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

**In the Matter of AMENDING Supreme Court Rules 22.02(2)(d), 22.25(3) and (4)(intro), and 22.26, REPEALING Supreme Court Rules 21.01(1)(b) and 21.06, REPEALING AND RECREATING Supreme court Rule 22.03(4), and CREATING Supreme Court Rules 21.01(1)(bg), 22.02(6)(d), and 22.25(3m).**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, and Marsha Mansfield, Chair of the Subcommittee on Process, respectfully petition the court to amend Supreme Court Rules 22.02(2)(d), 22.25(3) and (4)(intro), and 22.26, repeal Supreme Court Rules 21.01(1)(b) and 21.06, repeal and recreate Supreme court Rule 22.03(4), and create Supreme Court Rules 21.01(1)(bg), 22.02(6)(d), and 22.25(3m).

**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 Process subcommittee (Subcommittee) was charged with determining whether, and how, the disciplinary process may be made more efficient while maintaining protection of the rights of all involved parties.

## **DISCUSSION**

The Subcommittee undertook a wide-ranging view of the disciplinary process. It re-examined the roles of District Committees and of the Preliminary Review Committee (PRC), whether a complaint against an attorney should await resolution until an associated civil or criminal case is resolved, whether there should be established timelines for preparing, circulating, and releasing decisions in discipline cases, and the potential advantages of filing concurrently all complaints against an attorney of which the OLR is aware.

The Subcommittee's Petition would put into effect a streamlined disciplinary process that maximizes the effectiveness of OLR investigators and of the Director and that promotes accountability throughout the disciplinary process.

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

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

#### **Section 1. SCR 21.01(1)(b) is repealed.**

#### **Section 3. SCR 21.06 is repealed.**

**Discussion.** Current Rule states that the lawyer regulation system consists of OLR, District Committees, the Preliminary Review Committee, referees, the board of administrative oversight, and the Supreme Court. Under current Rule, the Court appoints, in each state bar district, a district committee composed of lawyers and non-lawyers, who meet as their duties require and who operate under the supervision of the Director. Under current Rule, duties of the district committees include educating the public about the high standards of professional conduct to which attorneys are held in Wisconsin, referring to the Director any possible misconduct or medical incapacity of an attorney that comes to its attention, assisting in investigations of misconduct or medical incapacity, assisting in monitoring compliance with alternatives to discipline or with conditions imposed on an attorney's practice of law, and resolving a dispute between an attorney and a client or other attorney if the dispute does not involve misconduct or medical incapacity and the complaining person agrees to the procedure.

The Petition proposes that the Court eliminate District Committees. This proposal reflects the Subcommittee's determination that the work performed by District Committees may be redundant and the Director has available resources that fulfill the role historically assumed by the District Committee. Additionally, the Subcommittee believes that elimination of District Committees will reduce the number of cases that are referred to special preliminary review panels (the Petition also proposes changes to current Rules relating to special preliminary review panels; see Sections 7 to 9 of the Petition).

The Subcommittee heard from stakeholders that the District Committees are valued but not called upon often enough to justify their continuation. The Subcommittee believes that the role of the District Committees is filled in large part by OLR and the Director and that parties to the disciplinary process will not be affected if the District Committees are eliminated.

## **Petition Sections 4. and 5.**

### **Section 4. SCR 22.02(2)(d) is amended to read:**

**22.02(2)(d)** Refer the matter to the director with a recommendation that the matter be investigated by staff ~~or~~, diverted, or resolved by a consensual reprimand.

### **Section 5. SCR 22.02(6)(d) is created to read:**

**22.02(6)(d)** Resolve the matter with a consensual reprimand as provided by SCR 22.09.

**Discussion.** Under current Rule, when OLR receives a grievance alleging attorney misconduct or medical incapacity, OLR staff conducts a preliminary evaluation of the grievance. At this stage of the proceeding, the intake stage, OLR staff may forward the matter to another agency, attempt to reconcile the matter between the grievant and the attorney if it is a minor dispute, close the matter if it does not present sufficient information of cause to proceed, or refer the matter to the Director with a recommendation that the matter be investigated or diverted to an alternatives to discipline program.

Upon receiving a referral from OLR staff, the Director may close the matter for lack of an allegation of possible misconduct or medical incapacity or lack of sufficient information of cause to proceed, divert the matter to an alternatives to discipline program, or commence an investigation when there is sufficient information to support a possible finding of cause to proceed. Under current Rule, the Director may obtain the respondent attorney's consent to the imposition of a public or private reprimand after the Director completes his or her investigation.

Under the proposed Rule, OLR staff may recommend, after a preliminary evaluation of a grievance, that the Director resolve the matter by consensual reprimand and the Director may take such action where appropriate.

