

**SUPPORTING MEMORANDUM**

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**In the matter of REPEALING AND RECREATING Supreme Court Rule 22.30, AMENDING Supreme Court Rules 10.03 (6m) and (7), 22.12(1), 22.33, and 31.11 (1m) and (4), CREATING Supreme Court Rule 22.29 (4x) and 22.305, and REPEALING Supreme Court Rule 22.31.**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald P. Ptacek, Chair, and Jacquelynn B. Rothstein, Chair of the Subcommittee on Reinstatement, respectfully petition the court to amend Supreme Court Rules by repealing and recreating Supreme Court Rule 22.30, amending Supreme Court Rules 10.03 (6m) and (7), 22.12(1), 22.33, and 31.11 (1m) and (4), creating Supreme Court Rule 22.29 (4x) and 22.305, and repealing Supreme Court Rule 22.31.

**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.

When the Referees subcommittee completed its work, its members created the Reinstatement subcommittee (Subcommittee) to examine whether, and how, the reinstatement process may be improved to provide the most fair and efficient resolution for attorneys seeking reinstatement while continuing to protect the interest of the public.

## **DISCUSSION**

The Reinstatement subcommittee focused on issues related to the reinstatement of an attorney's license to practice law following a suspension or revocation. The Subcommittee discussed at length the difference between the relatively simple administrative reinstatement process available to respondent attorneys whose licenses are suspended for less than six months, and the more complex and time-consuming reinstatement process required for respondent attorneys whose licenses are revoked or suspended for six months or longer. The Subcommittee discussed the practical limitations of the current Rule, which in effect turns a six month suspension into a suspension for at least 18 months, due to the reinstatement procedural requirements. The Subcommittee discussed how to weigh and balance the interests of an attorney petitioning for reinstatement, the general public, and persons affected by the attorney's misconduct. The Subcommittee sought to increase public awareness of petitions for reinstatement, to streamline procedures where appropriate, and to ensure that the Director, the public, and the Court are afforded ample opportunity to weigh in on the determination of whether, and under what circumstances, an attorney should be allowed to resume the practice of law.

Reinstatement Petition 1 seeks to consolidate, amend, and redesign current Rules governing the reinstatement process in a manner that provides due process for attorneys, allows OLR to present its position regarding the reinstatement, allows members of the public to express their opinions on the reinstatement, and preserves the Court's role in determining when reinstatement is appropriate.

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

### **Petition Sections 1., 2., 8., 9., and 10.**

**Section 1. SCR 10.03(6m) is amended to insert the following comment after that subsection:**

#### **Comment**

Costs regarding the petition for reinstatement under subsection (6m)(b) may be assessed against the petitioner, as provided in SCR 22.24.

**Section 2. SCR 10.03(7) is amended to insert the following comment after that subsection:**

#### **Comment**

Costs regarding the petition for readmission under subsection (7)(b) may be assessed against the petitioner, as provided in SCR 22.24.

**Section 8. SCR 22.33 is amended to insert the following comment after that rule:**

#### **Comment**

Costs regarding the petition for reinstatement may be assessed against the petitioner, as provided in SCR 22.24.

**Section 9. SCR 31.11(1m) is amended to insert the following comment after that subsection:**

**Comment**

Costs regarding the petition for reinstatement under subsection (1m) may be assessed against the petitioner, as provided in SCR 22.24.

**Section 10. SCR 31.11(4) is amended to insert the following comment after that subsection:**

**Comment**

Costs regarding the petition for reinstatement under subsection (4) may be assessed against the petitioner, as provided in SCR 22.24.

**Discussion.** Under current Rule, an attorney who is found to have engaged in misconduct or to be medically incompetent may be required to pay all or some of the costs associated with the proceeding against him or her. Additionally, current Rule allows the Court to assess costs associated with a reinstatement proceeding.

Under current Rule, an attorney whose license was suspended for nonpayment of bar dues, failure to comply with trust account certification requirements, or failure to comply with continuing legal education requirements, or whose license was suspended for less than six months for other misconduct may petition to have his or her license reinstated if the attorney has submitted certain proof of compliance, made requirement payments, and the board of bar examiners and/or the Director of OLR (Director) do not oppose reinstatement (administrative reinstatement).

