

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2007AP2711-CR
(Walworth County Case No. 2005CF80)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant-Petitioner.

**ATTACHMENTS TO
MOTION FOR RECUSAL OF JUSTICE
MICHAEL GABLEMAN ON CONSTITUTIONAL
GROUNDS**

DOCUMENTARY ATTACHMENTS:

Attachment No.	Description
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- | | |
|---|--|
| 1 | December 20, 2007 WJCIC letter to Judge Michael Gableman, available at http://www.wifaircourts.com/story3.html |
| 2 | Summary and text of first Gableman campaign television ad |
| 3 | Summary and text of second Gableman campaign television ad |
| 4 | Bauer, Scott, <i>Dodge DA Won't Back Gableman</i> , The Capital Times, Metro, C1 (3/21/08), available at http://www.madison.com/archives/read.php?ref=/tct/2008/03/21/0803210293.php |
| 5 | Transcript of WMC's first radio ad - "Fifty-one" |

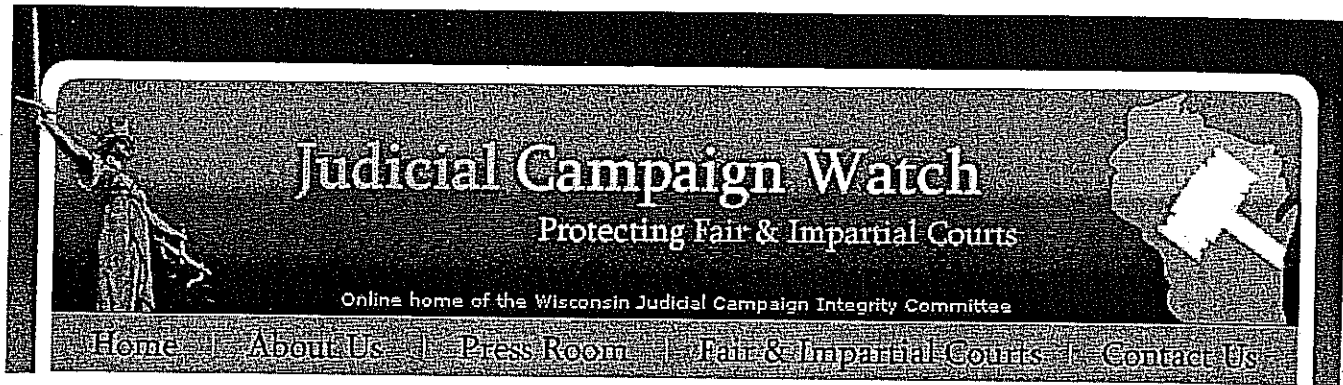
6	Summary and text of WMC's first television ad: "Ally"
7	WMC Press Release (3/3/08), available at http://www.wmc.org/display.cfm?ID=1774
8	Transcript of WMC's second radio ad: "Looking for Justice"
9	WMC Press Release (3/17/08), available at http://www.wmc.org/display.cfm?ID=1781
10	Summary and text of WMC's second television ad
11	Summary and text of WMC's third television ad
12	WMC's first postcard advertisement
13	WMC's second postcard advertisement
14	Summary of CFAF's first television ad
15	Summaries of CFAF's second television ad and second television ad (revised)
16	Summary of CFGW's television ad
17	Official Transcript of hearing in Wisconsin Judicial Commission v. The Honorable Michael J. Gableman, Case No. 2008AP2458-J (9/16/09)
18	Unofficial Transcript of Press Conference (9/16/09)

ELECTRONIC ATTACHMENTS:

Attachment No.	Description
E-1	Judge Gableman for Supreme Court Website (PDF)
E-2	Hall, Dee J., <i>Gableman Won't Retract Letters</i> , Wisconsin State Journal :: LOCAL :: D1 (2/26/08), available at http://www.madison.com/archives/read.php?ref=wsj/2008/02/26/0802250316.php

- E-3 FactCheck.org *Judgment Day in Wisconsin* (3/7/08), available at http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html
- E-4 Forster, Stacy, *Butler TV spot responds to allegations*, Journal Sentinel (Posted: Mar. 19, 2008), available at <http://www.jsonline.com/news/wisconsin/29505149.html>
- E-5 Bauer, Scott, *Butler denies claim he sides with criminals 60 percent of time*, The Associated Press, published 3/12/2008 and available at <http://www.lacrossetribune.com/articles/2008/03/12/wi/09wi0312.txt>
- E-6 N/A
- E-7 First Gableman Campaign television ad
- E-8 Second Gableman Campaign television ad
- E-9 FactCheck.org, *Wisconsin Judgment Day, the Sequel* (3/21/08) http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html
- E-10 N/A
- E-11 Walters, Steven, *Gableman ad criticized by 34 current, former judges* (3/28/08), available at the Journal Sentinel Online, <http://www.jsonline.com/blogs/news/31985874.html>
- E-12 Complaint in *In the Matter of Judicial Disciplinary Proceedings Against the Honorable Michael J. Gableman*, Appeal No. 2008AP2458-J
- E-13 Responsive Statement of Facts in *In the Matter of Judicial Disciplinary Proceedings Against the Honorable Michael J. Gableman*, Appeal No. 2008AP2458-J
- E-14 WMC's first radio ad - "Fifty-one"
- E-15 WMC's first television ad: "Ally"
- E-16 WMC's second radio ad - "Looking for Justice"

E-17	WMC's second television ad
E-18	FactCheck.org, <i>Winning Ugly in Wisconsin</i> (http://www.factcheck.org/elections-2008/winning_ugly_in_wisconsin.html)
E-19	WMC's third television ad
E-20	WMC's first postcard advertisement
E-21	WMC's second postcard advertisement
E-22	CFAF's first television ad
E-23	CFAF's second television ad
E-24	CFAF's second television ad (revised)
E-25	CFGW's television ad



Helpful Links
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12/20/07

Letter to Honorable Michael J. Gableman

December 20, 2007

Honorable Michael J. Gableman
 PO Box 71
 Webster, WI 54893-0071

Dear Judge Gableman:

I am dismayed by the response issued by your campaign to the Wisconsin Judicial Campaign Integrity Committee's (WJCIC) December 18th statement. First, it mischaracterizes the committee's position by claiming the committee "said Louis Butler's record as a Supreme Court Justice was fair discussion in the race for the state's highest court." While prior court rulings are clearly within bounds for discussion, the committee did not say anything about Louis Butler's record and certainly did not determine that the characterizations of that record in the campaign materials produced by your campaign and reviewed by the committee were fair.

Moreover, Darrin Schmitz exacerbated the problem when he asserted flatly that Supreme Court Justice Louis Butler "consistently sides with criminals over law enforcement."

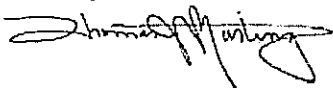
This is precisely the kind of campaign rhetoric that I and other members of WJCIC hoped we would not hear or read. As you know, in our system of government judges do not "side" with or against any of the parties to legal proceedings who may appear in their courtrooms. The role of the judge is to rule impartially based on the facts of each individual case and applicable law, which is clearly jeopardized if he or she "sides" with or against one or another identifiable group.

This characterization of a Supreme Court Justice by the campaign of a candidate for Wisconsin's Supreme Court will almost certainly create (or, at least, add to) the public perception that judges in Wisconsin do, in fact, take sides. The point is that no candidate for any judicial office, let alone the Supreme Court, should create an expectation that judicial candidates can or should be evaluated by voters based on whose "side" they are on.

We recognize that rhetoric of this kind is common in legislative and executive branch elections, but they have no place in a campaign for judicial office. Accordingly, on

behalf of WJCIC; I respectfully request that you repudiate this rhetoric and join us in promoting public confidence in a fair and impartial judiciary.

Sincerely,



Thomas J. Basting, Sr.
Chair
Wisconsin Judicial Campaign Integrity Committee

A Project of the State Bar of Wisconsin

[Terms and Conditions](#)

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Gableman Campaign – 1st Ad

(Onscreen: three clips from pro-Louis Butler ads playing on a black background)
(Ominous music plays)

Male Voice: In the race for Supreme Court,

(Onscreen: the text “ENOUGH PERSONAL ATTACKS” in red font appears superimposed over previous image)

Male Voice: let’s cut through slimy attacks, and set the record straight.

(Onscreen: various full-color clips of Michael Gableman in judicial robes in a courthouse, with the text “Judge Michael Gableman” in white font in the lower right of the screen, and the text “Former Prosecutor” in red font beneath that)

Male Voice: As a district attorney and judge, Michael Gableman has spent his life fighting crime and holding offenders accountable. It’s why the people who fight crime every day are supporting him.

(Onscreen: a sheriff’s star on a black background with the text “Judge Michael Gableman Endorsed by 52 Sheriffs” in white font and “Louis Butler 5 Sheriffs” in red font superimposed over it)

Male Voice: Gableman’s endorsed by 52 sheriffs,

(Onscreen: police car lights on a black background, with the text “Judge Michael Gableman Endorsed by 53 Police Chiefs” in white font and “Louis Butler 0 Police Chiefs” in red font superimposed over it)

Male Voice: 53 police chiefs,

(Onscreen: a clip of two men in suits ascending a staircase, with the text “Judge Michael Gableman Endorsed by a Majority of District Attorneys” in white font superimposed over it)

Male Voice: and a majority of district attorneys.

(Onscreen: a grayscale photo of Louis Butler side by side with clip of men in orange prison jumpsuits walking down hallways and exiting an open prison cell, with the text “Louis Butler” in white font underneath, and “Defended Criminals” in red font under that)

Male Voice: Louis Butler was a longtime criminal defense lawyer, working to set criminals free.

(Onscreen: a full color clip of Michael Gableman in judicial robes speaking from the bench, beside the text “Judge Michael Gableman” in white font, with the caption “Law Enforcement’s



Choice” in red font and the text “AUTHORIZED AND PAID FOR BY GABLEMAN FOR SUPREME COURT, JAMES ZEILER, TREASURER” in white font below that)

Male Voice: Judge Michael Gableman, law enforcement’s choice for Supreme Court.

Gableman Campaign – 2nd Ad

(Onscreen: the word “Unbelievable” in yellow font on a black background)

Female Voice: Unbelievable.

(Onscreen: a grayscale image of Louis Butler’s face and the text “Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman” on a black background)

Female Voice: Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman.

(Onscreen: the words “It’s Not True!” in yellow font on a black background)

Female Voice: It’s not true.

(Onscreen: quick-cutting full color clips of Michael Gableman in judicial robes in a courthouse, captioned with the text “Judge Michael Gableman” in white font on the right of the screen and “Endorsed by a majority of Sheriffs & District Attorneys” in red font at the center bottom of the screen)

(Uplifting music cuts in)

Female Voice: Judge District Attorney Michael Gableman has committed his life to locking up criminals to keep families safe,

(Onscreen: quick-cutting still image mugshots on a black background, accompanied by the text “Judge Michael Gableman putting child molesters behind bars for over 100 years”)

Female Voice: putting child molesters behind bars for over a hundred years.

(Onscreen: grayscale clip of Louis Butler’s face on a black background, with the text “Louis Butler” in white font and “Defended Criminals” in red font)

(Music becomes ominous)

Female Voice: Louis Butler worked to put criminals on the street,

(Onscreen: text disappears from previous image and is replaced by a grayscale mugshot of an African-American man wearing glasses, which appears side-by-side with the image of Louis Butler and is captioned with the text “State of Wisconsin CASE #1984CF000250” in white font)

Female Voice: like Reuben Lee Mitchell, who raped an eleven-year-old girl with learning disabilities.

(Onscreen: the mugshot and the image of Butler expand to fill the screen, the caption remains)



Female Voice: Butler found a loophole. Mitchell went on to molest another child.

(Onscreen: another grayscale image of Louis Butler with the text "Can Wisconsin families feel safe with Louis Butler on the Supreme Court?" in yellow text superimposed over Butler's face, and the text "AUTHORIZED AND PAID FOR BY GABLEMAN FOR SUPREME COURT, JAMES ZEILER, TREASURER" at the bottom center of the screen in white font)

Female Voice: Can Wisconsin families feel safe with Louis Butler on the Supreme Court?

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[2>Dodge Da Won't Back Gableman](#)

[Says Candidate's Ad Is 'revolting'](#)

The Capital Times :: METRO :: C1

Friday, March 21, 2008

By SCOTT BAUER Associated Press

The Dodge County district attorney pulled his support for Supreme Court candidate Michael Gableman this week, saying a television ad his campaign ran violates the code of judicial conduct and is "revolting."

Gableman, a Burnett County circuit court judge, has built his campaign against incumbent Justice Louis Butler around his support from district attorneys and sheriffs.

Dodge County District Attorney Steven G. Bauer announced his decision to pull his support of Gableman in a letter to the editor published Wednesday in the Watertown Daily Times and today in the Wisconsin State Journal.

Bauer said he believes the Gableman ad makes him unfit to be a justice on "This is not a factual ad. I have no interest in being associated with a campaign that is not factual," Bauer said in an interview today. "This crossed the line. It was revolting, quite frankly. I do think it undermines the entire judicial system."

Gableman campaign adviser Darrin Schmitz issued a brief statement today saying "Mr. Bauer is free to do as he sees fit and we wish him well."

Bauer was still listed as a Gableman supporter on his campaign Web site this morning but his name will be removed, Schmitz said.

Even without his backing, Gableman still has the support of the majority of saying they show he is the choice of law enforcement.

Butler has the support of five groups representing more than 18,000 law enforcement officers, as well as 20 district attorneys.

Bauer said he is not supporting anyone in the race.

The election is April 1. The winner will serve a 10-year term.

Bauer pulled his endorsement of Gableman over an ad that involves the case of Reuben Lee Mitchess, a convicted rapist who Butler defended on appeal while working in the public defenders office.

The ad is misleading because it doesn't tell viewers that Butler handled Mitchell's case as the assigned defense attorney, not as a judge, Bauer said. Butler was fulfilling his ethical duty as Mitchell's defense attorney, Bauer said.

The ad, which ran for a week and is no longer on the air, said that Butler found a loophole and Mitchell went on to molest another child. But what it doesn't tell viewers is that Mitchell served his entire prison sentence, he was not freed because of anything Butler did and he was sentenced

Attachment 4

to prison for 40 years and remains there to this day because of the second offense.

Bauer said the ad is inaccurate and it also mocks the constitutional right of the accused to have an effective defense attorney.

"As a prosecutor, I firmly believe in convicting and properly punishing criminals, but I also understand that I have a duty to be certain that a defendant is actually guilty," Bauer said in the letter. "A competent criminal defense attorney helps me be accurate."

Bauer goes on to say he is troubled that a candidate for the Supreme Court would "belittle our constitutional right to counsel."

"I am equally troubled by Gableman's cavalier disregard for accuracy in his representations to the public through this ad," he said. "The integrity of the criminal justice system should not be allowed to be tarnished by one man's ambitious desire for higher office."

The ad has generated a complaint with the state Judicial Commission filed by the liberal group Citizen Action of Wisconsin. The complaint charges that the ad is intentionally misleading and therefore violates the state's code of judicial conduct.

Gableman defended the ad, saying it was factual and was meant to demonstrate differences between his background as a former district attorney and prosecutor and Butler, who worked as a public defender.

