

A General Overview of Wisconsin's Lawyer Discipline System

By

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Wisconsin's Lawyer Disciplinary System is a rather complex system that is designed to provide for an ample opportunity for the Grievant to present concerns about the conduct of attorneys, for the attorney to have a full and fair opportunity to defend the claims asserted against him / her, and for the system to have sufficient checks and balances to make sure that the interests of all are taken into account and protected.

The initial starting point of the system involves the submission of an inquiry or a grievance.

An Inquiry or Grievance

Initially, if an inquiry or grievance is submitted, the staff of the Office of Lawyer Regulation ("OLR") has the first line of evaluation. *SCR 22.01*. The inquiry or grievance is filed with the OLR. *SCR 22.02*. Upon receipt of the inquiry / grievance, the staff can:

- (1) forward the matter to another agency;
- (2) attempt to reconcile the dispute if it is minor;
- (3) close the matter based on insufficiency of the grievance to demonstrate that no Supreme Court rule has been violated; or
- (4) refer the matter to the Director for an investigation.

SCR 22.02(2)(a)-(d).

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If the staff chooses or selects the option to forward it to another agency for review and processing, at that point, the office must provide the grievant with a basis for the referral. *SCR 22.02(3)*. There is no review of this decision. The decision for a referral is final. *SCR 22.02(4)*.

As noted, the OLR staff can attempt to reconcile the dispute. However, OLR's staff's limitation is the seriousness of the dispute. If it is a relatively minor dispute, OLR is permitted to attempt to resolve the dispute. *SCR 22.02(2)(b)*.

If OLR staff believes that the grievance does not demonstrate any possible rule violation, OLR can close the matter. *SCR 22.02(2)(c)*. However, a review is possible of the OLR's decision to close the matter. *SCR 22.02(4)*. A request must be made to the Director of the Office of Lawyer Regulation ("Director"). The Director, at that point, has two options. The Director can either close the matter or investigate the matter. *Id.* If the matter is closed, there is no review. *Id.*

The OLR staff can refer the matter to the Director for an investigation. Once the Director has the grievance, the Director has options. The Director can:

- (1) close the matter;
- (2) utilize a diversion agreement; or
- (3) commence an investigation for misconduct or mental incapacity.

SCR 22.02(6)(a)-(c).

If the Director chooses to close the matter, review is possible. The grievant is given notice of the Director's decision to close the matter. The grievant must then request the Director to have the decision to close reviewed. If that happens, then the matter is referred to the Preliminary Review Panel for a review. *SCR 22.02(6)(a)*.

If the Director chooses, a diversion program is a possible resolution. There is a limitation as to what types of claims are potentially referable to the diversion program. Diversion programs are authorized pursuant to *SCR 22.10*. Diversion programs can include, but are not limited to, referral to mediation, fee arbitration, law office management assistance, continuing legal education, alcohol and substance abuse programs, monitoring of an attorney's practice or trust account procedures. *SCR 22.10(2)*. An attorney must meet specific criteria in order to be eligible for participation in this program. *SCR 22.10(3)*.

Please note that referral to a diversion program is not considered discipline. *SCR 22.10(1)*. This is important in that the Office of Lawyer Regulation and the Supreme Court follow a practice of progressive discipline. *In re Disciplinary Proceedings Against Lister*, 2010 WI 108, ¶140, 329 Wis. 2d 289, 308, 787 N.W.2d 802, 829. That is, each succeeding disciplinary matter has an increased penalty.

Finally, the Director has the opportunity or discretion to commence an investigation to determine if there is misconduct or mental incapacity. SCR 22.02(6)(c)

Investigation Process

The SCRs require that the Director *shall* investigate all grievances where sufficient information exists to support an allegation of possible misconduct. SCR 22.03(1). Once this happens, the attorney must be notified. SCR 22.03(2). The notification is done by US mail. At that point, there is an obligation imposed upon the attorney. The attorney must fully and fairly disclose all facts and circumstances within 20 days of receipt of the inquiry by the Director. SCR 22.03(2). This is important because the failure to fully and fairly disclose all facts within that time period, unless an extension is otherwise granted, could constitute a failure to cooperate with the Office of Lawyer Regulation, and could consequently result in allegations of misconduct by the OLR. SCR 22.03(4); SCR 22.03(6).