Current Rule does not explicitly state that an attorney petitioning for reinstatement of his or her license to practice law is liable for costs associated with the petition in circumstances where administrative reinstatement is warranted. The Subcommittee determined that it is appropriate for petitioning attorneys to be responsible for the costs associated with the petition for reinstatement and recommends that a comment setting this forth be added the Rules relating to the petitions. The Subcommittee believes that these comments will remove any ambiguity regarding the costs associated with petitions for administrative reinstatement and will place the liability for these costs appropriately on the attorney who seeks to have his or her license reinstated.

**Petition Sections 3. SCR 22.12(1) is amended 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, together with a memorandum in support of the stipulation. The respondent may file a response to the Director's memorandum within 14 days of the date of filing of the stipulation. 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.

**Discussion.** Under current Rule, when the Director submits a complaint for disciplinary action with the Court, he or she may also file a stipulation agreed to by the respondent attorney and the Director that sets forth the facts, conclusions of law regarding misconduct, and discipline to be imposed. Under current Rule, the Court may approve, reject, or direct the parties to modify, the stipulation. If the matter is resolved according to the terms of the original or modified stipulation, no referee is appointed and the Court imposes the stipulated discipline.

Under the Petition, the Director may submit a memorandum in support of the stipulation, to which the respondent may reply within 14 days. The Subcommittee determined that resolution of a disciplinary matter by stipulation is an efficient and constructive means of imposing discipline. By submitting a memorandum in support of each proposed stipulation, the Director provides additional information to the Court, which the Subcommittee believes will enable the Court to determine more easily whether to approve, reject, or urge modification of, the stipulation.

**Petition Section 4. SCR 22.29(4x), and the following comment to be inserted after the subsection, are created to read:**

**22.29(4x)** At the time that the petitioner serves a copy of the petition for reinstatement on the director, the petitioner shall also submit to the director a completed reinstatement questionnaire.

#### **COMMENT**

A blank copy of the reinstatement questionnaire may be obtained from the office of lawyer regulation. The questionnaire is used by the office of lawyer regulation to assist it in its investigation. The questionnaire is not to be filed with the court.

**Discussion.** Under current Rule, an attorney who is not eligible for administrative reinstatement may petition the supreme court for reinstatement. Current Rule requires the petitioner to file the petition with the Court, with copies to the Director and the Board of Bar Examiners, along with a deposit for payment of costs associated with the reinstatement proceeding.

The Subcommittee's proposals do not affect current Rule regarding the petition for reinstatement except to require, in addition to the documentation required under current Rule, that the petitioner submit to the director a completed questionnaire. The proposed comment clarifies that OLR will supply a questionnaire for completion by the petitioner and that the questionnaire will be used to assist the OLR in its investigation of the petition; the form is not filed with the Court.

This proposal reflects the Subcommittee's determination that the current Rule setting forth the information and documentation required in the petition is necessary and sufficient, but that a completed questionnaire containing the information the OLR needs to investigate will promote efficiency.

## **Petition Sections 5., 6., and 7.**

### **Section 5. SCR 22.30 is repealed and recreated to read:**

**22.30 (1)** Promptly following the filing of the petition for reinstatement, the director shall publish a notice on the website of the office of lawyer regulation, in a newspaper of general circulation in all counties in which the petitioner maintained an office for the practice of law prior to suspension or revocation, in a newspaper of general circulation in the county of the petitioner's residence, and in an official publication of the state bar of Wisconsin.

**(2)** The notice shall contain all of the following:

**(a)** The name of the petitioner, the date on which the petition for reinstatement was filed, the case number assigned to the petition, a brief statement of the nature and date of suspension or revocation, and the matters required to be proved for reinstatement.

**(b)** The office of lawyer regulation will be investigating the eligibility of the petitioner for reinstatement.

**(c)** This notice is the only published notice regarding the petition for reinstatement.

**(d)** Interested parties may submit written comments regarding the petitioner and the reinstatement petition, the address (physical and electronic) to which written comments may be submitted, and the deadline for submitting written comments, which shall be 60 days following the date on which the petition for reinstatement was filed. All formal written comments regarding the petition shall be forwarded to a referee, if any, and to the supreme court.

