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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.

RESPONDENT'S BRIEF REGARDING SANCTIONS

TO: Jeremiah C. Van Hecke
Executive Director
110 East Main Street, Suite 700
Madison, WI 53703-3328

Judge Woldt, by his attorneys Habush Habush & Rottier S.C.[®] by Joseph M. Troy, submits his brief in response to the brief of the Wisconsin Judicial Commission.

Request for Oral Argument & Submission of Proposed Findings & Conclusions

Judge Woldt respectfully requests that oral arguments be scheduled and that the parties be authorized to submit proposed Findings of Fact and Conclusions of Law following the Commission's reply brief or oral arguments.

INTRODUCTION

Judge Scott C. Woldt has been an attorney since 1987 and has served as a Circuit Court Judge since 2004. He has never been the subject of any other public or private discipline as a judge or an attorney. ("Stip." ¶10) Judge Woldt has completely cooperated with the Judicial Commission's investigation and provided it with all information requested. (Id., ¶9) He admits and deeply regrets the conduct set forth in the Complaint. (Id., at ¶¶2, 15) However, the Commission's argument for suspension omits facts, ignores

context, and, at times, unfairly portrays the selected facts on which it does rely. The additional facts and clarifications offered by Judge Woldt will provide the Panel with a more complete and accurate understanding of the incidents and circumstances relevant to determining an appropriate sanction.

Judicial disciplinary cases require that “[e]ach case must be carefully analyzed according to the particular circumstances of that case.” *In re Judicial Disciplinary Proceedings Against Ziegler*, 2008 WI 47, ¶ 43, 309 Wis.2d 253, 750 N.W.2d 710. When the nature and full circumstances of Judge Woldt’s conduct are compared to the those in cases that resulted in a suspension, there are compelling differences. Judge Woldt’s conduct did not reflect a comparable degree of moral culpability of the judges sanctioned with suspension which includes: dishonesty and attempts to conceal misconduct (five of the last six suspension cases), initiating ex parte communications and attempts to influence the outcome of cases (two of the last three suspension cases), racist or sexist diatribes from the bench, and violations of law or court orders.¹ In addition, there are mitigating facts in Judge Woldt’s case that are absent from all suspension cases and only reflected in some of the cases with public reprimand sanctions. *Inter alia*, see *Ziegler, Id.*, and *In re Crivello*, 211 Wis.2d 785, 564 N.W.2d 785 (1997).

APPLICATION OF THE CODE PROVISIONS

Judge Woldt does not contest that his conduct was in violation of the various sections of the Code of Judicial Conduct cited in the complaint and the Commission’s brief. Although it should be recognized that the provisions of the Code are often “cast in general terms setting forth the principles their specific provisions are intended to foster”. (SCR Ch.60 Preamble). Because they necessarily are “cast in general terms”, the degree of wrongdoing which violates a Code provision may vary greatly from case to case. *Ziegler* explained that:

Whether disciplinary action is appropriate, and if so, the degree of discipline to be imposed, is determined through a reasonable and reasoned application of the text of the Code and depends on such factors as the seriousness of the transgression, whether a pattern of improper activity exists, and the effect of the improper activity on others or on the judicial system.

¹ Citations for all 14 suspension cases and related discussion in section III of brief, Pgs. 23-28.

Id., ¶ 7. The court further observed that “[s]uspension and removal from office are ‘drastic measures,’ generally reserved for serious, repeated or persistent violations of the judicial code,” which involve “some degree of moral culpability...” *Id.*, ¶¶ 10, 11, *quoting In re Complaint Against the Honorable Christ T. Seraphim*, 97 Wis.2d 485, 513, 294 N.W.2d 485 (1980). Judge Woldt is not contesting that his conduct violated various provisions of the Code, it is the degree and nature of his violations compared to those reflected in the suspension cases that distinguish his case from those sanctioned with suspension.

Applying the rules to all of the facts, in context, and giving due consideration to the mitigating facts in this case indicates that a public reprimand is sufficient to protect the public’s confidence in the justice system and commensurate with Judge Woldt’s admitted misconduct.

STATEMENT OF FACTS

I. FACTS IMPORTANT TO OVERALL CONSIDERATION.

1. The Timing of these Misconduct Incidents is Critical.

Judge Woldt has served as a Circuit Court Judge since 2004. (Stip., ¶ 10) The first incident in issue here occurred over eleven years ago, on February 27, 2009.² (Stip., Ex. G) The Commission provides no explanation for why this claim was not raised during the 11 years that have elapsed since that incident occurred.

The next incident occurred over six years later, at the end of May 2015. (Stip., Ex. E) The remaining incidents all occurred over the next eleven months, between May 29, 2015, and April 18, 2016. (See Complaint) In fact, three of those five incidents occurred during the same week, between May 29 and June 5, 2015. (*Id.*) That year was a period in Judge Woldt’s life when he was experiencing intense family problems. (Stip., ¶16)

² The Judicial Commission’s Complaint lists the incidents in reverse chronological order, with the most recent incident identified as Incident One.

It has been four years since the most recent of these six incidents. Since then, Judge Woldt has made some fundamental changes in his daily life and spiritual orientation which have helped him to better manage stress, better control his emotions, and reorder his priorities. (Stip., Pg. 16) These life changes have helped Judge Woldt, for the past four years, avoid conduct similar to that in issue, and provide a strong basis to conclude he is not likely to have such problems in the future. (Id.)

2. Judge Woldt's Brief Display of a Firearm in Court was Expressly Legal.

On two occasions, Judge Woldt briefly displayed an unloaded firearm to emphasize a point about courthouse security and, with respect to Incident Three, to empathize with the victim's fear and loss of security in his own home. While the specific facts regarding each incident are discussed below, it is important to understand that the weapon was only briefly displayed and was never used in a threatening manner. The firearm was not loaded, he had his finger off the trigger and out of the trigger guard, and the gun was not pointed in the direction of any person. (Complaint ¶15, fn. 4, Stip.¶5) At the time of both of these incidents, Judge Woldt was properly licensed to carry a concealed weapon. (Complaint, fn 3) Moreover, Wisconsin law expressly authorized him, as a judge, to be in possession of a firearm, either concealed or openly, in a courthouse and courtroom.

Wis. Stats. §175.60 (16)(a)6(b)2 provides:

(a) Except as provided in par. (b), neither a licensee ...**may knowingly carry a concealed weapon, a weapon that is not concealed...** in any of the following places:

...

6. Any portion of a building that is a county, state, or federal courthouse.

(b) The prohibitions under par. (a) do not apply to any of the following:

...

2. A weapon in a courthouse or courtroom if a judge who is a licensee is carrying the weapon ... (emphasis added).

At the time of these incidents, Judge Woldt knew that he had the legal right to carry and display a gun in a courtroom. On reflection, he admits that under the circumstances it was unnecessary and constituted misconduct.

3. Judge Woldt's Exceptional Record of Service to the Justice System

In contrast to all of the judges who received the discipline of suspension, Judge Woldt has a long record of public service. Judge Woldt's exceptionally generous use of his time and efforts to the advancement of the Wisconsin Judicial System and justice initiatives in his community is summarized in the Stipulation. (Stip., ¶13) It includes:

Wisconsin Judicial Leadership Efforts:

- Two-term Vice-Chair of the Judicial Conference Committee;
- Two-term member of the Judicial Conference Legislative Committee;
- Fourteen-year member of the Effective Justice Strategies, a subcommittee of the Planning and Policy Advisory Committee;
- Fourteen-year member of the Trial Judges Association Board of Directors;

Local Justice System Initiatives:

- Thirteen-year Chair of the Winnebago County Safe Streets Criminal Justice Coordinating Committee;
- Chair of the Winnebago County Victim Impact Panel (2004 - 2008), drunk driving deterrence program;
- Ten years on the Board of Directors for the Winnebago Conflict Resolution Center;
- Sixteen-year volunteer for the Winnebago County Teen Court;
- Ten years of initiating and presiding over the Winnebago County Drug Court;
- Thirty-year volunteer for the High School Mock Trial Competition;
- Received 2006 ESTHER Community Leadership Award for efforts to provide alternatives to incarceration; and
- Participated in efforts to change Wisconsin law to enable repeat OWI offenders to get needed treatment, resulting in passage of 2009 Wisconsin Act 100 (Wisconsin Safe Streets and Treatment Options Programs).

The only disciplinary cases that cite comparable exceptional service to the justice system are cases resulting in a public reprimand, not a suspension.

II. FACTS REGARDING SPECIFIC INCIDENTS.

1. Incident One (Stip. Ex. B, 09 FA 594)

After first accurately quoting Judge Woldt's statement in its factual recitation, the Commission's discussion of Incident One twice inaccurately states that it involved Judge Woldt "calling the attorney a 'dick'". (Commission Br. Pgs. 3, 23) The record does not support this characterization.

