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In the Matter of Judicial Disciplinary  
Proceedings Against the  
Honorable Leonard D. Kachinsky

Wisconsin Judicial Commission,  
Complainant,

Case No. 18 AP 628-J

v.

The Honorable Leonard D. Kachinsky,  
Respondent.

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**RESPONSE BRIEF AND APPENDIX  
OF THE WISCONSIN JUDICIAL COMMISSION**

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## **INTRODUCTION**

This case is currently before the Supreme Court to review the Findings of Fact, Conclusions of Law, and Recommendation of Discipline (Findings) of the Judicial Conduct Panel (Panel), pursuant to Wis. Stat. §757.91. The Panel was appointed to conduct an evidentiary hearing concerning a complaint of judicial misconduct filed by the Judicial Commission (Commission), pursuant to Wis. Stat. §§757.87-89, regarding the behavior of Village of Fox Crossing Municipal Court Judge Leonard D. Kachinsky (Judge Kachinsky).

In a December 19, 2018 order, the Supreme Court afforded the parties the opportunity to file opening briefs concerning the Panel's findings by March 13, 2019. Both the Commission and Judge Kachinsky elected to file such briefs.

The Commission's opening brief primarily addresses the appropriate sanction to impose for Judge Kachinsky's misconduct, and largely agrees with the Panel's findings of fact.

In his opening brief, Judge Kachinsky concedes that he violated the Code of Judicial Conduct and indicates that he believes a nine-month suspension of his judicial office would be an appropriate sanction. (R. Brief). However, he also asks the

Supreme Court to find that some of the Panel's findings of fact and conclusions of law were clearly erroneous or incomplete.

In a March 14, 2019 order, the Supreme Court informed the parties that they may file responsive briefs if they wished by March 25, 2019. This brief is filed pursuant to that order.

## ARGUMENT

In Section III his brief, Judge Kachinsky broadly asserts that “some of the findings of facts and conclusions of law were clearly erroneous or incomplete.” R. Brief, 25. However, the manner in which the respondent specifically addresses the Panel’s findings of fact and conclusions of law makes it difficult to logically decipher his arguments. Section I of this brief concentrates on Judge Kachinsky’s assertions concerning the Panel’s findings of fact, while Sections II – V center on Judge Kachinsky’s assertions regarding the Panel’s conclusions of law. Finally, Section VI of this brief addresses recommended sanctions.

### I. JUDGE KACHINSKY’S ASSERTIONS DO NOT SUPPORT A DETERMINATION THAT THE PANEL’S FINDINGS OF FACT WERE CLEARLY ERRONEOUS

As previously stated in its opening brief, it is the Commission’s position that “virtually all of the relevant facts [for purposes of the Supreme Court’s review] are concisely stated in the Panel’s Findings.” Complainant’s Brief, 4.

The manner in which Judge Kachinsky outlines his statements of fact and his arguments that the Panel’s findings of fact were clearly erroneous could be reasonably categorized as disjointed, especially given that the judge appears to be asking the

Supreme Court to invalidate the Panel’s findings of fact under the “clearly erroneous” standard.

For example, rather than noting additional facts for the record or facts that he feels the Panel misstated from the record in a single “statement of facts,” methodically analyzing the Panel’s findings using the same numbering system employed by the Panel in its findings, or disputing factual assertions made by the Panel in their findings in that same order, Judge Kachinsky takes a markedly different approach.<sup>1</sup> Further, the problems with the numbering system(s) employed by Judge Kachinsky in his brief make his arguments challenging to follow.<sup>2</sup>

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<sup>1</sup> Certain historical facts are outlined in the first part of Judge Kachinsky’s statement of facts. R. Brief, 4-7. Judge Kachinsky describes chronological events between when he and the court manager “became Facebook (FB) friends around 2011-2014,” his decision to hire the court manager in May 2016, and events of March 2017 (prior to the alleged incidents of judicial misconduct). Id.

Rather than chronologically addressing the facts relevant to the judicial ethics case (between late March 2017 and July 2018), Judge Kachinsky next provides a five-page chart which inaccurately outlines the Panel’s conclusions of law (which will be discussed further in Section V of this brief, below). R. Brief, 7-11. This chart does not describe any additional facts for the Supreme Court to consider, and Judge Kachinsky concludes his statement of facts with this chart.

In the middle of his legal argument (Section III), Judge Kachinsky provides the majority of the facts that he is seemingly asking this court to consider as either clearly erroneous findings or as additional relevant facts not cited by the Panel in the Findings. Id. 25-31.

<sup>2</sup> Judge Kachinsky employs his own numbering system to his paragraphs in Section III of his brief. Those numbers do not correspond to the Panel’s paragraph numbering system in the Findings.

(footnote continued)



Compounding these problems, Judge Kachinsky also: (1) fails to provide an appendix for the Supreme Court containing cited transcript pages and cited exhibits introduced into evidence during the Panel’s hearing; (2) fails to cite to the Panel’s record on numerous occasions;<sup>3</sup> and (3) cites to the record incorrectly or in a manner which could be deemed misleading.<sup>4</sup>

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Additionally, more than half of the paragraphs of “additional facts” contained in Section III purportedly cite to specific paragraphs in the Findings when it is readily apparent that Judge Kachinsky is not, in fact, citing the Findings. R. Brief, 28-31 (¶¶13-31).

