

STATE OF WISCONSIN

IN SUPREME COURT

In the Matter of Review of Amendments to  
Supreme Court Rule SCR 22.24 Relating to  
the Cost Assessments in the Lawyer  
Regulation System, et al., as Appropriate

To: Chief Justice Shirley S. Abrahamson  
Justice Ann Walsh Bradley  
Justice N. Patrick Crooks  
Justice David Prosser, Jr.  
Justice Patience D. Roggensack  
Justice Annette Kingsland Ziegler  
Justice Michael J. Gableman

**FILED**

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OF WISCONSIN

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Daniel L. Shneidman addresses the Supreme Court on the above subject matter as a sole practitioner in Milwaukee, Wisconsin for over 50 years, who represents or consults with Wisconsin attorneys and non-resident Wisconsin attorneys with regard to contact or potential contact with the Office of Lawyer Regulation on various regulation matters.

**PROPOSED MODIFICATIONS TO SCR 22.24 ET AL. AND EXPLANATIONS  
BELOW:**

(1) SCR 22.24(1) – Modify the next to last sentence as follows:

“The referee may recommend all or a portion of the costs of an investigation when discipline is imposed under SCR 22.09.”

(2) SCR 22.24(1m) – First sentence to be modified as follows:

“The court’s general policy is that upon a finding of misconduct it is appropriate to impose all costs, ~~including~~ excluding the expenses of counsel for the office of lawyer regulation, upon the respondent.”

(3) SCR 22.24(1m)(b) – Modify to read:

“The nature and severity of ~~the misconduct~~ each count charged, contested and proven.”

(4) Provide a new SCR 22.16(7):

“Within twenty (20) days of filing the referee’s initial misconduct report with OLR and the respondent, the Office of Lawyer Regulation shall file with the referee, with copy to the respondent, a statement of costs and recommendation containing an assessment of all or a portion or costs against the respondent. The respondent may file an objection to the statement and recommendation within ten (10) days of receipt. The Office of Lawyer Regulation may reply within five (5) days of receiving the objection. The referee shall file with the Supreme Court a recommendation as to the assessment of reasonable costs, together with the referee’s initial recommendation regarding the counts of misconduct. The referee shall consider the submission of the parties and the record of the proceeding. No further discovery or hearing is authorized. The director has the burden of establishing by clear, satisfactory and convincing evidence the costs to be assessed. The factors to be considered by the referee in making a cost recommendation shall be:

- (a) The number of counts charged, contested, and proven.
- (b) The nature and severity of each count charged, contested and proven.
- (c) The level of discipline sought by the parties and recommended by the referee.
- (d) The respondent’s cooperation with the disciplinary process.
- (e) Prior discipline, if any.
- (f) Other relevant circumstances.
- (g) Respondent’s ability to pay.”

**EXPLANATION FOR PROPOSED MODIFICATIONS:**

- (1) SCR 22.16(1) empowers the Supreme Court appointed referee with, inter alia, powers of a judge trying a civil action.
- (2) SCR 22.24(1) is a judicial fee shifting rule, contrary to the general policy of the American Rule:

“That all litigants, even the prevailing one, must bear their own attorney fee.” Black’s Law Dictionary, 8<sup>th</sup> Edition (2004). See also *Kolupar* case, page 7, paragraph 17.

- (3) Wisconsin has numerous civil fee shifting statutes, i.e. protective employment laws, consumer protection, and property damages or loss arising out of a claim upon which the Wisconsin Supreme Court has clearly established the circuit court duties, which include, but are not limited to, computation and assessment of attorney fees, *Kolupar v. Wilde Pontiac*, 275 Wis.2d 1 (2004), where this court acknowledge at paragraph 22 that, as follows:

“When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court. *First Wisconsin Nat’l Bank v. Nicolaou*, 113 Wis.2d 524, 537, 335 N.W.2d 390 (1983). We uphold the circuit court’s determination unless the circuit court erroneously exercised its discretion. *Standard Theatres, Inc. v. Transp. Dep’t*, 118 Wis.2d 730, 747, 349 N.W.2d 661 (1984). We give deference to the circuit court’s decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel. *Id.* Thus, we do not substitute our judgment for the judgment of the circuit court, but instead probe the court’s explanation to determine if the court ‘employ[ed] a logical rationale based on the appropriate legal principles and facts of record.’ *Hughes v. Chrysler Motors Corp.*, 197 Wis.2d 973, 987, 542 N.W.2d 148 (1996) (quoting *Vill. Of Shorewood v. Steinberg*, 174 Wis.2d 191, 204, 496 N.W.2d 57 (1993)).”

- (4) The fairness doctrine and the Frisch case referee report, pages 40-45.