This April 18, 2016, incident involved the cross examination of Winnebago County's Director of Family Services. (Stip., Ex. B, Pg. 5) This office is statutorily charged with conducting family mediation services and recommendation on child custody and placement. *Id.*, and Wis. Stat. §767.405. The Director is appointed by the Circuit Court Judges of the county. Section 767.405 (1m)(a). The Director is a court-appointed expert, not an expert retained or aligned with either party to a placement or custody dispute.

It was Judge Woldt's perception that one of the attorneys was being "very argumentative with the witness" and "playing games." (Stip., Ex. B. Pg. 37) The record does not reveal what tone, body language, or facial expressions by counsel may have contributed to Judge Woldt's concern for the nature of the questioning of this court-appointed expert. Nonetheless, Judge Woldt perceived that the manner and substance of the attorney's questioning was designed to frustrate and embarrass him and was "not effective to the ascertainment of truth". Wis. Stat. § 906.11 (1)(a). Judge Woldt had the duty to exercise his discretion to control the mode of interrogation and "protect witnesses from harassment or undue embarrassment." §906.11 (1)(c).

Judge Woldt clearly used inappropriate, crude language in exercising his discretion to protect the witness. He said: "Counsel, there's a thin line between being an advocate and being a 'dick'...thin line...and you're blurring it." There is no excuse for Judge Woldt to have used crude language, which he admits violated SCR 60.04(1)(d), 60.03(1) and 60.02. He did not, however, simply "call the attorney a dick", as the

Commission asserts. He stated that the attorney was “blurring” the line, but did not say the attorney had crossed it and did not directly call the attorney a ‘dick’.

The Commission also claims that Judge Woldt’s perceptions of the attorney’s aggressiveness was “not supported by the record” and was “not reasonable” (Brief, Pg. 23). This argument ignores the context which prompted Judge Woldt’s assessment. A review of the cross-examination prior to Judge Woldt’s comment supports that Judge Woldt’s perception was reasonable. For example, shortly before this exchange, the attorney was questioning the witness in a way that implied there was a problem between the parents related to past cooperation and getting the child to school on time. (Stip. Ex. B. Pgs. 29-32) However, the witness testified that the parents had not expressed that either of these subjects was a problem or concern. *Id.* Judge Woldt was concerned that cross examining the witness on matters that the parties weren’t raising as a concern had the potential to do more harm than good.

This is evident in Judge Woldt’s effort to explain his concern to the attorney:

...What I'm saying is that I think you're creating an issue here that's going to do nothing but hurt this family and I don't like it and it's just, I am very concerned about what's happening here and I -- anything I can do to (help) keep these two ...working together and doing what's in the best interests of the child, which it seems like they're doing, I'm going to help, and to raise this issue is just scary to me.

...

Now, the way I saw this going today I was thinking oh my God, don't, let's don't do this to this family. There's a reason both of you are here, because both of you love the daylights out of your daughter. *Id.* p. 61.

Judge Woldt also tried to explain his concerns to the parties:

Remember that whenever you make decisions on these things because she loves you too and she doesn't want to do anything to disappoint either one of you. I hope and pray that things work out for both of you and your daughter. I really do. I know you think that I hate you mom, but I don't. I don't. I don't hate your attorney either. I just am passionate about this, and I see that you two are too, and that's good. *Id.*, Pgs. 61-62.

This incident was the most recent misconduct; it occurred over four years ago.

2. Incident Two--Government Day

On January 25, 2016, Judge Woldt participated in the Oshkosh Chamber of Commerce's Government Day event, in which high school students get exposed to various parts of county government. During the students' visit to Judge Woldt's courtroom, he was asked about courthouse security. In response, Judge Woldt explained that due to the lack of security he possessed a firearm. He then briefly displayed an unloaded firearm. (Complaint ¶15, fn 4, Stip.¶ 5) As explained above, he briefly displayed the firearm with his finger off the trigger and out of the trigger guard and the gun not pointed in the direction of any person. Additionally, Judge Woldt's possession and open display of the firearm in the courtroom was legal.

Judge Woldt contends that the Commission characterizes this incident in an unfair and inaccurate way to try to make it appear more aggravated than it was. It asserts that Judge Woldt "unnecessarily involved the students" in an ongoing dispute between him and the County Board regarding courthouse security (Brief, Pg. 25), although it stipulated that Judge Woldt did not raise this issue—he was responding to a student's question about courthouse security. (Complaint ¶15, fn 4, Stip.¶ 5) The Commission then speculates about Judge Woldt's intent, asserting that he "had an alternative plan for the students when he used the event as his opportunity to complain about his dispute with the County Board regarding courthouse security..." (Brief, Pg. 26).. There is no evidence of any such "plan."

The Commission fails to mention that, during the informal meeting with the Judicial Commission (at which its counsel was present), Judge Woldt explained that the students' program for the day included a debate about the topic of courthouse security (8.16.19 Formal Appearance Transcript, Pg. 91) Judge Woldt explained that, after meeting with him:

The students go to lunch with the county board members. They came back, and then the students do a debate. You want to know what they debated?
Courthouse safety. So, they were aware that this was an issue, **and that's why the question came up for me.**

...

...they are kids that were going to debate this issue (courthouse safety) in front of the county board in two hours.” *Id.*, at 91, 119 (emphasis added).

Thus, Judge Woldt understood that the student’s question to him was prompted by the assigned debate topic. There is no evidence that Judge Woldt selected that topic or was involved in organizing the Government Day activities. No evidence supports the Commission’s accusations and effort to try to portray the incident as more aggravated than it was.

Nonetheless, Judge Woldt accepts that displaying the gun was unnecessary and ill-advised, and stipulates that it violated SCR 60.03(1) and 60.02.

3. Incident Three

Incident Three involves the sentencing of a young man who was charged with stalking and burglarizing the next-door neighbor’s home and stealing underwear from the wife’s dresser. (Stip. Ex. C, Pgs. 6, 8-10) The defendant had previously been convicted of sexual assault of two minors, including a seven-year-old. *Id.* The victims in this case were a young couple with two small children who had recently purchased their first home. The Commission characterizes part of Judge Woldt’s sentencing comments as “the judge’s profanity-laced comments to the victim ...unnecessarily using expressions “damn it”, “I don’t give a shit”, and “moving my ass out of there”. (Complainant’s Br. Pg. 23) The clear implication by the Commission’s characterization was that Judge Woldt was directing the profanity at the victim. In fact, the record demonstrates that Judge Woldt used profanity in an effort to convey empathy and understanding of the deep feelings of fear expressed by the victim in his statement.

The victim-husband addressed the court and explained that the defendant had stolen his wife’s underwear the last time he broke into their house. (Stip., Ex. C, Pgs. 5, 6) He was particularly concerned about how this crime had upset his wife, explaining:

“She scares easy. You know, trying to-trying to calm her down in our first home and saying, you know, you are going to be okay, you are going to be safe, it hasn’t been easy. You know it’s something for me too. . . You know, I mean this is our first house with-with two young children in the home.” (*Id.*, Pg. 6)

The victim expressed great concern about the defendant committing similar offenses in the future, and commented on the fact that this series of breaches of security was something that they would always remember as an unhappy part of owning their first home. (Id., Pg. 7) Judge Woldt expressed empathy with the fear expressed by the victim throughout his sentencing comments, in part by explaining his own fear due to lax courthouse security:

I understand the fear of the victims in this case. . . . Just an example is I have been trying to get security into this courthouse. There is none. Any of you could have walked in today with a gun. None of us would ever know. . . . So I have fear too.
(Id., pp. 21, 22)

Judge Woldt did not just focus on his own reasons for feeling fear, but instead expressed his understanding of the victims' fear:

...I wrote in my notes "you lost a sense of home" when this happened to you. See, it's not home...when people think of home, they think of safety: I'm home, I'm safe, I can relax...he took that away from you when he went into your house and did this stuff.
(Id., Pg. 25)

Judge Woldt admits using unnecessarily crass terms to try to express his understanding of how deeply troubling it must be for the victims to lose their sense of security in their own home:

Damn it, it's my house. It's my first house, and I don't want to move. Why should I have to move if I haven't done anything wrong? I understand that, but I also understand that I don't give a shit about my idealistic beliefs, if it comes down to my family's safety. I'm moving my ass out of there. (Id., Pg. 24)

During this incident, Judge Woldt also displayed an unloaded firearm. The Commission has stipulated that it was a brief display, during which Judge Woldt "did not have his finger on the trigger or inside the trigger guard of the handgun; and (b) did not point his handgun at anyone present in the courtroom." (Complaint fn 4 and Stip. ¶5). However, it misstates the sequence of events with respect to this incident. It states that "[i]mmediately after the gun was displayed, Judge Woldt addressed the defendant telling him . . ." (Brief, Pg. 6) The transcript makes clear that the gun was displayed while Judge Woldt was addressing the victims to emphasize his empathy, not the defendant:

I can tell you what I do now. This is what I do (the court holds up a gun). That I keep up here on the bench just because I want to protect myself. Now, I'm not saying you should do that but if I was in your, if I was in your situation, I'd have it on my side all the time."

