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**SUPPORTING MEMORANDUM****19-**

**In the matter of ORDER REPEALING AND RECREATING Supreme Court Rules 22.12 and 22.17, AMENDING Supreme Court Rules 21.09(1), 21.16(2)(c), 22.21(4), 22.22(2)(b), (3)(intro) and (b), and (6), 22.24(1), (1m)(intro), (2), and (3), CREATING Supreme Court Rules 21.08(1)(b), 21.09(1m), 22.16(6)(b) and (7)(b), 22.22(2m) and (4m), and 22.23(1m), RENUMBERING AND AMENDING Supreme Court Rules 21.08(1), and 22.16(6) and (7).**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, respectfully petitions the court to repeal and recreate Supreme Court Rules 22.12 and 22.17, amend Supreme Court Rules 21.09(1), 21.16(2)(c), 22.21(4), 22.22(2)(b), (3)(intro) and (b), and (6), 22.24(1), (1m)(intro), (2), and (3), create Supreme Court Rules 21.08(1)(b), 21.09(1m), 22.16(6)(b) and (7)(b), 22.22(2m) and (4m), and 22.23(1m), and renumber and amend Supreme Court Rules 21.08(1), and 22.16(6) and (7).

**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.

## **DISCUSSION**

The OLR Procedure Review Committee (Committee), in its mission statement, agreed to review the entire structure and procedure of OLR. The Committee determined that in order to fulfill its charge, it was necessary to consider the underlying structure of the disciplinary process, particularly how it relates to the relatively high level of involvement in the process by Supreme Court justices. The Committee's Petition 1 (Petition) is intended to create a larger role for referees in imposing discipline in certain cases, while preserving the Supreme Court's authority in the disciplinary process.

The Committee recognizes its Petition is a significant departure from current Rules, and recognizes that referees may not be currently trained or prepared to undertake these substantial new duties. The Committee believes that the recommendations set forth by the Referees subcommittee in its Referees Petition 1 and Proposed Internal Operating Procedures will be extremely beneficial in developing a highly trained, professional set of referees who will operate at the highest level. Accordingly, the Committee recommends that Committee Petition 1 be considered for approval by the Supreme Court after a sufficient period of time has allowed the referees to receive sufficient training and specialized education.

### **DISCUSSION OF EACH PROPOSED RULE CHANGE IN COMMITTEE PETITION 1.**

#### **Petition Sections 1., 2., and 3.**

##### **Section 1. SCR 21.08(1) is renumbered SCR 21.08(1)(a) and amended to read:**

**21.08 (1)(a)** Members of a permanent panel of attorneys and reserve judges appointed by the Supreme Court shall serve as referees to conduct hearings on complaints of attorney misconduct, petitions alleging attorney medical incapacity, and petitions for license reinstatement, ~~to~~. Except as provided in par. (b), referees shall make findings, conclusions and recommendations and submit them to the Supreme Court for review and appropriate action, and to review consensual discipline under SCR 22.09.

##### **Section 2. SCR 21.08 (1)(b) is created to read:**

**21.08 (1)(b)** In addition to their duties under par. (1), referees shall consider consensual discipline under SCR 22.09 and consider stipulations for discipline under SCR 22.12. Referees shall make findings and conclusions to determine attorney misconduct, and impose discipline in attorney misconduct complaints if any of the following apply:

- 1.** The referee imposes a suspension of the attorney's license to practice law for a period not exceeding three months.
- 2.** The referee approves a stipulation under SCR 22.12 to suspend the attorney's license to practice law for a period not exceeding one year.
- 3.** The referee approves consensual discipline under SCR 22.09 or imposes a public or private reprimand.
- 4.** The referee approves a stipulation under SCR 22.12 to impose discipline defined in SCR 21.16(1m)(d) through (f).

##### **Section 3. SCR 21.09(1) is amended to read:**

**21.09 (1)** ~~The~~ Except as provided in SCR 21.08(1)(b), the Supreme Court determines attorney misconduct and medical incapacity and imposes discipline or directs other action in attorney misconduct and medical incapacity proceedings filed with the court.

