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OLR GRIEVANCES: AVOIDANCE / DEFENSE

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Because my practice is representing lawyers, mostly in OLR matters, I tend to measure the importance of ethical rules by the number and severity of grievances they foster. While one hears anecdotes about peculiar circumstances and sensational conduct, most of the troubles that arise between lawyer and client are likely to result from misunderstandings or disputes concerning fees, allocation of authority, scope of the undertaking, communication, confidentiality, conflicts of interest or neglect. This presentation is based upon corresponding sections of Chapter 20 of the Supreme Court Rules (SCRs) which regulate law practice in Wisconsin.

I have made an effort to identify selected problems that might readily be avoided or minimized by attorneys and the paralegal staff assisting them. I conclude with observations concerning the means of contending with those problems which become grievances subject to inquiry by the Office of Lawyer Regulation (OLR) with an outline prepared by my colleague Stacie Rosenzweig.

I. GOOD BEGINNINGS, EFFECTIVE ENGAGEMENT LETTERS

Though we can't anticipate all the circumstances that foster troubles, there are many risks that can be minimized with the use of systems, including standard clauses for engagement and disengagement letters and other communications. Even with careful attention to the particulars, no such document will afford iron-clad protection, but we can adopt systems to reveal, account for and minimize many problems that otherwise recur. In my remarks I will suggest a framework for such undertakings which might include a collection of standardized engagement letters or stock clauses to use for tailoring engagement letters to deal with issues relating to:

1. Scope of Representation (SCR 20:1.2)
2. Allocation of Authority between Lawyer & Client (SCR 20:1.2)
3. Communication (SCR 20:1.4)
4. Fees (SCR 20:1.5)
5. Confidentiality (SCR 20:1.6)

6. Conflicts of Interest (SCR 20:1.7 – 1.9)
7. Declining or Terminating Representation (SCR 20:1.16)
8. Duties to Prospective Clients (SCR 20:1.18).

Importantly, SCR 20:1.5 *requires* written communication regarding fees in all but the narrowest of circumstances. Representation that is expected to cost more than $1,000 (including costs and fees), any matter handled on contingency, and engagements involving advanced fees deposited in a lawyer's operating or trust account must be explained in writing, (and contingent fee agreements must be signed by the client).

So -- if we are obliged to generate a document anyway, why not expand it to serve a variety of purposes in addition to fees?

- **FEES: SCR 20:1.5**

Speaking practically, most our work for clients will necessitate a written fee agreement. Even what appear at the outset to be the simplest of matters can become complex and exceed $1,000. Even if the rule may not strictly require it, best practice is to confirm ***all*** fees in writing. When mistaken in an estimate of fees, how often have you ***over***-estimated? It's all too easy to accrue $1,000 in fees before realizing it. Lastly, a written agreement reduces the potential for misunderstanding and may protect you in a dispute or grievance concerning a variety of subjects of which fees is only one. A written agreement may be dispensed with when rendering services of a kind regularly undertaken for the same client, but only where a writing confirms the original or previous work.

An engagement letter or agreement should clearly address whether funds will be deposited to your trust or operating account. If advanced fees will be taken into trust and used to satisfy invoices as they are earned, this should be laid out in plain language, as well as what will happen to funds remaining in trust at the conclusion of the representation.

If advanced fees (regardless of whether they are called a "retainer" or "flat fee" or even "nonrefundable fee") will be deposited into the lawyer's *operating* account, the fee agreement or other writing delivered to the client at the time of payment needs to contain the following information:

a. The amount of the advanced payment.
b. The basis or rate of the lawyer's fee.
c. Any expenses for which the client will be responsible.
d. The lawyer's obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation.

> e. The lawyer's obligation to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of the dispute.
> f. The ability of the client to file a claim with the Wisconsin Lawyers' Fund for Client Protection if the lawyer fails to provide a refund of unearned advanced fees.
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> SCR 20:1.5(g)(1)[1].

- **SCOPE OF REPRESENTATION & ALLOCATION OF AUTHORITY - SCR 20:1.2**

Misunderstandings concerning the scope of representation, can be minimized or avoided through the effective use of retainer letters. Prior codification of the ethics rules provided that the client decided upon the purpose of the legal undertaking and the lawyer determined the means by which the client's objective would be achieved. That comforting and reasonable model is gone.

