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**SUPPORTING MEMORANDUM**

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**In the matter of REPEALING AND RECREATING Supreme Court Rule 21.08 AND AMENDING Supreme Court Rules 21.11(4), 22.09(2), 22.13 (3), 22.16 (6), 22.25(6)(c), 22.30(1), 22.34(10), and 22.36(5).**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, and Jacquelynn B. Rothstein, Chair of the Subcommittee on Referees, respectfully petition the court to amend Supreme Court Rules by repealing and recreating Supreme Court Rule 21.08 and amending Supreme Court Rules 21.11(4), 22.09(2), 22.13 (3), 22.16 (6), 22.25(6)(c), 22.30(1), 22.34(10), and 22.36(5).

**SUPREME COURT SUPERINTENDING AUTHORITY**

The subject matter of the proposed rule changes falls within the power of the Wisconsin Supreme Court to regulate the practice of law in the state and protect the public from misconduct by persons practicing law in Wisconsin, pursuant to the constitutional responsibility to exercise superintending and administrative authority over all courts. The recommended procedural changes do not abridge the substantive rights of any participant in the attorney disciplinary process.

**INTRODUCTION and BRIEF HISTORY**

In 2016 the Wisconsin Supreme Court established a committee to review the Office of Lawyer Regulation (OLR) Procedures (Committee). The Honorable Gerald Ptacek was appointed as the Committee's chair. The Committee examined OLR procedures holistically and established its mission to review OLR procedures and structure, and to report to the Wisconsin Supreme Court recommendations that would increase the efficiency, effectiveness, and fairness of the OLR process.

The Committee established four subcommittees: the Charging Process subcommittee focused on OLR charging decisions, the Referees' subcommittee focused on the appointment, training, and performance of referees assigned to disciplinary matters, the Confidentiality subcommittee focused on balancing the rights of respondent attorneys and the rights of complainants and the public at large, and the Process subcommittee focused on the procedural aspects of the disciplinary process.

The Referees' subcommittee (Subcommittee) examined the role of referees, researched how referees are appointed, and heard from stakeholders in the attorney disciplinary process regarding the challenges faced by referees. This Petition (Referees' Petition 1) is brought by the

Referees' Subcommittee; it has been endorsed by the Committee and it seeks to amend Supreme Court Rules in a manner that promotes fairness, efficiency, and the highest level of professionalism for referees engaged in the disciplinary process.

## **DISCUSSION**

The Referees' subcommittee focused on current practices relating to the appointment and practices of referees, including determining who should serve as referees, whether it is desirable to require certain qualifications, whether referees should serve for determinate terms, and whether to establish guidelines for the manner in which referees are assigned to cases. Additionally, the Subcommittee considered whether and how to provide specialized training for referees, as well as the desirability of whether to clarify the rule on when a referee must submit to the Supreme Court a report setting forth his or her findings of fact, conclusions of law, and recommendations.

The Petition sets forth amendments to current Rules governing how referees are appointed, trained, assigned to cases, and retained. The Petition seeks to clarify the referees' duties and establish more feasible deadlines for referees to complete and submit their reports to the Court.

The Subcommittee also developed a set of proposed Internal Operating Procedures to augment the proposed Rule changes. The proposed Internal Operating Procedures specify that the Office of Judicial Education, with assistance from Supreme Court commissioners, will provide the required training and will include topics that are necessary for the referees to perform their duties at the highest level of competence. Additionally, the proposed Internal Operating Procedures set forth qualifications for referees and guidelines for appointment to cases, and establish procedures for applying for, and being appointed to, the panel of referees. These are also included for the Court's consideration and action.

The Subcommittee believes that the Petition, along with the proposed changes to the Internal Operating Procedures, will promote efficiency and accountability in every phase of attorney disciplinary proceedings.