**(e)** Individuals may request that notice of any reinstatement hearing regarding the petition be sent to an address they provide to the office of lawyer regulation.

**(f)** Only individuals who provide their address and ask to have notice of a reinstatement hearing will have a notice of a reinstatement hearing sent to them at the address provided.

**(g)** The office of lawyer regulation may contact individuals who submit written comments to obtain further information.

**(h)** Upon completion of the investigation, the director will file with the court a response to the petition stating either that the director does not oppose reinstatement and will negotiate a stipulation with the petitioner, which will be considered by the supreme court without the appointment of a referee or that the director opposes reinstatement and a referee will be appointed and a reinstatement hearing take place.

**(i)** Information regarding the status of the petition and any hearing will be available on the website of the office of lawyer regulation.

**(3)** Within 75 days after the filing of the petition, the board of bar examiners shall determine the attendance and reporting requirements of the petitioner, as required by SCR 31.06, and file with the court a report regarding the petitioner's compliance. Upon motion of the board of bar examiners or the petitioner for good cause shown, the court may grant the board of bar examiners an extension of time to complete the assessment of compliance and file the report regarding compliance. Failure of the petitioner to prove compliance within the time allowed, including any extension thereof, may subject the petition to immediate dismissal.

**(4)** Within 75 days after the filing of the petition, the director shall investigate the eligibility of the petitioner for reinstatement and shall file with the court a response to the petition stating whether the petitioner has demonstrated to the director satisfaction of all of the criteria for

reinstatement or the director opposes the petition. Upon motion of the director or the petitioner for good cause shown, the court may grant the director an extension of time to complete the investigation and file the response to the petition.

**(5)(a)** If the director's response states that the petitioner has demonstrated to the director satisfaction of all of the criteria for reinstatement, the director and the petitioner shall prepare and file a stipulation containing all facts and conclusions of law necessary to satisfy the standards for reinstatement, identifying all conditions to be imposed on the petitioner or the petitioner's practice of law following reinstatement, and requesting that the court reinstate the petitioner's license to practice law in this state. The director shall also file a memorandum in support of the stipulation, which shall include a discussion of any material issue potentially adverse to the petition and an explanation as to why the director concludes that the issue does not prevent reinstatement. At the time of filing the stipulation and memorandum, the director shall also file with the court all formal written comments that have been received regarding the petition. The petitioner may file a response to the director's memorandum within 14 days of the date of filing of the stipulation.

**(b)** The supreme court shall consider the petition and stipulation without the appointment of a referee. The court may approve the stipulation, adopt the stipulated facts and conclusions of law, and reinstate the petitioner's license to practice law in Wisconsin; the court may reject the stipulation and refer the petition to a referee for a hearing and consideration under sub. (5) below as if no stipulation had been filed; or the court may direct the parties to consider modifications to the stipulation.

**(c)** 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 reinstate the petitioner's license to practice law in Wisconsin; or the court may reject the stipulation and refer the petition to a referee for a hearing and consideration under sub. (5) below as if no stipulation had been filed. If the parties do not file a revised stipulation within 20 days of the date of the order or if the parties so request in writing, a referee shall be appointed and the petition shall be referred to the referee for a hearing and consideration under sub. (5) below as if no stipulation had been filed.

**(d)** A stipulation rejected by the supreme court has no evidentiary value and is without prejudice to the petitioner's prosecution of the petition for reinstatement or the director's response to the petition.

**(6)(a)** If the director opposes the petition for reinstatement, the clerk of the supreme court shall select a referee from the panel provided in SCR 21.08, based on availability and geographical proximity to the petitioner's place of residence, and the chief justice or, in his or her absence, the chief justice's delegee shall appoint the referee to conduct a hearing and prepare a report on the petition for reinstatement.

**(b)** The referee shall have the powers of a judge trying a civil action and shall conduct the proceedings regarding the petition pursuant to the rules of civil procedure, except where these rules provide a different procedure.

**(c)** 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.

(d) Following the appointment of a referee, the director shall transfer to the referee all formal written comments regarding or in response to the petition. The director shall also provide the referee with a list of all individuals who requested notice of the hearing on the petition.