**Discussion.** Current Rules set forth the duties of referees and of the Court in attorney disciplinary proceedings. Under current Rule, the Court determines attorney misconduct and medical incapacity and imposes discipline or other action in proceedings filed with the Court.

Referees conduct hearings on complaints of attorney misconduct, petitions alleging attorney medical incapacity, and petitions for license reinstatement and make findings, conclusions and recommendations. Under current Rule, the referees submit a report containing their findings, conclusions, and recommendations for discipline or other action to the Court for review and appropriate action.

Under current Rule, the Court considers every referee's report and may adopt, reject, or modify the findings and conclusions, remand the matter back to the referee, or determine and impose appropriate discipline. The Court may thereafter decide a motion filed by either side for reconsideration.

Additionally, the Court considers consensual license revocation, may summarily suspend a license upon proof the attorney was found guilty of a serious crime, and reviews complaints outlining discipline imposed on an attorney by another jurisdiction for the purpose of imposing reciprocal discipline.

Under the Petition, referees still conduct hearings on complaints of attorney misconduct, petitions alleging medical incapacity, and petitions for license reinstatement. However, under the Petition, in cases involving attorney misconduct, referees may approve consensual private and public reprimands and may approve stipulations under which an attorney's license to practice law is suspended for a period not to exceed one year, and/or the attorney stipulates to conditions on his or her continued practice of law, to a monetary payment, to restitution, or to conditions on seeking license reinstatement. Additionally, under the Petition, referees may suspend an attorney's license to practice law for a period not to exceed three months.

Under the Petition, in all other cases, the Court determines attorney misconduct and approves stipulations or imposes discipline. Additionally, the Supreme Court retains its role in medical incapacity cases, reinstatement cases, and cases of discipline following a criminal conviction. This proposal reflects the Committee's determination that a more efficient way to conduct attorney disciplinary proceedings can be accomplished without sacrificing due process, due consideration, and effective imposition of attorney discipline.

The Committee's proposals are based on its comparison of Wisconsin's procedures with disciplinary procedures in other states, particularly those states where disciplinary decisions are delegated to a party or a body other than the Supreme Court, with the Supreme Court generally retaining supervisory or appellate authority. Under Wisconsin's current Rules, the Court "touches" attorney disciplinary proceedings at several points. The Court is involved if a respondent attorney fails to respond or otherwise cooperate with an investigation. Later in the

process, after a preliminary review committee has determined there is cause to proceed in a disciplinary action, each case not subject to consensual reprimand or diversion is filed with Court and prosecuted.

The Committee determined that this level of involvement by the Court uses an inordinate amount of the Court's time, resources, and effort. The Committee found that during the Court's 2016-17 term, it issued 85 decisions. Of those, 30, or more than one-third, were disciplinary decisions. Of the remaining decisions, 27 were civil cases, and 28 were criminal cases.

The Committee believes that, without sacrificing the effectiveness or fairness of the disciplinary process, the role of the Court could be delegated in appropriate cases to a highly qualified and trained referee. Under the Committee's Petition, the Court maintains its authority as a reviewing body and ultimate arbiter of attorney discipline. The Committee believes that by relieving the Court of some of its workload related to attorney discipline, the Court will have more time to devote to other matters.

The Committee notes, in support of this proposal, that according to OLR analysis of the proposal, of the 145 cases decided between March, 2014 and March, 2018, 72 would have been decided by referees under the system proposed in the Petition. Of those 72 cases, 34 were consensual discipline or stipulations to a license suspension of one year or less and 38 were cases with sanctions of license suspension for three months or less. The Committee believes that referees, properly trained, are capable of approving consensual discipline agreements and stipulations and of imposing relatively short periods of license suspension.