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WMC Radio Ad – “Fifty-One”

Male Voice 1: They keep our families safe and confront those who would do us harm. They're the real experts on public safety. They're Wisconsin's seventy-two sheriffs. Wisconsin sheriffs know best that they need strong, rule of law judges and courts to win the war on crime. So when fifty-one of Wisconsin's seventy-two sheriffs praise the same judge, we ought to take notice. That judge is Michael Gableman. Judge Michael Gableman is a former prosecutor who has gone toe to toe with violent criminals. Michael Gableman has prosecuted crimes like arson, sexual assault, domestic violence, and white collar crimes. Judge Michael Gableman brings law and order to the bench, where he believes in personal responsibility and maximum accountability. No wonder fifty-one sheriffs and over fifty DAs and police chiefs call Judge Gableman their ally in the war on crime.

Male Voice 2: Contact Judge Gableman and tell him to keep working to win the war on crime.

Male Voice 3: Paid for by the WMC Issues Mobilization Council, Incorporated.

Wisconsin Manufacturers and Commerce – 1st Ad

(Onscreen: an image of police tape and flashing police lights and the text “The Issue: Crime” in white font, as the words “Thank judges like Michael Gableman who have been allies in the war on crime” in white font appear below)

(Uplifting music plays)

Male Voice: Crime’s an important issue in Wisconsin, and we should thank judges like Michael Gableman who have been allies in the war on crime.

(Onscreen: a Wisconsin map covered in police badges and sheriff’s stars next to the text “Sheriffs, DAs, Police Chiefs: Judge Gableman Stood up to Violent Criminals”)

Male Voice: Over a hundred Wisconsin sheriffs, DAs, and police chiefs have said Judge Michael Gableman has stood up to violent criminals.

(Onscreen: a camera pan over the tops of police cars, and the text “As a prosecutor Gableman tackled” in white font)

Male Voice: As a prosecutor, Judge Michael Gableman tackled

(Onscreen: same image as before, but with a clip of a chain link fence superimposed in the lower right corner and a clip of children jumping on a playground superimposed in the lower left corner, and the words “Arson” and “Sexual Assault” being added to the previous text)

Male Voice: arson, sexual assault,

(Onscreen: chain link fence clip disappears, the colors on the playground clip invert, a clip of a pair of handcuffed hands appears in the upper left corner, and the words “Domestic Violence” and “White Collar Crime” are added to the previous text)

Male Voice: domestic violence, and white collar crime.

(Onscreen: a still image of Michael Gableman in profile against a red background, with the text “District Attorneys Say: Gableman Applies the Law” in white imposed on a portion of an American flag beside him)

Male Voice: District Attorneys say that Judge Gableman applies the law,

(Onscreen: same image as before, but a clip of a gavel being banged down appears in the background behind the text)

Male Voice: and doesn’t look for loopholes.

(Onscreen: a slow camera zoom in on an empty courtroom, with a photo of Michael Gableman

and the text "Contact Judge Michael Gableman 715-349-2149 Tell him tough judges keep us safe." in white font superimposed on the image, and a caption reading "PAID FOR BY WMC ISSUES COUNCIL INC." in white font)

Male Voice: Contact Judge Michael Gableman. Tell him tough judges keep us safe.



WISCONSIN MANUFACTURERS & COMMERCE

Business Group Airs TV Ads Regarding Gableman Crime Fighting Agenda WMC IMC Continues Issue Advocacy Education Campaign

MADISON – Wisconsin Manufacturers & Commerce Issues Mobilization Council, Inc. announced that it will air a television ad hailing the crime-fighting priorities of Burnett County Judge Michael Gableman. The ad is part of a long-term public education and grassroots lobbying campaign.

"Judge Gableman is a law-and-order judge who has earned the highest praise from the cops, district attorneys, Sheriffs and deputy sheriffs throughout Wisconsin," said James A. Buchen, vice president of WMC. "Businesses need safe neighborhoods in order to operate and tough judges help keep Wisconsin safe. As part of our public agenda, we will continue to work to advance policies that keep our state safe."

In the ad, Gableman is cited for being "an ally in the war on crime."

Gableman has served as a district attorney, an assistant district attorney, and a circuit court judge.

Gableman has come under fire in negative TV attack ads from the Greater Wisconsin Committee, a group believed to be linked to organized labor and tribal gambling interests.

"We think the public needs to hear the truth about Judge Gableman's crime fighting agenda," Buchen said. "And, they should call him and tell him tough judges keep us safe." The WMC IMC ad ends by urging viewers to call Judge Gableman at 715-349-2149 to tell him that "tough judges keep us safe."

WMC IMC has been educating the public about the issues surrounding activist judges for many years. WMC IMC won an award for its issue advocacy campaign about Wisconsin's activist Supreme Court in 2006. WMC IMC has continued to educate the public and WMC members with videos, briefings, and brochures about the Supreme Court on civil and criminal justice issues.

FOR FURTHER INFORMATION CONTACT:
James A. Buchen, (608) 258-3400

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WMC Issues Mobilization Council, Inc.

Issue Advocacy

:30 television

March 3, 2008

"Ally"

Stock crime scene footage font comes up: "Thank judges like Michael Gableman who have been allies in the war on crime."	Crime is an important issue in Wisconsin and we should thank judges like Michael Gableman who have been allies in the war on crime.
Flying badges into background with centered font reading: "Sheriffs, DAs, police chiefs: Judge Michael Gableman has stood up to violent criminals."	Over 100 WI sheriffs, DAs & police chiefs have said Judge Michael Gableman has stood up to violent criminals.
Split screen of different types of crime. "As a prosecutor Gableman tackled arson, sexual assault, domestic violence, white collar crime."	As a prosecutor, Judge Michael Gableman tackled arson, sexual assault, domestic violence and white collar crime.

Interior courtroom footage: "DAs say Gableman applies the law"	DAs say that Judge Gableman applies the law and doesn't look for loopholes.
Contact Judge Gableman: 715-349-2149 Tell him tough judges keep us safe.	Contact Judge Michael Gableman. Tell him tough judges keep us safe.
Paid for by WMC Issues Mobilization Council Inc.	

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<http://www.wmc.org>

WMC Radio Ad – “Looking for Justice”

Female Voice: When our children go to school, they need to be safe. In our homes and neighborhoods, we need to be safe. Our cops, sheriffs, and district attorneys are on the front line, protecting us. And you know what? Our judges need to know they also must protect us. Most of Wisconsin's DAs and sheriffs, Republicans and Democrats, have said Judge Michael Gableman stands up to violent criminals. Judge Michael Gableman doesn't look for loopholes, he looks for justice. Judge Michael Gableman is a former district attorney. He's tough and independent, and brings common sense to the bench. Judge Michael Gableman puts criminals in jail, where they belong. Our families' safety must be a priority for judges. Call Judge Gableman: 715-349-2149. Tell him tough judges keep us safe. Paid for by WMC Issues Mobilization Council, Incorporated.



WISCONSIN MANUFACTURERS & COMMERCE

WMC IMC Airs New Radio Ad on Crime Fighting Agenda Business Group Continues Issue Advocacy Education Campaign

MADISON – Wisconsin Manufacturers & Commerce Issues Mobilization Council, Inc. announced that it will air a new radio ad hailing the crime-fighting priorities of Burnett County Judge Michael Gableman. The ad is part of a long-term public education and grassroots lobbying campaign.

"Judge Gableman doesn't look for loopholes. He looks for justice," says the ad that will air statewide. WMC Issues Mobilization Council, Inc. is airing issue ads on radio and television to educate Wisconsin about public safety issues.

"We think Judge Gableman's approach of applying the law as passed by the legislature rather than using his position to make new law, is the proper philosophy for a judge," said James A. Buchen, vice president of government relations for WMC. "As part of our public policy agenda, we will continue to work to advance policies that restore fairness and predictability to our legal system."

Gableman is "tough and independent and brings common sense to the bench," the ad says. The ad says most of the state's District Attorneys and Sheriffs have said Gableman stands up to violent criminals.

Gableman has served as a district attorney, an assistant district attorney, and a circuit court judge. Gableman has come under fire in negative TV attack ads from the Greater Wisconsin Committee, a group believed to be linked to organized labor and tribal gambling interests.

"We think the public needs to hear the truth about Judge Gableman's crime fighting agenda," Buchen said. "And, they should call him and tell him tough judges keep us safe." The WMC IMC ad ends by urging listeners to call Judge Gableman at 715-349-2149 to tell him that "tough judges keep us safe."

WMC IMC has been educating the public about the issues surrounding activist judges for many years. WMC IMC won an award for its issue advocacy campaign about Wisconsin's activist Supreme Court in 2006. WMC IMC has continued to educate the public and WMC members with videos, briefings, and brochures about the Supreme Court on civil and criminal justice issues.

**For Further Information Contact:
James A. Buchen, (608) 258-3400**

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WMC IMC LOOKING FOR JUSTICE ISSUE AD

RADIO 60

FEMALE ANNOUNCER:

When our children go to school, they need to be safe.

In our homes and neighborhoods, we need to be safe.

Our cops, sheriffs, and District Attorneys are on the front line protecting us.

Attachment 9

And you know what, our judges need to know they also must protect us?

Most of Wisconsin's DAs and sheriff — Republicans and Democrats — have said Judge Michael Gableman stands up to violent criminals.

Judge Michael Gableman doesn't look for loopholes. He looks for justice.

Judge Michael Gableman is a former district attorney.

He is tough and independent and brings common sense to the bench.

Judge Michael Gableman puts criminals in jail . . . where they belong.

Our families' safety must be a priority for judges.

Call Judge Gableman: 715-349-2149

Tell him tough judges keep us safe.

Paid for by WMC Issues Mobilization Council Inc.

© 2007 Wisconsin Manufacturers and Commerce
<http://www.wmc.org>

Wisconsin Manufacturers and Commerce – 2nd Ad

(Onscreen: a slow camera pan through an empty courtroom, and the text "PAID FOR BY WMC ISSUES MOBILIZATION COUNCIL INC.")

(Ominous music plays)

Male Voice: We count on judges to use practical common sense to keep

(Onscreen: quick-cutting stills of newspaper articles, headlines, and photos of Mark Jensen)

Male Voice: violent criminals behind bars. But when faced with an unspeakable crime,

(Onscreen: quick flashes of a closeup of Louis Butler's face and a framed photo of Butler with a gavel lying in front of it)

Male Voice: Justice Louis Butler

(Onscreen: camera pan over one of the Jensen newspaper articles, lingering on the accompanying photo of Jensen, with the caption "Source: State of Wisconsin v. Mark Jensen, Justice Butler's Dissenting Opinion" in white font)

Male Voice: almost jeopardized the prosecution of a murderer because he saw a technicality.

(Onscreen: camera pans over and quick-cutting closeups of the Julie Jensen letter in a clear bag marked "EVIDENCE," with the same caption as previous image)

Male Voice: When prosecutors needed to show critical evidence,

(Onscreen: a hand bangs down a gavel, with the caption "Source: AP, February 23, 2007; Wisconsin Law Journal, 03/05/07" in white font)

Male Voice: Butler dissented, going against six other justices.

(Onscreen: pan through an empty courtroom toward the bench, with the text "Thankfully, Butler didn't get his way." superimposed over the image, and the same caption as previous image)

Male Voice: Thankfully, he didn't get his way.

(Onscreen: pan through an empty courtroom toward the jury box as the text "Jurors: It was most important piece of evidence" in gray font fades in over the image, and the caption "Source: AP, February 22, 2008" in white font)

Male Voice: Jurors said it was the most important piece of evidence they saw.

(Onscreen: a framed photo of Louis Butler with a gavel lying in front of it, next to the text "Tell

him to stand up for victims – Not technicalities. Call Louis Butler: 608-266-1884" in gray font)

Male Voice: Call Louis Butler. Tell him to stand up for victims, not technicalities.

Wisconsin Manufacturers and Commerce – 3rd Ad

(Onscreen: pan through empty courtroom)

(Sad music plays)

Female Voice: We've heard it before.

(Onscreen: clip of a hand banging down a gavel on right side of screen, grayscale clip of a hand unlocking a handcuff from another person's hand, with the text "LOOPHOLES" in white font)

Female Voice: Judge cites loophole, sides with criminal who threatens our safety.

(Onscreen: Framed photo of Louis Butler next to a gavel and an open book, with the same text as before and the caption "Source: Louis Butler Press Release 3/6/08")

Female Voice: Take Justice Louis Butler.

(Onscreen: same image as before, but the text changes to "LOOPHOLE LOUIE" in quotes)

Female Voice: His colleagues called him "Loophole Louie."

(Onscreen: quick-cutting closeups of a baseball bat with a tag reading "EVIDENCE" lying atop a newspaper article featuring a mugshot and a headline about a woman being beaten to death)

Female Voice: A woman beaten to death with a bat.

(Onscreen: a hand bangs a gavel as the text "BUTLER USES LEGAL LOOPHOLE TO SUPPRESS CRITICAL EVIDENCE," in black and red font on a white background, appears superimposed on the image, with the caption "Source: Wisconsin Law Journal 9/8/05 Associated Press 7/14/05" in white text)

Female Voice: Butler uses a loophole, suppressing critical evidence.

(Onscreen: quick-cutting closeups of newspaper articles about Mark Jensen)

Female Voice: A husband poisoned his wife.

(Onscreen: quick-cutting closeups Louis Butler, followed by a slow zoom in on a framed photo of Butler with the text "LOOPHOLE LOUIE" in white font quotes and the caption "Source: State of Wisconsin v. Mark Jensen, Justice Butler's dissenting opinion")

Female Voice: Butler cites a loophole, almost jeopardizing the prosecution.

(Onscreen: a slow zoom in on a judicial robe hanging on a coat rack with the same text as previous image and a slow-motion clip of Louis Butler superimposed on the left side of the

screen)

Female Voice: Butler doesn't mind being called "Loophole Louie."

(Onscreen: same image as before, but text now reads "BUTLER SAYS: 'LOOPHOLE LOUIE' 'AFFECTIONATE'" in white font and a caption reads "Source: Louis Butler Press Release 3/6/08" in white font)

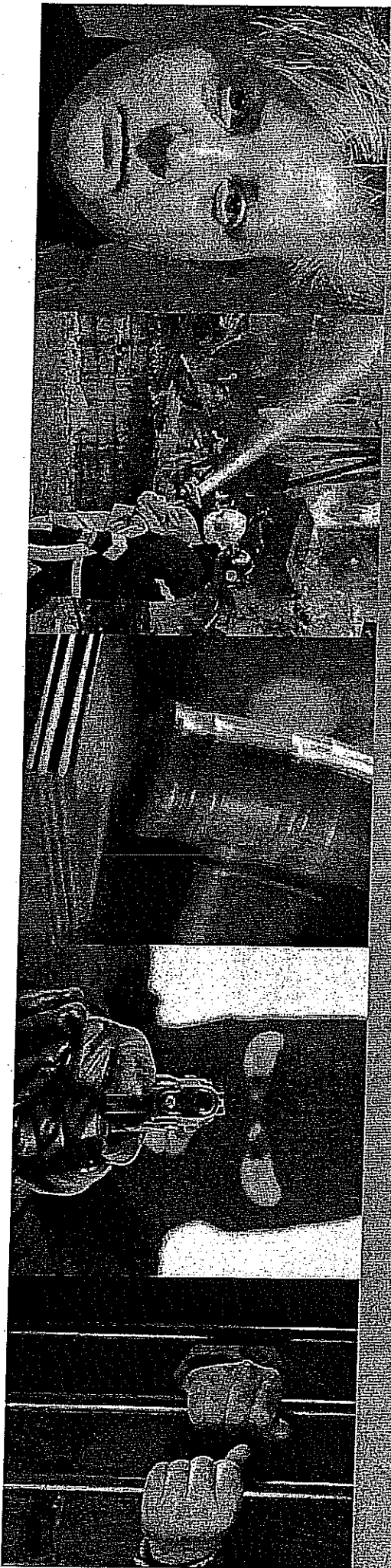
Female Voice: He says it's "affectionate."