SCR 20:1.2(a-b) sets forth how decisions regarding representation should be made:

> (a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

In other words, the decision as to *what* to do, including settlement, are up to the client. Decisions as to *how* to do it are up to lawyer *and client* together, with the lawyer acting as consultant and counselor and taking "such action on behalf of the client as is [explicitly or] impliedly authorized to carry out the representation." This enfranchises the clients in many decisions which may be consequential but enjoy no benefit from the client's involvement. In particular, strategic elections in the course of litigation, such as selection of experts and the like are not ones with respect to which most clients can contribute. Nevertheless, where one of these

[1] Upon conclusion of representation, the lawyer who accepted an advanced fee in their operating account must provide in writing to the client a final accounting; a refund of any unearned advanced fees and costs; notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting; and notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration. SCR 20:1.5(g)(2)(c-d).

decisions is pivotal in an unhappy outcome a failure to involve the client can subject the lawyer to criticism, or worse.

Practically speaking however, this means the client should be involved in *all* decisions having any strategic significance. While your client does not need to receive every late stage redlined iteration of a will or trust instrument (as by that point, you are likely correcting typos and paragraph numbers), you should keep them informed of any proposed substantive changes and get their informed consent before accepting them. Similarly, if your client has given you authority to negotiate and agree to contractual provisions within a certain range, you don't have to let them know about each phone call[2], but you need to bring any proposals outside of the range to their attention.

To that end, as stated above, is useful for lawyers to explain the scope of representation and allocation of authority at the relationship's outset. Lawyers representing institutional clients may find guidelines set forth in the client's outside counsel manual, but individual clients will need to be informed as to when, and how they will be consulted on important decisions. If the client does give you authority to accept certain proposals, put that in writing as well so there should be no misunderstanding later (even if "buyer's remorse" strikes).

With respect to estate planning a particular problem relating to scope concerns whether the lawyer will or will not advise the client in the future about changes in the law that present either opportunities or impediments in connection with the estate plan. Accepting a responsibility of this kind may seem attractive as a means of securing future business, but it is an enormous undertaking and risk which will only get worse as the practice expands. Far better to provide a written invitation to the client to seek periodic review of the plan. One could thereafter send out reminders to past clients concerning the desirability of having their estate plan reviewed and, in so doing, accept responsibility only for those who will engage you for that purpose. (In my opinion, targeted direct mail or email to this group of recipients would not qualify as legal advertising requiring compliance with the special requirements of SCR 20:7.3).

There are also allocation issues likely to arise where clients are instructed to take certain steps to preserve evidence or otherwise assist in the enterprise. To protect oneself a lawyer is best served when the assignments are confirmed in writing and perhaps subject to a reminder in the event there is no confirmation they have been completed. We want to avoid the acceptance of responsibility for tasks only the client can complete. In situations like this I favor the use of the so-called "negative option", for example: "… And unless I hear from you to the contrary I will assume that you have completed this undertaking…".

[2] That said, many grievances received by the OLR pertain to simple failures by the lawyer to keep the client reasonably informed about the progress of their matter. See SCR 20:1.4. Occasional updates, even to say that you're playing phone tag with the other party but don't have anything of substance to report, go a long way.

Lastly, one might provide in an engagement letter language to the effect "client specifically leaves to the sound and sole discretion of [attorney] all decisions concerning the means by which the objectives of the representation are pursued". Or "it shall be left to the sole discretion of [Attorney] election of those strategic decisions where the client's participation will be useful". Efforts to disarm the rule by agreement are anything but foolproof, but can't hurt.

- **COMMUNICATION - SCR 20:1.4**

It is useful for attorneys to inform clients what to expect with regard to communication and confirm their agreement in a retainer letter or contract. In general, this might mean informing the client up front that you will copy the client on outgoing correspondence; send them copies of some or all draft documents as they are received; and endeavor to respond to messages from clients and third parties as soon as possible (even if simply to acknowledge receipt offering substantive response later). Take care when copying clients on emails. This will inevitably result in communications directly with your client from anyone who hits "reply all."