This proposal reflects the Subcommittee's appreciation for the expertise of OLR staff and the Director to determine where a consensual reprimand may be appropriate. The proposal would offer an efficient means of disposition in appropriate cases, as the matter could be resolved at the intake stage, and would not affect the rights of any participant in the OLR process.

### **Petition Section 6. SCR 22.03(4) is repealed and recreated to read:**

**22.03(4)(a)** If respondent fails fully and fairly to disclose all facts and circumstances pertaining to the alleged misconduct within the deadline established pursuant to par. (2), including any extension granted by the director or special investigator, or fails to cooperate in other respects with an investigation, the director or special investigator shall notify respondent by personal service that respondent's license to practice law will be automatically suspended unless, within 20 days after receiving such personal service, respondent:

- 1.** Fully and fairly discloses all facts and circumstances pertaining to the alleged misconduct or otherwise cooperates with the investigation, to the reasonable satisfaction of the director or special investigator; or,

**2.** Submits evidence to the director or special investigator demonstrating, to the reasonable satisfaction of the director or special investigator, respondent's inability to disclose the facts and circumstances or otherwise cooperate with the investigation; or,

**3.** Files a motion with the supreme court showing cause why respondent's license to practice should not be suspended for willful failure to respond or cooperate with the investigation.

**(b) 1.** If respondent satisfies the condition of par. (a) 1., the director or special investigator shall proceed with the investigation.

**2.** If the respondent satisfies the condition of par. (a) 2., the director or special investigator may establish a new deadline for respondent to disclose fully and fairly all facts and circumstances or otherwise cooperate with the investigation. If respondent fails to disclose fully and fairly all facts and circumstances or otherwise cooperate with the investigation, to the reasonable satisfaction of the director or special investigator, before expiration of the deadline established pursuant to this par. 2, respondent's license to practice law is automatically suspended.

**3.** If respondent files a motion with the supreme court pursuant to par. (a) 3., the supreme court shall act upon respondent's motion, following its own procedures. All papers, files, transcripts, communications, and proceedings on the motion are confidential until the supreme court has acted upon the motion.

**(c) 1.** If the respondent fails to satisfy any of par. (a) 1, 2, or 3, or fails to meet a deadline established pursuant to par. (b) 2., or if the supreme court rejects respondent's motion submitted pursuant to par. (b) 3., respondent's license is suspended and the director shall promptly send notice of the suspension to the clerk of the supreme court, all supreme court justices, all courts of appeal and circuit courts, all circuit court commissioners, all circuit court clerks, all juvenile court clerks, all registers in probate, the executive director of the state bar of Wisconsin, the Wisconsin State Public Defenders' Office, and the clerks of the federal districts in Wisconsin.

**2.** SCR 22.26 (2) applies immediately upon suspension to a respondent whose license to practice law is suspended pursuant to this Rule. If respondents' suspension hereunder extends beyond 30 days, SCR 22.26 in its entirety applies to the respondent beginning on the 31st day.

**(d) 1.** Notwithstanding SCR 22.28, if, within 18 months of the date of suspension pursuant to SCR 22.03(4), a respondent whose license was suspended for failure to satisfy a condition of par. (a) 1. to 3., or failure to meet a deadline established pursuant to par. (b) 2., discloses fully and fairly all facts and circumstances pertaining to the alleged misconduct, or otherwise cooperates with the investigation, to the reasonable satisfaction of the director or special investigator, respondent's license to practice law shall be automatically reinstated. Upon reinstatement of a license pursuant to this subsection, the director or special investigator shall send notice of the reinstatement to each person identified in par. (c) 1.

2. Respondent, following suspension of respondent's license pursuant to paragraph (4) and whose license was not automatically reinstated pursuant to paragraph (e)(1) above, may apply for reinstatement pursuant to SCR 22.28(3).

**Discussion.** Under current Rule, if the Director commences an investigation of a grievance, he or she requests the respondent attorney to file, within 20 days, a written response to the alleged misconduct. If the respondent fails to respond to the request for a written response, the Director may file a confidential motion with the Court requesting that the Court order the respondent to show cause why his or her license to practice law should not be suspended for willful failure to respond or cooperate with the investigation. If the Court issues an order to show cause, all filings related to the motion are public.

If the Court suspends the respondent's license for willful failure to respond or cooperate with an investigation, the respondent may have his or her license reinstated upon a showing of cooperation with the investigation and compliance with the terms of suspension. Under current Rule, if a respondent files a motion for reinstatement, the Director files a response in support of or in opposition to the reinstatement within 20 days (or a period extended by the Court) after the filing of an attorney's request for reinstatement.