(Stip., Ex. C, Pgs. 21, 22)

Only then did Judge Woldt directed his attention from the victim to the defendant, saying:

With today's laws with the *Castle Doctrine*, you're lucky you're not dead because, if you would have come into my house, I keep my gun with me and you'd be dead, plain and simple, but that's what makes this so scary. (Id., Pg. 22)

Given the fact that the unloaded gun was displayed only "briefly", it's unclear whether it was still in view when Judge finished his comments to the victims and addressed the defendant. More important, the record reflects that Judge Woldt's purpose in displaying the gun was to show the victims "what he does" for personal safety as well as caution the defendant of the dangers of invading private homes.

4. Incident Four (Stip. Ex. D, 14 CT 413)

Incident Four occurred on June 4, 2015. It involves comments Judge Woldt made during a hearing on a post-conviction motion of ineffective assistance of counsel in a driving after revocation case. (Stip., Ex. D, Pg. 7) The case had been resolved with a no-contest plea by the defendant, with the opportunity to have the criminal conviction amended to a traffic citation if he took the necessary steps to get his license reinstated. *Id.* Instead of following through with that opportunity, the defendant's attorney brought a motion to vacate the conviction for ineffective assistance of counsel. Clearly, Judge Woldt felt that he had given the defendant an extremely light and manageable sentence with an opportunity to avoid a criminal conviction and that the basis of the motion was unfounded. In fact, if the motion had been granted, the charges would have been reinstated and the defendant would face up to a year in jail upon conviction.

Unfortunately, Judge Woldt expressed his frustration in an inappropriate way. He told the defendant he'd "love to grant this motion...have a trial" and "give him a year in jail" (Id., at 13) While Judge Woldt expressed frustration that the defendant didn't

appreciate the opportunity he was given to avoid a criminal conviction, there is no basis to believe that Judge Woldt's denial of the motion was legally wrong or influenced by his frustration. Nonetheless, he has acknowledged that it was wrong for him to have delivered the message that he did and to express what he might have done had the motion actually been meritorious.

The Panel should be aware that this incident was the middle of the three misconduct incidents that occurred within one week, between May 29, 2015, and June 5, 2015. It was a very stressful and depressing time in Judge Woldt's life. (Stip. ¶16) He knows that is no excuse for making comments of this kind or in the other cases during this time. However, since that time, he has made the changes necessary to avoid any similar misconduct for the past four years.

5. Incident Five

The Commission asserts that "the most aggravated example of Judge Woldt's crude conduct occurred during a sentencing hearing in *State v. E.K. ...*" (Brief, Pg. 21) It provides the Panel with Judge Woldt's admittedly crude comment, but provides no context or explanation of what prompted it. Judge Woldt acknowledges the wrongfulness of this comment, but contends that the incident must be considered in context.

Judge Woldt was sentencing a 19-year-old for sexual assault of a 13-year-old that included allegations of "pulling her hair/pushing her head down to suck on his penis". (Stip., Ex. F, Pg. 3) Judge Woldt's comment was in reaction to the defense attorney's argument that his client committed this crime because "he was confused, and he was somewhat paralyzed with fear . . ." (Stip., Ex. E, Pg. 6) This shocking explanation of why his client committed this crime impulsively provoked Judge Woldt to state: "I know when I'm paralyzed by fear the first thing I want to do is stick my 'dick' in some girl's mouth.... Everyone else the same way?" (Id.) Judge Woldt then stated: "I mean that's a stupid argument." (Id.)

Judge Woldt acknowledges that he should not have reacted to the attorney's incomprehensible explanation for the crime in this vulgar manner. In context, however, it is clear that his comment was an impulsive reaction directed to the defense attorney,

who was seeking to excuse the act of sexual assault because the perpetrator was “paralyzed with fear”. Judge Woldt was not being dismissive of the crime or the victim; he was expressing outrage over the attorney trivializing the crime with such an absurd justification.

Judge Woldt also admits that his statement to the defendant, after asking him whether he wanted to say anything, and then warning that doing so could “mess this deal up” (Stip., Ex. E, Pg. 9), was improper and violated SCR 60.01(1)(hm). However, Judge Woldt clearly set his impulsive reaction to the attorney’s explanation aside, listened to the balance of his argument, and didn’t let his reaction influence his decision. This is reflected in his comments to the defendant:

I don't think for a minute that you're the type of kid that's going to come back here. You're a low risk to reoffend. Everything in the PSI says you're a low risk to reoffend.

(Id.) He withheld sentence and, observing that the defendant was “doing the right things,” urged him to “keep it going.” (Id., Pg. 10)

This incident also includes a comment that Judge Woldt made at the end of the hearing, a comment that he deeply regrets. The comment was, “That tells me that there is something with this so-called victim in this case”. (Stip. Ex. E, Pg. 10) While context regarding this statement is not offered as an excuse, it makes clear that this was not a comment made in the presence of, or directly to, the victim.

At the commencement of the hearing, Judge Woldt confirmed on the record that the victim rights obligations had been complied with (including the right to be notified of the scheduling of all hearings, per Wis. Stat. § 950.04 (1v)(g)), and that no victim impact statement or restitution request had been requested of the DA or the court. (Id., Pgs. 3, 4) Judge Woldt then asked whether there was any victim that was “here and want(s) to make a statement”. Judge Woldt would have looked at all present in the courtroom and the record makes clear that there was no response. (Id.)

While explaining his sentence to the defendant, Judge Woldt also noted that the victim had no contact and would not return phone calls to the probation agent doing the pre-sentence investigation. Given that the victim had not asked to be notified of any court

hearings, would not respond to the pre-sentence investigator, had not returned Victim Impact Statements to the District Attorney or the court, and there was no response when he asked if there was a victim present who wished to make a statement, it was reasonable for Judge Woldt to conclude the victim was not present in the courtroom. It was, nonetheless, an unnecessary and regrettable statement. Judge Woldt accepts that it was wrong and had the potential to communicate a diminishment of the seriousness of the crime to those present. It was not, however, a statement made directly to a young victim, as implied by the Commission's argument.

6. Incident Six

Incident Six involves comments Judge Woldt made to a domestic abuse victim in a hearing over eleven years ago, on February 27, 2009. The next misconduct occurred over six years later, in May of 2015. Nothing in this record suggests that Judge Woldt has treated domestic violence cases or domestic violence victims inappropriately since the incident. The comments were on the record, and there is no evidence or even any allegation that Judge Woldt made any attempt to conceal the act or discourage an investigation. The Commission has offered no explanation as to why a Complaint was filed as to this misconduct eleven years after an undeniably isolated incident.

This incident occurred during a case involving a charge of a domestic disorderly conduct arising from a dispute over money between a boyfriend and girlfriend; there was no physical contact or violence. (Stip. Ex. G, Pgs. 3, 4) The defendant had been convicted of another domestic disorderly contact within the same year. (Id., Pg. 3) The defendant's girlfriend, and victim in the case, told the court that she did not want the defendant to be ordered into domestic abuse counselling and that she was "hoping that he could get a fine and community service instead of 18 months' probation . . ." (Id., Pg. 2) Judge Woldt was clearly trying to treat this domestic abuse case as a serious matter, not one that warrants only a fine and community service. By ordering probation with a condition of domestic abuse counselling, he was trying to do the right thing for the victim and the offender. Unfortunately, he verbalized his frustration that the victim didn't appreciate the need for this type of counselling by telling her:

If you are going to come in here and tell me that you just want a fine, everything is fine, then don't pick up the phone and dial 9-1-1, don't call the cops. I mean if you think you want to handle it, then handle it; but if you want to pick up the phone and call the police, **we are going to get involved and we are going to make him get the counseling which he needs.** I'm sick and tired of victims coming in here and they call the cops when they need them but then later on they come and say: oh, no, this person is an angel. I'm sick and tired of hearing it." (emphasis added) (Id., at Pg. 6)

Judge Woldt's sentence reflected an appreciation of the serious nature of any domestic abuse case and the need to do more than fine a defendant to interrupt the cycle of domestic abuse. His comments to the victim, however, did not communicate that well and had the potential of discouraging police intervention in the future. Judge Woldt understood that and regrets his comments. Nothing in the record even suggests that he has made a similar mistake in handling domestic abuse cases in the past eleven years.

