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**SUPPORTING MEMORANDUM****19-****In the matter of AMENDING Supreme Court Rules 21.16 (1m)(a) and 22.29 (2).**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, and Jacquelynn Rothstein, Chair of the Subcommittee on Reinstatement, respectfully petition the court to amend Supreme Court Rules 21.16 (1m)(a) and 22.29 (2).

**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 under what circumstances, the Court may order permanent revocation of an attorney's license to practice law.

**DISCUSSION**

The Reinstatement subcommittee reviewed current Rules regarding revocation of a respondent attorney's license to practice law and heard from stakeholders that revocation is more uncommon

than a suspension under current Rule and practice. The Subcommittee noted that under current Rule, an attorney whose license is revoked may not petition for reinstatement for a minimum of five years following the court's order for revocation. The inability to practice law for a minimum period of five years is a significant penalty and is generally imposed for very serious instances of misconduct.

The Subcommittee deliberated as to whether a more severe penalty, permanent revocation, should be permitted under Supreme Court Rules. While the Subcommittee determined that the level of attorney misconduct that would warrant such a severe sanction is admittedly rare, it decided that the option should nevertheless be available to the Supreme Court. Reinstatement Petition 2, empowers the Supreme Court to revoke permanently an attorney's license to practice law. An attorney whose license is permanently revoked may not petition for reinstatement.

## **DISCUSSION OF EACH PROPOSED RULE CHANGE IN REINSTATEMENT PETITION 2**

### **Petition Section 1. SCR 21.16(1m)(a) is amended to read:**

**21.16(1m)(a)** Revocation of license to practice law. The supreme court, in any order or judgment in which an attorney's license is revoked, retains the discretion to permanently revoke the attorney's license. Permanent revocation precludes reinstatement. If the supreme court's order or judgment does not specify that the revocation is permanent, it shall be deemed to be not a permanent revocation.

**Petition Section 2. SCR 22.29(2) is amended to read:****22.29(2)** A petition for reinstatement of a license that is revoked may be filed at any time commencing five years after the effective date of revocation, except that an attorney whose license has been permanently revoked may not petition for reinstatement.

**Discussion.** Under current Rule, upon a finding of misconduct, an attorney's license to practice law may be suspended for a period of time or may be revoked. An attorney whose license is suspended for a period of less than six months may petition for administrative reinstatement of his or her license to practice law. An attorney whose license is suspended for a period of six months or more may petition, at any time commencing three months prior to the expiration of the suspension period, to have his or her license to practice law reinstated after a public hearing on the petition. An attorney whose license to practice law has been revoked may petition to have his or her license reinstated after a public hearing when at least five years have passed since the date of the revocation.

Under the proposed Rule, the Court may permanently revoke an attorney's license for misconduct. Under the proposed Rule, an attorney whose license has been permanently revoked may not petition for reinstatement and may not be reinstated. The proposed Rule requires the Court to specify that a revocation is permanent when it imposes that sanction; under the proposed Rule, an order for revocation that does not so specify is deemed not a permanent revocation and the attorney may petition for reinstatement after five years.

The Subcommittee believes that the option of the most severe sanction, permanent revocation of an attorney's license to practice law, should be available to the Court. The Subcommittee believes that this will be a rarely imposed sanction but that public confidence in the integrity of the legal profession will be enhanced if this sanction is available for instances of egregious misconduct.

The Petition does not set forth standards for imposing permanent revocation. The Subcommittee declined to include specific standards in its proposed Rule, noting that no other standards exist in current Rule for the imposition of other disciplinary sanctions. The Subcommittee believes that the Court is capable of developing and applying appropriate criteria for permanent revocation, but the Subcommittee notes the Court could consider utilizing the standards set forth by the American Bar Association for the imposition of lawyer sanctions. Those standards include the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.

## **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 allow the Court to impose, under appropriate circumstances, permanent revocation of an attorney's license to practice law as a sanction for misconduct.

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