

**MANUAL FOR
DISTRICT COMMITTEES**

**A Component of the Wisconsin Lawyer Regulation System
Established by the Supreme Court of Wisconsin**

**Produced by the Office of Lawyer Regulation
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PART ONE

OVERVIEW OF THE LAWYER REGULATION SYSTEM

I. PURPOSE

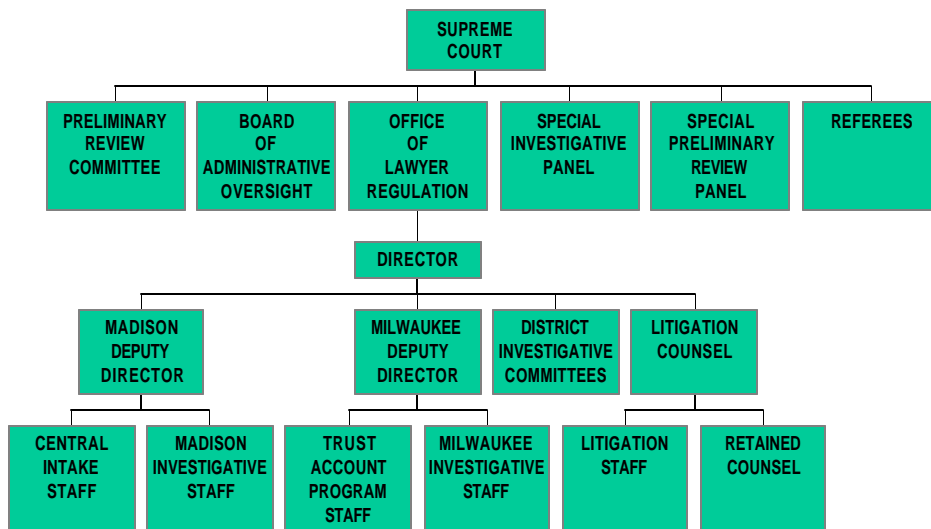
The Lawyer Regulation System is established to carry out the Supreme Court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin. Preamble, SCR Chapter 21.

II. LEGAL FRAMEWORK

The Supreme Court Rules prescribe ethical standards for all attorneys licensed to practice in Wisconsin (Chapter 20); establish an organizational structure with delineated authorities and responsibilities (Chapter 21); and prescribe procedures binding upon the Office of Lawyer Regulation and District Committees regarding the investigation and resolution of misconduct and medical incapacity matters (Chapter 22). These rules are available from the Supreme Court Homepage and the Office of Lawyer Regulation Homepage. A booklet containing them is also available from the Office of Lawyer Regulation.

III. STRUCTURE

ORGANIZATIONAL CHART OF THE LAWYER REGULATION SYSTEM



Supreme Court

The Supreme Court supervises the lawyer regulation system, determines attorney misconduct and medical incapacity, and imposes discipline or directs other appropriate action in proceedings filed with the Court.

Office of Lawyer Regulation

The Office of Lawyer Regulation (OLR) consists of the Director, investigative and support staff, litigation counsel, and retained counsel. The office has the following duties:

- ? To receive and to respond to inquiries and grievances relating to attorneys.
- ? To investigate allegations of attorney misconduct or medical incapacity.
- ? To divert matters into alternatives to discipline programs when appropriate.
- ? To prosecute misconduct or medical incapacity proceedings.
- ? To investigate license reinstatement petitions.

District Committees

District Committees exist in each of the sixteen state bar districts, and consist of lawyers and public members appointed by the Supreme Court. District Committees perform the following duties under the supervision of the Director:

- ? To educate the bar and the public about the legal profession and the ethical practice of law.
- ? To refer to the Director possible misconduct or medical incapacity matters.
- ? To assist in the investigation of possible misconduct or medical incapacity.
- ? To recommend to the Director the appropriate disposition of matters it investigated.
- ? To monitor an attorney's participation in an alternatives to discipline program or an attorney's compliance with conditions on practice.
- ? To assist in resolving minor disputes between an attorney and a client at the request of the Director.

Preliminary Review Committee

The Preliminary Review Committee consists of fourteen members, nine lawyers and five public members appointed by the Court. The Committee is comprised of two seven-member panels, each having at least four lawyers and at least two public members. The panels have the following duties:

- ? To review the results of OLR and District Committee investigations and to determine whether there is cause to proceed in the matter.
- ? To review, upon request by a grievant, decisions by the Director to dismiss a grievance after investigation.

- ? To confer with the Board of Administrative Oversight and to suggest improvements in the operation of the Committee and its panels.

Board of Administrative Oversight

The Board of Administrative Oversight consists of twelve members, eight lawyers and four public members appointed by the Court. The Board has the following duties:

- ? To monitor the fairness, productivity, effectiveness, and efficiency of the system.
- ? To monitor the implementation of new procedures.
- ? To assess public and bar perceptions of the integrity of the system.
- ? To report its findings to the Supreme Court.
- ? To review the operation of the system with the Court, and to file an annual report.
- ? To propose substantive and procedural rules.
- ? To inform and educate the public and bar about the system.
- ? To propose an annual budget.

Special Investigators

Special Investigators are lawyers appointed by the Supreme Court who are not currently participating in the lawyer regulation system. The Director refers allegations of misconduct against attorneys currently participating in the system to a special investigator. In a referred matter, the special investigator performs the functions that the Director would normally perform, which may include evaluating, investigating, dismissing, diverting, or prosecuting the matter.

Special Preliminary Review Panel

The Special Preliminary Review Panel is composed of four lawyers and three public members appointed by the Supreme Court. In matters involving allegations against current participants in the lawyer regulation system, the panel reviews the special investigator's decision to close a matter without investigation or dismiss a matter after investigation, and reviews an investigative report to determine whether there is cause to proceed.