A failure to cooperate with OLR can result in penalties. If an attorney fails to respond to OLR, it can file a motion with the Supreme Court to show cause why the license of the attorney should not be suspended. SCR 22.03(4). It is then incumbent upon the Respondent to oppose the motion to demonstrate why the license should not be suspended.

Once a substantive response to OLR's inquiries and requests are provided by the attorney, then OLR may decide to conduct a further investigation. There is a fair amount of discovery the Director can require of the attorney. The attorney can be required to answer questions, furnish documents and present any other information relevant to the investigation. SCR 22.03(8). As part of the power to investigate, the Director also has the authority to refer the matter to a District Committee. SCR 22.04(1).

Here, like in other parts of the process, it is important to note that a failure to cooperate with the OLR is a violation of SCR 22.03(6). The failure to cooperate is considered to be independent misconduct. It is misconduct regardless of the merit of the grievance. That is, the attorney can be found to have violated the Supreme Court Rule regarding cooperation which would support an independent penalty that is separate and apart from any penalty that might be imposed due to misconduct that supports the grievance itself. *Id.*

In referring the matter to the Director for an investigation, the Office of Lawyer Regulation staff must provide all exculpatory and inculpatory evidence for the Director's evaluation. SCR 22.03(3). As part of the investigation, the Director does have subpoena authority.

District Committee Investigation

Referral to the District Committee is a different level of investigation. The attorney must be notified of the investigation. The Respondent will not only be notified of the investigation but

will be notified of the identity of the investigator of the District Committee. *SCR 22.04(2)*. The attorney has the opportunity and right to request a substitution of the investigator. This is a timely issue. That is, the attorney must make the request for substitution within 14 days of receipt of the notice. *Id.* The substitution is granted as a matter of right. If that request is made and granted, then the investigator initially assigned to the matter can no longer participate in the process. *Id.* That is, the investigator cannot not participate in the investigation and cannot participate in the District Committee's review of the matter, including any discussion and recommendation following the investigator's report.

If the matter is referred to the District Committee for an investigation, the attorney must cooperate with the District Committee's investigation. *SCR 22.03(6)*. The only limitation on the attorney's obligation to cooperate is that of the refusal to answer questions if the Fifth Amendment interests are impacted. *SCR 22.03(7)*. Absent that, the Respondent must cooperate fully.

The District Committee must complete the investigation and submit a report within 90 days of when the right of substitution terminates. However, it should be noted that extensions may be granted. *SCR 22.01(3)*.

In terms of the process, it is wide ranging. The investigator will typically meet with the grievant(s), as well as with the attorney. The investigator will have the complete OLR file that is generated in the matter, along with a referral letter from the OLR outlining the essential nature of the grievance and a recommendation to investigate the matter with particular reference to certain Supreme Court rules. The investigator, after meeting with the grievant and attorney, may ask for additional documents, conduct interviews with other witnesses or people of interest. The investigator also has the ability to consult with attorneys or others in the public who have knowledge in a particular area that may be helpful to understanding the issues associated with the grievant.

Once the investigator has compiled sufficient information, the investigator will then draft a report and present it to the District Committee. *SCR 22.04(3)*. The District Committee will then hear from the investigator. Discussion will ensue regarding the matter. The investigator will then make recommendations as to any potential rule violations and of any potential penalties. The report is then completed and then submitted to the Director for further handling as appropriate. *Id.*

Once the report is completed, the copy must be given to the grievant as well as the attorney. *SCR 22.04(4)*. Once the investigation is completed, the Director has the discretion to take various actions:

- 1) Dismiss the matter for lack of evidence;

- 2) Attempt to use the diversion program for the attorney;
- 3) Consider a public or private reprimand; or
- 4) Submit the matter to the Preliminary Review Committee for determination of whether there is cause to proceed.

