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CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

BY THE COURT:

DATE SIGNED: June 15, 2022

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN DANE COUNTY CIRCUIT COURT
BRANCH 8

AMERICAN OVERSIGHT,

Petitioner,

vs. Case No. 21-CV-3007

ASSEMBLY OFFICE OF
SPECIAL COUNSEL, et al.

Respondents.

DECISION AND ORDER

INTRODUCTION

On January 25, 2022, the Court ordered the Assembly Office of Special Counsel ("OSC") to produce records American Oversight had requested under Wisconsin's public records law. OSC continues to intentionally violate that order. This decision is about why OSC is in contempt of court and why remedial sanctions are necessary to terminate OSC's contempt.

Contempt procedure has three steps: it begins when one party makes a prima facie showing of the violation of a court order. Wis. Stat. § 785.01; *Noack v. Noack,* 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989). The second step is for the other party to show their conduct was not

contemptuous. *Id.* In the final step, a court may impose sanctions "for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.02.

Application of that three-step procedure to this case is straightforward. In the first step, American Oversight made a prima facie case by showing OSC failed to produce records it was ordered to produce. The second step was supposed to have taken place at a June 10, 2022, evidentiary hearing, at which OSC had the opportunity to call witnesses, present evidence, and rebut the prima facie case. OSC adduced no evidence. The only witness to testify was its records custodian, Michael Gableman ("Gableman"), who invoked his Fifth Amendment right to not incriminate himself. The Court now proceeds to the third step: sanctions intended to terminate OSC's continuing contempt. OSC shall pay $2,000 each day, the maximum daily forfeiture under Wisconsin statute. OSC may purge its contempt by showing that it has complied with the Court's order to produce public records responsive to the Petitioner's requests.

Finally, although it has no bearing on those remedial sanctions, the Court addresses Gableman's unprofessional behavior at the June 10, 2022, hearing. In this State, attorneys swear to "maintain the respect due to courts of justice and judicial officers…" SCR 40:15. This oath is not formality or ceremony: "License to practice law in this state is granted on implied understanding that an attorney shall … refrain from such practices which bring disrepute on himself, the profession and the courts." *In re Disciplinary Proceedings Against Sommers,* 2014 WI 103, ¶26, 358 Wis. 2d 248, 851 N.W.2d 458 (quoting *State v. Eisenberg,* 48 Wis. 2d 364, 380-81, 180 N.W.2d 529 (1970)).

Wisconsin demands more from its attorneys. Gableman's demeaning conduct has discredited the profession and every other person sworn "to commit themselves to live by the constitutional processes of our system." *Cole v. Richardson,* 405 U.S. 676, 684 (1972). The Dane

County Clerk of Courts is directed to forward this decision, along with transcripts of the June 10, 2022 hearing, for appropriate disciplinary action by Wisconsin's Office of Lawyer Regulation.

I. BACKGROUND

The Court has set forth the background of this case in its previous orders. *See* Decision and Order (March 2, 2022), dkt. 165. Although American Oversight originally sought sanctions for contempt against all Respondents, including Robin Vos and the Wisconsin State Assembly ("the legislative respondents"), who have fully participated in these proceedings, the Court has found that American Oversight fails to make a prima facie case that either of those parties violated any order. The Court recounts only those matters presently at hand.

On January 25, 2022, the Court ordered the Assembly Office of Special Counsel ("OSC") to produce records American Oversight had requested the previous autumn. Decision and Order (Jan. 25, 2022) dkt. 110. In response to that order, OSC produced records for in camera review by the Court, which the Court then reviewed and released to American Oversight. Decision and Order (Mar. 2, 2022), dkt. 165.

On April 20, 2022, American Oversight filed two letters showing that OSC had not, in fact, obeyed the order to produce records. The first letter is from American Oversight's lawyer to OSC's lawyer. Westerberg Aff. Exh. A, dkt. 199. It alerts OSC to deficiencies in its submissions and asks OSC to remedy those deficiencies. *Id.* dkt. 199:4. The second letter is the response from OSC's lawyer. Westerberg Aff. Exh. B, dkt. 200. Therein, OSC admits that it "failed to include the attachments to emails," and "failed to include a few contracts and two calendars." *Id.* dkt. 200:3. OSC further says that it has "redacted personal information," although it supplies no "clear statutory exemption" which would allow it to lawfully make these redactions. *Id.; See* Decision

and Order (Mar. 2, 2022), dkt. 165.[1] Based on OSC's admitted failures, American Oversight moved to find OSC in contempt and to impose remedial sanctions. Dkt. 194, 196.[2]

On April 28, 2022, the Court issued a scheduling order setting time limits for discovery, briefing, and for oral arguments to be held June 10, 2022. Dkt. 208-209. OSC named Zakory Niemierowicz ("Niemierowicz") as its sole witness. Dkt. 224. After American Oversight deposed Niemierowicz (following a delay at the request of OSC's counsel), it realized that Niemierowicz had little substantive knowledge about OSC's compliance with the Court's order. American Oversight then subpoenaed Gableman.

On June 7, 2022, OSC moved to quash the subpoena. Dkt. 255. The next day, June 8, 2022, the Court denied OSC's motion in an oral ruling. *See* Tr. of June 8, 2022 Hr'g, dkt. 314.