ANALYSIS

I. Consideration of the "McCormick Factors" Supports a Public Reprimand Sanction for Judge Woldt

Ziegler set forth a list of ten, non-exclusive factors, derived from *In re Inquiry Concerning Patrick C. McCormick*, 639 N.W.2d 12, 16 (Iowa 2002), to guide the decision as to appropriate discipline. 2008 WI 47, ¶ 43. The discussion below addresses the facts related to these ten factors.

1. Whether the misconduct is an isolated instance or evidenced a pattern of misconduct.

The Commission's argument that Judge Woldt's conduct meets this first *McCormick* factor because his "conduct evidenced a pattern of misconduct over the course of three separate calendar years" (Brief, Pg. 19), should be rejected.

Judge Woldt's misconduct more fairly characterized as separate incidents, most of which occurred over a short period of his career. The Complaint identifies one act of misconduct from the time Judge Woldt took the bench in 2004 to May 2015. That incident occurred in February of 2009, then another six years passed without incident. Thus, this first incident can properly only be characterized as isolated. The remaining incidents occurred over an eleven-month period from May 29, 2015, to April 18, 2016. Three

occurred during the same week. While it is no excuse, that year was an extremely stressful year in Judge Woldt's personal life. (Stip., ¶16) Since then, Judge Woldt has made some fundamental changes in his daily life and spiritual orientation which have helped him to better manage stress, better control his emotions, and reorder his priorities. (Id.) No further incidents have occurred in the past four years. (Id.) Thus, Judge Woldt's life changes have helped him avoid further misconduct, and they, along with the four years without misconduct, provide a strong basis to conclude he is not likely to have such problems in the future. (Id.)

Taking all of the facts into consideration, the Judicial Commission's assessment should be rejected. Instead, it would fair to find that one isolated incident occurred in 2009 and that later, over a short and isolated period of Judge Woldt's career, he engaged in multiple instances of misconduct, but that period ended over four years ago.

2. The nature, extent, and frequency of occurrence of the acts of misconduct

The second factor inquiries into the "extent and frequency" of misconduct overlaps, considerably, with the first factor. Thus, the analysis regarding factor one applies here as well. As discussed above, while Judge Woldt admits six incidents of misconduct, half of them occurring in the same week. Judge Woldt made life changes and has committed no misconduct in the past four years. During thirteen of Judge Woldt's sixteen years of service as a judge, there was no misconduct whatsoever. Moreover, each incident complained of was a discrete event; no misconduct extended over time. Thus, Judge Woldt contends that the extent and frequency of misconduct is limited.

The third element of this factor is the "nature" of the misconduct. Since the Commission combines discussion of this element with that of the tenth factor, Judge Woldt addresses this element in his response to that discussion. Here, he simply points out that, as he will explain below, the nature of his conduct is qualitatively different from the nature of the conduct which has warranted suspension.

3. Whether the misconduct occurred inside or outside the courtroom or courthouse

Judge Woldt's six acts of misconduct occurred while in the courtroom.

4. Whether the misconduct occurred in the judge's official capacity or in his or her private life

During these six incidents of misconduct, Judge Woldt was on the bench acting in his official capacity. (Incident Two occurred while Judge Woldt was hosting a group of high school students learning about county government, but he was on the bench and wearing a robe.)

5. Whether the judge has acknowledged or recognized that the acts occurred

As the Joint Stipulation states, Judge Woldt acknowledges and deeply regrets his acts of misconduct:

Judge Woldt acknowledges that his conduct described in the Complaint was wrong, violated the Code of Judicial Conduct and did not reflect the standards and demeanor that judges must always maintain, especially within a public courtroom. He expresses his deep regret for his errors and judgment, his lack of restraint and civility, and any adverse effect his conduct may have had on individuals and the public's confidence in the Wisconsin Judicial System. (Stip., Ex. B ¶15)

6. Whether the judge has demonstrated an effort to change or modify his or her conduct

Beyond any words of regret or acknowledgment of responsibility, Judge Woldt has demonstrated over the past four years that he has effectively modified his demeanor and conduct to avoid any similar problems. No other judicial misconduct case involves a judge who, like Judge Woldt, demonstrated for four years prior to the commencement of the Complaint that he was committed to and capable of making changes necessary to avoid further misconduct.

As we've noted, five of the six incidents occurred in an eleven-month period (three in the same week), during a period in Judge Woldt's life when he was experiencing intense family problems. (Stip. ¶16) He committed himself to making changes in his daily life and spiritual orientation, which have "helped him manage stress and disappointment, re-order his priorities, and will enable him to avoid making similar mistakes in the future". *Id.* Indeed, he has a four-year track record to support the truth of

this statement. This factor strongly mitigates against the harsh discipline the Commission seeks.

7. The extent to which the judge exploited his or her position to satisfy personal desires

The Commission has stipulated that “Judge Woldt did not gain or attempt to gain financial advantage for himself or his family in connection with any of the six incidents. In addition, there is no indication that any of the cases at issue were decided incorrectly.” (Stip., ¶14) The Commission acknowledges that there is no evidence in this case that “Judge Woldt used his position to advance his personal interests.” (Commission Br, Pg. 20)

This stands in stark contrast to many of the cases in which suspension was ordered. For example, Judges Waddick and Dreyfus filed false Certificates Pending Cases. *See, In re Waddick*, 2000 WI 11, 232 Wis. 2d 733, 605 N.W.2d 861, and *In re Dreyfus*, 182 Wis. 2d 121, 513 N.W.2d 604 (1994). Because Judge Woldt’s misconduct did not exploit his position to satisfy personal desires, application of this factor supports rejection of the Commission’s recommendation.

8. The length of the judge's service on the bench

Judge Woldt has served as a Circuit Court Judge for sixteen years.

9. Whether prior complaints were filed against the judge

As the Commission has stipulated:

Other than the current matter, Judge Woldt has not been the subject of any public or private discipline since his appointment to judicial office in 2004. Additionally, while an attorney in private practice (from 1987 to 2004), Judge Woldt was not subjected to any public or private attorney discipline.” (Stip., ¶10)

The absence of prior discipline separates Judge Woldt’s case from many of the cases that resulted in a sanction of suspension. For example, in *In re Gorenstein*, 147 Wis.2d 861, 434 N.W. 2d 603 (1989), which the Commission urges the panel to compare to Judge Woldt’s case, Judge Gorenstein was the subject of an earlier judicial misconduct investigation, which resulted in a private admonishment by the Judicial Commission. *Id.*,

at. 864. Unfortunately, Judge Gorenstein's misconduct continued and another formal misconduct complaint was filed against him. "Because of the number and nature of the judge's statements and also because he had previously been admonished for making inappropriate statements from the bench, the judicial conduct panel concluded that Judge Gorenstein's violation of these standards was aggravated and persistent..." *Id.*, at 872. Similarly, Judge Van Susteren also had a prior public reprimand sanction in 1978, before his suspension case in 1984. *In re Van Susteren*, 118 Wis. 2d 806, 817, 348 N.W.2d 579 (1984).

Related to this *McCormick* factor, consideration should also be given to cases where the misconduct continued after the filing of the misconduct Complaint. Several judges sanctioned with a suspension continued their misconduct during the formal investigation or after filing of a complaint. For example, while a Judicial Commission investigation was pending, Judge Piontek twice submitted false denials in writing to the Commission. *In re Piontek*, 2019 WI 51, ¶12, 386 Wis. 2d 703, 927 N.W.2d 552. Similarly, Judge Waddick and Judge Dreyfus made false statements to the Commission during their investigation of misconduct. *In re Waddick*, 2000 WI 11, 232 Wis.2d 733, 605 N.W.2d; *In re Dreyfus*, 182 Wis. 2d 121, 513 N.W.2d 604.

Because Judge Woldt was not the subject of previous discipline and has no misconduct in the past four years, this factor weighs against the Commission's recommendation for a suspension. While four years without violations does not excuse Judge Woldt's conduct, it does provide a solid, fact-based, reason to conclude that he is not likely to engage in similar conduct in the future. It also supports the conclusion that the nature of his misconduct is substantially different than that warranting a suspension, rather than a public reprimand.

10. The effect the misconduct has upon the integrity of and respect for the judiciary

As mentioned above, the Commission combines considerations of factors two and ten in its argument regarding this factor. (Brief, Pgs. 20-26) Citing no authority, it declares that factors numbers two and ten are the "most significant *McCormick* factors". (*Id.*, Pg.