<sup>3</sup> In more than third of the paragraphs of “additional facts” contained in Section III of his brief, Judge Kachinsky attempts to introduce additional facts but fails to make any specific citation to a record, such as a transcript page or an exhibit number in so doing. R. Brief, 26, 28 – 29 (¶¶ 4, 16 – 25).

<sup>4</sup> In addition to the numbering problem in which the judge asserts that he is citing to the Findings but a review of the findings does not support his assertion (discussed in footnote 2, above), there are several other inaccuracies.

For example, in Section III, ¶2 of Judge Kachinsky’s brief, he asserts that he “agree[s] with the findings in paragraph 8 [of the Panel’s findings of fact] and that “overly lax supervision of [the court manager’s] predecessor did not mean it had to continue once [the court manager] was hired,” but does not cite to the Findings or a specific transcript page to support his contention, and a review of the transcript reflects that no such statement was made during the course of the evidentiary hearing in this matter. R. Brief, 25. Findings, 5-6 (¶8).

Additionally, in Section III, ¶6 of his brief (referring to the Findings), the judge states:

Agree with paragraph 16. However, please note that Exhibit 2 (which requested cooperation with photographs) was Kachinsky passing on a request from his daughter. The issue was not raised again once [the court manager] declined. R. Brief, 26.

This is inaccurate. The record reflects that, several days later, the judge, again, emailed the court manager about photos to be taken in the courtroom. See 2.7.18

(footnote continued)

Furthermore, it appears that the only factual findings of the Panel that Judge Kachinsky appears to assert are “clearly erroneous”

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Tr., 50-52 (testimony of court manager) and Exhibit 9 (4.30.17 Email “Cameras in Courtroom Voigt”)(Complainant’s Response Appendix (C. 2ND APP-102-104, 110)).

In ¶9 of his brief, referring to Findings, ¶¶19 - 20, Judge Kachinsky asserts that “the emails in question were in lieu of more time-consuming in-person discussions.” Again, the record does not support this claim. Additionally, in the same paragraph, the judge says that the court manager was “pleased that I took Barb (my wife) out to eat, a comment that was personal,” referring to Exhibit 5 (4.21.17 Email “Open communications, etc.”)(C. 2ND APP-112). This assertion is misleading, as the court manager was responding to the eighth email in a nine-email chain from the judge in which he relates, “And [my wife] just proposition me to go out to eat tonight somewhere.” The court manager responded, “I hope you and [the judge’s wife] have a great evening out to eat!” Id.

In ¶14 and ¶16 of Judge Kachinsky’s opening brief, the judge refers to the layout of the small office that he shares with the court manager, making mention of a room divider and his desk. R. Brief, 28. The Panel noted that “the judge and court manager share a small office in the municipal building.” Findings, 6 (¶8). In ¶14 of his brief, the judge refers to the portion of the court manager’s desk that he leaned over to whisper “are you afraid of me now” on July 17, 2017, as a “room divider.” Alternately, the Panel refers to it as a “desk ledge.” Findings, 21 (¶48). Two photographs of the court manager’s desk and the partition are attached to this response brief for reference. Exhibit 93 (1-2)(C. 2ND APP-119-120).

Additionally, in ¶16 of his brief, the judge indicates that the location of the bloody envelope on his desk on the evening of July 20, 2017, did not support the Panel’s finding that he “left the envelope, with blood stains, on his desk where it would be readily observed by [the court manager... and] the bloody envelope was an attempt to intimidate [the court manager] or to elicit her sympathy towards Judge Kachinsky.” Findings, 22 (¶50). The map the court manager drew of the office and her testimony concerning the placement of the envelope are instructive. Exhibit 96. (C. 2ND APP-121). The court manager’s testimony is, as well. See 2.7.19 Tr., 88-89 (in which the court manager testified that: (1) the envelope was placed at the “edge of his desk;” (2) it was impossible for her to get to her desk “without walking directly past where this envelope was placed;” and (3) in referring to Exhibit 96, the envelope was placed on the “rounded edge to his desk”)(C. 2ND APP-105-106, 121).

with any specificity are findings that: (1) “the alleged retaliatory acts” were not, in fact, “retaliatory;”<sup>5</sup> (2) “the February 15, 201[8] email that preceded the court session (Exhibit 81) was found to be a non-work related communication [, h]owever that was clearly erroneous as it clearly related to procedures that were going to be followed in court that night;”<sup>6</sup> and (3) the poster he left on his desk

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<sup>5</sup> R. Brief, 23. Findings, 20 (¶44), 34 (¶81). It is unclear whether the judge is asserting that the Panel’s holdings in which the judge’s conduct is described as retaliatory amounts to: (1) findings of facts (thus subject to the clearly erroneous standard); or (2) conclusions of law (subject to a less deferential standard of review).

It is the Commission’s position that the Panel’s retaliation findings are findings of fact, because the Wisconsin Code of Judicial Conduct does not have an explicit retaliation provision.