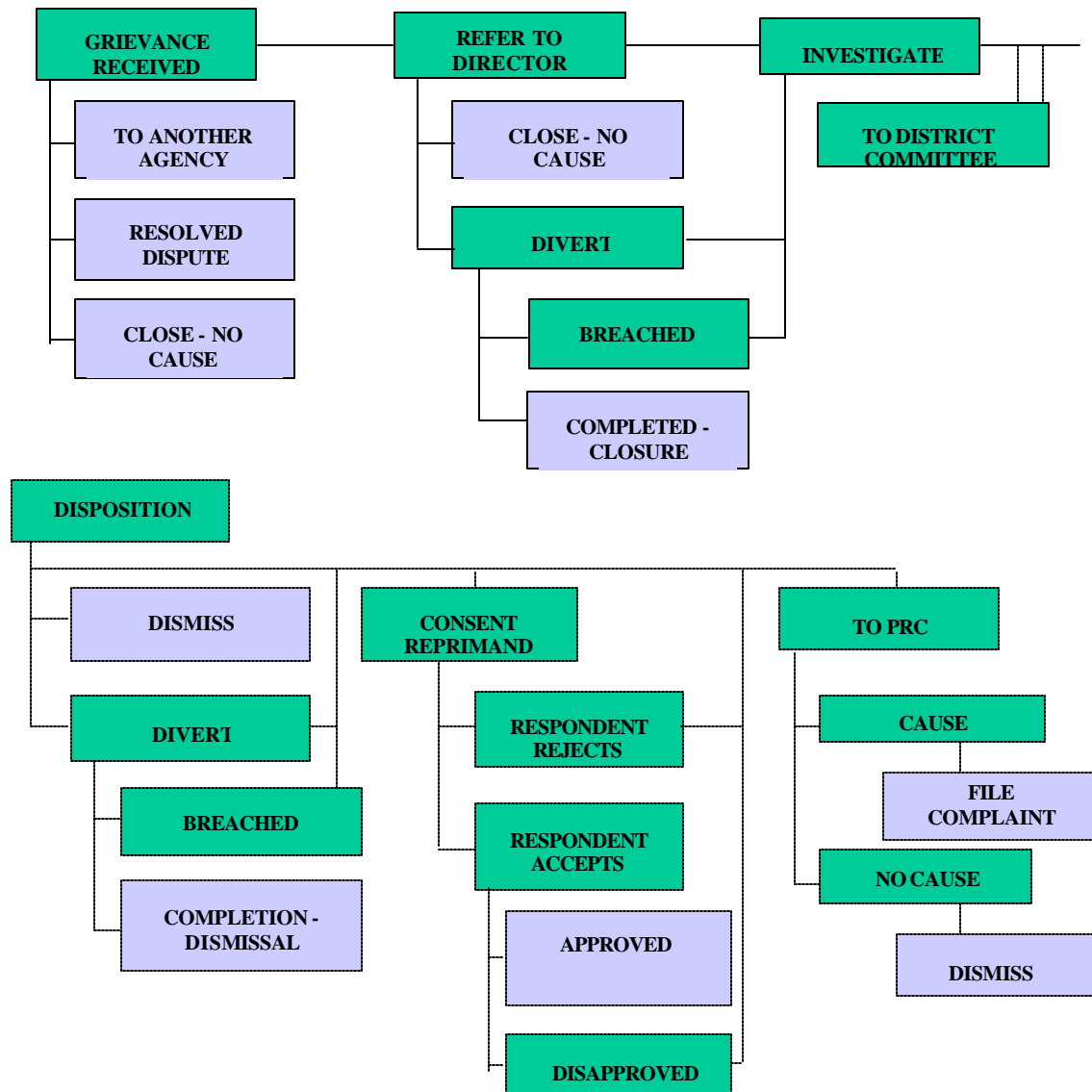
Referees

The Supreme Court appoints attorneys or reserve judges as Referees to:

- ? Conduct hearings in proceedings alleging misconduct or medical incapacity.
- ? Conduct hearings on petitions for license reinstatement.
- ? Review consensual public or private reprimands submitted by the Director.
- ? Review, upon the request of a grievant, determinations by Preliminary Review Panels of no cause to proceed.

IV. PROCEDURES

DIAGRAM OF THE GRIEVANCE PROCESS



OVERVIEW OF THE GRIEVANCE PROCESS

The Director of the OLR is required to investigate any possible misconduct or medical incapacity of an attorney licensed to practice in the State of Wisconsin. *SCR 21.03(6)(a)*. Communications with OLR alleging lawyer misconduct are privileged, and no lawsuit predicated on those communications may be instituted against any grievant or witness. *SCR 21.19*. Respondents and grievants may consult with and be represented by counsel at any stage of an investigation. Prior to the filing of a formal

complaint or petition, all papers, files, transcripts and communications in an OLR investigation must be kept confidential by OLR. *SCR 22.40(1)*. OLR may, however, provide relevant information to the respondent and the grievant. *SCR 22.40(2)*. Although the Supreme Court Rules provide no sanction for disclosure of a grievance by the respondent or the grievant, OLR requests that those involved in an OLR investigation keep confidential all documents generated by the investigation.

Initially, OLR staff screens all inquiries and grievances concerning attorney conduct. If the allegations made are not within OLR's jurisdiction, staff will close the file. If the grievant disagrees with the staff's decision, the grievant may make a written request for the Director's review of the closure. The Director's decision is final. After preliminary evaluation, staff may also forward the matter to another agency; attempt to reconcile the matter between the grievant and respondent if it is a minor dispute; or refer the matter to the Director for diversion or investigation. Before or after investigation, the Director may divert the matter to an alternatives to discipline program, providing that nothing more than minor misconduct is involved, the respondent agrees, and the respondent is eligible to participate. Alternatives to discipline are usually educational programs or monitoring arrangements designed to assist an attorney in improving the quality of his or her practice.

If the grievance sets forth sufficient information to support an allegation of a violation of Chapter 20 of the Supreme Court Rules, OLR staff may initiate an investigation. OLR staff will send a letter to the respondent enclosing the grievance and requesting a response within 20 days. In most instances, staff will forward the respondent's response to the grievant for comments. When OLR staff has completed the preliminary investigation, the Director will determine whether: (a) an uncontested violation exists; (b) the grievance should be dismissed for lack of merit; (c) further staff investigation is needed; or (d) the matter should be assigned to a District Committee for further investigation, pursuant to *SCR 22.04(1)*.

If the grievance is further investigated by staff or a District Committee, the respondent and the grievant will be kept advised about the investigation. Upon referral of a matter, the Chairperson may assign the matter to one of the committee's investigators or investigate the matter personally. Pursuant to *SCR 22.04(2)*, the respondent may request a substitution of a Committee investigator within 14 days of receiving notice of the assignment of the investigator. The respondent shall be granted one such substitution as a matter of right, and any other requests for substitution shall be granted by the Chairperson for good cause shown. If the committee decides to take sworn testimony regarding a grievance at an investigative meeting, the respondent and the grievant will receive timely notice of the meeting. Committee members elicit pertinent information from witnesses at such a meeting. In any matter referred to committee, the committee will prepare a report summarizing the facts and potential disciplinary violations. That report will be sent to the respondent and grievant for comment.

After the investigation is completed by staff and/or a committee, the Director may dismiss the matter for lack of sufficient evidence of cause to proceed, divert the matter to

an alternatives to discipline program, obtain respondent's consent to a private or public reprimand, or present the matter to the Preliminary Review Committee for a determination of whether there is cause to proceed. In those cases in which the Director dismisses, the grievant has 30 days after receiving written notice of the dismissal to make a written request for review of the decision by the Preliminary Review Committee. The decision of the Preliminary Review Committee is final.

If, after the investigation is completed, the Director does not dismiss the grievance, seek a consent reprimand, or divert the matter, OLR staff will prepare an investigative report and provide a copy to the grievant and to the respondent for comment. [In cases in which a District Committee investigates a matter, its report serves as the investigative report.] The grievant and the respondent may submit a written response to the report no later than ten days following receipt of the report.

The Director may then submit the results of the investigation to the Preliminary Review Committee. The Preliminary Review Committee determines whether the evidence presented supports a reasonable belief that an attorney has engaged in misconduct or has a medical incapacity that may be proved by clear, satisfactory and convincing evidence. *SCR 22.001(2)*. If the Preliminary Review Committee dismisses the matter, the grievant has 30 days after being notified of the dismissal to file a written request for review of that decision. The Supreme Court will select a referee to review the matter, and the referee's decision is final.