Under the Petition, a respondent's failure to respond or otherwise cooperate with an investigation will result in an automatic suspension of the respondent's license to practice law unless the respondent promptly cooperates with the investigation. The proposed Rule reflects the Subcommittee's recognition that the practice of law is a privilege the Court grants individuals upon their satisfaction of certain conditions. Among those conditions resides the responsibility freely and fully to cooperate in resolving questions of whether the respondent exercised that privilege consistently with all the attendant conditions.

The Subcommittee believes that the proposed changes will create greater incentive than current Rule for an otherwise reluctant respondent to cooperate in the resolution of such a question. The Subcommittee notes that under current Rule, an uncooperative respondent may deliberately delay an OLR investigation 140 or more days without sanction. The Subcommittee believes that such an extended delay contravenes the intent of the Rules and hinders the effective regulation of the profession.

The proposed reduction, from an interval of 140 or more days to 40, is intended to induce respondent's expeditious cooperation in an investigation arising from that practice, without depriving the respondent of the right to practice or compromise the respondent's right to due process.

Additionally, the Petition transfers the onus of dealing with a respondent's lack of cooperation. Currently, after multiple attempts at contacting an uncooperative respondent and ultimate notice by personal service, the investigator, Deputy Director of investigation, a litigator, Deputy Director of litigation and Director collaborate to file a motion requesting that the Court order respondent to show cause why respondent's license not be suspended. The proposed Rule requires only the investigator and Director (informing the appropriate Deputy Directors) to compel the respondent to (i) cooperate, (ii) demonstrate the impossibility of cooperating or

(iii) show cause to the Court why respondent's license to practice not be suspended for lack of cooperation. The onus shifts from OLR to the respondent.

The Petition sets forth clearly the consequences of a respondent complying with each of the three options provided or not complying with any. Once suspension occurs, the proposed Rule permits the respondent automatically to lift the suspension by cooperating or demonstrating the impossibility of cooperating and defines the availability of appealing to the Court for relief. (Throughout the proposed process, the Court remains the venue of last resort.)

Under the Petition, the procedure following automatic suspension for failure to cooperate parallels the procedure defined in SCR 31.10 for failure to meet continuing legal education requirements (administrative suspension). Under the proposed Rule, suspension of a license to practice, or the reversal of a suspension, does not address the substance of any allegation of misconduct against a respondent.

The Subcommittee submits that its proposed Rule respects the respondent's right to due process by not only allowing, but seeking, a respondent's reply to an allegation of misconduct (or an explanation of the respondent's inability to reply) (1) during the intake phase of a grievance, (2) during the 20 days immediately following commencement of a formal investigation, (3) during any extension thereof offered by OLR, (4) during the 20 days following service of notice regarding a potential license suspension, (5) during any proceeding subsequent to respondent's motion to forestall suspension and (6) during any proceeding subsequent to respondent's appeal of suspension.

The proposed Rule also delays by 30 days application of SCR 22.26 (governing activities following suspension of revocation) to a respondent suspended for failure to cooperate. This proposal, in effect, allows the respondent an additional month to answer or cooperate before suffering the public consequences of suspension.

The Subcommittee believes the proposed Rule enforces responsibilities individuals assume when exercising the privilege to practice law and does so in a manner fulling respecting those individuals' rights.

## **Petition Sections 7., 8., 2., and 9**

### **Section 2. SCR 21.01 (1)(bg) is created to read:**

**22.01(1)(bg)** Special investigators and the special preliminary review panel, provided in SCR 22.25.

### **Section 7. SCR 22.25(3) is amended to read:**

**22.25(3)** If the special investigator determines that there is not sufficient information to support ~~a possible finding of cause to proceed~~ an allegation of possible misconduct, the special investigator may close the matter. The special investigator shall notify the grievant in writing that the grievant may obtain review by the special preliminary review panel of the closure by submitting a written request to the special investigator. The request for review must be received

by the special investigator within 30 days after the date of the letter notifying the grievant of the 181 closure. The special investigator shall send the request for review to the special preliminary review panel ~~consisting of 4 lawyers and 3 public members appointed by the supreme court and having a quorum of 4 members. Members of the special preliminary review panel serve staggered 3-year terms, as described in sub. (3m).~~ A member may serve not more than 2 consecutive 3-year terms. Upon a timely request by the grievant for additional time, the special investigator shall report the request to the chairperson of the special preliminary review panel, who may extend the time for submission of additional information relating to the request for review. If the panel affirms the investigator's determination, the special preliminary review panel shall inform the grievant. The panel's decision affirming closure of the matter is final. If the panel does not concur in the investigator's determination, it shall direct the investigator to initiate an investigation of the matter.