Furthermore, using the words “retaliation” and “retaliatory” in the Findings, the Panel does so in the context of producing a description of or commentary about what the evidence presented during the hearing reflects, and, thus, more properly, should be considered a finding of fact. Findings, 20 (¶44), 34 (¶81). Additional discussion concerning a review of this determination as a “conclusion of law” is contained in Section III of this brief (below).

Removing any legal materiality or sufficiency requirement, retaliation is defined as “[t]he act of doing someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or revenge.” Black’s Law Dictionary, 1510 (10<sup>th</sup> Ed. 2014). By this definition of retaliation, Judge Kachinsky retaliated against his employee. Regardless, the Panel’s conclusion of law was that the described behavior amounted to a violation of SCR 60.02 and 60.03(1) (again, discussed further in Section III of this brief).

<sup>6</sup> R. Brief, 31 (n. 10). Findings, 27 (¶66), 30(¶76), and 35 (¶81). A closer review of the Panel’s findings reflects that Judge Kachinsky’s factual description is inaccurate. The Panel did not find that the judge’s February 15, 2018 email was “non-work related,” as he asserts. Id.

Rather, the Panel found that the judge, according to his email, “wanted [the court manager] to take a brief opportunity to observe him in a closed setting to see if he displayed signs of impairment” prior to court that evening. Findings,

(footnote continued)

prior to July 2, 2018, with a picture of the Village Manager's face and the words, "I am from the government and I am here to help you. WWRD. #notmetoo," was not a "communication" directed at the court manager.<sup>7</sup>

As discussed more extensively in the preceding pages (including footnotes), the Panel's findings of fact, to the extent that they are apparently challenged by Judge Kachinsky in various portions of his brief, should be upheld and are not clearly erroneous.

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27 (¶66). The Panel also found that the judge's decision to send the court manager that email (and another one about a courthouse dispute between a judge and a clerk in another county later that month) was "irresponsible and improper conduct and conduct unbecoming of a judge," especially given that, earlier that same day, the court manager obtained an injunction compelling the judge's communications to the court manager to be limited to those that are "work-related and essential to the functioning of the Village of Fox Crossing Municipal Court." *Id.*, 35 (¶81) (emphasis added).

The Panel notes that "[i]t was not part of the [court manager's] job to observe Judge Kachinsky for signs of impairment." *Findings*, 27 (¶66). At the very least, the judge's attempt to use court manager to act as an amateur drug-recognition expert is not a communication "essential to the functioning" of the court.

<sup>7</sup> *R Brief*, 32. *Findings*, 28 (¶69) and 35 (¶81). The Panel specifically found that "[a]lthough Judge Kachinsky testified that he did not intend the poster to be a communication to [the court manager], he and [the court manager] were the only two individuals who worked in the municipal court office" and it was "left [...] on his desk where [the court manager] would see it." *Id.* Furthermore, the office in question had been previously described as "small." *Id.*, 6 (¶8). *See also* 2.7.19 Tr., 130-132 (court manager's testimony regarding posters) (C. 2ND APP-107-109) and 2.8.19 Tr., 437-439 (judge's testimony regarding posters)(C. 2ND APP-123-125). Based upon the testimony of court manager and the judge, the Panel's reasoning that the poster amounted to a communication was not clearly erroneous.

II. THE ARGUMENTS CONTAINED IN SECTION I OF JUDGE KACHINSKY’S BRIEF CONCERNING THE SEPARATION OF POWERS ARE NOT GERMANE TO THE SUPREME COURT’S DETERMINATION CONCERNING WHETHER JUDGE KACHINSKY VIOLATED THE CODE OF JUDICIAL CONDUCT

Rather than squarely addressing the Panel’s conclusions of law in the context of Supreme Court Rule 60, in his opening brief, Judge Kachinsky makes legal arguments which he had not previously developed in these disciplinary proceedings which are irrelevant to them, asserting that Village administrators had no legal authority to address his treatment of the court manager.

First, it should be noted that Judge Kachinsky conceded in his brief that he committed judicial misconduct.<sup>8</sup> Even if the Court

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<sup>8</sup> Judge Kachinsky states that he believes that “primarily demeanor violations” “have been adequately proven” and that he made “inappropriate comments” during “incidents in which the tensions slightly boiled over.” R. Brief, 34. He further opines:

The violations of the Judicial Code supported by the evidence are primarily matters of demeanor in out-of-courtroom interactions with [the court manager]. The Facebook postings did not specifically identify [the court manager] but persons who knew them well could figure out to whom Kachinsky was referring. Similarly, labeling [the court manager...] a “weakling” and “coward” fell below the high standards to which judges are supposed to adhere. R. Brief, 36.

*See also Findings*, 6 (¶10), 7 (¶13), 20 (¶45), and 26 (¶61)(regarding Facebook postings), and *Findings*, 20 (¶46), 22 (¶51), and 34 (¶81) (weakling and coward comments).