If the Preliminary Review Committee determines that the Director has established cause to proceed, the Director may file a complaint with the Supreme Court alleging misconduct. OLR, rather than the grievant, is the complainant in such a matter. If the Director files a complaint, an answer is required within 20 days of service of the complaint. Upon proof of service, the Supreme Court appoints a referee to hear the matter pursuant to *SCR 22.13(3)*. The referee holds a scheduling conference to define the issues and to determine the extent of discovery. The referee then presides at a public hearing which is conducted as a trial of a civil action to the court. *SCR 22.16*. OLR must prove misconduct or medical incapacity by clear, satisfactory and convincing evidence. *SCR 22.38*.

Within 30 days after the conclusion of the hearing, the referee will submit his or her report to the Supreme Court, including findings of fact, conclusions of law, and a recommendation of dismissal or imposition of discipline. OLR or a respondent may file an appeal of the referee's report within 20 days after the report is filed. If no appeal is timely filed, the Supreme Court reviews the referee's report and determines appropriate discipline in cases of misconduct and appropriate action in cases of medical incapacity. The Court may, on its own motion, order the parties to file briefs. Either the respondent or OLR may file a motion for reconsideration of the Supreme Court's decision within 20 days of the filing of the decision by the Court. The filing of a motion for reconsideration does not stay enforcement of the judgment. The Supreme Court's final dispositions of disciplinary and medical incapacity proceedings are published in the *Wisconsin Reports* and in *The Wisconsin Lawyer*.

PART TWO

ROLE OF DISTRICT COMMITTEES IN THE LAWYER REGULATION SYSTEM

I. PURPOSE

District Committees, as a component of the lawyer regulation system, serve to assist the Supreme Court “to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin.” [SCR, Chapter 21, Preamble.] They perform their duties under the supervision of the Director of the Office of Lawyer Regulation. *SCR 21.06(2)*.

District Committees link the interests of the public and legal profession in a variety of ways. First, they apply their local experience and knowledge of specific areas of legal practice or other professional and technical knowledge to the thorough and impartial investigation of grievances. Second, they apply judgment from the public and professional perspectives in the evaluation of ethical misconduct. Third, they promote public confidence in the integrity of the lawyer regulation system, and consequently, in the administration of justice, by integrating peer review and local perspective into the investigation of matters, and by educating the public about the system.

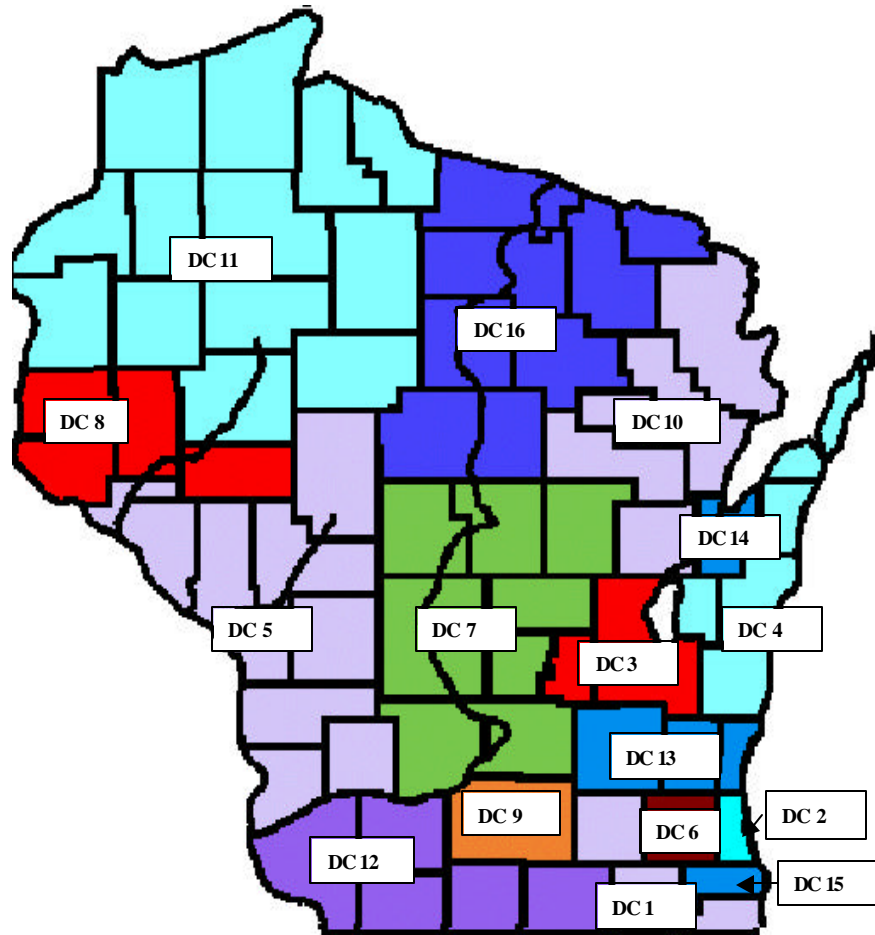
District Committees also link local constituencies throughout the state with the Supreme Court. District Committees refer possible misconduct or medical incapacity to the Director, recommend the appropriate disposition of a matter it has investigated, and monitor attorneys who are complying with conditions designed to assist the attorney’s practice and protect the public interest.

Wisconsin is one of only a few states to use district committees, and perhaps the only state to use them in such a comprehensive manner. Wisconsin recognizes that the public service they perform is a valuable contribution to the overall effectiveness and efficiency of the lawyer regulation system.

II. ORGANIZATION

District Committees are organized in each of the sixteen state bar districts, as are depicted in the diagram on the next page. They are comprised of lawyer members and public members in the ratio of 2 to 1, to the extent feasible. At the first meeting of each calendar year, each committee elects its Chairperson and Vice Chairperson.

The Supreme Court appoints members of the District Committee after consideration of applications by an Appointments Selection Committee (ASC). The ASC nominates two persons for each available position; the Court selects one by majority vote. The person not selected remains under consideration for future positions, or for other appointment opportunities. A list of the current members is at Appendix A.



(District Committees are organized in each of the sixteen state bar districts, each committee responsible for investigations arising within the counties depicted on the above diagram.)

III. DUTIES

SCR 21.06(3) lists the duties of committees; they are as follows:

- ? To educate the bar and the public about the legal profession and the ethical practice of law.
- ? To refer to the Director possible misconduct or medical incapacity matters.
- ? To assist in the investigation of possible misconduct or medical incapacity.
- ? To recommend to the Director the appropriate disposition of matters it investigated.
- ? To monitor an attorney's participation in an alternatives to discipline program or an attorney's compliance with conditions on practice.
- ? To assist in resolving minor disputes between an attorney and a client at the request of the Director.

The Committee holds regularly scheduled meetings to conduct its business, and meets specially at the call of the Chairperson. A majority of the committee constitutes a quorum, although the Chairperson may designate a subcommittee to conduct a preliminary investigation or investigative meeting.

IV. ROLE OF COMMITTEE MEMBERS

District Committee members, like the staff of OLR, do not represent the interests of grievants or respondent attorneys. Instead, they represent “the interests of the supreme court and the public in the integrity of the lawyer regulation system in its search for the truth.” *SCR 21.12*. During the course of an investigation, committee members must be impartial, seeking out relevant facts regardless of whether they support or undermine a particular point of view, and applying ethics rules objectively regardless of whether or not the evidence tends to prove a violation. The situations that are investigated frequently involve underlying motivations. It is important to understand them, provided that the focus of the investigation and analysis remains on the ethics rules.

