IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

In the Matter of Judicial Disciplinary
Proceedings Against the
Honorable Scott C. Woldt

Wisconsin Judicial Commission,
Complainant,

Case No. 20 AP 1028-J

v.

The Honorable Scott C. Woldt,
Respondent.

COMPLAINANT'S REPLY BRIEF REGARDING SANCTIONS

TO:

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The Wisconsin Judicial Commission by its attorney, Jeremiah C. Van Hecke, hereby submits this reply brief to the Respondent's Brief Regarding Sanctions, filed on August 31, 2020. The Commission submitted its Brief Regarding Sanctions on July 31, 2020.

All three briefs are filed, pursuant to the June 29, 2020, July 8, 2020, and July 24, 2020 orders of the Judicial Conduct Panel to submit briefing on the issue of appropriate discipline for Winnebago County Circuit Court Judge Scott C. Woldt.

I. NEITHER ORAL ARGUMENTS NOR SUBMISSION OF PROPOSED FINDINGS OF FACT BY THE PARTIES ARE NEEDED

The Commission is neither requesting oral arguments, nor requesting that the Panel order both parties to provide the Panel with proposed findings of fact. It is the Commission's position that both are unnecessary, redundant, and of no benefit to the Panel.

It should be noted that, although the parties agree as to the facts and the conclusions of law in this matter, they disagree on: (1) the nature of the sanction which should be imposed upon Judge Woldt; and (2) inferences and conclusions that can be made based upon the undisputed facts (which could be considered either aggravating or mitigating in consideration of the appropriate sanction to impose in this matter).

By the time the Panel decides whether oral argument is needed, it will have in its possession: (1) the Commission's twelve-page complaint to which Judge Woldt completely admits; (2) the five-page joint stipulation of the parties, including 145 pages of exhibits, containing, *inter alia*, the complete transcripts of hearings relating to five of the six incidents; (3) the Commission's twenty-nine-page brief regarding sanctions; (4) Judge Woldt's thirty-seven-page brief regarding sanctions; and (4) this twenty-four-page reply brief.

The Commission contends that there is no need to develop additional oral arguments, given the substantial factual and legal record, including the thorough and lengthy sanction arguments that have been advanced. Oral arguments are rare in Commission cases and typically only occur after a hearing has occurred as a result of contested facts and law or if the law is contested regardless of the facts.[1] Neither circumstance is present here.

[1] *See* In re Kachinsky, 387 Wis. 2d 823, 930 N.W.2d 252 (2019) (contested facts and law) *and* In re Gableman, 325 Wis. 2d 579, 784 N.W.2d 605 (2010), 325 Wis. 2d 631, 784 N.W.2d 631 (2010) (contested law).

Furthermore, the Commission is aware of only one past case in which the Panel directed the parties to submit proposed findings of fact, and there are significant distinguishing characteristics in that matter.[2] It is simply unnecessary, especially since the parties have already provided the Panel with the complaint, the joint stipulation, and the exhibits to the joint stipulation which contain virtually all of the relevant undisputed facts and all of the relevant conclusions of law.[3] The Panel has been presented with sufficient information to make its decision.

II. JUDGE WOLDT ADMITTED HE VIOLATED THE CODE ON SIX SEPARATE OCCASIONS AND THE STIPULATED FACTS SUPPORT THE COMMISSION'S INTERPRETATIONS OF THE INCIDENTS IN QUESTION.

There is no question that Judge Woldt's conduct, as outlined in the complaint, violated the Code of Judicial Conduct during each of the six separate incidents at issue. However, the parties differ as to the inferences and conclusions which can be made from the facts in each incident in consideration of appropriate sanctions.

A. Incident One

Judge Woldt admits that, in C.W. v. B.W. (Winnebago County case no. 09FA594), he "clearly used inappropriate, crude language" which violated the Code when he said, "Counsel, there's a thin line between being an advocate and being a 'dick' - - thin line - - and

[2] In re Gableman, the parties jointly proposed filing dueling statements of fact and did so. Id. at 606, n. 2. However, in that matter, there was no joint stipulation of the parties from which to begin, and the Panel heard a motion for summary judgment filed by the respondent based upon a dispute regarding the appropriate legal conclusions. Id.

[3] Only a few minor additional facts have been presented to the Panel; both concern the Government Day incident (Incident Two). *See* Commission's Brief, n. 4 *and* Response Brief, 8-9. Both briefs cite 8.16.19 Formal Appearance Tr., 91, and the Commission's Brief also cites Judge Woldt's 8.12.19 Response to Formal Appearance Notice, 1-2.

you're blurring it." Response Brief, 6 (citing 09FA594 Tr., 37). Furthermore, when asked by the attorney for clarification of his comment, the judge cut him off in the following exchange:

> [PETITIONER'S ATTORNEY]: Can you be more specific? I'm not understanding - -
>
> THE COURT: I'm not going to play your games with you, okay? I'm not going to play your games with you. You're being very argumentative with this witness, and you're playing games. 09FA594 Tr. at 37. (*See also* Complaint, ¶9).