## **DISCUSSION OF EACH PROPOSED RULE CHANGE IN REFEREES PETITION 1**

### **Petition Sections 1. and 2.**

#### **Section 1. SCR 21.08 is repealed and recreated to read: 21.08 Referees.**

(1) The referee panel consists of no more than 24 lawyers and reserve judges appointed by the supreme court. Referees shall be members of the State Bar of Wisconsin in good standing. Referees serve staggered four-year terms. A referee may be reappointed to serve consecutive terms. If a referee's term ends while an assigned matter remains pending, the referee may oversee completion of the matter unless, on its own motion or on motion of the parties, the supreme court directs the appointment of a new referee.

(2) Referees function under the supervision of the supreme court.

(3) The duties of a referee are:

- (a) To preside over and conduct hearings on complaints of attorney misconduct, on petitions alleging attorney medical incapacity, and on petitions for license reinstatement, and to issue orders necessary to advance the proceeding.
- (b) To make written findings, conclusions, and recommendations, and to submit them to the supreme court for review and appropriate action.
- (c) To review consensual discipline under SCR 22.09.
- (d) To conduct hearings, make written findings, conclusions, and recommendations on other matters as the supreme court may direct.

(4) Referees shall function pursuant to the procedures set forth in SCR chapter 22.

(5) Each referee shall participate in mandatory referee training developed by the judicial education office, as follows:

- (a) Each newly appointed referee shall attend the earliest one-half day new referee orientation seminar offered following his or her appointment, unless a period of extension is granted by the judicial education office, upon prior application by the referee. A referee reappointed to serve a consecutive term need not repeat the new referee orientation seminar.
- (b) Each referee shall attend a one-half day referee training seminar every two years during the referee's four-year term when offered by the judicial education office.
- (c) If a referee fails to comply with the mandatory referee training, the judicial education office shall advise the supreme court and the supreme court may, following notice to the referee, remove the referee from the referee panel provided in SCR 21.08.

**Section 2. SCR 21.11 (4) is amended to read:**

**21.11 (4)** ~~Staff of the supreme court shall provide formal~~ Formal training to the referees shall be provided as set forth in SCR 21.08.

**Discussion.** Under current Rule, an indeterminate number of attorneys and reserve judges are appointed by the Court to serve for indeterminate terms as referees. Current Rule states that the referees have the duty to review agreements for consensual discipline, conduct hearings on matters alleging attorney misconduct, medical incapacity, or seeking license reinstatement, and submit findings, conclusions, and recommendations to the Court.

The Subcommittee's proposed recreation of this Rule limits the referee panel to no more than 24 members appointed by, and functioning under the supervision of, the Supreme Court. The Subcommittee believes that limiting the number of referees allows the Court to ensure that the referees are appropriately trained and to maintain a high level of professionalism by encouraging referees to develop the expertise that comes with experience in serving as a referee in attorney disciplinary matters. The Subcommittee believes that 24 referees is sufficient to handle the caseload borne by referees under current Rule.

The Subcommittee's recreated Rule also sets forth the duties of each referee, including the duty to preside over and conduct hearings on matters involving attorney discipline, medical incapacity, or reinstatement, to make written findings and conclusions submitted, with a recommendation for action on each matter, to the Supreme Court, to review consensual disciplinary agreements, and to perform other duties as directed by the Supreme Court. The Subcommittee intends that this somewhat expanded catalog of duties will clarify current Rule and ensure that each referee understands his or her role at each stage of a proceeding.

The Referees' Petition 1 further recommends amending the Rules to require referees to acquire specialized education upon appointment and continued education throughout their tenures. The proposed Rule contemplates removal of a referee from his or her appointment for failure to comply with the educational requirements. The Subcommittee believes that education for referees is highly important and that the Court, the legal profession, and the public will be better served by referees who have particularized training designed to help them carry out their duties. The proposed Rule requires the office of judicial education to develop a training program for referees. The Subcommittee believes that the office of judicial education is well suited to develop specialized training and that by allowing that office to create the curricula, the burden on the Court will be minimized.

