

MEMORANDUM

TO: Justices of Supreme Court of Wisconsin

FROM: Dean R. Dietrich, Chair
Committee on Professional Ethics
State Bar of Wisconsin

DATE: September 28, 2010

RE: In the Matter of Review of Amendments to Supreme Court Rule 22.24
Relating to Cost Assessments in the Lawyer Regulation System

On behalf of the Board of Governors of the State Bar of Wisconsin, we are writing to provide information to the Court regarding the public hearing on the Amendments to SCR 22.24 to be held on October 4, 2010. The Board of Governors of the State Bar of Wisconsin, at its recent meeting, authorized the submission of the following information and documentation to the Supreme Court.

The State Bar of Wisconsin submits the documentation and recommended language provided to the Wisconsin Supreme Court in response to Petition 05-01. This information was provided in November, 2005. Attached is a copy of the document previously submitted to the Supreme Court.

This document contains proposed language modifications to SCR 22.16 – Proceedings Before a Referee and SCR 22.24 – Assessment of Costs. The principal difference in this document from the current language in SCR 22.16 and SCR 22.24 is the requirement that the Referee in a lawyer disciplinary proceeding file a recommendation as to the assessment of reasonable costs with the Court and that the Court consider the recommendation of the Referee when determining the assessment of costs in a lawyer disciplinary proceeding. The Board of Governors believes that the Referee should be given the initial requirement of submitting a recommendation regarding the apportionment of costs because the Referee is intimately knowledgeable regarding the proceedings that were heard and the amount of time and effort that were spent by the parties when addressing the various counts that may be litigated as part of the disciplinary proceedings. The State Bar believes that a recommendation from the Referee will provide an accurate picture of the nature and scope of the proceedings and will provide additional assistance to the Court in determining the appropriateness of any assessment of costs against the lawyer involved in the disciplinary proceeding.

Representatives of the Board of Governors will be in attendance at the hearing on October 4, 2010, to respond to any questions from the Justices.



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To: Cornelia Clark, Clerk of the Wisconsin Supreme Court
From: D. Michael Guerin, State Bar President
Re: Petition 05-01 Cost Assessments
August 16, 2010 [N.B.: THIS DATE IS INCORRECT; DOCUMENT DATES FROM Nov. 2005]

At its September 30th meeting in Green Lake, the State Bar's Board of Governors (Board) voted to oppose Keith Sellen's petition relating to the assessment of costs in disciplinary proceedings within the lawyer regulation system. Subsequently, the Board then overwhelmingly adopted alternative language (attached) recommended by the State Bar's Lawyer Regulation Study Committee. Please note that the proposal before you was crafted with considerable input from Director Sellen.

Given the supreme court's opinions in *Marks v. OLR* and *O'Neal v. OLR* (and various other recent cases) the State Bar's Lawyer Regulation Study Committee undertook a comprehensive study of this issue as directed by past State Bar President George Burnett. As a result of that analysis both the Board and the study committee truly believe that this alternative provides the court with the most flexibility and latitude on a case by case basis. It simply provides additional factors to be considered when assessing costs. However, considering that referees are already in place within the disciplinary process, we feel it only appropriate that he/she be responsible for making preliminary findings in these cases.

Questions? Contact:

D. Michael Guerin: President, State Bar (414) 271-1440

George Brown: Executive Director, State Bar (608) 250-6101

Warren W. Wood: Chair, Lawyer Regulation Study Committee (715) 246-2146

State Bar of Wisconsin

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SCR 22.16 Proceedings before a referee.

...

(7) Within 20 days of the filing of the referee's report, the office of lawyer regulation shall file with the referee, with copy to the respondent, a statement of costs and recommendation concerning an assessment of all or a portion of the costs against the respondent. The respondent may file an objection to the statement and recommendation within 10 days of receipt. The office of lawyer regulation may reply within 5 days of receiving the objection. The referee shall file a recommendation as to the assessment of reasonable costs with the court within 10 days after the parties' submissions. The referee shall consider the submissions of the parties and the record in the proceeding. No further discovery or hearing is authorized. The director has the burden of establishing by clear, satisfactory and convincing evidence the costs to be assessed. The factors to be considered by the referee in making a recommendation shall include the following:

- a. The number of counts charged, contested, and proven;
- b. The severity of counts charged, contested, and proven;
- c. The level of discipline sought by the parties and recommended by the referee;
- d. The respondent's cooperation with the disciplinary process; and
- e. The respondent's ability to pay.

SCR 22.24 Assessment of costs.

...

(2) In seeking the assessment of costs by the supreme court, the director shall file ~~in the court~~ a statement of costs as required by supreme court rule 22.16 (7) and 22.31 ~~within 20 days after the filing of the referee's report,~~ provided that if ~~that if~~ If an appeal of the referee's report is filed or the supreme court orders briefs to be filed in response to the referee's report, ~~the~~ a supplemental statement of costs shall be filed within 14 days after the appeal is assigned for submission to the court or the briefs ordered by the court are filed. Objection to the supplemental statement of costs shall be filed by motion within 10 days after service of the supplemental statement of costs. ~~The director has the burden of establishing costs to be assessed.~~

(3) The supreme court shall consider the submissions of the parties and the recommendation of the referee. The supreme court shall accept the referee's findings of fact regarding the cost assessment unless clearly erroneous, but may exercise discretion regarding the assessment of costs. Upon the assessment of costs by the supreme court, the clerk of the supreme court shall issue a judgment for costs and furnish a transcript of the judgment to the director. The transcript of the judgment may be filed and docketed in the office of the clerk of court in any county and shall have the same force and effect as judgments docketed pursuant to Wis. Stat. 809.25 and 806.16 (1997-98).



STATE BAR OF WISCONSIN

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MEMORANDUM

To: Wisconsin Supreme Court
From: James Boll, President
State Bar of Wisconsin
Date: September 27, 2010
Re: State Bar of Wisconsin response regarding rule-making order 05-01

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SEP 29 2010

CLERK OF SUPREME COURT
OF WISCONSIN

At its meeting on September 24, 2010, the Board of Governors of the State Bar of Wisconsin voted unanimously to resubmit to the court its 2005 response to Petition 05-01 relating to the assessment of costs in lawyer disciplinary cases. Attached is a copy of the 2005 submission as well as a memo from Attorney Dean Dietrich, chair of the State Bar's Committee on Professional Ethics. Attorney Dietrich will address the court at the hearing on October 4, 2010, regarding the Board of Governor's position on this matter.

Thank you for your consideration.