Judge Woldt argues that he admonished the attorney to "protect the witness" (a court-appointed expert), as he perceived that the attorney's nature of questioning was designed to "frustrate and embarrass the witness." Response Brief, 6. Judge Woldt posits that he was acting under his duty "to exercise his discretion to control the mode of interrogation and 'protect witnesses from harassment or undue embarrassment' [citing Wis. Stat. § 906.11]." Id.

However, Judge Woldt's selective quotation of the statute ignores an essential part of Wis. Stat. § 906.11 which instructs judges to "exercise **reasonable** control over the mode and order of interrogating witnesses." (Emphasis added). The word "reasonable" is absent from Judge Woldt's citation of the relevant statute, and a review of the transcript shows that the judge's behavior was not, in fact, reasonable, and that the crude admonishment and "game-playing" accusations were unwarranted.[4]

[4] Although the parties agree that the exchange at issue violated the Code of Judicial Conduct, it is evident that the parties disagree about some aspects of the exchange. In considering whether the judge's comments were aggravated, a review of the nature of the questioning immediately preceding the comments is helpful. 09FA594 Tr. at 29 – 37. Additionally, it bears mention that the witness in question was not a lay witness (such as a victim in a criminal case) unfamiliar with cross-examination who was subject to aggressive questioning by an attorney before a jury of twelve of his or her peers; the witness was a court-appointed expert testifying at a motion hearing before a judge. It does not appear from the transcript that he was harassed or embarrassed by the attorney or his line of questioning.

B. Incident Two

Judge Woldt admits that, during the Government Day incident, his decision to display his handgun to the visiting high school students was "unnecessary and ill-advised, and stipulates that doing so violated SCR 60.03(1) and 60.02." Response Brief, 9. Rather than reiterate all of its arguments concerning Judge Woldt's unnecessary display of a firearm as a prop to a group of high school students contained in its original brief, the Commission would refer the Panel to its positions developed in that brief. Commission Brief, 4-5, 24-26.

In his Response Brief, Judge Woldt does not deny the Commission's assertion that, during this incident (and in Incident Three, *discussed below*), he used his handgun as a prop to express his dissatisfaction with the manner in which courthouse security was being addressed by the County Board. Commission Brief, 24; Response Brief, 8-9.

Instead, Judge Woldt denies that he "involved the students" in this dispute and reiterates his past assertions that: (1) the students debated courthouse security in front of him; (2) "that's why the question [of courthouse security] came up for [him];" and (3) "the kids were going to debate this issue (courthouse safety) in front of the county board in two hours." Response Brief, 8 (internal citations omitted).

Even though Judge Woldt knew that the high school students were debating the issue of courthouse security, it is entirely reasonable to infer that Judge Woldt intentionally involved these students in his dispute with the County Board (albeit in a minor way). After all, Judge Woldt knew when he displayed his firearm to them, that they would be debating courthouse safety in front of the County Board right after meeting with the judge, making it likely that his dramatic display of the weapon (and his expressed personal security concerns) would be addressed by the students in front of the County Board.

C. Incident Three

Judge Woldt admits that, in State v. Z.S. (Winnebago County case no. 14CF509), he used "unnecessarily crass terms" when speaking to the victim (stating "damn it," "I don't give a shit," and "moving my ass out of there") and displayed his firearm, resulting in violations of Supreme Court Rules 60.04(1)(d), 60.03(1), and 60.02.[5]

In his Response Brief, Judge Woldt asserts that there was a "clear implication" made by the Commission that "Judge Woldt was directing the profanity at the victim." Id. at 9. The Commission never made such a "clear implication" at any point in its discussion of Incident Three. *See* Commission Brief, 5-8, 23. Although the words were spoken to the victim, they were not used by the judge in a personal attack of the victim. Regardless, Judge Woldt could have made his points without using repeated profanity.

Additionally, Judge Woldt asserts that his handgun was "displayed while [he] was addressing the victims to **emphasize his empathy**." Id. at 10. (Emphasis added). It is truly stunning for a judge to believe that displaying a deadly weapon in his courtroom from the bench while wearing his black robe is an appropriate way to convey empathy to a victim in a criminal case.

Furthermore, the Commission would remind the Panel that, although the record is not precise as to when the judge lowered his handgun, once the weapon was displayed, he told the developmentally disabled defendant that "if you would have c[o]me into my house, I keep my gun with me and you'd be dead, plain and simple…." 14CF509 Tr., 22. This statement (whether it was made while the gun was raised or just afterwards) appears likely to

[5] In his Response Brief, Judge Woldt admits to the use of profanity and the firearm display. Id., 9 – 11. In paragraph 3 of the joint stipulation, Judge Woldt admits to the factual allegations and conclusions of law as pleaded in the complaint. *See* Complaint, ¶¶ 18-27.

be an attempt by the judge to strike fear into the defendant's heart, rather than just "caution[ing him] of the dangers of invading private homes." Response Brief, 11.