20) The Supreme Court has not suggested there is a hierarchy of significance for these ten factors. But even if it had, the Commission's argument is unsustainable because it provides only selected facts, mischaracterizes the facts of these incidents, and ignores the qualitative differences between the conduct warranting suspension and Judge Woldt's conduct. His conduct is neither persistent nor aggravated and does not warrant suspension.

- i. The Commission's factual arguments ignore certain facts and context and mischaracterize the incidents.

The Commission omits facts providing context and inaccurately depicts some of the incidents of misconduct. Judge Woldt has identified most of these mischaracterizations in his recitations of fact. Because of these omissions and mischaracterizations, the panel should not accept the Commission's characterization of these incidents at face value.

Perhaps the most glaring example of mischaracterization is the Commission's discussion of Incident Five. The Commission asserts, incorrectly, that Judge Woldt was "dismissive of the 2d degree sexual assault case before him and disrespectful to the victim". *Id.* In fact, Judge Woldt's comment was the *opposite* of this assertion.

Judge Woldt made an impulsive remark in reaction to the defense attorney's bizarre explanation for why his client committed the sexual assault. Contrary to the Commission's argument, he was not being dismissive of the crime or the victim, but instead was "dismissive" of the attorney's trivializing of the crime with such an absurd justification.

The Commission's argument also unfairly, implies that the victim was present to hear Judge Woldt's improper comments. By asserting that this comment was "disrespectful to the victim (a thirteen-year-old girl) and *other participants in the proceeding*" (Brief, Pg. 21) (emphasis added), the Commission implies that the thirteen year old girl was one of the participants in the proceeding. As we've explained there's no reason to believe she was in the courtroom.

That the Commission was trying to imply that Judge Woldt's comments were made directly to the victim in Incident Five is undeniably revealed in the first sentence following the argument regarding this incident. The Commission states, "Judge Woldt's statement **to another victim**... was also problematic." (emphasis added) (Commission Br. at 21) This argument reinforces the Commission's previous, misleading statement that Judge Woldt's comment in Incident Five was made to directly to the victim. We trust the Panel will look at the whole facts and not be misled by mischaracterization of the facts.

- ii. The Commission essentially ignores mitigating factors in its recommendation.

The Commission essentially ignores many facts which militate against the drastic sanction of suspension. For example, in several of the hearings in which misconduct occurred, Judge Woldt later took pains to explain his rationale or clearly demonstrated that his momentary use of inappropriate language did not impact his later explanation and decisions on the merits of the case before him. The Commission also completely ignores Judge Woldt's four-year record of demonstrating the will and ability to conform his conduct to the letter and spirit of the Code. The Commission gives no explanation for the eleven-year gap between the Incident Six and the filing of the Complaint.

For many circuit court judges, the challenge is not handling the more complex and challenging cases well, but instead, it is being efficient while staying engaged and thoughtful when handling the unending flow of more routine cases. That is particularly true when other stressful events are simultaneously occurring. Most of the incidents here occurred during a very stressful and depressing time in Judge Woldt's life. (Stip. ¶16) Fortunately, he has demonstrated that he's made the changes necessary to avoid any similar misconduct for the past four years.

- iii. The 2009 incident should be considered an isolated long-past incident

Incident Six occurred over eleven years ago. This exceedingly long passage of time from the incident to the filing of the judicial conduct complaint appears unprecedented in publicly reported judicial disciplinary cases in Wisconsin. The Commission has not explained this eleven-year gap. It is not attributable to Judge Woldt.

If a judge committed a heinous felony offense, including one involving bribery or corruption, the statute of limitations would preclude criminal charges after six years. Wis. Stat. § 939.74. Since there is no statute of limitations for judicial misconduct incidents, there is no valid objection to the Judicial Commission pursuing this misconduct charge, but Judge Woldt submits that the passage of time and the isolation of this incident, along with the lack of repetition, renders it an improper basis for imposing suspension.

The Commission could have exercised its discretion and handled this long-past act with a private admonishment. It chose not to, but this Panel and the Supreme Court should exercise their discretion in a way that recognizes that this isolated and remote incident should be given little weight in the determination of a proper sanction.

iv. Brief Display of Firearm

In considering the firearms incidents, the panel should bear in mind that Judge Woldt did not act in a threatening manner and did not carelessly handle the firearms. He was properly licensed and his carrying of the firearm was indisputably legal. On reflection, he appreciates that use of a firearm in this way was unnecessary and had the potential to be misunderstood.

A public reprimand related to these two incidents is an appropriate way to inform judges that, although authorized by law, a judge's display of a firearm violates the Code of Judicial Conduct. Given the clear authority of §175.60 (16)(a)6(b)2, the specific facts of the incidents, and the absence of any relevant prior misconduct decision, these incidents should not be the basis of a suspension sanction of Judge Woldt.

II. Suspensions are “Drastic Measures Reserved for the Most Serious” and “Persistent Violations” of the Code of Judicial Conduct

Every act in violation of the Code of Judicial Conduct is wrong, including Judge Woldt's misconduct at issue in this case. There are, however, degrees of wrongfulness and moral culpability in the nature of the misconduct committed by judges in past cases. The Supreme Court has recognized that “...a sanction of a public reprimand is both serious and significant.” *Ziegler*, 2008 WI 47, ¶113. *Ziegler* also made clear that “[s]uspension and removal from office are ‘drastic measures’ reserved for the most

serious, repeated or persistent violations of the judicial code.” (emphasis added) *Id.*, ¶10. A significant factor in determining when a public reprimand instead of suspension is the appropriate discipline, is the “degree of moral culpability” of the conduct. *Id.*, ¶ 11. This assessment of the relative moral culpability was prominent in determining that Judge Ziegler should be given a public reprimand, instead of a suspension:

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. *Id.*

Judge Woldt’s conduct is different from the conduct in *Ziegler*, but his conduct is also far less morally culpable than the conduct of the judges in all past suspension cases.

III. Judge Woldt’s Conduct Did Not Involve an Element of Moral Culpability Similar to Past Suspension Cases

The Commission’s brief accurately explains that the conduct of fourteen judges has warranted a sanction of suspension. (Complainant Brief, Pg. 14) These cases include four general types of morally culpable conduct: dishonesty, violations of law or court orders, racial or sexist conduct or comments, and issuing coercive orders beyond a judge’s legitimate authority. These more serious and morally culpable types of conduct are not present in Judge Woldt’s case.

A. Dishonesty was prominent factor in the suspension of seven judges, including all six judges suspended from 1994 through 2019.

Between 1994 and 2019, the Supreme Court imposed the sanction of suspension in six judicial misconduct cases. All six cases involved elements of dishonesty in the nature of the misconduct itself, representations by the judge about the misconduct to the Commission, or both. Dishonesty and efforts to conceal misconduct were also in issue in *In re Aulik*, 146 Wis. 2d 57, 429 N.W.2d 759 (1988). None of the incidents of misconduct by Judge Woldt involved any form of dishonesty or misrepresentation, before or after the Commission commenced an investigation. Moreover, in contrast to these cases, Judge Woldt fully cooperated with the Commission’s investigation and acknowledged his misconduct. (Stip., ¶¶3 & 9).

Dishonesty and Ex parte Communications Ex parte communications have both the potential and, often, the purpose of impacting the outcome of a case. Misconduct of this kind demonstrates a judge's "willingness to tilt the playing field", as the court expressed in *In re Calvert*, 2018 WI 68, ¶27, 386 Wis.2d 703, 927 N.W.2d. The court declared Judge Aulik's ex parte communication antithetical to the role of a judge: "Those ex parte communications **subverted the very process Judge Aulik was sworn to administer.**" *Aulik*, 146 Wis. 2d at 74 (emphasis added). The misconduct of the four judges sanctioned with a suspension for ex parte communications were also dishonest about those communications. The combination of these morally culpable types of conduct is far more serious than the misconduct present in this case. The cases in which judges engaged in ex parte communication and dishonesty are:³

1. **Judge Piontek** initiated ex parte communication with the prosecutor and expressed that he wanted to impose a stiff sentence for the defendant. He concealed his ex parte communication from the other party and twice lied to the Commission in written responses to its investigation. *Piontek*, 2019 WI 5, ¶¶5, 30. He was given a 5-day suspension.
2. **Court Commissioner Calvert** lied to the parties about his ex parte communications with a police chief and circuit judges to coerce a particular result in a pending case. The court explained his deceitful misconduct as follows:

He ...lied to the parties in a particularly manipulative manner, falsely claiming that he had communicated with individuals in the judicial and law enforcement systems in such a way that the parties were doomed to failure and future legal troubles should they ever seek additional recourse. We cannot abide such assurances by a judge to rig the judicial and criminal justice systems against its participants. *Calvert*, 2018 WI 68 ¶26.