By reserving the Court's involvement in disciplinary proceedings for those cases that cannot be resolved by consensus or stipulation, or that call for longer periods of suspension, the Committee believes its Petition represents an appropriate allocation of Court resources that maintains the integrity of the disciplinary process for attorneys and for the public.

**Petition Section 4. SCR 21.09 (1m) is created to read:**

**21.09 (1m)** The Supreme Court shall determine whether, pursuant to SCR 22.03 (4), to suspend or reinstate the license to practice law of a respondent in an attorney disciplinary proceeding, conduct appellate review of reports and orders imposing discipline pursuant to SCR 22.17, determine whether to suspend temporarily an attorney's license to practice law pursuant to SCR 22.21, and determine whether to reinstate a license under SCR 22.28 through 22.33.

**Discussion.** Current Rule directs the Court generally to determine attorney misconduct and medical incapacity and to impose discipline or direct other action in attorney misconduct and medical incapacity proceedings filed with the court. As part of those duties, the Court may temporarily suspend an attorney's license upon finding that the attorney's continued practice of law poses a threat to the interests of the public and the administration of justice, and the Court may suspend an attorney's license or impose conditions on the attorney's continued practice if the Court finds the attorney has a medical incapacity.

Additionally, under current Rule the Court considers petitions for reinstatement from attorneys whose licenses were revoked for failure to comply with terms of conditional admission,

suspended for nonpayment of bar due or for failure to comply with continuing legal education requirements, or suspended or revoked for other misconduct that warranted a suspension longer than six months.

The Petition retains the Court's sole authority to temporarily suspend an attorney's license upon finding that the attorney's continued practice of law poses a threat to the interests of the public and the administration of justice, to suspend an attorney's license or impose conditions on the attorney's continued practice if the court finds the attorney has a medical incapacity, and to consider petitions for reinstatement.

This proposal reflects the Committee's intent to delegate certain, but not all, duties related to attorney discipline to referees. The Petition allows the Court to intervene in the most serious circumstances requiring temporary suspension of an attorney's license to practice and maintains the Court's role in determining whether, and under what conditions, an attorney it determines to have a medical incapacity may continue to practice. The Committee believes that the Court is best suited to make these determinations and that, while its Petition assigns other duties related to attorney discipline to referees, these very serious duties should not be delegated.

The proposal also requires the Court to determine whether an attorney should be allowed to resume his or her practice after a significant period of license suspension. The Committee believes that the Court, as the ultimate arbiter of attorney discipline and the body responsible for upholding the integrity of the attorney disciplinary system, is best suited to make these determinations.

**Petition Section 5. SCR 21.16 (2)(c ) is amended to read:**

**21.16 (2)(c )** ~~Upon ordering~~ When the Supreme Court or a referee orders restitution to the Wisconsin lawyers' fund for client protection under par. (a)2., the clerk of the Supreme Court shall issue a judgment and shall furnish a transcript of the judgment to the Fund. 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 under ss. 809.25 and 806.16, stats.

**Discussion.** Under current Rule, when the Court orders an attorney to pay restitution to the Wisconsin lawyers' fund for client protection, the Court issues a judgment and furnishes a transcript of the judgment to the Fund for docketing and collection purposes.

Under the Petition, a referee is allowed to order restitution to the Fund in cases where he or she imposed discipline. This amendment reflects that change and also requires the clerk of the Court, not the Court itself, to issue the judgment and furnish the transcript of judgment to the Fund. This proposal reflects the change allowing referees to order restitution in certain cases and also reflects the Committee's position that some administrative functions, like issuing a judgment and furnishing the transcript of the judgment, may be delegated by the Court. This amendment promotes the efficient use of the Court's resources.

**Petition Section 6. SCR 22.12 is repealed and recreated to read:**

**22.12 (1)** The director may file with the complaint a stipulation of the director and the respondent to the facts, conclusions of law regarding misconduct, and discipline to be imposed.