Finally, in taking a position on what he believes to be appropriate discipline, Judge Kachinsky states:

(footnote continued)

agreed with Judge Kachinsky's legal arguments (which the Commission does not concede), because of the judge's admissions concerning violations of the Code of Judicial Conduct, the Supreme Court could limit its consideration and impose sanctions on those issues alone, as it did in In re Crawford, 245 Wis.2d 373, 390, n. 11, 629 N.W.2d 1 (2001). In Crawford, the Court held:

We do not need to reach the issue concerning the application of SCR 60.04(2)(a) and Wis. Stat. § 943.30(1) to Judge Crawford's conduct. As a general rule, while resolution of one issue disposes of a matter, we will not address additional issues. *See, e.g., Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis.2d 627, 640 n. 7, 586 N.W.2d 863 (1998). We have concluded that Judge Crawford violated SCR 60.03(1) and impose a sanction on that basis alone. Id.

In Section I of his opening brief, Judge Kachinsky makes an argument which is irrelevant to this judicial disciplinary case. For the first time in these disciplinary proceedings, Judge Kachinsky cites case law to develop his heretofore unsubstantiated argument that the Village employees had no legal authority to address his treatment of the court manager.<sup>9</sup> Concerns of equity aside, Judge

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A fair and just resolution of this complaint would be a finding of judicial misconduct on the counts I have conceded were proven. A suspension of nine months would be more than commensurate with [the] seriousness of the proven violations. Id. at 38.

<sup>9</sup> While the case was before the Panel, Judge Kachinsky could have made these arguments by: (1) filing a motion to dismiss the Commission's complaint in part or in whole; (2) filing a motion for summary judgment; (3) citing these cases prior to or at the conclusion of the evidentiary hearing before the Panel; or (4)

(footnote continued)

Kachinsky attempts to transfer arguments to his brief from several distinguishable civil lawsuits relating to his dispute with the court manager and other Village employees (Winnebago County case nos. 17CV954, 18CV102, and 18CV359).<sup>10</sup>

Judge Kachinsky posits that the Village did not have the authority to regulate contact between him and the court manager pursuant to Wis. Stat. § 755.10(1).<sup>11</sup> Such an argument is of little relevance, as the Village of Fox Crossing is not a party to this

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requesting additional time to address these issues after the evidentiary hearing but before the Findings were issued. He did none of these things.

<sup>10</sup> In several instances, Judge Kachinsky copies pages verbatim from the legal briefs he filed in two of those cases to his opening brief.

<sup>11</sup> In pleadings filed in connection with Winnebago County case no. 17CV974, the municipality acknowledged that the judge was the court manager's supervisor pursuant to Wis. Stat. § 755.10, but indicated that: (1) the court manager had a right to a workplace free from harassment and retaliation under the law; (2) the Village, as the court manager's employer, would be liable for Judge Kachinsky's conduct if it failed to take reasonable care to prevent, investigate, or correct harassing behavior; and (3) the manner in which the judge acted exposed the Village to liability concerning these complaints. The contact at issue in 17CV974 primarily related to the Village's insistence that another employee be present during in-person meetings between the judge and the court manager. The case was dismissed prior to any final ruling on any these issues, and these matters are largely irrelevant to these disciplinary proceedings.

Incidentally, in Barland v. Eau Claire, 216 Wis.2d 560, 573, 575 N.W.2d 691 (1998) (internal citations omitted)(cited by Judge Kachinsky on page 15 of his brief), the court explained that the majority of governmental powers lie within the "great borderlands" of "shared authority" and that, in those areas, one branch of government "may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power." It is difficult to see how a request by the court manager or other Village officials to keep conversations between the judge and the court manager limited to work issues (the relevant concern in this case) would "unduly burden" or "substantially interfere" with Judge Kachinsky's exercise of his judicial powers.

judicial discipline case. Rather, the relevant determination in this case is whether the Supreme Court has the authority to regulate Judge Kachinsky's conduct. It does, pursuant to Art. VII, Sec. 11, Wis. Const. and Wis. Stat. § 757.91. Judge Kachinsky acknowledges the Court's authority in his opening brief. R. Brief, 14.

Regardless of arguments concerning the scope of the Village's authority, Judge Kachinsky's dogged persistence in demanding that the court manager maintain a personal relationship with him or risk termination, and the relentless and bitter manner in which he responded to her attempts to limit their communications to the workplace (for example, calling her a "coward" and a "weakling" (Findings, 20 (¶46), 22 (¶51), and 34 (¶81)) was conduct inconsistent with the high standards of judicial office which he is required to maintain.

Furthermore, a review of Judge Kachinsky's recently filed response brief reflects that he has a fundamental misunderstanding concerning the relationship which exists under the law between a judge and his or her court manager, indicating that his dispute with the court manager "had the inevitable result of eroding any emotional bonds between Kachinsky and [the court manager] that were essential for a high functioning municipal court." R. 2<sup>nd</sup> Brief, 4. Judge Kachinsky's self-described "emotional bonds" with his



court manager should not be a consideration in his supervision of her or in determining whether she should be disciplined or her employment should be terminated (as apparently it was for him).

