OFFICE OF LAWYER REGULATION PROCEDURE REVIEW COMMITTEE

FINAL REPORT

October 2018

Hon. Gerald P. Ptacek, Chair

Table of Contents

Creation and Membership of the OLR Procedure Review Committee

In 2016 the Wisconsin Supreme Court established a committee to review the Office of Lawyer Regulation (OLR) Procedures. The Honorable Gerald Ptacek was appointed as the Committee's chair; the other members include Marsha Mansfield, who also serves as the Committee's reporter, Christopher Sobic, Mark Baker, Ed Hannan, Joseph Ranney, Terry Johnson, the Honorable David Wambach, Edward Hannan, Catherine La Fleur, David Meany, Jennifer E. Nashold, Jacquelynn Rothstein, Paul Schwarzenbart, the Honorable Carrie Schneider, Michael Apfeld, Rick Esenberg, Amy Jahnke, Rod Rogahn, and Frank LoCoco. The Honorable Michael Waterman replaced the Honorable David Wambach upon Judge Wambach's retirement.

The Committee established as its mission statement:

> *It is the mission of the OLR Procedure Review Committee 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 generally met monthly, alternatively meeting in Madison and Milwaukee. Committee members were allowed to attend via telephone, when necessary.

During its earlier meetings, the Committee learned about the procedures employed by OLR to receive, investigate, prosecute or dismiss, and resolve complaints against attorneys who are accused of committing an ethical or legal violation. The Committee heard from several stakeholders and identified many areas of potential inquiry, including examining the possibility of combining investigative and legal staff within the OLR, assessing the role of District Committees, establishing grievants' rights and responsibilities, determining whether a lifetime revocation should be an option for discipline, examining the assessment of costs, particularly in cases where some, but not all, charges are proven against a respondent, discussing whether attorneys are mandatory reporters for ethical violations, establishing rules for restitution, revisiting the reinstatement process, and assessing whether the disciplinary process may benefit from bifurcated hearings. Many of the topics were assigned to a specific subcommittee or incorporated into the work of the Committee as a whole. Some of the topics were discussed but did not generate specific Rule change petitions; a comprehensive list of topics considered by the Committee is attached as Appendix 1.

In 2017, the Committee voted to focus on four main areas of inquiry: the OLR Charging Process, Referees, Confidentiality, and Changes to the OLR Process. Later, the Referees subcommittee regrouped to form a subcommittee on Reinstatement. Additionally, the Committee was asked to consider the ethical duties of attorneys as reporters of misconduct and to take an overview of OLR's bureaucratic, or administrative, structure. Michael Apfeld developed a proposed policy on mandatory reporting and Paul Schwarzenbart conducted the investigation into the OLR administrative structure.

Finally, the committee as a whole discussed services currently provided by OLR to grievants. The committee considered different models for grievant protection or advocacy, including

providing legal representation to grievants, and creating an ombudsman or grievant liaison. Ultimately the committee concluded that current services provided by OLR to grievants are adequate. However, the committee recommends that OLR should consider a more formalized process and a higher profile effort to provide assistance to grievants. The committee recommends as an initial step that OLR review how it currently serves grievants and identify an existing position within OLR as the grievant liaison in order to enhance services.

Areas of Focused Inquiry and Subcommittees

For each area of focused inquiry, the Committee assigned members and invited interested individuals with expertise to serve as ad hoc members on a dedicated subcommittee. Generally, the subcommittees met monthly in person or via teleconference to delve into each topic, to consider the options available for the disciplinary process as it relates to each topic, and to develop a proposed petition to amend the Supreme Court Rules pertaining to each topic as appropriate. Ultimately, each proposed petition was presented to the Committee as a whole and approved before its inclusion in this Report. Each petition is attached as an Appendix to this Report; a full supporting memorandum will accompany each petition when it is filed with the Supreme Court.

This Report summarizes the considerations undertaken by the subcommittees, and their petitions' major components. In some instances, if the subcommittee submitted a report or memorandum explaining its process and considerations and discussing Rules it opted not to include in its Petition, the report or memorandum is attached as an Appendix.

1. OLR Charging Process

This subcommittee is chaired by Paul Schwarzenbart; other subcommittee and ad hoc members are Christopher Sobic, Michael Apfeld, the Honorable Carrie Schneider, Julie Spoke, and Mike McChrystal.

The OLR Charging Process subcommittee began its focus on OLR Charging decisions. Subcommittee members identified as areas of inquiry the desirability of early charging decisions that may include diversion and education and/or monitoring of attorneys accused of certain violations, a determination of whether a form of "plea bargaining" or "consent agreements" is appropriate and desirable in OLR cases, and whether and how OLR should exercise discretion in bringing or pursuing charges. The subcommittee also looked at Rule Petition 13-05, considering how it could be modified to address concerns raised by some members of the Supreme Court regarding the enforcement of mandates in disciplinary cases.

The petitions approved by the Committee are attached as Appendix 2, Charging Process Petition 1, and Appendix 3, Charging Process Petition 2.

The Charging Process Petition 1 addresses several aspects of attorney disciplinary procedure, and seeks to improve the procedures by promoting openness, balancing the interests of the public, the profession, and the respondent attorney, and streamlining procedures toward a fair and prompt resolution.

First, Charging Process Petition 1 ask the Supreme Court to amend its Rules to require the OLR Director (Director), when he or she closes a file opened by OLR after it receives a grievance, to provide the grievant with a written explanation for the decision. The subcommittee determined that this change reflects our state's commitment to, and tradition of, open government, and may also promote public confidence in the attorney disciplinary process by providing more information to the grievant.

The Charging Process subcommittee considered at length the current Rules governing diversion agreements for attorneys facing disciplinary action. The subcommittee supports the intentions behind the diversion program, and its recommendations reflect the subcommittee's interest in the program's continued success. Consideration was given to whether the Rule, as currently structured, sufficiently provides an incentive for performance of the agreement, because the attorney's material and unjustified breach merely results in re-opening the matter for possible imposition of discipline, delaying resolution.

After carefully considering the OLR's track record of success with diversion agreements, the subcommittee concluded that modifying the Rule to provide adverse consequences for a breach was unnecessary and possibly counterproductive. However, Charging Process Petition 1 does request the Supreme Court amend its Rules so that allegations of a breach of a diversion agreement are not addressed by the Preliminary Review Committee (PRC). The subcommittee determined that if there is an allegation that a diversion agreement has been breached, the attorney should be given the opportunity to respond. Thereafter, the agreement may be modified by mutual agreement, or the Director may terminate the agreement. This reflects the subcommittee's determination that diversion agreements should be regarded as a tool to be used in the Director's discretion and not as one that confers substantive rights. Therefore, breaches to a diversion agreement should not be the subject of litigation within the Lawyer Regulation System.

The Charging Process Petition 1 also contains provisions that the Committee hopes will reduce potential costs and delays in the disciplinary process, as well as provide satisfactory outcomes for the public, the profession, and the respondent attorney. The petition requests the Supreme Court to amend its Rules to allow a respondent attorney to waive, at any stage of the proceeding, submission of the matter to the PRC for a probable cause determination.

Additionally, the subcommittee requests that the Director be allowed additional discretion to enter into a consent reprimand agreement prior to conducting an investigation. Under the current Rule, the Director may refer a matter to the diversion program at the intake stage; the requested amendment allows the Director the additional option of entering into a consent reprimand agreement under appropriate circumstances.

Appendix 3, Charging Process Petition 2, is the subcommittee's revision and resubmission of Rule Petition 13-05. The subcommittee accepted a charge from the Supreme Court to review Petition 13-05 in light of the Petition's long procedural history and the court's stated concerns about the lack of any mechanism to enforce an order for discipline or for restitution other than

through restrictions on a lawyer's license or as a condition for reinstatement. After extensive research and discussion, the subcommittee opted for a "minimalist" approach in its Petition.

In sum, Charging Process Petition 2 creates a procedural Rule to govern the procedure for OLR to seek enforcement of a disciplinary order without having to resort to the extreme measure of initiating a new disciplinary proceeding. The new Rule explicitly states that disciplinary orders may be enforced in the context of the original proceeding in which the order was issued, and allows the Supreme Court to enforce compliance, where a respondent attorney's noncompliance is "substantial," on its own motion or on the motion of the Director or a special investigator.

Under the Petition, the Supreme Court may issue an order to show cause directing the respondent attorney to show why the relief sought shall not be granted, but it is not required to do so. The proposed Rule allows the Director or special investigator to reply, within 10 days, to the attorney's statement. Under the proposed Rule, the Supreme Court may determine the motion on written submissions, or may refer the matter to the referee appointed in the original proceeding for a hearing and report with recommendations. The Petition expressly states that the procedures set forth in the proposed Rule do not limit the Director's authority or the Supreme Court's authority in disciplinary matters. The Petition also asks the Supreme Court to amend its Rules to allow for the imposition of costs against the respondent attorney in a motion to enforce the disciplinary order and to provide that the middle burden of proof applies when enforcement of a disciplinary order is sought.

A complete discussion of the Charging Process subcommittee's research, conclusions, and recommendations regarding its Petition is attached as Appendix 4, Charging Process Subcommittee's Memorandum on Enforcement of Disciplinary Orders. Finally, although not represented in its petitions, the Charging Process subcommittee weighed issues surrounding the confidentiality of attorney discipline and the concept of "plea bargaining" and its application to the attorney disciplinary process. The Charging Process subcommittee declined to submit separate recommendations on the confidentiality of disciplinary proceedings, citing the creation of a separate subcommittee on Confidentiality, but notes it would support a Rule amendment to require notification of grievances to organizations with which the respondent attorney is affiliated at a time no later than when the Preliminary Review Committee determines that the Director has shown cause to proceed.

The Charging Process subcommittee also discussed at length the history and philosophy surrounding the acceptance of "plea bargaining" in criminal cases and in attorney disciplinary cases. The subcommittee declined to submit proposed Rule amendments, noting that there is no specific Rule prohibiting the practice, so there is no Rule that could be amended to allow it. The subcommittee cited the evolution of a constructive ban on the practice in disciplinary proceedings that resulted from the court exercising its constitutional and inherent authority over the judicial branch and the legal profession. The subcommittee noted that if the Supreme Court desires to change its position on the practice, the court would be best positioned to do so. The full discussion on the topic is attached as Appendix 5, Charging Process Subcommittee's Discussion on "Plea Bargaining."

2. Referees

This subcommittee was chaired by Jacquelynn Rothstein; other subcommittee and ad hoc members included the Honorable David Wambach, who was replaced upon his retirement by the Honorable Michael Waterman, Terry Johnson, Rick Esenberg, David Meany, Bill Weigel, Julie Rich, and David Runke.

The Referees subcommittee focused on questions relating to the appointment of referees, including determining who should serve as referees, whether it is desirable to require certain qualifications, whether referees should serve for determinate terms, and whether to establish guidelines for the manner in which referees are assigned to cases. Additionally, the subcommittee considered whether and how to provide specialized training for referees, as well as the desirability of whether to clarify the rule on when a referee must submit to the Supreme Court a report setting forth his or her findings of fact, conclusions of law, and recommendations.

The Referees subcommittee heard from several stakeholders in the disciplinary process and fashioned its Petition, attached as Appendix 6, Referees Petition 1, to amend Supreme Court Rules in a manner that promotes fairness, efficiency, and the highest level of professionalism for referees engaged in the disciplinary process. The Referees subcommittee also requests that the Supreme Court amend its Internal Operating Procedures in order to implement the proposed Rule changes most effectively. The proposed Internal Operating Procedures changes are attached as Appendix 7, Referees Proposed Internal Operating Procedures.

Referees Petition 1 asks the Supreme Court to revise its Rules to limit its referee panel to no more than 24 members appointed by, and functioning under the supervision of, the Supreme Court. The proposed Rule calls for the referees to serve staggered 4-year terms, although a referee may serve consecutive terms. It also sets forth the duties of each referee, including the duty to preside over and conduct hearings on matters involving attorney discipline, medical incapacity, or reinstatement, to make written findings and conclusions submitted, with a recommendation for action on each matter, to the Supreme Court, to review consensual disciplinary agreements, and to perform other duties as directed by the Supreme Court.

The Referees Petition 1 further recommends amending the Rules to require that referees attend an educational seminar upon their appointments, and that they attend an additional training seminar every two years during their terms of appointment. The proposed Rule contemplates removal of a referee from his or her appointment for failure to comply with the educational requirements.

The proposed Internal Operating Procedures augment the proposed Rule changes by specifying that the Office of Judicial Education, with assistance from Supreme Court commissioners, will provide the required training and will include topics that are necessary for the referees to perform their duties at the highest level of competence. Additionally, the proposed Internal Operating Procedures set forth qualifications for referees, and establish procedures for applying for, and being appointed to, the panel of referees.

The Referees subcommittee examined how referees were assigned to disciplinary matters under the current Rule and practice. The subcommittee considered whether to create geographic districts to which referees are assigned, but declined to pursue that option.

Instead, the Referee Petition 1 proposes that the clerk or deputy clerk of the Supreme Court, after considering the location of the respondent attorney's principle office and any potential conflicts of interest, prepare a letter of appointment that is sent for approval to the Chief Justice or the Chief Justice's delegee. The proposed Internal Operating Procedure further explains that the clerk or deputy clerk shall seek to maintain a uniform distribution of assignments, taking into consideration geography and whether a referee may have a conflict of interest in presiding over the matter. The proposed Internal Operating Procedure notes that the chief justice or his or her delegee formally appoints the referee upon the clerk's or deputy clerk's recommendation but otherwise is not involved in the assignment process. The Referee subcommittee intends these proposed Rule amendments and supplemental Internal Operating Procedures to promote fairness and efficiency in the appointment process.

Finally, the Referees subcommittee considered at length the Rules establishing a deadline for a referee to submit to the Supreme Court his or her report setting forth findings of fact, conclusions of law, and recommendations for resolution of the matter. The subcommittee heard from various stakeholders that the deadline contained in current Rule, 30 days after later of the conclusion of the hearing or the filing of the hearing practice, is routinely not met. The referee subcommittee heard several explanations for this, perhaps the most prominent being that post-hearing briefs are often filed, and referees need to take those briefs into consideration before writing their reports.

In response, Referees Petition 1 asks the Supreme Court to amend its Rule by allowing the referee to file his or her report 30 days after the later of the conclusion of the hearing, the filing of the hearing transcript, or the filing of post-hearing briefs. The Petition also proposes that if a referee is unable to comply with the 30 day deadline, he or she must file a statement with the Supreme Court as to the reason why he or she cannot comply and the deadline by which the referee will file the report. The Referees subcommittee believes that proposal, along with the proposed changes to the Internal Operating Procedures, will promote efficiency and accountability in the post-hearing phase of attorney disciplinary proceedings.

2a. Reinstatement

Once the subcommittee on Referees completed its initial charge, it was then asked to focus on issues related to the reinstatement of an attorney's license to practice law following a suspension or revocation. It was also asked to consider whether permanent revocation should be an option for the Supreme Court to use in disciplinary proceedings.

The Reinstatement subcommittee discussed at length the difference between the relatively simple administrative reinstatement process available to respondent attorneys whose licenses are suspended for less than six months, and the more complex and time-consuming reinstatement process required for respondent attorneys whose licenses are revoked or suspended for six months or longer. The subcommittee discussed the practical limitations of the current Rule, which in effect turns a six month suspension into a suspension for at least 18 months, due to the

reinstatement requirements. The subcommittee discussed how to weigh and balance the interests of a respondent attorney seeking reinstatement, the general public, and persons affected by the respondent attorney's misconduct.

The subcommittee considered several different options for proposed Rule amendments, including whether to require the formal reinstatement process for different sets of matters, such as those involving revocations or suspensions of nine months (or 12 months) or more, whether the Supreme Court should indicate in license suspension orders if an attorney may be reinstated without the formal process, whether to abbreviate the process by eliminating certain requirements of the formal reinstatement process, such as the referee's report and investigation, and whether to create streamlined procedures in situations where the Director and the respondent attorney stipulate to reinstatement. After much discussion, the Reinstatement subcommittee drafted its Petition to amend Rules relating to the reinstatement process, attached as Appendix 8, Reinstatement Petition 1.

Reinstatement Petition 1 asks the Supreme Court to amend its Rules to allow costs to be assessed against an attorney who petitions for reinstatement, and to require the petitioning attorney to submit to the Director a reinstatement questionnaire designed to assist the Director in his or her investigation of the petition. More substantively, Reinstatement Petition 1 consolidated, amended, and redesigned current Rules regarding the reinstatement procedure.