Public members are not expected to know all the ethics rules or to be expert investigators. They perform a significant role in the system by applying their judgment and experience in the context of the committee’s consideration of investigative matters. On the other hand, public members may conduct investigations; frequently, they do so in conjunction with a lawyer member of the committee.

District Committee members are immune from suit for their conduct in the performance of official duties. *SCR 22.19*. They are, however, accountable to the Supreme Court for compliance with the rules relating to the conduct of investigations. Two important considerations committee members should always keep in mind are the need for impartiality and confidentiality.

Impartiality.

Committee members must recuse themselves from involvement in an investigation when they are a grievant or a respondent attorney, when their own outside interests may be perceived to impair their impartiality, or when a judge in similar circumstances would be disqualified under section 757.19 of the statutes or required to recuse under *SCR 60.04(4)*. *SCR 21.14(1)*. See also Appendix I. When considering whether to recuse, committee members should take into account personal and financial interests, personal and family member interests, and independent personal knowledge of or involvement in the underlying matter. It is also helpful to consult with the Chairperson or OLR staff when questions arise.

Confidentiality.

All papers, files, transcripts and communications in an investigation by the OLR and the proceedings before the Preliminary Review Committee (PRC) prior to the filing of a formal complaint or petition are confidential. *SCR 22.40(1)*. Everything relating to a District Committee investigation should be considered confidential. Committee members

must exercise care not to disclose the existence of a grievance, grievance documents, or the identity of grievants or respondents to anyone. The following practical advice is recommended:

- ? Advise your secretary/staff that all mail received related to committee work should be given to you unopened. [You may delegate this to your confidential secretary.] This is particularly important in an office where there is a mailroom or multiple secretaries.
- ? Set up an area in your office where committee records and materials will be located and which will not be accessible to other staff. Committee records should not be filed with other office files where others may inadvertently access them.
- ? Be sure to destroy committee materials when you no longer need them, especially those items which contain names of respondents and/or grievants (i.e.- committee reports, committee minutes, lists of pending cases, communications from OLR staff, etc.).
- ? When you send letters or memos regarding an investigation be sure to mark the envelope **CONFIDENTIAL**, or **PERSONAL AND CONFIDENTIAL**. The top of the communication should be similarly labeled. If the communication is to a witness or other third party to the investigation, the first paragraph should indicate that you are conducting a confidential investigation and a request that the recipient not disclose the existence of the investigation.
- ? Do not send faxes containing anything confidential, even if it is only the name of the respondent, to another office unless it is arranged for the recipient to personally pick the fax up directly from the machine. In an office of any size, even that of another committee member, there is no way of knowing who or how many may see a fax. This does not apply to faxes sent to the OLR's offices, however.
- ? **Never** discuss committee investigations with anyone other than committee members, OLR staff, or individuals directly involved in the investigation, not even hypothetically, and not even with others in your law firm. Hypotheticals have a way of becoming identifiable. If you feel the need to consult with someone regarding an issue or question of procedure, it should be done with OLR staff or fellow committee members. Permission to consult with an expert can be obtained from the OLR if necessary expertise does not exist on the committee.

PART THREE

THE COMMITTEE CHAIRPERSON

I. ELECTION

At its first meeting of each calendar year, the committee elects a Chairperson and Vice Chairperson. *SCR 21.06(4)*.

II. CHAIRPERSON'S DUTIES

General. Chairpersons perform an important leadership role in the lawyer regulation system. They promote effective committee work in a variety of ways, including recruiting members, welcoming and training new members, sharing information with committee members, promoting close cooperation between OLR and the committee, evaluating committee work, and recognizing committee members for their contributions.

Recruiting. The Supreme Court appoints members to District Committees. Persons interested in serving must send a letter to the Clerk of the Supreme Court, P.O. Box 1688, Madison, WI 53701-1688. The letter should indicate willingness to volunteer to serve on a District Committee, and should enclose a resume or curriculum vitae. The Clerk refers these applications to the Appointments Selection Committee, which considers applicants for open positions and nominates two persons to the Court for each opening. The Court selects one of the two by majority vote and retains the other application for future consideration.

Chairpersons can realize many advantages by recruiting qualified applicants from within their respective districts. Qualities to look for include a strong interest in public service, familiarity with investigative work, and reputations for integrity and sound judgment. It is helpful to engage the entire committee in recruiting efforts.

On occasion, an applicant will ask to know the status of his or her application. The Chairperson should refer these inquiries to OLR.

Welcoming and Training. Upon selection by the Court, the applicant typically receives a phone call from the Chief Justice. If the applicant accepts, the Chief Justice will send the person a welcoming letter with copy to the Chairperson. OLR will send information about the regulation system directly to the new member. The Court Public Information Officer will issue a press release for the local media. The Chairperson should welcome the new member, inform him or her of the date and place of the next committee meeting, and introduce him or her to the committee.

OLR will schedule several training sessions during the spring, including a session in conjunction with the State Bar Convention in May. It is helpful to hold training sessions in various locations. Neighboring committees can conveniently participate in a local training session. The Director will contact Chairpersons in February to arrange

training dates and locations. OLR provides training materials and presenters for the training. Chairpersons are welcome to attend; their participation adds significantly to the value of the training. Experienced committee members are also welcome to attend. The training typically receives continuing legal education credit for four hours of ethics.

Other. District Committee Chairpersons are frequently asked to share their expertise in formulating policies and procedures for the lawyer regulation system. The Board of Administrative Oversight will frequently seek their views. The OLR Director will normally hold a conference with Chairpersons in conjunction with the State Bar Convention to discuss issues affecting the operation of the committees and the lawyer regulation system in general.

Committee Meetings. Chairpersons should schedule committee meetings on a regular basis for the next 12 months. The frequency of scheduled meetings should take into account the need to process matters within the 90-day standard prescribed by the Court, and the number of matters requiring committee deliberation. In the event a scheduled meeting becomes unnecessary, it may be cancelled.

Chairpersons should call meetings to order in open session for administrative matters. On the other hand, Chairpersons must ensure that the consideration of specific cases is done in closed session, as these matters are confidential. *SCR 21.06(5)*. Standard rules of order are appropriate for conducting business at the meeting. A majority of the committee is a quorum. Minutes should be kept, and a copy forwarded to OLR for information. A sample report of minutes is provided for your information at Appendix B.

Managing Cases. When referring a case to the District Committee, the OLR investigator will mail case materials to the Chairperson. The Chairperson should consider several factors when assigning the case to an investigator, including the expertise required, and the member's availability and workload. Ideally, each member of the committee should be assigned one or two cases per year. Public members may be assigned to do investigations, but should be assigned to work with a lawyer member. The Chairperson should notify OLR of the assignment. A form letter assigning a matter to an investigator is at Appendix C.

