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**SUPPORTING MEMORANDUM****19-****In the matter of AMENDING Supreme Court Rules 20:1.8 (3)(h)(3) and 20:8.3**

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The Office of Lawyer Regulation Procedures Review Committee, the Honorable Gerald Ptacek, Chair, respectfully petitions the court to amend Supreme Court Rules amending Supreme Court Rules 20:1.8 (3)(h)(3) and 20:8.3.

**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.

While each of the subcommittees completed its work, the Committee as a whole (Committee) took a comprehensive look at the OLR Procedure and examined whether there were areas of potential improvement that may not have been considered by an individual subcommittee.

## DISCUSSION

One focus was the role of the attorney as a mandatory reporter of misconduct. The Committee asked shareholders in the OLR Process to discuss the current Rules, compare them to national standards, and make a recommendation to the Committee. The Committee endorsed their recommendation to change the standard under which an attorney is required to report misconduct.

## DISCUSSION OF EACH PROPOSED RULE CHANGE IN COMMITTEE PETITION 2

**Petition Section 1. SCR 20:1.8 (3) (h) (3) and the Rule's Wisconsin Comment are amended to read:**

**20:1.8(3) (h) (3)** make an agreement limiting ~~the client's~~ a person's right to report the lawyer's conduct to disciplinary authorities.

### WISCONSIN COMMENT

This rule differs from the Model Rule in four respects. Paragraph (c) incorporates the decisions in *State v. Collentine*, 39 Wis. 2d 325, 159 N.W.2d 50 (1968), and *State v. Beaudry*, 53 Wis. 2d 148, 191 N.W.2d 842 (1971). Paragraph (f) adds a reference to an attorney retained at government expense and retains the "insurance defense" exception from prior Wisconsin law. But see SCR 20:1.2(e). Paragraph (h) prohibits a lawyer from making an agreement limiting ~~the client's~~ a person's right to report the lawyer's conduct to disciplinary authorities. Paragraph (j)(2) includes language from ABA Comment [19].

**Discussion.** Under current Rule, an attorney may not make an agreement with a client that limits the client's right to report the attorney's conduct to a disciplinary authority.

Under the Petition, an attorney may not make an agreement with a client that limits any person's right to report the attorney's conduct to a disciplinary authority, regardless of whether the person is a client. The proposed Rule reflects the Committee's commitment to upholding the highest standards of professionalism and ethics for attorneys.

The Committee notes that, without the proposed amendment, an attorney is compliant with current Rule if he or she enters into an agreement with a client that prohibits any person related to or associated with the client from reporting the attorney's misconduct. The proposed Rule eliminates that possibility. The Committee believes that this provides additional protection for the public and encourages accountability and ethical behavior among attorneys.

**Petition Section 2. SCR 20:8.3 (a) and (b) and the Rule's Wisconsin Comment are amended to read:**

**20:8.3 (a)** A lawyer who ~~knows~~ reasonably believes that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that

lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

**(b)** A lawyer who ~~knows~~ reasonably believes that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

### WISCONSIN COMMENT

~~The change from “having knowledge to “who knows” in SCR 20:8.3(a) and (b) reflects the adoption of the language used in the ABA Model Rule. See also SCR 20:1.0(g) defining “knows.” Wisconsin rule differs from the ABA Model Rule in substituting “reasonably believes” for “knows” in (a) and (b). See also SCR 20:1.0(1) defining “reasonable belief.” The requirement under paragraph (c) that the lawyer consult with the client is not expressly included in the Model Rule. A lawyer who consults with a client pursuant to subsection (c) should not discourage a client from consenting to reporting a violation unless the lawyer believes there is a reasonable possibility that it would compromise the attorney-client privilege or otherwise prejudice the client. Lawyers should also be mindful of the obligation not to use the threat of a report as a bargaining chip (see Wisconsin Ethics Opinion E-01-01) and the obligation not to seek to contractually limit a person from reporting professional misconduct. See SCR 20:1.8(h)(3).~~

**Discussion.** Under current Rule, with certain exceptions, an attorney is required to inform the appropriate professional authority when he or she knows that another lawyer or a judge has committed a violation of the Rules of Professional Conduct or of judicial conduct and the violation raises a substantial question of fitness.

Under current Rule, if the information revealing attorney or judicial misconduct is confidential, the attorney must consult with the client about the matter and abide by the client's wishes to the extent required by Rules governing confidentiality.

Current Rule contains a comment noting that the Rule requiring knowledge of misconduct reflects the adoption of the language used in the ABA Model Rule and that the ABA Model Rule does not expressly require a consultation with a client if confidentiality is implicated.

The Petition changes the standard from one of knowledge to one of reasonable belief. The Committee determined that requiring an attorney to report a violation only if he or she “knows” a violation occurs, is quite a high standard that could inhibit attorneys from reporting misconduct.

The Committee believes that by requiring attorneys to report misconduct upon their reasonable beliefs, the Rules will provide clear guidance and promote the highest standards of professionalism and ethics.

## **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 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