(Onscreen: same image as before, but text now reads "DELIVER JUSTICE, NOT LOOPHOLES ASK LOUIS BUTLER 608-266-1884" in white font and the caption now reads "PAID FOR BY WMC ISSUES MOBILIZATION COUNCIL INC." in white font)

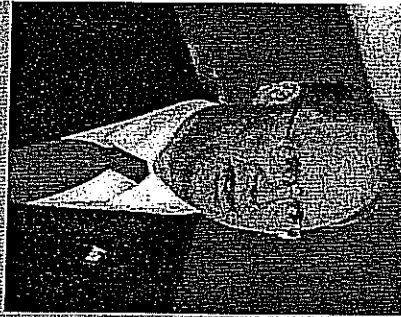
Female Voice: Call Louis Butler. Ask him to deliver justice, not loopholes.

Judge Michael Gableman:

An ally in the war on crime!



Judge Gableman is tough on crime!



They keep our families safe, and confront those who would do us harm. They're the real experts on public safety. They're Wisconsin's 72 sheriffs.

Wisconsin's sheriffs know best that they need strong, able law judges, and courts to win the war on crime.

So when 51 of Wisconsin's 72 sheriffs praise the same judge, we ought to be sure to go.

That judge is Michael Gableman.

Judge Michael Gableman is a former prosecutor, who has gone to the wire with violent criminals.

Michael Gableman has prosecuted crimes like a son, sexual assault, domestic violence, and miscellaneous crimes.

Judge Michael Gableman brings law and order to the bench where he believes in personal responsibility and maximum accountability.

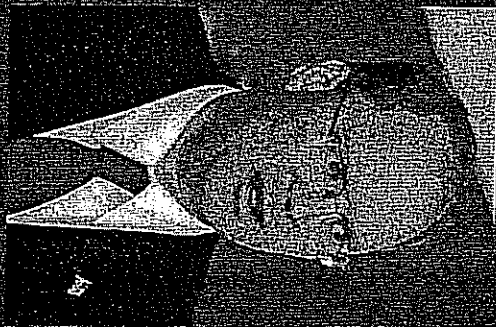
No wonder 51 sheriffs and over 20 DAs and police chiefs call Judge Gableman one of the best in the state.

This public safety alert is brought to you as a service of the Wisconsin Chamber of Commerce. Paid for by WMC Issues Mobilization Council, Inc. (WMC-1)

**Call Judge Gableman today at
(715) 349-2149 and tell him:
"Keep working to win
the war on crime!"**

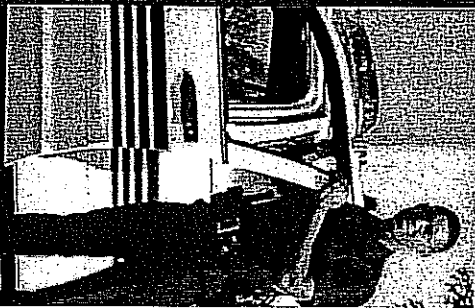
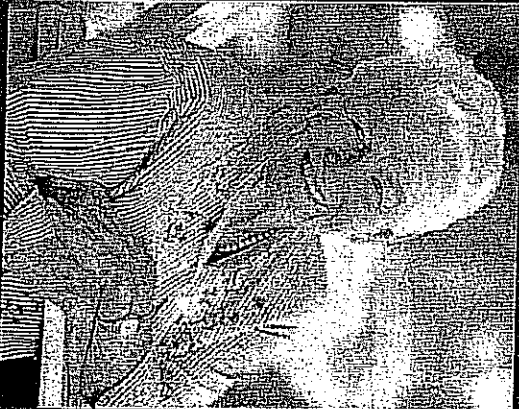
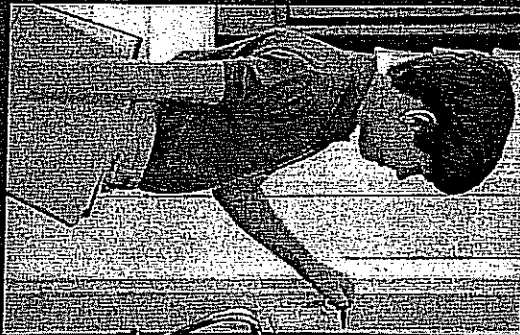
WISCONSIN CHAMBER OF COMMERCE
PO Box 352
MADISON, WI 53701-0352

or current resident

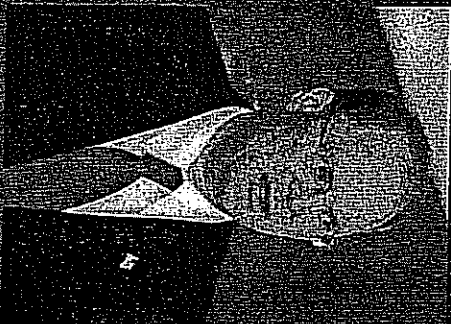


Judge Michael Gablmann

Looking for justice ... not loopholes!



Judge Gableman Stands Up to Violent Criminals!



When our children go to school, they need to be safe.

In our homes and neighborhoods, we need to be safe.

Our cops, sheriffs, and District Attorneys are on the front line protecting us.

And you know what? Our judges need to know they also must protect us.

Most of Wisconsin's DAs and sheriffs — Republicans and Democrats — have said Judge Michael Gableman stands up to violent criminals.

Judge Michael Gableman doesn't look for loopholes. He looks for justice.

Judge Michael Gableman is a former district attorney.

Judge Michael Gableman is tough and independent, and brings common sense to the bench.

Judge Michael Gableman puts criminals in jail . . . where they belong.

Our families' safety must be a priority for judges.

*This public safety alert is brought to you as a service of the Wisconsin Chamber of Commerce.
Paid for by WMC Issues Mobilization Council, Inc. (WMC-2)*

Call Judge Gableman today
at (715) 349-2149 and tell him:
"Tough judges keep us safe!"

WISCONSIN CHAMBER OF COMMERCE
PO BOX 352
MADISON, WI 53701-0352

or circuit resident

Coalition for America's Families – 1st Ad

(Onscreen: a mailing envelope with the flap partway open, and the caption "PAID FOR BY THE COALITION FOR AMERICA'S FAMILIES")

Male Voice: A murdered wife left an envelope to be opened in the event of her death.

(Onscreen: a hand writing on a piece of paper with what appears to be a calligraphy pen)

Male Voice: Inside, she left a roadmap to her killer—

(Onscreen: photo of Mark Jensen fades in, superimposed on previous image)

Male Voice: husband, Mark Jensen.

(Ominous piano music cuts in)

Female Voice: If anything happens to me, he would be my first suspect.

(Onscreen: image changes to a bluescale clip of Louis Butler speaking at a podium)

(Ominous music continues with addition of electric/synthetic strings)

Male Voice: According to the Wisconsin Law Journal,

(Onscreen: the words "LOUIS BUTLER" appear and then fade over previous image)

Male Voice: Louis Butler would not have allowed the jury to hear the letter Julie Jensen wrote.

(Onscreen: a hand raps a gavel and then sets it down, the words "Wisconsin Supreme Court" appear)

Male Voice: On cases taken up by the Supreme Court,

(Onscreen: a bluescale still photo of Louis Butler appears over various, quick-cutting still images of police tape and crime scenes, captioned with the words "Butler sides with criminals 60% of the time")

Male Voice: Butler sides with criminals nearly sixty percent of the time.

(Onscreen: the foreground image of butler remains unchanged, the caption disappears and is replaced by the telephone number "608.266.1884", the background image changes to a bloody knife)

Male Voice: Tell Louis Butler victims, not criminals, deserve justice.



Coalition for America's Families – 2nd Ad

(Onscreen: a close-up shot of a human eye, with the caption "PAID FOR BY THE COALITION FOR AMERICA'S FAMILIES")

Male Voice: Ralph Armstrong was a convicted rapist

(Onscreen: a blurry shot of the face of a man standing in the rain, the caption "PAID FOR BY THE COALITION FOR AMERICA'S FAMILIES" remains)

Male Voice: out on parole.

(Onscreen: a woman lying on the ground by bags of trash, as another figure in the foreground looks down at her)

Male Voice: He raped, beat,

(Onscreen: brief close-up of the woman on the ground from previous image)

Male Voice: and strangled

(Onscreen: police cars pulling past to a two story house with their lights on, image then fades to fake television static)

Male Voice: a nineteen-year-old co-ed to death.

(Onscreen: brief image of two uniformed policemen, one crouched in the foreground with his back to the camera, shining a flashlight at a white object on the ground, the other wearing gloves and crouched in profile, reaching toward the white object)

Male Voice: There was

(Onscreen: grainy black and yellow security camera image of a shadowy human silhouette, with "TCR 02:11:13:05" in white print on a black background at the bottom)

Male Voice: eyewitness testimony,

(Onscreen: colored digital scan of a fingerprint, which suddenly turns grayscale and then back to color as the word "MATCH" in red print appears superimposed on it)

Male Voice: fingerprints found at the crime scene,

(Onscreen: thermal image of a human arm being dragged offscreen)

Male Voice: and blood under Armstrong's fingernails.



(Onscreen: image changes to a bluescale clip of Louis Butler speaking at a podium, as the words "LOUIS BUTLER" fade in and then vanish)

Male Voice: But Louis Butler wrote the decision to overturn this rapist's conviction.

(Onscreen: a hand raps a gavel and then sets it down, the words "Wisconsin Supreme Court" appear)

Male Voice: On cases taken up by the Supreme Court,

(Onscreen: a bluescale still photo of Louis Butler appears over various, quick-cutting still images of police tape and crime scenes, captioned with the words "Butler sides with criminals 60% of the time")

Male Voice: Butler sides with criminals nearly sixty percent of the time.

(Onscreen: the foreground image of butler remains unchanged, the caption disappears and is replaced by the telephone number "608.266.1884", the background image changes to a bloody knife)

Male Voice: Tell Louis Butler victims, not criminals, deserve justice.

Coalition for America's Families – 2nd Ad (Revised)

(Onscreen: a close-up shot of a human eye, with the caption "PAID FOR BY THE COALITION FOR AMERICA'S FAMILIES")

Male Voice: Ralph Armstrong was a convicted rapist

(Onscreen: a blurry shot of the face of a man standing in the rain, the caption "PAID FOR BY THE COALITION FOR AMERICA'S FAMILIES" remains)

Male Voice: out on parole,

(Onscreen: a woman lying on the ground by bags of trash, as another figure in the foreground looks down at her)

Male Voice: when convicted of raping, beating

(Onscreen: brief close-up of the woman on the ground from previous image)

Male Voice: and strangling

(Onscreen: police cars pulling past to a two story house with their lights on, image then fades to fake television static)

Male Voice: a nineteen-year-old co-ed to death.

(Onscreen: brief image of two uniformed policemen, one crouched in the foreground with his back to the camera, shining a flashlight at a white object on the ground, the other wearing gloves and crouched in profile, reaching toward the white object)

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(Onscreen: thermal image of a human arm being dragged offscreen)

Male Voice: and blood under Armstrong's fingernails.

(Onscreen: image changes to a bluescale clip of Louis Butler speaking at a podium, as the words "LOUIS BUTLER" fade in and then vanish)

Male Voice: But Louis Butler wrote the decision to overturn this rapist's conviction.

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Male Voice: Butler sides with criminals nearly sixty percent of the time.

(Onscreen: the foreground image of butler remains unchanged, the caption disappears and is replaced by the telephone number "608.266.1884", the background image changes to a bloody knife)

Male Voice: Tell Louis Butler victims, not criminals, deserve justice.

Wisconsin Club for Growth – 1st Ad

(Onscreen: seen from behind, a man in a white tee-shirt with his hands cuffed behind his back being escorted by two people in dark clothes as another person crosses the field of view behind them, with a caption reading "PAID FOR BY WISCONSIN CLUB FOR GROWTH")

(Ominous music plays)

Male Voice: Criminals threaten our communities. Oddly enough, so do some judges, who return them to the street.

(Onscreen: a full-color clip of Michael Gableman's face as he talks to someone)

Male Voice: But not Judge Michael Gableman. He's gone toe to toe

(Onscreen: two firefighters, one crouching and one walking, in a blackened, burnt-out building)

Male Voice: with the arsonists,

(Onscreen: a pudgy man in sunglasses and a blue shirt with his hands pinned behind him being put into the back of a police car by two male officers)

Male Voice: sexual predators,

(Onscreen: seen from behind, a man in a brown shirt with his hands cuffed behind him being escorted by a police officer)

Male Voice: domestic abusers,

(Onscreen: a finger being fingerprinted on a recording sheet)

Male Voice: and white-collar criminals who belong in jail.

(Onscreen: two male police officers leaning against a police car, with the caption "Sheriffs and Deputy Sheriffs Praise Judge Gableman" in white text)

(A police siren is heard)

Male Voice: That's why seventy percent of Wisconsin's sheriffs

(Onscreen: a clip of Michael Gableman in a suit and tie with an American flag lapel pin, with the same caption as previous image)

Male Voice: and countless Das and police chiefs consider Gableman their ally

(Onscreen: a dark-skinned pair of hands, belonging to a person in an orange prison jumpsuit, reaching through prison bars)



Male Voice: in the war on crime.

(Onscreen: another clip of Michael Gableman in a suit, with the words "Judge Michael Gableman" in white font beside him)

Male Voice: Strong leadership leads to safer communities.

(Onscreen: gray and white text reading "wicfg.com WISCONSIN CLUB FOR GROWTH" on a black background)

Male Voice: Visit Wisconsin Club for Growth dot com.

IN THE SUPREME COURT
OF THE STATE OF WISCONSIN

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

RECEIVED
SEP 22 2009

Wisconsin Judicial Commission,
Complainant,

Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

vs.

Case No. 2008AP2458-J

The Honorable Michael J. Gableman,
Respondent.

Proceedings held in the above-entitled
matter before the Judicial Conduct Panel: HON. HARRY
S. SNYDER, Presiding Judge; HON. RALPH ADAM FINE;
HON. DAVID G. DEININGER. Held on the 16th day of
September, 2009, at the District II Court of
Appeals, 2727 N. Grandview Blvd., Suite 300,
Waukesha, Wisconsin.

APPEARANCES:

ATTY. JAMES C. ALEXANDER, Executive Director, State
of Wisconsin Judicial Commission, 110 E. Main
Street, Suite 700, Madison, Wisconsin 53703-3328,
appearing on behalf of the Complainant.

ATTY. JAMES BOPP, JR., of the firm BOPP, COLESON &
BOSTROM, 1 South 6th Street, Terre Haute, Indiana
47803; and ATTY. ERIC M. MCLEOD, of the firm
MICHAEL, BEST & FRIEDRICH, LLP, One South Pinckney
Street, Suite 700, Madison, Wisconsin 53703,
appearing on behalf of the Respondent.

P R O C E E D I N G S (9:00 a.m.)

JUDGE SNYDER: Panel will call the matter of Wisconsin Judicial Commission vs. the Honorable Michael J. Gableman. The judicial conduct panel this morning consists of myself, my name is Harry Snyder. I sit as a member of District II in the Court of Appeals located here in Waukesha. To my left is Judge Ralph Adam Fine. Judge Fine is a judge sitting in Milwaukee in District I. To my right is Judge David Deininger. Judge Deininger previously sat in District IV in Madison. He is now sitting as a reserve appellate judge.

We are here today to hear arguments on a motion brought by Justice Gableman. We've set aside an hour and a half, and I believe that Justice Gableman is reserving 15 minutes of your time. We hope -- Usually we have about an hour set aside. We hope this is going to be sufficient to allow all of the information and argument and whatever you wish to relate to the panel.