Court Commissioner Calvert was given a 15-day suspension.

3. **Judge Carver** lied to the parties and the public about recent ex parte communication to try to influence the outcome of a case. The Supreme Court explained how this dishonesty was a significant aggravating factor for suspension:

The panel properly concluded that Judge Carver's misrepresentation constituted a "deliberate and significant lack of candor" which was aggravated because it was

³ The suspension cases are addressed consecutively, to better track all 14.

made on the record in a pending case of substantial public interest and concealed from the parties and the public an ex parte communication from the defendant asking him for favorable treatment. *In Re Carver*, 192 Wis. 2d 136, 150,151, 531 N.W.2d 62 (1995)

Judge Carver was given a 15-day suspension.

4. **Judge Aulik** initiated ex parte communication with one side of a pending case, including sending the attorney a draft decision. He tried to conceal his ex parte communications and was not forthcoming when it was discovered. *Aulik*, 146 Wis. 2d 57. Judge Aulik was given a 15-day suspension.

B. Filing False Certificates of Pending Cases and Dishonesty with Commission

Circuit court judges are required to file monthly Certificates of Pending Cases listing any case that has been pending for more than 90 days after final submission. SCR 70.36 (2)(a) 1. Two judges were given suspensions for filing numerous false certificates and lying about it to court administrative personnel and the Judicial Commission:

5. **Judge Dreyfus** ignored accurate Certificates of Pending Cases prepared by his staff and authored and submitted false certificates. He then, "...affirmatively misled the deputy chief judge and the Judicial Commission investigator in an attempt to conceal his failure to promptly decide cases and his submission of false certifications. *Dreyfus*, 182 Wis. 2d at 128.

Judge Dreyfus was given a 15-day suspension.

6. **Judge Waddick** failed to timely decide 15 cases and filed false certificates of pending cases over a period of eight years. He lied to the Judicial Commission about it having overdue decisions and continued to file false certificates after they gave him a chance to correct the conduct with no sanction. *Waddick*, 2000 WI 11.

Judge Waddick was given a six-month suspension.

C. Four suspension cases involved judges committing violations of law, court orders or directives from court administrators:

7. **Judge Kachinsky** Judge Kachinsky engaged in a long, disturbing course of conduct directed to a court clerk that resulted in the issuance of temporary and permanent harassment injunctions and commencement of criminal charges for alleged violations of the injunctions. *In re Kachinsky*, 2019 WI 82 387 Wis. 2d 823, 930 N.W.2d 252.
8. **Judge Staeger** was convicted of contempt of court and sentenced to jail for years of ignoring circuit court orders to comply with ordinances related to the storage of junk cars on his property. *In re Staeger*, 165 Wis. 2d 21, 24. 476 N.W.2d 876 (1991).

9. **Judge Pressentin** ignored repeated warnings from representatives of the Director of State Courts and the Executive Director of the Judicial Commission that he was violating SCR 60.05 and 60.19(2), which prohibits a judge from being a candidate for a nonjudicial elective office. Despite these express warnings and his clear violation of the rule, Judge Pressentin continued his campaign for county board while serving as a municipal judge. *Pressentin*, 139 Wis. 2d at 153.
10. **Judge Van Susteren** was convicted of criminal tax violations and found in contempt of court for ignoring his duties as a personal representative of an estate. *In re Vansusteren*, 118 Wis. 2d 806, 348 N.W.2d 579 (1984).
11. **Judge Crawford** refused to comply with his Chief Judge's administrative order regarding court hours and following county personnel rules. He essentially tried to extort the Chief Judge with threats of publicly disclosing untrue, baseless information about the Chief Judge and others. The Supreme Court explained that: "Judge Crawford tried to force the chief judge's hand, by threatening public disclosure of extraneous, unfounded, but nevertheless potentially embarrassing professional and personal matters. *In re Crawford*, 2001 WI 96 ¶3, 245 Wis. 2d 373, 629 N.W.2d 1.
12. **Judge Seraphim** engaged in a staggering number of acts of misconduct on and off the bench. Among the most morally reprehensible conduct was his sexual harassment of women. Several of these incidents fit the elements of criminal disorderly conduct or, even, sexual assault. The Supreme Court summarized these acts as follows: "...respondent's conduct in these incidents consisted of unprivileged and nonconsensual physical contacts with offensive sexual overtones, the totality of which is gross personal misconduct." *Seraphim*, 97 Wis. 2d at 503.

D. The conduct of Judges Gorenstein and Breitenbach had elements of moral culpability Judge Woldt's conduct did not.

The Commission compares Judge Woldt's case to two prior cases: *In re Gorenstein*, 147 Wis. 2d 861, 434 N.W.2d 603 (1989), and *In re Breitenbach*, 167 Wis. 2d 102, 482 N.W.2d 52 (1992). (Brief, pp. 27-28) There are many compelling differences between these cases and Judge Woldt's. Most of these distinctions are addressed in the next section of this brief. This section is limited to the elements of moral culpability in the conduct of Judges Gorenstein and Breitenbach. None of Judge Woldt's misconduct involved similar kinds or degree of moral culpability.

13. **Judge Gorenstein** made racist and sexist comments from the bench. For example, Judge Gorenstein told an African-American woman at a probation review hearing:

I am sick and tired of supporting people. **Seventy-five percent of the black people in Milwaukee are illegitimate.** This woman has three illegitimate kids. I don't want to

support her kids. You can do it. It's become a way of life here. I am not tolerating it any more. You tolerate it. **Seventy-five percent to eighty percent... of the people I see in court are born illegitimate and black and come from welfare families;** and I pay for this courtroom and the staff and I am sick of it and so is the rest of Wisconsin. *Gorenstein*, 147 Wis. 2d at 865 (emphasis added).

When a female sexual assault victim began crying during her testimony, Judge Gorenstein admonished her, saying: "I think **the female response to** (sic) **crying to any tough situation** is inappropriate in a courtroom." *Id.*, at 870 (emphasis added).

Judge Gorenstein's racist and sexist remarks were a significant factor in the Court's determination to impose a suspension:

A plaintiff, a defendant or a witness comes before the court as an individual, responsible as an individual for his or her conduct. Defendants are not on trial as members of a race or of an ethnic group. A judge's references to race or ethnicity that seem to stigmatize individuals appearing before the judge are not acceptable. *Id.* at 874.

14. Judge Breitenbach The conduct most revealing of Judge Breitenbach's moral culpability was his abuse of power to coerce attorneys or litigants to do things that were far in excess of a Circuit Court Judge's authority. The following are examples of how Judge Breitenbach issued orders that exceeded his legitimate authority and were designed to intimidate lawyers and litigants for his own purposes, not the law:

- In a civil jury trial, he ordered an attorney to bring a claims representative to court and "threatened the attorney with contempt for refusing to obey his order and forced the parties to settle the action by his statements, demeanor and orders." *Breitenbach*, 167 Wis.2d at 107.
- Ordered an assistant district attorney to produce the District Attorney "before him" and threatened a contempt finding, if he failed. *Id.*, at 110.
- Instructed a school principle to notify him directly of a juvenile's violation of any school rule and told the juvenile "the police are going to come out to that school and pick you up right by your hair" and bring him before Judge Gorenstein. *Id.*, at 109.
- One of the most alarming examples of Judge Breitenbach's abuse of power involved him ordering the court reporter not to record his statements to a jury made in the courtroom while he was ordering the case and the jury dismissed. *Id.*, at 112.

The Supreme Court adopted the Judicial Panel's reasoning on why Judge Breitenbach's conduct warranted the severe sanction of a suspension. The very first reason the Panel cited in support of a suspension sanction was Judge Breitenbach issuing orders and commands well beyond the legitimate authority of a circuit court judge:

A judge should be mindful that ours is a government of law and not of men and should not permit his or her personal concept of justice to override the law. A judge

should administer his or her office with due regard to the integrity of the system of law itself, remembering that he or she is not a repository of arbitrary power but a judge under the sanction of law. *Id.*, at 113.

All fourteen prior suspension cases involved conduct with a high degree of moral culpability including: dishonesty; racist or sexist comments or conduct; conduct that was in violation of law or contempt of a court order; or was an abuse of power and the authority of a circuit court judge. Judge Woldt's conduct cannot fairly be described as comparably immoral or corrupt as the conduct warranting suspension in these cases.