Pursuant to the Petition, when an attorney petitions for reinstatement of his or her license to practice law, the Director must publish a notice in the State Bar's publication and must publish a newspaper notice in every county where the attorney practiced and the county where the attorney lives. The notice is intended to inform the public of the nature and date of the suspension or revocation, the procedure for reinstatement, and what the attorney must prove before he or she may be reinstated. The notice further informs the public that interested persons may submit written comments, may request notification of any reinstatement hearing regarding the attorney, and that anyone who submits a written comment may be contacted by OLR.

Reinstatement Petition 1 requests the Supreme Court to amend its Rules to require the Board of Bar Examiners to submit, within 75 days after the petition is filed, a report to the Supreme Court regarding the attorney's compliance with continuing legal education requirements. Under the proposed Rule, the Director must meet the same 75 day deadline to investigate the attorney's eligibility for reinstatement and inform the Supreme Court whether the Director opposes the petition or whether the petitioner has demonstrated satisfaction of all of the criteria for reinstatement.

If the Director agrees that the attorney has satisfied all the criteria for reinstatement, the Director and the attorney prepare a stipulation for submission to the Supreme Court, along with any written comments the Director received regarding the petition. The Director must also file a memorandum in support of the stipulation, setting forth any material issue potentially adverse to the attorney, with an explanation as to why the Director believes the potentially adverse material does not prohibit reinstatement. The attorney may file a response to the memorandum.

Under the proposed Rule, the Supreme Court may approve the stipulation, adopt its stipulated facts and conclusions of law, and reinstate the attorney's license, ask the parties to amend the stipulation, or reject the stipulation and refer the matter to a referee.

Reinstatement Petition 1 proposes that if the Director opposes the petition for reinstatement, the clerk of the Supreme Court will select a referee to hear the petition in a public hearing. Reinstatement Petition 1 sets forth detailed procedures, criteria, and policies regarding a petition for reinstatement that the Reinstatement subcommittee believes balances the interests of the disciplined attorney with those of the court in its exercise of its duties to regulate the legal profession, as well as the interests of the public any those persons directly affected by the attorney's misconduct.

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. It also considered whether the court should have the option to revoke permanently an attorney's license to practice law. The subcommittee agreed that although the level of attorney misconduct that would warrant such a severe sanction is admittedly rare, the option should nevertheless be available to the Supreme Court. Appendix 9, 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.

In the course of its discussion, the Reinstatement subcommittee considered whether to create standards for imposing permanent revocation, but declined to do so, noting that no other standards exist in the current Rules for the imposition of other disciplinary sanctions. However, the Supreme Court could consider utilizing the standards set forth by the American Bar Association for the imposition of lawyer sanctions. The 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.

3. Confidentiality

This subcommittee is chaired by Jay Ranney; other subcommittee and ad hoc members are Jennifer Nashold, Mark Baker, Amy Jahnke, the Honorable Gerald Ptacek, Andrea Kupfer Schneider, and Mary Spranger. Additionally, Keith Sellen attended subcommittee meetings and consulted with the subcommittee.

The Confidentiality subcommittee inquired into whether, and for how far into the process, complaints alleging attorney misconduct or medical incapacity should be kept confidential in order to balance the rights of the respondent attorney and the interest of protecting the public. The subcommittee also examined whether, and at what stage of the process, the OLR should notify a respondent attorney's employer of a complaint against the attorney, and how to convey or reveal, within a pending criminal case against a respondent, materials received or uncovered during an OLR investigation.

The Confidentiality subcommittee found that practices vary widely among other states, with some states having disciplinary actions completely public from the time a grievance is filed and

other states keeping matters confidential until after discipline is imposed. Additionally, the subcommittee considered how disciplinary actions involving other licensed professions are treated in this state. In its Petition, attached as Appendix 10, Confidentiality Petition 1, the subcommittee incorporated its intention to balance the rights of the respondent attorney who has merely been accused of misconduct, the rights of the public to protection, and the interest of assuring public confidence in the disciplinary process.

The Confidentiality subcommittee also strove to ensure that grievants' rights to be kept informed and involved while their grievances were adjudicated were protected. The subcommittee determined, after much discussion and analysis, that some information related to a disciplinary action should be made public at an earlier stage than under current Rule, but that some documents or other information available under current Rule should not be made public unless it is filed in a proceeding following a misconduct complaint, medical incapacity petition, or petition for temporary license suspension.

In its discussions and analysis the Confidentiality subcommittee noted that current Rules allow for several exceptions to the general Rule that papers, files, transcripts, communications and proceedings OLR are confidential until a misconduct complaint, medical incapacity petition, or petition for temporary license suspension is filed with the Supreme Court. Confidentiality Petition 1 seeks to clarify the Rules, promote consistency, and promote public confidence in the OLR disciplinary process.

Confidentiality Petition 1 asks the Supreme Court to amend its Rules to require or allow more information regarding a grievance to be disseminated to interested persons under appropriate circumstances. For example, the amended Rule would require an attorney who receives a notice that an investigation is being undertaken by the OLR regarding an allegation that the attorney committed misconduct to provide a copy of the notice to a supervisor in his or her law firm, or the law firm where he or she worked at the time of the alleged misconduct. The Petition allows OLR to inform respondent attorneys of their duties to inform under the proposed Rule, and to provide the copy of the notice to the law firm(s) if, in the Director's view, such action is warranted.

The amended Rule also allows the Director to provide the respondent attorney with a copy of the grievance received by OLR and any additional information provided by the grievant if, after weighing the grievant's right to privacy, the respondent attorney's interest in receiving full information regarding the grievance filed, and the effect the disclosure may have on the public, the Director believes the disclosure is appropriate.

Confidentiality Petition 1 proposes amendments to the Rules that would make all papers, files, transcripts, communications, and proceedings confidential except for certain materials at certain stages of the disciplinary proceedings. Confidentiality Petition 1 addresses three disciplinary scenarios: actions involving motions for temporary suspension, where it appears the attorney's continued practice of law poses a threat to the interests of the public and the administration of justice, actions alleging medical incapacity, and the general procedures following the filing of a grievance against an attorney for misconduct.

Under the Petition, when the Supreme Court issues an order to show cause why an attorney's license to practice law should not be suspended temporarily, the motion for temporary suspension and the order to show cause are public information, with certain exceptions. Under the proposed Rule, the following information remains confidential: the name of a special investigator or any person alleging the misconduct, medical information regarding the respondent attorney, financial information regarding the respondent attorney, or of any person alleging the attorney committed an act of misconduct, if the financial information is unrelated to the order to show cause, and information that is subject to legal privilege.

In its consideration of actions alleging medical incapacity, the Confidentiality subcommittee noted that under current Rule, information regarding these matters is kept confidential until the Supreme Court issues an order revoking, suspending indefinitely, or imposing conditions on an attorney's license to practice law. The Confidentiality subcommittee considered the sensitive nature of these allegations and concluded that, if no misconduct is being alleged, matters involving medical incapacity should remain confidential for the longer period. Under the proposed Rule, following the issuance by the Supreme Court of an order revoking, suspending indefinitely, or imposing conditions on the attorney's license to practice law, the petition and all papers relating to the petition that are filed with the Supreme Court are public information. Other information received by the OLR but not filed with the Supreme Court remains confidential.

The Confidentiality subcommittee, in its proposed Rule regarding confidentiality for misconduct allegations seeks to strike the same balance between the between the public's right to receive information about problematic conduct by an attorney and the personal privacy rights and legal privileges of grievants and of attorneys. Under the proposed Rule, when a Preliminary Review Committee (PRC) issues a written Cause to Proceed Determination, the Written Cause to Proceed Determination is public information, except that the following remain confidential at that stage: the name of the grievant, the names of voting PRC members, the vote count, and information relating to other allegations for which cause to proceed was not found, medical information regarding the grievant and the attorney, financial information regarding the grievant and the attorney if the financial information is unrelated to any allegation of misconduct for which there is Cause to Proceed, and privileged information.

Additionally, Confidentiality Petition 1 seeks to reduce, from 10 years to six years, the limitations period for filing a grievance with the OLR. The Confidentiality subcommittee noted that the limitations period for legal malpractice claims is three years or six years, depending on the nature of the claim. OLR receives very few grievances involving actions that occurred more than five years before the grievance is filed. Confidentiality Petition 1 also changes the limitations period from the later, to the earlier, of the times when the grievant (1) knew or (2) reasonably should have known of the conduct underlying the grievance. The Confidentiality subcommittee concluded that using the later of the two times could prolong the limitations period indefinitely, thus effectively defeating the governing principle of this provision that time limits must be placed on claims in order to promote predictability and certainty.

4. OLR Process

This subcommittee is chaired by Marsha Mansfield; other subcommittee and ad hoc members are Catherine La Fleur, Rod Roghan, Ed Hannan, Frank LoCoco, John O'Connell, and Don Christl.

The OLR Process subcommittee undertook a wide-ranging review of the OLR process and how it could be made more efficient while maintaining protection of the rights of all involved parties. Specifically, the subcommittee re-examined the role of the Preliminary Review Committee (PRC), whether a complaint against an attorney should await resolution until an associated civil or criminal case is resolved, whether there should there be established timelines for preparing, circulating, and releasing decisions in discipline cases, and the potential advantages of filing concurrently all complaints against an attorney of which the OLR is aware. The OLR Process subcommittee reviewed the Supreme Court rules pertaining to the role of District Committees, the PRC process, and examined timelines related to the OLR investigative and decision-making process, as well as issues identified by the Supreme Court in certain disciplinary decisions.

The OLR Process subcommittee's Petition is attached as Appendix 11, Process Petition 1. In addition to the issues addressed in the Petition, which this Report will summarize, the OLR Process subcommittee considered several other Rules and opted, after thorough discussion and analysis, not to petition for changes to those Rules. The full discussion of Rules that the subcommittee considered for proposed amendment, and its analysis thereof, is attached as Appendix 12, Process Memorandum.

Process Petition 1 intends to streamline the disciplinary process and to promote cooperation between the Director or special investigator, if an allegation of misconduct is lodged against a participant in the lawyer regulation system. The Petition asks the Supreme Court to amend its Rules to eliminate District Committees, noting that the work performed by District Committee may be redundant and the Director has available resources that fulfill the role historically assumed by the District Committee. Additionally, elimination of District Committees will reduce the number of cases that are referred to special preliminary review panels. Process Petition 1 also proposes amending current Rules by allowing OLR staff to recommend, after a preliminary evaluation of a grievance, that the Director resolve the matter by consensual reprimand and allow the Director to take such action where appropriate.

Process Petition 1 asks the Supreme Court to amend its Rules regarding special investigators by asking the special investigator to determine whether the grievant has provided information sufficient to support an allegation of possible misconduct and, if so, to notify the respondent attorney of his or her duty to provide full and fair disclosure of all facts and circumstances relating to the alleged misconduct. The proposed Rule establishes a 20 day deadline and allows the special investigator to conduct further investigation and compel the respondent attorney to provide additional information as the investigator deems relevant. Under the proposed Rule, the same requirements relating to a notice of investigation and duty to cooperate that apply to standard grievances also apply to grievances investigated by the special investigator.

The Process subcommittee also asks the Supreme Court to amend its Rules regarding the process for a respondent attorney who fails to respond to a request for a written response to an allegation

of misconduct, or who otherwise fails to cooperate with a disciplinary investigation. The proposed amendment is intended to create a greater incentive within the Rules to cooperate with a disciplinary investigation, noting that the practice of law is a privilege the Supreme Court grants individuals upon their satisfaction of certain conditions.

The subcommittee considered that under current Rule, an uncooperative respondent may cause a delay of 140 or more days to an OLR investigation, without sanction. The Process subcommittee determined that such an extended delay contravenes the intent of the Rules and hinders the effective regulation of the profession.

Accordingly, Process Petition 1 reduces the interval from 140 or more days to 40, without compromising a respondent's right to due process, and creates an administrative license suspension for failure to cooperate. Additionally, under the proposed Rule, the onus of dealing with a respondent's lack of cooperation is transferred from OLR to the respondent attorney. Process Petition 1 requests the Supreme Court to amend its Rules to require the respondent attorney to either cooperate, demonstrate why he or she is not able to cooperate, or show cause as to why his or her license to practice ought not be suspended.

Under the proposed Rule, if a respondent attorney's license is administratively suspended for failure to cooperate, the respondent may automatically lift the suspension by cooperating or demonstrating the impossibility of cooperating, Process Petition 1 establishes the availability of appealing to the Supreme Court for relief; the Supreme Court remains the venue of last resort.

The Process subcommittee notes that its proposed procedure following automatic suspension for failure to cooperate parallels the procedure defined in the current Rules for failure to meet continuing legal education requirements. Suspension of a license to practice for failure to cooperate, or the reversal of the suspension does not address the substance of the underlying allegation of misconduct against the respondent.

The Process subcommittee discussed the respondent attorney's right to due process and drafted its Petition to protect those rights not only allowing, but seeking, the respondent's reply to an allegation of misconduct (or an explanation of the respondent's inability to reply) at several stages of the disciplinary investigative process. Additionally, under the proposed Rule, a respondent attorney whose license is administratively suspended need not publicly disclose the suspension until his or her license is suspended for at least 30 days. Process Petition 1 requests a comment be added to the disclosure Rule that makes it clear that, under case law, the disclosure Rule applies to administrative suspensions.

The Process subcommittee intends that its proposed Rule creating an administrative suspension for attorneys who fail to cooperate with a disciplinary investigation enforce responsibilities that attorneys assume when exercising the privilege to practice law and does so in a manner fully respecting those attorneys' rights.

5. Committee Recommendation on Referees

The OLR Procedure Review Committee, in its mission statement, agreed to review the entire structure and procedure of OLR. The Committee looked in depth at the current Rules, OLR's current practices, and considered the impressions of many stakeholders in the process as to whether the current Rules and procedures produce the best possible results for the public, the profession as whole, respondent attorneys, and grievants.

The Committee heard from many stakeholders and most expressed overall satisfaction with Wisconsin's OLR Procedures. In particular, high marks were given to the thoroughness and thoughtfulness of the Supreme Court Rules governing the legal profession and the disciplinary process, and to the integrity and professionalism of OLR personnel at every stage of the process.

However, one recurring suggestion was to find a way to reduce the length of time a typical grievance takes to wend its way through the process. Grievants and respondent attorneys were equally aggrieved by the length of the process and the Committee heard the concern that public confidence in the process is undermined when the resolution of a matter is delayed for so long.

Each subcommittee petition asks the Supreme Court to amend its Rules in ways that will promote efficiency and are likely to shorten the time period that each grievance takes until resolution. However, the Committee as a whole determined that in order to fulfill its charge, it was necessary to consider the underlying structure of the disciplinary process, particularly how it relates to the relatively high level of involvement in the process by Supreme Court justices. The Committee's Petition, intended to create a larger role for referees in imposing discipline in certain cases, while preserving the Supreme Court's authority in the disciplinary process, is attached as Appendix 13, Committee Petition 1.

The Committee's proposals are based on its comparison of Wisconsin's procedures with disciplinary procedures in other states, particularly those states where disciplinary decisions are delegated to a party or a body other than the Supreme Court, with the Supreme Court generally retaining supervisory or appellate authority. In particular, the Committee examined the attorney disciplinary processes in Colorado and Arizona, both of which recently revised their Rules in ways that greatly reduce the time and effort their respective Supreme Courts expend on attorney disciplinary proceedings. On May 15, 2018, the Committee made a presentation of those states' procedures to the Supreme Court.

Under Wisconsin's current Rules, the Supreme Court "touches" attorney disciplinary proceedings at several points. The Supreme Court is involved if a respondent attorney fails to respond or otherwise cooperate with an investigation. Later in the process, after a preliminary review committee has determined there is cause to proceed in a disciplinary action, each case not subject to consensual reprimand or diversion is filed with Supreme Court and prosecuted.

The complaint and every other case filing is filed with the Supreme Court. After the referee has concluded his or her hearing on the matter, the Supreme Court receives the referee's findings of fact, conclusions of law, and recommendations for discipline and a recommendation on assessment of costs. The Supreme Court considers every referee's report and may adopt, reject,

or modify the findings and conclusions, remand the matter back to the referee, or determine and impose appropriate discipline. The Supreme Court may thereafter decide a motion filed by either side for reconsideration.

Additionally, the Supreme Court considers consensual license revocation, may summarily suspend a license upon proof the attorney was found guilty of a serious crime, and reviews complaints demonstrating discipline in another jurisdiction for the purpose of imposing reciprocal discipline.

The Supreme Court may temporarily suspend an attorney's license upon finding that the attorney's continued practice of law poses a threat to the interests of the public and the administration of justice, and the Supreme Court may suspend an attorney's license or impose conditions on the attorney's continued practice if the court finds the attorney has a medical incapacity. Finally, the Supreme Court considers petitions for reinstatement from attorneys whose licenses were revoked for failure to comply with terms of conditional admission, suspended for nonpayment of bar due or for failure to comply with continuing legal education requirements, or suspended or revoked for other misconduct that warranted a suspension longer than six months.

