievant in writing, when he or she affirms the decision to close that matter, of the reasons for the affirmation. The Subcommittee recommends this amendment to enhance communication with grievants who, under current Rule, may not understand why their matters were closed. The Subcommittee believes that this amendment is consistent with Wisconsin's tradition of open government, and will enhance the public's confidence in the disciplinary process without unduly burdening OLR.

Petition Section 2. SCR 22.02 (6)(a) is amended to read:

22.02 (6)(a) Close the matter for lack of an allegation of possible misconduct or medical incapacity or lack of sufficient information of cause to proceed. The director shall ~~notify~~ provide to the grievant written notice of the decision to close, accompanied by a brief written statement of reasons for the director's decision. The notice shall inform the grievant ~~in writing~~ that the grievant may obtain review by a preliminary review panel of the director's closure by submitting a written request to the director. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the closure. The director shall send the request for review to the chairperson of the preliminary review committee, who shall assign it to a preliminary review panel. Upon a timely request by the grievant for additional time, the director shall report the request to the chairperson of the preliminary review committee, who may extend the time for submission of additional information relating to the request for review.

Discussion. Under current Rule, if OLR staff determines, after its preliminary evaluation of a grievance, that the matter presents sufficient information of cause to proceed, it refers the matter to the Director for review. The Director may then divert the matter to an alternatives to discipline program, commence an investigation into the matter, or close the matter if he or she determines that there is no allegation of possible misconduct or medical incapacity or that there is a lack of sufficient information of cause to proceed. Under current Rule, if the Director closes the matter, the Director must notify the grievant that he or she may ask a preliminary review panel to review the Director's decision.

The proposed amendment, similar to the amendment proposed in Petition Section 1., requires the Director to also inform the grievant in writing, when he or she closes a matter, of the reasons for the closure. The Subcommittee recommends this amendment to enhance communication with grievants who, under current Rule, may not understand why their matters were closed. As with its recommendation in Petition Section 1., the Subcommittee believes that this amendment is consistent with Wisconsin's tradition of open government, and will enhance the public's confidence in the disciplinary process without unduly burdening OLR.

Petition Section 3. SCR 22.02 (6)(d) is created to read:

22.02 (6)(d) Obtain the respondent's consent to the imposition of a public or private reprimand and proceed under SCR 22.09.

Discussion. Under current Rule, if OLR staff determines, after its preliminary evaluation of a grievance, that the matter presents sufficient information of cause to proceed, it refers the matter to the Director for review. The Director may then divert the matter to an alternatives to discipline program, commence an investigation into the matter, or close the matter if he or she determines that there is no allegation of possible misconduct or medical incapacity or that there is a lack of sufficient information of cause to proceed.

The proposed amendment offers another option for resolving a matter expeditiously, under appropriate circumstances, by imposing a public or private reprimand at the intake stage. Current Rule allows the Director, after investigation of the matter, to enter into an agreement with a respondent attorney for the imposition of a private or public reprimand; the agreement is reviewed by a referee appointed by the clerk of the supreme court (*See* SCR 22.05 (1)(c) and 22.09). Under the amendment, the same procedure would apply to a public or private reprimand imposed by agreement between the Director and the respondent attorney at the intake stage.

The Subcommittee recommends this amendment to allow OLR and a respondent to reach a mutually satisfactory conclusion in a manner that is consistent with the current Rule allowing the Director to divert a matter to an alternatives to discipline program at the intake stage. The Subcommittee believes that this amendment will result in efficient and effective resolutions of disciplinary matters, particularly because the amendment requires the consent of the respondent and review and possible revision by a referee before the reprimand is imposed. The Subcommittee does not believe that this amendment will abridge any substantive or process rights of the respondent, because the respondent's consent is required in order for the Director to

impose this form of discipline at the intake stage and because the appropriateness of the reprimand is reviewed by a referee.

Petition Section 4. SCR 22.05 (1)(e) is created to read:

22.05 (1)(e) With the mutual consent of the attorney and the director to waive presentation of the matter to the preliminary review committee, proceed in any manner authorized by SCR 22.08(2).