D. Incident Four

Judge Woldt admits that, in State v. M.G. (Winnebago County case no. 14CT413), he "expressed his frustration in an inappropriate way" when he stated:

> I would have denied the motion in the first place if [the original defense attorney] would have […] filed it and I probably would have done so forcefully, not that I wouldn't like to grant this [post-conviction] motion because I really would. I would love to grant this [post-conviction] motion. I would love to have a trial on this issue, I'd love that he get found guilty, and I'd love to give him a year in jail for wasting my time today. I would love to do that, but unfortunately I can't. 14CT413 Tr., 12-13.[6]

It is unclear how such a short motion hearing (the transcript is only 14 pages long) would induce such frustration in the judge and evoke such acerbic dialogue from the judge directed towards a defendant who was acting upon his attorney's advice and merely trying to avail himself of his rights under the law.

E. Incident Five

Judge Woldt admits that, in State v. E.K. (Winnebago County case no. 14CF466), he made a "crude comment" when he stated, "I know when I'm paralyzed by fear the first thing I want to do is stick my 'dick' in some girl's mouth," and asked whether "everyone else [felt]

[6] Although not explicitly stated in his Response Brief, based upon Judge Woldt's admission in Paragraph 3 of the Joint Stipulation, Judge Woldt admitted that his actions amounted to misconduct. *See also* Complaint, ¶¶ 28 – 33.

the same way."[7] In his Response Brief, Judge Woldt asserts that he "deeply regrets" referring to the victim as a "so-called victim" and admits that he violated Supreme Court Rule 60.04(1)(hm) when he told the defendant about the benefits of parties "shut[ting] their pie holes" during hearings before him "when things are getting behind," before asking him whether there was anything he wanted to say to "mess this deal up."[8]

Regardless of the seriousness of the allegations in the criminal complaint (in which it is alleged that the crime at issue was committed with force), during the sentencing hearing, the defense attorney appears to have been put in the incredibly challenging position of asserting that his client pled guilty because he engaged in sexual activity with the victim which he asserted was consensual (but nevertheless still amounted to criminal behavior based upon the victim's age, regardless of any consent). It does not appear that the attorney "impulsively provoked" the judge, as posited by Judge Woldt (Response Brief, 12), but instead just doing his best to competently represent his client, an individual accused of a serious crime.

In his response, Judge Woldt incredibly asserts that, in making his vulgar remark, he was "expressing outrage" on the victim's behalf. Id. at 13. The Commission contends that this assertion is without merit and logically inconsistent, given Judge Woldt's comments a short time later about that very same victim whose experience he purportedly did not want trivialized:

[7] Response Brief, 12-14. Although not explicitly stated in his Response Brief, based upon Judge Woldt's admission in Paragraph 3 of the Joint Stipulation, Judge Woldt admitted that his actions amounted to misconduct. *See also* Complaint, ¶¶ 34 – 41.

[8] Id.

> What tells me a lot is the fact that the victims in this case had no contact whatsoever with return phone calls to the agent [PSI writer]. That tells me that there's something with this so-called victim in this case. Id., 9-10.

In a light most favorable to Judge Woldt, he is belittling her status as a victim because she did not return the calls of the PSI writer (after facing the trauma of the crime committed against her). Alternately, these comments could be viewed as the judge belittling a 13-year-old victim for her role in the incident.[9]

Regardless of the circumstances and the context (and the Commission encourages the Panel to review the judge's statements in context), jokes and sarcasm have no place in child sexual assault cases in any courtroom.

Once again, Judge Woldt asserts in his Response Brief that the Commission's argument implied something that it did not (that the statement at issue was made directly to the victim). Response Brief, 14. It remains unclear whether the victim, a family member, a friend, or representative was present in court.[10] In any case, even if the victim was not physically present in the courtroom, the hearing was open to the public and a matter of public record, and Judge Woldt's comments still violated Supreme Court Rules 60.04(1)(d), 60.03(1), and 60.02.

[9] Immediately after "the so-called victim" comment, Judge Woldt announced that he was sentencing this defendant to probation for a felony which could have resulted in a sentence of up to forty years. Id. at 10; State v. E.K. Criminal Complaint, 1. (Joint Stipulation, Exhibit F).

[10] Although the transcript indicates that no one responded when the judge asked about whether any victims present wished to make a statement (14CF466 Tr., 3-4), there is no evidence before the Panel that the victim, or any of the victim's family or representatives, were either present or absent for the hearing. In the Response Brief, Judge Woldt's attorney asserts that "Judge Woldt would have looked at all present in the courtroom" when awaiting a response to his question. However, it should be noted that this is conjecture or inference based upon the transcript, not evidence of who was in court and present on that particular day.

Moreover, it is not the judge's duty to pressure a defendant to forfeit his right to allocution under Wis. Stat. § 972.14(2), as criminal defendants have the right to allocution (to make a statement to the court prior to sentencing in a criminal case).