(e) The referee shall establish a schedule for proceedings and a hearing on the petition, which hearing shall be held at the earliest feasible date.

(f) At least 20 days prior to the hearing, the director shall provide written notice of the date, time, and location of the hearing to all individuals who requested notice of the hearing on the petition. If the hearing is rescheduled, the director shall provide written notice of the date, time, and location of the rescheduled hearing to all individuals who requested notice of the hearing on the petition. The director shall advise the referee that the director has complied with this notice requirement.

(g) The reinstatement hearing shall be public.

(h) The referee shall appoint a person to act as the court reporter to make a verbatim record of the proceedings as provided in SCR 71.01 to 71.03.

(i) The petitioner and the director or a person designated by the director shall appear at the hearing. The petitioner may be represented by counsel.

(j) The referee shall conduct the hearing as the trial of a civil action to the court. The hearing shall be conducted pursuant to the rules of civil procedure, but the rules of evidence shall not apply, and the referee may consider any relevant information presented. Interested persons may present information in support of or in opposition to reinstatement.

#### **Section 6. SCR 22.31 is repealed.**

#### **Section 7. SCR 22.305 is created to read:**

**22.305 Standard for Reinstatement.** At all times relevant to the petition, the petitioner has the burden of demonstrating, by clear, satisfactory, and convincing evidence, all of the following:

(1) That he or she has the moral character to practice law in Wisconsin.

(2) That his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive of the public interest.

(3) That his or her representations in the petition, including the representations required by SCR 22.29(4)(a) to (m) and 22.29(5), are substantiated.

(4) That he or she has complied fully with the terms of the order of suspension or revocation and with the requirements of SCR 22.26.

**Discussion.** Sections 5, 6, and 7 of the Petition combine and amend current Rules governing the reinstatement procedure and the reinstatement hearing. The Subcommittee considered several different options for proposed Rule amendments, and the consolidation, amending, and redesign of the procedures represent the Subcommittee's balancing of the interests of the public, the petitioning attorney, and the Court. These proposed Rule changes affect attorneys who are not eligible for administrative reinstatement.

Under current Rule, after an attorney who wishes to have his or her license to practice law reinstatement submits to the Court a petition for reinstatement, a referee is appointed to conduct a hearing on the petition. Under current Rule, all parties file all papers and pleadings with the Court, including a mandatory statement by the Director opposing or supporting the petition, and a report from the board of bar examiners regarding the petitioner's attendance at, and reporting of, continuing legal education. Current Rule requires the Director to publish a notice of the petition in the official publication of the state bar and publish a newspaper notice in every county where the attorney practiced and the county where the attorney lives. The notice must inform the public of the nature and date of the suspension or revocation, the procedure for reinstatement, and what the attorney must prove before he or she may be reinstated.

Current Rule requires the hearing on the reinstatement petition to be public and reported verbatim, and indicates that the rules of civil procedure apply, except that the rules of evidence do not apply. Current Rule requires the petitioner and the Director or the Director's designee to appear at the hearing and allows the petitioner to be represented by counsel.

Under current Rule, the petitioner has the burden of demonstrating, by clear, satisfactory, and convincing evidence, that he or she has the moral character to practice law in Wisconsin, that his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive of the public interest, that his or her representations in the petition are substantiated, and that he or she has complied fully with the terms of the order of suspension or revocation and with the requirements regarding activities following suspension or revocation.

The Petition retains the substance of current Rule, but provides additional guidelines for the procedure, requires more information be provided to the public, and streamlines procedures where appropriate.

Under the Petition, repealed and recreated SCR 22.30 sets forth the procedure for receiving and administering a petition for reinstatement. Subsections (1) and (2) of the proposed Rule retain the current requirement that the Director publish a notice in the state bar's publication and in every county where the attorney practiced and the county where the attorney lives, but in addition to the information required under current Rule, the notice required by the proposed Rule also informs the public that interested persons may submit written comments and may request notification of any reinstatement hearing regarding the attorney, and that anyone who submits a written comment may be contacted by OLR.

The Subcommittee believes that this requirement will allow the public an opportunity to submit comments on the petition and to remain informed about upcoming proceedings related to the petition for reinstatement. The Subcommittee wishes the amended Rule to maximize public understanding of, and participation in, the reinstatement process.