Regardless, as recently as the evidentiary hearing in February 2019, Judge Kachinsky acknowledged that the court manager was a “model employee” and a “great employee” and that he had no problem with her work product, describing it as “good.” 2.8.19 Tr., 409 (C. APP, 109). However, at seemingly every turn, Judge Kachinsky disregarded the repeated requests made of him to avoid conduct which could be considered harassment of or retaliation against the court manager for making a complaint with the Village’s human resources director concerning his conduct or for cooperating with the Commission in its investigation.<sup>12</sup> Moreover, he did so in a particularly spiteful manner.

Alternatively, the judge could have: (1) without any fanfare, filed an injunction request in June or July of 2017 arguing that the Village administrators were overstepping their authority; or (2) at the

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<sup>12</sup> The Panel found:

Despite numerous interventions and directives by the human resources manager, the Village manager, the Village attorney, law enforcement, a circuit court commissioner, a circuit court judge, and [the court manager] herself, Judge Kachinsky persisted in conduct contrary to those directives and was driven solely by his myopic view of what his work relationship with [the court manager] should be. Findings, 38.

very least, acted circumspectly while this disagreement was ongoing. Instead, Judge Kachinsky called the court manager a “coward” and a “weakling” (Findings, 20 (¶46), 22 (¶51), and 34 (¶81)), publicly aired his grievances about her on Facebook, visible to 600+ people, including members of the local legal community<sup>13</sup> (Findings, 6 (¶10), 7 (¶13), 20 (¶45), and 26 (¶61)), lunged toward the court manager, over her desk, and whispered, “are you afraid of me now?” (Findings, 21 (¶48) and 34 (¶81)), left a bloody envelope on his desk

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<sup>13</sup> Several of Judge Kachinsky’s Facebook posts specifically noted in the Panel’s findings were: (1) a June 29, 2017 post “this sh-- is not over, I might have an employee termination today. Not mine” (referring to his threats to terminate the court manager’s employment if she does not have a low-level personal relationship with him); and (2) a December 23, 2017 post in which he used a “sad face emoji” and stated “Len Kachinsky was feeling sad. Few things are sadder than a co-worker who refuses to return a Merry Christmas greeting out of spite.” Findings, 20 (¶45), 26 (¶61), and 34 (¶81).

The Panel found that while the June post did not identify the court manager by name (instead as an “employee”) “Judge Kachinsky had no employees other than [the court manager] at the municipal court and no employees in his law practice [and t]he conclusion that the employee to whom he referred was [the court manager] is unavoidable.” Id. With regard to the December post in which the court manager was referred to as a “co-worker,” the Panel noted, “Again, [the court manager] is Judge Kachinsky’s only co-worker/employee.” Id. Additionally, the judge had just posted a photograph of the court manager on his Facebook page three days earlier, praising her for her past support during his health problems. Findings, 25 (¶60).

At one point in his opening brief, Judge Kachinsky argues that the December post did not identify the court manager by name or “identify the gender, position or place of employment of the co-worker” and that “[t]here were approximately 160 employees on the average Fox Crossing payroll.” R. Brief, 24. However, the judge only had one other co-worker in the Municipal Court, the court manager. Additionally, later in that same brief, Judge Kachinsky acknowledged, “The Facebook postings did not specifically identify [the court manager] but persons who knew them well could figure out to whom Kachinsky was referring.” Id. at 36.

for her to find (Findings, 22 (§50) *and* 34 (§81)), and engaged in additional conduct which can be reasonably seen as petty and/or vindictive.

Furthermore, Judge Kachinsky's November 3, 2017 cryptic email threatening "fire and fury" and urging the court manager to be "psychologically prepared" for events the following week was unnecessary and designed to be disruptive by its very language. Furthermore, when Judge Kachinsky was interviewed by the police concerning the threatening email, he giggled on several occasions. Findings, 23-24 (§57) and 35 (§81).

Judge Kachinsky needlessly sent the "fire and fury" email to his court manager when he could have just: (1) filed the intended lawsuit without advance notification to anyone involved, or (2) alternately, specifically disclosed in his email to the court manager that he was filing the lawsuit without using the concerning and inflammatory language.<sup>14</sup>

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<sup>14</sup> During his testimony in the evidentiary hearing, Judge Kachinsky asserted that he was planning on filing a lawsuit against the Village but "didn't feel like" telling the Village directly. 3.8.19 Tr. (Cross Examination of Respondent), 422-425 (C-APP. 122-125). Instead, the judge insisted on using the "fire and fury" language in his email to the court manager because he wanted to "at least leave them a little bit curious as to what was going to go on," and he "just wanted to make them curious as to what I had [up] my sleeve." Id.

The judge's use of the plural "them" twice during his cross examination should be noted. Id. at 423-424. Based upon the use of this plural pronoun, it is

(footnote continued)

Sending this email was just one of the judge's numerous actions which added fuel to a fire that might have died out on its own accord if only he had acted with some degree of circumspection in his interactions with the court manager and other Village employees.

