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**To: Cornelia Clark, Clerk of the Wisconsin Supreme Court**  
**From: D. Michael Guerin, State Bar President**  
**Re: Petition 05-01 Cost Assessments**  
**November 10, 2005**

At its September 30<sup>th</sup> meeting in Green Lake, the State Bar's Board of Governors (Board) voted to oppose Keith Sellen's petition relating to the assessment of costs in disciplinary proceedings within the lawyer regulation system. Subsequently, the Board then overwhelmingly adopted alternative language (attached) recommended by the State Bar's Lawyer Regulation Study Committee. Please note that the proposal before you was crafted with considerable input from Director Sellen.

Given the supreme court's opinions in *Marks v. OLR* and *O'Neal v. OLR* (and various other recent cases) the State Bar's Lawyer Regulation Study Committee undertook a comprehensive study of this issue as directed by past State Bar President George Burnett. As a result of that analysis both the Board and the study committee truly believe that this alternative provides the court with the most flexibility and latitude on a case by case basis. It simply provides additional factors to be considered when assessing costs. However, considering that referees are already in place within the disciplinary process, we feel it only appropriate that he/she be responsible for making preliminary findings in these cases.

**Questions? Contact:**

D. Michael Guerin: President, State Bar (414) 271-1440

George Brown: Executive Director, State Bar (608) 250-6101

Warren W. Wood: Chair, Lawyer Regulation Study Committee (715) 246-2146

**State Bar of Wisconsin**

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SCR 22.16 Proceedings before a referee.

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(7) Within 20 days of the filing of the referee's report, the office of lawyer regulation shall file with the referee, with copy to the respondent, a statement of costs and recommendation concerning an assessment of all or a portion of the costs against the respondent. The respondent may file an objection to the statement and recommendation within 10 days of receipt. The office of lawyer regulation may reply within 5 days of receiving the objection. The referee shall file a recommendation as to the assessment of reasonable costs with the court within 10 days after the parties' submissions. The referee shall consider the submissions of the parties and the record in 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 recommendation shall include the following:

- a. The number of counts charged, contested, and proven;
- b. The severity of counts 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; and
- e. The respondent's ability to pay.

SCR 22.24 Assessment of costs.

...

(2) In seeking the assessment of costs by the supreme court, the director shall file ~~in the court~~ a statement of costs as required by supreme court rule 22.16 (7) and 22.31 ~~within 20 days after the filing of the referee's report, provided that if~~ If an appeal of the referee's report is filed or the supreme court orders briefs to be filed in response to the referee's report, ~~the~~ a supplemental statement of costs shall be filed within 14 days after the appeal is assigned for submission to the court or the briefs ordered by the court are filed. Objection to the supplemental statement of costs shall be filed by motion within 10 days after service of the supplemental statement of costs. ~~The director has the burden of establishing costs to be assessed.~~

(3) The supreme court shall consider the submissions of the parties and the recommendation of the referee. The supreme court shall accept the referee's findings of fact regarding the cost assessment unless clearly erroneous, but may exercise discretion regarding the assessment of costs. Upon the assessment of costs by the supreme court, the clerk of the supreme court shall issue a judgment for costs and furnish a transcript of the judgment to the director. The transcript of the judgment may be filed and docketed in the office of the clerk of court in any county and shall have the same force and effect as judgments docketed pursuant to Wis. Stat. 809.25 and 806.16 (1997-98).