(2)(a) If the parties have stipulated to revocation of the respondent's license to practice law or suspension of the respondent's license to practice law for a period exceeding one year, the Supreme Court may consider the complaint and stipulation without the appointment of a referee, in which case the Supreme Court may approve the stipulation, reject the stipulation, or direct the parties to consider specific modifications to the stipulation.

(b) If the Supreme Court approves a stipulation, it shall adopt the stipulated facts and conclusions of law and impose the stipulated discipline.

(c) If the Supreme Court rejects a stipulation, a referee shall be appointed and the matter shall proceed as a complaint filed without a stipulation.

(d) If the Supreme Court directs the parties to consider specific modifications to the stipulation, the parties may, within 20 days of the date of the order, file a revised stipulation, in which case the Supreme Court may approve the revised stipulation, adopt the stipulated facts and conclusions of law, and impose the stipulated discipline. If the parties do not file a revised stipulation within 20 days of the date of the order, a referee shall be appointed and the matter shall proceed as a complaint filed without a stipulation.

(3)(a) If the parties have stipulated to suspension of the respondent's license to practice law for a period not exceeding one year, to imposition of discipline defined in SCR 21.16(1m)(d) through (f), or a combination thereof, a referee appointed under SCR 22.13(3) may approve the stipulation, reject the stipulation, or direct the parties to consider specific modifications to the stipulation.

(b) If the referee approves a stipulation, he or she shall adopt the stipulated facts and conclusions of law and impose the stipulated discipline.

(c) If the referee rejects a stipulation, the matter shall proceed as a complaint filed without a stipulation.

(d) If the referee directs the parties to consider specific modifications to the stipulation, the parties may, within 20 days of the date of the order, file a revised stipulation, in which case the referee may approve the revised stipulation, adopt the stipulated facts and conclusions of law, and impose the stipulated discipline. If the parties do not file a revised stipulation within 20 days of the date of the order, the matter shall proceed as a complaint filed without a stipulation.

(4) A stipulation rejected under this rule has no evidentiary value and is without prejudice to the respondent's defense of the proceeding or the prosecution of the complaint.

**Discussion.** Under current Rule, when the Director of the OLR (Director) files a complaint with the Court, he or she may also file a stipulation of the Director and the respondent attorney to the facts, conclusions of law regarding misconduct, and discipline to be imposed. The Court may then approve, reject, or direct the parties to consider specific modifications to the stipulation.

Under current Rule, if the Court accepts the stipulation, it adopts the parties' stipulated facts and conclusions and imposes the stipulated discipline, without appointing a referee to hear the matter. If the Court rejects a stipulation, or if the parties decline to produce a modified stipulation after the Court directs them to do so, the Court appoints a referee and the matter proceeds as if a stipulation had not been filed. If the Court directs the parties to modify the stipulation, it may accept the modified stipulation, adopt its facts and conclusions, and impose the stipulated discipline.

The Petition proposes the same procedure for stipulations submitted by the Director and a respondent attorney, but directs a referee, not the Court, to consider stipulations under which an attorney's license to practice law is suspended for a period not to exceed one year, and/or the attorney stipulates to conditions on his or her continued practice of law, to a monetary payment, to restitution, or to conditions on seeking license reinstatement. Under the proposal, the referee may approve, reject, or order specific modifications of the stipulation.

All other stipulations are considered and administered by the Court as under current Rule.

This proposal is intended to preserve the Court's role in administering attorney disciplinary cases where the Director and the respondent believe a suspension of more than a year is appropriate. The proposal reflects the Committee's belief that the Director and the respondent are well suited to propose a stipulation that imposes effective discipline and promotes accountability. The Committee further believes that a properly trained referee is qualified to evaluate the proposed stipulation and by enabling them to adopt, reject, or require modification of the proposed stipulation, a referee is able to resolve the action in an efficient and fair manner. The Committee notes that many attorney disciplinary actions are resolved by stipulations under current Rule and the Committee wishes to continue this practice, but in a more efficacious manner by delegating certain cases for consideration by a referee.