Please speak loudly and clearly. The room is small, I understand, and the acoustics ought to be pretty good; but some of us don't hear quite as well as we used to. So please state your name and the address of your office to commence your comments

1 and arguments.

2 Judge Fine, do you have anything further
3 before we proceed to arguments?

4 JUDGE FINE: No.

5 JUDGE SNYDER: Judge Deininger?

6 JUDGE DEININGER: No.

7 JUDGE SNYDER: All right. With that then
8 we can proceed.

9 MR. BOPP: Thank you, your Honor. My name
10 is Jim Bopp, I'm attorney for Justice Gableman.
11 With me is Eric McLeod who, but I will be handling
12 the argument today. My office is at Bopp, Coleson &
13 Bostrom, 1 South Sixth Street in Terre Haute,
14 Indiana.

15 Our motion for summary judgment is asking
16 this Court -- this panel, I should say I guess, to
17 recommend to the State Supreme Court that this
18 disciplinary complaint be dismissed. The grounds
19 for the dismissal is that we believe that the charge
20 that has been brought against Justice Gableman
21 really sounds in the second sentence of the
22 misrepresentation clause, which is aspirational and
23 for which discipline may not be required.

24 The first sentence, we believe the
25 advertisement at issue fully meets the requirements

1 of the first section, and that sentence is the only
2 mandatory section of 60(3)(c) (sic), and is the only
3 provision for which discipline may be imposed.

4 Now, as I've mentioned, the --

5 JUDGE FINE: I'm not sure I understand
6 your distinction, although the committee note seems
7 to make one, about something that is
8 misrepresentative or misrepresenting and something
9 that is misleading.

10 MR. BOPP: Well, the first sentence is
11 "shall," so --

12 JUDGE FINE: No, I understand that, that's
13 there's shall and that there is --

14 MR. BOPP: Should.

15 JUDGE FINE: -- should. That's like the
16 "must" and "should" jury instruction in criminal
17 cases which opens the way for nullification, under
18 some views.

19 But what I don't understand is the
20 distinction you're attempting to draw between
21 something that's misleading and something that's
22 misrepresenting.

23 MR. BOPP: Well, the focus on the first
24 section is the statement's truth or falsity being
25 misrepresented. So the focus is not on the word,

1 misrepresent; the focus is on the words, the
2 statement's truth or falsity. So if the statement
3 is -- if the statement were false, you are
4 misrepresenting a fact concerning your opponent. If
5 the statement is true, you are not misrepresenting a
6 fact concerning the opponent.

7 The second sentence assumes that all the
8 statements or representations are actually true.
9 However, because of the juxtaposition of the stated
10 facts, or the absence of certain facts, that the
11 result may be misleading in terms of the impression
12 or the opinion that the listener derives from the
13 statement. So section one, the first section is
14 focusing on the statement's truth or falsity. While
15 the second sentence assumes that all the statements
16 might be true, that because of items or facts not
17 stated or implied, that the, there is a misleading
18 impression by the listener. And of course, the
19 second section --

20 JUDGE FINE: So are you saying that
21 somebody could sew together a series of true
22 statements and that would just be a
23 misrepresentation? Or that would be misleading?

24 MR. BOPP: Would be misleading, or
25 confusing. That's the other part of the second

1 sentence. It would be either misleading or
2 confusing.

3 JUDGE FINE: It would not be a
4 misrepresentation?

5 MR. BOPP: It would not be a
6 misrepresentation, because all the facts that are
7 stated are true.

8 JUDGE FINE: Let me give you a
9 hypothetical, if I can. In Milwaukee County I
10 understand that the judges have to empty their own
11 wastebaskets now and do other maintenance/
12 janitorial things. A news report on that dispute
13 catches a judge coming out of the courthouse and
14 says well, what's your view of judges having to
15 empty their own wastebaskets? The judge says
16 something to the effect, I think it's a big deal
17 over nothing. I could care less. You should get on
18 to more important things. It is not important.

19 Later that judge runs for office, and the
20 opponent runs an advertisement that says crime is at
21 an all-time high, judges aren't doing what they
22 should do to protect society, and then they run that
23 clip. It's a big deal over nothing, et cetera, et
24 cetera, et cetera.

25 MR. BOPP: That would probably be an

1 example of number two, yes.

2 JUDGE FINE: So that's just aspirational,
3 not mandatory?

4 MR. BOPP: Well, the State Supreme Court
5 has made it aspirational.

6 JUDGE FINE: No; but I mean you would say
7 that that would not be a false statement?

8 MR. BOPP: That would not be a false
9 statement. He made the statement. But the fact
10 that the, that what he was referring to is omitted
11 created a false or misleading impression of what he
12 was saying. Because there was an absence of a fact,
13 which was that that statement was in response to the
14 fact that judges have to clean up their own offices.
15 So.

16 And, you know, number one, we are dealing
17 with what the Wisconsin Supreme Court has decided
18 that they're going to make subject to discipline or
19 not. Justice Gableman did not draft this canon.
20 This is the State Supreme Court deciding to
21 differentiate between two situations.

22 Now, the second thing is, is I do think
23 that that distinction is demanded by the First
24 Amendment. And because, of course, here we're
25 dealing with campaign speech. And the First

1 Amendment, while your example did not deal with
2 campaign speech.

3 JUDGE FINE: Well, no, yes, it does. I
4 mean the judge who gave the comments about the
5 wastebasket.

6 MR. BOPP: Oh, because he was running for
7 reelection.

8 JUDGE FINE: Well, he was running for
9 office --

10 MR. BOPP: Yes.

11 JUDGE FINE: -- and then the opponent
12 cobbled it together so that the impression given was
13 that he thought that the rise in the crime rate was
14 no big deal.

15 MR. BOPP: Yes, I agree, I agree. And I
16 forgot that you had said when he was running for
17 office he was interviewed.

18 So, you know, when the First Amendment is
19 applicable, it is applicable, because campaign
20 speech is at the core of the First Amendment. And
21 it has its most urgent application to campaign
22 finance speech. And since the 2002 decision of the
23 United States Supreme Court in *Republican Party of*
24 *Minnesota vs. White*, there's simply no doubt that
25 the First Amendment protections apply to judges and

1 judicial candidates, just as they apply to all other
2 candidates for public office. And of course, as a
3 result of *White* we now have certainly more than a
4 dozen, perhaps dozens now, of cases being decided by
5 both state and federal courts. And you have federal
6 courts, including one here in Wisconsin, that struck
7 down other judicial canons other than those that the
8 U.S. Supreme Court addressed in *White*, which was the
9 announce clause. And state supreme courts that have
10 limited the scope or application of their canons to
11 ensure that they fall within only those
12 circumstances in which the First Amendment would
13 allow discipline regarding campaign speech.

14 JUDGE FINE: Do you think the First
15 Amendment permits discipline with respect to any
16 kind of campaign speech, or is that something that
17 should be left to the --

18 MR. BOPP: Yes.

19 JUDGE FINE: You do?

20 MR. BOPP: Yes. Yes, sure. And I argued
21 in the United States Supreme Court in the *White* case
22 that certainly, a pledging or promising certain
23 results in a particular case, a discipline could be
24 imposed on judicial candidates for making that
25 promise.

1 JUDGE DEININGER: Well, what about just
2 statements? Your briefs and the majority opinion in
3 the *Rickert* case, at least the way you present it,
4 and even the language of that opinion, seems to say,
5 at least the Washington court concluded, that there
6 is a constitutional right to lie in a political
7 campaign as long as there are no provable damages.

8 MR. BOPP: I don't think the Washington
9 Supreme Court would put it that way. I think what
10 the Washing Supreme Court --

11 JUDGE DEININGER: Well --

12 MR. BOPP: I think --

13 JUDGE DEININGER: Would you put it that
14 way?

15 MR. BOPP: I would not put it that way.

16 JUDGE DEININGER: All right. How would
17 you put it?

18 MR. BOPP: I would put it that it's a
19 question of what authority government has to make,
20 in the face of the First Amendment, to deal with
21 campaign speech. And what the Washington Supreme
22 Court said is that the First Amendment leaves it to
23 the citizens to decide whether or not statements are
24 true or false, and the way to combat false
25 statements is for more speech. And of course, when

1 this ad ran, there was a lot of more speech by the
2 integrity committee, by newspapers, by editorials,
3 by all sort of folks, about whether or not the
4 statements in this ad were true or false. And
5 that's ultimately for the people to decide.

6 Now, I don't think you have to go to the
7 extent of finding that this canon is unconsti-
8 tutional, as the Washington Supreme Court did,
9 because as I've already mentioned, I think that the
10 claim that is being made here, the charge that is
11 being made here, is under Subsection -- under the
12 second sentence, the aspirational sentence, not
13 under section one, which is the mandatory one for
14 which discipline can be brought. Because as I will
15 soon explain, each of the statements of fact are
16 true.

17 JUDGE DEININGER: All right. Well, let's
18 pause there then. You're saying that because each
19 of the four statements that are focused on, and I
20 guess it starts with the line that begins, "Louis
21 Butler worked to put criminals on the street."

22 MR. BOPP: Yes.

23 JUDGE DEININGER: That and the next three
24 sentences.

25 MR. BOPP: Those four.

1 JUDGE DEININGER: Your claim is that each
2 of those is objectively true.

3 MR. BOPP: Um-hum.

4 JUDGE DEININGER: The Commission's claim
5 is while they don't outright concede that, they come
6 very close.

7 MR. BOPP: I think they pretty well
8 concede.

9 JUDGE DEININGER: Arguably literally true,
10 or some words to that effect.

11 MR. BOPP: Yes.

12 JUDGE DEININGER: However, those four
13 sentences, put one after the other in that sequence,
14 add up to, in the Commission's view, a misrepresen-
15 tation, a false statement; that is, that Louis
16 Butler was somehow responsible for Reuben Mitchell's
17 release.

18 MR. BOPP: Yes. A fact that they concede
19 is not -- is omitted here. I mean, they use the
20 word, omit. That that fact that they are charging
21 him with is an omitted fact. It's not stated here.
22 And so, and while each one of these are true, in
23 fact they concede that these three are true, and as
24 to this one, to describe a criminal defense attorney
25 as one who works to put criminals on the street is

1 simply the way lay people talk about criminal
2 defense lawyers. It's not, and it is literally
3 true. Because the result of what criminal defense
4 lawyers often do, not always but often do, when
5 they're successful, is to put criminals on the
6 street. So they don't really, I mean, I wouldn't
7 say that they seriously contest the truth of that
8 statement.

9 JUDGE DEININGER: But they do say that the
10 four statements taken together add up to a
11 misrepresentation --

12 MR. BOPP: Right.

13 JUDGE DEININGER: -- that being former
14 Justice Butler's responsibility for --

15 MR. BOPP: Yeah. Which is not here, is
16 it?

17 JUDGE DEININGER: It isn't there. But --

18 MR. BOPP: No.

19 JUDGE DEININGER: It isn't there in so
20 many words. But --

21 MR. BOPP: No. It isn't there in any
22 words.

23 JUDGE DEININGER: Is there any other
24 reasonable conclusion that a reader or hearer of
25 those words could reach?

1 MR. BOPP: Of course. And that is, to
2 focus on Butler's willingness to find loopholes. He
3 is willing to find a loophole for a person so evil
4 that he raped an 11-year-old girl with learning
5 disabilities. And that he's so evil, that once he
6 got out of jail, he went on to molest another child.
7 So the focus is on Butler's willingness to find
8 loopholes for even people that are as despicable as
9 this person is, and known to be as despicable as he
10 was, because he raped an 11-year-old girl with a
11 learning disability.

12 JUDGE DEININGER: The point is no one
13 who's ever been a Public Defender should become a
14 judge? I mean.

15 MR. BOPP: Well, no.

16 JUDGE DEININGER: I realize that's a --

17 MR. BOPP: That's a decision of the
18 voters, isn't it? You know, it's a decision of the
19 voters. And so this, they concede that each one of
20 these are literally true. They want to dispute
21 this, while at the same time saying, well, but of
22 course, in the answer regarding their dispute of
23 this, is that of course, Louis Butler worked as a
24 criminal defense lawyer, and this is simply the way
25 people talk about criminal defense lawyers. So

1 there's no serious question, I wouldn't think, that
2 this statement is also true.

3 JUDGE SNYDER: Counsel --

4 MR. BOPP: But the one statement that they
5 claim is false is a statement never made here.

6 JUDGE SNYDER: Counsel, if those four
7 elements of the statements are true, I read the
8 Judicial Commission as saying there's a contextual
9 problem here. If there is true, how does that last
10 sentence relate to them? You get all done with
11 those four things that you claim are true, and then
12 the ad says, "Can Wisconsin families feel safe with
13 Louis Butler on the Supreme Court?"

14 MR. BOPP: Um-hum.

15 JUDGE SNYDER: So you have four premises,
16 I guess, that you say are true; but then you have a
17 conclusion that seems to come out of those, those
18 premises, that perhaps Justice Butler would not be a
19 safe alternative to Justice Gableman?

20 MR. BOPP: Well, it's not a statement or
21 conclusion; it's a question.

22 JUDGE SNYDER: Well, no. But the Judicial
23 Commission is saying this is contextual. They're
24 saying you've got to look at the whole ad, or the
25 message that it's going to deliver. And I

1 understand that your position is that you have four
2 truisms. But then the ad ends up with saying, "Can
3 Wisconsin families feel safe with Louis Butler on
4 the Supreme Court?" What's the relationship?

5 MR. BOPP: Yes. In other words, would you
6 feel safe having somebody on the Supreme Court that
7 is willing to find a loophole for a scum bag like
8 Reuben Lee Mitchell, who would rape an 11-year-old
9 girl with learning disabilities, and once he got out
10 of jail would rape children again.

11 JUDGE SNYDER: But it doesn't say, Can
12 Wisconsin families feel safe with Reuben Lee
13 Mitchell back on the streets of the state of
14 Wisconsin. That's not what that conclusion says.

15 MR. BOPP: He is willing to find a
16 loophole, whatever the result that manifests. It
17 may result in his release. Which is, of course,
18 what Butler was seeking. He was seeking the release
19 of Mitchell by finding this loophole. Now, and the
20 Court of Appeals granted that. If Butler had gotten
21 his way, Mitchell would have been released. State
22 Supreme Court, however, wouldn't release him on
23 these grounds. Even though they found it error,
24 they would not release him on these grounds. So
25 there's nothing here about whether he got out as a

1 result of finding the loophole. This is not about
2 Mitchell; this is about Butler, what he is willing
3 to do, what advocacy is he willing to make, and who
4 is he willing to find loopholes for. And if he's
5 willing to find a loophole for someone like him, if
6 he's in the State Supreme Court reviewing criminal
7 charges, you just have to wonder, is that somebody
8 you want on the Supreme Court, that is willing to
9 find a loophole for someone like this, like him.

10 Because as we know, the loophole which
11 the, and the Commission agrees with this statement,
12 that "Butler found a loophole," had nothing to do
13 with Mitchell's guilt or innocence. It had to do
14 with whether or not, the fact that the virginity of
15 this 11-year-old girl was disclosed by the
16 prosecutor. So it was a question of did the, you
17 know, the violation of the rape shield law. So, I
18 mean, it is a loophole, that it had nothing to do
19 with his guilt or innocence.

20 JUDGE SNYDER: Well, it wasn't so much a
21 -- "Loophole" has kind of an emotional ring to it.
22 It wasn't so much a loophole, as it just was a
23 properly argued application of the rape shield law.
24 Was it not?

25 MR. BOPP: Well, it turned out, it turned

1 out to be, yes.