I think it also useful to have the engagement letter contain a statement by the client agreeing that the subjects about which communication may be expected shall be left to *the sound discretion of the lawyer,* or words to that effect. Although the OLR has made clear that we cannot contract away our obligations under the Supreme Court Rules a clause such as this can help protect you in instances of grievances concerning the omission of a notification.

- **CONFIDENTIALITY – SCR 20: 1.6**

Engagement letters can also help manage clients' expectations regarding confidentiality. For instance, SCR 20:1.6 prohibits lawyers from divulging "information relating to the representation of a client" absent informed consent, "except for disclosures that are impliedly authorized in order to carry out the representation" (and other exceptions unlikely to apply here). Your engagement letter can specify how and what information may be revealed, and can confer explicit authority upon the lawyer to divulge certain information. It can also specify the persons to whom otherwise confidential information might be confided. Again, the engagement letter might include a statement that observance of confidentiality is relegated to the sound and sole discretion of the attorney. Or "the benefit of revealing information that would otherwise be confidential is left to the discretion of [attorney]"

Of particular concern to is the appropriateness of communicating with family members, trustees, physicians or the like in connection with respect to evidence, unforeseen future issues or changes relating to the original plan.

- **CONFLICTS OF INTERESTS SCR 20:1.7, 8 & 9**

Rules 20:1.7-1.8 discuss conflicts of interest; which type may be waived, and how to do so. In office work, whether a conflict exists and whether it is waivable differs from the litigation setting but the rules are applicable to both. In the latter, a lawyer cannot represent both a plaintiff and defendant in the same matter and that conflict cannot be waived. In connection with contracts or, for example an estate plan, a lawyer cannot represent both testator and beneficiary or others with differing interests in the same transaction unless the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and each client gives informed consent in writing (**SCR 20:1.7(b)).**

As a practical matter, multiple party undertakings of this kind always warrant caution. Parties at the outset of a transaction are routinely enthusiastic and feel generally allied. The subjects about which they will later fight are neither evident, anticipated, nor discussed. If the parties believe they have no issues and wish to save money, better to accept representation of one of the parties and let the other go unrepresented. When this is done the lawyer's role should be confirmed explicitly.

Special care is warranted where an existing client, who is an anticipated beneficiary brings mom or dad or a relative to you for estate planning. In the event of an unanticipated departure from expected apportionment that benefits the existing client this will be grist for an undue influence claim to which you may be a party. More likely, this circumstance is fertile ground for an allegation of malpractice. Estate planning is not a practice area where one safely serves as "the family's attorney".

Of paramount importance is the necessity to determine who your client is. Often this is the foundation for resolution of a whole series of subsequent ethical issues.

An engagement letter is good place to confirm disclosures about factors which bear upon, but are thought **not** to create a conflict or to confirm waiver where a conflict is extant. If the latter, the client *must* sign the engagement letter and special care exercised in recognition of the fragility of conflict waivers. Although a tedious precaution, the most durable waivers are those about which the client has had independent counsel. Boilerplate waivers and/or "waivers" that are not explicit or affirmatively agreed to by the client may be ineffective.

Also note that **SCR 20:1.9** sets forth duties to *former* clients; if former representation creates a conflict with a current or potential client then a separate waiver from the former client must be obtained. Again, this will require you determine whether a conflict actually exists; if you ask for a waiver from a former client when you are unsure, you risk refusal to waive and your request taken as an acknowledgement that a conflict of interest does exist. Little purpose is ever

served by reference to "potential conflicts".

If you conclude that the former representation is not "substantially related" to the proposed undertaking adverse to the former client (that is, it did not afford you confidential information which may now be exploited to the former client's disadvantage) I recommend alerting the former client concerning the matter, and your conclusion that the former representation does *not* preclude the proposed project, inviting the client to consult his/her lawyer and raise the issue timely if they conclude otherwise. The letter should include a presumption that unless raised promptly you will assume agreement with your analysis.