The Petition maintains the Court's role in considering stipulations calling for a longer period of license suspension, as the Committee believes the Court is best suited to administer the more serious attorney disciplinary cases. The Committee believes that this proposal, in addition to its proposals allowing referees to impose shorter periods of license suspension, strikes the appropriate balance of promoting efficiency and maintaining effectiveness within the attorney disciplinary process.

#### **Petition Sections 7., 8., 9., and 10.**

##### **Section 7. SCR 22.16 (6) is renumbered SCR 22.16 (6)(intro) and amended to read:**

**22.16 (6)(intro)** Within 30 days after the conclusion of the hearing or the filing of the hearing transcript, whichever is later, the referee shall ~~file~~ do one of the following:

(a) 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 the imposition of specific discipline, pursuant to SCR 21.08 (1)(a).

##### **Section 8. SCR 22.16 (6)(b) is created to read:**

**22.16 (6)(b)** File with the Supreme Court and provide to the director and the respondent a report setting forth findings of fact, conclusions of law regarding the respondent's misconduct, if any, and an order for dismissal of the proceeding or the imposition, pursuant to SCR 21.08 (1)(b), of specific discipline.

**Section 9. SCR 22.16 (7) is renumbered SCR 22.16 (7)(a) and amended to read:**

**(7)(a)** ~~The A~~ referee who files a report under sub. (6)(a) with the Supreme Court shall also file with the Supreme Court a recommendation as to the assessment of reasonable costs within 10 days after the parties' submissions regarding assessment of costs.

**Section 10. SCR 22.16 (7)(b) is created to read:**

**22.16(7)(b)** A referee who imposes discipline under sub. (6)(b) shall file with the Supreme Court and provide to the director and the respondent an order assessing reasonable costs within 10 days after the parties' submissions regarding assessment of costs.

**Discussion.** Under current Rule, after a referee has conducted a hearing on a matter involving attorney misconduct or medical incapacity, he or she files with the 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. Additionally, under current Rule the referee files with the Court a recommendation as to the assessment of reasonable costs associated with the proceeding.

Under the Petition, the same procedure applies if, after conducting a hearing, the referee determines that he or she is not authorized under the Rules set forth in the Petition to impose discipline on the attorney. In those cases, the Court considers the referee's reports concerning discipline and costs as under current Rule.

If the referee determines that he is she is authorized to impose discipline for attorney misconduct, the referee issues a report to the Director and the respondent attorney that sets forth his or her findings of fact and conclusions of law and an order either dismissing the proceeding or imposing discipline. Under the Petition, if a referee imposes discipline, the referee may also issue an order assessing reasonable costs against the respondent attorney.

This proposal reflects the Committee's intent to maintain the roles of referees and of the Court in more serious cases but to give referees full authority to impose discipline and costs in appropriate situations. The Petition maintains the same basic procedure for each type of disciplinary procedure, which reflects the Committee's determination that the current Rule provides an appropriate structure for disciplinary and medical incapacity proceedings. The proposal is intended to implement fully the delegation of certain cases to referees.

**Petition Section 11. SCR 22.17 is repealed and recreated to read:**

**22.17 (1) (a)** Within 20 days after the filing of a referee's report under SCR 22.16 (6)(a), the director or the respondent may file with the Supreme Court an appeal from the referee's report. If no appeal is filed timely, the Supreme Court shall review the referee's report; adopt, reject or modify the referee's findings and conclusions or remand the matter to the referee for additional

findings; and determine and impose appropriate discipline. The court, on its own motion, may order the parties to file briefs in the matter.

(2) Within 20 days after the filing of a referee's order under SCR 22.16 (6)(b), the director or the respondent may file with the Supreme Court an appeal from the referee's order.

(3) An appeal from a report or order of a referee filed under this section is conducted under the rules governing civil appeals to the Supreme Court. The Supreme Court shall place the appeal on its first assignment of cases after the briefs are filed.