The Committee determined that this level of involvement by the Supreme Court uses an inordinate amount of the court's time, resources, and effort. During its 2016-17 term, the Supreme Court issued 85 decisions. Of those, 30, or more than one-third, were disciplinary decisions. Of the remaining decisions, 27 were civil cases, and 28 were criminal cases.

The Committee believes that, without sacrificing the effectiveness or fairness of the disciplinary process, the role of the Supreme Court could be delegated in appropriate cases to a highly qualified and trained referee. Under the Committee's Petition, the Supreme Court maintains its authority as a reviewing body and ultimate arbiter of attorney discipline. The Committee believes that by relieving the Supreme Court of some of its workload related to attorney discipline, the court will have more time to devote to other matters

Committee Petition 1 asks the Supreme Court to amend its Rules so that referees make findings, conclusions, and, under certain circumstances, determine attorney misconduct and impose or approve disciplinary actions. Under the Committee's proposal, referees may approve consensual private and public reprimands and may approve stipulations under which an attorney's license to practice law is suspended for a period not to exceed one year, and/or the attorney stipulates to conditions on his or her continued practice of law, to a monetary payment, to restitution, or to conditions on seeking license reinstatement. Additionally, referees may suspend an attorney's license to practice law for a period not to exceed three months.

Under Committee Petition 1, the Supreme Court determines attorney misconduct and approves or imposes discipline or other action in all other cases. Additionally, the Supreme Court retains its role in medical incapacity cases, reinstatement cases, and cases of reciprocal discipline or discipline following a criminal conviction.

The Committee asked OLR to determine how many cases would be resolved by a referee under this proposal. OLR considered the 145 cases decided between March, 2014 and March, 2018, and found that 72 would have been decided by referees under the system proposed in Committee Petition 1; of these, 34 were consensual discipline or stipulations to a license suspension of one year or less and 38 were cases with sanctions of license suspension for three months or less.

Committee Petition 1 also allows the referee to impose costs if the referee imposed the discipline or approved a stipulation or consensual reprimand in the matter; otherwise, the Supreme Court imposes costs in its discretion.

Under Committee Petition 1, if the referee finds that the respondent attorney committed misconduct warranting discipline that the referee is authorized to impose or approve, the referee submits to the Supreme Court a report setting forth his or her findings and conclusions and an order imposing discipline. In all other cases, the referee submits to the Supreme Court a report setting forth his or her findings and conclusions and a recommendation for discipline, which the court may adopt, reject, or modify. In these cases, the Supreme Court imposes the discipline it deems appropriate.

Committee Petition 1 allows the Director or a respondent attorney who is subject to discipline imposed by a referee to appeal the matter to the Supreme Court; upon appeal the Supreme Court may adopt, reject, or modify the referee's findings of fact and conclusions of law or may remand the matter for further findings, and may adopt, reject, or modify the referee's imposition of discipline.

Under Committee Petition 1, decisions and orders issued by referees are published in much the same manner as disciplinary decisions and orders by the Supreme Court; the Committee anticipates that the referees will use decision and order forms to standardize their written decisions and orders and maintain the professionalism of the disciplinary process.

The Committee recognizes its Petition is a significant departure from current Rules, and recognizes that referees may not be currently trained or prepared to undertake these substantial new duties. The Committee believes that the recommendations set forth by the Referees subcommittee in its Petition 1 and Proposed Internal Operating Procedures will be extremely beneficial in developing a highly trained, professional set of referees who will operate at the highest level. Accordingly, the Committee recommends that Committee Petition 1 be considered for approval by the Supreme Court after a sufficient period of time has allowed the referees to receive sufficient training and specialized education.

6. Attorneys as Reporters of Misconduct

The Committee considered the role of attorneys as reporters of suspected misconduct. Under current Rules, 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. Additionally, current Rules prohibit an attorney from making an

agreement with a client that limits the client's right to report the attorney's conduct to a disciplinary authority.

Michael Apfeld and Timothy Pierce examined for the Committee the current Rules and alternatives to their mandates. They explained to the Committee the effect of requiring an attorney to report a violation only if he or she "knows" a violation occurs, noting that this is quite a high standard. Mr. Apfeld and Mr. Pierce told the Committee that the standard of "reasonable belief" reflects the way the current Rule has been interpreted in case law. Additionally, Mr. Apfeld and Mr. Pierce supported amending the Rules so that an attorney may not enter into an agreement with a client limiting any person's right to report the attorney's conduct to a disciplinary authority. The Committee agreed with the language proposed by Mr. Apfeld and Mr. Pierce; Appendix 14, Committee Petition 2, contains these proposed changes.

7. Statement and Recommendations Regarding the Administrative Structure of OLR

Throughout its deliberations, the OLR Process Review Committee was cognizant of the view that the administrative structure, sometimes referred to as the "bureaucracy" of OLR may be limiting its efficiency and effectiveness. The Committee was aware of recommendations made in a 2014 consultation report by John Gleason and Jerome Larkin suggesting that the OLR structure be modified from its current form to a "vertical" system from the point that an investigation moves beyond the intake stage. The Committee was aware that the Director had submitted a memorandum in response to the consultation report and that certain structural and procedural changes had, in turn, been implemented by OLR.

Paul Schwarzenbart agreed to take a closer look at the issues surrounding OLR and its administrative bureaucracy. His full report is attached as Appendix 15.

Conclusion

The OLR Procedure Review Committee would like to thank the Supreme Court for the honor and privilege of allowing its members to be part of the efforts to improve the OLR for the betterment of our profession and the protection of the public. The Committee has worked diligently over the course of two years to study, in depth and at length, our state's disciplinary process, and to appraise its strengths and weaknesses at every stage and from the viewpoint of every participant. The Committee believes that each Petition, considered separately, has merit and will enhance the legal profession in this state. As a package, the Petitions represent a significant rethinking and reworking of the OLR Process that the Committee believes fulfills its mission to submit recommendations that will increase the efficiency, effectiveness, and fairness of the OLR process.

APPENDIX 1

OLR Procedure Review Committee

Topics for Investigation

The following were topics generated by the Committee's discussions and research:

1. Confidentiality of Complaints
    a. Interest of Protecting the Public
    b. Notification of a respondent's employer
2. Change in Process
    a. Should the PRC meet more often
    b. Delay caused by waiting for underlying civil or criminal case to resolve
3. Referees
    a. Qualifications
    b. Appointment process
4. OLR Structure and the potential to combine investigative and legal staff
5. OLR Charging and alternatives
    a. Charging Issues
    b. "Plea bargaining"
    c. Early decisions
    d. Diversion with education and/or monitoring
6. Reinstatement process
7. District Committees
8. Grievants' rights
9. Appeal of OLR decisions
10. Lifetime revocation
11. Costs of the disciplinary process
12. Restitution
13. Ethics rules and attorneys as mandatory reporters
14. Trust account rules and procedures
15. Application by the Supreme Court of SCR 21.18 (1)

APPENDIX 1

The following were the issues raised by the Chief Justice:

Issues relating to Referees

1. Who decides which referees are appointed to serve the court

2. Who decides which referee is assigned to a particular OLR matter

3. Should OLR be allowed to substitute a referee

4. Should the court limit the number of referees or revise the existing appointment list

5. Review Wisconsin Referee Bench Manual on court's website

6. Referee handling of default cases (insufficient factual basis; failure to find bad faith) and procedures for approving stipulations

7. Perception that referees are not independent of the OLR

Issues relating to Investigation stage

1. Perceived OLR failure to triage cases, i.e. move more quickly against truly bad actors who need to be suspended

2. Failures to seek temporary suspension in pending disciplinary proceeding when clearly warranted

3. Should respondents' counsel be encouraged to participate sooner

4. Causes for delay and long processing time for investigations

Issues relating to OLR charging and litigation

1. Should OLR have a right to "plea bargain"

2. Should OLR have more charging discretion

3. Overcharging of counts, esp. charges related to trust accounts

4. Over-litigating

5. Litigating de minimis violations, esp. over-charging minor trust account issues

6. Use of diversion program

7. Which cases are appealed and what are some criteria for appealing

8. How frequently does the PRC agree with OLR recommendation

9. Use of past disciplinary history to prove present wrong

10. OLR bringing serial complaints against an attorney rather than trying to fold all counts into one complaint

APPENDIX 1

Issues relating to Restitution, Sanctions and Costs

1. OLR declining to request restitution on the grounds of there being no reasonably ascertainable amount when restitution seems appropriate based on record.
2. Managing costs
3. Should a 30 days suspension be a standard possible sanction

Other

1. Reinstatement process very long; unfair impact on suspended attorneys
2. Advanced fee issue in trust account rule
3. Alternatives to WisLAP Monitoring, appropriate level of detail in orders directing monitoring or involving substance abuse seek input form WisLAP

APPENDIX 2

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to the charging process in attorney disciplinary proceedings **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Charging Process FOR AN ORDER CREATING Supreme Court Rules 22.02 (6)(d), 22.05 (1)(e), and 22.11 (2)(b) and (c), REPEALING Supreme Court Rule 22.10 (7)(b) and (c), AMENDING Supreme Court Rules 22.02 (4) and (6)(a), 22.05 (2), and 22.10 (4) and RENUMBERING AND AMENDING Supreme Court Rules 22.10 (7)(a) and 22.11 (2).

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Charging Process respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting the charging process in attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Charging Process respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 22.02 (4) is amended to read:
22.02 (4) The staff shall notify the grievant in writing that the grievant may obtain review by the director of the staff's closure of a matter under sub. (2)(c) by submitting to the director a written request. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the closure. The director may, upon a timely request by the grievant for additional time, extend the time for submission of additional information relating to the request for review. If the director affirms the closure, he or she shall provide to the grievant a brief written statement of reasons for affirmation. The decision of the director affirming the closure or referring the matter to staff for further evaluation is final, and there shall be no review of the director's decision.

Section 2. SCR 22.02 (6)(a) is amended to read:
22.02 (6)(a) Close the matter for lack of an allegation of possible misconduct or medical incapacity or lack of sufficient information of cause to proceed. The director shall ~~notify~~ provide to the grievant written notice of the decision to close, accompanied by a brief written statement of reasons for the director's decision. The notice shall inform the grievant ~~in writing~~ that the grievant may obtain review by a preliminary review panel of the director's closure by submitting a written request to the director. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the closure. The director shall send the request for review to the chairperson of the preliminary review committee, who shall assign it to a preliminary review panel. Upon a timely request by the grievant for additional time, the

director shall report the request to the chairperson of the preliminary review committee, who may extend the time for submission of additional information relating to the request for review.

Section 3. SCR 22.02 (6)(d) is created to read:
22.02 (6)(d) Resolve the matter with a consensual reprimand as provided by SCR 22.09.

Section 4. SCR 22.05 (1)(e) is created to read:
22.05 (1)(e) With the mutual consent of the attorney and the director to waive presentation of the matter to the preliminary review committee, proceed in any manner authorized by SCR 22.08(2).

Section 5. SCR 22.05 (2) is amended to read:
22.05 (2) ~~The~~ If the director dismisses the matter under sub. (1), the director shall ~~notify~~ provide to the grievant ~~in writing~~ written notice of the decision to dismiss, accompanied by a brief written statement of reasons for the director's decision. The notice shall inform the grievant that the grievant may obtain review by a preliminary review panel of the director's dismissal of a matter under sub. (1) by submitting to the director a written request. The request for review must be received by the director within 30 days after the date of the letter notifying the grievant of the dismissal. The director shall send the request to the chairperson of the preliminary review committee, who shall assign it to a preliminary review panel. Upon a timely request by the grievant for additional time, the director shall report the request to the chairperson of the preliminary review committee, who may extend the time for submission of additional information relating to the request for review.

Section 6. SCR 22.10 (4) is amended to read:
22.10 (4) *Diversion agreement.* If the attorney agrees to diversion to an alternatives to discipline program, the terms of the diversion shall be set forth in a written agreement between the attorney and the director. The agreement shall specify the program to which the attorney is diverted, the general purpose of the diversion, the manner in which the attorney's compliance with the program is to be monitored, and the requirement, if any, for payment of restitution or costs. If the diversion agreement is entered into after the director has reported the matter to the preliminary review committee, pursuant to SCR 22.06(1), the ~~agreement shall be submitted for approval to the preliminary review panel to which the matter has been assigned. If the preliminary review panel rejects the agreement, the matter shall proceed as otherwise provided in this chapter~~ matter shall be withdrawn from the preliminary review committee.

Section 7. SCR 22.10 (7)(a) is renumbered to SCR 22.10 (7) and amended to read:
22.10 (7) *Breach of diversion agreement.* If the director has reason to believe that the attorney has breached a diversion agreement ~~entered into prior to a report of the matter to the preliminary review committee, pursuant to SCR 22.06(1)~~, the attorney shall be given the opportunity to respond, and the ~~director~~ parties may modify the diversion agreement or the director may, in the director's sole discretion, terminate the diversion agreement and proceed with the matter as otherwise provided in this chapter.

Section 8. SCR 22.10 (7)(b) and (c) are repealed.

Section 9. SCR 22.11 (2) is renumbered to SCR (2)(a) and amended to read:
22.11 (2)(a) ~~The~~ Except as provided in sub. (b) or (c), the complaint shall set forth only those facts and misconduct allegations for which the preliminary review panel determined there was cause to proceed. ~~and~~ The complaint may set forth the discipline or other disposition sought. ~~Facts and misconduct allegations arising under SCR 22.20 and SCR 22.22 may be set forth in a complaint without a preliminary review panel finding of cause to proceed.~~

Section 10. SCR 22.11 (2)(b) is created to read:
22.11 (2)(b) A complaint may set forth facts and misconduct allegations arising under SCR 22.20 and SCR 22.22 without a preliminary review panel finding of cause to proceed.

Section 11. SCR 22.11 (2)(c) is created to read:
22.11 (2)(c) A complaint may set forth facts and misconduct allegations without a preliminary review panel finding of cause to proceed if presentation to the preliminary review committee is waived under SCR 22.05 (1)(e).

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Paul Schwarzenbart, Chair, Charging Process Subcommittee

APPENDIX 3

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to attorney disciplinary proceedings **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Charging Process FOR AN ORDER CREATING Supreme Court Rule 22.185 AND AMENDING Supreme Court Rules 22.24 (1) and 22.38.

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Charging Process respectfully petitions the Supreme Court to create and amend certain Supreme Court Rules affecting attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Charging Process respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 22.185 is created to read:
22.185 Enforcement of Disciplinary Orders.

(1) The Supreme Court, on its own motion, upon the motion of the director, or upon the motion of a special investigator acting under SCR 22.25 filed in the disciplinary proceeding in which an order was issued, may enforce any disciplinary order where the respondent has failed to substantially comply with the order.

(2) Upon filing of a motion under sub. (1), the Supreme Court may order the respondent to show cause why the relief requested in the motion should not be granted. Within the time set forth in the order, the respondent shall have the right to file with the Supreme Court a written response to the order to show cause, and respondent shall serve a copy of such response on the director, or special investigator. The director, or special investigator, may file a reply memorandum within 10 days after filing of the response.

(3) The Supreme Court may decide the motion upon the submissions of the parties, or may refer the matter to the referee appointed in the proceeding, who shall promptly conduct a hearing and file a report with the Supreme Court containing findings of fact, conclusions of law, and a recommendation for disposition of the motion. Unless otherwise directed by the Supreme Court, the referee shall follow the procedures in SCR 22.15 and SCR 22.16, and may conduct the hearing by telephone. A report issued by the referee is reviewable under SCR 22.17.

(4) Upon the submissions of the parties, or upon receipt of the report of the referee, the Supreme Court shall decide the motion, and may either deny or dismiss the motion, or issue such orders as are necessary to enforce the order.

(5) Nothing in this rule shall:

(a) Limit the authority of the director, or a special investigator, to initiate an investigation or proceeding for misconduct or medical incapacity under these rules.

(b) Limit the constitutional, statutory, or inherent authority of the Supreme Court to enforce an order issued in a disciplinary proceeding.

Section 2. SCR 22.24 (1) is amended to read:
22.24 (1) The Supreme Court may assess against the respondent all or a portion of the costs of a disciplinary proceeding in which misconduct is found, a medical incapacity proceeding in which it finds a medical incapacity, ~~or~~ a reinstatement proceeding, or a motion to enforce an order issued in a disciplinary proceeding, and may enter a judgment for costs. The director may assess all or a portion of the costs of an investigation when discipline is imposed under SCR 22.09. Costs are payable to the office of lawyer regulation.