On June 10, 2022, the parties appeared for oral arguments on the contempt motion. *See* Tr. of June 10, 2022 Hr'g, dkt. 322. The Court recounts the events of that hearing in detail below. In brief, the Court found OSC in contempt and stated it would issue this written decision.

II. STANDARD OF REVIEW

Wisconsin Stat. § 785.01 defines contempt of court as, among other things, the intentional: "[d]isobedience, resistance or obstruction of the authority, process or order of a court." Wis. Stat. §§ 785.01(b); *See Christensen v. Sullivan,* 2009 WI 87, ¶48, 320 Wis. 2d 76, 768 N.W.2d 798. A court may impose a remedial sanction for contempt of court, which "means a sanction imposed for the purpose of terminating a continuing contempt of court." Wis. Stat. § 785.02.[3]

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[1] American Oversight does not seek restoration of the redacted portions. The Court's observation is intended to show yet another point of evidence, consistent with the Court's conclusions below, that OSC continues to intentionally disobey the Court's order.

[2] In the same moving papers, American Oversight sought an order for relief from judgment under Wis. Stat. § 806.07.

[3] Courts may also impose a punitive sanction for contempt, although motions for punitive sanctions may "be brought

"Intentionally" means either "a purpose to … cause the result" or "aware[ness] that his or her conduct is practically certain to cause that result." *Matter of Findings of Contempt in State v. Shepard,* 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (Ct. App. 1994) (adopting the definition in Wis. Stat. § 939.23(3)).[4]

> The principal difference between negligent and intentional conduct is the difference in the probability, under the circumstance known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act. A person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct.

Id. (citations, quotations, and alterations omitted).

The first step in the award of remedial sanctions is for a complainant "to seek imposition of a remedial sanction for the contempt by filing a motion…" Wis. Stat. § 785.03(1)(a). A court must find a "prima facie showing by complainant of a violation of an order…" *Noack v. Noack,* 149 Wis. 2d 567, 575, 439 N.W.2d 600 (Ct. App. 1989) (citations omitted); *See Joint Sch. Dist. v. Wisconsin Rapids Educ. Ass'n.,* 70 Wis. 2d 292, 321, 234 N.W.2d 289 (1975). If the complainant makes this prima facie showing, then the "alleged contemnors bear the burden of showing that their conduct was not contemptuous." *Id.* Then, if the contemnor fails to show their conduct was not contemptuous, "[t]he court, after notice and hearing, may impose a remedial sanction authorized by [Wis. Stat. ch. 785.]" Wis. Stat. § 785.03(1)(a).

Five categories of sanctions are authorized:

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exclusively" by prosecutors. *Christensen v. Sullivan,* 2009 WI 87, ¶53, 320 Wis. 2d 76, 768 N.W.2d 798 (internal citations and quotations omitted); Wis. Stat. § 785.03(1)(b).

[4] Wis. Stat. § 939.23(3) reads, in full:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally".

> (a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.
>
> (b) Imprisonment if the contempt of court is of a type included in s. 785.01 (1) (b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.
>
> (c) A forfeiture not to exceed $2,000 for each day the contempt of court continues.
>
> (d) An order designed to ensure compliance with a prior order of the court.
>
> (e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

Wis. Stat. § 785.04(1). "[T]he stated and principal objective of a remedial sanction is to force the contemnor into compliance with a court order for the benefit of a private party—the litigant." *Christensen,* 2009 WI 87, ¶55.

III. DISCUSSION

A. American Oversight's Prima Facie Case.

On May 2, 2022, American Oversight moved the Court to find each of the Respondents in contempt. Dkt. 210-212. The Court's analysis begins with whether American Oversight has made a prima facie showing of contempt. *Noack,* 149 Wis. 2d at 575; *Joint Sch. Dist.,* 70 Wis. 2d at 321.

1. American Oversight fails to make a prima facie case against the legislative respondents.

As the Court stated in its oral ruling on Friday, June 10, 2022, American Oversight fails to make a prima facie case against the legislative respondents. The Court writes only to explain its reasoning.

American Oversight argues that the legislative respondents remain responsible for OSC's records under Wis. Stat. § 19.36(3), which ensures the government may not evade the public

records law by use of contractors. AO Br., dkt. 210:6-9. However, this rule requiring disclosure of records is limited to "any record produced or collected under a contract … with a person other than an authority…" Wis. Stat. § 19.36(3). The application of this rule is further limited by the Court's previous ruling, based on American Oversight's repeated concessions, that "only the assembly had any contractors…" Decision and Order (March 2, 2022) dkt. 165:34. Further, of the assembly's contractors, American Oversight "ha[s] agreed the OSC is an authority…" AO Br., dkt. 210:8.

Thus, the Court need only look to see if American Oversight supplies any evidence which would show the assembly has intentionally failed to produce records which were *not* "produced or collected under a contract" with the OSC. The Court finds no such evidence, and accordingly, American Oversight fails to make a prima facie case against the legislative respondents.

2. OSC conceded the prima facie case of a violation of the Court's order.

OSC has repeatedly conceded that American Oversight makes a prima facie case of contempt. In its letter to American Oversight, OSC described several failures to comply with the Court's order. Dkt. 200. OSC conceded the prima facie case again during the oral arguments on its motion to quash a subpoena served on Gableman. At that hearing, the OSC's counsel admitted that responsive records "were inadvertently [o]mitted from the production on January 31st. There's no dispute. The only question on those is was that omission intentional?" Tr. of June 8, 2022 Hr'g, dkt. 314:6. OSC's counsel continued:

> The only matters at issue right now at this hearing on Friday, [June 10th] and at this motion is whether or not, subsequent to January 25th, the Office of Special Counsel deliberately or intentionally ignored and violated the Court's order.