II. GOOD ENDINGS: DISENGAGEMENT LETTERS

As with engagement letters at the beginning of representation, disengagement letters are useful as a means of avoiding problems relating to:

1. Scope of Representation (SCR 20:1.2)
2. Diligence (SCR 20:1.3)
3. Duties to Former Clients (SCR 20:1.9)
4. Declining or Terminating Representation (SCR 20:1.16)
5. Malpractice

Importantly, closing communication is advisable in all matters, it is *required* in certain circumstances. For instance, lawyers who accepted an advance fee (or a retainer, flat fee, non-refundable fee, regardless of what it is called) in their operating account *must* provide, in writing, a final accounting; a refund of any unearned advanced fees and costs; notice that, if the client disputes the amount of the fee and wants that dispute to be submitted to binding arbitration, the client must provide written notice of the dispute to the lawyer within 30 days of the mailing of the accounting; and notice that, if the lawyer is unable to resolve the dispute to the satisfaction of the client within 30 days after receiving notice of the dispute from the client, the lawyer shall submit the dispute to binding arbitration. SCR 20:1.5(g)(2)(c-d).

Any attorney with funds or property in trust must follow SCR 20:1.5(h)(1), which provides that at least five business days prior to making a disbursement from a trust account to pay attorney fees, the client must be provided in writing an itemized bill, a notice of the amount owed and the anticipated date of the disbursement, and a statement of the remaining trust funds after the disbursement. The final bill at the conclusion of representation should follow this procedure, and a refund of money left in trust should be provided.[3]

[3] Disputes over trust property are governed by SCR 20:1.15(h), which requires that the lawyer holds the disputed property in trust until the dispute is resolved, but any property or funds not in dispute must be promptly disbursed.

In addition to providing an avenue for final accountings and notices required by the Rules, a disengagement letter will help eliminate the dangers that attend a misunderstanding between lawyer and client about when the lawyer's work is completed. This also holds true when the contract contemplates financial transactions or other actions years in the future—if you don't want your clients to think you are supposed to remind them of contractual duties years hence, make sure your closing letter makes clear that upon the contract being executed it is up to the clients to perform their obligations.

Although in law firms many lawyers relish the status conferred by have many open matters, the client likes nothing more than hearing their case is concluded and their file is being closed. Moreover, failure to confirm conclusion of your work can create conflicts of interest prohibiting future work for other clients that would otherwise exist.

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III. DEALING WITH THE OLR

Special Warning Re Trap in Recent Trust Rule Changes

In April, 2016, the Wisconsin Supreme Court made significant changes to the rules relating to lawyers' handling of trust property, effective July 1, 2016. Of note, changes were made to SCR 20:1.15 to allow for E-Banking, remote transactions and the like, conditioned upon observance of new requirements for the maintenance of security relating to lawyers' trust accounts. Time permitting, we will talk about some features of the new rules. The most regrettable of the changes to the trust account rule is imposition of a **presumption that a lawyer has failed to hold trust property in trust** in the event of: *failure to promptly deliver trust property* to a client or third party entitled to the property, or f*ailure to promptly submit trust records* to the OLR upon request, or f*ailure to promptly provide an accounting* of trust property to the OLR. These presumptions may be rebutted by the lawyer only upon a showing of clear, satisfactory, and convincing evidence—the middle burden once borne by OLR.

- **Somebody Filed a Grievance; Now What?**

First, it is important to remember that anyone can file a grievance at any time and the barriers to doing so are minimal—it's a matter of making a phone call or filling out a form, and there is no fee to do so. Once a grievance comes in, intake staff conducts a preliminary review (SCR 22.02). The purpose of this review is not to evaluate the merits of the complaint, but to see if it falls within the OLR's jurisdiction and states sufficient information to give rise to investigation. If it does not, the OLR may close the matter, with an opportunity for the grievant to

request a written review by the OLR director. (SCR 22.02(4)). In certain cases and for good reason, the OLR may refer the matter to another agency such as the Board of Bar Examiners, the State Bar of Wisconsin, or even the district attorney's office (SCR 22.03). In cases involving minor disputes, the intake staff can attempt to reconcile the matter. If there is sufficient information of cause to proceed, the investigator will refer the matter to the OLR director with a recommendation that the matter be investigated, or diverted (which will be explained below).