**Discussion.** Under current Rule, within 20 days after the filing of the referee's report, the Director or the respondent attorney may file an appeal from the report with the Court. If an appeal is filed, it is placed on the Court's first assignment of cases after briefs are filed and the appeal is conducted under the rules of civil appeals.

If no appeal is filed, under current Rule the Court may adopt, reject, or modify the referee's findings of fact and conclusions of law or it may remand the matter back to the referee for additional findings, and the Court determines and imposes appropriate discipline. Current Rule allows the Court to require additional briefing on its own motion.

Under the Petition, in cases where a referee is not authorized to approve or impose discipline, the proceeding works as under current Rule: the referee submits a report to the Court and the Court approves, rejects, or remands, and imposes discipline. If the Director of the respondent attorney files an appeal from the referee's report within 20 days of its filing, the procedure is the same as under current Rule: an appeal is available under the rules of civil appeals to the Court.

Under the Petition, if a referee finds that a respondent attorney committed misconduct warranting discipline that the referee is authorized to impose or approve, the referee submits to the Supreme Court a report setting forth his or her findings and conclusions and an order imposing discipline.

Under the Petition, the Director or a respondent attorney who is subject to discipline imposed by a referee may appeal the matter to the Court. The Supreme Court does not review the report or the order imposing discipline unless a party appeals the referee's order. If a party files an appeal from the referee's order within 20 days of its filing, the procedure is the same as under current Rule and under proposed Rule relating to an appeal from a referee's report: an appeal is available under the rules of civil appeals to the Court.

This proposal reflects the Committee's determination that the Court need not review every case of misconduct that calls for discipline, but that due process requires the Court be available as an appellate body if the Court is not the body to impose the discipline in the first instance. The Committee believes that properly trained referees will impose appropriate discipline or approve appropriate stipulations but the Committee recognizes that parties may wish to have their matter reviewed by the Court if any party disagrees with the referee's findings, conclusions, or order imposing discipline.

The Committee intends to maintain current Rule for the more serious cases but to reserve review by the Court of referee-imposed discipline to those cases in which an appeal is filed with the Court. This reflects the Committee's determination to relieve the Court of some of the burden of attorney disciplinary actions while maintaining the Court's important role as the final decision maker in contested cases. The Committee believes that the proposal promotes efficiency while preserving fairness, full due process, and the integrity of the attorney disciplinary proceedings for all participants.

The Committee is aware that its proposal allowing referees to impose discipline in certain cases represents a significant shift from current Rule, and its Petition is intended to assure all participants that review by the Court is available in every instance if one or both of the parties requests review.

**Petition Section 12. SCR 22.21 (4) is amended to read:**

**22.21 (4)** Filing of referee report. The referee appointed to conduct a hearing on the complaint shall conduct the hearing promptly and shall file the report or issue the order required by SCR 22.16 no later than 6 months after the filing of the complaint. If the report is not filed within 6 months of the filing of the complaint, the respondent attorney may move the Supreme Court for reinstatement pending completion of the disciplinary proceeding. Reinstatement under this section does not terminate any misconduct investigation or disciplinary proceeding pending against the attorney.

**Discussion.** Under current Rule, a referee must file his or her report following a hearing within six months after the complaint was filed with the Court. This proposal imposes the same deadline for the issuance of an order imposing discipline. This proposal reflects the Committee's intent to delegate some duties to referees but maintain the same degree of timeliness and order regardless of whether the case is one where discipline is imposed by the Court or by a referee.

**Petition Sections 13., 14., and 15.**

**Section 13. SCR 22.22 (2)(a), (b), (3)(intro) and (b), and (6) are amended to read:**

**22.22 (2)(b)** A motion requesting an order directing the attorney to inform the Supreme Court or the referee appointed under sub. (2m) in writing within 20 days of any claim of the attorney predicated on the grounds set forth in sub. (3) that the imposition of the identical discipline or license suspension by the Supreme Court or referee would be unwarranted and the factual basis for the claim.