Tr. of June 8, 2022 Hr'g. dkt. 314:14. And again:

> THE COURT: Let me ask you this, Mr. Dean: Does the Office of Special Counsel concede that it did not comply with the Court's January order at the time the documents were first produced?
>
> ATTORNEY DEAN: Yes. ….

Id. dkt. 314:17. OSC's concession on this point was a deviation from the approach taken at an earlier court hearing, when it refused to concede the point. *See* Tr. of April 26, 2022 Hr'g, dkt. 223. Therefore, to make the record crystal clear, the court "acknowledged [OSC's] concession on this point; but only made today [June 8th]…" Tr. of June 8, 2022 Hr'g, dkt. 314:20.

Each of these statements was a concession of "a prima facie showing of a violation of the order…" *Joint Sch. Dist.,* 229 Wis. 2d at 321. And these statements were consistent with OSC's prior written submissions. OSC Resp. Br., dkt. 225:7 fn. 9 ("OSC does not address herein whether AO [made a prima facie case].") Accordingly, although OSC did not concede an *intentional* violation of a court order, Tr. of June 8, 2022, Hr'g, dkt. 314:21, its concession of a violation was sufficient to establish a prima facie case and advance to the second step of the contempt proceeding.

3. American Oversight submits abundant evidence from which to conclude OSC continues to intentionally violate this Court's order.

Even if OSC had not conceded the prima facie case, the Court would conclude that American Oversight has submitted sufficient evidence from which to conclude that it has made a prima facie case of contempt. The Wisconsin Supreme Court sets a low bar for a prima facie case of contempt. A movant need only show "the violation of an order":

> [I]n a civil contempt proceeding, <u>other than a prima facie showing of a violation of the order</u>, the burden of proof is on the person against whom contempt is charged to show his conduct was not contemptuous.

Joint Sch. Dist., 70 Wis. 2d at 321 (emphasis added); *See Noack,* 149 Wis. 2d at 575 (requiring "a

prima facie showing … of a violation of an order …").

Here, American Oversight showed that OSC violated the Court's order to produce responsive records. In the Westerberg Aff. Exhs. A-B, dkt. 198-200, American Oversight's counsel supplies letters from OSC in which it admits, among other things, that it "failed to include the attachments to e-mails" which would have been subject to the Court's January 25, 2022, order. OSC's intent is not material to the issue of whether this failure was a violation of the Court's order. *Joint Sch. Dist.,* 70 Wis. 2d at 321.

B. The Burden Shifts to the Respondents.

Next, the burden shifts to OSC to show its violation of the order was not contemptuous. *Joint Sch. Dist.,* 70 Wis. 2d at 321. OSC did not meet its burden. In fact, it provided no evidence at all. Tr. of June 10, 2022 Hr'g, dkt. 322:17 ("MR. DEAN: …. I am not presenting any evidence.") OSC is therefore in contempt. *Noack,* 149 Wis. 2d at 575 ("we see no reason why a trial court cannot hold in contempt a respondent who is in court but refuses to present evidence…")

C. Remedial Sanctions.

The third step in the contempt procedure is the imposition of sanctions. Remedial sanctions are a discretionary remedy intended to terminate a continuing contempt. *Christensen,* 2009 WI 87, ¶55. Below, the Court summarizes the abundant evidence demonstrating OSC's continual, intentional violations of the Court's order and then explains why sanctions are necessary to terminate this contempt.

1. There is abundant evidence of a pattern of OSC's continuing contempt.

The first piece of evidence of OSC's continuing contempt is the letters which demonstrate OSC refuses to produce records until confronted with proof of its failure, at which point it supplies the records along with a factually baseless excuse for the failure. Westerberg Aff. Exh. B, dkt. 200.

This evidence reveals a continuing pattern. In other words, OSC's failure to produce a group of certain identified records has never been the basis for contempt. Instead, each specific failure is evidence of a single pattern of continuing contempt.

OSC characterizes the evidence another way. It begins its briefing by saying it already "printed all responsive records … [then] produced all of those documents to the Court on January 31, 2022." OSC Resp. Br., dkt. 225:9. But this indefensible statement is not even supported by the remainder of OSC's brief, in which OSC immediately changes position to say that "a few records … were overlooked," or that some records "were mistakenly deleted." *Id.* at 10. OSC supplies no evidence that either of these statements might be true. Instead, it misses the forest for the trees by summarily interpreting the evidence of their continued failures as discrete, individual, and already-rectified failures. Thus, OSC asserts that its contempt ceased to continue after its production of ninety-seven pages of records. OSC Resp. Br., dkt. 225:11-13; *See* Tr. of June 10, 2022 Hr'g, dkt. 322:25 ("the motion that the [P]etitioners have filed here has three things in it that it says it wants to attack.") OSC's lawyers are not witnesses. The Court rejects their unsupported factual assertions and also rejects their characterization of the evidence.

On the preceding basis, the Court concluded that American Oversight demonstrated a prima facie case for contempt and scheduled an evidentiary hearing. Since then, significant additional evidence of OSC's pattern of continuing disobedience has emerged.