Subsection (3) of proposed SCR 22.30 retains the requirement for the board of bar examiners to submit a report regarding the petitioner's compliance with continuing education requirements, but establishes a 75 day deadline for doing so. Under subsection (4) of the proposed Rule, the Director must meet the same 75 day deadline to investigate the attorney's eligibility for reinstatement and inform the Supreme Court whether the Director opposes the petition or

whether the petitioner has demonstrated satisfaction of all of the criteria for reinstatement. The proposed Rule allows for the Court to grant extensions for good cause shown.

The Subcommittee intends for these amendments to enhance the efficiency of processing petitions for reinstatement. By proposing a deadline for submitting required reports to the Court, the Subcommittee hopes to ensure that petitions are not delayed while the Court awaits a report from the board of bar examiners or from the Director. However, the Subcommittee recognizes that it may not be feasible for these parties to meet the proposed deadline, so the proposed Rule allows the Court to grant extensions in appropriate circumstances.

Subsection (5) of proposed SCR 22.30 allows the Director and the petitioner to enter into a stipulation for reinstatement and would obviate the need for a hearing if the Director and the Court determine that this stipulated resolution is appropriate.

Under the proposed rule, if the Director agrees that the petitioner has satisfied all the criteria for reinstatement, the Director and the petitioner may prepare a stipulation for submission to the Supreme Court, along with any written comments the Director received regarding the petition. The Director must also file a memorandum in support of the stipulation, setting forth any material issue potentially adverse to the petitioner, with an explanation as to why the Director believes the potentially adverse material does not prohibit reinstatement. The petitioner may file a response to the memorandum.

Under the proposed Rule, the Supreme Court may approve the stipulation, adopt its stipulated facts and conclusions of law, and reinstate the attorney's license, ask the parties to amend the stipulation, or reject the stipulation and refer the matter to a referee for a hearing.

The Subcommittee intends this proposed Rule to function in much the same manner as its proposal for amending SCR 22.12(1), governing stipulations for discipline. The Subcommittee believes that its proposed Rule promotes efficiency and will streamline the reinstatement procedure where the Director and the Court determine it is appropriate. The proposed Rule does not affect the substantive rights of the petitioner, allows the public's comments to be taken into consideration, and rests the ultimate decision of whether to reinstate the petitioner's license without a full hearing with the Court. The Subcommittee believes the proposed Rule strikes the appropriate balance between efficiency, fairness, and protection of the public.

Under the proposed Rule, if the Court rejects a stipulation or if the Director opposes the petition for reinstatement, the clerk of the Supreme Court will select a referee to hear the petition in a public hearing. The procedure set forth in the proposed subsection (6) of SCR 22.30 retains much of the current Rule regarding the public nature of the hearing, the mandatory and allowed appearances at the hearing, and the rules of procedure and evidence for the hearing. However, the proposed Rule also establishes guidelines for submitting documents and information to the referee, requires the referee to conduct the hearing at the earliest feasible date, and allows the referee to conduct the hearing in generally the same manner as a judge trying a civil action. Additionally, the proposed Rule sets forth a requirement and a procedure for contacting members of the public who wish to be informed of a hearing.

The Subcommittee believes that the proposed Rule will allow for an expeditious administration of reinstatement hearings, protect the interests of the petitioner, the public, and the Court. The Subcommittee intends the proposed Rule to provide clear guidelines for a timely hearing that allows for all parties to be heard fully.

The proposed Rule creating SCR 22.305 is a technical amendment in that it does not change the substantive Rule regarding what a petitioner must prove in order to have his or her license to practice law, nor does it change the current Rule regarding the burden of proving these matters by clear, satisfactory, and convincing evidence.

The Subcommittee believes that the substance of the proofs required and the burden of proof are most clearly articulated in a Rule separate from the Rule governing the process of pleading and decision-making in a reinstatement proceeding.

## **CONCLUSION**

For the reasons set forth in this Memorandum, the Office of Lawyer Regulation Procedures Review Committee and the Subcommittee on Reinstatement ask the Court to amend its Rules as proposed in order to promote fairness, efficiency, and accountability in the reinstatement 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, Reinstatement Subcommittee