Section 3. SCR 22.38 is amended to read:
22.38 Allegations of misconduct in a complaint, allegations of medical incapacity in a petition, allegations of noncompliance with an order of the Supreme Court issued in a disciplinary proceeding, and character and fitness to practice law shall be established by evidence that is clear, satisfactory and convincing.

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Paul Schwarzenbart, Chair, Charging Process Subcommittee

APPENDIX 4

MEMORANDUM

To Office of Lawyer Regulation ("OLR") Procedure Review Committee

From Charging Process Subcommittee

Date November 26, 2018

Re 13-05 Petition

BACKGROUND

On September 5, 2017, the Charging Process Subcommittee ("CPS") accepted the task of reviewing and making a recommendation regarding whether the Wisconsin Supreme Court should adopt a rule providing for a procedure to enforce orders issued in disciplinary proceedings ("disciplinary orders").

As outlined in a memorandum dated May 22, 2017, from Supreme Court Commissioner Julie Anne Rich to the OLR Procedure Review Committee ("Committee"), Rule Petition 13-05, filed jointly by the Office of Lawyer Regulation, the Board of Administrative Oversight and the State Bar of Wisconsin, proposed adoption of such a rule.[1] The Petition was filed in response to court's suggestions, in two disciplinary decisions,[2] that such a rule might be needed. The court ultimately denied the petition, and it tabled a revised petition (13-05A) modifying the original proposal, and the court referred the matter to Committee. Further details are spelled out in Commissioner Rich's memorandum and are not repeated here.

The CPS initially reviewed the 13-05 Petition issue very briefly on September 12, 2017. Notes for discussion were shared with subcommittee members on October 3, 2017 and were briefly reviewed on October 9, 2017 and December 7, 2017. A general consensus emerged from these discussions that the court would most likely be receptive to a simple, straightforward rule – one the subcommittee dubbed "minimalist."

The 13-05 Petition issue was discussed at subcommittee meetings on February and March, including a meeting on March 29, 2018, although we had difficulty obtaining quorums for those meetings due to unexpected scheduling problems. The general consensus among the members who were able to participate was to keep it "minimalist."

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[1] The petition was entitled *Petition to Create a Supreme Court Rule for Enforcement of Supreme Court Disciplinary Orders* and is referred to in this memorandum as the 13-05 Petition.

[2] *See Disciplinary Proceedings Against Lister*, 2012 WI 102, 343 Wis. 2d 532, 817 N.W.2d 867, and *Disciplinary Proceedings Against LeSieur*, 2013 WI 39, 347 Wis. 2d 190, 832 N.W.2d 67.

In these meetings, initial drafts were reviewed, based on edits of the proposal made in Petition 13-05A, and members suggested we review the law in other jurisdictions.

On April 11, 2018, the research memorandum addressing the law in other jurisdictions and a revised draft were circulated among the subcommittee members for review. On Friday May 18, 2018, the subcommittee had a scheduled teleconference, but two members had last minute conflicts that prevented their participation. After reviewing the research and the draft, the members able to participate agreed to go forward with the draft. The remaining members subsequently concurred in this judgment.

COMMENT

Research disclosed scant authority addressing the process for enforcing disciplinary orders. In *Lawyer Disciplinary Bd. v. Ball*, 633 S.E.2d 241 (W.Va. 2006), the court addressed the concern expressed by the Hearing Panel Subcommittee of the Lawyer Disciplinary Board[3] that it lacked any mechanism to enforce restitution other than through restrictions on a lawyer's license or as a condition for reinstatement. 633 S.E.2d at 252.

In response, the court stated that it was "at a loss to understand the Panel's position" and that the court's "disciplinary orders are not intended to be empty noise." The court stated that when it imposed sanctions on an attorney "the attorney is still subject to the continuing jurisdiction of this Court as a result of the disciplinary order." 633 S.E.2d at 253. The court therefore "construe[d] the power and duty of [the ODC] broadly to ... authorize prosecution of enforcement actions by seeking such relief as injunctions and punishment for contempt of court for noncompliance." *Id*.

In an earlier case, *Matter of Disciplinary Action Against Larson*, 512 N.W.2d 454 (N.D. 1994), the Supreme Court of North Dakota had reached the same result. While filing a new disciplinary action against an attorney for failing to comply with a disciplinary order was one option, the court construed the authority of disciplinary counsel to "authorize prosecution of enforcement actions by seeking such relief as injunctions and punishment for contempt of court for noncompliance" with disciplinary orders. 512 N.W.2d at 458.

With that background, the subcommittee members carefully reviewed the memorandum from Julie Rich. From that overview, it appeared a narrow majority of the court supports the idea of having a procedural rule to govern the procedure for OLR to seek enforcement of a disciplinary order without having to resort to the extreme measure of initiating a new disciplinary proceeding. Therefore, the recommended new rule would operate as follows:

- Subpart (1) explicitly provides that disciplinary orders may be enforced in the context of the original proceeding in which the order was issued.

[3] The Panel in that state plays the same role as referees in the state of Wisconsin.

- Subpart (1) allows the court to enforce compliance on its own motion or on motion of the director or a special investigator acting under SCR 22.25 wherever the noncompliance is "substantial."

- Under subpart (2), the Supreme Court "may" but is not required to issue an order to show cause directing the lawyer to show why the relief sought shall not be granted, with a 10 day reply time afforded to the OLR Director.

- Under subpart (3), the Supreme Court "may" determine the motion on written submissions, or the court may refer the matter to the referee appointed in the proceeding (meaning the original proceeding) to conduct a hearing and file a report.

- Subpart (5) provides that this procedural rule is no way limits the director's authority or the Supreme Court's authority.

- SCR 22.24 is amended to allow for the imposition of costs against the lawyer in a motion to enforce the disciplinary order.

- SCR 22.38 is amended to provide that the middle burden of proof also applies in the part of the proceeding seeking enforcement of the disciplinary order.

APPENDIX 5

Charging Process subcommittee's Discussion on "Plea Bargaining"

"Plea bargaining," commonly used criminal practice, is not a statutory device. Rather, it is a practice that has evolved in American jurisprudence since the middle of the 19th Century. *See generally* B. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 Ann. Rev. L. & Soc. Sci. 131 (2005).

The Wisconsin Supreme Court first addressed the pros and cons attendant to the practice of plea bargaining in *Jung v. State*, 32 Wis. 2d 541, 145 N.W.2d 684 (1966), where a defendant challenged on equal protection grounds the leniency in sentencing afforded to two other participants in the armed robbery for which he was convicted. While the court expressed reservations about the practice and of the justification for lighter sentencing in consideration of a guilty plea, it acknowledged that the practice "may assist the district attorney, reduce court backlogs and result in more economical administration of justice …." 32 Wis. 2d at 551.

Despite its reservations expressed in *Jung*, it appears the court has never suggested that plea bargaining should be banned. If anything, the court has done the opposite, at least implicitly. In 1973, in adopting the Wisconsin Rules of Evidence, the court created Wis. Stat. (Rule) § 904.10, which provides that evidence of a plea of guilty, later withdrawn, is not admissible and that statements made in court or to the prosecuting attorney in connection with plea negotiations also are not admissible. *See, e.g., State v. Myrick*, 2014 WI 55, 354 Wis. 2d 828, 848 N.W.2d 743 (holding defendant's testimony at preliminary examination of a co-defendant was barred by Rule § 904.10 because given in connection with an offer to plead guilty).

In contrast to its acceptance, indeed what could be characterized as its encouragement, of plea negotiations (that lead to plea bargains) in criminal practice, this court has explicitly admonished the Office of Lawyer Regulation (OLR) that it cannot engage in plea bargaining. *See Disciplinary Proceedings Against Inglimo*, 2007 WI 126, ¶ 85, 305 Wis. 2d 71, 740 N.W.2d 125 ("Office of Lawyer Regulation (OLR) is not authorized to plea bargain attorney disciplinary matters, although it may enter into stipulations of fact and law and jointly request the imposition of a certain level of discipline that is supported by the particular facts of a matter."). OLR continues to abide by the court's directions in this respect. *See, e.g., Disciplinary Proceedings against Kratz*, 2014 WI 31, 353 Wis. 2d 696, 851 N.W.2d 219 ("The OLR further informs us that it reminded Attorney Kratz that this court prohibits parties in OLR cases from engaging in plea bargaining.").

In adopting the Wisconsin Rules of Civil Procedure in 1975, following the lead of the drafters of the Federal Rules of Civil Procedure, this court stated that Chs. 801 to 847 of the Wisconsin Statutes "shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding." *Compare* Fed.R.Civ.P. 1. Evidentiary hearings in disciplinary proceedings are conducted as civil trials to the court and rules of civil procedure and evidence shall be followed in the hearings. SCR 22.16(1). The Charging Process subcommittee believes that the objective in disciplinary matters also should be achieving the "just, speedy and inexpensive determination" of the matter. The Charging Process subcommittee believes that the court's absolute prohibition upon plea bargaining in disciplinary matters is inconsistent with this objective.

The prohibition upon plea bargaining leaves the parties with essentially two options. One, all counts must be litigated to resolution.[4] Two, the parties can enter into a stipulation of facts and law that resolves all claims on the merits.[5] These limited options appear predicated upon an almost utopian desire to obtain a scientifically certain result for each disciplinary count upon which a preliminary review panel finds cause to proceed, regardless of the costs to the attorney and the judicial system, and regardless whether the resolution of each specific count would materially affect the court's decision as to sanction.

The Charging Process subcommittee believes this absolute prohibition upon "plea bargaining" defeats the objective of obtaining a "just, speedy and inexpensive determination" in disciplinary matters. The Charging Process subcommittee believes the parties should be afforded greater flexibility by allowing the kind of give and take ordinarily afforded in plea negotiations in criminal matters. In addition to advancing the interest of efficiency in the use of resources available to the judicial branch, it also has the potential benefit of reducing the likelihood of disputes about costs where, after trial, the OLR fails to prove one or more counts by clear and convincing evidence. *See, e.g., Disciplinary Proceedings Against Frisch*, 2010 WI 60, 326 Wis. 2d 128, 784 N.W.2d 670 (reducing recoverable costs from $12,000 to $1,500 based upon OLR's failure to prevail on most significant count). And making the tool of plea bargaining available to the parties would not impair the court's superintending authority as to disciplinary matters, because the court retains ultimate authority as to sanction.

Lastly, the Charging Process subcommittee believes that authorization of "plea bargaining" is not a proper subject of a procedural rule. There is no specific rule prohibiting plea bargaining, so there is no rule that can be amended to allow it. Plea bargaining evolved in criminal practice as a product of common law. The prohibition upon plea bargaining in disciplinary matters evolved as a result of the court exercising its constitutional and inherent authority over the judicial branch and in its regulation of the legal profession. How to unwind the prohibition, if the court concludes it would be appropriate to do so, is a matter best left to the court.

[4] There is sort of an intermediate option. The parties could stipulate to the facts and brief contested issues of law, but in the end this is the same as litigating the issues, albeit bypassing the evidentiary hearing.

[5] Assuming the referee and the court accept the stipulation.

APPENDIX 6

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to referees and attorney discipline. **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Referees FOR AN ORDER REPEALING AND RECREATING Supreme Court Rule 21.08 AND AMENDING Supreme Court Rules 21.11(4), 22.09(2), 22.13 (3), 22.16 (6), 22.25(6)(c), 22.30(1), 22.34(10), and 22.36(5).

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Referees petitions the Supreme Court to create and amend certain Supreme Court Rules affecting attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Referees respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 21.08 is repealed and recreated to read:
21.08 Referees.
(1) The referee panel consists of no more than 24 lawyers and reserve judges appointed by the Supreme Court. Referees shall be members of the State Bar of Wisconsin in good standing. Referees serve staggered four-year terms. A referee may be reappointed to serve consecutive terms. If a referee's term ends while an assigned matter remains pending, the referee may oversee completion of the matter unless, on its own motion or on motion of the parties, the Supreme Court directs the appointment of a new referee.

(2) Referees function under the supervision of the Supreme Court.

(3) The duties of a referee are:

(a) To preside over and conduct hearings on complaints of attorney misconduct, on petitions alleging attorney medical incapacity, and on petitions for license reinstatement, and to issue orders necessary to advance the proceeding.
(b) To make written findings, conclusions, and recommendations, and to submit them to the Supreme Court for review and appropriate action.
(c) To review consensual discipline under SCR 22.09.
(d) To conduct hearings, make written findings, conclusions, and recommendations on other matters as the Supreme Court may direct.

(4) Referees shall function pursuant to the procedures set forth in SCR chapter 22.

(5) Each referee shall participate in mandatory referee training developed by the judicial education office, as follows:

(a) Each newly appointed referee shall attend the earliest one-half day new referee orientation seminar offered following his or her appointment, unless a period of extension is granted by the judicial education office, upon prior application by the referee. A referee reappointed to serve a consecutive term need not repeat the new referee orientation seminar.
(b) Each referee shall attend a one-half day referee training seminar every two years during the referee's four-year term when offered by the judicial education office.
(c) If a referee fails to comply with the mandatory referee training, the judicial education office shall advise the Supreme Court and the Supreme Court may, following notice to the referee, remove the referee from the referee panel provided in SCR 21.08.

Section 2. SCR 21.11 (4) is amended to read:
21.11 (4) ~~Staff of the Supreme Court shall provide formal~~ Formal training to the referees shall be provided as set forth in SCR 21.08.

Section 3. **SCR 22.09 (2) is amended to read:**
22.09 (2) The director shall request the appointment of a referee by providing in confidence to the clerk of the Supreme Court the names of the grievant and respondent, the address of the respondent's principal office, and the date of the consent agreement. The clerk or deputy clerk of the Supreme Court shall select ~~a~~ an available referee from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to~~ the location of the respondent's principal office. The chief justice or, in his or her absence, the ~~senior~~ chief justice's delegee shall appoint the referee selected by the clerk or deputy clerk. The director shall submit the agreement, accompanied by the respondent's public and private disciplinary history, to the appointed referee for review and approval. The director shall send a copy of the agreement to the grievant. The grievant may submit a written response to the director within 30 days after being notified of the agreement, and the director shall submit the response to the referee. The respondent and the director may submit comments to the referee regarding the grievant's response. The agreement, the grievant's response, and the comments of the respondent and director shall be considered by the referee in confidence.

Section 4. SCR 22.13 (3) is amended to read:
22.13 (3) Except as provided in SCR 22.12, upon receipt of proof of service of the complaint, the clerk or deputy clerk of the Supreme Court shall select ~~a~~ an available referee from the panel provided in SCR 21.08, based on ~~the availability and geographic proximity to~~ the location of the respondent's principal office~~,~~. ~~and t~~The chief justice or, in his or her absence, the ~~senior~~ chief justice's delegee shall issue an order appointing the referee selected by the clerk or deputy clerk to conduct a hearing on the complaint.

Section 5. SCR 22.16 (6) is amended to read:
22.16 (6) Within 30 days after the conclusion of the hearing, ~~or~~ the filing of the hearing transcript, or the filing of a final post-hearing brief, whichever is later, the referee shall file with the Supreme Court a report setting forth findings of fact, conclusions of law regarding the respondent's misconduct, if any, and a recommendation for dismissal of the proceeding or the

imposition of specific discipline, or a statement advising the court why the referee cannot comply with this deadline and the date by which the referee will file the report and recommendation.

Section 6. SCR 22.25 (6)(c) is amended to read:
22.25 (6)(c) The special preliminary review panel shall notify the grievant in writing that the grievant may obtain review by a referee of the panel's ~~dismissed~~ dismissal by submitting a written request to the director. ~~The~~An available referee shall be selected by the clerk or deputy clerk of the Supreme Court, from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to~~ the location of the respondent's principal office~~,~~. ~~and appointed by t~~The chief justice or, in his or her absence, the ~~senior~~ chief justice's delegee shall issue an order appointing the referee selected by the clerk or deputy clerk to review the dismissal. The request for review must be received within 30 days after the date of the letter notifying the grievant of the dismissal. The director may, upon a timely request by the grievant for additional time, extend the time for submission of additional information relating to the request for review. The decision of the referee affirming the dismissal or referring the matter to the special investigator for further investigation is final, and there shall be no review of the referee's decision.

Section 7. SCR 22.30 (1) is amended to read:
22.30 (1) The clerk or deputy clerk of the Supreme Court shall select an available referee from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to~~ the location of the petitioner's place of residence, and the chief justice or, in his or her absence, the ~~senior~~ chief justice's delegee shall issue an order appointing the referee selected by the clerk or deputy clerk to conduct a hearing on the petition for reinstatement. In the case of a license suspension, the hearing shall not be held prior to the expiration of the period of suspension. Following the appointment of a referee, the parties shall file all papers and pleadings with the Supreme Court and serve a copy on the referee.