SCR 22.05(1)(a)-(d).

If the Director chooses to dismiss the matter for lack of evidence supporting a rule violation, notice must be given of the dismissal to the grievant. *SCR 22.05(2)*. The grievant can seek review by requesting that the Director forward the matter to the Chair of the Preliminary Review Panel. *Id.*

Preliminary Review Panel

If the matter is referred to the Preliminary Review Panel, the chairperson will then assign the matter to the panel for review. *SCR 22.06(1)*. The review of the panel will be whether the Director erroneously exercised his discretion in dismissing the matter. *SCR 22.05(2)*. If the panel does conclude that the Director erroneously exercised his discretion in dismissing the matter, then the matter will be referred to the Director for further investigation. *SCR 22.08(1)(a)*. It is significant to note that a majority of the vote is needed by the Preliminary Review Panel to find an erroneous exercise of discretion. It is important to also note that the decision of the panel is final. Notice of the decision will be provided to the Grievant as well as the Respondent. *SCR 22.08(1)(b)*.

Once the matter is submitted to the Chairperson of the Preliminary Review Panel, the Chair submits it to the panel for consideration. *SCR 22.06(1)*. Discussions amongst the panel are private and confidential. *SCR 22.07(2)*. If there is cause to continue, four or more members must vote in favor of moving forward. *SCR 22.07(3)*. It is significant to note that this does not mean that there is clear and convincing evidence of misconduct. Rather, that there is sufficient evidence to support a cause to continue the matter. *Id.*

If the panel concludes that the Director failed to establish cause to proceed, then it shall report to the Chairperson who then will report to the Director, the attorney and the grievant. *SCR 22.07(4)*. The Director, at that point, can either dismiss the matter or continue the investigation and resubmit to a different Preliminary Review Committee Panel. *SCR 22.08(1)(a)*. If there is a resubmission, and the Director again fails to establish cause to proceed, then the Preliminary Review Committee's decision is final and no review is possible. *SCR 22.08(1)(b)*. If

cause is established, then the Director may either look to a private or public reprimand, a diversion program, or file a Complaint with the Supreme Court. *SCR 22.08(2)(a)-(c)*.

The Proceedings

If a complaint is filed by the Office of Lawyer Regulation, it is handled in many ways like a traditional lawsuit. An answer is required. *SCR 22.11(1)*. Discovery can and often does ensue. *SCR 22.03(8)*. A hearing is held. *SCR 22.13(3)*. Witnesses can be called to testify and documents produced. A recommendation of rule violations and proposed penalties is made by an appointed referee. The recommendation can be appealed by either side: the OLR or the Respondent. The review of the recommendation is conducted by the Wisconsin Supreme Court. *SCR 22.16(6)*. Oral argument may be required after briefing. A decision is issued.

Once a complaint is filed, the proceedings must be limited to those misconduct allegations for which the preliminary review panel concluded there was cause to proceed. *SCR 22.11(2)*. The exception to this prohibition is that any potential violations of *SCR 20.20* and *SCR 22.22* may be asserted even if the panel has not found cause to proceed on those proposed violations. *Id.*

A stipulation by the Office and the Respondent as to the facts, conclusions of law and of the discipline accompanies the complaint, the Supreme Court can consider the stipulation and impose the penalty without the necessity of a referee or a hearing. *SCR 22.12(2)*. However, if the Supreme Court does not approve the stipulation, then the matter will proceed forward as if there was no stipulation attached to the complaint. *SCR 22.12(3)*. The Supreme Court can also make modifications to the stipulation and request that the parties review and agree to the modified stipulation. *SCR 22.12(3m)*. If the parties agree to the modifications and submit a revised stipulation within the time period provided, then the Supreme Court will adopt the findings of fact, conclusions of law and impose the penalty agreed to via the stipulation. *Id.*

