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May 9, 2019

Chief Justice Patience D. Roggensack
Justice Shirley S. Abrahamson
Justice Ann Walsh Bradley
Justice Annette Kingsland Ziegler
Justice Rebecca G. Bradley
Justice Daniel Kelly
Justice Rebecca F. Dallet
16 East, State Capitol
P.O. Box 1688
Madison, WI 53701-1688

Dear Chief Justice and Justices:

I write in my capacity as Chair of the Subcommittee on Referees and as a member of the OLR Procedure Review Committee, which proposes changes to certain provisions in Chapters 21 and 22 of the Supreme Court Rules. Rule Petition 19-04, filed on March 13, 2019, seeks to amend several sections in those chapters related to referees including, for instance, the number that should be appointed, the nature of their duties, the type of training that they should receive, and the manner in which they are to be chosen. It also includes proposed internal operating procedures for the Court.

Six interested parties responded to the rule petition. All agree and support providing training to referees and believe that it will improve the quality, consistency, and timeliness of the attorney disciplinary process.

There were, however, differences of opinion regarding the number of referees that should be appointed to the panel. Some believe that the existing panel is sufficient. Others suggested that a smaller number would be preferable. One person maintained that no cap on the number of referees should exist. There were approximately seventeen referees who were actively utilized during 2017-18, but that number has varied over the years, including increases and decreases to the panel. Although there were divergent views from both the interested parties and members of the Subcommittee as to the ideal number of referees, there was not strong support for any one particular number. The Subcommittee chose twenty-four as a reasonable compromise and stands by it. Nevertheless, there is ample room for adjustment if the Court concludes that the number of referees on the panel should be modified in one direction or the other.

Board: Judith G. McMullen, Chairperson, Milwaukee; Marc A. Hammer, Vice Chairperson, Green Bay; Patrick Delmore, Madison; Blake J. Duren, Reedsburg; Timothy D. Edwards, Madison; Jesus G. Q. Garza, Madison; Kevin Kelly, Madison; Steven Levine, Madison; Kyle J. Sargent, Appleton; Sally M. Younger, Madison

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The Office of Lawyer Regulation also suggested that instead of amending SCR 22.25 (6) (c), it be deleted, and that a sentence be added to the end of SCR 22.25 (6) (b) stating “The panel’s decision to dismiss after resubmission is final and there is no further review.” The Subcommittee’s proposed amendment to SCR 22.25 (6) (c) was not intended to be a substantive change. Rather, it was amended to make it consistent with the manner in which referees are appointed in other sections of SCR Chapter 22. Under OLR’s proposal, a layer of review that currently exists would be eliminated. That, in turn, may create a perception that special treatment is being given to an “insider” of the attorney disciplinary framework whereas the appointment of a referee would arguably provide a more impartial review. OLR maintains that this provision has not been used, which would justify its elimination. While that may be true and therefore account for its proposed elimination, the Subcommittee did not consider that aspect of it. As such, the Court will need to determine whether to leave the Subcommittee’s proposal intact or adopt OLR’s alternative approach.

The Board of Administrative Oversight (BAO) also suggested that the Court consider adopting a Referee Code of Conduct as part of Rule Petition 19-04. The BAO made a similar request to the Referee Subcommittee. Unfortunately, at the time of that request, the Subcommittee had nearly concluded its work and did not include it as part of its proposals. The Subcommittee determined that the inclusion of the proposed code fell outside the scope of the Subcommittee’s charge. Additionally, it was unclear whether and to what extent it could be reconciled with either the Code of Attorney Conduct or the Judicial Code. It was also unclear who or how such a code would be enforced. Further study of the proposal would therefore be required before a recommendation about whether to include such a code in the Supreme Court Rules could be made.

Thank you for the opportunity to participate in the OLR Procedure Review Committee. I look forward to further consideration and discussion about these proposals during the public hearing being conducted on June 6, 2019. In the meantime, kindly contact me if I may provide further information or assistance.

Very truly yours,

Jacquelynn B. Rothstein

cc: Sheila Reiff, Clerk of the Supreme Court and Court of Appeals