Section 8. SCR 22.34 (10) is amended to read:
22.34 (10) The petition may be accompanied by a stipulation of the director and the respondent to a suspension or to the imposition of conditions on the respondent's practice of law. The Supreme Court may consider the petition and stipulation without the appointment of a referee. If the Supreme Court approves the stipulation, it shall issue an order consistent with the stipulation. If the Supreme Court rejects the stipulation, the clerk or deputy clerk of the Supreme Court shall select an available referee from the panel provided in SCR 21.08, based on ~~availability and geographic proximity to~~ the location of the respondent's place of residence~~,~~. ~~t~~The chief justice or, in his or her absence, the ~~senior~~ chief justice's delegee shall issue an order appointing the referee selected by the clerk or deputy clerk, and the matter shall proceed as a petition filed without a stipulation. A stipulation rejected by the Supreme Court has no evidentiary value and is without prejudice to the respondent's defense of the proceeding or the prosecution of the petition.

Section 9. SCR 22.36 (5) is amended to read:
22.36 (5) Following the investigation, the petition shall be submitted to a referee. ~~selected by t~~The clerk or deputy clerk of the Supreme Court shall select an available referee from the panel provided in SCR 21.08, based on ~~geographic proximity to~~ the location of the respondent's place of residence, and ~~appointed by~~ the chief justice or, in his or her absence, the ~~senior~~ chief justice's

delegee shall issue an order appointing the referee selected by the clerk or deputy clerk to review the petition.

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Jacquelynn Rothstein, Chair, Referees Subcommittee

APPENDIX 7

Referees Proposed Internal Operating Procedures

VI. Attorney Regulatory Process

A. Referees

1. Qualifications of Referees. Individuals appointed to serve as referees in attorney regulatory matters will be granted the powers of and have many of the same obligations as a trial court judge presiding over and trying a civil action from initiation through trial/hearing and decision. See SCR 22.16(1). In appointing individuals to the panel of referees, the court therefore looks for individuals with relevant experience and demonstrated ability to handle case-management and trial responsibilities. Individuals appointed to the panel of referees shall be members of the State Bar of Wisconsin in good standing. The court generally prefers candidates with a minimum of ten years of experience participating in trials. Such experience may have been gained in a variety of ways, including presiding over trials as a judge, participating in trials as a practitioner, or presiding over administrative or regulatory matters as a referee or an administrative law judge.

2. Application for and Appointment to Panel of Referees. Every two years, at least 75 days prior to the expiration of the terms of certain referees, the court issues a call for applications for appointment to the panel of referees. To referees whose terms are about to expire, the court sends a letter asking whether the individual wishes to be considered for reappointment to another term and whether the individual wishes to supplement his/her prior application. The court also places public notices inviting interested individuals to submit a written application for appointment to the panel of referees. At least 20 days prior to the start of the term, the court then appoints referees for the upcoming four-year term from the pool of individuals who have applied. The court maintains the written application form on its website. Referee applications are not made public.

3. Appointments to Replace a Referee on the Panel. If there is an opening in the panel of referees, the court appoints an individual to the panel of referees to serve out the remainder of the four-year term. The court may appoint an individual from the pool of applications from the most recent appointment process or may issue a special call for the submission of written applications.

4. Assignment of Referees. In assigning referees to particular matters, the clerk or deputy clerk of the Supreme Court considers the geographic location of the respondent attorney and the availability of potential referees, and discusses with potential referees whether any conflict of interest would lead the referee to recuse himself or herself if appointed. Subject to these considerations, the clerk or deputy clerk of the Supreme Court seeks to maintain a uniform distribution of matters among the referees on the panel. The chief justice or, in his or her absence, the chief justice's delegee signs the appointment order but typically is not otherwise involved in the referee assignment process for a particular matter.

5. Training of Referees. Training programs for referees shall be administered by the judicial education office, with the assistance of the Supreme Court commissioners. The director of judicial education may establish a committee to plan the referee training programs. While the subject(s) of any one training program shall be established by the judicial education office or the

committee, training sessions generally provide information about how to maintain a record; the handling of pretrial matters; the conduct of evidentiary hearings, including making evidentiary rulings; how to draft reports, including how to make findings of fact, conclusions of law, and recommendations; and other matters pertaining to the responsibilities of serving as a referee.

The training programs are held once every other year, typically within 60 days of the start of the new term for referees. The training program for new appointees to the panel of referees (new referee orientation seminar) is a half-day program. The training program for all referees on the panel is a half-day program that follows the program for new appointees. The judicial education office endeavors to allow live, remote participation in the training programs.

APPENDIX 8

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to reinstatement of a license to practice law in attorney disciplinary proceedings **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Reinstatement FOR AN ORDER REPEALING AND RECREATING Supreme Court Rule 22.30, AMENDING Supreme Court Rules 10.03 (6m) and (7), 22.12(1), 22.33, and 31.11 (1m) and (4), CREATING Supreme Court Rule 22.29 (4x) and 22.305, and REPEALING Supreme Court Rule 22.31.

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Reinstatement respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting reinstatement of a license to practice law in attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Reinstatement respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 10.03(6m) is amended to insert the following comment after that subsection:

Comment

Costs regarding the petition for reinstatement under subsection (6m)(b) may be assessed against the petitioner, as provided in SCR 22.24.

Section 2. SCR 10.03(7) is amended to insert the following comment after that subsection:

Comment

Costs regarding the petition for readmission under subsection (7)(b) may be assessed against the petitioner, as provided in SCR 22.24.

Section 3. SCR 22.12(1) is amended to read:

22.12(1) The director may file with the complaint a stipulation of the director and the respondent to the facts, conclusions of law regarding misconduct, and discipline to be imposed, together with a memorandum in support of the stipulation. The respondent may file a response to the Director's memorandum within 14 days of the date of filing of the stipulation. The Supreme Court may consider the complaint and stipulation without the appointment of a referee, in which

case the Supreme Court may approve the stipulation, reject the stipulation, or direct the parties to consider specific modifications to the stipulation.

Section 4. SCR 22.29(4x), and the following comment to be inserted after the subsection, are created to read:

22.29(4x) At the time that the petitioner serves a copy of the petition for reinstatement on the director, the petitioner shall also submit to the director a completed reinstatement questionnaire.

COMMENT

A blank copy of the reinstatement questionnaire may be obtained from the office of lawyer regulation. The questionnaire is used by the office of lawyer regulation to assist it in its investigation. The questionnaire is not to be filed with the court.

Section 5. SCR 22.30 is repealed and recreated to read:

22.30 (1) Promptly following the filing of the petition for reinstatement, the director shall publish a notice on the website of the office of lawyer regulation, in a newspaper of general circulation in all counties in which the petitioner maintained an office for the practice of law prior to suspension or revocation, in a newspaper of general circulation in the county of the petitioner's residence, and in an official publication of the state bar of Wisconsin.

(2) The notice shall contain all of the following:

(a) The name of the petitioner, the date on which the petition for reinstatement was filed, the case number assigned to the petition, a brief statement of the nature and date of suspension or revocation, and the matters required to be proved for reinstatement.

(b) The office of lawyer regulation will be investigating the eligibility of the petitioner for reinstatement.

(c) This notice is the only published notice regarding the petition for reinstatement.

(d) Interested parties may submit written comments regarding the petitioner and the reinstatement petition, the address (physical and electronic) to which written comments may be submitted, and the deadline for submitting written comments, which shall be 60 days following the date on which the petitioner for reinstatement was filed. All formal written comments regarding the petition shall be forwarded to a referee, if any, and to the Supreme Court.

(e) Individuals may request that notice of any reinstatement hearing regarding the petition be sent to an address they provide to the office of lawyer regulation.

(f) Only individuals who provide their address and ask to have notice of a reinstatement hearing will have a notice of a reinstatement hearing sent to them at the address provided.

(g) The office of lawyer regulation may contact individuals who submit written comments to obtain further information.

(h) Upon completion of the investigation, the director will file with the court a response to the petition stating either that the director does not oppose reinstatement and will negotiate a stipulation with the petition, which will be considered by the Supreme Court without the appointment of a referee or that the director opposes reinstatement and a referee will be appointed and a reinstatement hearing take place.

(i) Information regarding the status of the petition and any hearing will be available on the website of the office of lawyer regulation.

(3) Within 75 days after the filing of the petition, the board of bar examiners shall determine the attendance and reporting requirements of the petitioner, as required by SCR 31.06, and file with the court a report regarding the petitioner's compliance. Upon motion of the board of bar examiners or the petitioner for good cause shown, the court may grant the board of bar examiners an extension of time to complete the assessment of compliance and file the report regarding compliance. Failure of the petitioner to prove compliance within the time allowed, including any extension thereof, may subject the petition to immediate dismissal.

(4) Within 75 days after the filing of the petition, the director shall investigate the eligibility of the petitioner for reinstatement and shall file with the court a response to the petition stating whether the petitioner has demonstrated to the director satisfaction of all of the criteria for reinstatement or the director opposes the petition. Upon motion of the director or the petitioner for good cause shown, the court may grant the director an extension of time to complete the investigation and file the response to the petition.

(5)(a) If the director's response states that the petitioner has demonstrated to the director satisfaction of all of the criteria for reinstatement, the director and the petitioner shall prepare and file a stipulation containing all facts and conclusions of law necessary to satisfy the standards for reinstatement, identifying all conditions to be imposed on the petitioner or the petitioner's practice of law following reinstatement, and requesting that the court reinstate the petitioner's license to practice law in this state. The director shall also file a memorandum in support of the stipulation, which shall include a discussion of any material issue potentially adverse to the petition and an explanation as to why the director concludes that the issue does not prevent reinstatement. At the time of filing the stipulation and memorandum, the director shall also file with the court all formal written comments that have been received regarding the petition. The petitioner may file a response to the director's memorandum within 14 days of the date of filing of the stipulation.
(b) The Supreme Court shall consider the petition and stipulation without the appointment of a referee. The court may approve the stipulation, adopt the stipulated facts and conclusions of law, and reinstate the petitioner's license to practice law in Wisconsin; the court may reject the stipulation and refer the petition to a referee for a hearing and consideration under sub. (5) below as if no stipulation had been filed; or the court may direct the parties to consider modifications to the stipulation.
(c) If the Supreme Court directs the parties to consider specific modifications to the stipulation, the parties may, within 20 days of the date of the order, file a revised stipulation, in which case the Supreme Court may approve the revised stipulation, adopt the stipulated facts and conclusions of law, and reinstate the petitioner's license to practice law in Wisconsin; or the court may reject the stipulation and refer the petition to a referee for a hearing and consideration under sub. (5) below as if no stipulation had been filed. If the parties do not file a revised stipulation within 20 days of the date of the order or if the parties so request in writing, a referee shall be appointed and the petition shall be referred to the referee for a hearing and consideration under sub. (5) below as if no stipulation had been filed.
(d) A stipulation rejected by the Supreme Court has no evidentiary value and is without prejudice to the petitioner's prosecution of the petition for reinstatement or the director's response to the petition.

(6)(a) If the director opposes the petition for reinstatement, the clerk of the Supreme Court shall select a referee from the panel provided in SCR 21.08, based on availability and geographical proximity to the petitioner's place of residence, and the chief justice or, in his or her absence, the chief justice's delegee shall appoint the referee to conduct a hearing and prepare a report on the petition for reinstatement.
(b) The referee shall have the powers of a judge trying a civil action and shall conduct the proceedings regarding the petition pursuant to the rules of civil procedure, except where these rules provide a different procedure.
(c) Following the appointment of a referee, the parties shall file all papers and pleadings with the Supreme Court and serve a copy on the referee.
(d) Following the appointment of a referee, the director shall transfer to the referee all formal written comments regarding or in response to the petition. The director shall also provide the referee with a list of all individuals who requested notice of the hearing on the petition.
(e) The referee shall establish a schedule for proceedings and a hearing on the petition, which hearing shall be held at the earliest feasible date.
(f) At least 20 days prior to the hearing, the director shall provide written notice of the date, time, and location of the hearing to all individuals who requested notice of the hearing on the petition. If the hearing is rescheduled, the director shall provide written notice of the date, time, and location of the rescheduled hearing to all individuals who requested notice of the hearing on the petition. The director shall advise the referee that the director has complied with this notice requirement.
(g) The reinstatement hearing shall be public.
(h) The referee shall appoint a person to act as the court reporter to make a verbatim record of the proceedings as provided in SCR 71.01 to 71.03.
(i) The petitioner and the director or a person designated by the director shall appear at the hearing. The petitioner may be represented by counsel.
(j) The referee shall conduct the hearing as the trial of a civil action to the court. The hearing shall be conducted pursuant to the rules of civil procedure, but the rules of evidence shall not apply, and the referee may consider any relevant information presented. Interested persons may present information in support of or in opposition to reinstatement.

Section 6. SCR 22.31 is repealed.

Section 7. SCR 22.305 is created to read:
22.305 Standard for Reinstatement. At all times relevant to the petition, the petitioner has the burden of demonstrating, by clear, satisfactory, and convincing evidence, all of the following:

(1) That he or she has the moral character to practice law in Wisconsin.

(2) That his or her resumption of the practice of law will not be detrimental to the administration of justice or subversive of the public interest.

(3) That his or her representations in the petition, including the representations required by SCR 22.29(4)(a) to (m) and 22.29(5), are substantiated.

(4) That he or she has complied fully with the terms of the order of suspension or revocation and with the requirements of SCR 22.26.

Section 8. SCR 22.33 is amended to insert the following comment after that rule:

COMMENT

Costs regarding the petition for reinstatement may be assessed against the petitioner, as provided in SCR 22.24.

Section 9. SCR 31.11(1m) is amended to insert the following comment after that subsection:

COMMENT

Costs regarding the petition for reinstatement under subsection (1m) may be assessed against the petitioner, as provided in SCR 22.24.

Section 10. SCR 31.11(4) is amended to insert the following comment after that subsection:

COMMENT

Costs regarding the petition for reinstatement under subsection (4) may be assessed against the petitioner, as provided in SCR 22.24.

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Jacquelynn Rothstein, Chair, Reinstatement subcommittee

APPENDIX 9

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to permanent revocation of a license to practice law in attorney disciplinary proceedings **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Reinstatement FOR AN ORDER AMENDING Supreme Court Rules 21.16 (1m)(a) and 22.29 (2).

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Reinstatement respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting permanent revocation of a license to practice law in attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Confidentiality respectfully requests that the Supreme Court adopt the following rule:

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.

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.

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Jacquelynn Rothstein, Chair, Reinstatement Subcommittee

APPENDIX 10

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to confidentiality in attorney disciplinary proceedings **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Confidentiality FOR AN ORDER AMENDING Supreme Court Rules 21.18 (1), 21.19, 22.21 (2) and (3), 22.34 (12), and 22.40 (1), RENUMBERING AND AMENDING Supreme Court Rule 22.001 (6), aND CREATING Supreme Court Rules 222.001 (6) (b), 22.03 (2g) and (2r), 22.03 (5) (c), 2.21 (2m), 22.34 (12m), and 22.40 (1g), (1m), and (8).

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Confidentiality respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting confidentiality in attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Confidentiality respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 21.18 (1) is amended to read:
21.18 (1) Information, an inquiry, or a grievance concerning the conduct of an attorney shall be communicated to the director within ~~10~~ six years after the person communicating the information, inquiry or grievance knew or reasonably should have known of the conduct, whichever is ~~later~~ earlier, or shall be barred from proceedings under this chapter and SCR chapter 22.

Section 2. Supreme Court Rule 21.18 (2) is amended to read:
SCR 21.18 (2) The time during which a person who knew or should have known of the attorney's conduct is under a disability as provided in Wis. Stat. § 893.16 ~~(1997-98)~~ and the time during which the attorney acted to conceal the conduct from or mislead the person who knew or should have known of the conduct regarding the conduct are not part of the time specified in sub. (1).

Section 3. SCR 21.19 is amended to read:
21.19 Communications with the director, staff of the office of lawyer regulation, a district committee, a special investigator, retained counsel, the preliminary review committee, and a special preliminary review panel alleging attorney misconduct or medical incapacity and testimony given in an investigation or proceeding under SCR ch. 22 are privileged, except as provided under SCR 22.21, SCR 22.34, SCR 22.40 and SCR 22.03. No lawsuit predicated on these communications may be instituted against any grievant or witness. The director, staff of the

office of lawyer regulation, members of a district committee, special investigators, retained counsel, members of the preliminary review committee, members of a special preliminary review panel, referees, members of the board of administrative oversight, and persons designated by the director to monitor compliance with diversion agreements or with conditions imposed on the attorney's practice of law, shall be immune from suit for any conduct in the course of their official duties.