**(3)(intro)** The Supreme Court or referee shall impose the identical discipline or license suspension unless one or more of the following is present:

**(3)(b)** There was such an infirmity of proof establishing the misconduct or medical incapacity that the Supreme Court or referee could not accept as final the conclusion in respect to the misconduct or medical incapacity

(6) If the discipline or license suspension imposed in the other jurisdiction has been stayed, any reciprocal discipline or license suspension imposed by the Supreme Court or referee shall be held in abeyance until the stay expires.

**Section 14. SCR 22.22 (2m) is created to read:**

**22.22 (2m)** If the judgment or order filed under sub. (2) (a) imposes discipline that a referee may impose under SCR 21.08(1)(b), the clerk of the Supreme Court shall select a referee from the panel provided in SCR 21.08, based on availability and geographic proximity to the respondent's principal office, and the chief justice or, in his or her absence, the senior justice shall appoint the referee to proceed under this section.

**Section 15. SCR 22.22 (4m) is created to read:**

**22.22 (4m)** An order issued by a referee under sub. (3) may be appealed under SCR 22.17 (2).

**Discussion.** Under current Rule, when the Director receives notification that another jurisdiction has imposed public discipline on an attorney who is licensed to practice in Wisconsin, the Director may file a complaint with the Court and seek to have the identical, reciprocal discipline imposed by the Court. Generally, the Court will impose the identical discipline unless it determines that the procedure followed in the other jurisdiction or the proof presented is insufficient to justify the discipline in this state, or it determines that the misconduct warrants a substantially different discipline in this state. Current Rule allows the Court to refer a complaint for reciprocal discipline to a referee for a hearing. Following the hearing, under current Rule the referee files a report with findings, conclusions, and recommendations for discipline, as under current Rules for other disciplinary actions.

The Petition delegates review of the Director's submissions for reciprocal discipline to referees if the discipline imposed in the other jurisdiction is a measure of discipline that a referee is authorized to impose under the Petition. The proposed amendments to the Rules reflect that the Court and the referees may both impose reciprocal discipline, depending on the nature and severity of the discipline imposed by the original jurisdiction. Under the Petition, a party may appeal a referee's order for reciprocal discipline in the same manner he or she would appeal a referee's order for discipline in a case originating in Wisconsin: by filing an appeal with the Court.

The proposal again reflects the Committee's intent to relieve the Court of its burden to consider every request to impose reciprocal discipline against an attorney, no matter the severity. By allowing a referee to review and administer a request for discipline reciprocal to what the referee may impose if the matter originated in Wisconsin, the Committee intends to promote efficiency and fairness in the process. The Committee wishes to preserve, however, the Court's role as a reviewing body in cases involving more significant discipline and in cases where a party disputes a referee's order.

The Committee believes that the Petition strikes the correct balance by allowing the Court to become involved at the request of the parties, but not requiring the Court to become involved if the matter involves a relatively short period of license suspension or involves stipulated discipline.

**Petition Section 16. SCR 22.23 (1m) is created to read:**

**22.23 (1m)** With the exception of a referee's disposition of a private reprimand or dismissal of a proceeding, a referee's disposition of a proceeding under this chapter shall be published in an official publication of the state bar of Wisconsin and in the official publications specified in SCR 80.01. A party may file a request to publish a dismissal of a proceeding.

**Discussion.** Under current Rule, the Court's disposition of a proceeding alleging misconduct or medical incapacity is published in an official publication of the state bar and in the official publication designated by Rule to publish Court opinions, rules, orders, and other items. Private reprimands and dismissals are not published, except that a party may file a request to publish the dismissal of a proceeding.

Under the Petition, decisions and orders issued by referees are published in much the same manner as disciplinary decisions and orders by the Supreme Court. The proposal reflects the Committee's anticipation that referees will use decision and order forms to standardize their written decisions and orders and maintain the professionalism of the disciplinary process. The proposal is intended to provide the same level of publicity and openness under current Rule to attorney disciplinary proceedings that are resolved by a referee's order.

