IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

In the Matter of Judicial Disciplinary
Proceedings Against the
Honorable Michael J. Gableman

Wisconsin Judicial Commission,

Complainant,

v.

The Honorable Michael J. Gableman,

Respondent.

Case No. 2008AP2458-J

FILED
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CLERK OF SUPREME COURT
OF WISCONSIN

RESPONSIVE STATEMENT OF FACTS

Justice Michael J. Gableman ("Justice Gableman"), by and through his attorneys, James Bopp, Jr. and Anita Y. Woudenberg, Bopp, Coleson & Bostrom, and Eric M. McLeod, Michael Best & Friedrich LLP, for his Responsive Statement of Facts states and alleges as follows:

STATEMENT OF FACTS

1. On or about March 14, 2008, Justice Gableman ran the advertisement ("the Ad") at issue.

2. The Ad was designed to respond to other ads suggesting he had purchased his job, that he was a substandard judge, and that he coddled child molesters by contrasting his experience and judicial philosophy as a prosecutor with his opponent Louis Butler's as a criminal defense attorney.

3. No statement contained in the Ad is false.

4. Each statement in the Ad is factually true.

5. That "Louis Butler worked to put criminals on the street" is true. Louis Butler served as a criminal defense attorney, assisting those accused, guilty or innocent, in lessening or dropping the charges against them.

6. That "Reuben Lee Mitchell [] raped an 11-year-old girl with learning disabilities" is true. Mitchell was convicted of this crime in 1985.

7. That "Butler found a loophole" in Reuben Lee Mitchell's case is true. Butler convinced the appellate courts that evidence about the virginity of an 11-year-old rape victim was improperly admitted into evidence at trial because Wisconsin has a rape shield law limiting disclosure of prior sexual behavior of rape victims. Such evidence had been used in the Mitchell cases to help demonstrate that Mr. Mitchell was the victim's rapist because the victim had contracted gonorrhea, a venereal disease for which Mr. Mitchell tested positive. Thus, a law designed to protect rape victims was used to help a child rapist and harm a rape victim.

8. That "Mitchell went on to molest another child" is true. Upon release from prison in 1992, Mitchell committed and was convicted of raping a 14-year-old girl.

9. The Ad did not state that Mitchell committed a second crime because of Louis Butler's conduct as his criminal defense attorney. Instead, the Ad contrasts Justice Gableman's history as a prosecutor and judge with Louis Butler's willingness to represent and find legal loopholes for criminals like Reuben Lee Mitchell.

10. Justice Gableman did not knowingly misrepresent the identity, qualifications, present position, or other fact concerning his opponent, Justice Butler.

11. Justice Gableman did not, with reckless disregard for the Ad's truth or falsity, misrepresent the identity, qualifications, present position, or other fact concerning his opponent, Justice Butler.

12. Justice Gableman viewed the Ad and reviewed the Ad's script prior approving it for publication.

13. Justice Gableman made every reasonable effort to ensure that the Ad was accurate by:

a. Obtaining assurances from campaign staff who had drafted the text of the Ad that an appropriate investigation into accuracy of the facts set forth in the Ad had been conducted.

b. Being familiar with the Mitchell cases in general, with their facts and holdings, and the arguments advanced by Butler, who represented Mitchell.

14. That the tone of the Ad was more negative than Justice Gableman liked does not make the Ad false or misrepresentative of Louis Butler.

15. Justice Gableman delayed the Ad for several days to solicit friends to view the Ad to address his concerns about the tone of the Ad.

RESPONSES TO COMMISSION'S STATEMENT

1. The Wisconsin Judicial Commission ("Commission") is organized under Wis. Stat. §§ 757.81 to 757.99 (2005-06) and is charged with the responsibility of investigating allegations of misconduct by members of the Wisconsin judiciary. Upon a finding of probable cause that a judge has engaged in misconduct, the Commission is required to file a complaint with the Supreme Court.

Response: Justice Gableman does not dispute the Commission's statement concerning its statutory role and authority under Wis. Stat. §§ 757.81 to 757.99. However,

Justice Gableman disputes the existence of any factual or legal basis supporting a finding of probable cause that he has engaged in misconduct

2. At all times material to this proceeding, the Honorable Michael J. Gableman ("Judge Gableman") was a judge of the Burnett County Circuit Court and thus a judge within the meaning of Wis. Stat. § 757.81(3).

Response: Justice Gableman admits this statement.