After assignment, the Chairperson should contact the committee investigator to ensure the case is progressing well, and to identify and help resolve any problems that arise. As the case is approaching completion, the Chairperson should coordinate with the committee investigator to plan for distributing the report to the members and the OLR staff investigator in advance of the meeting. It is helpful for the Chairperson to keep a record with the status of all assigned cases; this helps to ensure cases progress promptly toward completion.

After the committee meeting, the Chairperson ensures that the report is finalized in accordance with the committee's decisions, and promptly forwarded to OLR in the format provided in Appendix J.

PART FOUR

THE COMMITTEE'S INVESTIGATIVE PROCESS

I. INITIAL CONSIDERATIONS

Referral. When the staff investigator receives a grievance, attorney's response, and any comments on the response by the grievant, the staff investigator will evaluate whether to refer the case to committee. The referral may apply to some, or all, of the allegations in a matter. The decision to refer is based upon an analysis of whether the staff or the District Committee is best equipped to conduct the investigation. Indications that the committee is best equipped include the following.

- ? The credibility of the grievant, respondent, or other witnesses would be best evaluated by face-to-face questioning that can be done most effectively by a local investigator or through an investigative meeting.
- ? The perspective of attorneys with expertise in a particular area of law would be helpful.
- ? The perspective of local practitioners and lay people, or knowledge of local practices and customs would be helpful.
- ? The investigation requires extensive examination of local files and other evidence.
- ? The grievance involves issues relating to a frivolous action or an excessive fee.

Before referring the case, the staff investigator will contact the chairperson to provide advance notice of the pending referral, and to include the identity of the affected individuals and potential witnesses.

Conflict Check & Recusal. After receiving the identity of the individuals involved in a referral, the committee investigator should perform a conflict check. It may be necessary to disclose some information to perform the check, but the investigator should disclose only the information required to determine whether to recuse [see SCR 21.14 and Appendix I]. If questions arise about whether to recuse, the investigator should consult with the Chairperson or the staff investigator. In questionable cases, err in favor of recusing.

Substitution & Waiver. In every case, the respondent may make one timely request for the substitution of the investigator assigned to the matter by the Chairperson. SCR 22.04(2).

- ? The request for substitution as a matter of right must be made within 14 days after receiving notice of the investigator assignment. If there is a timely request, it will be granted. Another investigator will be assigned.

- ? The Chairperson will grant additional requests for substitution only for good cause.
- ? When a request for substitution is granted, the investigator initially assigned will not participate further in the matter.

The respondent may also waive the right to request substitution. Therefore, the committee investigator should contact the respondent immediately upon receipt of the case and determine whether the respondent would be willing to sign a waiver. This strategy will allow the investigator to begin immediately, and more easily to meet the processing standard prescribed by the Court.

II. DEVELOPING THE INVESTIGATIVE STRATEGY

Review the Materials. The committee investigator should receive a letter from the staff investigator, referring the case, and identifying issues relating to potential ethical misconduct and information that is needed. Enclosed with the letter will be a copy of the grievance when it has been received in writing, the staff's letter to the respondent, the respondent's response, and any further comments from the grievant. In some cases, there will be additional information. The committee investigator should read the material and become familiar with the facts and issues of potential misconduct.

Contact with Staff Investigator. At the outset of every case, the committee investigator and staff investigator should collaborate to clarify the issues and to discuss how to proceed. The staff investigator can assist the committee investigator by identifying needed information, suggesting collection strategies, and providing guidance about procedures and the interpretation of ethics rules.

Determine the required tasks and their sequence. Before collecting information, the committee investigator should formulate a strategy. The staff investigator can assist. When developing the strategy, the committee investigator should:

? ***Identify the issues of potential ethical misconduct.*** These may be described in the referral letter, or be apparent from the facts described in the enclosures. They may also become apparent later in the course of the investigation; when that happens, the investigator should collect relevant information relating to the newly identified issue. If further guidance or assistance is needed, the investigator should consult with the Chairperson or staff investigator.

? ***Determine what information is needed.*** The investigator should discover and collect all relevant information, whether inculpatory or exculpatory.

? ***Determine what collection methods will be used.*** Considering which methods are required will enable the investigator to collect efficiently, sequence the collection effort, identify collection problems, and meet processing timelines. Information about available collection methods is in the next major section.

? *Plan the sequence and timing of the investigation.* The Court requires the committee to complete its investigation within 90 days of the referral. To meet this standard, the investigator should plan, beginning backward from the required completion date, and setting dates for the accomplishment of all the significant steps in the investigation, including the committee meeting, circulation of the draft report, any investigative meeting that is required, and any other significant interviews or collection tasks.

? *Revise the strategy as required during the course of the investigation.*

Some ways to effectively and efficiently pursue the strategy include the following.

- ? Review the sequence of events with the Chairperson.
- ? Request from the respondent a written waiver of the right to request substitution.
- ? Ask the Chairperson to assign a second investigator when assistance is needed.
- ? Determine early on whether an investigative meeting is required, and if so, schedule it and notify the grievant and respondent as soon as possible.
- ? Arrange for interviews with the grievant, respondent, and relevant witnesses immediately.
- ? Maintain regular communication with the staff investigator.

III. COLLECTING EVIDENCE

The committee investigator should discover and document all the information relevant to a determination of the issues of potential misconduct. All inculpatory and exculpatory information must be included in the report. *SCR 22.04(3)*.

Interviews.

General.

? The first step after reviewing the file is to arrange appointments to meet separately with the grievant and respondent. Interview both in every case, if possible within 15-30 days of receipt of the file. Appendix D is a form letter for use in making the initial contact with a grievant or respondent. The investigator may also make the initial contact by phone. When doing so, it is important to be discreet to preserve the confidentiality of the investigation.

? In most circumstances, the investigator should interview the grievant first, then the respondent. If there is a face-to-face interview with one, there should also be one with the other, so as to treat the grievant and respondent evenhandedly. Telephone

interviews may also be appropriate, especially where travel is a consideration or if the interviews will be brief. Conduct as many follow-up interviews as are necessary.

? Investigators must report all relevant information, whether it supports or negates a possible rule violation. *SCR 22.04(3)*.

? Investigators must make and preserve their notes of interviews and calls. Such notes are necessary to the preparation of an accurate report and may be needed in the event testimony is required at a disciplinary hearing.

? During or in conjunction with an interview, an investigator may receive documentary evidence. All documentary evidence should be preserved and included as part of the investigative report.

Grievant Interview.

It is generally best to interview the grievant first; this is the most efficient way to frame the issues for investigation. During the interview, the investigator should seek to accomplish the following objectives.

? Confirm the allegations.

? Get the facts in more detail. Grievants often provide additional information or raise new issues, which can then be addressed with the respondent.

? Identify relevant witnesses. It frequently becomes apparent from the interview that other witnesses have relevant information. These may include the grievant's counsel, adverse counsel, a judge, a court clerk, insurance claims staff, adverse party, etc.

? Identify and obtain relevant documents. The grievant may also have relevant documentation, including written fee arrangements, correspondence with the respondent, receipts, memoranda, or other items.

? Evaluate credibility. Investigators should use their instincts when evaluating credibility, and should consider the grievant's openness, responses to difficult questions, and general comfort level.