Section 4. SCR 22.001 (6) is renumbered SCR 22.001 (6)(a) and amended to read:
22.001 (6) (a) "Grievant" means the person who presents a grievance~~, except that~~ . Except as provided in par. (b), a judicial officer or a district committee who communicates a matter to the office of lawyer regulation in the course of official duties is not a grievant.

Section 5. SCR 22.001 (6) (b) is created to read:
22.001 (6) (b) A judicial officer who communicates a matter to the office of lawyer regulation may, at any time during the course of proceedings related to the grievance, elect to be a designated as a grievant.

Section 6. SCR 22.03 (2g) and (2r) are created to read:
22.03(2g) Upon receipt of a notice of investigation, the respondent shall promptly furnish a copy of the notice to the following:

(a) If the respondent practices in a law firm, a person in the law firm having supervisory authority over the respondent or, if no such person exists, any and all law firm partners and shareholders. In this paragraph, "law firm" has the same meaning as in SCR 20:1.0(d).

(b) If at the time of the events referenced in the notice of investigation the respondent practiced law in one or more law firms different from that in which the respondent practices at the time he or she receives the notice of investigation, a person in each such former law firm having supervisory authority over one or more other attorneys or, if no such person exists, at least one firm partner or shareholder. In this paragraph, "law firm" has the same meaning as in SCR 20:1.0(d).

(2r) The office of lawyer regulation may, in its discretion, inform the respondent in writing in the notice of investigation or in an accompanying paper of respondent's obligations under subsection (2g), and may, in its discretion, transmit a copy of the notice of investigation to any of the persons identified in subsections (2g)(a) and (b).

Section 7. SCR 22.03 (5) (c) is created to read:
22.03 (5) (c) The director may, in his or her discretion, provide the respondent a copy of the grievance and of any information supplied by the grievant that is not included in the grievance. In exercising such discretion, the director shall consider:

1. The grievant's interest in privacy.

2. The respondent's interest in being fully informed of the basis for the grievance and of any proceedings taken against him or her pursuant to the grievance.

3. Any effect that supplying or withholding a copy of the grievance and information supplied by the grievant may have upon the public interest.

Section 8. SCR 22.21 (2) is amended to read:
22.21 (2) Before entering an order suspending an attorney's license under sub. (1), the Supreme Court shall order the attorney to show cause why the license to practice law should not be suspended temporarily. The attorney shall file with the Supreme Court a written response to the order and serve a copy of the response on the director within the time set forth in the order. The director, or special investigator acting under SCR 22.25, may file a memorandum in support of or in opposition to the temporary license suspension within 10 days after the attorney's response is filed. ~~All~~ Except as provided in sub. (2m) and (3), SCR 22.34 and SCR 22.40, all papers, files, transcripts, communications, and proceedings ~~shall be confidential and shall remain~~ are confidential ~~until the Supreme Court has issued an order to show cause~~.

Section 9. SCR 22.21 (2m) is created to read:
22.21 (2m) Following the issuance of the order to show cause under sub. (2), the motion under sub. (1), and the order to show cause are public information, except as follows:

(a) The name of the special investigator or any person alleging that the attorney committed an act of misconduct.

(b) Medical information regarding the attorney who is the subject of the order to show cause.

(c) Financial information regarding the attorney who is the subject of the order to show cause, or of any person alleging the attorney committed an act of misconduct, if the financial information is unrelated to the order to show cause.

(d) Information that is subject to legal privilege, including the attorney-client privilege, unless such privilege is waived in writing by the person or persons holding such privilege.

(e) As otherwise expressly provided in this chapter or by law or by order of the Supreme Court.

Section 10. SCR 22.21 (3) is amended to read:
22.21 (3) *Filing of Complaint.* The director, or a special investigator acting under SCR 22.25, shall file the complaint in the disciplinary proceeding within 4 months of the effective date of the temporary suspension imposed under this section, or shall show cause why the temporary suspension should continue. The respondent attorney may file a response with the Supreme Court within 10 days of service. The statement of cause to continue the temporary suspension and the attorney's response are public information, subject to the same exceptions set forth in sub. (2m) (a) to (d). Reinstatement under this section shall not terminate any misconduct investigation or disciplinary proceeding pending against the attorney.

Section 11. SCR 22.34 (12) is amended to read:

22.34 (12) All papers, files, transcripts, communications and proceedings shall be confidential and shall remain ~~confidential until the Supreme Court has issued an order revoking, suspending indefinitely, or imposing conditions on the attorney's license to practice law~~, except as provided in sub. (12m) and except that acknowledgement that a proceeding is pending and notification to another court before which a similar petition is pending may be made when considered necessary by the director and that any publication the Supreme Court considers necessary may be made.

Section 12. SCR 22.34 (12m) is created to read:

22.34 (12m) Following the issuance by the Supreme Court of an order revoking, suspending indefinitely, or imposing conditions on the attorney's license to practice law, the petition and all papers relating to the petition that are filed with the Supreme Court are public information.

Section 13. SCR 22.40 (1) is amended to read:
22.40 (1) ~~Prior to the filing of a misconduct complaint, medical incapacity petition, or petition for temporary license suspension~~ Except as provided in sub. (1g) through (7) and SCR 22.21(2), all papers, files, transcripts, and communications ~~in any matter~~ relating to an allegation of attorney misconduct involving the office of lawyer regulation are to be held in confidence by the director and staff of the office of lawyer regulation, the members of the district committees, special investigators, the members of the special preliminary review panel, and the members of the preliminary review committee. Following the filing of a complaint or petition, the proceeding and all papers filed in it are public, except where expressly provided otherwise in this chapter or by law.

Section 14. SCR 22.40 (1g), (1m), and (8) are created to read:
22.40 (1g) Following the issuance by the preliminary review panel of a written Cause to Proceed Determination finding cause to proceed on at least one count of misconduct, the written Cause to Proceed Determination is public information, except as follows:

(a) The name of the grievant.

(b) The names of the voting preliminary review committee members, the vote count and other information relating to how each member voted, and information relating to counts or allegations for which cause to proceed was not found.

(c) Medical information regarding the grievant and the attorney who is the subject of the Cause to Proceed Determination.

(d) Financial information regarding the grievant and the attorney who is the subject of the Cause to Proceed Determination, if the financial information is unrelated to any allegation of misconduct for which there is Cause to Proceed.

(e) Information that is subject to legal privilege, including the attorney-client privilege, unless such privilege is waived in writing by the person or persons holding such privilege.

(f) As otherwise expressly provided in this chapter or by law or by order of the Supreme Court.

(1m) Following the filing by the director in the Supreme Court of a complaint alleging at least one count of misconduct, the proceeding, the complaint or petition, and all papers relating to the complaint or petition that are filed with the Supreme Court are public information, except where expressly provided otherwise in this chapter or by law.

(8) Subsections (1g) and (1m) do not apply to a proceeding under SCR 22.34 where there is no allegation of misconduct against the attorney who is the subject of the proceeding.

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Joseph Ranney, Chair, Confidentiality Subcommittee

APPENDIX 11

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to the charging process in attorney disciplinary proceedings **PETITION 18-___**

PETITION OF the OLR Process Review Committee's Subcommittee on Process FOR AN ORDER AMENDING Supreme Court Rules 22.02(20(d), 22.25(3), 22.25(4)(intro), 22.26, CREATING Supreme Court Rules 22.01(bg), 22.02(6)(d), 22.25(3m), REPEALING Supreme Court Rules 21.01(b), 21.06, and RENUMBERING AND AMENDING Supreme Court Rules

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Process respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting the charging process in attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee's Subcommittee on Process respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 21.01(b) is repealed.

Section 2. SCR 21.01 (bg) is created to read:

22.01(bg) Special investigators and the special preliminary review panel, provided in SCR 22.25.

Section 3. SCR 21.06 is repealed.

Section 4. SCR 22.02(2)(d) is amended to read:
22.02(2)(d) Refer the matter to the director with a recommendation that the matter be investigated by staff ~~or~~, diverted, or resolved by a consensual reprimand.

Section 5. SCR 22.02(6)(d) is created to read:
22.02(6)(d) Resolve the matter with a consensual reprimand as provided by SCR 22.09.

Section 6. SCR 22.03(4) is repealed and recreated to read:

22.03(4)(a) If respondent fails fully and fairly to disclose all facts and circumstances pertaining to the alleged misconduct within the deadline established pursuant to par. (2), including any extension granted by the director or special investigator, or fails to cooperate in other respects with an investigation, the director or special investigator shall notify respondent by personal

service that respondent's license to practice law will be automatically suspended unless, within 20 days after receiving such personal service, respondent:

1. Fully and fairly discloses all facts and circumstances pertaining to the alleged misconduct or otherwise cooperates with the investigation, to the reasonable satisfaction of the director or special investigator; or,

2. Submits evidence to the director or special investigator demonstrating, to the reasonable satisfaction of the director or special investigator, respondent's inability to disclose the facts and circumstances or otherwise cooperate with the investigation; or,

3. Files a motion with the Supreme Court showing cause why respondent's license to practice should not be suspended for willful failure to respond or cooperate with the investigation.

(b) 1. If respondent satisfies the condition of par. (a) 1., the director or special investigator shall proceed with the investigation.

2. If the respondent satisfies the condition of par. (a) 2., the director or special investigator may establish a new deadline for respondent to disclose fully and fairly all facts and circumstances or otherwise cooperate with the investigation. If respondent fails to disclose fully and fairly all facts and circumstances or otherwise cooperate with the investigation, to the reasonable satisfaction of the director or special investigator, before expiration of the deadline established pursuant to this par. 2, respondent's license to practice law is automatically suspended.

3. If respondent files a motion with the Supreme Court pursuant to par. (a) 3., the Supreme Court shall act upon respondent's motion, following its own procedures. All papers, files, transcripts, communications, and proceedings on the motion are confidential until the Supreme Court has acted upon the motion.

(c) 1. If the respondent fails to satisfy any of par. (a) 1, 2, or 3, or fails to meet a deadline established pursuant to par. (b) 2., or if the Supreme Court rejects respondent's motion submitted pursuant to par. (b) 3., respondent's license is suspended and the director shall promptly send notice of the suspension to the clerk of the Supreme Court, all Supreme Court justices, all courts of appeal and circuit courts, all circuit court commissioners, all circuit court clerks, all juvenile court clerks, all registers in probate, the executive director of the state bar of Wisconsin, the Wisconsin State Public Defenders' Office, and the clerks of the federal districts in Wisconsin.

2. SCR 22.26 (2) applies immediately upon suspension to a respondent whose license to practice law is suspended pursuant to this Rule. If respondents' suspension hereunder extends beyond 30 days, SCR 22.26 in its entirety applies to the respondent beginning on the 31st day.

(d) 1. Notwithstanding SCR 22.28, if, within 18 months of the date of suspension pursuant to SCR 22.03(4), a respondent whose license was suspended for failure to satisfy a condition of par. (a) 1. to 3., or failure to meet a deadline established pursuant to par. (b) 2., discloses fully and fairly all facts and circumstances pertaining to the alleged misconduct, or otherwise cooperates

with the investigation, to the reasonable satisfaction of the director or special investigator, respondent's license to practice law shall be automatically reinstated. Upon reinstatement of a license pursuant to this subsection, the director or special investigator shall send notice of the reinstatement to each person identified in par. (c) 1.

2. Respondent, following suspension of respondent's license pursuant to paragraph (4) and whose license was not automatically reinstated pursuant to paragraph (e)(1) above, may apply for reinstatement pursuant to SCR 22.28(3).

Section 7. SCR 22.25(3) is amended to read:
22.25(3) If the special investigator determines that there is not sufficient information to support ~~a possible finding of cause to proceed~~ an allegation of possible misconduct, the special investigator may close the matter. The special investigator shall notify the grievant in writing that the grievant may obtain review by the special preliminary review panel of the closure by submitting a written request to the special investigator. The request for review must be received by the special investigator within 30 days after the date of the letter notifying the grievant of the 181 closure. The special investigator shall send the request for review to the special preliminary review panel ~~consisting of 4 lawyers and 3 public members appointed by the Supreme Court and having a quorum of 4 members. Members of the special preliminary review panel serve staggered 3-year terms~~, as described in sub. (3m). A member may serve not more than 2 consecutive 3-year terms. Upon a timely request by the grievant for additional time, the special investigator shall report the request to the chairperson of the special preliminary review panel, who may extend the time for submission of additional information relating to the request for review. If the panel affirms the investigator's determination, the special preliminary review panel shall inform the grievant. The panel's decision affirming closure of the matter is final. If the panel does not concur in the investigator's determination, it shall direct the investigator to initiate an investigation of the matter.

Section 8. SCR 22.25(3m) is created to read:
22.25(3m) The special preliminary review panel consists of 4 lawyers and 3 public members, appointed by the Supreme Court and having a quorum of 4 members. Members of the special preliminary review panel serve staggered 3-year terms. A member may not serve more than 2 consecutive 3-year terms.

Section 9. SCR 22.25(4)(intro) is amended to read:
22.25(4)(intro) If the special investigator determines that the information provided is sufficient to support ~~a possible finding of cause to proceed~~ an allegation of misconduct, the special investigator shall conduct an investigation of the matter. Upon commencing an investigation, the special investigator shall notify the respondent of the matter being investigated unless in the opinion of the special investigator the investigation of the matter requires otherwise. The respondent shall fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct with 20 days after being served by ordinary mail a request for a written response. The special investigator may allow additional time to respond. Except in limited circumstances when good cause is shown and a response summary is more appropriate, the special investigator shall provide the grievant a copy of the respondent's response and the opportunity to comment in writing on the respondent's response. Following receipt of the response, the special investigator

may conduct further investigation and may compel the respondent to answer questions, furnish documents, and present information deemed relevant to the investigation. In the course of the investigation, the respondent's willful failure to provide relevant information, to answer questions fully, or to furnish documents and the respondent's misrepresentation in a disclosure are misconduct, regardless of the matters asserted in the grievance. Upon completion of the investigation, the special investigator shall do one of the following:

Section 10. SCR 22.26 is amended to insert the following comment after that Rule:

COMMENT

SCR 22.26 has been applied to administrative suspensions. *Office of Lawyer Regulation v. Scanlan (In re Scanlan),* 2006 WI 38, 290 Wis. 2d 30, 712 N.W.2d 877.

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

_____

Marsha Mansfield, Chair, OLR Process Subcommittee

APPENDIX 12

Process Subcommittee Memorandum

Introduction

The process subcommittee's considered the following issues that for the reasons stated herein, the subcommittee either recommended that the rules be left unchanged or recommended certain changes to the internal court operations.

Issues for Consideration:

1) The PRC meets quarterly to review draft OLR complaints. Would meeting more frequently increase efficiency and the processing of complaints?
2) Is the PRC effective, needed, and useful? Could its process (contained in SCR 22.06(1)) be streamlined? Should volume of materials provided to the PRC be streamlined?
3) Should SCR 22.41 (Pending Litigation) be modified?
4) Should there be set timelines for preparing, circulating, and releasing decisions in discipline cases as the court does for non-discipline cases?
5) Should other timelines be imposed for OLR completion of investigation (OLR has internal guidelines)? Additionally, could/should the investigative process be streamlined?
6) How should OLR handle sequential or multiple complaints involving the same respondent? Should that process be modified?
7) Should there be a mechanism in place when the special investigator delays or the case lags?
8) Should a rule be adopted that permits resignation pending discipline?
9) Should SCR 22.36 be clarified to include administrative suspensions?
10) Should SCR 22.46 be removed because it is never used?
11) Should SCR 22.03(2) be modified to provide for an administrative suspension of an attorney's license for failure to cooperate with an OLR Investigation?

Discussion and Recommendations

(1) Timing of PRC Meetings. The PRC fulfills an important role in reviewing and thoroughly analyzing the OLR's charges. No reasons has been advanced for increasing the number of meetings per year, as the PRC is able to review all matters that are brought before it during each scheduled meeting. Furthermore, a process already is in place for summary suspension (SCR 22.21(1)) if circumstances warrant immediate action.

(2) Streamlining the PRC process by amending SCR 22.06(1) regarding OLR's delivery of materials to PRC members. Currently, approximately 20 reports (with extensive appendices) are provided to the PRC for each meeting. The reports are divided among two panels. The current Rule requires OLR to include with its reports to the PRC "all exculpatory and inculpatory information and appendices and exhibits, if any." This language reflects a policy supporting full disclosure of all information of even arguable relevance, so that the PRC can be confident that it has a complete record before it upon which to assess the recommendations made by OLR. Therefore, the OLR consistently provides the PRC with complete case files containing everything sent and received in the post-intake phase of the operation. In cases where the OLR seeks cause to proceed, the OLR provides proposed cause determinations, a summary of the underlying facts, and a discussion of the evidence that supports the alleged SCR violation(s). Reports vary in length, but they are generally five to ten pages. A draft complaint

prepared by the OLR is attached as are appendices consisting of a complete case file in almost all instances. The PRC members are mailed a link to a secure, password protected web site where they may access scanned case materials (reports and appendices). Paper documents are not provided.