**Section 8. SCR 22.25(3m) is created to read:**

**22.25(3m)** The special preliminary review panel consists of 4 lawyers and 3 public members, appointed by the supreme court and having a quorum of 4 members. Members of the special preliminary review panel serve staggered 3-year terms. A member may not serve more than 2 consecutive 3-year terms.

**Section 9. SCR 22.25(4)(intro) is amended to read:**

**22.25(4)(intro)** If the special investigator determines that the information provided is sufficient to support ~~a possible finding of cause to proceed~~ an allegation of misconduct, the special investigator shall conduct an investigation of the matter. Upon commencing an investigation, the special investigator shall notify the respondent of the matter being investigated unless in the opinion of the special investigator the investigation of the matter requires otherwise. The respondent shall fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct with 20 days after being served by ordinary mail a request for a written response. The special investigator may allow additional time to respond. Except in limited circumstances when good cause is shown and a response summary is more appropriate, the special investigator shall provide the grievant a copy of the respondent's response and the opportunity to comment in writing on the respondent's response. Following receipt of the response, the special investigator may conduct further investigation and may compel the respondent to answer questions, furnish documents, and present information deemed relevant to the investigation. In the course of the investigation, the respondent's willful failure to provide relevant information, to answer questions fully, or to furnish documents and the respondent's misrepresentation in a disclosure are misconduct, regardless of the matters asserted in the grievance. Upon completion of the investigation, the special investigator shall do one of the following:

**Discussion.** Under current Rule, an allegation of misconduct against the Director, OLR staff, retained counsel, a referee, or a lawyer member of a District Committee, of the Preliminary Review Committee, or of the board of administrative oversight is referred to a special investigator. Under current Rule, special investigators are appointed by the Court and, upon receiving an allegation of misconduct, make a determination as to whether to close the matter or conduct an investigation. If the special investigator believes that closure is appropriate, he or she notifies the grievant of the determination, with a notice that the grievant may request review of the decision by the special preliminary review panel. Under current Rule, the special preliminary

review panel consists of four lawyers and three public members appointed by the Court to serve no more than two consecutive staggered 3-year terms.

Under the Petition, the special investigator determines whether the grievant has provided information sufficient to support an allegation of possible misconduct and, if so, notifies the respondent attorney of his or her duty to provide full and fair disclosure of all facts and circumstances relating to the alleged misconduct. The proposed Rule establishes a 20 day deadline and allows the special investigator to conduct further investigation and compel the respondent attorney to provide additional information as the investigator deems relevant. Under the proposed Rule, the same requirements relating to a notice of investigation and duty to cooperate that apply to standard grievances also apply to grievances investigated by the special investigator.

The Subcommittee believes that these changes will make consistent the procedures for investigations undertaken by the Director and by a special investigator, promote efficiency and accountability, while maintaining all due process protections for respondent attorneys.

**Petition Section 10. SCR 22.26 is amended to insert the following comment after that Rule:**

#### **COMMENT**

SCR 22.26 has been applied to administrative suspensions. *Office of Lawyer Regulation v. Scanlan (In re Scanlan)*, 2006 WI 38, 290 Wis. 2d 30, 712 N.W.2d 877.

**Discussion.** Under current Rule, a respondent attorney whose license is suspended or revoked must notify by certified mail all current clients of the suspension or revocation and advise the clients to seek legal advising elsewhere, provide notice of the suspension or revocation to each court or administrative agency where the respondent has a pending matter and to opposing counsel on each matter, arrange for closing the respondent's practice (temporarily or permanently, as the suspension or revocation require), and file a document with the Director demonstrating compliance with the requirements.

Under current law, the Court has held that the Rule governing actions following suspension or revocation applies to administrative suspensions. The Petition proposes adding a Comment to the Rule to that effect.

The Subcommittee recognizes that its Petition proposes to impose, for a respondent's failure to cooperate with an investigation, an administrative suspension more responsively and on a tighter deadline than under current Rule. The proposed Comment is intended to ensure that all stakeholders in the OLR process understand that under case law, the disclosure Rule applies to administrative suspensions.

As set forth above, under the proposed Rule, a respondent attorney whose license is administratively suspended need not publicly disclose the suspension until his or her license is suspended for at least 30 days. However, once that time period is reached, the disclosure Rules clearly apply. The Subcommittee intends that its proposed Rule creating an administrative suspension for attorneys who fail to cooperate with a disciplinary investigation will enforce

responsibilities that attorneys assume when exercising the privilege to practice law. The Subcommittee believes that the proposals contained in its Petition fully respect attorneys' rights while commanding respect for the privilege of practicing law.

## **CONCLUSION**

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