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**SUPPORTING MEMORANDUM**

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**In the matter of CREATING Supreme Court Rule 22.185 AND AMENDING Supreme Court Rules 22.24 (1) and 22.38, relating to the charging process in attorney disciplinary proceedings.**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, and Paul Schwarzenbart, Chair of the Subcommittee on Charging Process, respectfully petition the court to amend Supreme Court Rules by creating Supreme Court Rule 22.185 and amending Supreme Court Rules 22.24 (1) and 22.38.

**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.

Among its other responsibilities, the Charging Process subcommittee (Subcommittee) reviewed whether the Wisconsin Supreme Court should adopt a rule providing for a procedure to enforce orders issued in disciplinary proceedings (disciplinary orders). The Subcommittee noted that the Court had been petitioned in 2013 to adopt such a Rule, but declined to do so, referring the

question to the Committee for its review (see Rule Petition 13-05 and revised Rule Petition 13-05A).

This Petition (Charging Process Petition 2) is brought by the Charging Process Subcommittee; it has been endorsed by the Committee and it seeks to establish a Rule governing the enforcement of disciplinary orders.

## **DISCUSSION**

The Subcommittee reviewed the 2013 petition and commentary regarding the petition. The Subcommittee determined that there is scant authority addressing the process for enforcing disciplinary orders. In *Lawyer Disciplinary Bd. v. Ball*, 633 S.E.2d 241 (W.Va. 2006), the court in West Virginia addressed the concern expressed by the Hearing Panel Subcommittee of the Lawyer Disciplinary Board (the Panel in that state plays the same role as referees in Wisconsin) that it lacked any mechanism to enforce restitution other than through restrictions on a lawyer's license or as a condition for reinstatement. 633 S.E.2d at 252.

In response, the court stated that it was "at a loss to understand the Panel's position" and that the court's "disciplinary orders are not intended to be empty noise." The court stated that when it imposed sanctions on an attorney "the attorney is still subject to the continuing jurisdiction of this Court as a result of the disciplinary order." 633 S.E.2d at 253. The court therefore "construe[d] the power and duty of [the ODC] broadly to ... authorize prosecution of enforcement actions by seeking such relief as injunctions and punishment for contempt of court for noncompliance." *Id.*

In an earlier case, *Matter of Disciplinary Action Against Larson*, 512 N.W.2d 454 (N.D. 1994), the Supreme Court of North Dakota had reached the same result. While filing a new disciplinary action against an attorney for failing to comply with a disciplinary order was one option, the court construed the authority of disciplinary counsel to "authorize prosecution of enforcement actions by seeking such relief as injunctions and punishment for contempt of court for noncompliance" with disciplinary orders. 512 N.W.2d at 458.

The Subcommittee determined that if a respondent attorney fails to comply with all or part of a disciplinary order, the more efficient process would allow the OLR to seek enforcement of a disciplinary order without having to resort to the extreme measure of initiating a new disciplinary proceeding. Charging Process Petition 2 sets forth the Subcommittee's recommendations.

## **DISCUSSION OF EACH PROPOSED RULE CHANGE IN CHARGING PROCESS PETITION 2**

### **Petition Section 1. SCR 22.185 is created to read: 22.185 Enforcement of Disciplinary Orders.**

(1) The supreme court, on its own motion, upon the motion of the director, or upon the motion of a special investigator acting under SCR 22.25 filed in the disciplinary proceeding in which an

order was issued, may enforce any disciplinary order where the respondent has failed to substantially comply with the order.

(2) Upon filing of a motion under sub. (1), the supreme court may order the respondent to show cause why the relief requested in the motion should not be granted. Within the time set forth in the order, the respondent shall have the right to file with the supreme court a written response to the order to show cause, and respondent shall serve a copy of such response on the director, or special investigator. The director, or special investigator, may file a reply memorandum within 10 days after filing of the response.

(3) The supreme court may decide the motion upon the submissions of the parties, or may refer the matter to the referee appointed in the proceeding, who shall promptly conduct a hearing and file a report with the supreme court containing findings of fact, conclusions of law, and a recommendation for disposition of the motion. Unless otherwise directed by the supreme court, the referee shall follow the procedures in SCR 22.15 and SCR 22.16, and may conduct the hearing by telephone. A report issued by the referee is reviewable under SCR 22.17.

(4) Upon the submissions of the parties, or upon receipt of the report of the referee, the supreme court shall decide the motion, and may either deny or dismiss the motion, or issue such orders as are necessary to enforce the order.

(5) Nothing in this rule shall:

(a) Limit the authority of the director, or a special investigator, to initiate an investigation or proceeding for misconduct or medical incapacity under these rules.

(b) Limit the constitutional, statutory, or inherent authority of the supreme court to enforce an order issued in a disciplinary proceeding.

**Discussion.** Under current Rule, there is no specific mechanism or procedure for OLR or the court to enforce a disciplinary order. Current Rule allows for the Director of OLR (Director) to modify or terminate certain agreements for diversion to alternatives to discipline of the respondent attorney fails to comply with the agreement, but current Rule does not address how the Director or the Court may proceed when a respondent fails to comply with part of all of a disciplinary order.

The Subcommittee requests the creation of this Rule explicitly providing that disciplinary orders may be enforced in the context of the original proceeding in which the order was issued. This obviates the need for a new disciplinary action whenever an attorney fails to comply with part of all of a disciplinary order.

The Subcommittee believes that adoption of this Rule will clarify the rights and responsibilities of each party to a disciplinary action and that it will protect the rights of all parties by providing opportunity for the respondent to answer an allegation of failure to comply. The proposed Rule allows, but does not require, the court to appoint a referee to conduct a hearing on an allegation of failure to comply; under the proposed Rule, the Court decides the ultimate question of whether

the respondent failed to comply and issues orders as it deems necessary to enforce the disciplinary order.

The proposed Rule establishes that it is a procedural Rule and in no way limits the Director's authority or the Court's authority in attorney disciplinary proceedings.

The Subcommittee believes that creating this Rule will provide a clear and efficient procedure for enforcing disciplinary orders.

**Petition Section 2. SCR 22.24 (1) is amended to read:**

**22.24 (1)** The supreme court 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,~~ or a motion to enforce an order issued in a disciplinary 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.

**Discussion.** Under current Rule, the Court may assess against the respondent all or a portion of the costs of a disciplinary proceeding, medical incapacity proceeding, or a reinstatement proceeding if the respondent is found to have committed misconduct or to be medically incapacitated. Under the proposed amendment, the Court may also impose costs against the respondent in a motion to enforce the disciplinary order. The Subcommittee believes that this amendment will promote consistency and fairness by holding a respondent who fails to comply with a disciplinary order responsible for the costs borne to enforce the order.

**Petition Section 3. SCR 22.38 is amended to read:**

**22.38** Allegations of misconduct in a complaint, allegations of medical incapacity in a petition, allegations of noncompliance with an order of the supreme court issued in a disciplinary proceeding, and character and fitness to practice law shall be established by evidence that is clear, satisfactory and convincing.

**Discussion.** Under current Rule, allegation of misconduct or medical incapacity must be proven by evidence that is clear, satisfactory, and convincing. The proposed amendment establishes the same middle burden of proof for allegation of noncompliance with a disciplinary order. The Subcommittee believes that this amendment promotes fairness and consistency for these proceedings.

**CONCLUSION**

For the reasons set forth in this Memorandum, the Office of Lawyer Regulation Procedures Review Committee and the Subcommittee on Charging Process ask the Court to amend its Rules relating to the enforcement of disciplinary orders.

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

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

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Paul Schwarzenbart, Chair, Charging Process Subcommittee