Discussion. Under current Rule, if the Director determines at the intake stage of a disciplinary proceeding that there is sufficient information to support a possible finding of cause to proceed, he or she may commence an investigation of the matter. Upon completing the investigation, the director may divert the matter to an alternatives to discipline program, obtain the respondent's consent to impose a public or private reprimand, dismiss the matter for lack of sufficient evidence of cause to proceed, or present the matter to a preliminary review committee. The preliminary review committee reviews, in a confidential proceeding, each matter assigned to them to determine whether there is cause for the Director to proceed.

Under the proposed amendment, the Director and the respondent may waive presentation of the matter to the preliminary review committee. The Subcommittee proposes this change in order to promote efficiency in matters where the Director and the respondent agree that review by the preliminary review committee is not necessary. The Subcommittee does not believe that this amendment will abridge any substantive or process rights of the respondent, because the respondent's consent is required in order for this step of the proceeding to be waived.

Petition Section 5. SCR 22.05 (2) is amended to read:

22.05 (2) ~~The~~ If the director dismisses the matter under sub. (1), the director shall ~~notify provide to the grievant in writing~~ written notice of the decision to dismiss, accompanied by a brief written statement of reasons for the director's decision. The notice shall inform the grievant that the grievant may obtain review by a preliminary review panel of the director's dismissal of a matter under sub. (1) by submitting to the director a written request. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the dismissal. The director shall send the request to the chairperson of the preliminary review committee, who shall assign it to a preliminary review panel. Upon a timely request by the grievant for additional time, the director shall report the request to the chairperson of the preliminary review committee, who may extend the time for submission of additional information relating to the request for review.

Discussion. Under current Rule, if the Director determines at the intake stage of a disciplinary proceeding that there is sufficient information to support a possible finding of cause to proceed, he or she may commence an investigation of the matter. Upon completing the investigation, the director may divert the matter to an alternatives to discipline program, obtain the respondent's consent to impose a public or private reprimand, present the matter to a preliminary review committee, or dismiss the matter for lack of sufficient evidence of cause to proceed.

Under current Rule, if the Director dismisses the matter, the Director must notify the grievant that he or she may ask a preliminary review panel to review the Director's decision.

The proposed amendment, similar to the amendments proposed in Petition Sections 1. and 2., requires the Director to also inform the grievant in writing, when he or she dismisses a matter, of the reasons for the dismissal. The Subcommittee recommends this amendment to enhance communication with grievants who, under current Rule, may not understand why their matters were closed. As with its recommendation in Petition Sections 1. And 2., the Subcommittee believes that this amendment is consistent with Wisconsin's tradition of open government, and will enhance the public's confidence in the disciplinary process without unduly burdening OLR.

Petition Sections 6., 7., and 8.

Section 6. SCR 22.10 (4) is amended to read:

22.10 (4) *Diversion agreement.* If the attorney agrees to diversion to an alternatives to discipline program, the terms of the diversion shall be set forth in a written agreement between the attorney and the director. The agreement shall specify the program to which the attorney is diverted, the general purpose of the diversion, the manner in which the attorney's compliance with the program is to be monitored, and the requirement, if any, for payment of restitution or costs. If the diversion agreement is entered into after the director has reported the matter to the preliminary review committee, pursuant to SCR 22.06(1), ~~the agreement shall be submitted for approval to the preliminary review panel to which the matter has been assigned. If the preliminary review panel rejects the agreement, the matter shall proceed as otherwise provided in this chapter~~ matter shall be withdrawn from the preliminary review committee.

Section 7. SCR 22.10 (7)(a) is renumbered to SCR 22.10 (7) and amended to read:

22.10 (7) *Breach of diversion agreement.* If the director has reason to believe that the attorney has breached a diversion agreement ~~entered into prior to a report of the matter to the preliminary review committee, pursuant to SCR 22.06(1),~~ the attorney shall be given the opportunity to respond, and the ~~director~~ parties may modify the diversion agreement or the director may, in the director's sole discretion, terminate the diversion agreement and proceed with the matter as otherwise provided in this chapter.

Section 8. SCR 22.10 (7)(b) and (c) are repealed.

Discussion. Under current Rule, the Director and a respondent attorney may enter into an agreement for diversion of a matter to an alternatives to discipline program at intake, during an investigation, or after the conclusion of an investigation into the matter. If the Director and the respondent enter into an agreement before the matter is reported to the preliminary review panel, and the Director has reason to believe the respondent has breached the agreement, current Rule allows the respondent to answer the allegation of breach and allows the Director to modify or terminate the diversion agreement at his or her discretion.