The Petition also contemplates the Court's decision to decline to reappoint a referee after his or her four-year term is complete. The proposed Rule allows a referee to be appointed to consecutive terms but does not obligate the Court to reappoint a referee. The Subcommittee believes that this Rule will allow the Court to monitor the quality of referees and to ensure that the most qualified and diligent referees remain active in the attorney disciplinary process.

### **Petition Sections 3., 4., 6., 7., 8., and 9.**

#### **Section 3. SCR 22.09 (2) is amended to read:**

**22.09 (2)** The director shall request the appointment of a referee by providing in confidence to the clerk of the supreme court the names of the grievant and respondent, the address of the respondent's principal office, and the date of the consent agreement. The clerk or deputy clerk of the supreme court shall select a an available referee from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to~~ the location of the respondent's principal office. The chief justice or, in his or her absence, the ~~senior chief justice's~~ delegee shall appoint the referee selected by the clerk or deputy clerk. The director shall submit the agreement, accompanied by the respondent's public and private disciplinary history, to the appointed referee for review and approval. The director shall send a copy of the agreement to the grievant. The grievant may submit a written response to the director within 30 days after being notified of the agreement, and the director shall submit the response to the referee. The respondent and the director may submit comments to the referee regarding the grievant's response. The agreement, the grievant's response, and the comments of the respondent and director shall be considered by the referee in confidence.

#### **Section 4. SCR 22.13 (3) is amended to read:**

**22.13 (3)** Except as provided in SCR 22.12, upon receipt of proof of service of the complaint, the clerk or deputy clerk of the supreme court shall select a an available referee from the panel

provided in SCR 21.08, based on ~~the availability and geographic proximity to the location of the~~ respondent's principal office, ~~and~~ ~~†~~The chief justice or, in his or her absence, the ~~senior chief~~ justice's ~~delegee~~ shall issue an order appointing the referee selected by the clerk or deputy clerk to conduct a hearing on the complaint.

**Section 6. SCR 22.25 (6)(c) is amended to read:**

**22.25 (6)(c)** The special preliminary review panel shall notify the grievant in writing that the grievant may obtain review by a referee of the panel's ~~dismissed~~ dismissal by submitting a written request to the director. ~~The~~An available referee shall be selected by the clerk or deputy clerk of the supreme court, from the panel provided in SCR 21.08, based on availability and geographic proximity to the location of the respondent's principal office, ~~and appointed by~~ ~~†~~The chief justice or, in his or her absence, the ~~senior chief~~ justice's ~~delegee~~ shall issue an order appointing the referee selected by the clerk or deputy clerk to review the dismissal. The request for review must be received within 30 days after the date of the letter notifying the grievant of the dismissal. The director may, upon a timely request by the grievant for additional time, extend the time for submission of additional information relating to the request for review. The decision of the referee affirming the dismissal or referring the matter to the special investigator for further investigation is final, and there shall be no review of the referee's decision.

**Section 7. SCR 22.30 (1) is amended to read:**

**22.30 (1)** The clerk or deputy clerk of the supreme court shall select an available referee from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to the location of~~ the petitioner's place of residence, and the chief justice or, in his or her absence, the ~~senior chief~~ justice's ~~delegee~~ shall issue an order appointing the referee selected by the clerk or deputy clerk to conduct a hearing on the petition for reinstatement. In the case of a license suspension, the hearing shall not be held prior to the expiration of the period of suspension. Following the appointment of a referee, the parties shall file all papers and pleadings with the supreme court and serve a copy on the referee.

**Section 8. SCR 22.34 (10) is amended to read:**

**22.34 (10)** The petition may be accompanied by a stipulation of the director and the respondent to a suspension or to the imposition of conditions on the respondent's practice of law. The supreme court may consider the petition and stipulation without the appointment of a referee. If the supreme court approves the stipulation, it shall issue an order consistent with the stipulation. If the supreme court rejects the stipulation, the clerk or deputy clerk of the supreme court shall select an available referee from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to the location of~~ the respondent's place of residence, ~~†~~The chief justice or, in his or her absence, the ~~senior chief~~ justice's ~~delegee~~ shall issue an order appointing the referee selected by the clerk or deputy clerk, and the matter shall proceed as a petition filed without a stipulation. A stipulation rejected by the supreme court has no evidentiary value and is without prejudice to the respondent's defense of the proceeding or the prosecution of the petition.