Investigation is governed by SCR 22.03 (if done by OLR), SCR 22.04 (if done by district committee[4]), and SCR 22.25 (if done by special investigator). Once the matter has been referred to investigation, the OLR must notify the respondent. (In practice, the OLR usually does so during intake before it is determined whether an investigation should occur.) While historically that notice has come by letter, it is increasingly occurring via email or by a phone call. Once you receive notice, you generally have 20 days to respond; extensions are common and usually given without too much trouble. Once you receive notice in whatever form, you likely have an obligation to notify your malpractice carrier.

You have a duty to cooperate with all facets of investigation, even if the complaint is obviously frivolous. Failing to respond can result in an order to show cause for why your license should not be suspended (SCR 22.03(4)); willful failure to respond or cooperate, or providing false information is considered misconduct (SCR 22.03(6)) and can subject you to discipline even if the underlying grievance is meritless. If the allegations implicate potential criminality, you do retain your Fifth Amendment rights as to those allegations (but still need to respond to allegations that are not criminal in nature).[5] The duty to cooperate with the investigation calls for revelation of facts – not pleading to charges or offering legal conclusions.

In some cases, grievances are filed by current clients, and your duties under Chapter 20 continue unless and until you withdraw from representation. (See SCR 20:1.16.) In some of these cases, though it seems odd, the grievant wants you to continue representing them. There is no black letter law absolutely prohibiting you from doing so, but it may be difficult for you to do so (See SCR 20:1.7(a)(2).)

If, in the course of reviewing your file you determine that, indeed, you did not respond to an important email or you erred in a calculation, it's generally better to admit to that fact, express regret, and move on than it is to pick a fight you won't win. If you discover a problem that has a remedy (for instance, your fee agreement doesn't conform to the requirements of SCR 20:1.5),

[4] The committee will appoint one or more people to act as investigator; you have the right to request substitution once as a matter of course and after that for good cause.
[5] Note that invoking Fifth Amendment rights may be construed against you in a disciplinary matter, but the alternative is admitting to conduct that will give rise to criminal liability later. Consultation with a criminal defense attorney is advised at this point.

you can note the problem and let the OLR know you have fixed it or can fix it. Remedial measures after the fact won't necessarily result in a dismissal of the grievance (though they can), but they will show a good faith effort to comply which speaks to your cooperation with the investigation and may be considered mitigating factors later.

Once you have responded, the OLR will usually provide your response to the grievant and, if necessary, solicit a reply. Once the grievant has replied, you get a copy and will have the opportunity to submit more information. (There may be several rounds of this.) During this time, the investigator can also contact witnesses if warranted, and may ask for an in-person or telephone interview with you. These interviews are not depositions (though they may be tape recorded) and are otherwise generally informal, but you still have a duty to be truthful.

Some attorneys wonder whether they should get assistance in responding. The answer to that question is almost always yes; however, "assistance" can take many forms. First, you likely have a duty to report the matter to your malpractice carrier, and your claims representative can be a good source of information. Moreover, your policy may cover some defense costs (many policies allow you to choose your counsel and do not impose a deductible for this coverage). Yes, reporting a grievance may affect your rates (though not necessarily by much), but not reporting a grievance when you are required to do so can cost you coverage if you need it later.

Second, if you work with other attorneys, your employment or partnership agreement may require you to disclose grievances to your boss or partners. Even if you are not required to do so, it is generally a good idea. This can be nerve-wracking and embarrassing, especially for a young associate, but it's important. If you didn't do anything wrong, colleagues (some of whom have probably been there) can help reassure you of that fact; if your conduct could potentially constitute misconduct or malpractice, it is important for management to know that in order to gauge risk. In any case, colleagues can provide guidance and moral support; they can help you draft a response or read a response you draft yourself to make sure it's adequate but not overboard.

Whether to retain outside help is an individual decision to be made based on the totality of the circumstances—cost (especially if your insurance does not cover defense); time (if responding to the grievance using your firm personnel would come at the expense of paid work or important deadlines); severity (cases implicating criminal liability should involve experienced defense counsel); complexity (if you do not understand the Supreme Court Rules you're accused of violating or need help figuring out whether you did commit a violation); emotion (if you're freaked out it can help to put a layer between you and the OLR); desire (if you simply don't want to handle the matter yourself). The OLR will not read anything negative into your decision to hire counsel, and will appreciate that you're taking the grievance seriously.