F. Incident Six

Judge Woldt admits that his comments to the domestic violence victim in State v. J.W. (08CM1517), including, "And ma'am, if you come in here and tell me that you just want a fine, […] then don't pick up the phone and dial 911, don't call the cops […] then you handle it [herself]," and, "I'm just sick and tired of victims coming in here and they call the cops when they need 'em but then later on they come in and say: Oh, no, this person's an angel," "had the potential of discouraging police intervention in the future" and violated the Code of Judicial Conduct.[11]

In his Response Brief, Judge Woldt characterizes the case as "domestic disorderly conduct arising from a dispute over money between a boyfriend and girlfriend; there was no physical contact or violence." Id. at 14. However, this assertion is misleading in several ways: (1) the criminal charge was "domestic **violence** disorderly conduct" (emphasis added); and, (2) although the victim was not physically injured by the defendant, her fish tank and door were broken, resulting in the charges against the defendant. 08CM1517 Tr., 4-5. Violence is not limited to personal injury and is defined as "the use of physical force, usually accompanied by fury, vehemence, or outrage; esp. physical force unlawfully exercised with the intent to harm." Black's Law Dictionary, 10th Edition.

[11] Response Brief, 14-15. Although not explicitly stated in the Response Brief, based upon Judge Woldt's admission in Paragraph 3 of the Joint Stipulation, Judge Woldt admitted that his actions amounted to misconduct. *See also* Complaint, ¶¶ 42-47.

The victim's statement of her hope that the defendant would receive probation does not adequately explain the judge's angered reaction to her statement. She attended the court hearing, she did not request dismissal of the case, and there is no indication that she was either: (a) the victim in previous cases involving that same defendant (Id., 2), or (b) uncooperative with the State. It is unclear what, if anything, provoked such a response from Judge Woldt but, regardless, encouraging victims not to summon law enforcement when they are in need is irresponsible and not befitting judicial office.

III. ALTHOUGH SEVERAL CIRCUMSTANCES AND FACTS CITED BY JUDGE WOLDT MERIT CONSIDERATION AS MITIGATING FACTORS, SEVERAL MERIT LIMITED CONSIDERATION OR NO CONSIDERATION, AND SUSPENSION REMAINS WARRANTED IN THIS MATTER.

A. The six incidents involving Judge Woldt are not isolated and are indicative of a pattern of misconduct.

In In re Inquiry Concerning Patrick C. McCormick, 639 N.W.2d 12, 16 (Iowa 2002), several factors are outlined for consideration in the determination of appropriate discipline, including "whether the misconduct is an isolated instance or evidenced a pattern of misconduct," and the "frequency of occurrence of the acts of misconduct."[12]

Interestingly, in his Response Brief, Judge Woldt rejects the assertion that his conduct evidenced a pattern of misconduct and then proceeds to describe a pattern of his conduct. *See* Response Brief, 15-16. While the Commission concedes that one incident occurred in 2009, it did not occur in isolation, as there were five other, separate incidents which occurred over the course of other calendar years (2015 and 2016).

[12] The factors outlined in In re McCormick were employed by the Wisconsin Supreme Court in In re Ziegler, 309 Wis. 2d 253, 279, 750 N.W.2d 710 (2008).

The Commission respectfully requests that the Panel note the wording of the McCormick factor at issue: "whether the misconduct is an isolated **instance or** evidenced a pattern of misconduct." (Emphasis added). McCormick at 16. The Court considered whether there was a single, isolated instan**ce**, not plural isolated incident**s**. Thus, by implication, if the misconduct at issue is not a single, isolated incident, it evidences a pattern of misconduct as exists in this matter, given Judge Woldt's judicial misconduct which occurred in six distinct and separate incidents (which occurred over the course of three different calendar years).

B. Although the six separate incidents in this matter did not occur recently, Judge Woldt's conduct still warrants suspension.

Although not a stated factor in McCormick, the Commission concedes that the passage of time between when the misconduct occurred and the present day can be argued to be a mitigating factor. (Incident Six occurred in 2009 and the most recent incident included in the Commission's complaint occurred in 2016).

However, the conduct at issue still warrants a suspension for several reasons.

The Commission is not bound by any statute of limitations (or other rule-based limit based upon age of incident) for prosecution under the Code of Judicial Conduct. Past judicial discipline cases resulting in suspensions or removal included dated conduct.[13]

[13] *See, e.g.* In re Seraphim, 97 Wis. 2d 485, 500-509, 294 N.W.2d 485, *cert. denied*, 449 U.S. 994 (1980) (the circuit court judge was suspended in 1980 for numerous incidents, several of which occurred: (a) in late 1969 or early 1970 (ten or eleven years prior to the judge's suspension); (b) in April and May of 1970 (ten years prior to the suspension); (c) in October 1974 (six years prior to the suspension); (d) in July 1976 (four years old); and (e) numerous other incidents that occurred after 1976; In re Sterlinske, 123 Wis. 2d 245, 247-257, 365 N.W.2d 876 (1985) (the circuit court judge was removed from eligibility for judicial office (a sanction more severe than a suspension) in 1985 for incidents which occurred in 1979 (six years prior to the judge's removal), 1981 (four years prior to judge's removal), 1981, 1982 (three years prior to the judge's removal) and 1983 (two years prior to the judge's removal)); *and* In re Gorenstein, 147 Wis. 2d 861, 862 – 871, 434 N.W.2d 603 (1989) (the circuit court judge was suspended from eligibility for judicial office for two years in 1989 for

Additionally, in spite of the passage of time between the date of the latest misconduct cited in the complaint and the filing date of the formal complaint, such cases have still resulted in suspensions.[14] Finally, for all of the reasons previously discussed concerning these six incidents (both individually and collectively), the misconduct in the instant case is egregious. *See* Commission's Brief, 21 - 26.