IV. Aggravating Factors in *Gorenstein* and *Breitenbach* are Not Present in Judge Woldt's Case.

The Commission argues that Judge Woldt's case is similar to *Gorenstein* and *Breitenbach*, because "all three judges engaged in multiple incidents involving improper demeanor." (Brief, Pg. 27) That assertion is literally true, but far from the whole truth. As explained in the previous section, Judges Gorenstein and Breitenbach's conduct involved elements of serious moral culpability that is qualitatively different than Judge Woldt's conduct. Judge Gorenstein made racist and sexist comments and Judge Breitenbach made numerous illegitimate orders to coerce and intimidate lawyers and litigants. As accurately noted by the Commission, Judge Gorenstein had ten incidents of misconduct related to demeanor and Judge Breitenbach fourteen. Judge Woldt had four. Another contrast omitted by the Commission is that: the incidents of misconduct by both Judges Gorenstein and Breitenbach extended until shortly before they retired; all of Judge Woldt's incidents were over four years ago.

There are additional fundamental differences between the facts of those cases and Judge Woldt's case which the Commission omits.

A. Judges Gorenstein and Breitenbach exhibited loud, angry demeanors; Judge Woldt did not

Judge Woldt's misconduct related to demeanor involved the use of crude words or unnecessary sarcasm. In contrast, the incidents of improper demeanor by Judges Gorenstein and Breitenbach included evidence of visible anger, yelling, or unauthorized threats of jail for those that disagreed with them.

- **Judge Gorenstein**

Judge Gorenstein's demeanor was found to be:

...inconsiderate and discourteous to litigants, witnesses, attorneys, and others in court . . . in his manner or tone towards counsel and witnesses that prevented the proper presentation of the case or the ascertainment of truth." *Gorenstein*, 147 Wis. 2d at 863.

Judge Gorenstein's demeanor towards people of color or low economic means was particularly reprehensible. At a restitution review hearing, he made bigoted and inaccurate assumptions about the defendant, stating that she didn't work:

...so you can sit at home and watch television and have fun with your kids. Lady, get out of here before I throw you in jail. I'm sick of it." *Id.* at 867.

At another restitution review hearing, the Judge became upset with the defendant and stated, "Your husband is a bum, your kids don't want to work, that's not the victim's responsibility". *Id.* at 870. The defendant then informed the judge that she had only one child, who was not yet five years old. *Id.*

Judge Gorenstein threatened to jail a probation officer if the defendant failed to pay restitution. *Id.* at 871. He told another: "I'd like to send you (to jail) along with (the probationer)." *Id.*

Judge Gorenstein also demonstrated an angry, inappropriate demeanor in his expressions of disrespect the appellate courts and by making blatant partisan political comments from the bench. Just a few examples make the point:

...and I pay for this courtroom and the staff and I am sick of it and so is the rest of Wisconsin. And that's why [Governor] Tommy Thompson got elected and not Giveaway (Governor) Earl. *Id.*, at 865.

...
Let those saps on the sixth floor [where the office of District I of the Court of Appeals is located] and in Madison [where the Supreme Court is located] liberals do it if they want to. *Id.*, at 867.

...
The suppression rule must be changed; and I am talking to the hypocrites in the Appellate Court and Supreme Court, because I have seen the decisions that come down. ...if the boys and girl in Madison [referring to the Supreme Court] don't like it, if they have got the guts to reverse this case on a lot of technical things, let them do it, and I will run against the first judge that reverses this case. *Id.*, at 869.

The Supreme Court concluded that:

“Judge Gorenstein has demonstrated his present unfitness to serve as a member of the judiciary. That he lacked the necessary judicial temperament as evidenced by his pattern of expressing insensitivity and disrespect towards litigants, witnesses, prosecutors, and other court’s in our judicial system. Moreover, he routinely displayed that lack of judicial temperament from the bench in open court.” *Id.*, at 873.

- **Judge Breitenbach**

There are numerous examples of Judge Breitenbach displaying a loud, angry demeanor (no similar evidence exists here):

- In a February 1990 jury trial, Judge Breitenbach’s conduct was described as “angry and upset and yelled at one of the attorneys”. *Breitenbach*, 167 Wis.2d 102, 108.
- In a November 1987 motion hearing, Judge Breitenbach is described as becoming “visibly angry, upset, loud, and intemperate towards the District Attorney”. *Id.*, at 110.
- During a jury trial in June of 1988, Judge Breitenbach was found to have been impatient and intemperate in his manner and comments towards the defendant’s attorney. *Id.*
- In a September 1986 criminal trial, Judge Breitenbach was found to have become “angry and upset and yelled at the prosecutor to sit down and be quiet”. *Id.*, at 112. Judge Breitenbach later “yelled at [the same attorney] to leave the courtroom or he would go to jail”. *Id.*
- In a jury trial April of 1986, the judge’s demeanor was described as “loud, intemperate, impatient, and rude to the prosecutor and prevented him from making a record in support of the State’s position”. *Id.*
- Similarly, in July of 1986, Judge Breitenbach was found to have been “intemperate and discourteous in his remarks to the Assistant District Attorney and prevented him from making a record in support of the State’s position”. *Id.*, at 113.
- In a December 1985 hearing, Judge Breitenbach was found to be “intemperate and discourteous towards the prosecutor and again limited his attempt to make a record in support of the State’s position”. *Id.*
- In August of 1985, Judge Breitenbach was “intemperate, impatient, and discourteous towards the prosecutor and refused to allow him to make a record in support of the State’s position”. *Id.*

There 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. This is no small distinction. It is one thing for a

judge to make a sarcastic remark or use crude language to express a point, as Judge Woldt did in less than a handful of cases. It is qualitatively different for a judge to habitually display anger and shout loud diatribes, spiced with abusive threats, in the manner displayed by both Judges Gorenstein and Breitenbach.

B. Judge Breitenbach was violating existing criminal law in concealing a firearm in the courtroom; Judge Woldt was expressly permitted by state law to possess and openly display a firearm in a courtroom.

The Commission suggests that Judge Woldt's display of a firearm on two occasions has both mitigating and aggravating aspect to it, compared to Judge Breitenbach's misconduct. (Brief, Pg. 28) Judge Breitenbach twice brought a firearm to the courtroom and concealed it in a waste basket, where it was discovered by the maintenance staff. *Breitenbach* 167 Wis.2d at 114. We appreciate the effort at striking a balance between these two cases, but the Commission has overlooked a very significant difference.

As explained at the beginning of this brief, Judge Woldt was licensed to carry a concealed weapon and § 175.60 (16)(b)2 authorized him to possess a firearm in the courtroom, whether concealed or not. Though Judge Woldt was legally entitled to possess and display a firearm in the courtroom, he accepts it was nonetheless improper under the circumstances to do so.

Judge Breitenbach, on the other hand, was violating state law by taking and concealing a firearm in the courtroom. The *Breitenbach* decision was issued in 1992. Until 2011, Wis. Stat. §941.23 provided that “**Any person except a peace officer** who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor.” (emphasis added) Wisconsin had no existing concealed weapon licensing law at the time and there was no exception for judges. While the Panel and Supreme Court did not expressly address the illegality of Judge Breitenbach possessing and concealing a firearm in the courtroom, it is reasonable to assume they were both aware of existing law. The Panel and the Supreme Court should take into account that Judge Woldt's brief display

of an unloaded firearm was expressly sanctioned by state law, which makes his conduct materially different than Judge Breitenbach.

While the Commission asserts that Judge Woldt's action in displaying the firearm was willful, as discussed above, Judge Woldt was operating in the good faith belief that his conduct was legal and not violative of the Code of Judicial Conduct. In this respect, *Ziegler's* discussion of "willfulness" warrants consideration.

Ziegler explained that "[a] violation of the Code of Judicial Conduct is 'willful' ... when the judge's conduct was not the result of duress or coercion and when the judge knew or should have known that the conduct was prohibited by the Code of Judicial Conduct." 2008 WI 47, ¶ 69. Judge Ziegler stipulated that the misconduct occurred and was willful and the court agreed that it was. *Id.*, ¶¶ 70-74. However, the Judicial Conduct Panel accepted Judge Ziegler's statement that her conduct was inadvertent. *Id.*, ¶ 75. The court explained that "[a]lthough a judge may commit a 'willful' violation constituting judicial misconduct when the judge has no actual knowledge that her conduct is prohibited by the Code, the judge's actual knowledge (or lack thereof) of the Code is relevant to the issue of discipline." *Id.*

Because Judge Woldt knew that his carrying the firearm in the courtroom, openly, was legal, his good faith belief that displaying the firearm was legal should be considered a mitigating factor, in the same manner as in *Ziegler*. Just as in *Ziegler*, Judge Woldt's conduct was without moral culpability.

C. Both Judges Gorenstein and Breitenbach continued to display inappropriate conduct until a formal disciplinary complaint was filed.