2 JUDGE SNYDER: Yes.

3 MR. BOPP: But I think again, we're not
4 talking to judges when we do ads. We're talking to
5 the people. And the Commission agrees that Butler
6 found a loophole. And I think that's a fair
7 statement as far as the public is concerned.
8 Because, you know, loopholes, as far as the public
9 is concerned, is something that doesn't have
10 anything to do with the guilt or innocence; that
11 that could, could result, in effect, whether or not
12 the person is found guilty. And I mean, that's the
13 way the public looks at the things. And I think the
14 Commission has been really fairly candid about many
15 of these things.

16 Now, I think that the distinction that the
17 Supreme Court makes, Wisconsin Supreme Court makes,
18 between considering the statement's truth or
19 falsity, and considering whether or not the
20 statement while true is misleading, is demanded by
21 the First Amendment. So I think, I think you have a
22 well-crafted canon that observes three of the
23 requirements that the First Amendment imposes in
24 this circumstance. The first is they have the
25 malice standard, which is required by many courts

1 that have considered the misrepresentation canon.

2 They've either been struck down or implied, which-
3 ever the case may be. But you have to have the
4 malice standard of *New York Times vs. Sullivan*.

5 Secondly is that you, it must be based on
6 the actual language used. And of course, the most
7 recent case on this is *Wisconsin Right to Life vs.*
8 *Federal Election Commission*, where the FEC is
9 arguing essentially what the, what the Commission is
10 arguing and what would be found in the second
11 sentence; that is, not what was said, but what was
12 omitted or implied, and to, and to use the reaction
13 of the listener to determine, to cast liability or
14 restrictions or prohibitions, as the case may be, on
15 the speech. And *Wisconsin Right to Life* explains,
16 as the Supreme Court itself, as the Supreme Court
17 did in *Buckley vs. Valeo*, that the First Amendment
18 demands that you look at the four corners of the
19 statement and consider what is said, not what is the
20 impact or interpretation of what is said on the
21 listener.

22 And the final is, is that you must, the
23 statement must be either -- must be false, not
24 misleading. The Wisconsin -- The Michigan Supreme
25 Court considered a canon which had, in addition to

1 the statement being false, also that the statement
2 was misleading. And the court said the First
3 Amendment doesn't permit one to cast liability on
4 campaign speech because it is misleading. So did
5 the Alabama Supreme Court in the *Butler* case. And
6 so did the 11th Circuit in the *Weaver* case, in a
7 case out of Georgia.

8 So what you have is a canon here that
9 meets three of the most important First Amendment
10 requirements on, with respect to protecting campaign
11 speech; and that is, the malice standard basing any
12 liability on what is said. Here it says in the
13 first sentence, the statement's truth or falsity.
14 The statement. Not what was not said, but what was
15 said in the statement. As opposed to the second
16 sentence, which is the representations are true but
17 there is something misleading because something is
18 omitted or implied.

19 JUDGE DEININGER: All right. Mr. Bopp,
20 let me amend my previous question then. Is it your
21 position that there's a constitutional right to be
22 misleading in campaign advertisements? That
23 misleading campaign advertisements, even if
24 knowingly or issued with reckless disregard of their
25 misleading nature, cannot be sanctioned in any way

1 by a governmental entity?

2 MR. BOPP: Yes.

3 JUDGE DEININGER: Okay.

4 MR. BOPP: Yes. And the Supreme Courts of
5 Michigan and Alabama and the 11th Circuit have so
6 held, that misleading, misleading does not provide
7 sufficient protection for campaign speech, if it is
8 going to be subject to discipline or punishment.

9 JUDGE DEININGER: Correct. So let's pause
10 there. So then the premise of your motion, since
11 you're couching it in terms of summary judgment, and
12 I know there was some discussion in the argument,
13 written arguments, as to whether this Court -- or
14 how this panel, rather, can act on that, given
15 our --

16 MR. BOPP: Well, of course, you make a
17 recommendation to the Supreme Court.

18 JUDGE DEININGER: So is it, in your mind,
19 a question of fact, or a conclusion of law, whether
20 this is misleading or false?

21 MR. BOPP: I think -- Question of law, or
22 misleading?

23 JUDGE DEININGER: I mean --

24 MR. BOPP: Whether these statements are
25 true are questions of fact.

1 JUDGE DEININGER: Which you claim are
2 conceded, each individual statement.

3 MR. BOPP: Yes.

4 JUDGE DEININGER: But whether the
5 combination of sentences constitutes a
6 misrepresentation, as opposed to simply being
7 misleading. Is that a question of law, or is that a
8 question of fact?

9 MR. BOPP: I think that's a question of
10 law. And of course, the fact that I have given you
11 an alternate explanation of the way I view what this
12 is implying, because again, it doesn't say that
13 Reuben is an evil man. It doesn't say that Butler
14 is willing to find an evil man a loophole. I mean,
15 it doesn't say those things.

16 JUDGE FINE: Well, sure, it says that's
17 he's an evil man. I mean --

18 MR. BOPP: Well, it doesn't literally.

19 JUDGE FINE: Well, it doesn't use the
20 word, evil, but it says he's an evil man.

21 MR. BOPP: Well, see, that's a difference
22 between what is literally said and what you imply
23 from it.

24 JUDGE FINE: Well, it's more than a
25 distinction between connotation and denotation.

1 That's a denotation of evil, not a connotation of
2 evil.

3 MR. BOPP: Well, I mean, do you think that
4 everyone -- I don't think everyone would agree
5 that this is evil conduct.

6 JUDGE FINE: Really.

7 MR. BOPP: Yes.

8 JUDGE FINE: Who would not?

9 MR. BOPP: I don't know. But, I, you
10 know, this is a factual statement about what
11 occurred. He raped an 11-year-old girl with
12 learning disabilities. It expresses no opinion on
13 whether or not that conduct should be condemned or
14 not, or is evil or not. It doesn't say anything
15 like that. It doesn't state that this is wrong.
16 This is a, just a factual statement about what
17 occurred.

18 Now, I would certainly say it's wrong and
19 evil. And in fact, I would expect that most people
20 in Wisconsin to look at this and say, wow, you know,
21 this guy is willing to find a loophole for such an
22 evil person, do we really want him on the State
23 Supreme Court if that's his mind-set?

24 JUDGE FINE: Is your argument based on the
25 fact that you don't see a denotation of evil in that

1 sentence?

2 MR. BOPP: Of course not. I've never said
3 that. Of course not. And that's not in any of
4 our --

5 JUDGE FINE: Well, you seem to be pushing
6 it.

7 MR. BOPP: No. What I'm pushing is the
8 difference between what is literally said and what
9 you imply or are willing to, opinions you are
10 willing to reach as a listener. As a listener, the
11 vast majority of people would hear these facts as
12 factual statements and say well, that's evil.

13 JUDGE FINE: Does that turn on what the
14 definition of "is" is?

15 MR. BOPP: No, of course not. This -- Of
16 course not.

17 JUDGE FINE: Do you have to imply
18 something in the word, "is," or is it sufficient to
19 denote what the use of the language says?

20 MR. BOPP: Well, it doesn't either praise
21 or condemn the conduct in that statement. It
22 doesn't express an opinion on whether or not the
23 conduct is evil or not. And that's the difference
24 between what is said and what people imply. Now,
25 that certainly, the people that put this together

1 would expect people to think that that is evil
2 conduct. And the people of Wisconsin would view
3 that to be quite evil. And that's what is the
4 power, it seems to me, of the ad, because it's
5 talking about Butler's willingness to do something
6 that would -- that could -- see, it doesn't say
7 whether or not he got out of jail as a result of
8 this, but certainly could result in this person
9 getting out of jail, whether it caused him to get
10 out or not.

11 JUDGE FINE: Well, let me ask you another
12 question then. All right?

13 MR. BOPP: Right.

14 JUDGE FINE: Let's assume that Justice
15 Butler had nothing at all to do with the Reuben
16 Mitchell case. But he was a criminal defense
17 lawyer. And in a case involving disorderly conduct
18 arising out of somebody shouting in a store, he
19 found a loophole, as that term might be used. So
20 the statement, "Butler found a loophole," would be
21 true, because he did in some other case. "Reuben
22 Lee Mitchell raped an 11-year-old girl with learning
23 disabilities," that statement is true. "Mitchell
24 went on to molest another child." That statement is
25 true.

1 MR. BOPP: Um-hum.

2 JUDGE FINE: Would the three sentences be
3 misleading or misrepresentative if the loophole that
4 Butler found had nothing to do with Reuben Lee
5 Mitchell?

6 MR. BOPP: It would be misleading.

7 JUDGE FINE: Just misleading?

8 MR. BOPP: Yes. Well, I mean, you say
9 just. I don't think --

10 JUDGE FINE: As opposed to being
11 misrepresentative.

12 MR. BOPP: I don't think being misleading
13 is like something good.

14 JUDGE FINE: No; but you say it can't be
15 sanctioned.

16 MR. BOPP: It can't be sanctioned.

17 JUDGE FINE: But it's not totally
18 misrepresentative?

19 MR. BOPP: No. It's misleading.

20 JUDGE FINE: Even though Butler --

21 MR. BOPP: And I would say grossly
22 misleading. And of course, the effect of having run
23 that ad would have been Justice Gableman's defeat.

24 Okay:

25 JUDGE FINE: Well, no; but we're not

1 talking about what the ultimate result was or might
2 have been. But where do you, where do you draw the
3 distinction between misrepresentation and
4 misleading?

5 MR. BOPP: It's misrepresenting the truth
6 or falsity of the statement. That's what the
7 sentence says. The use of the word, misrepresent,
8 is not independent of the statement, the statement
9 in the sentence, the statement's truth or falsity.
10 So misrepresent isn't like another category. Okay.
11 It's misrepresenting the truth or falsity is what
12 the, is what the sentence applies to. So it's
13 either true or not. It's either true or false..

14 Now, the Commission acknowledges that the
15 purpose of the ad was to compare and contrast the
16 backgrounds, qualifications, and experiences of
17 Justice Gableman -- or Judge Gableman at the time,
18 with the background, qualifications, and experience
19 of Justice Butler. So it started off with
20 discussing then Judge Gableman's history and what he
21 had been doing in his career, juxtapose that with
22 what Louis Butler did in much of his career. And of
23 course, the State acknowledges -- I mean, the
24 Commission acknowledges, that Louis Butler served as
25 a criminal defense lawyer assisting those accused,

1 guilty or innocent, in lessening or dropping charges
2 against them. And of course, if the charges are
3 dropped, people can get out of jail.

4 Now, they then in their replies to our
5 Responsive Statement of Facts in 6, 7 and 8, do not
6 dispute the truth of each one of these statements.
7 The only one that they really, I would say quibble
8 with, is what is a fair-to-the-layman statement
9 about what both the efforts of and the results of
10 the efforts of criminal defense lawyers is that
11 criminals are put on the street. This is not, this
12 is obviously not the way criminal defense lawyers
13 would like to be talked about, and I appreciate
14 that. I think it is a derogatory way of talking
15 about what criminal defense lawyers say. But it is
16 literally true. That in many instances, that it
17 literally happens. And that of course, the working
18 to, toward, is the working toward putting them on
19 the street. So it is a truthful statement about
20 what criminal defense lawyers do.

21 Now, the problem the Commission found is
22 that, as they say on Page 6, it falsely implied
23 something. In other words, they're not saying it
24 stated something here; it quote, falsely implied.
25 In fact, they say the key facts are omitted. So the

1 facts that they want to charge, punish Justice
2 Gableman for, are facts that they concede are
3 omitted in the advertisement. So it is not that
4 there is a false statement in the ad, but there is a
5 key fact that is omitted from the ad.

6 I mean, this is classic example, once you
7 recognize that these are of course true, a classic
8 example of what would fall under the second
9 sentence; and that is, you would have three or four
10 truthful statements that are misleading because of a
11 key fact that is omitted from the advertisement.

12 And they repeat on Page 10, a false statement about
13 an opponent because he, meaning Gableman, studiously
14 avoids saying it directly. Didn't say it. Didn't
15 say what the -- what they are charging him with,
16 which is this false statement of fact, that Louis
17 Butler in some way is responsible for the release
18 from prison of Mitchell and for Mitchell's
19 subsequent crime. That statement of fact is not in
20 the ad. There is no effort to attribute the finding
21 of the loophole to his release and subsequent
22 molestation of a child. There is no claim made that
23 that is the sequence of events or the result of the
24 finding of the loophole.

25 And so what they rely upon is the law of

1 defamation. Which, of course, this isn't, but it
2 may be analogous, where you have a quote, implied,
3 end of quote, defamatory fact. And it's just simply
4 not the way, number one, the State Supreme Court
5 fashioned this canon, to cast liability on those
6 things that are not said. And in fact, the court
7 expressly deals with that circumstance in the second
8 sentence. When something is not said, that whatever
9 is said is true, those things that are not said
10 result in the, in it being misleading.

11 And, you know, this discussion that we are
12 having here about what you should infer from this ad
13 is exactly the reason why the government shouldn't
14 be doing this.

15 JUDGE SNYDER: Counsel, I'm going to
16 interrupt you a minute. How are we doing time-wise?
17 I know you've reserved some of your time.

18 MR. BOPP: My 30 seconds -- minutes is up?
19 Could I do -- one more minute. Okay? I know, I
20 used up, that's fine, my rebuttal. I understand.

21 It is exactly the reason why our
22 discussion about the alternate ways that you could
23 infer or imply what this means, is exactly why the
24 government should not be entitled under the First
25 Amendment to punish one for saying it; and that is,

1 that it would chill speech. It would chill
2 political speech. It's not that people want to get
3 off of doing misleading statements; it's that people
4 are concerned that one person or commission or group
5 will read a statement one way, and they read it
6 another way. And when we are talking about
7 implications or relevant facts that aren't stated, I
8 mean, this is a fertile field for discussion. I
9 mean, how many times have you all dealt with motions
10 for summary judgment on whether or not a particular
11 fact is a material fact? Well, there's always a
12 debate on that, or nearly always a debate on what's
13 a material fact.

14 JUDGE FINE: Well, then we don't grant
15 summary judgment. Are you suggesting --

16 MR. BOPP: If you're convinced.

17 JUDGE FINE: Are you suggesting that we
18 make that recommendation here?

19 MR. BOPP: No. If you're convinced, if
20 you're convinced, and I'm only talking to this case.
21 I'm talking about the fact there are often disputes
22 about what are omitted and the probity of what is
23 omitted. And those are legitimate discussions. All
24 right. But the problem in the First Amendment area
25 for campaign speech is that that's the very kind of

1 discussion that leads people to be chilled from
2 speaking. And of course, what your Chief Justice
3 Abrahamson said in 1996 I think is pertinent to
4 this. In other words, it's not that they get off.
5 I think there was a big controversy about this ad.
6 And people were influenced, one way or another, to a
7 certain extent, on what, to the extent that they
8 viewed this as either being truthful or not
9 truthful, or misleading. And if they thought that
10 it was misleading, then they of course risked a
11 negative impact on the voters saying, well, I'm not
12 going to vote for somebody that is misleading. You
13 know. And so that is the proper forum. It is the
14 discussion and debate and questions that are raised
15 that the voters settle. Not the courts, not ex post
16 facto through a commission, but the voters decide
17 that, that issue.