3. At all times material to this proceeding, Judge Gableman was a candidate for the office of Wisconsin Supreme court Justice and thus a "candidate" for judicial office pursuant to SCR 60.01(2), Wisconsin Code of Judicial Conduct.

Response: Justice Gableman admits this statement.

4. On April 30, 2008 the Commission notified Judge Gableman that it was investigating allegations of his possible misconduct.

Response Justice Gableman admits this statement.

5. On July 15, 2008 the Commission notified Judge Gableman of the substance of the allegations contained in the Complaint in this proceeding.

Response: Justice Gableman admits that he received a "Notice of Formal Proceeding and Request to Respond" on or about July 15, 2008

6. Judge Gableman responded to the allegations referenced in paragraph 5 with a written submission on August 14, 2008 and by appearing in person, with counsel, before the Commission on August 21, 2008.

Response: Justice Gableman admits this statement.

7. After considering Judge Gableman's written submission and his and his counsel's statements to the Commission, the Commission found probable cause to believe that Judge Gableman willfully had violated SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct.

Response: Justice Gableman disputes the existence of any factual or legal basis supporting a finding of probable cause that he willfully violated SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct

8. In relevant part, SCR 60.06(3)(c) states that a candidate for judicial office shall not knowingly, or with reckless disregard for the statement's truth or falsity, misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

Response: Justice Gableman affirmatively alleges that SCR 60.06(3)(c) states in its entirety as follows:

> *Misrepresentations.* A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent. A candidate for judicial office should not knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system.

9. The underlying facts giving rise to the Commission's Complaint are these:

A. In his campaign for Justice of the Wisconsin Supreme Court, Judge Gableman was opposed by then incumbent Justice Louis Butler.

B. Prior to March 14, 2008, Judge Gableman's advisors told him that a third-party political group had come out with a very devastating ad and that his campaign needed to get an ad up and running within a few days to compare and contrast the backgrounds of the two candidates.

C. The ad then produced was in response to a series of ads promoting the election of Justice Butler by third-party political groups, which Judge Gableman and his campaign considered to have been blistering, negative, and false about Judge Gableman.

D. Although urged by his campaign to release the responsive ad as soon as possible, Judge Gableman insisted first upon reviewing the entire video presentation because he wanted to make sure he understood what was going on, not just what the words in the ad were.

E. After receiving the text of the ad, and the video of ad, Judge Gableman was not pleased with the "tone" of the ad.

F. Accordingly, Judge Gableman delayed the release of the ad for a week while trying to work out possible other endings to the ad. Ultimately, however, he did not make any changes.

G. On or about March 14, 2008 Judge Gableman approved and released the ad (hereinafter "Advertisement"), which was then broadcast publicly supporting his candidacy for Justice of the Wisconsin Supreme Court.

H. The audio text of the Advertisement was as follows:

> "Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true!
>
> Judge, District Attorney, Michael Gableman has committed his life to locking up criminals to keep families safe. Putting child molesters behind bars for over 100 years.
>
> Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.
>
> Can Wisconsin families feel safe with Louis Butler on the Supreme Court?"

I. The compact disc attached as Exhibit A to the Complaint in this proceeding contains an accurate copy of the audio and video components of the Advertisement in its entirety.

J. The purpose of the Advertisement was to compare and contrast the background, qualifications, and experience of Judge Gableman with the background, qualifications, and experience of Justice Butler.

K. Louis Butler was an Assistant Public Defender for the State of Wisconsin from 1979 until 1992. In that capacity, Louis Butler represented Reuben Lee Mitchell ("Mitchell") from 1985 to 1988 in Mitchell's appeal of his conviction in circuit court (the "Mitchell case").

L. The Mitchell case is the matter handled by Louis Butler to which the Advertisement referred.

M. In reviewing Mitchell's appeal of his conviction in the Mitchell case, both the Court of Appeals and the Supreme Court of Wisconsin agreed with Mitchell's contention that the circuit court had committed error in admitting certain evidence.

N. The evidentiary error as found by both the Court of Appeals and the Supreme Court of Wisconsin is the "loophole" to which the Advertisement referred.

O. Although it found that error had occurred in the trial court in the Mitchell case, the Supreme Court further concluded that the error was not sufficiently prejudicial to have denied Mitchell's right to a fair trial and therefore upheld his conviction. *State v. Reuben Lee Mitchell*, 139 Wis. 2d 856, 407 N.W.2d 566 (Ct. App. 1987), reversed, 144 Wis. 2d 596, 424 N.W.2d 698 (1988).