The second source of evidence of OSC's continuing contempt is Niemierowicz' deposition, in which a person OSC claims to be one of its records custodians (*See* dkt. 302:3) averred to hold a limited and perverse understanding of the public records law. That understanding was based entirely on instruction provided by Gableman. Niemierowicz Depo. p.26, dkt. 317. Niemierowicz' deposition provided several additional points of evidence from which to conclude that OSC

continues to fail to comply with the Court's January 25, 2022 order:

- Niemierowicz averred that OSC employed a "classified person" whose records cannot be, and have never been, released. *Id.* p.78.

- Niemierowicz averred to have been responsible for producing records but did "not know the specific origins of each of those documents [he was producing]…" *Id.* p. 130. Further, Niemierowicz averred to "not have the authority" to require records production and to have never questioned records given to him for production. *Id.* p. 191.

- Niemierowicz averred to a belief that a custodian may somehow evade the public records law by immediately destroying a record. *Id.* p. 142.

In sum, OSC appears to have attempted to comply with the Court's order through an agent with limited knowledge of the public records law and no knowledge of the subject records. These shortcomings are overshadowed by Niemierowicz' lack of any authority to ensure compliance with the Court's order by procuring records. This too, is evidence of a pattern of intentional disobedience by OSC, and Niemierowicz' good faith ignorance is not a barrier to the imposition of contempt. As courts have observed in a related context:

> [S]ympathy for an individual agent of a corporation, when the agent acts in good faith, but without knowledge of what is in the files the agent is charged to administer, would permit easy corporate avoidance of responsibility by simply hiring a new employee with no actual knowledge of the order. <u>We do not understand the legislature or prior court decisions to have created such a facile path by which a corporate entity can avoid its responsibility to comply with court orders.</u>

Carney v. CNH Health & Welfare Plan, 2007 WI App 205, ¶23, 305 Wis. 2d 443, 740 N.W.2d 625 (internal citations and footnotes omitted, emphasis added).

The third source of evidence of OSC's continuing contempt is a series of records OSC produced to American Oversight pursuant to an unrelated records request. These were admitted into evidence at the June 10, 2022 hearing as Exhibit 2. Dkt. 321. These records show that OSC had received citizen reports responsive to American Oversight's records requests, but were never

produced as part of this records case. *See e.g.* Exh. 2, dkt. 321:42 (citizen reports dated September 2021).

The final source of evidence that OSC's contempt is continuing is the adverse inference the Court must draw from Gableman's refusal to testify. At the June 10, 2022 hearing, instead of presenting evidence that OSC does not continue to intentionally disobey the Court's order, Gableman exercised his constitutional right to not answer questions on the ground the answers might incriminate himself. Tr. of June 10, 2022 Hr'g, dkt. 322:36 ("I invoke the right … to silence guaranteed to me under the United States Constitution…"); *See* U.S. Const. amend. V; Wis. Const., art. I § 8. Gableman's refusal must be interpreted as though, had he answered, his answers would have been against his interest.[5] *Grognet v. Fox Valley Trucking Serv.,* 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969); *See* WI JI-CIVIL 425.

In conclusion, American Oversight's original showing was sufficient to establish a prima facie case of contempt, which OSC has conceded. When viewed together with the evidence which has followed, OSC either deliberately withholds responsive records or it engages in any number of possible behaviors which guarantee, under these circumstances, the same result. *See Shepard,* 189 Wis. 2d at 286. Whatever the case, the Court must reach the inescapable conclusion that OSC intentionally continues to disobey the Court's order to produce responsive public records.

2. Remedial sanctions are necessary to terminate this contempt.

Having determined OSC's contempt is intentional and continuing, the Court turns to the sanctions set forth in Wis. Stat. § 785.04(1) to determine which, if any, will force compliance with

[5] Although of limited application to the issue of contempt, the Court draws the same inference from OSC's admission that it routinely destroys documents and evidence. Every person has an independent duty not to spoliate evidence, even before litigation begins. *Garfoot v. Fireman's Fund Ins. Co*., 228 Wis. 2d 707, 718, 599 N.W.2d 411 (Ct. App. 1999); *See* WIS JI-CIVIL 400.

its order. The Court concludes that a daily forfeiture under Wis. Stat. § 785.04(1)(c) will best force compliance in this case. That forfeiture must be substantial given OSC's status as a subunit of the Wisconsin State Assembly. Milbank Aff. Exh. C, dkt. 298:10-11. Accordingly, OSC is commanded to pay the statutory maximum forfeiture of $2,000 for each day the contempt of court continues. Purge conditions shall be to submit evidentiary proof of compliance with the Court's order, and are specified in detail below.

D. The remaining motions.

Finally, the Court rules on the remaining motions in this case, some of which were made jointly by OSC and the legislative respondents. As noted above, the legislative respondents may not be found in contempt and to the extent the Court must individually address their motions, each is moot. *PRN Associates LLC v. State of Wisconsin Dep't of Admin.,* 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559 (A moot decision has "no practical effect on the underlying controversy").

1. American Oversight's motion under Wis. Stat. § 806.07 is denied.

The first remaining motion is American Oversight's motion for relief from judgment[6] under Wis. Stat. § 806.07. "This statute is construed liberally because of its remedial nature…" *Connor v. Connor,* 2001 WI 49, ¶28, 243 Wis. 2d 279, 627 N.W.2d 182. To be entitled to relief, the moving party "bears the burden to prove that the requisite conditions existed." *Id.* American Oversight proves none of the requisite conditions set forth in Wis. Stat. § 806.07(1) existed, and, accordingly, its motion must be denied.

