

WISCONSIN

Report on the Lawyer Regulation System

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OFFICE OF LAWYER REGULATION REVIEW COMMITTEE

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INTRODUCTION

In April 2011, the Board of Administrative Oversight ("BAO") appointed this Committee to review the Office of Lawyer Regulation ("OLR") process for handling ethics complaints against attorneys in Wisconsin. Here is a summary of our review, the conclusions we reached as a result of that review, and the actions we anticipate being taken by the OLR as a result of this review.

BACKGROUND

In April 2011, the members of this Committee were requested by the BAO to review the OLR process. The members of the Committee originally included me, Paul Eberle, Alan Lee, Daniel Schooff and Sharon Schmeling. Due to work commitments, Ms. Schmeling resigned from the Committee in August 2011. Our task was to evaluate the efficiency of the OLR process and to determine whether there are changes that could be made to improve the efficiency and transparency of the process.

We decided as part of our review that it would be helpful to have input from a number of different individuals who are involved in the OLR process. As a result, as part of our review either the full Committee or members of the Committee spoke with: (1) Keith Sellen, the Director of the OLR; (2) the investigators who are employed by the OLR; (3) the litigation staff employed by the OLR; and (4) many of the Chairpersons of the OLR District Committees. We solicited input from these individuals regarding their thoughts on the current OLR system and how it can be improved. In addition to discussions with the individuals listed above, members of the Committee reviewed files for some ethics complaint matters that have been pending for longer periods of time. The purpose of the review of the files was to determine whether there are common issues that result in the delayed resolution of ethics complaints in those cases that have been pending for longer periods of time.

FINDINGS

Based on our investigation, it appears that the current system for handling ethics complaints is generally a good system. Most people involved in the process felt that the system works well. The vast majority of ethics complaints are resolved at the intake stage of the process. While the system in general appears to be a good one, there are several things that could be done to improve it.

One of the complaints that has been raised regarding the OLR process is the fact that an ethics complaint can remain confidential for a substantial period of time before it is disclosed to the public. Public disclosure is a sensitive issue that requires a balance between the right of the public to know promptly of lawyer misconduct and the right of an attorney who is the subject of a complaint to protection from public disclosure of complaints that may have no merit. There were a number of individuals involved in the process who expressed concern that disclosure of complaints at the time they are filed by complainants would be detrimental. The concern is that

disclosure upon filing could subject an attorney to the adverse consequences resulting from public disclosure of a complaint before any determination is made regarding the merits of the complaint. On the other hand, a lengthy period of confidentiality prior to disclosure of complaints that do have merit could result in further harm to the public by an attorney who may be engaging in a pattern of misconduct.

In many ways, the issues with public disclosure are tied to the efficiency of the OLR system. The more quickly meritorious complaints move through the system, the more quickly they will be disclosed to the public. Consequently, improving the efficiency of the system would result in earlier disclosure to the public of complaints that do have merit.

A couple of ways in which the process could be improved that would also promote earlier public disclosure would be: (1) to disclose complaints as soon as the Preliminary Review Committee ("PRC") determines that the OLR can move ahead with the complaint; and (2) to change the PRC process so that the PRC can act on proposed complaints more frequently than on a quarterly basis. Under the current process, the PRC meets on a quarterly basis to review proposed complaints from the OLR. The process could be changed so that the PRC would meet more frequently, or to allow the PRC to act in approving complaints through smaller groups of the PRCs' members on a much more frequent basis. In addition, there is sometimes a lapse between the time that the PRC approves a complaint, and the time that the complaint is disclosed to the public through a public filing. This time lapse could be eliminated by disclosing the complaint at the time that the PRC approves it.

The cases that are pending for the longest periods of time prior to resolution appear to be primarily ones in which there is a related, pending civil or criminal matter. In cases where there is a pending civil or criminal matter that may have a direct impact on a pending ethics complaint against an attorney, the OLR's policy is typically to wait for the outcome of the civil or criminal matter before OLR pursues a complaint against an attorney. Eliminating this policy would greatly expedite the resolution of the matters that have been pending for the longest periods of time. However, elimination of this policy could also result in inconsistent decisions regarding attorney conduct between the OLR and the court system.

There are several other ways in which the efficiency of the OLR system could be improved. First, the OLR could use reserve Judges as referees rather than attorneys who may not be as familiar with the litigation process. Second, the OLR could increase its staff, including adding more OLR litigation attorneys. Relying on outside attorneys who may not be familiar with the OLR process to litigate OLR matters can result in inefficiencies. Third, the OLR could make more of an effort to facilitate free communication between its litigation staff and its investigators. It is our understanding that currently OLR litigation staff are required to seek approval in order to obtain information from investigators. Open communication between investigators and litigation staff without the need for preapproval would promote the efficiency of the process. Fourth, someone other than OLR investigators could handle attorney reinstatement requests. Under the current system, investigators handle attorney reinstatement requests which must be

resolved within a limited time period. This takes the investigators away from their work on investigating new complaints against attorneys. Fifth, the OLR could use the temporary suspension process more frequently to compel uncooperative attorneys to respond to OLR requests for information.

One other issue we reviewed was the need for a rule allowing for a lifetime revocation for attorneys. The individuals we spoke with regarding this issue were divided on it, with some favoring it and some opposed to it. The members of the Committee believe that it would be a good idea to have a rule providing for a lifetime ban that could be used in certain instances of particularly egregious conduct.

RESPONSE FROM OLR

The OLR was provided the opportunity to review the findings of this Committee. Based on the response from the OLR, it is our understanding that the OLR intends to take the following actions:

1. Develop a system for disclosure of complaints as soon as the Preliminary Review Committee determines that OLR can move forward with the complaint, except in situations where continued confidentiality may be required;
2. Explore whether the PRC can act on proposed complaints more frequently than on a quarterly basis;
3. Seek to have "permanent" referees, possibly reserve Judges, who are retained on a contract basis to handle disciplinary matters;
4. Seek an increase in staffing so that litigation of OLR matters can be handled more often by OLR staff rather than outside counsel;
5. Explore a system to streamline the handling of reinstatement requests by investigative staff, perhaps by assigning reinstatement requests to one member of the investigative staff on a rotating basis so that investigative staff has more time to devote to investigation of attorney disciplinary matters; and
6. Make available online disciplinary history and information for State Bar Members on a web site where it can be easily accessed by the public.

CONCLUSION

Overall, as a result of our investigation, we concluded that the current OLR system generally works well in most cases. However, as described above, there are some ways in which the process can be improved.