The OLR attempts to include citations to the appendices for every assertion in the report. This allows every PRC member to assess the viability of OLR's assertions and to develop questions to ask when OLR presents its reports to the PRC. The PRC also considers appeals of dismissed grievances. Thus, the practice of submitting a full and complete record for PRC member consideration outweighs any time-saving or efficiency considerations. It is manifestly important that the respondent, and the public, be assured that the PRC has considered all facets of a complaint in its decision-making process. For this reason no changes to SCR 22.06(1) are recommended.

(3) Amending Rule: SCR 22.41 Pending litigation. This rule states "Neither the director nor a referee may defer, except for cause, a matter or proceeding because of substantial similarity to the material allegations of pending criminal or civil litigation." Some statistics are helpful to understanding this rule's operation. Out of 341 cases at the start of FY 2016, there were 13 cases placed "on hold." Out of 281 cases at the start of FY 2017, 6 cases were placed "on hold." Prior to deferring a matter, the OLR Director always considers whether "cause' is present for deferral. When there are related court proceedings pending, the OLR will often defer because the outcome may be relevant to the OLR's determination. For example, if there is a pending criminal proceeding involving an attorney, the OLR will open an investigation, but will put the matter "on hold." This allows the OLR knowledge of the case outcome in considering its pending matter so that consistency and efficiencies are maintained throughout the process. This rule serves a useful function and should be preserved as is.

(4) Timelines for releasing cases. Long delayed court decisions after public charges are filed can impact the public's trust in the system. When the commissioners receive the referee's report, they put together a memo or they draft a PC and then send it to the Court. The memo includes when the case was received and the memo or draft PC was circulated. The subcommittee recommends an IOP proposal rather than a change in the rule that sets forth timelines for the commissioners' actions.

(5) Timelines for OLR investigations; streamlining OLR investigations.
The OLR has internal guidelines that govern completion of intakes and investigations.
The guidelines are not in writing. For intake matters, the OLR's objectives are to complete the evaluations within 60 days of the filing of the grievance, with no more than 10% of an investigator's caseload open more than 60 days. For formal investigations, the objectives are to complete each formal investigation within one year of the referral, with no more than 25 attorneys pending a formal investigation for more than one year. Productivity expectations are that an intake investigator receive and complete up to 50 grievance evaluations per month, and that a formal investigator should be able to receive and complete up to 40 formal investigations per year. Although a rule change is unnecessary, OLR should consider publishing these guidelines on its website.

(6) Sequential or multiple complaints involving the same respondent.
No changes are recommended as to handling these types of complaints.

(7) Delays in the Special Investigative Process
Abolishing district committees will reduce the need for SPRP's and therefore, a rule change is unnecessary.

(8) Resignation Pending Discipline
The dissent in *Office of Lawyer Regulation v. Robert W. Horsch* (May 15, 2017) suggests that the OLR Procedure Review Committee examine the appropriateness of allowing an attorney voluntarily to resign from the practice of law during the pendency of a discipline case against the attorney (a "respondent"). The *Horsch* decision and Justice Abrahamson's dissent (joined by Justice Bradley) comprehensively describe the issues involved.

At first blush, with the removal of a respondent from the practice as the most severe discipline available, a respondent's voluntary resignation appears a logical and expeditious resolution to any disciplinary proceeding. It saves both the state and the respondent time, money and annoyance. Once having resigned, the former attorney may not casually return to practice. The public and profession enjoy the protection afforded by the requirement that any such attorney must submit to the procedure outlined in SCR 10.03(7), involving the Court, the Board of Bar Examiners and OLR.

In the alternative, a respondent may petition for consensual license revocation pursuant to SCR 22.19. Consensual revocation requires a procedure involving the Court and the OLR more complex than that required for voluntary resignation. It also continues the respondent's exposure to the discipline matter and its possible consequences. Returning to the practice for such an individual requires a five-year wait and fulfilling the reinstatement procedure demanded of anyone with a revoked license.

The OLR expressed concern that a respondent could invoke voluntary resignation to avoid the obligation of restitution, to escape public notice of the discipline (thereby not alerting other possible victims to the opportunity for recovery) and to apply for a license in another jurisdiction without a clear record of misconduct. Allowing a respondent summarily to resign, without more, would prove expedient but incur those risks.

Currently, the Court defers action on a respondent's resignation until conclusion of the pending discipline matter. The OLR expedites action on such cases. Most end in dismissal, removing that impediment to the Court's acceptance of the resignation. If the matter proceeds further (as in *Horsch*), the Court addresses the discipline case before acting on the resignation. In such instances, if the case requires restitution or publication, the Court (presumably) would so order, thereby protecting the public and potential victims.

The OLR retains records of disciplinary proceedings, available for review upon a resigned respondent's application to resume practicing in either Wisconsin or another jurisdiction (if requested by such other jurisdiction), thereby protecting against jurisdiction hopping by a

respondent. In light of this, there does not appear to be a basis for changing the requirements or the rules.

(9) Amending SCR 22.26 to clarify that it applies to administrative suspensions by adding the following comment to the rule: "SCR 22.26 has been applied to administrative suspensions. *Office of Lawyer Regulation v. Scanlan* (*In re Scanlan*), 2006 WI 38, 290 Wis. 2d 30, 712 N.W.2d 877.

(10) Removing SCR 22.46. Although this rule has not been used in over 15 years, there is no real reason to remove it except to "clean up" the rules.

(11) Amending SCR 22.03. SCR 22.03 as revised recognizes that the practice of law is a privilege, a privilege the Court grants individuals upon their satisfaction of certain conditions. Among those conditions resides the responsibility freely and fully to cooperate in resolving questions of whether the practitioner exercised that privilege consistently with all the attendant conditions. SCR 22.03 now creates greater incentive than its predecessor for an otherwise reluctant respondent to cooperate in the resolution of such a question.

Currently, SCR 22.03 allows an uncooperative respondent 140 or more days intentionally to delay an OLR investigation without sanction. Such an extended delay contravenes the intent of the Rules and hinders the effective regulation of the profession.

SCR 22.03 as amended reduces the interval from 140 or more days to 40, all without compromising respondents' right to due process. The amended Rule seeks not to deprive a respondent of the right to practice but to induce respondent's expeditious cooperation in an investigation arising from that practice.

The restatement of paragraph (4) transfers the onus of dealing with a respondent's lack of cooperation. Currently, after multiple attempts at contacting an uncooperative respondent and ultimate notice by personal service, the investigator, Deputy Director of investigation, a litigator, Deputy Director of litigation and Director collaborate to file a motion requesting that the Court order respondent to show cause why respondent's license not be suspended. The revision requires only the investigator and Director (informing the appropriate Deputy Directors) to compel the respondent to (i) cooperate, (ii) demonstrate the impossibility of cooperating or (iii) show cause to the Court why respondent's license to practice not be suspended. The onus shifts from OLR to the respondent.

The remainder of the revisions to paragraph 4 recites the consequences of a respondent complying with each of the three options provided or not complying with any. Once suspension occurs, the revision permits the respondent automatically to lift the suspension by cooperating or demonstrating the impossibility of cooperating and defines the availability of appealing to the Court for relief. (Throughout the revised process, the Court remains the venue of last resort.)

The procedure following automatic suspension for failure to cooperate parallels the procedure defined in SCR 31.10 for failure to meet continuing legal education requirements. Suspension of

a license to practice, or the reversal of a suspension, pursuant to paragraph (4) does not address the substance of any allegation of misconduct against a respondent.

Paragraph (4) respects the respondent's right to due process by not only allowing, but seeking, a respondent's reply to an allegation of misconduct (or an explanation of the respondent's inability to reply) (1) during the intake phase of a grievance, (2) during the 20 days immediately following commencement of a formal investigation, (3) during any extension thereof offered by OLR, (4) during the 20 days following service of notice regarding a potential license suspension, (5) during any proceeding subsequent to respondent's motion to forestall suspension and (6) during any proceeding subsequent to respondent's appeal of suspension. The revised paragraph (4) also delays by 30 days application of SCR 22.26(1) to a respondent suspended thereunder, in effect, allowing the respondent an additional month to answer or cooperate before suffering the public consequences of suspension.

SCR 22.03 as revised not only shortens the interval between the initial contact with a respondent and imposition of sanctions if the respondent fails to cooperate, it also transfers the procedural onus from OLR to the uncooperative respondent if sanctions prove necessary. The Rule enforces responsibilities individuals assume when exercising the privilege to practice law and does so in a manner fulling respecting those individuals' rights

APPENDIX 13

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to attorney disciplinary proceedings. **PETITION 18-___**

PETITION OF the OLR Process Review Committee FOR AN ORDER REPEALING AND RECREATING Supreme Court Rules 22.12 and 22.17, AMENDING Supreme Court Rules 21.09(1), 21.16(2)(c), 22.21(4), 22.22(2)(a), (b), (3)(intro) and (b), and (6), 22.24(1), (1m)(intro), (2), and (3), CREATING Supreme Court Rules 21.08(1)(b), 21.09(1m), 22.16(6)(b) and (7)(b), 22.22(2m) and (4m), and 22.23(1m), RENUMBERING AND AMENDING Supreme Court Rules 21.08(1), and 22.16(6) and (7).

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting the attorney disciplinary proceedings.

PETITION

The OLR Process Review Committee respectfully requests that the Supreme Court adopt the following rule:

Section 1. SCR 21.08(1) is renumbered SCR 21.08(1)(a) and amended to read:
21.08 (1)(a) Members of a permanent panel of attorneys and reserve judges appointed by the Supreme Court shall serve as referees to conduct hearings on complaints of attorney misconduct, petitions alleging attorney medical incapacity, and petitions for license reinstatement~~, to~~. Except as provided in par. (b), referees shall make findings, conclusions and recommendations and submit them to the Supreme Court for review and appropriate action~~, and to review consensual discipline under SCR 22.09~~.

Section 2. SCR 21.08 (1)(b) is created to read:
21.08 (1)(b) In addition to their duties under par. (1), referees shall consider consensual discipline under SCR 22.09 and consider stipulations for discipline under SCR 22.12. Referees shall make findings and conclusions to determine attorney misconduct, and impose discipline in attorney misconduct complaints if any of the following apply:
1. The referee imposes a suspension of the attorney's license to practice law for a period not exceeding three months.
2. The referee approves a stipulation under SCR 22.12 to suspend the attorney's license to practice law for a period not exceeding one year.
3. The referee approves consensual discipline under SCR 22.09 or imposes a public or private reprimand.
4. The referee approves a stipulation under SCR 22.12 to impose discipline defined in SCR 21.16(1m)(d) through (f).

Section 3. SCR 21.09(1) is amended to read:
21.09 (1) ~~The~~ Except as provided in SCR 21.08(1)(b), the Supreme Court determines attorney misconduct and medical incapacity and imposes discipline or directs other action in attorney misconduct and medical incapacity proceedings filed with the court.

Section 4. SCR 21.09 (1m) is created to read:
21.09 (1m) The Supreme Court shall determine whether, pursuant to SCR 22.03 (4), to suspend or reinstate the license to practice law of a respondent in an attorney disciplinary proceeding, conduct appellate review of reports and orders imposing discipline pursuant to SCR 22.17, determine whether to suspend temporarily an attorney's license to practice law pursuant to SCR 22.21, and determine whether to reinstate a license under SCR 22.28 through 22.33.

Section 5. SCR 21.16 (2)(c) is amended to read:
21.16 (2)(c) ~~Upon ordering~~ When the Supreme Court or a referee orders restitution to the Wisconsin lawyers' fund for client protection under par. (a)2., the clerk of the Supreme Court shall issue a judgment and shall furnish a transcript of the judgment to the Fund. 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 under ss. 809.25 and 806.16, stats.

Section 6. SC R 22.12 is repealed and recreated to read:
22.12 (1) The director may file with the complaint a stipulation of the director and the respondent to the facts, conclusions of law regarding misconduct, and discipline to be imposed.

(2)(a) If the parties have stipulated to revocation of the respondent's license to practice law or suspension of the respondent's license to practice law for a period exceeding one year, the Supreme Court may consider the complaint and stipulation without the appointment of a referee, in which case the Supreme Court may approve the stipulation, reject the stipulation, or direct the parties to consider specific modifications to the stipulation.

(b) If the Supreme Court approves a stipulation, it shall adopt the stipulated facts and conclusions of law and impose the stipulated discipline.

(c) If the Supreme Court rejects a stipulation, a referee shall be appointed and the matter shall proceed as a complaint filed without a stipulation

(d) If the Supreme Court directs the parties to consider specific modifications to the stipulation, the parties may, within 20 days of the date of the order, file a revised stipulation, in which case the Supreme Court may approve the revised stipulation, adopt the stipulated facts and conclusions of law, and impose the stipulated discipline. If the parties do not file a revised stipulation within 20 days of the date of the order, a referee shall be appointed and the matter shall proceed as a complaint filed without a stipulation.

(3)(a) If the parties have stipulated to suspension of the respondent's license to practice law for a period not exceeding one year, to imposition of discipline defined in SCR 21.16(1m)(d) through (f), or a combination thereof, a referee appointed under SCR 22.13(3) may approve the

stipulation, reject the stipulation, or direct the parties to consider specific modifications to the stipulation.

(b) If the referee approves a stipulation, he or she shall adopt the stipulated facts and conclusions of law and impose the stipulated discipline.

(c) If the referee rejects a stipulation, the matter shall proceed as a complaint filed without a stipulation.

(d) If the referee directs the parties to consider specific modifications to the stipulation, the parties may, within 20 days of the date of the order, file a revised stipulation, in which case the referee may approve the revised stipulation, adopt the stipulated facts and conclusions of law, and impose the stipulated discipline. If the parties do not file a revised stipulation within 20 days of the date of the order, the matter shall proceed as a complaint filed without a stipulation.

(4) A stipulation rejected under this rule has no evidentiary value and is without prejudice to the respondent's defense of the proceeding or the prosecution of the complaint.

Section 7. SCR 22.16 (6) is renumbered SCR 22.16 (6)(intro) and amended to read:
22.16 (6)(intro) Within 30 days after the conclusion of the hearing or the filing of the hearing transcript, whichever is later, the referee shall ~~file~~ do one of the following:

(a) File with the Supreme Court a report setting forth findings of fact, conclusions of law regarding the respondent's misconduct, if any, and a recommendation for the imposition of specific discipline, pursuant to SCR 21.08 (1)(a).

Section 8. SCR 22.16 (6)(b) is created to read:
22.16 (6)(b) File with the Supreme Court and provide to the director and the respondent a report setting forth findings of fact, conclusions of law regarding the respondent's misconduct, if any, and an order for dismissal of the proceeding or the imposition, pursuant to SCR 21.08 (1)(b), of specific discipline.

Section 9. SCR 22.16 (7) is renumbered SCR 22.16 (7)(a) and amended to read:
(7)(a) ~~The~~ A referee who files a report under sub. (6)(a) with the Supreme Court shall also file ~~with the Supreme Court~~ a recommendation as to the assessment of reasonable costs within 10 days after the parties' submissions regarding assessment of costs.

Section 10. SCR 22.16 (7)(b) is created to read:
22.16(7)(b) A referee who imposes discipline under sub. (6)(b) shall file with the Supreme Court and provide to the director and the respondent an order assessing reasonable costs within 10 days after the parties' submissions regarding assessment of costs.

Section 11. SCR 22.17 is repealed and recreated to read:

22.17 (1) Within 20 days after the filing of a referee's report under SCR 22.16 (6)(a), the director or the respondent may file with the Supreme Court an appeal from the referee's report. If no appeal is filed timely, the Supreme Court shall review the referee's report; adopt, reject or modify the referee's findings and conclusions or remand the matter to the referee for additional findings; and determine and impose appropriate discipline. The court, on its own motion, may order the parties to file briefs in the matter.

(2) Within 20 days after the filing of a referee's order under SCR 22.16 (6)(b), the director or the respondent may file with the Supreme Court an appeal from the referee's order. If an appeal is filed timely, the Supreme Court shall review the referee's report and order; adopt, reject or modify the referee's findings and conclusions or remand the matter to the referee for additional findings; and adopt, reject, or modify the referee's imposition of discipline. The court, on its own motion, may order the parties to file briefs in the matter.