C. Although Judge Woldt has made contributions to the justice system, a suspension is still warranted.

In Paragraph 13 of the Joint Stipulation, the parties list a number of volunteer positions undertaken by Judge Woldt within the legal system, including service to the Judicial Conference Committee, the Trial Judges Association, the Winnebago County Safe Streets Criminal Justice Coordinating Committee, the Winnebago County Teen Court, and other groups.

In his Response Brief, Judge Woldt asserts that "The only disciplinary cases that cite comparable exceptional service to the justice system are cases resulting in a public reprimand, not a suspension," "nothing in […] the [fourteen] suspension cases reflects similar positive contributions by any of those judges," "[t]he Supreme Court has made it clear that a judge's exceptional contributions to the judicial system and community do weigh heavily in determining an appropriate sanction," and that his "exceptional record of service" is a "significant mitigating factor." Response Brief, 5, 34. Judge Woldt then cites two cases

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eight incidents which occurred primarily between 1981 and 1985 (between four and eight years prior to the suspension). One incident occurred in 1986 (three years before the suspension), and two incidents occurred in 1987 (two years prior to the suspension).

[14] *See, e.g.* In re Piontek, 386 Wis. 2d 703, 706-707, 927 N.W.2d 552 (2019) (two separate 2014 incidents resulted in a circuit court judge's 2019 suspension); *and* In re Calvert, 382 Wis. 2d 354, 358-361, 914 N.W.2d 765 (2018) (two 2015 incidents resulted in the full-time court commissioner's 2018 suspension).

in which the Supreme Court discussed a history of community involvement of two judges to whom they issued reprimands. *See* In re Crivello, 211 Wis. 2d 435, 439, 564 N.W.2d 785 (1997) *and* In re Ziegler, 309 Wis. 2d at 280-281.

Although the Commission has stipulated that Judge Woldt made contributions to the justice system during his tenure as a judge and concedes that these contributions are a mitigating factor, the Commission contends that several of the positions taken by Judge Woldt in his Response Brief are unsubstantiated concerning the Panel's consideration of those contributions.

First, there are three cases in which a judge's service record is specifically discussed by the Supreme Court, not just the two mentioned by Judge Woldt. Recently, in In re Piontek, 386 Wis. 2d 703, 712, 927 N.W.2d 552 (2019), despite the judge's "long history of community involvement" (as a mitigating factor found by the Judicial Conduct Panel and considered by the Supreme Court), the Supreme Court suspended the circuit court judge (who had suggested a public reprimand as the appropriate sanction for his actions to the Panel) for the misconduct he engaged in relative to two separate incidents.

Additionally, the Supreme Court's mere mention of a judge's service record in judicial discipline cases does not signify that it was considered by the Judicial Conduct Panels in those cases.[15]

[15] The Supreme Court rarely details every finding of fact made by the Judicial Conduct Panels in their findings of fact, conclusions of law, and recommended sanctions. Such reports are neither located in the Wisconsin Court System's publicly accessible online court records, nor published in a reporter.

This leads to difficulties in determining what, if any, record of community service a judge may have. For example, in In re Dreyfus, 182 Wis. 2d 121, 130, 513 N.W.2d 604 (1994), the Supreme Court cited a comment mentioned in the Panel's report made by the Judicial Commission's attorney that the judge "stands in high esteem in this community and in this courthouse." It is probable that this remark was based, in part, on the judge's service record, but the Panel's reasoning was not detailed in the Supreme Court's decision. It should be noted that, despite Judge Dreyfus' esteemed reputation, he was still suspended (not reprimanded) for two incidents involving delay.

Second, the two cases cited by Judge Woldt are distinguishable for a number of reasons.[16]

Third, although Judge Woldt characterizes the Supreme Court's review of a judge's service to the justice system as "weigh[ing] heavily" and "significant," there is nothing in Piontek, Crivello, or Ziegler which specifically calls for any more significant consideration of this factor than any other aggravating or mitigating factors.

D. Judge Woldt's assertions concerning what may be inferred from his comparatively lower substitution rate between 2014 and 2018 are based upon speculation and, therefore, should not be considered in mitigation of his conduct.

In the joint stipulation, the parties agreed that, based upon statistics provided by court administration, "Judge Woldt's substitution rate between 2014 and 2018 was below average," and "During the relevant time period, the records reflect that there were no requests for substitutions made by the attorneys for the criminal defendants in Incidents One, Four, and Five." Joint Stipulation, ¶12 and n.6.

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[16] In re Crivello, involved a circuit court judge's actions in a domestic violence incident which occurred off the bench. In re Crivello, 211 Wis. 2d. at 436. Although the incident in Crivello is individually more aggravated than any one of the incidents before the Panel, there are six separate incidents involving Judge Woldt and they all occurred while he was wearing his judicial robe, on the bench.