[6] American Oversight fails to show that it actually seeks relief from a judgment. "A judgment is the determination of the action." Wis. Stat. § 806.01(1)(a). Instead of seeking relief from any determination, this motion appears to simply seek a new "determination of the action" altogether. Thus, even if the Court were persuaded to vacate its judgment, for example, if presented with evidence changed factual circumstances, the Court would still decline to award the entirely new judgment American Oversight seeks.

2. OSC's oral motion based on competency is denied.

Next, the Court addresses OSC's oral motion challenging the Court's competent exercise of its subject matter jurisdiction. This motion originally relied on, as best the Court can tell, the proposition that the Court failed to follow the statutory procedure for remedial sanctions set forth in Wis. Stat. ch. 785. However, when asked to point to the specific statutory language setting forth such a procedure, counsel responded by citing the civil procedural requirement that a motion "shall state with particularity the grounds therefor..." Wis. Stat. § 802.01(2)(a);[7] *See* Tr. of June 10, 2022 Hr'g, dkt. 322:27.

As the Court explained above, OSC confuses the grounds for the motion (disobedience of a court order) with evidence supporting those grounds (among other things, evidence of OSC's omission of ninety-seven pages of responsive records). In other words, OSC sets up the contempt motion as a straw man that relies only on the very specific grounds OSC would like it to rely on, and then argues that consideration of any additional grounds would violate the statutory mandate of Wis. Stat. § 802.01(2)(a), depriving the Court of competency.[8]

The Court rejects OSC's interpretation of American Oversight's motion and rejects, to the extent OSC supplies any, its understanding of the principles of competency. The Court proceeds by setting forth those principles, then explains why American Oversight's motion gives this Court competency.

[7] Wis. Stat. § 802.01(2)(a) reads, in full:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Unless specifically authorized by statute, orders to show cause shall not be used.

[8] OSC did not explain why its own motion, supplied orally, tersely, and without citation to any legal authority, meets the same statutory mandate for "particularity" which they seek to enforce.

a. Legal standard for competency.

"A court's 'competency' … is defined as the power of a court to exercise its subject matter jurisdiction in a particular case." *City of Eau Claire v. Booth,* 2016 WI 65, ¶¶7, 20, 370 Wis. 2d 595, 882 N.W.2d 738 (citations and quotations omitted). Statutory noncompliance may deprive a court of competency "only when the failure to abide by a statutory mandate is central to the statutory scheme of which it is a part." *Id.* ¶21.

b. American Oversight's motion abides by the statutory mandate of Wis. Stat. § 802.01(2)(a).

Next, the Court turns to American Oversight's motion to see if it abides by the statutory mandate of Wis. Stat. § 802.01(2)(a) such that this Court may competently exercise its subject matter jurisdiction. Wis. Stat. § 802.01(2)(a) has three mandates. Assuming each is central to its statutory scheme, a concept which OSC's oral motion neglects altogether, each mandate is clearly satisfied by American Oversight's motion: it is in writing (dkt. 196), it asks the Court for the relief sought (dkt. 196:13 ("include contempt findings")), and it states with particularity the grounds for that relief by describing OSC's failures to comply with the Court's order (dkt. 196:2-6).

c. The Respondents forfeited their argument.

Further, although oral motions may be made "during a hearing or trial," (Wis. Stat. § 802.01(2)(a)) there was no reason for OSC to wait until the time of the hearing to challenge the competency of the court to exercise its subject matter jurisdiction. Like any other argument, challenges to competency may be forfeited when not timely raised. *City of Eau Claire,* 2016 WI 65, ¶11 (citing *Vill. of Trempealeau v. Mikrut,* 2004 WI 79, ¶¶30, 38, 273 Wis. 2d 76, 681 N.W.2d 190).

Here, OSC forfeited its competency argument by not raising it until after the

commencement of the show cause hearing. The particular statutory mandate which OSC claims to have been violated was not violated *during* the hearing. Instead, if one accepts OSC's argument as correct, then the Court lacked competency to even hold an evidentiary hearing—after all, the only grounds for American Oversight's motion were, OSC argues, missing documents provided one month earlier, on or before May 13, 2022. *See* Milbank Aff., dkt. 261.

3. OSC's oral motion for a continuance is denied.

The Court next addresses OSC's oral motion to continue the show cause hearing. As the Court discussed on the record at the June 10, 2022 hearing, OSC failed to show good cause for a continuance.[9] Having already denied this motion in an oral ruling, the Court writes only to further explain its reasoning.

On April 28, 2022, the Court issued a scheduling order setting deadlines for briefing, discovery, and reserving June 10, 2022 for oral arguments on the contempt motion. Dkt. 208. OSC chose not to subpoena any witnesses and named only one person, Niemierowicz, as a potential witness. OSC Witness List, dkt. 224. At around 6:00pm the evening prior to the hearing, Niemierowicz informed OSC he would not appear Tr. of June 10, 2022 Hr'g, dkt. 322:9. OSC did not inform opposing counsel or the Court of this development. American Oversight did not consent to a continuance. Granting the surprise motion to adjourn would prejudice American Oversight, whose counsel had traveled from Washington D.C., and was prepared to proceed.

a. The Court's suggestion that Niemierowicz may wish to seek counsel was not grounds for a continuance.