Under *SCR 22.14(1)*, the Respondent must file an answer with OLR within 20 days after service of the Complaint. A failure to do so has the potential obvious penalty of a default. *SCR 22.15(1)*. In addition, a failure to answer could give rise to a violation of the Supreme Court Rules. For example, *SCR 21.15(4)* imposes the obligation of cooperation by the Respondent. Most importantly, the referee will be deemed to have properly relied on the allegations of the complaint, which were deemed admitted by the failure to answer. *In re Disciplinary Proceedings Against Coplien*, 2010 WI 109, ¶10, 329 Wis. 2d 311, 788 N.W.2d 376.

Like other civil cases, if the matter is contested, a scheduling conference is held. *SCR 22.15(1)*. The typical scheduling activities are undertaken at that conference, including the scheduling of a hearing. If the matter does not resolve prior to the hearing, then the hearing will take place before the referee. The referee has the same powers as a judge in a civil case and must conduct the hearing in a similar manner. *SCR 22.16(1)*. Within 30 days after the hearing is

concluded or the transcript is filed, the referee must file with the Supreme Court a report with the findings of fact, conclusions of law and a recommendation for either a dismissal or imposition of discipline. *SCR 22.16(6)*. In addition, the report must contain a recommendation as to the assessment of costs of the proceedings. *SCR 22.16(7)*.

Typically, the full amount of the costs is imposed, even if the Respondent is successful in defeating one or more claims. *SCR 22.24(1m)*. However, the rules do provide for some latitude. *Id.* In doing so, the assessment of costs will involve the consideration of the following factors:

- (1) number of counts charged, contested and proven;
- (2) the nature of the misconduct;
- (3) the level of discipline sought by the parties and recommended by the referee;
- (4) the attorney's cooperation with the disciplinary process;
- (5) prior discipline, if any;
- (6) any other relevant circumstances.

Id.

Within 20 days after the referee's report is filed, both the Office of Lawyer Regulation and the Respondent may file for a review. *SCR 22.17(1)*. The review is before the Wisconsin Supreme Court. When reviewing a referee's report and recommendation, the Supreme Court will affirm the referee's findings of fact unless they are clearly erroneous. *In re Disciplinary Proceedings Against Inglimo*, 2007 WI 126, ¶5, 305 Wis. 2d 71, 740 N.W.2d 125. The Court will review the referee's conclusions of law de novo. *In re Disciplinary Proceedings Against Alia*, 2006 WI 12, ¶39, 288 Wis.2d 299, 709 N.W.2d 399. It is also important to note that when reviewing a referee's report and recommendation, the referee, as the finder of fact, is the ultimate arbiter of the credibility of the witnesses. *In re Disciplinary Proceedings Against Alia*, 2006 WI 12, ¶71, 288 Wis. 2d 299, 709 N.W.2d 399.

After the Wisconsin Supreme Court has issued its opinion, a motion for reconsideration can be filed. *SCR 22.18*

Penalties

The purpose of imposing professional discipline is to impress upon the attorney the seriousness of the misconduct, to deter other attorneys from engaging in similar misconduct, and to protect the public, the courts, and the legal system from a repetition of the misconduct. *In re Disciplinary Proceedings Against Grogan*, 2011 WI 7, ¶17, 331 Wis. 2d 341, 795 N.W.2d 745. Suspension or revocation of an attorney's license to practice is part of the discipline process. The Supreme Court will determine the appropriate level of discipline to impose given the particular facts of each case, independent of the referee's recommendation, but benefitting from it. *In re Disciplinary Proceedings Against Widule*, 2003 WI 34, ¶44, 261 Wis. 2d 45, 660 N.W.2d 686.