- **What Happens After the Investigation?**

An OLR investigation can take a days or months. Sometimes, after a flurry of inquiries and follow-up messages, OLR goes silent. This in itself does not mean anything—sometimes matters sit in OLR's hands for months and then get dismissed; sometimes they sit for months and then a complaint seeking revocation is issued. Regardless of how long it takes, there are several paths to disposition:

1. The OLR may find insufficient evidence of a violation or otherwise find no cause to proceed and may dismiss the case. The grievant has limited appeal rights (to the OLR director or to committee) but dismissals are generally affirmed.
2. The OLR may offer a diversion agreement. (SCR 22.10.) A diversion agreement is, essentially, a deferred prosecution agreement. You agree to abide by certain conditions (for instance, take CLE or submit a matter to fee arbitration, as well as pay costs of the proceeding) and avoid additional findings of misconduct and the matter will be dismissed, then completely expunged after three years. The fact of the diversion is revealed to the grievant but the terms are not. You are not required to accept a diversion agreement.
3. The OLR may offer stipulation to a consensual public or private reprimand. (SCR 22.09.) These terms are largely self-explanatory; a public reprimand is made public and a private reprimand exists in the OLR offices. However, should a formal complaint be issued in a different matter after a lawyer has received a private reprimand, the fact of the reprimand is recited in the complaint and otherwise becomes public. Again, you are not required to stipulate to a reprimand.
4. If you decline to stipulate to a diversion or reprimand, or the OLR director believes that there is sufficient evidence of misconduct that could result in more serious sanctions such as a suspension or revocation, then the director will present the matter to the preliminary review committee to determine whether there is cause to proceed to more formal action. If the preliminary review committee finds cause to proceed, the OLR director then determines what action to take.

- **What If It Doesn't Go Away?**

If a stipulation is not reached or not offered, the OLR files a complaint with the Supreme Court. (SCR 22.11.) At this point, the fact that you are under investigation becomes public.[6] If a complaint is filed, you will need to file an answer, and then the matter proceeds similarly to a civil

[6] Legal publications keep an eye on Supreme Court filings and may contact you for an interview. Whether and how you respond is a business, reputational, and risk management decision rather than a legal or ethical one.

trial, except the Supreme Court will appoint a referee to act as the hearing officer. (SCR 22.16.) Referees may be practicing or retired lawyers, or retired judges; you have the right to substitute referees once as a matter of course[7] and thereafter for cause.

The referee will confer with the parties or their counsel and enter one or more scheduling orders (see SCR 22.15), which will provide for discovery (including depositions), witness disclosures, briefing if requested or required, and a hearing date or dates. During the course of the proceeding, it is possible to stipulate to findings, conclusions, and recommended discipline, which the Supreme Court can approve or reject (rejected stipulations have no evidentiary value), or direct the parties to consider specific modifications. (SCR 22.12.) Stipulations are not supposed to be the product of plea bargaining and should generally include a disclaimer of same.

The hearing itself is less formal than a court trial—it often occurs in a hotel or bar association conference room (SCR 22.16 provides that the hearing occur in the county of the respondent's principal office unless the referee for cause designates a different location). A court reporter will make a record of the proceeding. The hearing is open to the public. The OLR is represented by either staff or retained counsel. Both the OLR and the accused lawyer may present witnesses and exhibits, and cross-examine the other party's witnesses. Hearsay is admissible though the referee may not give it particular weight. Opening and closing arguments may be made on the record, may be waived, or the referee may request briefing. The OLR has the burden of showing with clear, convincing, and satisfactory evidence that the attorney has committed misconduct.

Within the later of 30 days after the conclusion of the hearing[8] or the filing of the transcript, the referee is supposed to file a report and recommendation[9] with the Supreme Court. This report and recommendation sets forth findings of fact, conclusions of law, and recommendation for dismissal or specific discipline.