**Section 9. SCR 22.36 (5) is amended to read:**

**22.36 (5)** Following the investigation, the petition shall be submitted to a referee, ~~selected by~~ ~~†~~The clerk or deputy clerk of the supreme court shall select an available referee from the panel provided in SCR 21.08, based on geographic proximity to the location of the respondent's place

of residence, and ~~appointed by~~ the chief justice or, in his or her absence, the ~~senior~~ chief justice's delegee shall issue an order appointing the referee selected by the clerk or deputy clerk to review the petition.

**Discussion.** Under current Rule, referees are selected at various stages of disciplinary proceedings by the clerk of the supreme court, based on availability and geographic proximity to the respondents' principal office. Under current Rule, the chief justice appoints the referee.

Referee Petition 1 proposes that the clerk or deputy clerk of the Supreme Court choose a referee, after considering the location of the respondent attorney's principle office; the choice is then approved by the Chief Justice or the Chief Justice's delegee. The Subcommittee intends these proposed Rule amendments to promote fairness in the appointment process and, by allowing the Chief Justice and the clerk of the supreme court to delegate some or all of this duty, promote flexibility and efficiency in the appointment process.

**Petition Section 5. SCR 22.16 (6) is amended to read:**

**22.16 (6)** Within 30 days after the conclusion of the hearing, ~~or~~ the filing of the hearing transcript, or the filing of a final post-hearing brief, whichever is later, the referee shall file with the supreme court a report setting forth findings of fact, conclusions of law regarding the respondent's misconduct, if any, and a recommendation for dismissal of the proceeding or the imposition of specific discipline, or a statement advising the court why the referee cannot comply with this deadline and the date by which the referee will file the report and recommendation.

**Discussion.** Under current Rule when a referee conducts a hearing, the referee must file, not more than 30 days after the hearing concludes or the hearing transcript is filed, a report to the Court setting forth findings of fact, conclusions of law, and a recommendation for dismissal or imposition of a specific discipline. The proposed amendment would require the referee to file those items within 30 days after the hearing, the filing of the hearing transcript, or the filing of a final post-hearing brief. Under the proposed Rule, if the referee is unable to do so, he or she must file a statement advising the Court why the referee cannot meet that deadline and the date by which the referee will file the documents with the Court.

The Subcommittee makes this recommendation after hearing from various stakeholders that the deadline contained in current Rule, 30 days after later of the conclusion of the hearing or the filing of the hearing practice, is routinely not met. The Subcommittee determined that the most common reason that referees are not able to comply with current Rule is that participants in the disciplinary proceedings often file post-hearing briefs, which the referees must take into consideration in order to prepare a comprehensive report.

The Subcommittee believes that by amending the Rule to allow the 30 day deadline to start to run after any post-hearing briefs are filed and to require a referee to inform the court whenever he or she is unable to meet the deadline, the Rule will encourage better compliance and accountability. By requiring a referee to indicate when he or she believes he can deliver the

report to the Court, the Subcommittee intends the Rule to promote accountability and keep the disciplinary proceeding on track toward an efficient resolution.

## **CONCLUSION**

For the reasons set forth in this Memorandum, the Office of Lawyer Regulation Procedures Review Committee and the Subcommittee on Referees ask the Court to amend its Rules as proposed in order to promote fairness, efficiency, and the highest level of professionalism for referees engaged in the disciplinary process.

Respectfully submitted this \_\_\_\_ day of \_\_\_\_\_, 2019.

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Hon. Gerald P. Ptacek, Chair, OLR Procedure Review Committee

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Jacquelynn B. Rothstein, Chair, Referees' Subcommittee