Additionally, by the time Judge Crivello was sanctioned in his case, he had been defeated by a challenger for reelection and his term of office was scheduled to end 30 days after the disciplinary decision was issued. Id. at 437. Judge Woldt remains on the bench and his current term ends in 2023. Joint Stipulation, n. 4.

In re Ziegler, involved the judge's failure to recuse herself in eleven cases in which the same conflict of interest existed, albeit one that did not result in any personal benefit to the judge or her family. In re Ziegler, 309 Wis. 2d at 267, 282. The judge explained that she did not consider that her decision to sit on cases involving the party at issue amounted to a conflict of interest under the Code of Judicial Conduct. Id. at 292. She ultimately received a reprimand.

Moreover, Judge Ziegler did not use crude or sarcastic language in numerous proceedings before her; she did not use a concealed firearm as a prop on two occasions; she did not deny parties an opportunity to be heard; and she did not made comments belittling victims of sexual assault or domestic violence, as Judge Woldt did. Furthermore, Judge Woldt's case does not contain any allegations relating to recusal.

In his Response Brief, Judge Woldt asserts:

> These statistics provide objective support that the legal community felt that these incidents were aberrations, not the conduct they regularly experienced when appearing before Judge Woldt. It is also telling that the attorneys involved in incidents one, four, and five filed no substitutions for Judge Woldt during this period. Response Brief, 35.

This is speculation, requiring a logical leap. This supposition is not based upon any affidavits or testimony from any local attorneys or parties who have a right to substitute in cases before Judge Woldt. Their reasons for remaining on cases before Judge Woldt were not provided. Furthermore, there is no evidence before this Panel that any members of the local legal community (or their clients) were even aware of Judge Woldt's behavior in the six incidents upon which this judicial disciplinary case is based during the time period for which these records were generated (2014-2018), and the Commission's judicial discipline case was not publicly filed until 2020 (two years after the end of the statistical period).[17]

Additionally, though the records show that three of the attorneys involved in Incidents One, Four, and Five did not move to substitute Judge Woldt during that time period, those statistics are not particularly telling because: (1) they are only three of the seven attorneys present for the incidents in question in these three cases; (2) these records do not include the substitution rates of the four attorneys involved in Incidents Three and Six; and (3) four of the eleven attorneys involved in these five cases were prosecutors and, therefore, were unable to move for Judge Woldt's substitution under Wisconsin law. *See* Wis. Stat. § 971.20(2) (which only grants the right to substitution in criminal cases to criminal defendants).

[17] Of course, the individuals who were present during each of the six incidents would be aware of Judge Woldt's conduct during their own incident. However, there is no indication that any of these witnesses to an individual incident would be aware of the other five incidents (when they were not present).

Furthermore, the Commission can posit an alternate explanation for Judge Woldt's comparatively lower substitution rate that is supported by the record, unlike Judge Woldt's speculative assertions.[18] Although the Commission's alternate theoretical analysis of the statistics is more factually grounded than Judge Woldt's, it is largely conjecture. Therefore, the Commission is not asking the Panel to adopt its reasoning, but to consider it when examining the nature of Judge Woldt's assertions concerning substitution rates.

IV. UNDER THE APPLICABLE LEGAL STANDARDS, AND BASED UPON A CONSIDERATION OF COMPARABLE JUDICIAL DISCIPLINE CASES IN WISCONSIN, THE PANEL SHOULD RECOMMEND THAT THE SUPREME COURT SUSPEND JUDGE WOLDT.

Discipline should be responsive to the gravity of the misconduct. In re Aulik, 146 Wis. 2d 57, 77, 429 N.W.2d 759 (1988). The discipline imposed should be determined by the extent that the public and court system need protection from unacceptable judicial behavior, based upon the seriousness of the judge's misconduct and the likelihood that it would recur.

[18] These statistics could provide objective support for a hypothesis that criminal defendants (and defense attorneys) involved in Judge Woldt's cases have declined to move for his substitution because he gives more favorable sentences to criminal defendants, regardless of what he may do or say in court.

After all, in State v. E.K. (Incident Five), the defendant was charged with Sexual Assault of a Child Under 16 Year of Age, a Class C Felony for which, if convicted, he faced the potential to be "fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both." State v. E.K. Criminal Complaint, 1. (Joint Stipulation, Exhibit F).

Even though Judge Woldt could have sentenced the defendant to forty years of imprisonment and a $100,000 fine and made crude, sarcastic and offensive comments during the hearing, he still placed the defendant on probation without any up front jail or prison time and imposed no fines. That appears to be a favorable sentence for that defendant given the charges at issue in spite of having to endure crude, sarcastic and offensive comments from the judge.

Similar arguments could be made with regard to State v. Z.S. (Incident Three) (in that matter, the defendant was also facing several years in prison based upon pleading guilty to a felony, but was sentenced by Judge Woldt to only one year of initial confinement) (14CF509 Tr., 26) and the other criminal cases relating to Incidents Four and Six, before the Panel.