? Make a Record. Investigators should make contemporaneous notes of any interview or contact, indicating the date, person interviewed, and a summary of pertinent facts. If appropriate, the notes can later be transcribed into a more detailed document. The investigator may record an interview with the person's consent. Notes or recordings are helpful for preparing when necessary to testify regarding admissions or statements made by the person.

Respondent Interview

? Obtain a response to each allegation. The respondent has a duty to cooperate and should respond to every one of the grievant's allegations. Investigators should clarify responses to make them as coherent and detailed as possible.

? Identify relevant witnesses. It frequently becomes apparent from the interview that other witnesses have relevant information. These may include adverse counsel, a judge, a court clerk, insurance claims staff, adverse party, etc.

? Identify and obtain relevant documents. The respondent may also have relevant documentation, including written fee arrangements, correspondence with the grievant, receipts, memoranda, or other items.

? Evaluate credibility. Investigators should use their instincts when evaluating credibility, and should consider the respondent's openness, responses to difficult questions, and general comfort level.

? Make a Record. Investigators should make contemporaneous notes of any interview or contact, indicating the date, person interviewed, and a summary of pertinent facts. If appropriate, the notes can later be transcribed into a more detailed document. The investigator may record an interview with the person's consent. Notes or recordings are helpful for preparing when necessary to testify regarding admissions or statements made by the person.

? Dealing with uncooperative respondents. It is important to document all efforts to obtain information from a respondent. If a temporary suspension or discipline is sought for a respondent's failure to cooperate, a record will be necessary. Even if a respondent eventually cooperates, failing to cooperate can still be the basis for finding a violation. If a respondent fails to cooperate, consider the following measures.

- Failure to respond to the initial letter to set up an interview appointment should be followed by a second letter, sent by certified mail. When a letter is sent by certified mail, a copy should also be sent by first class mail, in case the certified letter is returned.

- If a respondent fails to respond to letters, a Notice to Appear in the committee investigator's office can be sent to the respondent. The format for a Notice to Appear is attached as Appendix E; the format for an Admission of Service is attached as Appendix F. If the Admission is not returned in a reasonable period of time, contact OLR staff to authorize a process server to personally serve the respondent.

- If the respondent fails to return phone calls, the investigator should note the date and time the call was made, the message left, and who (or what) took the message.

- As long as confidentiality is not violated, the committee investigator has discretion regarding how to contact the respondent. The investigator can drop into the respondent's office unannounced; call the respondent at home where a secretary or answering machine will not intervene; stop the respondent in the courthouse, and so on.

- Failure to respond to the OLR is often associated with personal or emotional problems on the part of the respondent. These may render the respondent unable to cope with the situation involving the grievance. The investigator should be sensitive to these possibilities. Sometimes, the investigator can secure cooperation by assuring the respondent that the investigator will listen and impartially evaluate the grievance.

- If it appears that the respondent may have a disability, the investigator should inform the Chairperson and the staff investigator. OLR will provide further guidance on how to proceed.

- At any time, the committee investigator may consult with the staff investigator about how to gain cooperation. SCR 22.03(4) permits the Director to file a motion with the Supreme Court requesting that the Court order an uncooperative respondent to show cause why his or her law license should not be suspended for willful failure to cooperate. A motion requires a supporting affidavit from the investigator about the efforts to secure the respondent's cooperation. It is therefore important that the committee investigator maintain accurate information about attempts to contact the respondent.

Witness Interviews

? Corroborate allegations; evaluate the credibility of the grievant and respondent. Witness interviews may be crucial in corroborating factual allegations. In addition to direct testimony, witnesses frequently can provide background information, further documentation, and information concerning the character and reputation of the grievant or respondent for truthfulness.

? Assess new information and identify new allegations. Information gathered in witness interviews may raise new ethics issues. Investigators should consider whether new issues have arisen, and take steps to resolve them. This may require another interview of the grievant or respondent, or even a revision of the investigative strategy.

Written Inquiries

? Investigators may write to the respondent, grievant, or other witnesses, requesting written responses to specific questions. This is similar to sending interrogatories, but is done more informally. A respondent's duty to cooperate includes a duty to respond to written inquiries. A format for a written inquiry is at Appendix G.

? Written inquiries have a distinct advantage in that the responses are not easily changed or challenged by the witness. The response also reduces the possibility that the investigator misunderstood a statement, and precluded the possibility that the investigator took inaccurate notes, or did not correctly remember information.

Field Investigations

? A primary example of field investigation is going to the courthouse to review firsthand court files, docket sheets, or minutes.

? Investigators should make copies of relevant documents to alleviate the need for repeated visits, and to append to the investigative report.

? OLR reimburses fees paid for copying documents. Before incurring any significant expense, the investigator must contact the staff investigator in order to ensure that any significant expense is necessary.

Subpoenas

? Pursuant to SCR 22.42(1), the committee may issue a subpoena during an investigation to obtain testimonial evidence from witnesses and documents, such as bank records, insurance company files, etc. The subpoena format is at Appendix H.

? The need for a subpoena should be discussed with the Chairperson and OLR staff prior to issuance, to assure that no other route to obtain the information is available. The Chairperson should sign the subpoena.

? When a person is subpoenaed for testimony, the investigator should have a second committee member witness and record the interview, or should contact OLR to arrange for the presence of a court reporter. The witness should be placed under oath.

? If a witness is subpoenaed, the witness has the right to have an attorney present. On the other hand, neither the grievant nor respondent has the right to be present or have an attorney present at an interview of each other or of a third person.

Investigative Meetings

The Chairperson may conduct an investigative meeting by the committee, or by a subcommittee of one or more members. *SCR 21.06(4)*. Investigative meetings are an investigative method; they are not due process hearings. Committee members should be careful to avoid confusion about their purpose.

Considerations affecting whether to conduct an investigative meeting

? The purpose of an investigative meeting is to allow the committee or a sub-committee to formally interview the grievant, respondent, and any other witnesses.

? The investigative meeting is useful in assessing credibility. The committee or sub-committee acts somewhat as a jury, and has the opportunity to see witnesses and question them under oath. The committee then advises OLR on whether the witness would appear credible to a trier of fact. Credibility can be judged by demeanor, ability to recall facts, perception of events, and so on.

? An investigative meeting is often useful in complicated matters; when there are a number of witnesses who need to be questioned and assessed; or when the questioning of the grievant and/or the respondent needs to be expanded after the initial interviews have been completed.

? An investigative meeting can expedite an investigation by allowing the committee access to immediate witness responses to statements just made by other witnesses, which is much faster than sending letters back and forth, or doing repeated, sequential interviews. On the other hand, investigative meetings require time for notices to the grievant and respondent, and for scheduling the availability of the committee or subcommittee.

? The questions, input, and analysis of several committee members at an investigative meeting often result in an investigation more thorough than that of a single investigator. If a quorum of the committee is present, it can deliberate at the conclusion of the meeting, make findings, and agree on a recommendation. Thus, another meeting is not needed, and the process is expedited.

Preliminary Matters

? The Chairperson, in consultation with the committee investigator, will call an investigative meeting when it is necessary to complete an investigation. The Chairperson will determine whether the meeting will be conducted before the committee as a whole, or a sub-committee appointed by the Chairperson.

? The investigator must provide written notice of the time, date and place of the investigative meeting, to grievant and respondent 20 days prior to the meeting, unless the parties agree to an earlier date. The investigator should send the notice via first class mail, accompanied by an Admission of Service. See Appendices E and F.

