

Memorandum

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION
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DATE: July 29, 2015

TO: Clerk of Supreme Court
ATTN: Deputy Clerk - Rules

FROM: Keith L. Sellen, Director, Office of Lawyer Regulation
7.29.15

SUBJECT: Rules Petition 14-06 Response to Questions from the Supreme Court

I write in response to the memorandum of Commissioner Julie Rich, dated July 7, 2015, in which she requested on behalf of the Court that OLR respond to the following issues and questions.

- The rule proposal makes several references to the OLR having “sufficient information to support ~~an allegation~~ a possible finding of cause to proceed ~~possible misconduct or medical incapacity.~~” Why include “possible finding”?
- The memorandum in support of the petition advises the court that if the petition is adopted, the OLR intends to consider factors such as the *de minimus* nature of a violation, whether the attorney acknowledges the violation, whether the violation caused harm and whether the attorney has remediated any harm, and whether the violation is part of a pattern of misconduct or is repeated misconduct. The petition does not propose including these factors in the rules. Please explain in more detail why these criteria should not be included in the text of the proposed rule.
- The memorandum in support of the petition advises the court that the proposed changes will enable the OLR to prioritize resources on matters where there is harm and to complete them more promptly. This is an important policy statement. Should this be incorporated into the rule?

References to “possible finding” of cause to proceed

In the current version of SCRs 22.02(6)(c), 22.03(1), 22.25(3), and 22.25(4), the standard applied to decide whether to conduct a formal investigation is “sufficient information to support an allegation of possible misconduct or medical incapacity.” In contrast, the standard applied after an investigation has concluded is cause to proceed. The definition of cause to proceed refers to the review of an investigative report, and to a reasonable belief that misconduct may be proved by clear, satisfactory and convincing evidence. When deciding whether to begin a formal investigation less information is available than after the investigation, and a lower threshold is appropriate. Current rules provide this lower threshold by using the term “possible misconduct.” OLR proposes including the words “possible finding” to maintain the lower threshold for deciding whether to conduct a formal investigation.

Additionally, OLR's proposal is that the phrase "possible finding" be applied to "cause to proceed," and that the definition of cause to proceed includes the concept that the conduct must "warrant discipline." The proposed modifications collectively would provide OLR with the rule-based basis for the ability to exercise increased discretion during its investigative process.

Whether discretionary factors should be included in the rule

OLR does not suggest including discretionary factors in the proposed rule. As a practical matter, the Preliminary Review Committee and the Board of Administrative Oversight would oversee these factors and their application. Future experience may suggest helpful modifications to the discretionary factors, which if not included in the rule could be taken into account by OLR without the need for a rule change.

Whether the policy statement should be incorporated into the rule

OLR would welcome publication of the policy statement. OLR suggests doing so in the Supreme Court order implementing the rule change or as a comment to SCR 22.001(2), the definition of cause to proceed.