(3) An appeal from an order or a report of a referee is conducted under the rules governing civil appeals to the Supreme Court. The Supreme Court shall place the appeal on its first assignment of cases after the briefs are filed.

Section 12. SCR 22.21 (4) is amended to read:
22.21 (4) Filing of referee report. The referee appointed to conduct a hearing on the complaint shall conduct the hearing promptly and shall file the report or issue the order required by SCR 22.16 no later than 6 months after the filing of the complaint. If the report is not filed within 6 months of the filing of the complaint, the respondent attorney may move the Supreme Court for reinstatement pending completion of the disciplinary proceeding. Reinstatement under this section does not terminate any misconduct investigation or disciplinary proceeding pending against the attorney.

Section 13. SCR 22.22 (2)(a), (b), (3)(intro) and (b), and (6) are amended to read:
22.22 (2)(a) A certified copy of the judgment or order from the other jurisdiction.

22.22 (2)(b) A motion requesting an order directing the attorney to inform the Supreme Court or the referee appointed under sub. (2m) in writing within 20 days of any claim of the attorney predicated on the grounds set forth in sub. (3) that the imposition of the identical discipline or license suspension by the Supreme Court or referee would be unwarranted and the factual basis for the claim.

(3)(intro) The Supreme Court or referee shall impose the identical discipline or license suspension unless one or more of the following is present:

(3)(b) There was such an infirmity of proof establishing the misconduct or medical incapacity that the Supreme Court or referee could not accept as final the conclusion in respect to the misconduct or medical incapacity

(6) If the discipline or license suspension imposed in the other jurisdiction has been stayed, any reciprocal discipline or license suspension imposed by the Supreme Court or referee shall be held in abeyance until the stay expires.

Section 14. SCR 22.22 (2m) is created to read:
22.22 (2m) If the judgment or order filed under sub. (2) (a) imposes discipline that a referee may impose under SCR 21.08(1)(b), the clerk of the Supreme Court shall select a referee from the panel provided in SCR 21.08, based on availability and geographic proximity to the respondent's principal office, and the chief justice or, in his or her absence, the senior justice shall appoint the referee to proceed under this section.

Section 15. SCR 22.22 (4m) is created to read:
22.22 (4m) An order issued by a referee under sub. (3) may be appealed under SCR 22.17 (2).

Section 16. SCR 22.23 (1m) is created to read:
22.23 (1m) With the exception of a referee's disposition of a private reprimand or dismissal of a proceeding, a referee's disposition of a proceeding under this chapter shall be published in an official publication of the state bar of Wisconsin and in the official publications specified in SCR 80.01. A party may file a request to publish a dismissal of a proceeding.

Section 17. SCR 22.24 (1), (1m) (intro), (2), and (3) are amended to read:
22.24 (1) The Supreme Court or a referee who imposes discipline under this chapter may assess against the respondent all or a portion of the costs of a disciplinary proceeding in which misconduct is found, a medical incapacity proceeding in which it finds a medical incapacity, or a reinstatement proceeding and may enter a judgment for costs. The director may assess all or a portion of the costs of an investigation when discipline is imposed under SCR 22.09. Costs are payable to the office of lawyer regulation.

(1m) (intro) The court's general policy is that upon a finding of misconduct it is appropriate to impose all costs, including the expenses of counsel for the office of lawyer regulation, upon the respondent. In some cases the court or the referee may, in the exercise of ~~its~~ discretion, reduce the amount of costs imposed upon a respondent. In exercising ~~its~~ discretion regarding the assessment of costs, the court or the referee will consider the statement of costs, any objection and reply, the recommendation of the referee when applicable, and all of the following factors:

(2) In seeking the assessment of costs ~~by the Supreme Court~~, the director shall file in the court, with a copy to the referee and the respondent, or with the referee, with a copy to the respondent if the referee imposed discipline, a statement of costs within 20 days after the filing of the referee's report or order or a SCR 22.12 or 22.34(10) stipulation, together with a recommendation regarding the costs to be assessed against the respondent. If an appeal of the referee's report or order is filed or the Supreme Court orders briefs to be filed in response to the referee's report, a supplemental statement of costs and recommendation regarding the assessment of costs shall be filed within 20 days of the date of oral argument or, if no oral argument is held, the filing date of the last brief on appeal. The recommendation should explain why the particular amount of costs is being sought. The respondent may file an objection to the statement of costs and recommendation within 21 days after service of the statement of costs. A respondent who objects to a statement of costs must explain, with specificity, the reasons for the objection and must state what he or she considers to be a reasonable amount of costs. The objection may include relevant supporting documentation. The office of lawyer regulation may reply within 11

days of receiving the objection. ~~In proceeding before a referee~~ If the discipline was imposed by the Supreme Court, the referee shall make a recommendation to the court regarding costs. If discipline was imposed by a referee, the referee shall enter an order regarding costs. The referee should explain the recommendation or order addressing the factors set forth in SCR 22.24 (lm). The referee shall consider the submissions of the parties and the record in the proceeding. No further discovery or hearing is authorized.

(3) Upon the assessment of costs by the Supreme Court or a referee, 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).

Respectfully submitted this _____day of _____, 2018.

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Hon. Gerald Ptacek, Chair, OLR Procedure Review Committee

APPENDIX 14

STATE OF WISCONSIN **SUPREME COURT**

In the matter of amending Supreme Court Rules pertaining to the reporting conduct to a disciplinary authority **PETITION 18-___**

PETITION OF the OLR Process Review Committee's FOR AN ORDER AMENDING Supreme Court Rules 20:1.8 (3)(h)(3) and 20:8.3

For the reasons set forth in the accompanying supporting memorandum, the OLR Process Review Committee's Subcommittee on Confidentiality respectfully petitions the Supreme Court to amend certain Supreme Court Rule affecting reporting attorney conduct to a disciplinary authority.

PETITION

The OLR Process Review Committee's Subcommittee on Confidentiality respectfully requests that the Supreme Court adopt the following rule:

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].

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.

APPENDIX 14

The ~~change from "having knowledge to "who knows" in SCR 20:8.3(a) and (b) reflects the a doption 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). This change better reflects the way the rule has been interpreted in case law. See also SCR 20:1.0(l) 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).

Respectfully submitted this _____day of _____, 2018.

_____

Hon. Gerald Ptacek, Chair, OLR Procedure Review Commiittee

APPENDIX 15

MEMORANDUM

To Office of Lawyer Regulation ("OLR") Procedure Review Committee

From Paul W. Schwarzenbart

Date September 5, 2018

Re OLR Bureaucracy

This addresses the topic of the "OLR Bureaucracy," briefly discussed at recent meetings.

BACKGROUND

The OLR Procedure Review Committee ("Committee") was formed by the Wisconsin Supreme Court, at the initiation and urging of Chief Justice Patience D. Roggensack. At the Committee's initial meeting, September 13, 2016, various topics for possible review were discussed. The Chief Justice supplied the Committee a list of issues and concerns, and the Committee developed and adopted the following Mission Statement:[1]

> It is the mission of the OLR Procedure Review Committee 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.

At the Committee's initial meeting, OLR Director Keith Sellen provided the Committee an overview of procedures and structures under the current applicable Supreme Court Rules. Director Sellen subsequently provided the Committee with additional information and data regarding the agency's operations, including a Lawyer Regulation System Overview and a copy of a September 24, 2014 memorandum (the "Sellen Memorandum") to former Chief Justice Abrahamson and the Board of Administrative Oversight ("BAO") addressing recommendations made in a July 2014 consultation report prepared by John Gleason and Jerome Larkin[2] (the "Gleason-Larkin Report").

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[1] The Mission Statement as adopted appears in the Committee's January 10, 2017 minutes. An earlier draft of the Mission Statement appears in the Wisconsin Reports as follows:

> It is the mission of the OLR Procedure Review Committee to review OLR procedures/process and structure and to report to the Wisconsin Supreme Court recommendations for changes to the current Supreme Court rules that would increase the efficiency and effectiveness of the OLR procedures/process.

Disciplinary Proceedings Against Alfredson, 2017 WI 6, ¶ 47 n.2, 373 Wis. 2d 79, 890 N.W.2d 13 (Abrahamson, J., concurring).

The Gleason-Larkin Report examines what it refers to as the "four" divisions of the OLR, described as the Trust Account Program, the Intake Division, the Investigation Division and the Litigation Division. In my view, the agency is more accurately described as having three (not four) divisions, as the Intake, Investigation Division and Litigation Divisions are each supervised by a Deputy Director, who in turn report to Director Sellen. A grievance goes through one or more of these three divisions (intake, investigation and litigation) before resolution, whereas the trust account program addresses a variety of matters specific to trust accounts, not limited to grievances. It is best viewed as a separate program.[3]

The Gleason-Larkin Report made a number of recommendations to the OLR, and those recommendations were addressed in the Sellen Memorandum. Recommendation #2 in the Gleason-Larkin Report was that:

> The Director should merge the Investigations and Litigation divisions, and should direct that litigation counsel be assigned responsibility for investigations and resulting proceedings, with the assistance of investigators working under their supervision. (Some lawyers within the Investigation Division may apply for a litigation position.) Lawyers should direct investigators and investigations and prepare and pursue charges that are warranted. This would avoid the unnecessary duplication that we saw in the separate divisions.
>
> We strongly favor a vertical system from the point that an investigation moves beyond the intake stage. The use of a vertical system encourages a quick assessment of critical information by the assigned lawyer. In a relatively small office like OLR, separation and specialization limit the core functions of the office: productivity, efficiency and protection of the public. The use of a vertical system will address our concerns about over staffing in the investigation division and under staffing in the trust account division.

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[2] The authors are John S. Gleason, Of Counsel, Colorado Supreme Court Office of Attorney Regulation Counsel, and Jerome E. Larkin, Administrator, Attorney Registration and Disciplinary Commission, Supreme Court of Illinois. The report is accompanied by a memorandum from Director Sellen to former Chief Justice Abrahamson and the Board of Administrative Oversight ("BAO").

[3] As it is described in OLR's website:

> The OLR Trust Account Program has two primary goals: 1) to oversee compliance with the Wisconsin Supreme Court's overdraft reporting requirements; and 2) to educate lawyers with respect to safeguarding funds and maintaining proper records.

https://www.wicourts.gov/services/attorney/trust.htm (accessed 8/15/18). Travis Stieren, formerly an OLR investigator, presently serves as the Trust Account Program Administrator.

Gleason-Larkin Report at 5. It is understood that the topic "OLR Bureaucracy" relates to this recommendation that OLR merge its Investigation and Litigation Divisions and adopt a vertical system for processing grievances through the intake and litigation stages.

DISCUSSION

The Sellen Memorandum states that "OLR will evaluate the policy and fiscal aspects of merger and provide further information to the Board," meaning the BAO. Sellen Memorandum at 2. OLR subsequently performed its analysis and concluded that it should not merge its investigation and litigation divisions, that is, not adopt the vertical system recommended in the Gleason-Larkin Report.

In analyzing the Gleason-Larkin recommendation, OLR compared its structure to the vertical structure used in Colorado and Illinois -- the home states of authors Gleason and Larkin. The proposed vertical model involved the assignment of all formal investigations to the lawyer who would ultimately prepare and prosecute a disciplinary complaint, if a complaint was filed. That lawyer would supervise the investigation and the preparation and presentment of the investigative report to the Preliminary Review Committee ("PRC"), and then litigate the matter to conclusion.

Based on its review, the OLR attributed any perceived efficiency in Colorado and Illinois as the product not of structure, but rather to the use of increased discretion. OLR also noted staffing costs in Colorado and Illinois were significantly higher, and OLR also noted that 75% of formal investigations are resolved without litigation. OLR also noted that on its smaller budget it was able to complete more investigations than Colorado and Illinois. These factors were critical to OLR rejecting the vertical structuring recommendation, although it did make some internal changes to improve efficiency.

First, focusing on what was done, OLR filed Rules Petition 14-06 with the court, requesting that the court (1) grant OLR greater discretion in handling *de minimis* violations, (2) clarify the definition to "cause to proceed" to include as an element that the violation "warrants discipline," and (3) clarify that an investigation would be required if there was sufficient information to support a "possible finding" of cause to proceed. The court entered an order adopting this petition effective July 1, 2016. *See In the Matter of the Petition to Amend Supreme Court Rules 22.001(2), 22.02(6)(c), 22.03(1), 22.25(3), and 22.25(4),* 2016 WI 28. The OLR also adopted an internal policy whereby litigation counsel would become involved prior to presenting the investigative report to the PRC, by preparing a draft complaint as part of the submission to the PRC, referred to as the "PRC Complaint."

In discussing this matter with Director Sellen, he feels these changes have had a positive impact. The Order entered on Petition 14-06 affords the Director greater discretion to resolve grievances that involve what are at least technical rules violations as *de minimis* violations without the need to commence a formal investigation and without the need to involve the PRC or litigation counsel. The practice of involving litigation counsel at the point where a matter is submitted to the PRC has also proved useful, even if a matter is ultimately resolved without filing a formal complaint. It allows counsel who would try the case, or prepare a stipulation to resolve a matter, input in the process of framing the alleged violations that would be charged if the matter goes

forward.

Second, regarding the part of the recommendations not adopted by OLR, Director Sellen concluded that adopting the vertical model would not increase the efficiency, effectiveness, and fairness of the OLR process. The basis for the conclusion was as follows:

Regarding efficiency, staffing costs for the counterpart agencies in Colorado and Illinois were significantly higher than the Wisconsin OLR. This was attributed to the need to have greater staffing of more costly in-house lawyers to oversee both the investigation and litigation functions. Where 75% of formal investigations are resolved without litigation, and many if not most of these are resolved without need to go to the PRC, having lawyers oversee the investigative process becomes more costly, because it adds another person to the process, forming an investigative team, whereas in the majority of cases involvement of a litigation attorney is not needed. And having a lawyer overseeing the investigation could slow down the process, for the simple reason that at least two people are involved.

In addition, data showed that the Wisconsin OLR was able to complete more investigations annually than its Colorado and Illinois counterparts. So, in other words, while the Gleason- Larkin report suggested there was "unnecessary duplication" of effort between the investigation and litigation divisions, based on the years of experience with our Wisconsin model, Director Sellen's view is that the vertical model actually would result in a greater degree of "unnecessary duplication" of effort and needless costs.

To sum it up, Director Sellen believes that the combination of increased discretion afforded by the Order entered on Petition 14-06 and the involvement of attorneys in preparing draft complaints for PRC review has addressed the costs and efficiency issues, and that going to the full vertical model would be a step backward. At this time, therefore, OLR remains committed to the horizontal model.

Are there issues with the horizontal model? Yes, there have been several. Drawing upon my experience as a retained counsel[4] for OLR, one issue that has arisen has been the ability of outside counsel to have direct contact with investigators who may be needed to testify as witnesses, or whose personal input might be helpful in developing proof for trial. In my experience, this has never turned into a problem, but it does require coordination between the litigation deputy director and investigation deputy director. It has also been my experience that to the extent this is a "problem" at all, it has become far less of a problem in recent years. If one recognizes the potential need for an investigator to testify, or if some direct input from the investigator would be

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[4] The role of "retained counsel" is defined at SCR 21.05(2), as follows:

> The director may retain attorneys engaged in the practice of law in Wisconsin to assist in the performance of the director's duty to present matters to the preliminary review panels, to prosecute complaints alleging attorney misconduct and petitions alleging attorney medical incapacity, and to conduct or assist in reinstatement investigations and represent the office of lawyer regulation in hearings, and perform other duties assigned by the director. Retained counsel are independent contractors and serve at the pleasure of the director.

helpful, typically it takes at most one or two days to obtain the support needed. From the perspective of a retained counsel, in the end, this practice likely is similar to the experience one has as outside counsel working through in-house counsel in representing a large organization in litigation.

The other issue, in my view, has been resolved by the PRC complaint practice – and again, this is an internal policy, not a rules issue. In the past, counsel were reminded (admonished) by the litigation director that drafting a complaint by "cutting and pasting" an investigative report was an unsound practice. The need to "translate" the investigative report into a complaint pleading the elements of a claim slowed the process of getting the complaint filed after a cause to proceed determination was issued by the PRC.

Involving counsel in the complaint drafting process before going to the PRC has, in my view, based on my own personal experience, increased the efficiency, effectiveness and fairness of the OLR process, and has made life easier on counsel. Having the lawyer who will try the case review the report with a focus on the elements of a charge means the complaint should be ready for filing upon issuance of the cause to proceed determination. This also reduces the possibility of having to drop charges after filing a complaint, where it turns out the available evidence was not adequate to support the elements of a charge under the middle burden of proof (clear and convincing evidence) applicable in these proceedings.