18 Now, properly canonized, as the State
19 Supreme Court here has done, that is narrowly
20 crafted this misrepresentation clause, you know, it
21 meets all -- many of the requirements for the, for
22 constitutionality. There are, however, two, that if
23 this Court decides that, and ultimately, the
24 Wisconsin Supreme Court decides, that Justice
25 Gableman should be punished for this statement, then

1 the canon itself is drawn into question. And if so,
2 it would be unconstitutional, not only for failure
3 to apply the distinctions that I think are already
4 in here, but if you don't, if you don't apply them,
5 then we have an unconstitutional application. But
6 it would be unconstitutional for the two reasons:
7 one, that the truth or falsity of campaign speech is
8 left under the First Amendment to the people, to the
9 voters, not to the government to decide; and that
10 there is no -- and that the canon itself does not
11 require any proof of harm in order to impose
12 liability. In other words, you know, in normal
13 defamation, which is analogous, you do have a
14 defamatory statement. Some of those statements are
15 per se defamatory because damage is assumed. Others
16 you have to come in and prove your damages; in other
17 words, what is the harm that is caused. But here
18 you have absolute liability. If you make a false
19 statement of fact, then you are liable. And I don't
20 see how the government can impose liability and
21 sanctions where there's no harm. And of course, one
22 of the conundrums here is --

23 JUDGE SNYDER: Mr. Bopp, we're going to
24 have to move on. I presume you still want to
25 have whatever time --

1 MR. BOPP: Whatever time I have remaining,
2 sure.

3 JUDGE SNYDER: -- to respond. But we're
4 going to have to move on, give Mr. Alexander an
5 opportunity to respond to your comments.

6 MR. BOPP: I assume I still have time
7 left?

8 THE CLERK: Not much.

9 MR. BOPP: Okay. Good. Thank you.

10 MR. ALEXANDER: Thank you, Judge. I am
11 James Alexander, attorney for the Wisconsin Judicial
12 Commission. My address is 110 East Main Street,
13 Suite 700, Madison, Wisconsin, 53703.

14 We're here today because the statement of
15 fact in this advertisement is false. We're talking
16 about the statement that you see before you on that
17 poster. We're not talking about words that were
18 omitted, things that were not said. We're talking
19 about what this advertisement says. It's false, and
20 it was intended to be false, and it sent a false
21 message.

22 JUDGE SNYDER: Which exactly? Now you say
23 that the statement is false; which exact statements
24 are you referring to? Let's try to be more certain
25 and definite about the falsity and whether the

1 falsity refers to a statement or a fact.

2 MR. ALEXANDER: The statement of fact is
3 contained in the last four sentences: "Louis Butler
4 worked to put criminals on the street. Like Reuben
5 Lee Mitchell who raped an eleven year-old girl with
6 learning disabilities. Butler found a loophole.
7 Mitchell went on to molest another child."

8 The fact is that there was no loophole
9 that was found. Mitchell was never released of any
10 criminal responsibility in the case --

11 JUDGE SNYDER: Wasn't there a loophole
12 found? As I read *State v. Mitchell*, there was a
13 proper assertable defense concerning the rape shield
14 law that was presented to the Court of Appeals and
15 the Supreme Court, and in effect was, did benefit
16 Mr. Mitchell's defense. Whether you call it a
17 loophole or not is --

18 MR. ALEXANDER: I agree. Take the third
19 sentence, "Butler found a loophole," since we're
20 talking about it, and let's parse it like respondent
21 would like us to do. Standing alone, "Butler found
22 a loophole," is meaningless. Absolutely
23 meaningless. What is a loophole? Arguably, it's an
24 evidentiary fact that was wrongly admitted, as was
25 in the Mitchell case. But it's meaningless. A

1 loophole, to use Mr. Bopp's statement, what do
2 people, laymen on the street think a loophole is? A
3 tax loophole allows one to avoid taxes. I found a
4 loophole, I didn't pay taxes. In the criminal
5 justice setting, which this was, a loophole is a way
6 to allow a criminal defendant to avoid
7 responsibility for his or her actions. And that's
8 what, "Butler found a loophole."

9 When does the term, loophole, gather any
10 meaning whatsoever? Only in context. Because
11 language is understood in context. Okay. We look
12 at the third sentence, literally, in isolation, as
13 respondent would have you do, "Butler found a
14 loophole," is meaningless. But when you read it in
15 context, like Louis Butler worked to put criminals
16 on the street. That's what loopholes do. Like
17 Reuben Lee Mitchell. "Butler found a loophole," a
18 way for Mitchell to avoid responsibility. Mitchell
19 was put on the street. "Mitchell went on to molest
20 another child." Only in context does the term,
21 loophole, in that sentence have any meaning
22 whatsoever.

23 JUDGE SNYDER: But when you talk context,
24 you're not talking context about judicial
25 misconduct, which is the normal premise upon which

1 these type of hearings are held.

2 MR. ALEXANDER: Right.

3 JUDGE SNYDER: Here we're talking campaign
4 misconduct. And the meaning really isn't for us as
5 judges, or -- it's for the voters. This goes to the
6 voters. It's what it means to them that counts.
7 Wouldn't that be the case?

8 MR. ALEXANDER: That is the case.
9 Campaign speech is the most highly protected speech
10 under the Constitution. Absolutely. No question
11 about it. But not all campaign or political speech
12 is protected by the Constitution. Campaign speech
13 that is false and intentionally and purposely made
14 false is not protected by the First Amendment, and
15 hasn't been since 1964 when *New York Times v.*
16 *Sullivan* --

17 JUDGE FINE: Well, that didn't concern
18 campaign speech.

19 MR. ALEXANDER: It was political speech.

20 JUDGE FINE: Did not concern campaign
21 speech, sir.

22 MR. ALEXANDER: So yes. But not all
23 campaign speech is protected. For example, in the
24 *Chmura* case out of Michigan that Mr. Bopp referred
25 to earlier, and the *Butler* case out of Alabama, and

1 the *Weaver v. Bonner* case that we're on the 11th
2 Circuit, they say you can't have a code provision
3 that prohibits campaign speech that is misleading.
4 But you can have a prohibition on campaign speech
5 that is a misrepresentation, that's knowingly made,
6 or made with reckless disregard. As a matter of
7 fact --

8 JUDGE FINE: And who makes that
9 determination?

10 MR. ALEXANDER: Who makes that -- As to
11 what? I'm sorry, Judge Fine.

12 JUDGE FINE: As to whether the statement
13 is quote, false, as you've defined it in the last
14 three sentences?

15 MR. ALEXANDER: In this case this panel is
16 the finder of fact and makes conclusions of law.
17 This panel does.

18 JUDGE FINE: Is that consistent with the
19 First Amendment, that a determination as to whether
20 a statement is false or not depends upon the
21 collective judgment -- I won't use the word
22 wisdom -- the collective judgment of three persons
23 who are chosen somewhat at random?

24 MR. ALEXANDER: Does it? No. I think
25 what it does is say -- The code obviously,

1 provision is constitutional. They seem to have
2 omitted that this morning. The code provision says
3 what you can and shall prosecute are
4 misrepresentations that are knowingly made or made
5 with reckless disregard. That puts the ball, as it
6 were, in your court, as to determine whether this is
7 a misrepresentation, or, as Mr. Bopp claims, merely
8 misleading.

9 JUDGE FINE: So that relegates to a
10 government tribunal, no matter how constituted, to
11 make a determination as to whether something is
12 false or true in a campaign speech context.

13 MR. ALEXANDER: That is correct. Because
14 campaign speech that is -- constitutes a
15 misrepresentation and is knowingly made --

16 JUDGE FINE: No; but somebody has to make
17 that determination.

18 MR. ALEXANDER: Yes.

19 JUDGE FINE: All right. And Mr. Bopp
20 would say that it should be the public, that they
21 are the only tribunal that has the authority to
22 chastise or sanction, in both senses of the word,
23 campaign speech. While you would have it relegated
24 to a governmental agency.

25 MR. ALEXANDER: In the case of

1 intentional, purposeful misrepresentation-type cases
2 as this is, yes.

3 JUDGE FINE: No; but somebody has to make
4 a determination as to whether it is or not
5 intentionally misrepresented.

6 MR. ALEXANDER: Yes.

7 JUDGE DEININGER: And is that a question
8 of law or fact, whether these four sentences, taken
9 together and in context, constitute a misrepre-
10 sentation or is merely misleading? Is that decision
11 one of fact or one of law?

12 MR. ALEXANDER: It's a combination of fact
13 and law. And I don't think that, if it was -- this
14 was a jury case and we had a jury here, it would be
15 up to the jury to decide whether it was false. But
16 this panel is the finder of fact. And also the
17 panel that makes conclusions of law. And I think
18 it's mixed. I think obviously, and without any
19 question, the statement in context is a false
20 statement.

21 JUDGE SNYDER: Well, we're not a jury and
22 we can't do what a jury would do. We can only make
23 recommendations. But --

24 MR. ALEXANDER: But you can make findings
25 of fact.

1 JUDGE DEININGER: Well, let's focus on
2 that. And at one point in your brief you say
3 there's a sufficient issue as to material fact on
4 the subject of whether or not this is a violation of
5 the first sentence of the canon. If we were to have
6 further proceedings, what type of evidence or
7 testimony would be presented that we would have to
8 sort through to determine truth or falsehood here?

9 MR. ALEXANDER: I believe, Judge
10 Deininger, the portion of our brief you're referring
11 to was on the issue of intentionality. And I think
12 there is sufficient evidence on the issue of
13 intentionality that no further hearing is needed.

14 JUDGE DEININGER: Okay.

15 MR. ALEXANDER: As to whether this -- this
16 statement is the statement, is the advertisement.
17 That's the transcript of the advertisement. You
18 also have the video of the advertisement. I don't
19 think any further hearing on what the advertisement
20 is or the words used in the advertisement is
21 obviously necessary.

22 JUDGE DEININGER: So we can make that call
23 right now based on the language of the ad and the
24 arguments that we've heard?

25 MR. ALEXANDER: Yes.

1 JUDGE DEININGER: And if we would agree
2 with Mr. Bopp on that question, then there would be
3 no reason to delve into intentionality. Is that
4 true?

5 MR. ALEXANDER: That is correct.

6 JUDGE DEININGER: Okay. Go ahead.

7 JUDGE FINE: Where, in the
8 constitutionally permitted sense, is the line drawn
9 between falsity and spinning?

10 MR. ALEXANDER: I would say it's, it's
11 like respondent argues, that this is merely
12 misleading, it's spinning. But if it's a
13 misrepresentation, it's above and beyond spinning or
14 parsing. It's a lie. I mean, let's say what, it's
15 a lie. If it's a lie it's not spinning.

16 JUDGE FINE: What if a judge relates his
17 or her experience in terms of work ethic, that is
18 objectively not true. Is that spinning or is that
19 falseness?

20 MR. ALEXANDER: I would say basically,
21 what you're saying in the general terms, what you're
22 saying is probably spinning. Now, if a judge said,
23 I have decided 600 cases in the year and a half I've
24 been on the bench, and the judge decided five,
25 that's a misrepresentation.

1 JUDGE FINE: What if -- That would be a
2 false statement?

3 MR. ALEXANDER: Yes.

4 JUDGE FINE: What if the judge had decided
5 559?

6 MR. ALEXANDER: It's still a false
7 statement.

8 JUDGE FINE: 599?

9 MR. ALEXANDER: Yeah, it's still a false
10 statement.

11 JUDGE FINE: It would be a false
12 statement. Well, back in, I don't know, 2003 as I
13 recall, now Justice Roggensack was running for
14 election. And she said on the Tom Clark show, "No,
15 every case that I've had as an appellate judge where
16 there has been both a state and a federal
17 constitution claim, you will find, if you pull my
18 opinions up on the Web, and they are all there, that
19 I analyzed each one separate and independent."

20 Well, I looked at it, and I couldn't find
21 any. And I sent her an E-mail, and she responded
22 citing me one. Spinning? Or falseness?

23 MR. ALEXANDER: I would -- I don't know
24 the facts of that case, Judge Fine. If what she
25 said is not true, then it's obviously a false

1 statement, and it's not, it goes beyond spinning.

2 JUDGE FINE: And the First Amendment would
3 not protect it?

4 MR. ALEXANDER: The First Amendment would
5 not protect it. Because she was giving a false
6 statement about her own qualifications and her own
7 background.

8 The, as I was saying, the loophole
9 sentence has no meaning. If you take what
10 respondent is saying, he's asking you to ignore the
11 natural and ordinary meaning of language. Context
12 is important. Language is interpreted in context in
13 which it is used, not in isolation, but as part of a
14 whole. And when you read even the word, loophole,
15 as part of a whole, it becomes clear and unambiguous
16 what this ad says and what it was intended to say;
17 that is, that something that Louis Butler did
18 allowed Reuben Lee Mitchell back on the street where
19 he committed another crime, and what Butler did was
20 found a loophole.

21 JUDGE SNYDER: But again, aren't we
22 getting in, I know Mr. Bopp mentioned that really,
23 what we have here is not so much fact, but reaction
24 of the listener, reaction of the voter. It's not
25 what any government entity, whether it's judicial or

1 agency or executive or legislative, might think. We
2 have election laws. And we go out and we ask people
3 to vote for us. Isn't it their reaction to what's
4 being said, rather than what we think, that is
5 proper and good and acceptable, and under the First
6 Amendment and under our cherished and treasured
7 election voting rights laws?

8 MR. ALEXANDER: I would agree with you,
9 Judge Snyder. But that's not what this ad states.
10 This ad leaves the listener no room. This isn't --

11 JUDGE SNYDER: How do we know that? I
12 mean, how can I sit here and say that one of these
13 22,000 or more people that voted for Judge Gableman
14 did so because this ad left them no more room? I
15 mean, isn't that kind of a stretch?

16 MR. ALEXANDER: When I say no more room to
17 vote, I say no room in which to understand what
18 happened in this case any differently. There's no,
19 there's -- the ad is not capable of any other
20 reasonable interpretation when you look at it.

21 Now, that's the problem with the ad. The
22 ad doesn't leave itself up to the vagaries of
23 inferences from listeners. To the contrary: The
24 facts, the method of communication, what was
25 written, was all in the control of the respondent.

1 And the respondent clearly sent a false message that
2 Reuben Lee Mitchell was put on the street by Butler,
3 probably finding a loophole, and therefore Wisconsin
4 families cannot feel safe with him on the bench.
5 They wrap it up in a tiny (sic) bow and present it
6 to the listener. So it's the listener, or in this
7 case the viewer, that is at the mercy of the speaker
8 here.

9 JUDGE SNYDER: The voter is at the mercy
10 of the candidate, that's what you're --

11 MR. ALEXANDER: The candidate, in reading
12 and listening to and watching this advertisement.
13 That was the intent of the ad, to portray Louis
14 Butler as someone who put Reuben Lee Mitchell back
15 on the street, because that's what it says. Butler
16 worked to put criminals on the street, like Reuben
17 Lee Mitchell. Butler found a loophole. Mitchell
18 went on to molest another child. You can't feel
19 safe.

20 JUDGE FINE: In a related case that was
21 just argued before the United States Supreme
22 Court -- related in the sense that it concerns
23 campaign financing and not necessarily specific
24 words of speech -- Chief Justice Roberts asked one
25 of the lawyers whether that should be left to what

1 he phrased as the bureaucrats at the Federal
2 Elections Commission. I take it what you're saying
3 is that whether it is truth or false, whether it's
4 taken as a whole or taken separately, can be
5 determined by us bureaucrats sitting up here, or
6 people sitting in our stead or the Wisconsin Supreme
7 Court ultimately.

8 MR. ALEXANDER: Yes. And the reason is
9 because these types of false statements do such harm
10 to the institution and to society. And that's why
11 the Judicial Commission, whose duty is to protect
12 the integrity of Wisconsin's judicial system, as is
13 the Wisconsin Supreme Court's duty to protect the
14 integrity of the Wisconsin judicial system. That's
15 why we're bringing this case and putting it into the
16 hands of the courts, to protect the harm. The harm
17 is not private; the harm is societal. And to an
18 institution.