III. THE ARGUMENTS CONTAINED IN SECTION II OF JUDGE KACHINSKY'S BRIEF RELATING TO RETALIATION AND INTIMIDATION ARE IRRELEVANT TO THE SUPREME COURT'S DETERMINATION CONCERNING WHETHER JUDGE KACHINSKY VIOLATED THE CODE OF JUDICIAL CONDUCT

In Section II of his brief, Judge Kachinsky asserts that the Panel's findings that his conduct amounted to "retaliation" and "intimidation" were incorrect. R. Brief, 21-25. However, in his conclusion in that same section, the judge:

[a]cknowledges that conduct that is not "retaliation" or "intimidation" may violate the Judicial Code provisions against not maintaining and enforcing high standards of conduct (SCR 60.02) and respect and compliance with the law (SCR 60[.]03).<sup>15</sup> Id. at 25.

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evident that Judge Kachinsky intended this email (although sent by him to the court manager alone) to cause a reaction from not only the court manager, but also from various other Village officials.

<sup>15</sup> In that same section, Judge Kachinsky also admits "[w]hile [Judge] Kachinsky's acts can still be considered violations of other provisions of the Judicial Code, any finding that those acts were retaliatory was clearly erroneous." Id., 23.

First, Judge Kachinsky asserts that the Supreme Court should extend certain federal employment law requirements of a retaliation claim to the Panel's findings that the judge retaliated against the court manager for complaining about his conduct and/or requesting that they have a relationship limited to workplace matters.

Judge Kachinsky argues that none of his conduct which the Panel found to be retaliatory rose to the level of a "materially adverse" employment action under Rabinovitz v. Pena, 89 F.3d 482, 488 (7<sup>th</sup> Cir. 1996). However, a threshold requirement for prevailing in a federal employment lawsuit and arguments concerning the sufficiency of the retaliatory conduct are irrelevant to the Panel's and the Court's determinations concerning whether the judge violated SCR 60.02 and 60.03(1). Additionally, the judge does not cite any judicial ethics cases in Wisconsin (or elsewhere) to support his position.

As previously discussed in Section I (n. 5) of this brief, aside from any requirement in a federal employment law cause of action, retaliation is defined as "[t]he act of doing someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or revenge." Black's Law Dictionary, 1510. As the Panel made findings of fact categorizing the respondent's actions as "irresponsible and improper conduct and conduct unbefitting of a

judge,” it is evident that it was Judge Kachinsky’s intent to harm the court manager and the Village as a result of perceived slights against him, and the Panel found accordingly.<sup>16</sup> Findings, 20 (¶44) and 35 (¶81).

Judge Kachinsky next argues in Section II of his brief that he did not intimidate the court manager (while again acknowledging that the described conduct “can” be the basis for a violation of SCR 60.02 and SCR 60.03(2)). R. Brief, 25. It is not clear whether Judge Kachinsky is arguing that a determination that the judge intimidated the court manager is a finding of fact (to be considered under the “clearly erroneous” standard) or a conclusion of law (entitled to less deference). Again, just as with his arguments concerning retaliation, it appears as if the Panel’s use of the word “intimidation” amounted to a description of the judge’s problematic conduct (factual finding) rather than a legal finding (conclusion of law). Findings, 21 (¶48), 22 (¶50), 26 (¶62), and 34 (¶81). Even affording the common dictionary definition of “intimidate,” as “to make timid or fearful,”

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<sup>16</sup> Because the Wisconsin Code of Judicial Conduct does not have an explicit retaliation provision (as is contained in several other states’ judicial ethics codes), the Panel’s findings that the judge’s behavior amounted to “retaliation” was not a conclusion under federal employment law, but instead a commentary on or description of what the evidence presented reflects and should, more properly, be considered a finding of fact. Under the Black’s Law definition of retaliation, Judge Kachinsky retaliated against his employee. The Panel’s conclusion of law indicated that the described behavior amounted to a violation of SCR 60.02 and 60.03(1).

as Judge Kachinsky argues the Court should do, pursuant to Bachowski v. Salamone, 139 Wis.2d 397, 407, 407 N.W.2d 533 (1987), a reasonable fact-finder could find the judge's behavior amounted to intimidation of the court manager.

IV. THE ARGUMENTS CONTAINED IN SECTION IV OF JUDGE KACHINSKY'S BRIEF CONCERNING WHETHER HE VIOLATED THE INJUNCTION ARE UNPERSUASIVE.

Despite Judge Kachinsky's implications to the contrary, the Panel did not specifically find that Judge Kachinsky violated: (1) the harassment injunction issued by Winnebago County Court Commissioner Lisa Krueger on February 15, 2018, in Winnebago County case no. 18CV102 by sending an email in late February 2018, or (2) the second injunction issued by Sheboygan County Circuit Court Judge L. Edward Stengl on June 19, 2018 (in a *de novo* review of Commissioner Krueger's decision) with several postings in his office. However, the Panel found that the Judge's problematic behavior relating to the injunctions violated Supreme Court Rules 60.02 and 60.03(1) (irrespective of whether his conduct actually violated the injunctions) and indicated that such behavior was "irresponsible and improper conduct and conduct unbefitting of a judge." Findings, 35 (¶81).

While it is the Commission's position that the judge's emails and postings did, in fact, violate the injunctions, even if the Court does not make similar findings (which it is not required to do), it can still find that the conduct in which the judge engaged after the February 15, 2018 and June 19, 2018 orders were issued violated the Code of Judicial Conduct.