Further, OSC's argument that somehow this Court's comments at the June 8, 2022 hearing

[9] The motion also violates Dane County Local Rule 304, which provides, in relevant part, that "[n]on-stipulated requests for continuance must be on motion and hearing and for good cause shown by the party or with the party's written consent." Dane County Local Rule 304, available online at https://courts.countyofdane.com/Prepare/Rules, last visited June 10, 2022.

support a continuance has no legal or factual support. OSC's recitation of those comments belie the Court's actual statement: after denying the motion to quash the subpoena served on Gableman, it occurred to the Court that OSC's strategy might be to blame Niemierowicz for any failure to comply with this Court's order.

In some instances, a person facing civil contempt has the right to counsel. *Brotzman v. Brotzman*, 91 Wis.2d 335, 283 N.W.2d 600 (Ct. App. 1979). For example, Wisconsin's judicial conference publishes forms routinely used in family cases that apprise persons facing contempt that they may have the right to counsel. It is good practice to tell unrepresented people the potential consequences when called to defend themselves from contempt. On Wednesday June 8, 2022, in anticipation of the hearing the coming Friday, and in light of the statutory sanctions available under Wis. Stat. § 785.04, the Court simply wanted to inform OSC's apparent co-custodian of the possible consequences to him if the Court concluded that OSC intentionally violated the Court's order. At that point, Niemierowicz was still the only witness designated by the OSC to testify and no attorney had entered an appearance on his behalf.

A circuit judge's best practice is to apprise unrepresented witness of their possible constitutional rights, including the loss of liberty. To that end, the Court stated:

> I'm not suggesting there's a conflict of interest. … I do think a discussion may be warranted because Mr. Niemierowicz's personal interest might be to escape the scrutiny of the Court for deficiencies that appear now to be undisputed that he was acting at the direction of Mike Gableman. … I just think it would be appropriate to have a discussion over whether a potential conflict exists. … I am not suggestion that anyone has done anything wrong or that anyone has failed to do anything. It just appears to me that at this junction of the litigation, the interest may be divergent, which would cause this individual to look perhaps probably to his own personal interest or at least have a discussion with an attorney either provided to him by the Office, by you, Mr. Dean, or by his own choosing. … Now, like I said, I'm not accusing anyone of anything wrong. I do belive [sic] it's a discussion that

> should be had so we don't have a problem on Friday if it ere to come at that late date.

Tr. of June 8, 2022 Hr'g, dkt. 314:47-49. Nothing in these comments justified OSC's refusal to participate in the June 10 hearing, call any witnesses or present any evidence.

b. OSC failed to show any reason for not beginning the hearing.

Even if the Court's cautionary comments as to the statutory penalties for contempt came as a surprise, Gableman and Niemierowicz had two days to consult a lawyer. Gableman is himself a lawyer. Nothing the Court said on June 8 would have indicated that the Court would do anything other than listen to the evidence and then apply the statutes as written.

It was readily apparent to the Court then, as it is now, that the motion for a continuance was baldly a tactic to stall the proceedings. *See e.g.* Tr. of June 10, 2022 Hr'g, dkt. 322:5 (OSC claimed Gablemen needed "at least 90 days" to "locate someone to represent him…") Further, the Court offered to revisit the request for a continuance after Gableman's testimony, if in fact a continuance would have been necessary to secure other evidence. Tr. of June 10, 2022 Hr'g, dkt. 322:17. However, after Gableman pleaded the Fifth Amendment, OSC did not renew their request for a continuance.

IV. IN RE GABLEMAN'S PROFESSIONAL RESPONSIBILITY

In the preceding sections, the Court determined that OSC continues to intentionally violate the Court's order, and the Court also explained why remedial sanctions are necessary to terminate that contempt. The following section will address a different topic. Gableman is an attorney licensed to practice in this state. Under Wisconsin law, and consistent with the dignity of the profession of law and the attorney's sworn oath, an attorney is expected to comport himself honorably; with respect for the court and courtesy to fellow attorneys. These expectations have not

been met.

A. Gableman's Conduct at the June 10, 2022, Hearing.

When called as a witness pursuant to a lawful subpoena, the only question Gableman answered was to state his name. Tr. of June 10, 2022 Hr'g, dkt. 322:33. Rather than answer the next question, to confirm he is the president of Consultare, LLC, Gableman launched into an irrelevant diatribe about how and when he was served with process. *Id.* The Court sustained the objection to his statements as unresponsive. *Id.* Undaunted, Gableman turned to face the Court and accused me of "abandon[ing my] role as a neutral magistrate" and of "acting as an advocate." *Id.* He made these comments on "advice of counsel," despite earlier stating he had no counsel, and then he segued into a complaint about how "Meagan Wolfe, the executive director of the Wisconsin Election Commission, successfully resisted [his] subpoena in a Madison courtroom based on personal constitutional rights." *Id.* at 33-34.