19 JUDGE FINE: And that requires a black
20 line assessment?

21 MR. ALEXANDER: A black line assessment?
22 Of what --

23 JUDGE FINE: Truth or false.

24 MR. ALEXANDER: Yes.

25 JUDGE FINE: And Mr. Bopp would say that

1 the black line has each of those statements true.
2 You say taken in context, the four statements read
3 as a whole are false.

4 MR. ALEXANDER: The four arguably true
5 statements are conflated into one false statement.

6 JUDGE DEININGER: Well, Mr. Alexander, Mr.
7 Bopp's argument was that the problem, if there is
8 one, with this language and what makes it misleading
9 is an omitted fact, the omitted fact being the
10 loophole that was found as being harmless error and
11 Mitchell was not released as a result. What about
12 that? Can -- Is that the problem here? And is a
13 significant omission like that tantamount to a
14 falsity, in your view?

15 MR. ALEXANDER: As I said, we're not
16 prosecuting the respondent for what is omitted from
17 this ad. We're prosecuting the respondent for what
18 this ad clearly states.

19 Now, the word, loophole, is important. He
20 didn't say Butler found an evidentiary issue. He
21 found a loophole. And none of this ad is accidental
22 or coincidental. This is cleverly thought out. The
23 word, loophole, is purposely used because of what it
24 connotes to people on the street. A loophole is a
25 way to avoid a responsibility.

1 JUDGE SNYDER: So you're saying that in
2 judicial campaigns the word, loophole, should not be
3 used.

4 MR. ALEXANDER: Of course it can be used.

5 JUDGE SNYDER: Well, how can we control
6 its use?

7 MR. ALEXANDER: Not in the context where
8 somebody did not avoid responsibility for their
9 action. This is no loophole. Mitchell didn't get
10 out.

11 JUDGE SNYDER: We're not talking about
12 context; we're talking about fact and we're talking
13 about misstatement or misrepresentation.

14 MR. ALEXANDER: Yes, it's a
15 misrepresentation.

16 JUDGE DEININGER: So the case turns on our
17 construction or on our conclusions as to what the
18 word, loophole, means?

19 MR. ALEXANDER: Part of it, yes. A large
20 part of it. What those four sentences say.
21 Statements and intended statement in those four --
22 pardon me?

23 JUDGE FINE: Conflated, using your word,
24 conflated into one statement.

25 MR. ALEXANDER: Yes. The four sentences

1 conflated into one false statement.

2 JUDGE FINE: So each individual word
3 cannot be looked at in a vacuum.

4 MR. ALEXANDER: That is correct. If you
5 parse this and look at each sentence with blinders
6 on, it's the proverbial missing the forest for the
7 trees. But it's just exactly as you said, Judge
8 Fine, the conflation of the four sentences into one
9 false statement..

10 JUDGE FINE: By the way, *Learned Hand* once
11 wrote that it was every taxpayer's duty to find
12 loopholes to avoid paying taxes.

13 MR. ALEXANDER: That is the issue in this
14 case. The code provision itself, apparently, is now
15 admitted to be constitutional. And I really don't
16 think there was any argument about that in the first
17 case.

18 Would a finding by this Court.--

19 JUDGE FINE: Well, I think Mr. Bopp, to be
20 fair, because he's going to use his seven and-a-half
21 seconds more wisely than -- I don't think he's
22 conceded that it's constitutional. I think he's
23 conceded that if it's interpreted the way he wants
24 it interpreted.

25 MR. ALEXANDER: It's constitutional. And

1 Mr. Bopp is capable of saying many wise things in
2 seven and-a-half seconds. Trust me on that.

3 A finding by this panel that this
4 advertisement is false is not a slippery slope. It
5 will not quell speech. It will not chill speech.
6 The code provision only prohibits speech in very
7 unusual circumstances such as this. Very unusual
8 circumstances. Only speech that is false, that is
9 intentionally made with the intended purpose of
10 being false. If, in campaigns, candidates for
11 judicial office avoid telling lies, there's no
12 chilling of speech. And judicial candidates telling
13 lies in judicial campaigns is something that greatly
14 and adversely affects the public's confidence in the
15 integrity of the judicial system.

16 JUDGE SNYDER: Mr. Alexander, who is, who
17 is really harmed or injured by this particular set
18 of circumstances, factual misrepresentation, who is
19 really harmed?

20 MR. ALEXANDER: The institution of the
21 courts. The institution of the courts.

22 JUDGE SNYDER: The institution of the
23 court?

24 MR. ALEXANDER: The institution of the
25 courts. The public's confidence in the integrity of

1 the Wisconsin judiciary. And we quoted from the
2 recent U.S. Supreme Court in *Caperton* about how
3 important a state interest in protecting the
4 integrity of its judicial system is.

5 JUDGE SNYDER: But we can, we can intrude
6 into the election process based upon our
7 determination that it is to protect the integrity of
8 the court. It's not the voters or the election
9 process or this, or the, or the court or the
10 judicial product that's harmed; it's the integrity
11 of our court system.

12 MR. ALEXANDER: That's correct. And to
13 society. Society relies upon a court system that
14 has integrity and probity in order to have
15 confidence in the decisions that the third branch of
16 government makes. The third branch of government
17 can't perform its duty in a democracy if the public
18 doesn't have confidence in its integrity.

19 JUDGE SNYDER: Is there a logical stopping
20 point then as to when we cannot intervene between
21 people running for office, judicial or otherwise,
22 and the voters who will elect them, based upon the
23 reason that it may be contrary to the integrity of
24 the court system?

25 MR. ALEXANDER: Sure. Judicial candidates

1 have the full panoply of First Amendment
2 constitutional rights. All of them. The only thing
3 that they can't do is lie. And as Garrison said,
4 lying is --

5 JUDGE SNYDER: Are you saying that we've
6 gone 240 years of campaigns, judicial and otherwise,
7 where people have been prohibited from lying?

8 MR. ALEXANDER: You can't --

9 JUDGE SNYDER: Or should be?

10 MR. ALEXANDER: You can't purposely and
11 intentionally make a misrepresentation in a judicial
12 campaign.

13 JUDGE FINE: Back in the early 1950's
14 George Smathers ran for the United States Senate
15 against then Senator Pepper who later became a
16 congressman. Smathers ran some ads or went around
17 speaking, I don't know whether it was radio ads or
18 he was just speaking, accusing Pepper of having a
19 sister who was a thespian in Greenwich Village,
20 t-h-e-s-p-i-a-n, and accused Pepper of practicing
21 celibacy before marriage. This was in Florida in
22 the early 1950's. Smathers won.

23 If those statements were made in the
24 context of a judicial campaign subject to Supreme
25 Court rule that we're discussing, 60.06(3), would

1 they be false statements, or would they be
2 misleading statements? Assuming his sister was an
3 actress. And assuming he did not have premarital
4 sex.

5 MR. ALEXANDER: Well, then the statement
6 would be true.

7 JUDGE FINE: And just misleading. Or
8 would it even be misleading?

9 MR. ALEXANDER: I don't know that it would
10 be misleading. People that didn't understand the
11 word, thespian, the definition of the word,
12 thespian, or what a thespian was, or somebody that
13 didn't understand what he was talking about, may
14 have misconstrued it. But his statement said words
15 that were, you know, she's an actress and practiced
16 celibacy.

17 JUDGE FINE: But isn't that what Mr. Bopp
18 says, the way we should look at those words there?

19 MR. ALEXANDER: No. Because this is
20 false. This is like saying that she was something
21 else and that she was not celibate when she was
22 married.

23 JUDGE FINE: No; it was Pepper who
24 practiced celibacy before he was married.

25 MR. ALEXANDER: Pepper, sorry. No. This

1 is an entirely different statement. This statement
2 is false.

3 JUDGE DEININGER: So you agree -- or I
4 should put it this way, do you agree with Mr. Bopp
5 that what our job in determining our recommendation
6 to the Supreme Court is confined to an objective
7 look at the words contained within the four corners
8 of the ad, and that we are not relying on the
9 impression or conclusions of the listener?

10 MR. ALEXANDER: Yes.

11 JUDGE DEININGER: And again, this gets
12 back to all four sentences, but in particular the
13 meaning of, loophole.

14 MR. ALEXANDER: Loophole is a very key
15 part of that --

16 JUDGE DEININGER: Analysis.

17 MR. ALEXANDER: -- analysis, because it
18 tells, it sends the message that it was the loophole
19 that put Mitchell back on the street. Which was
20 what was Butler made his living doing.

21 When we get to the issue of
22 intentionality, as Judge Deininger pointed out,
23 there's no question, there's no dispute that the
24 respondent was familiar with both Mitchell cases, he
25 knew their holdings, he knew the facts, and he knew

1 the evidentiary ruling that was in dispute in this
2 case. To go ahead with an ad that is so clearly and
3 unequivocally false about what happened in the
4 Mitchell case, in light of the respondent's reading
5 of the case, which on the first page twice says that
6 the Court of Appeals was reversed, is a strong,
7 strong indication of his intent to publish a false
8 statement of fact.

9 Also, I think you can see from the
10 statement of facts that were submitted that the
11 respondent personally viewed the ad, that he vetted
12 the ad, that he didn't agree to publish the ad for I
13 think it was a week, and then had some questions of
14 what he called the tone of the ad but allowed its
15 publication anyway. He was totally familiar with
16 the Mitchell cases, and he was totally familiar with
17 what the statement of fact in this ad was, and the
18 statement of fact was false. And also --

19 JUDGE FINE: In fact, Mr. Bopp indicated
20 during his presentation that the loophole wouldn't
21 have even had to have been in the Mitchell case in
22 order for the ad to be truthful.

23 MR. ALEXANDER: The, I'm sorry, Judge
24 Fine?

25 JUDGE FINE: Mr. Bopp indicated in his

1 presentation that the loophole that Butler found
2 could have been in an entirely different case and it
3 still would have been true.

4 MR. ALEXANDER: It would have still been a
5 true ad?

6 JUDGE FINE: Yes. That's what he said in
7 response to my question, if the loophole --

8 MR. ALEXANDER: Yes, that's --

9 JUDGE FINE: -- that Justice Butler had
10 found was in a disorderly conduct case arising out
11 of somebody yelling or screaming in a convenience
12 store, Mr. Bopp indicated that the ad still would be
13 true as phrased.

14 MR. ALEXANDER: That's what he said, yes.

15 JUDGE FINE: That's right.

16 MR. ALEXANDER: A totally unreasonable
17 interpretation. It's beyond unreasonable. It
18 borders on absurd because of what the ad says. When
19 the ad says "Louis Butler worked to put criminals on
20 the street" and immediately talks about the Reuben
21 Lee Mitchell case, and says that "Butler found a
22 loophole," in the context, giving language its
23 ordinary and plain meaning, that's the statement.
24 That what Butler did in that case was find a
25 loophole that allowed -- put Mitchell back on the

1 street. That's what the ad says. That's what it
2 was intended to say.

3 JUDGE DEININGER: Mr. Alexander, a bit
4 off-point because of the facts of this case, but
5 given your argument that you were going into on
6 intentionality, if a judicial candidate hires a
7 campaign manager and media staff and says run
8 whatever ads you want to, I don't want to see them,
9 does that insulate the candidate then from, I mean,
10 admitted falsehoods in ads ? If the candidate
11 himself or herself does not know prior?

12 MR. ALEXANDER: Unfortunately, yes. But
13 that's not what happened.

14 JUDGE DEININGER: That's not the facts of
15 this case. I understand.

16 MR. ALEXANDER: Also, the way the ad is
17 constructed, the four sentences, one after the
18 other, interrelation of them and the words, not only
19 goes to show the context of the false statement, but
20 to show the intentionality that it was false.
21 Ending with the tidy ribbon at the end, "Can
22 Wisconsin families feel safe with Louis Butler on
23 the Supreme Court?" Of course they can't feel safe
24 with Louis Butler on the Supreme Court, given his
25 conduct in the *Reuben Lee Mitchell* case. So the

1 intentionality is there, the facts are there.

2 JUDGE FINE: Would the advertisement be
3 false in your view if the sentence that says
4 "Mitchell went on to molest another child" was
5 removed? So the segue way from "Butler found a
6 loophole," can Wisconsin families be safe -- feel
7 safe.

8 MR. ALEXANDER: Would the statement be
9 true if --

10 JUDGE FINE: Would you contend that the
11 statement was false if the "Mitchell went on to
12 molest another child" were removed? That is, you
13 just had Mitchell raped an 11-year-old girl, he
14 found a loophole, can Wisconsin families feel safe.

15 MR. ALEXANDER: Well, our contention is
16 the context is the four statements. You take the
17 four --

18 JUDGE FINE: No, I understand.

19 MR. ALEXANDER: It's a tougher case if you
20 take the fourth statement out.

21 JUDGE FINE: It's a tougher case; but what
22 would be your position? That's why I asked it,
23 because it's a tougher case.

24 MR. ALEXANDER: I would say that in
25 reading that, it would -- those three sentences

1 would not constitute a false statement.

2 JUDGE FINE: Okay. So the crux of the
3 falseness is --

4 MR. ALEXANDER: The four sentences.

5 JUDGE FINE: -- the four sentences, but
6 conflating the four sentences. But the crux of the
7 falseness is the third sentence in it, because
8 without that keystone, so to speak, the conflation
9 fails, your conflation argument fails.

10 MR. ALEXANDER: Yes. But the fact is that
11 the four sentences were stated and it's there.

12 JUDGE FINE: No, I understand. I'm just
13 trying to gauge the extent to which you view this
14 and what your analysis is.

15 MR. ALEXANDER: Yes. Yes.

16 JUDGE FINE: So the fourth statement is
17 the -- that "Mitchell went on" is the keystone, and
18 as the four sentences sit there today it's an arch
19 that you see conflated into a false statement.

20 MR. ALEXANDER: Yes.

21 JUDGE SNYDER: Mr. Alexander, as I read
22 the preamble to Supreme Court Rule 60, it says that
23 the rules should not be present or should not be
24 applied to create a trap for the unwary. It occurs
25 to me that down the road, based upon this type of an

1 exercise that we're going through here, someone
2 might suggest that perhaps judicial candidates have
3 all their advertisements and matters they wish to
4 present to the voters cleared by the Judicial
5 Commission or some other government agency. Why
6 isn't that a logical further development of this
7 type of concern?

8 MR. ALEXANDER: I go back, Judge Snyder,
9 to this being a most unusual case, and that the code
10 provision only prohibiting the most unusual types of
11 cases. There should be no fear by judicial
12 candidates of misunderstanding of words that they
13 use if they're true and not misrepresentations and
14 are not understood exactly as they are intended to
15 be. This ad --

16 JUDGE FINE: But if your, if your
17 concession that "Mitchell went on to molest another
18 child" is the keystone of your arch of conflation,
19 isn't Judge Snyder's concern legitimate? If "Butler
20 found a loophole. Can Wisconsin families feel safe"
21 is okay. But "Butler found a loophole," and then
22 the truth, the truthful statement, "Mitchell went on
23 to molest another child" is put in there, it's not
24 okay, isn't it, doesn't that indicate that there's
25 some tension between the First Amendment's

1 protection against chilling campaign speech if a
2 candidate has to say, gee, can I add that truthful
3 statement? Or must I take that truthful statement
4 out, on fear that somebody later on will look at it
5 as the keystone of the conflation arch?

6 MR. ALEXANDER: No. I, this advertisement
7 is easy. Because they looked at it and say, that's
8 not what happened. That's a false statement.

9 JUDGE FINE: What's not what happened?

10 MR. ALEXANDER: In the *Reuben Lee Mitchell*
11 case, what they stated happened didn't happen.
12 Butler didn't do anything that put Mitchell back
13 onto the street.