The referee also must file a recommendation as to the assessment of costs following the OLR's statement and the lawyer's objections if any; per SCR 22.24 the full cost of the proceeding (including OLR's time, the referee's time, hearing room rental, court reporter, copying, etc.) is imposed on the lawyer if misconduct is found. If no misconduct is found the parties pay their own costs; unfortunately, if no misconduct is found the accused lawyer is not entitled to reimbursement. However, the Court has the discretion to reduce the amount of costs based on the circumstances.

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[7] If you are unfamiliar with the appointed referee, senior colleagues may have insight, or you can perform a search on Westlaw or Lexis to find other cases on which the referee has served.

[8] If post-hearing briefing is requested, the hearing may not be "concluded" until briefing is complete.

[9] SCR 22.16(6) uses the term "shall" to describe this deadline, but it gets missed. If the report is significantly tardy the Supreme Court may send the referee a letter asking after it, but a late report doesn't give you any advantage or rights.

Once the referee's report and recommendation is filed, either party has 20 days to file an appeal. (SCR 22.17.) If no appeal is filed, the Supreme Court considers the report on its own (though in rare cases may order briefs); if either party appeals, the appeal proceeds in a manner similarly to other Supreme Court appeals, except the Court hears the appeal automatically and does not have the discretion to decline it. The parties file briefs and appendices, and in most cases, the Court orders oral argument.

Whether or not an appeal is filed, the Court acts on its own timeline and eventually renders a decision, which is final (subject to motions for reconsideration under 22.18 which are rarely successful). The Court considers the referee reports and the briefing of the parties, and can adopt, reject, or modify the referee's findings, conclusions, and disciplinary recommendations. (A common disposition is the Court's general acceptance of findings of fact and conclusions of law, but deviating from the disciplinary recommendation in some fashion.)

If the Court finds no misconduct occurred, then the matter is dismissed. Sometimes, the Court finds that there is evidence of some minor or technical violation but not sufficient to warrant discipline. If the Court does determine that there is sufficient evidence of misconduct warranting discipline, the Court may impose a private reprimand, public reprimand, suspension ranging from 60 days to three years, or revocation. "Revocation" is a term of art, as there is no mechanism for permanently disbarring a Wisconsin attorney; an attorney whose license has been revoked can apply for reinstatement after five years.

If the Court's disposition is anything other than a private reprimand or dismissal, the decision is published in official reporters as well as in the *Wisconsin Lawyer* magazine. (A party may request publication of a dismissal, for instance, if the matter got significant publicity and the lawyer wishes to clear his or her name.) The OLR will send notice of a public reprimand, suspension, or revocation to the State Bar and to a newspaper of general circulation in each county in which the attorney maintained an office; the OLR sends all judges in Wisconsin notice of a suspension or revocation. (SCR 22.23.)

- **What if I Can't Defend Against The Charges?**

In some cases, you don't have a good defense. You may choose to plead no contest to some or all of the allegations in your answer to the Complaint. (SCR 22.14.) If you do so, the referee will make a determination of misconduct based on the allegations and for which the referee finds an adequate basis in the record, and discipline will be recommended based on those findings. Pleading no contest creates a conclusive presumption that you engaged in the misconduct pled to in any subsequent disciplinary or reinstatement proceedings. As with a criminal no contest plea, a no contest plea here will not help you avoid discipline but will reduce the costs and time involved.

In cases in which the OLR is seeking revocation that you cannot successfully defend, an option is petitioning for consensual license revocation. (SCR 22.19.) Lawyers are not permitted to resign their licenses while under investigation; still, if you know that you cannot defend against allegations of misconduct that would give rise to revocation and you do not see a reasonable path to lesser discipline, consensual revocation may avoid lengthy, embarrassing, and expensive proceedings. If you are accused of criminal conduct, a petition for consensual revocation may help you avoid doing something in the disciplinary proceeding that could imperil your criminal defense. If such a petition is filed before a complaint has been filed, the Court will grant or deny the petition based on the filings of the parties; if a complaint has been filed the referee will make a determination (again based on the filings of the parties) and the Court will grant or deny the petition on that basis. If the Court denies the petition, the matter is remanded to the OLR or referee for further proceedings.

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