Over four years has elapsed since the last incident of judicial misconduct involving Judge Woldt. The last incident cited in Judge Breitenbach's case was in February of 1990; the formal judicial complaint was filed in August of 1990. Despite a private admonishing by the Judicial Commission in 1985, Judge Gorenstein's misconduct continued at least until February of 1987; he retired from the bench on July 31, 1987. The evidence in the *Breitenbach* and *Gorenstein* cases demonstrated that their misconduct would likely continue as long as they served as judges. Judge Woldt's record of over four

years proving he is not a threat to commit future acts of misconduct is a significant difference which the Judicial Commission essentially ignores.

D. Both Judges Gorenstein and Breitenbach left the bench prior to the Supreme Court's decisions on their misconduct.

There is a significant difference between suspending a judge during the prime of his or her career and suspending a judge from serving as a reserve judge after they retire. For the past four years, Judge Woldt has continued to contribute to the state judicial system, his community, and served with honor on the bench. Judge Gorenstein retired on July 31, 1987; his case was decided in 1989. 147 Wis.2d at 864. Similarly, Judge Breitenbach retired in 1991 and his case was decided in 1992. 167 Wis.2d 102.

V. The Mitigating Facts in Judge Woldt's Case Weigh Heavily in Favor of a Public Reprimand, Not Suspension.

Many of the mitigating factors in Judge Woldt's case have been explained throughout this brief including:

- His complete cooperation with the Commission's investigation (Stip., ¶9)
- Other than this case, he has not been the subject of any other public or private discipline in his sixteen years as a judge and his seven years as an attorney in private practice (Id., ¶10)
- His admission that the incidents involved constitute violations of the Code of Judicial Conduct (Id., ¶3)
- That none of the misconduct was an attempt to gain some personal advantage for him or his family (Id., ¶14)
- That there is no indication that any of the cases involved was decided incorrectly (Id.)
- His sixteen-year career, handling over 27,000 cases to completion, while five of six of these incidents occurred over one eleven-month period of distressing family difficulties. (Id., ¶11)
- His deep regret and commitment to make the changes necessary to present this Panel with a four-year record of compliance with the Code (Id., ¶16 & Complaint)

Additional mitigating facts consistent with a sanction of public reprimand include:

A. Judge Woldt's exceptional record of service to the state and local justice systems is a significant mitigating factor similar to prior reprimand cases.

Judge Woldt has long volunteered and assumed leadership positions to improve the delivery of justice in his community and the State Judicial System. (Stip., ¶13) Many of his local justice system initiatives were directly aimed at assisting victims and reducing recidivism of crime. For over sixteen years he served on various judicial committees whose purpose is to provide a more responsive, efficient and effective judicial system for the citizens of Wisconsin. Nothing in *Gorenstein*, *Brietenbach*, or the other twelve suspension cases reflects similar positive contributions by any of those judges.

The Supreme Court has made clear that a judge's exceptional contributions to the judicial system and community do weigh heavily in determining an appropriate sanction. This is most evident in two, relatively recent, public reprimand cases. In *Ziegler*, the court noted that: "According to the record, Judge Ziegler was a fine circuit court judge and an active member of the judiciary contributing to the administration of the judicial system." 2008 WI 47, ¶46. The court then listed Judge Ziegler's contributions in detail. *Id.*, ¶¶47, 48.

Judge Crivello was found guilty of a domestic violence crime and violation of the Code of Judicial Conduct "for battering his wife and causing her bodily harm." *Crivello*, 211 Wis.2d at 437. The court explained the prominent role Judge Crivello's contributions had in determining that a sanction of a public reprimand was appropriate, despite the illegal, aggravated nature of his misconduct:

It is our independent determination on our review of the record that Judge Crivello be reprimanded for his misconduct established in this proceeding. We recognize that Judge Crivello has well and ably served the judicial system and its administration, including, as the record shows, many years of service to the court's Office of Judicial Education and the Wisconsin Judicial College, on the faculty of the National Judicial College, and on numerous Supreme Court and judicial administrative district committees. Under all of the circumstances presented, a reprimand is the appropriate disciplinary response. *Id.* at 438.

Every case must be judged on its unique facts and circumstances. Judge Woldt's conduct could be viewed as more aggravated than Judge Ziegler's conduct. It is, however, considerably less aggravated than the commission of a criminal act of domestic battery and the associated impact such an offense has on the public's confidence in its judges. Among the many other mitigating factors in Judge Woldt's case, his service to the state and local justice systems should weigh heavily in favor of a public reprimand, as it did in *Ziegler* and *Crivello*.

B. Judge Woldt's below average substitution rate is evidence of the confidence the legal community has in his ability to be a fair and even-handed Judge

Wisconsin has a liberal judicial substitution law. With the exception of the State, any party may substitute against an assigned judge, once, without stating a reason. Wis. Stat. §801.58 and §971.20. While many factors go into a judge's record of substitutions, they provide insight into the judge's reputation for being a fair judge. A judge who listens to both sides, treats people respectfully, and demonstrates a commitment to fair decisions is likely to have a below average number of substitutions. Based on CCAP records, Judge Woldt's substitution rate between 2014 and 2018 was below average. (Stip., ¶12) Five of the six incidents of misconduct occurred during this period.⁴ 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. (Stip. ¶ 11, fn. 6).

C. Public reprimand is a "serious and significant" sanction and appropriate under all the facts of this case.

The Supreme Court has recognized that "...a sanction of a public reprimand is both serious and significant." *Ziegler*, 2008 WI, ¶113. The earliest reported public

⁴ 2018 was the last full-year statistics available to the parties when the stipulation was entered on June 10, 2020

reprimand sanction was issued in 1975. *In re Kading*, 70 Wis.2d 508, 235 N.W. 2d 409 (1975), 238 N.W. 2d 63 (1976), 239 N.W. 2d 297 (1976), 74 Wis.2d 405, 246 N.W. 2d 903 (1976). Only twelve Circuit Court Judges have been sanctioned with a public reprimand in the intervening 45 years. (Brief, Pg. 15 fn 9) There have been only four judges publicly reprimanded in the last 21 years. (Id.) While these low numbers are a tribute to the quality and dedication of the Wisconsin judiciary, they also reflect the serious nature of a public reprimand sanction.

It is a deeply distressing experience for any Circuit Court Judge to be publicly reprimanded by the Wisconsin Supreme Court. Because public reprimands of judges are so uncommon, the Supreme Court's decision to publicly sanction a judge attracts substantial media (and social media) attention. The fact that a judge has been publicly reprimanded becomes well-known by the public and reverberates through the legal community. It is perceived as a serious rebuke of the of the misconduct and the judge.

The mitigating facts of this case will allay any reasonable concern about whether a more severe sanction would have been appropriate. The public and legal community will appreciate that during Judge Woldt's sixteen years of service as a circuit judge he has been exceptional in his efforts to improve the state and local justice systems. It will be meaningful that he cooperated with the investigation, and that he admits and deeply regrets his misconduct. They will understand that Judge Woldt has demonstrated the will and ability to avoid any similar acts of misconduct for over four years and that none of the conduct impacted his decision in any case. Given the facts and circumstances involved in this case, the message a public reprimand would send to the judiciary and to the public, a public reprimand will be perceived as a serious, but sufficient level of discipline.

Given the more serious, morally culpable conduct of judges sanctioned with a suspension, a public reprimand is consistent with the discipline of past judicial misconduct cases.

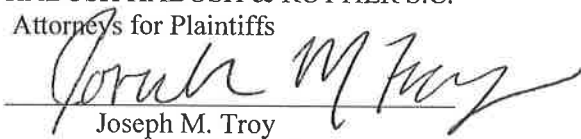
CONCLUSION

As *Ziegler* teaches, every case must be judged on its particular facts. 309 Wis.2d 253, ¶11. When all of the facts of this case are considered, in context, and compared to prior disciplinary cases, Judge Woldt contends that a public reprimand is sufficient to protect the public, send a strong message to other judges, and would be fair. Judge Woldt respectfully requests that this panel recommend a public reprimand as the appropriate discipline for his admitted past misconduct.

Dated at Appleton, Wisconsin this 31th day of August, 2020

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Postscript

Judge Woldt and I wish to acknowledge Wisconsin Judicial Commission Executive Director, Jeremiah Van Hecke, the Honorable Kendall M. Kelley, Chair of the Commission, and all members of the Commission for their cooperation related to navigating the process and willingness to consider points of agreement related to this case. Other than attorneys for the Commission, like Attorney Van Hecke, few lawyers have any experience in judicial discipline process and procedures. We have appreciated Mr. Van Hecke's willingness to work cooperatively on matters related to the process, though we clearly differ on some of the substance and appropriate sanction in this case.