The Court admonished Gableman, recognized his experience, and then informed him that he was not allowed to make speeches, but that he should as a witness simply answer the questions put to him. *Id.* at 34. Gableman persisted. Speaking over Petitioner's counsel, Gableman again accused me of acting "as an advocate for one party over the other." *Id.* at 35. Gableman next gestured to the bailiff and taunted the Court, saying: "I see you have a jail officer here. You want to put me in jail, Judge Remington? I'm not gonna be railroaded." *Id.*[10]

In what can only be characterized as sneering, Gableman attempted to recast the legal question of contempt as being "railroaded." *Id.* He continued by volunteering an undeveloped legal theory that "the only issue at play in this whole thing was 97 documents…" *Id.* Persisting in

[10] In the Dane County Circuit Court, like many other courts, a bailiff appears at in-person hearings. This hearing was no exception. The only plausible explanation for Gableman's outburst is that Gableman believed the theatrics of a special appearance by a "jail officer," whatever that is, would somehow engender sympathy to him.

misapprehension of the purposes of this hearing, he again accused the Court and the Petitioner of a "fishing expedition." *Id.* at 36. He then refused to answer any further questions. *Id.* at 36-37.

The transcript of these events does not tell the whole story. It does not show Gableman's raised voice, his accusatory tone and his twisted facial expression. It does not show that as he spoke, he pointed and shook his finger at the judge. If Gableman's behavior on the witness stand was not enough, during a short recess, he made clear what he thought of the judge and opposing counsel. Speaking into the microphone, he told an attorney for the legislative respondents, Ronald Stadler ("Stadler") that this "was [Remington's] time to shine … what passes for success for him." Tr. of Recess, dkt. 325:2. Gableman mockingly continued, saying the Court was not "interested in right or wrong." *Id.* Stadler responded, then tapped the microphone to confirm that the entire courtroom could hear their conversation. *Id.* Gableman's tantrum concluded with his sarcastic impersonation of the Court:

> That's what you are saying, right, Ms. Westerberg? Oh yes. Why don't you come right up to the bench, Ms. Westerberg? Why – why don't you come back into my chambers so you can dictate what –

Id. Making no effort to keep his conversation private, Gableman made sure opposing counsel heard his every word.

This recorded conversation has been widely reported in the press. Even after Stadler pointed out to Gableman that the microphones were still on and that they were being recorded, Gableman stated: "I know, I don't care. It's the truth." *Id.* at 2-3. Of course, Stadler's warning was not necessary—Gableman knew all along that his microphone was active because the Court had *already* warned him, at the beginning of the hearing, about the sensitive microphones:

> MS. WESTERBERG: [Speaking]

THE COURT: Hang on. Mr. Gableman, everyone can hear you talking.

MR. GABLEMAN: Oh. I didn't know that.

THE COURT: Yeah. The microphones are very sensitive.

Tr. of June 10, 2022 Hr'g, dkt. 322:13-4. The circus Gableman created in the courtroom destroyed any sense of decorum and irreparably damaged the public's perception of the judicial process.

B. Gableman's Conduct Violates Numerous Rules of Professional Responsibility.

Gableman's conduct was an affront to the judicial process and an insult to Atty. Westerberg, by their very suggestion that she is not capable of litigating without the help of the judge. The sophomoric innuendo about Atty. Westerberg coming back to chambers is a sad reminder that in 2022, woman lawyers still have to do more than be excellent at their job.

In addition to disrespect and disparagement, Gableman's conduct also disrupted a court proceeding. Wisconsin Supreme Court Rule 20:3.5, "Impartiality and decorum of the tribunal," prohibits a lawyer from engaging in conduct intended to disrupt the tribunal. SCR 20:3.5(d). The American Bar Association's comment to the rule explains:

> A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is not justification for similar dereliction by an advocate. An advocate can still present the cause. Protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

SCR 20:3.5 cmt. 3.

Gableman's conduct also violated his oath as an attorney. As a former Wisconsin Supreme Court Justice, Gableman would have undoubtedly given new lawyers their oath upon being admitted to the Wisconsin Bar. This oath is supposed to have meaning. It is intended to guide every lawyer in the practice of law. To these ends, it is also enforceable under SCR 20:8.4(g). The oath

provides:

> I, ___________________________ do solemnly swear (or affirm) that as a member of the Bar of this Court, I will support the constitution of the United States and the constitution of the state of Wisconsin; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land; I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval; I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God.

SCR 40.15.

Finally, in addition to being disruptive and disrespectful, Gableman further violated his duty of professional responsibility because he supplies no evidence to support his accusation that the Court has "abandoned its role as a neutral magistrate." Supreme Court Rules prohibit lawyers from making this kind of baseless accusation:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

SCR 20:8.2(a). Gableman's attack on the Court was a textbook example of what SCR 20:8.2 is intended to prohibit. Examples of discipline for similar misconduct are legion. *Sommers,* 2014 WI 103, ¶25 (disciplining an attorney for baselessly asserting that "judges are permitted to get away with falsifying the record."); *Disciplinary Proceedings Against Riordan*, 2012 WI 125, ¶20, 345 Wis. 2d 42, 824 N.W.2d 441 (disciplining an attorney for baseless "negative rhetoric" like: "The

Court acts for its own interest, its personal political view, and its own prejudices…" (alteration omitted));[11] *Disciplinary Proceedings Against Johann,* 216 Wis. 2d 118, ¶4, 574 N.W.2d 218 (1998) (disciplining an attorney for baselessly accusing "judges of having made 'hate-based' decisions against her."); *Disciplinary Proceedings Against Pangman,* 216 Wis. 2d 440, ¶5, 574 N.W.2d 232 (disciplining an attorney for baselessly accusing a circuit judge of manipulating the record.); *et al.*

C. Conclusion.

In the end, it was readily apparent that Gableman intended to use his appearance to distract from OSC's failure to follow the Court's order, and perhaps to direct attention away from his office's illegal records practices. The Court will ignore the personal insult.[12] However, the Court cannot ignore Gableman's disruptive conduct and misogynistic comments about a fellow lawyer. All lawyers are obligated to report this form of professional misconduct. SCR 20:8.3(a).