If the Director and the respondent enter into the agreement after the matter has been referred to the preliminary review panel, under current Rule the panel must approve the agreement. Thereafter, if the respondent commits an act that breaches the agreement, the Director reports the suspected breach to the preliminary review panel and, after the respondent has an opportunity to respond, the panel may determine whether to terminate the agreement. Upon a motion by either

the respondent or the Director, a referee may be appointed to conduct a hearing and to submit findings of fact and conclusions of law to the panel.

Under the Petition, the Director and the respondent may enter into agreement for diversion without the approval of the preliminary review panel, even if the matter had already been referred to the panel. If the matter is pending before the preliminary review panel when the parties enter into the agreement, the matter is withdrawn from the panel.

Additionally, the Subcommittee proposes amending the Rules so that allegations of a breach of a diversion agreement are not addressed by the preliminary review panel. Instead, the proposed amendments allow the respondent to answer any allegation of a breach and then allow the Director to reach a mutual decision with the respondent to modify the agreement or, at the Director's sole discretion, to terminate the diversion agreement.

The proposed amendments to SCR 22.10 reflect the Subcommittee's determination that diversion agreements should be regarded as a tool to be used in the Director's discretion and not as one that confers substantive rights. Therefore, breaches to a diversion agreement should not be the subject of litigation within the Lawyer Regulation System.

The Subcommittee believes that these amendments will lead to a more efficient resolution of alleged breaches of diversion agreements without affecting any substantive rights of a respondent. Additionally, by allowing a respondent to enter into an agreement to modify an agreement after an alleged breach, the proposed amendments creates the opportunity for a respondent to remain actively engaged in a diversion agreement even after an alleged breach. The Subcommittee believes that this will alleviate the perception of an agreement for diversion to an alternative to discipline program as an "all or nothing" proposition and encourage respondents to complete the diversion program.

Petition Sections 9., 10., and 11.

Section 9. SCR 22.11 (2) is renumbered to SCR (2)(a) and amended to read:

22.11 (2)(a) ~~The Except as provided in sub. (b) or (c), the complaint shall set forth only those facts and misconduct allegations for which the preliminary review panel determined there was cause to proceed. and The complaint may set forth the discipline or other disposition sought. Facts and misconduct allegations arising under SCR 22.20 and SCR 22.22 may be set forth in a complaint without a preliminary review panel finding of cause to proceed.~~

Petition Section 10. SCR 22.11 (2)(b) is created to read:

22.11 (2)(b) A complaint may set forth facts and misconduct allegations arising under SCR 22.20 and SCR 22.22 without a preliminary review panel finding of cause to proceed.

Petition Section 11. SCR 22.11 (2)(c) is created to read:

22.11 (2)(c) A complaint may set forth facts and misconduct allegations without a preliminary review panel finding of cause to proceed if presentation to the preliminary review committee is waived under SCR 22.05 (1)(e).

Discussion. These proposed amendments are technical in nature in that they reflect amendments proposed elsewhere in this Petition. Under current Rule, a complaint may set forth only those facts and misconduct allegations for which the preliminary review panel determined there was cause to proceed, unless the matter involves summary license suspension after a criminal conviction or imposition of discipline reciprocal to that imposed by another jurisdiction.

The proposed amendments reflect the changes contained in proposed Petition Section 4., which would allow the Director and the respondent to waive review by the preliminary review panel. As a result, SCR 22.11 (2) is renumbered and amended by these sections to indicate that a complaint may set forth facts and misconduct allegations without a preliminary review panel finding of cause to proceed if the matter involves summary license suspension after a criminal conviction or imposition of disciplinary reciprocal to that imposed by another jurisdiction, or if the Director and the respondent waived presentation to the preliminary review committee under SCR 22.05 (1)(e).

CONCLUSION

For the reasons set forth in this Memorandum, the Office of Lawyer Regulation Procedures Review Committee and the Subcommittee on Charging Process ask the Court to amend its Rules relating to the Charging Process in attorney disciplinary proceedings.

Respectfully submitted this ____ day of _____, 2019.

Hon. Gerald P. Ptacek, Chair, OLR Procedure Review Committee

Paul Schwarzenbart, Chair, Charging Process Subcommittee