In re Gorenstein, 147 Wis. 2d 861, 873, 434 N.W.2d 603 (1989). Discipline is not intended to punish the judge. In re Crawford, 245 Wis.2d 373, 392, 629 N.W.2d 1 (2001).

Suspension and removal from office are considered "drastic measures," generally reserved for serious, repeated or persistent violations of the Code. In re Seraphim, 97 Wis.2d 485, 513, 294 N.W.2d 485 (1980).[19]

It is the Commission's position (as extensively outlined in the Commission's Brief), that Judge Woldt's conduct during the course of six separate incidents was serious, repeated and persistent.[20]

In his response brief, Judge Woldt cites the aforementioned quote from Seraphim but appears to attribute it to Ziegler. Response Brief, 3. He then argues that "A significant factor in determining when a public reprimand instead of a suspension is the appropriate discipline, is the 'degree of moral culpability' of the Conduct." Id. at 23.

The Supreme Court in Ziegler never stated that the "degree of moral culpability" is a "significant factor" in determining an appropriate sanction for judicial misconduct. Rather this is an opinion of Judge Woldt. Additionally, this relatively ambiguous term ("moral culpability"), while mentioned in Ziegler, appears to be *dicta* in that case,[21] and is neither used as a standard for consideration of appropriate judicial discipline sanctions or even mentioned in any of the other judicial discipline cases in Wisconsin (going back forty-four

[19] This standard is also discussed and employed in Ziegler, 309 Wis. 2d at 262-263, and Crawford, 245 Wis.2d at 393.

[20] The Commission will not reiterate the same arguments it made in its original brief, but refers the Panel to them. *See* Commission's Brief, 19-28.

[21] After citing Seraphim, the Court opines that "Prior judicial misconduct cases in which judges received a sanction more severe than a reprimand all involved some degree of moral culpability that is not present here." Ziegler, 309 Wis. 2d at 262. It appears that the Supreme Court is using moral culpability as a descriptive term or observation, not a legal standard.

years). Regardless, Judge Woldt employs the term "moral culpability" twenty-one times as a standard for the Panel and the Supreme Court to use in determining whether he should be reprimanded or suspended. Response Brief, 2 - 3, 22 - 24, 26 - 28, 32, 36.

The Commission encourages the Panel to rely on the standards outlined in judicial ethics cases which have been cited as favorable precedent in other judicial ethics cases such as those outlined in Aulik, Gorenstein, Crawford and Seraphim (all discussed above).

In their respective sanctions briefs, both parties have analyzed Judge Woldt's conduct in the context of other judicial discipline cases, as "discipline imposed in any case should be consistent with that imposed in other cases." In re Ziegler, 309 Wis. 2d at 303.

In the Commission's Brief, its analysis was limited to the most relevant cases, the six prior judicial discipline cases in which improper demeanor was at issue (as the majority of the allegations in Judge Woldt's case relate to improper demeanor). Commission's Brief, 15 – 19, 27 – 28.

Judge Woldt took a different approach and discussed every one of the fourteen suspension cases, arguing on a case-by-case basis that each offending judge was more "morally culpable" than he was relative to his behavior as outlined in the Complaint. Judge Woldt also cited several reprimand cases in arguing that this matter had shared some similarities with them.[22]

Rather than reiterate the Commission's arguments regarding the past six demeanor-related judicial ethics cases and how they support the imposition of a suspension (see

[22] The Commission's arguments for how the two reprimand cases cited by Judge Woldt (Crivello and Ziegler) are distinguishable from the instant case, are already contained earlier in this reply brief. *See* Reply Brief, n. 16 (Sec. III, C).

Commission Brief, 19-29), the Commission would like to make a few general points about some of the arguments advanced in Judge Woldt's Response Brief.

Judge Woldt asserts "[t]here is nothing in the Complaint, Stipulation of the Parties, or evidence in the transcripts that suggest that Judge Woldt's demeanor was 'angry,' 'intemperate,' or that he yelled at anyone in the courtroom," and, thus, the judicial misconduct in Gorenstein and Breitenbach is more aggravated. Response Brief, 29-30.

Although the transcripts and the other material before the Panel does not address the volume of Judge Woldt's voice when making the statements at issue, the Commission disagrees with this characterization and directs the Panel to Incidents Four, Five, and Six as demonstrative of the judge's angry and intemperate behavior. It should be noted that even the descriptive terms employed by Judge Woldt in his Response Brief supports this analysis.

For example, in Incident Four, after Judge Woldt denied the defendant's motion, he complained that " [he] would love to grant this motion…have a trial" and "give him a year in jail for wasting [his] time today." 14CF413 Tr., 13. Although the transcript does not provide the judge's tone, this statement is angry and intemperate on its face. Even Judge Woldt concedes that, in making these comments, he "expressed his frustration in an inappropriate way." Response Brief, 11.

In Incident Five, when the judge interrupted the defense attorney and stated, "I know when I'm paralyzed by fear the first thing I want to do is stick my 'dick' in some girl's mouth," and asked if "[e]veryone else [felt] the same way," the comments appear to be an angry and intemperate. 14CF466 Tr., 6. This view is bolstered by Judge Woldt's description of the event that he was "impulsively provoked," had an "impulsive reaction directed to the

defense attorney," and was "expressing outrage" in response to the attorney. Response Brief, 12-13.