P. The judgment of the circuit court having been upheld in the Mitchell case, Mitchell remained in prison sentenced by the circuit court.

Q. Mitchell remained in prison under the sentence imposed in the Mitchell case until 1992 when he was released on parole.

R. In 1995 Mitchell was convicted of second-degree sexual assault of a child.

S. The child whom Mitchell raped in 1995 was the "other child" to which the Advertisement referred.

T. Prior to his approval and publication of the Advertisement, Judge Gableman became familiar with (1) the decisions of both the Wisconsin Court of Appeals and the Supreme Court of Wisconsin in the Mitchell case, as described and cited in sub-paragraphs 9.M through 9.P; (2) the participation of Louis Butler in those two appeals as described in sub-paragraphs 9.K and 9.L; and (3) the subsequent conduct and conviction of Mitchell described in sub-paragraphs 9.R and 9.S.

Response: Justice Gableman does not dispute Paragraphs 9(A), 9(G), 9(H), 9(I), 9(J), 9(K), 9(L), 9(M), 9(N), 9(O), 9(R), 9(S) and 9(T). Justice Gableman disputes the characterization and relevance of Paragraphs 9(B)-9(F) to the extent they conflict with his proposed statement of facts, above. Justice Gableman lacks knowledge or information sufficient to form a belief as to the truth of Paragraphs 9(P) and 9(Q). Justice Gableman further disputes Paragraphs 9(D), (E), and (F) because they are misleading. Those Paragraphs are misleading because they do not set forth the fact that during the time leading up to the publication of the Ad,

Justice Gableman sought to and did verify the accuracy of the Ad *See supra* paragraph 13(a)-(b).

10. The facts supporting the Commission's contention that Judge Gableman wilfully violated SCR 60.06(3)(c) are these:

A. The Advertisement falsely implied and was crafted so as to falsely convey the fact that the work of Louis Butler enabled or resulted in Mitchell's release from prison and Mitchell's subsequent commission of a criminal molestation.

B. Louis Butler did not cause, facilitate, or enable Mitchell's release from prison.

C. Louis Butler had no responsibility for or connection with Mitchell's subsequent commission of a crime.

D. At the time Judge Gableman approved and caused the publication of the Advertisement, he had no reason to believe that Louis Butler had any responsibility for or involvement in Mitchell's release from prison or that any action by or work of Louis Butler had anything to do with Mitchell's commission of the subsequent criminal molestation to which the Advertisement referred.

E. At the time Judge Gableman approved and caused publication of the Advertisement he did not know, and does not know, of anything Louis Butler did in the aftermath of the Supreme Court's decision in the Mitchell case that resulted in Mitchell's release from prison or his subsequent criminal conduct.

F. The misrepresentation of fact identified in sub-paragraph 10.A was made by Judge Gableman knowingly or with reckless disregard for the truth. The publication of the Advertisement therefore constituted a willful violation by Judge Gableman of SCR 60.06(3)(c), Wisconsin Code of Judicial Conduct.

Response: Justice Gableman disputes sub-paragraph 10(A) that the Ad falsely implied and was crafted to falsely convey that Louis Butler enabled Mitchell's release from prison and his subsequent commission of a criminal molestation. Justice Gableman also disputes sub-paragraph 10(F) The Ad contains no false statement of fact made knowingly or with reckless disregard for the truth, so as to constitute a willful violation of SCR 60.06(3)(c). Justice

Gableman lacks knowledge or information sufficient to form a belief as to the truth of sub-paragraphs 10(B) or 10(C).

11. By publishing the Advertisement in willful violation of SCR 60.06(3)(c), Judge Gableman engaged in judicial misconduct pursuant to Wis. Stat. § 757.81(4)(a).

Response: Justice Gableman disputes Paragraph 11 as the Ad does not constitute a willful violation of SCR 60.06(3)(c) and Justice Gableman did not engage in judicial misconduct pursuant to Wis. Stat. § 757.81(4)(a).

Dated this 31st day of March, 2009.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Respondent

By: _____
Eric M. McLeod
State Bar No. 1021730

MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
Post Office Box 1806
Madison, WI 53701-1806
Telephone: 608.257.3501
Facsimile: 608.283.2275
Local Counsel for Justice Gableman

James Bopp, Jr., Ind. #2838-84
Anita Y. Woudenberg, Ind. #25162-64
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: 812.232.2434
Facsimile: 812.235.3685
Lead Counsel for Justice Gableman

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