**Petition Section 17. SCR 22.24 (1), (1m) (intro), (2), and (3) are amended to read:**

**22.24 (1)** The Supreme Court or a referee who imposes discipline under this chapter may assess against the respondent all or a portion of the costs of a disciplinary proceeding in which misconduct is found, a medical incapacity proceeding in which it finds a medical incapacity, or a reinstatement proceeding and may enter a judgment for costs. The director may assess all or a portion of the costs of an investigation when discipline is imposed under SCR 22.09. Costs are payable to the office of lawyer regulation.

**(1m) (intro)** The court's general policy is that upon a finding of misconduct it is appropriate to impose all costs, including the expenses of counsel for the office of lawyer regulation, upon the respondent. In some cases the court or the referee may, in the exercise of ~~its~~ discretion, reduce the amount of costs imposed upon a respondent. In exercising ~~its~~ discretion regarding the assessment of costs, the court or the referee will consider the statement of costs, any objection and reply, the recommendation of the referee when applicable, and all of the following factors:

**(2)** In seeking the assessment of costs ~~by the Supreme Court~~, the director shall file in the court, with a copy to the referee and the respondent, or with the referee, with a copy to the respondent if the referee imposed discipline, a statement of costs within 20 days after the filing of the referee's report or order or a SCR 22.12 or 22.34(10) stipulation, together with a recommendation regarding the costs to be assessed against the respondent. If an appeal of the referee's report or order is filed or the Supreme Court orders briefs to be filed in response to the referee's report, a supplemental statement of costs and recommendation regarding the assessment of costs shall be filed within 20 days of the date of oral argument or, if no oral argument is held, the filing date of the last brief on appeal. The recommendation should explain why the particular amount of costs is being sought. The respondent may file an objection to the statement of costs and recommendation within 21 days after service of the statement of costs. A respondent who

objects to a statement of costs must explain, with specificity, the reasons for the objection and must state what he or she considers to be a reasonable amount of costs. The objection may include relevant supporting documentation. The office of lawyer regulation may reply within 11 days of receiving the objection. ~~In proceeding before a referee~~ If the discipline was imposed by the Supreme Court, the referee shall make a recommendation to the court regarding costs. If discipline was imposed by a referee, the referee shall enter an order regarding costs. The referee should explain the recommendation or order addressing the factors set forth in SCR 22.24 (1m). The referee shall consider the submissions of the parties and the record in the proceeding. No further discovery or hearing is authorized.

(3) Upon the assessment of costs by the Supreme Court or a referee, 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).

**Discussion.** Under current Rule, in a disciplinary proceeding or a reinstatement proceeding, the Court may require the respondent attorney to pay some or all of the costs associated with the proceeding if the Court finds attorney misconduct or medical incapacity.

Under the Petition, a referee may impose costs if the referee imposed the discipline or approved a stipulation or consensual reprimand in the matter; otherwise, the Court imposes costs in its discretion. The proposal amends current Rule to reflect that the Court determines and assesses reasonable costs in each case involving medical incapacity and reinstatement, and in those cases where only the Court is authorized to impose discipline. In cases otherwise disposed of by a referee, the Petition requires the referee to make a determination regarding reasonable costs and assess those costs against the respondent attorney.

The proposal reflects the Committee's intention that, in cases appropriate for resolution by a referee, the Court need not consider those cases unless one party requests an appeal of the referee's order. The Committee intends for the Court to retain its role in other disciplinary cases, and in all cases involving reinstatement and medical incapacity. The Petition reflects the Committee's intent to delegate appropriate cases for resolution to referees while maintaining the Court's full authority in all other matters.

## CONCLUSION

For the reasons set forth in this Memorandum, the Office of Lawyer Regulation Procedures Review Committee asks the Court to amend its Rules as proposed in order to create a larger role for referees in imposing discipline in certain cases, while preserving the Supreme Court's authority in the disciplinary process.

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

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