- o The notice shall include a list of the committee members who will be present. The grievant and respondent may object to the participation of a member for good cause only, as determined by the Chairperson.

- o The notice shall advise the grievant and respondent of the matters under investigation, including references to Supreme Court Rules, which the committee

has tentatively identified as being in issue. However, the committee can investigate any issue relevant to the respondent's professional responsibility during the investigative meeting. The Supreme Court Rules that are specifically identified in the notice shall not limit the committee in its questions to the witnesses or be binding on the committee with respect to its findings.

- The notice shall also advise the grievant and respondent that if they have relevant questions they wish to have asked of any witness, they should submit those to the committee in writing prior to the meeting. The committee shall determine whether to pursue such questions.

? Prior to the investigative meeting, the committee investigator should draft a written report summarizing all pertinent information initially gathered by staff, and subsequently obtained by the committee investigator. The report should also identify the possible rule violations, and append all pertinent documents. The investigator should send the report and appendices to all committee members attending the meeting to allow them to prepare.

Conducting the Meeting

? The Chairperson, or a designee, shall preside at the meeting. The Chairperson, or designee, shall conduct the meeting in a fair and thorough manner and shall take responsibility for deciding any procedural questions that arise during the meeting. Unless waived by the respondent and the grievant, a quorum of the committee or sub-committee must be present in order to conduct the investigative meeting.

? The Chairperson, or designee, shall also be responsible for deciding whether a committee member has a conflict of interest and, therefore, must be excluded from the meeting. See Appendix I for information about when recusal is required.

? An investigative meeting is confidential and closed to the public. The grievant and respondent may be present throughout the meeting, and may be represented by counsel at the meeting. On the other hand, witnesses should be sequestered, except for good cause in the discretion of the Chairperson. Witnesses may have a designee present during the witness' testimony when the Chairperson determines that the designee's presence is required to provide necessary physical or emotional assistance to the witness.

? The committee must keep a record of the meeting. The Chairperson should designate a committee member to take sufficient notes so that the committee investigator will be able to prepare the investigative report. The meeting may be recorded on audio or videotape. If a more formal record of the testimony is required, the committee should request the Director's authorization to use a court reporter. After the meeting, if a transcript is required, the investigator should request the Director's authorization for a transcript.

? Non-attorney witnesses and documents may be subpoenaed. (*See* subpoena format, Appendix H). Attorney witnesses should receive a Notice to Appear, not be subpoenaed. (*See* Appendix E).

? The Chairperson, or designee, shall determine the order of witness testimony, giving reasonable accommodation to the witnesses' schedules. A typical order of testimony might be: grievant, grievant's witnesses, respondent, respondent's witnesses.

? Prior to testifying, the respondent, the grievant and witnesses shall be sworn by someone with authority to administer the oath.

? The Chairperson or lead investigator should lead the questioning, but all committee members and OLR staff present should be allowed the opportunity to question any witness.

? The grievant and the respondent shall not be allowed to cross-examine one another during the investigative meeting. They may, however, make an oral request to the committee for any follow-up questions that they would like to be asked. The committee shall determine whether to ask any particular question.

? The rules of evidence do not apply and do not constitute a basis for objection by the participants. The committee may hear and accept any evidence they believe helpful or that might lead to relevant information. Therefore, the committee may listen to "hearsay" and may accept documents, without the laying of a foundation, etc. Subsequently, however, the committee may need to contact additional witnesses and/or obtain further documents in order to corroborate the accuracy of any "hearsay" information that has been provided during the meeting.

? The respondent does have a privilege against self-incrimination [*SCR* 22.03(7)] regarding those matters that may subject the respondent to criminal liability.

? At the close of the investigative meeting, the committee may deliberate on the preliminary report, testimony and documentary evidence, and make its findings and recommendation, or schedule the deliberations/discussion for a subsequent meeting.

? The information obtained and the conclusions made as a result of the investigative meeting should be set forth in the investigator's report. Any documentary evidence that is obtained during the investigative meeting should be marked as an exhibit, preserved, and ultimately sent to OLR with the investigative report.

IV. EVALUATING THE EVIDENCE

What Are The Facts?

? After collecting and documenting all the relevant information relating to the investigation, the investigator should reflect on what really happened. In many cases, the evidence will make this clear. In other cases, it will be unclear. Reflecting on the information will reveal areas where the facts are unclear, and provide leads to other potential information. This evaluation will form the basis for writing the factual portion of the investigative report.

? The investigator should review the referral letter; this will help ensure collection of all needed information and consideration of all potential issues. The investigator may need to re-interview the grievant, respondent, or other witnesses, or to conduct further field investigation. If so, the investigator should immediately pursue the needed information. The staff investigator is available; committee investigators are encouraged to consult the staff investigator to discuss unclear factual situations.

? There may also be circumstances where the investigator believes it necessary to investigate other areas of potential ethical misconduct. The investigator has authority to do this. On the other hand, it may be prudent for the investigator to consult with the Chairperson or staff investigator beforehand.

Is there clear, satisfactory, and convincing evidence of ethical misconduct?

? OLR has the burden of proof in any disciplinary proceeding to prove misconduct by clear, satisfactory, and convincing evidence. *SCR 22.38 & SCR 22.39*. Therefore, the committee investigator should consider, for each allegation of potential ethical misconduct, whether the evidence would meet that burden. That consideration should account for evidence tending to support or tending to negate a finding of misconduct. The investigator should weigh all of the evidence and draw a conclusion regarding each allegation of potential misconduct. This evaluation will form the basis for writing the analysis portion of the investigative report.

? The investigator may need information regarding the interpretation of ethics rules to make this determination. The investigator should first consult with the staff investigator. Also, each committee has two copies of “Professional Discipline of Wisconsin Attorneys: A Compendium.” The compendium is also available in each circuit court library and on LOIS.

V. RECOMMENDING DISPOSITIONS

? The committee may make a recommendation concerning the disposition of a matter. Though non-binding, these recommendations are very helpful. They provide a perspective from the profession and the public that is independent of established

precedent, and that does affect future decisions concerning the sanction sought and obtained.

? Several resources are available to investigators to evaluate what an appropriate disposition might be. These include:

- Professional Discipline of Wisconsin Attorneys: A Compendium. The compendium is an organized collection of professional discipline cases, which includes all court cases—including court public reprimands—from 1983, all BAPR/OLR public reprimands from 1989, and all BAPR/OLR private reprimands from 1990. Materials are indexed by rule, area of practice, and topic, making research quick and effective. Each committee has two copies of the compendium. It is also available in each circuit court library and on LOIS.

- ABA Model Sanction Standards. The ABA Standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction. They include sanction standards and a procedure for considering the duty violated, the harm resulting, and a variety of aggravating and mitigating factors. While they are not binding on OLR or the Court, they offer a helpful framework for analysis. The ABA Standards are available from the Chairperson.

- OLR Disposition Index. The index is a computerized resource similar to the compendium. The staff investigator can provide the committee investigator information needed to make disposition recommendations.

- Decision Guidelines. The Guidelines provide principles and examples of disciplinary dispositions for use by committee investigators. Each committee investigator should have a copy.