As to the February 15, 2018 court order, Judge Kachinsky states, "A transcript of Court Commissioner Krueger's oral ruling (Exhibit 217) defined harassment as communications that are personal in nature and have no connections with the parties' work duties." R. Brief, 31.

Although the transcript is incorrectly cited, it appears that Judge Kachinsky is largely quoting from page 5 of Exhibit 217 (his exhibit). However, he omits language in the same paragraph of his quotation which is essential to a full understanding of Commissioner Krueger's ruling. More fully, the transcript reads:

I'm defining [harassment] as personal communication both at work and outside of work, unwanted cards, gifts, Facebook posts, conversations, emails that are personal in nature and have no connection with either party's work duties. All communication moving forward should be work related and essential to the functioning of the Village of Fox Crossing municipal court. Exhibit 217:5 (2.15.18 Tr. 5)(C. 2ND APP-129) (emphasis added).

This is the section of the transcript that the Panel noted in its decision. Findings, 27 (¶65), 35 (¶81).



Incredibly, the judge asks the Court to believe that his February 27, 2018 email about a dispute between a circuit court judge and his clerk in another jurisdiction was sent because he was “responsible for [the court manager’s] professional development which included knowledge of situations in other courts in Wisconsin,” and that the email was “meant to inform her of a work situation to which she might compare her own.” R. Brief, 32. Perhaps an argument can be advanced that this email was “work-related,” albeit unnecessary. However, it is hard to fathom how this email complied with Commissioner Krueger’s order to Judge Kachinsky to limit communication to that which is “essential to the functioning of the Village of Fox Crossing municipal court.”<sup>17</sup> This was not an email about a case before the judge or a financial report to be submitted to the municipality.

As to the June 19, 2018 court order, Judge Kachinsky admits that it did not “contain latent ambiguities,” but asserts that the poster he left on his desk which had the Village manager’s face on it was not intended as a communication to the court manager and that the

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<sup>17</sup> The judge’s arguments concerning the February 15, 2018 email should fail for the same reasons. Regardless of whether it was “work-related,” it was not “essential to the functioning of the Village of Fox Crossing municipal court.” (Discussed further in footnote 6, above).

“sexual harassment policy” poster with the word “sexual” highlighted seven times was “work related.” R. Brief, 32-34.

Arguments responsive to Judge Kachinsky’s assertion that the Panel’s findings about the poster of the Village manager’s face are developed in detail in Section I, footnote 7, of this brief (above), as it appears that the judge is asking the Court to review the Panel’s findings of fact concerning this communication.

Additionally, Judge Kachinsky’s argument that the posting of the sexual harassment policy was “essential to the operation of the municipal court” strains the bounds of logic, especially considering that he had never (in his 22 years on the bench) posted the sexual harassment policy anywhere in the small municipal court office, despite working with two female court managers, until a few days after the injunction was issued against him in June 2018.<sup>18</sup> Judge Kachinsky’s decision to post the policy in the office and his decision to highlight the word “sexual” was not “essential to the workplace” before or after June 19, 2018, and an argument to the contrary has little merit.

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<sup>18</sup> Judge Kachinsky stated that he had been on the bench since 1997 (R. Brief, 34) and, upon questioning during the evidentiary hearing admitted that he had never posted the Village’s harassment policy prior to this date. (2.8.19 Tr., 439)(C. 2ND APP-125).

Finally, just as with so many of the other incidents involving the judge in this case, instead of acting with circumspection or availing himself of a legal remedy during this dispute, the judge took a contrary approach.<sup>19</sup> Accordingly, it is the Commission's position that, even if the Court does not find that the judge violated the injunction, the Panel's finding that conduct at issue still violated the Code of Judicial Conduct was correctly decided.

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<sup>19</sup> If Judge Kachinsky believed that the portion of the February 15, 2018 order limiting his communications to those which were "essential to the functioning" of the court was confusing, he could have filed a motion to clarify Commissioner Krueger's rulings or perhaps, simply erred on the side of caution when communicating with the court manager while the *de novo* review of the order was still pending.

Likewise, Judge Kachinsky could have just not posted the sexual harassment policy or highlighted the word "sexual" when he did. Additionally, Judge Kachinsky's poster of the Village manager could have remained in a drawer in his desk or turned upside down while he decided whether to display it elsewhere. Again, the judge could have filed a motion to clarify the June 19, 2018 ruling or appealed it.

Judge Kachinsky did not pursue these options, and his actions relating to the injunctions appear to have been intended (just like many of his other actions throughout this dispute) to deliberately goad or provoke the court manager and other Village employees concerning their involvement in these proceedings.

V. TO THE EXTENT THAT OTHER ARGUMENTS CAN BE GLEANED FROM SECTION III OF JUDGE KACHINSKY'S BRIEF CONCERNING THE PANEL'S CONCLUSIONS OF LAW, THOSE ARGUMENTS DO NOT SUPPORT A FINDING THAT ANY OF THE PANEL'S CONCLUSIONS OF LAW SUPPORTING A FINDING OF MISCONDUCT SHOULD BE DISREGARDED.