In assessing a proper sanction, the Court considers the following factors: (1) the seriousness, nature, and extent of the misconduct; (2) the level of discipline needed to protect the public, the courts, and the legal system from repetition of the attorney's misconduct; (3) the need to impress upon the attorney the seriousness of the misconduct; and (4) the need to deter other attorneys from committing similar misconduct. *In re Disciplinary Proceedings Against Hammis*, 2011 WI 3, ¶39, 331 Wis. 2d 19, 793 N.W.2d 884. As noted earlier, the Supreme Court follows the concept of progressive discipline. *In re Disciplinary Proceedings Against Brandt*, 2012 WI 8, ¶21, 338 Wis. 2d 524, 808 N.W.2d 687; *In re Disciplinary Proceedings Against Nussberger*, 2006 WI 111, ¶27, 296 Wis. 2d 47, 719 N.W.2d 501.

An attorney's license and thus, right to practice can be suspended for a period of time. Usually, the first suspension is for a 30-day period. If an attorney's license is suspended or revoked, additional obligations and limitations are imposed. *SCR 22.26(1)(a)-(e)*. On or prior to the effective date of the suspension or revocation, the attorney must:

- (1) notify all clients by certified mail of the suspension or revocation and thus, the inability to serve as counsel;
- (2) advise the clients to seek legal advice elsewhere;
- (3) provide timely notice to all tribunals before which the attorney has any pending matters;
- (4) within 15 days of the effective date of the suspension or revocation, make arrangements to permanently close or wind up practice;
- (5) within 25 days of the effective date of the suspension or revocation, file an affidavit with the Director an affidavit detailing, in essence, compliance with the obligations imposed under this SCR.

Id.

Reinstatement

Three months prior to the expiration of the suspension period, an attorney can file a petition for reinstatement. *SCR 22.29*. The petition must be filed with the Supreme Court of Wisconsin and a copy served upon the director and the board of bar examiners. The petition must show full compliance with the terms of the suspension or revocation order as well as other requirements. *SCR 22.29(4)(a)-(k)*. The petition must also be accompanied by an advance deposit for all or a portion of the reinstatement proceedings cost. *SCR 22.29(5)*.

The reinstatement procedure requires the appointment of a referee in the geographical area of the attorney where possible. *SCR 22.30(1)*. The Director will investigate the attorney's eligibility for reinstatement and provide a report to the referee. *SCR 22.30(2)*. The Board of Bar Examiners will also investigate the attorney's eligibility for reinstatement and provide a similar report to the referee. *SCR 22.30(2m)*. The Director must also publish a notice regarding the

hearing for reinstatement in a newspaper of general circulation in a county in which the attorney had practiced. *SCR 22.30(3)*.

SCR 22.30(1) provides that a reinstatement hearing will be conducted by the referee. At the hearing, the attorney has the burden to demonstrate that he or she is entitled to reinstatement. *SCR 22.31(1)*. Specifically, the attorney must show by clear, satisfactory, and convincing evidence that he or she has the moral character to practice law, that his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive to the public interest, and that he or she has complied with *SCR 22.26* and the terms of the order of suspension. In addition to these requirements, *SCR 22.29(4)(a)-(4m)* provides additional requirements that a petition for reinstatement must show. *SCR 22.31(1)(a)-(d)*.

Within 30 days after the conclusion of the hearing, or filing of the hearing transcript (whichever is later), the referee will file a report with the Wisconsin Supreme Court with the recommendation on the petition. *SCR 22.32(1)*. Within 10 days after the later of those two dates, the petitioner may file a response to the referee's report. If the petitioner would like to appeal, he or she must do so within 20 days after the filing of the referee's report. *SCR 22.33(1)*.

As noted from the outset, the disciplinary process is a rather complex one with several levels of review. The different checks and balances ensure that all receive a fair and full opportunity to address the issues. The purposes of the disciplinary system are to protect the public and courts from attorney misconduct, to impress upon the attorney the consequences of his / her misconduct, and to deter other attorneys from engaging in similar misconduct. It is important that the Respondent be sure to comply with all rules pertaining to the investigation and disciplinary proceedings, to avoid additional sanctions.