? The following dispositions are available for consideration. More information about when they are appropriate is in the Decision Guidelines.

- Dismissal. This is appropriate when there is no violation or insufficient evidence of a violation.

- Dismissal with Advice. This is also appropriate when there is no violation or insufficient evidence of a violation, but where advice would alert the attorney to conduct that could constitute a violation or would enable the attorney to avoid committing misconduct.

- Diversion to an Alternative to Discipline Program. Diversion is appropriate whether or not there is a finding of misconduct. Alternative programs may involve education, arbitration, treatment for a medical, substance abuse, or psychological condition, or other programs. Diversion is appropriate where there is little likelihood that the attorney will harm the public, where the normal sanction would not exceed a private reprimand, where the Director can properly

supervise the program, and where the program can reasonably be expected to benefit the attorney. There are several limitations on when diversion is appropriate. For more information, *see* SCR 22.10.

- Private Reprimand. A private reprimand requires a finding of misconduct that may have caused no harm or minor harm. It is appropriate where public notice of the attorney's conduct is not required.

- Public Reprimand. A public reprimand requires a finding of misconduct. This is appropriate when the misconduct has caused little or no harm, but public notice of a rule violation is required to protect the public or the integrity of the courts or legal profession.

- Suspension. Suspension requires a finding of misconduct that is relatively serious. It may vary in length from 60 days to three years. It is appropriate when the misconduct has caused substantial harm, there is a pattern of misconduct or a history of prior discipline, the attorney failed to cooperate with the investigation, or the misconduct involves serious criminal activity.

- Revocation. Revocation requires a finding of misconduct that is serious in terms of its nature, its extent, or the harm caused. Most revocations are imposed for illegal and dishonest conduct, such as forgery or theft of client funds.

- Conditions on Continued Practice. Conditions require a finding of misconduct. Conditions may include a variety of terms, which are deemed appropriate to ensure the attorney practices professionally and may be entrusted to the public. A condition might relate to treatment for a medical condition, or to supervision of an attorney's trust account.

- Monetary Payment. Where there has been a finding of misconduct, a monetary payment may be appropriate as restitution to someone harmed by the attorney's misconduct.

VI. WRITING THE REPORT

? After collecting and evaluating the evidence, and before the committee meeting at which the report will be presented, the investigator must draft the investigative report. After the committee's consideration of the report, the investigator will finalize the report in accordance with the committee's decisions and forward the report to OLR.

? Due to the need for an efficient and effective transfer of information from the committee to the staff investigator, to the Preliminary Review Committee, and litigation counsel, it is important to use a standardized report format. Therefore, the committee investigator should use the format at Appendix J, with care to include all the sections and to use numbered paragraphs where indicated in the format.

? If the investigation involves more than one grievant or respondent, a separate report must be prepared for each, in order to preserve confidentiality.

Completing the Report

Investigative History

? List the date on which the grievance was referred to the committee.

? Note the name of the committee investigator and briefly summarize the steps involved in the investigation, including the names of all individuals interviewed and the manner in which the interview was conducted, i.e., face-to-face, telephone, etc.

? If applicable, note the date of any Investigative Meeting. List the names of the respondent and/or grievant as well as any witnesses who attended the meeting. Also identify the committee members in attendance.

? Identify the counsel representing the respondent or grievant.

Evidence

? This section should describe all the evidence that was obtained and reviewed by the committee during its investigation, with citations to the supporting evidence in the appendices.

? Where witnesses conflict in their testimony, the investigator should relate the factors that weighed in the evaluation of their relative credibility.

? Be sure to describe evidence of any mitigating and aggravating circumstances. These circumstances are not to be considered in determining whether a disciplinary violation has occurred, but are relevant in determining the appropriate disposition.

? Paragraphs in this section should be brief, numbered paragraphs, similar to a complaint to be filed in court. Each paragraph should contain a specific set of related facts, as does a civil complaint. Each paragraph should be capable of being “admitted” or “denied” fairly briefly. This format allows the committee’s report to become the basis of a disciplinary complaint, if the Director determines to seek public discipline.

Conclusions Regarding Misconduct by Allegation

? This section should analyze each potential disciplinary violation considered during the investigation, and should state whether there is clear, satisfactory, and convincing evidence to support an allegation that the respondent violated the applicable disciplinary rule.

? In determining whether the evidence supports a violation, please keep in mind that OLR would have the burden to prove each violation by clear, satisfactory, and convincing evidence. If there is some evidence of a violation, but not enough to meet the clear, satisfactory and convincing standard, the report should find no violation.

? At the beginning of each investigation, the staff investigator will identify issues of possible misconduct. The report should address each of these, and any additional possible violations identified during the investigation.

Recommended Disposition with Rationale

? Should the committee choose to submit a recommendation for the appropriate disposition of the grievance, the recommendation should always be prepared on a separate page. The recommendation is not sent to the grievant or the respondent. The committee should not disclose its disposition recommendation to them.

? If the report finds a violation, the recommendation should relate the basis for the disposition recommendation, to include any pertinent mitigating or aggravating circumstances.

? Prior discipline would constitute an aggravating circumstance. The committee will receive in a sealed envelope a history of any prior discipline of the respondent. If the committee finds rule violations, then the envelope is opened, and the enclosed information included in the basis for the disposition recommendation. If no violation is found, then the envelope should be destroyed.

? Upon request, staff will provide the committee with information regarding similar cases; this will promote a principled application of precedent in sanction recommendations.

Attaching Appendices

? Investigative reports must include copies of the documentation of interviews, written inquiries and responses, documents collected during the course of the investigation, notes of any investigative meeting, and correspondence.

? These materials should be attached as appendices to the investigative report.

VII. STAFFING THE REPORT

Before the Meeting

? The investigator should send a copy of the draft report to each member of the committee a week before the committee meeting to consider the case. The investigator may obtain reimbursement for mailing expenses from OLR.

? The investigator should be prepared to brief the committee members about the facts and allegations, and to respond to questions from the committee about the case.

During the Meeting

? The investigator should brief the committee members about the facts and allegations, and respond to questions from the committee about the case.

? The Chairperson should entertain motions and obtain votes on the following matters in each case.

- o The sufficiency of the facts. The committee should determine whether the investigation is complete. If the committee finds that more information is needed, the matter should be remanded to the investigator with specific instructions (i.e., interview additional witnesses, obtain additional documents, ask further questions of the respondent and/or grievant, etc.). If an investigative meeting is needed, the investigator should schedule it.

- o Findings regarding misconduct allegations. The committee should determine whether there is clear, satisfactory, and convincing evidence to support each of the separate allegations. The number of votes for and against should be recorded and reported, as well as the identity of any committee member who abstains or has recused.

- o The recommended disposition of the case.

? The staff investigator will be available to attend the meeting either in person or by phone.

VIII. SUBMITTING THE REPORT

After the conclusion of the committee meeting, the investigator should finalize the report to reflect the committee's decisions. The investigator should ensure all appendices are attached and marked, and that the disposition recommendation is contained on a separate page from the remainder of the report. The investigator should mail the report to the staff investigator as soon as possible after the committee meeting. Accounting for the timeliness of the report continues until the report is filed with OLR.