OLR PROCEDURES REVIEW COMMITTEE

March 14, 2017 Meeting

Present: Jay Ranney, Mark Baker, Carrie Schneider, David Wambach, Jacquelynn Rothstein, Paul Schwarzenbart, David Meany, Marsha Mansfield, Jennifer Nashold, Amy Janke,

On phone: Mike Apfield, Rick Esenberg, Ed Hammond, Terry Johnson, Chris Sobic

Also present: Keith Sellen, David Runke, Peggy Hurley, John O'Connell, Katja Kunzke, Bill Weigel, Mary Spranger, Mike McChrystal, Julie Rich, Tim Pierce

1. Welcome and Introductions.

2. Approval of Minutes from February meeting. Minutes approved.

3. Report on the Joint Meeting of Supreme Court and OLR: Mansfield presented about the meeting, to which Judge Ptacek, Peggy, and Marsha were invited. Other persons present at today's meeting also attended. First issue discussed was whether there should be a deadline for submission of referee reports. Keith Sellen presented data on the submission of referee reports, noting that the average time for submission is 103 days from hearing to report. Referee reports tend to take longer if there is a delay in getting a transcript or if a deadline for post-hearing briefs is extended. Justice Roggensack noted that when she sees that a report seems to be taking too long, she calls the referee. It was suggested that the OLR Committee look at timelines for proceedings and possible consequences for not getting a timely report. One suggestion is to replace language in the Rules that the report should be submitted within 30 after the hearing with a requirement that the report be submitted within 30 (or whichever number chosen) days after the case is "ready for decision."

   Two other matters were discussed: the "Making a Difference" study and the law firm self- assessments. Keith Sellen explained these to the Committee. The "Making a Difference" study began as an initiative looking at criminal and civil law cases, because those case types are the source of the greatest number of grievances. The study seeks to identify common issues within those cases and determine approaches to assist lawyers to avoid common problems. Two scholars in Connecticut and in Texas A&M are doing the research, using data provided by the OLR. The study will lead to discussions with constituencies in these two areas of law and, ultimately, lead to recommended practices.

The law firm self-assessment started in Australia, when a change in the law allows law firms to be held and managed by nonlawyers. In order to be licensed, firms are required to do a self-assessment. The apparent success of these self-assessments has caused their use to spread: reports are that after 10 years, complaints against firms that employ these self-assessments were reduced by two-thirds. European countries use them extensively, and they are gaining popularity in Canada and Nova Scotia. Additionally, Illinois just issued a Supreme Court Rule requiring firms that do not have insurance to take a self-assessment. (For more information, see, https://iln.isba.org/blog/2017/02/28/amended-supreme-court-rule-requires-uninsured-lawyers-do-self-assessment). Missouri and Colorado are also considering law firm self-assessments.

Pierce described them to the Committee as a risk assessment tool, where firms are forced to think about certain vulnerabilities the firm may have and come up with ways to shore them up. Mansfield asks if the Committee has any role in developing or looking into a self-assessment tool: is it a process issue? Pierce thinks that, because this is a trend in lawyer regulation, the committee should know about them and keep them in mind when considering how to regulate the legal profession. He reiterates that it is essentially a preventative measure. Apfield stated that he did believe that prevention should be a focus of attention for this Committee, and he sees the self-assessment tool as potentially very helpful.

Keith Sellen notes that the "Making a Difference" study should also be of interest to the Committee, as something to keep apprised of as it moves ahead. The information gleaned from that may lead to recommendations for procedure changes. Tim Pierce noted that the issues examined by the study have been issues for at least 20 years.

4. Discussion of letter submitted by Judge Dykman. The Committee discussed a response, as there were several issues that could be assigned to the appropriate subcommittee. Mansfield suggested that the Charging Process Subcommittee consider this issue as part of their work.

   Judge Dykman also pointed out that the OLR rules do not contain a clear definition of the "clear, satisfying, and convincing" standard. Hannon agreed, but Schwarzenbart noted that the standard is a recitation of the "middle standard" of proof used commonly in civil litigation. He suggests that defining the standard is within the province of the Supreme Court, not the Committee. Hannon stated that the Committee's role is to make

recommendations to the Court and ways to provide clarity in charging and disposition decisions.

Wambach stated that the standard might be amorphous, but no more so than any other burden of proof that courts apply all the time. Elasticity is by design, in that the standards need to cover a broad spectrum of circumstances. This more of a procedural issue than a process issue.

Mansfield will follow up with Rod Rogahn regarding a written response to Judge Dykman.

5. Subcommittee Reports: Mansfield gives an overview of the Committee and its subcommittees. Each subcommittee gave a brief report on the last meeting's activities.

    a. OLR Charging Process. Schwarzenbart reported that members talked but did not elect officers or take written notes. They will determine their next tasks at today's meeting. Carrie Schneider added that they identified additions to the subcommittee.

    b. Referees. Hurley read the subcommittee's mission statement: "To investigate how referees are chosen for the referee pool, how they are appointed to an individual case, how referees may be trained, evaluated, and compensated, and to determine whether to make recommendations for a Best Practice within the Office of Lawyer Regulation or for a Supreme Court Rule change." Weigel noted that he and the other folks from OLR are here to give information and answer questions for the subcommittee.

    c. Confidentiality and Grievant Issues. Jay Ranney is the chair. He reports that they discussed goals and got information regarding confidentiality of other type of professional discipline proceedings.

    d. OLR Process (Combining investigative and legal staff). Mansfield said the subcommittee held a freewheeling discussion on a variety of issues, particularly issues raised by recent Supreme Court decisions such as, serial charges, permanent revocation, delays in procedure, including waiting until underlying civil or criminal cases are resolved, the role of the PRC, and "plea agreements." The Committee will look at each rule line by line and determine whether, and what, changes to recommend.

6. Other Business. None raised.
7. Adjournment

Next Meeting: April 11, 2017
1:30 p.m. State Bar of Wisconsin