Finally, in Incident Six, the judge's confrontation of a victim in a domestic violence case after the case was over, telling her "don't call the cops" if she only wanted a fine to be issued in the future and that he was "sick and tired" of hearing from victims in his court, "Oh, no, this person's an angel." 08CM1517 Tr., 6. Without tone, in context, the statement is evidence of angry and intemperate behavior, and even Judge Woldt admits that, in making these comments, he was "verbaliz[ing] his frustration." Response Brief, 14.

Although Judge Woldt's sarcasm is evident in all three incidents, when each viewed in context, the statements at issue surpass mere sarcasm and appear to be expressions of anger, outrage, frustration, and intemperate behavior.

In his Response Brief, Judge Woldt also asserts that the judge's conduct in Breitenbach (twice bringing a gun to the courtroom and concealing it in a wastebasket) was more aggravated than his because Judge Breitenbach's conduct was illegal. However, although at the time of the Breitenbach decision, Wis. Stat. § 941.23 stated that "any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor," an argument could be (or have been) advanced that the Judge Breitenbach could have legally carried the gun as a "peace officer."[23]

Regardless, the Supreme Court did not express whether the judge's conduct amounted to criminal behavior, and presumably would have mentioned Wis. Stat. § 941.23 if

[23] At the time, "peace officer" was defined in Wis. Stat. § 939.22(22) as "any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

their consideration of the criminal statute was either material or in any way relevant to their decision concerning sanctions. The Court did not do so. It also declined to find that the judge engaged in "gross personal misconduct," contrary to Supreme Court Rule 60.13 and, instead held that he violated Supreme Court Rules 60.01(9) and (12), two of the predecessors to the modern day demeanor provision (Supreme Court Rule 60.04(1)(d)). [24]

The fact remains that, although Judge Woldt had the legal ability to have his firearm in court during Incidents Two and Three, this did not give him the unfettered right to unholster his loaded handgun and needlessly use it as a prop without telling individuals that it had been unloaded, whether he did so to "emphasize his empathy" (Incident Three), make his point to a group of high students about courthouse security (Incident Two), or express his frustration with the County Board (Incidents Two and Three). Further, while Judge Breitenbach's actions were negligent (leaving his gun in a wastebasket), by comparison, Judge Woldt's actions were more aggravated as they were intentional and deliberate.

It remains the Commission's position that the Panel should primarily consider the past sanction decisions of the Supreme Court in demeanor-related cases as this matter relates to Judge Woldt's demeanor.

Regardless, the Commission would note that several of the suspension cases cited by Judge Woldt involved fewer incidents than the six the Panel is considering in the instant case. *See e.g.,* In re Calvert, 382 Wis.2d 354, 914 N.W.2d 765 (2018) (court commissioner suspended for an independent fact investigation and improper comments during an injunction

[24] It should be noted that the Code of Judicial Conduct and its numbering have been altered on several occasions since the Breitenbach decision was issued. At the time of the decision, 60.01(9) stated, in relevant part, that "a judge should conduct the work of his or her court with dignity and decorum and without interference which might detract from the proper courtroom atmosphere…," and 60.01(12) stated, in relevant part, "A judge should not seek to be extreme, peculiar, spectacular or sensational in his or her judgment or in his or her conduct of the court…"

hearing all relating to a single case); In re Carver, 192 Wis. 2d 136, 531 N.W.2d 62 (1995) (circuit court judge suspended for a single ex parte communication and improper courtroom comments concerning one case); In re Piontek, 386 Wis. 2d 703, 927 N.W.2d 552 (circuit court judge suspended for a single ex parte communication and an independent fact investigation in two separate cases); *and* In re Dreyfus, 182 Wis. 2d 121, 513 N.W.2d 604 (1994) (circuit court judge suspended for delay in two separate cases and completing false case certification forms).

The Supreme Court in Seraphim opined that suspension and removal from office are "drastic measures," generally reserved for serious, repeated or persistent violations of the Code. In re Seraphim, 97 Wis.2d 485, 513, 294 N.W.2d 485 (1980). Judge Woldt's case appears to involve more "serious, repeated or persistent violations of the Code," than these four suspension cases.

Conclusion

The Complaint, the Joint Stipulation, and its Exhibits, conclusively establish that Judge Woldt engaged in judicial misconduct and may form the basis of the Panel's findings of fact and conclusions of law. The Commission is not requesting that the parties either submit proposed findings of fact or engage in oral arguments.

The Commission recognizes that the discipline recommended by the Panel to the Supreme Court is solely within the Panel's province. However, the Panel requested briefing by the parties as to appropriate discipline in this matter.

Given that the six incidents before this court are "serious, repeated, [and] persistent violations of the Code," and after considering all of the aggravating and mitigating factors at issue, it remains the Commission's position that a suspension is warranted. [25]

Dated this 10th day of September, 2020.

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[25] Id. at 513. It is the Commission's position that the length of such a suspension should be determined by the Supreme Court with the recommendation of the Panel.