Judge Kachinsky titles Section III of his opening brief "Some of the findings of fact and conclusions of law were clearly erroneous or incomplete" and informs the Court that "[s]et forth below are my comments on the Findings of Fact by the Panel." R. Brief, 25. The judge then provides a 31-paragraph list of his comments on the factual findings of the Panel. Id. at 25-31.<sup>20</sup> However, at the conclusion of his list addressing the Panel's findings of fact, Judge Kachinsky fails to specify the Panel's conclusions of law which were "clearly erroneous or incomplete," or ask this Court to rule differently than the Panel concerning them.

Further challenging the reader, other than the arguments that Judge Kachinsky makes in Sections I, II, and IV of his brief (addressed above), Judge Kachinsky does not specifically detail which of the Panel's conclusions of law he believes to be legally

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<sup>20</sup> The Panel's findings of fact are addressed by the Commission in Section I, 3-8, of this responsive brief.

incorrect, if any, and, most importantly, what action, if any, the Court should take regarding them.

Earlier in his brief, Judge Kachinsky provides a chart that lists the allegations included in the Commission's Amended Complaint and has a column entitled "Finding by Panel." R. Brief, 7-11. However, it is the Commission's position that the chart is of minimal use in analyzing the Panel's findings. To the extent that the Court considers the Panel's findings, the best source to rely upon is the Findings themselves, not the judge's chart.<sup>21</sup>

VI. SUSPENSION OF JUDGE KACHINSKY'S CURRENT JUDICIAL OFFICE UNTIL APRIL 30, 2019 AND PERMANENT REMOVAL OF HIS ELIGIBILITY FOR RESERVE MUNICIPAL COURT JUDGE APPOINTMENT REMAINS THE APPROPRIATE DISCIPLINE IN THIS CASE

The Panel recommends that Judge Kachinsky's eligibility for service as a municipal reserve judge be suspended for a period of one to three years, and that he never be eligible to serve as a reserve

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<sup>21</sup> The Judge's chart is of minimal use in analyzing the Panel's findings because: (1) the chart does not differentiate between findings of fact and conclusions of law by the Panel; (2) the order of the chart does not correspond to the order of the Panel's findings and the chart contains no cross references to the pages or paragraphs in the Panel's findings, instead relying on numbering in the Amended Complaint which was not provided by Judge Kachinsky to the Court in an appendix; and (3) the judge addresses each paragraph individually as conclusions of law by the Panel, rather than as findings of fact when appropriate, or as part of one or often several paragraphs when describing conclusions of law.

municipal judge for the Village of Fox Crossing while Mandy Bartelt is employed as the Village of Fox Crossing Court Manager. Findings, 44.

Judge Kachinsky argues that he should be suspended for nine months “with credit for the time served” based upon his temporary and continued suspension imposed by the Supreme Court on July 3, 2018, issued pursuant to Wis. Stat. §757.95. R. Brief, 3. By the Commission’s calculation, if the Court were to impose this sanction, it would result in the resumption of Judge Kachinsky’s judicial duties for the Village of Fox Crossing on April 3, 2019 (or perhaps later, depending on the timing of the Court’s ruling). The judge would then act as the municipal court judge until the end of his term (on April 30, 2019).<sup>22</sup>

As a municipal court judge who has served at least eight years, pursuant to Wis. Stat. § 800.065(2), as of May 1, 2019, Judge Kachinsky will be eligible for appointment as a reserve municipal court judge by the chief judge of his judicial administrative district. Judge Kachinsky further argues that no restrictions be placed on his future service as a reserve municipal court judge. Id.

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<sup>22</sup> Judge Kachinsky also asks the Court to remove his authority to terminate the court manager during the remainder of his term.

The Commission recommends that Judge Kachinsky be suspended for the remainder of his term of judicial office (ending on April 30, 2019) and removed from eligibility for reserve municipal court judge status. The basis for the Commission's position concerning its recommendation is outlined extensively in its opening brief, filed with this court on March 13, 2019. There is nothing contained in Judge Kachinsky's opening brief which would cause the Commission to alter its recommendation.

## **CONCLUSION**

The Panel's findings of fact are accurate and contain virtually all of the relevant information pertinent to this judicial disciplinary matter. Judge Kachinsky's limited arguments to the contrary are unpersuasive.

The Panel's conclusions of law that Judge Kachinsky violated SCR 60.02 and 60.03(1) were appropriately decided.

Finally, for the reasons more significantly detailed in the Commission's opening brief, it is the Commission's position that the appropriate sanctions to impose in this case are Judge Kachinsky's suspension for the remainder of his term of judicial office (ending on April 30, 2019) and his removal from eligibility for future reserve municipal court judge status.

Dated this 25<sup>th</sup> day of March, 2019.

Respectfully submitted,

WISCONSIN JUDICIAL COMMISSION

By: \_\_\_\_\_  
Jeremiah Van Hecke  
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## **CERTIFICATION**

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is: 4,693 words.

Dated this 25<sup>th</sup> of March, 2019.

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Attorney for Complainant

### **CERTIFICATION REGARDING ELECTRONIC BRIEF**

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25<sup>th</sup> of March, 2019.

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## **CERTIFICATION OF APPENDIX**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court;
- (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a

notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25<sup>th</sup> of March, 2019.

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