

SUPPORTING MEMORANDUM

In the Matter of the Petition  
To Amend Supreme Court Rules 22.001(2),  
22.02(6)(c), 22.03(1), 22.25(3), and  
22.25(4)

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TO: Chief Justice Shirley S. Abrahamson  
Justice Ann Walsh Bradley  
Justice N. Patrick Crooks  
Justice David T. Prosser, Jr.  
Justice Patience D. Roggensack  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman

Filed with the Clerk of Court Diane Fremgen  
Clerk of Supreme Court  
110 E. Main Street  
Suite 215  
Madison, WI 53703

The Office of Lawyer Regulation (OLR) provides this memorandum in support of the petition for an order amending Supreme Court Rules (SCR) 22.001(2), 22.02(6)(c), 22.03(1), 22.25(3), and 22.25(4).

The Supreme Court has expressed concern in recent cases that OLR should exercise more discretion when allegations involve de minimus violations [See Disciplinary Proceedings Against Creedy, 2014 WI 114; Disciplinary Proceedings Against Johns, 2014 WI 32; Disciplinary

Proceedings Against Merry, 2014 WI 30; Disciplinary Proceedings Against Netzer, 2014 WI 7].

OLR agrees that exercising more discretion is appropriate, and notes that language in current rules requires OLR to investigate and to pursue discipline even where the violation is de minimus. SCR 22.03(1) states, "[t]he director shall investigate any grievance that presents sufficient information to support an allegation of possible misconduct." Also, SCR 22.05(1)(a) permits dismissal for "lack of sufficient evidence of cause to proceed;" and SCR 22.001(2) defines cause to proceed in terms of an attorney's misconduct (a violation of the rules of professional misconduct), without regard to whether the violation is de minimus.

OLR consulted with experts from Colorado and Illinois about these concerns. On September 8, 2014, these experts submitted a report in which they recommended that the Director and staff exercise more discretion. Their report stated: "We believe that that disciplinary counsel in most states routinely exercise discretion to close investigations regarding minor violations." The report further stated: "We believe that disciplinary counsel can and should dismiss minor violations without diversion if

circumstances warrant, e.g., the attorney acknowledges the violation and the violation has caused no harm.”

The changes proposed in Appendix A amend the definition of cause to proceed, and incorporate that definition into the rules relating to the decisions whether to initiate an investigation and how to dispose of a matter after investigation. The changes provide for adequate discretion and will protect the public from harm. The changes will enable OLR to prioritize resources on matters where there is harm and to complete them more promptly.

If adopted, the rules will permit OLR to exercise discretion in accordance with guidance offered in recent court decisions and the recommendations of the consultation report. In doing so, 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 such factors in the rules, but instead permitting consultation between the Board of Administrative Oversight and OLR regarding the appropriate factors to be considered.

Respectfully submitted this \_\_\_\_ day of December, 2014.

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