The Court concludes with the humblest of the many professional responsibilities placed upon lawyers. Outside each of the Dane County Circuit Courtrooms, a plaque sets forth a simple code of decorum and courtesy. It reads:

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[11] Michael Gableman participated in the court's decision in *Riordan*.

[12] About two weeks ago, our colleague the Honorable Judge John P. Roemer was assassinated by a person who he had sentenced. This heinous crime was unmistakably intended to affect the court system as a whole. Judges should not work under the threat of personal violence or our judicial system will suffer immeasurably. Lawyers who appear in court should help to protect the court system even if they have a problem with the judge.

Unfortunately, the Court has observed firsthand the effect of Gableman's unfounded accusation that I am biased and that I am an advocate for American Oversight. I have been made aware of threats, for example, that I had "better watch my back," or "I hope the judge has a gun." One online suggestion has been for a group to protest at my home as has been reported at the home of United States Supreme Court Justice Kavanagh.

That these threats originate with the statements of a retired judge is the saddest part of this whole experience.

> In order to enhance the administration of justice, this code establishes uniform standards of courtroom decorum applicable to judges, court commissioners, attorneys, court personnel and the public in Dane County Circuit Courts.
>
> - Judges, court commissioners, lawyers, clerks and staff shall at all times maintain a cordial and respectful demeanor and shall be guided by a fundamental sense of integrity and fair play in all their professional activities.
> - Judges, court commissioners, lawyers, clerks and staff shall at all times be civil in their dealings with one another. All court and court related proceedings, including discovery proceedings, whether written or oral, shall be conducted with civility and respect for each of the participants.
> - Judges, court commissioners, lawyers, clerks and staff shall abstain from making disparaging, demeaning or sarcastic remarks or comments about one another, and shall not engage in any conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive.
> - Judges, court commissioners, and lawyers shall be punctual in convening and appearing for all hearings, meetings and conferences and, if delayed, shall notify other participants, if possible.
>
> …
>
> - Lawyers practicing before the courts in Dane County shall at all times act in good faith and shall honor promises or commitments to other lawyers and to the court.
> - All participants in the judicial process, whether judges, court commissioners, lawyers, clerks or staff, shall conduct themselves in a manner which demonstrates sensitivity to the necessity of preserving decorum and the integrity of the judicial process.
> - Professionalism, as defined in this code and in accordance with other relevant standards of courtesy, good manners and dignity, is the responsibility of the individual judge, court commissioner, lawyer, clerk, staff member and all other personnel of the court who assist the public.

Gableman abided none of these platitudes. As an attorney, Gableman should not escape the consequences for violating his oath under SCR 40.15, for disruptive conduct under SCR 20:3.5, 20:8.2 and for violating the Dane County Code of Professional Responsibility.

Neither facts nor law supported Gableman's conduct on June 10, 2022. He chose to raise his voice, point his finger, accuse the judge of bias, proclaim he would not be "railroaded," and refuse to answer any questions. This strategy might work elsewhere, but it has no place in a courtroom. The American Bar Association reminds us all of the importance of the rule of law:

> The rule of law is a set of principles, or ideals, for ensuring an orderly and just society. Many countries throughout the world strive to uphold the rule of law where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all.

www.americanbar.org, last visited June 15, 2022.

ORDER

For the reasons stated, the Court enters the following orders.

(1) The Dane County Clerk of Courts shall forward this decision, along with transcripts of the Court's June 10, 2022 hearing, and the transcript of the recess during the June 10, 2022 hearing, to the Wisconsin Office of Lawyer Regulation.

(2) OSC, after hearing and notice, continues to intentionally violate a court order, and is therefore in contempt of court.

(3) OSC shall pay American Oversight's costs and fees incurred in bringing this contempt motion. Wis. Stat. § 785.04(1)(a); *Town of Seymour v. City of Eau Claire,* 112 Wis. 2d 313, 332 N.W.2d 821 (Ct. App. 1983).

(4) OSC shall pay a forfeiture of $2,000 per day, effective immediately, until it purges its contempt.

(5) Purge conditions shall be as follows:

   a. Michael Gableman shall submit evidentiary proof to a reasonable degree of certainty that he has complied with the Court's January 25, 2022, order to search for and produce records responsive to the Petitioner's requests. This proof shall specify each individual source searched and the steps taken to search that source.

   b. Michael Gableman shall submit evidentiary proof of reasonable efforts to search for deleted, lost, missing, or otherwise unavailable records, or provide an explanation of why such a search would not be reasonable.

   c. Michael Gableman shall submit evidence describing any responsive records he withholds and the reasons for withholding, but he shall not withhold any records unless because of a clear statutory exemption to disclosure.

   d. Evidentiary proof should take the form of a sworn affidavit describing the steps taken to comply with each of these purge conditions.

This is a final order for purposes of appeal. Wis. Stat. § 808.03(1).