14 JUDGE FINE: Well --

15 MR. ALEXANDER: And when they're looking
16 at the ad and the ad, well, and, you know, the
17 respondent looked at the ad and he didn't like its
18 tone. And when somebody is looking at an ad like
19 this, the immediate reaction should say no, that's
20 not what happened. How is that chilling?

21 JUDGE FINE: Butler found a loophole,
22 which everybody here concedes that he did, and later
23 on Mitchell went on to rape somebody else. Right?

24 MR. ALEXANDER: Let's, let's make sure we
25 understand what the Commission means when it says

1 that everybody agrees that Butler found a loophole.

2 As I said, "Butler found a loophole," parsed and
3 looked at as an individual sentence, has no meaning.
4 But when you put it in the context of the other four
5 sentences, it blooms into a meaning that Butler
6 found a loophole that got Mitchell off. Which
7 didn't happen. You see. And so somebody looking at
8 this ad, say well, Butler didn't find a loophole
9 that got Mitchell off, we can't put that out,
10 because that would be a false statement. And that's
11 not chilling speech at all.

12 JUDGE FINE: Well, what you're saying is
13 the words, found a loophole that got Mitchell off,
14 are so clear from the conflation of the four
15 sentences, that it's as if they were there in actual
16 type.

17 MR. ALEXANDER: Yes.

18 JUDGE FINE: That doesn't create any First
19 Amendment problems for you?

20 MR. ALEXANDER: Because it's a
21 misrepresentation falsely made, which is not
22 protected by the First Amendment of the
23 Constitution.

24 JUDGE FINE: I mean, that kind of parsing
25 analysis doesn't create any First Amendment problems

1 that you see?

2 MR. ALEXANDER: No. Because this case is
3 outside that. This is a different case, different
4 than the *Wisconsin Right to Life*, or *Buckley vs.*
5 *Valeo*. This is a different type of case. As I say,
6 the advertisement containing the false statement has
7 really a severe effect upon the public's confidence
8 in the integrity of Wisconsin's judiciary. And is
9 not allowed by the Code of Judicial Conduct. The
10 code as written is constitutional. And this conduct
11 violates that code.

12 So unless you have any further questions,
13 I --

14 JUDGE FINE: What kind of a recommendation
15 are you seeking?

16 MR. ALEXANDER: The Commission has not
17 discussed a recommendation. And I, so obviously,
18 I'm not authorized to make it.

19 JUDGE SNYDER: Mr. Alexander, let's say
20 Justice Gableman runs again ten years from now, and
21 let's say that somebody runs against him and he puts
22 out an ad that says, Justice Gableman was publicly
23 accused of misusing his phone as a judge, as a
24 sitting judge, back before he became or when he
25 became a justice; further, Justice Gableman had to

1 respond to a complaint by the Judicial Commission
2 concerning an advertisement he put up during the
3 campaign, and ends up with something like, Can
4 Wisconsin families feel safe, secure with Justice
5 Gableman continuing as a, as a justice when he's
6 been challenged twice by the Judicial Commission?
7 Isn't that kind of the same circumstance we have
8 here?

9 MR. ALEXANDER: No, not at all. Because
10 it's not an intentionally false statement.

11 JUDGE SNYDER: I mean, you can draw
12 conclusions that may not be appropriate.

13 MR. ALEXANDER: Well, from those
14 statements, yes, you can infer. But that's not what
15 the ad, that's not what those ads said.

16 JUDGE DEININGER: Mr. Alexander, if we
17 agree with the Commission's position here that there
18 has been a violation of the canon and there are no
19 constitutional difficulties with us so concluding,
20 do you wish then to have further argument on the
21 question of recommendations? Or would you be
22 looking to submit that? Or we'll cross that bridge
23 when we come to it?

24 MR. ALEXANDER: I would suggest that some
25 sort of further proceedings would be necessary, if

1 the panel wanted to hear the Commission's
2 recommendation and the respondent's recommendations.
3 So I would think further proceedings would be
4 necessary in that regard. Whether it's written or
5 have a hearing like this, I would leave up to the
6 discretion of the panel.

7 JUDGE FINE: Do you see summary judgment
8 as resolving all issues that are on the table at
9 this point? One way or the other?

10 MR. ALEXANDER: I do. Yes, I do. I think
11 that this panel has enough information so it's
12 capable of making a decision one way or the other.
13 Thank you.

14 JUDGE SNYDER: Still have a couple
15 minutes. Thank you. Any further questions?

16 JUDGE FINE: He'll probably save them for
17 Mr. Bopp.

18 JUDGE SNYDER: Thank you. Counsel, you
19 have some time left. Please be concise and to the
20 point concerning any responses to Mr. Alexander.

21 MR. BOPP: Sure. Thank you very much,
22 your Honor.

23 The Commission has conceded that if, if
24 this statement is true, "found a loophole," then
25 their conflation argument fails. Well, the

1 Commission has conceded that --

2 JUDGE FINE: No, I don't think they have
3 conceded that.

4 MR. BOPP: They did concede it.

5 JUDGE FINE: No, No. I didn't hear it and
6 --

7 JUDGE DEININGER: Well, they conceded that
8 that statement is true, but they're not conceding
9 that if that individual statement taken in isolation
10 is true, then the entire ad is true. They're making
11 exactly the opposite statement.

12 MR. BOPP: Yes. And what I understood
13 them to say, and you have to consult the transcript,
14 I understand, but --

15 JUDGE FINE: No, no, no.

16 MR. BOPP: I could be wrong in my --

17 JUDGE FINE: No, no. I agree with Judge
18 Deininger, that's what I meant in a shorthand way.

19 MR. BOPP: Okay. Well, they have admitted
20 that the statement is true in the Statement of
21 Facts. They were asked -- that we made our
22 Statement of Facts on number -- paragraph seven,
23 that Butler found a loophole in Reuben Lee
24 Mitchell's case is true, the Commission's response
25 does not dispute it. They've already done that. So

1 whatever this means, if it means that Mitchell got
2 out of jail, they have admitted that it's true.

3 Now, you know, obviously that's not true
4 that Mitchell got out of jail as a result of the
5 loophole. And in fact, when you asked what
6 statement here do we need to look to to find a false
7 statement? The Commission said, well, you need to
8 look at, Butler worked to put criminals on the
9 street, Mitchell raped a girl, Butler found a
10 loophole, and Mitchell, you know, got out of jail,
11 and Mitchell went on to molest another child. In
12 other words, he said these words. I mean, these are
13 the words that he is pointing to as being false,
14 that he says are here; but he has to add them.

15 And after all, there's no one meaning of
16 the word, loophole, that means that you always get
17 out of jail. Nobody believes that when a criminal
18 defense lawyer finds a loophole, it means inexorably
19 that you get out of jail. So you can't say that
20 this word -- these words, which they say are true,
21 mean this. Because he would never even had to say
22 this. It would have been inherent in the meaning of
23 this word.

24 Well, I suggest -- I haven't done it, but
25 I suggest we look it up, look up the word and see if

1 it says that therefore, the criminal always gets out
2 of jail.

3 Now, he also said that, Well, we are not
4 going after Justice Gableman because of an omitted
5 fact. There it is. He said it. The omitted fact.
6 And he says on Page 12 of the Commission's motion
7 for summary judgment, "Respondent had to know from
8 his understanding of the Mitchell case that key
9 facts were omitted in the advertisement." He says
10 that it's omitted facts. They go on on Page 10 to
11 say, "conveys a false fact about an opponent because
12 he studiously avoids saying it directly." In other
13 words, again, doesn't say it. Doesn't say the false
14 fact, that in reading this, in answer to the Court's
15 question, he has to state that he got out of jail as
16 a result of the finding of the loophole.

17 Now, of course, the other, the reason we
18 keep going back to --

19 JUDGE FINE: If finding a loophole doesn't
20 mean that you get out on the street, what would it
21 mean? What would it mean other than the short
22 answer?

23 MR. BOPP: Well, it could be, it could
24 mean you're retried. I mean, many cases people are
25 retried. They stay in jail, they're retried, and

1 they're a lot of times reconvicted. So, you know.
2 And of course, even in this case the Supreme Court
3 said that even though there was a quote, loophole,
4 there was a problem, that he wasn't released from
5 jail because of it. Despite what the Court of
6 Appeals wanted to do and of course what Butler
7 wanted to happen. Okay. So, you know, those things
8 happened. And so the result is it may or may not be
9 that you get out of jail.

10 Now, we keep going back to the, this
11 statement's truth or falsity, because that's what
12 the canon says. The canon says, with reckless
13 disregard for the statement's truth or falsity,
14 misrepresents the identity, qualifications, present
15 position, or other fact concerning the candidate.
16 The misrepresentation is -- points you to what facts
17 are pertinent, that you can be charged with having
18 misrepresented through a statement, the statement's
19 truth or falsity. So it all begins and ends with
20 the statement's truth or falsity. That's the way
21 the Wisconsin Supreme Court wrote it. They didn't
22 use the word alone, misrepresents, as a stand-
23 alone, as a standalone. They wanted to focus, and I
24 think quite correctly, because of the constitutional
25 issues involved, on the statement's truth or

1 falsity. Not the omitted statement's truth or
2 falsity, but the statement's truth or falsity.

3 And of course, the final point I would
4 make about the public interest, the Supreme Court in
5 a fascinating case called *Bridges vs. California* in
6 1941 addressed the Commission's final point, and
7 that will be my -- this will be my final point; and
8 that is, whether or not enforced silence stifling
9 criticism of the judiciary is necessary to preserve
10 the integrity of the judiciary. And the court said,
11 the U.S. Supreme Court said the exact opposite; and
12 that is, that enforced silence about the judiciary
13 creates resentment, suspicion, and contempt, more
14 than it would enhance respect of the judiciary. The
15 judiciary can stand a truthful discussion of the
16 matters at issue regarding a campaign. They can
17 stand that. And enforced silence will simply breed
18 contempt. And that's why the, this canon is written
19 so narrowly. They could have written it, and I
20 think unconstitutionally, but they could have
21 written it to deal with omitted facts or misleading
22 statements. But they didn't. But because the
23 Supreme Court recognizes that this has to be very
24 narrow, only in the most exigent circumstances is
25 the government -- and even that's controversial --

1 can the government intervene in a political campaign
2 to punish somebody for campaign speech. This ad, if
3 anything, and we don't think it falls anywhere, if
4 anything, is a -- would be a quintessential example
5 of what falls within the second sentence, not the
6 first. Thank you.

7 JUDGE SNYDER: Thank you.

8 JUDGE FINE: One quick question in
9 follow-up to my question to Mr. Alexander. Do you
10 agree with Mr. Alexander that the issues that we
11 have on the table at the current time can be
12 resolved on summary judgment?

13 MR. BOPP: I do. Thank you.

14 JUDGE SNYDER: Thank you, gentlemen.
15 Appreciate it.

16 (Proceedings concluded, 11:35 a.m.)
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1 STATE OF WISCONSIN)

2) SS:

3 COUNTY OF WAUKESHA)

4
5 I, SUSAN M. DeMENT, do hereby certify
6 that I am a stenographic reporter; that I was
7 present at the proceedings held in the
8 above-entitled matter, and that I recorded the same
9 in Stenotype; that the foregoing transcript is a
10 true and complete copy, in typewritten form, of my
11 Stenotype notes taken at said hearing.

12
13 Dated September 21, 2009.

14
15 Susan M. DeMent
16 Susan M. DeMent
17 Registered Professional Reporter
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1 COURT OF APPEALS
2 DISTRICT 3
3 WAUKESHA, WISCONSIN
4 =====

5 JUDICIAL COMMISSION
6 -vs-
7 JUSTICE MICHAEL GABLEMAN
8 =====

9
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11 Transcript of Wisconsin Eye Audio Recording
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13 Press Conference
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15 Waukesha, Wisconsin
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17 September 16, 2009
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Transcribed by: Anna Jacobs, RPR

PRESS CONFERENCE AUDIO RECORDING 9/16/09

1 REPORTER: Mr. Bopp, a couple of

2 quick questions for you?

3 MR. BOPP: Sure.

4 REPORTER: All right. Let me ask

5 you, first of all, the contention from

6 Mr. Alexander that it really hinges on that

7 final statement that Mitchell went on to repeat

8 again, without the argument that, using the

9 word "loophole," implies that he was set free

10 because of Justice Butler in some way, what

11 does that final statement have to do with

12 Louis's defense?

13 MR. BOPP: Well, it's the type of

14 person that he was willing to represent and

15 the type of person that he was willing to

16 find a loophole for. It had all --

17 everything to do with Justice Butler's

18 judgment, that he was willing to find a

19 loophole to let such a heinous -- or to

20 release such a heinous criminal from

21 responsibility for the crime, whatever that

22 meant in terms of finding a loophole.

23 Justice Butler at the time, as criminal

Press Conference Transcript of Proceedings

24 defense lawyer, was urging that Mitchell
25 got -- be released. And, in fact, the Court

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PRESS CONFERENCE AUDIO RECORDING 9/16/09

1 of Appeals ordered him to be released based
2 upon this loophole. And -- and so it has to
3 do with his judgment and his willingness to
4 subvert the criminal -- our system of
5 criminal -- bringing criminals into account.
6 That's what it has to do with.

7 REPORTER: I know one judge passed
8 another example that in a future campaign,
9 there was an ad that talked about Justice
10 Gableman being accused of misusing his phone,
11 of Justice Gableman being brought before the
12 State Judicial Commission, Justice Gableman
13 isn't right for families. Would that be
14 permissible in your mind?

15 MR. BOPP: Yes. That would be
16 misleading, you know, because -- I assume by
17 that point, he -- Justice Gableman will be
18 vindicated by the -- from these charges,
19 but -- and it would be misleading. But after
20 all, I didn't write the statute. I didn't

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21 make the distinction between false statements
22 of facts and misleading. The Wisconsin
23 Supreme Court did. There's two sentences to
24 this canon. The only one that holds
25 candidates into account is for false

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1 statements that misrepresent certain things
2 like the qualifications or identity of the
3 opponent or the candidate.
4 They have a second sentence that
5 says, well, if your statement is misleading
6 so that people get the wrong impression about
7 things that aren't said, but we're not going
8 to do anything about that. I mean, that's a
9 decision of the Wisconsin Supreme Court.
10 Now, I think they're right in that decision,
11 is that we cannot -- you know, we cannot have a
12 situation like we have here where they are
13 bringing charges based upon their reading of
14 what the statement says and claiming that
15 it's misleading because a relevant fact was
16 not stated.

17 I mean, are we going to have all
18 candidates be subject to this sort of

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19 tribunal? How much money are you going to
20 have to have to run for public office in
21 Wisconsin if you're going to have to fight
22 these charges after your -- after your --
23 either win or lose?

24 REPORTER: You were arguing the
25 difference between misleading and

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1 misrepresentation. Was this ad
2 misleading?

3 MR. BOPP: I don't think it was
4 misleading at all. It -- because the focus
5 of the ad was on Justice -- was then
6 Mr. Butler's willingness to find a loophole
7 for such a heinous criminal.

8 REPORTER: You also --

9 MR. BOPP: And I had to do with
10 his judgment and how -- and how he is willing
11 to conduct himself. I mean, Mitchell raped
12 an 11-year-old girl with learning
13 disabilities. He didn't have to take that --
14 represent that criminal. He could have
15 walked. I mean, don't you have standards?

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16 REPORTER: But it was about -- it
17 It was about that fact, why include the
18 statement that Mitchell raped again?

19 MR. BOPP: Because --

20 REPORTER: Isn't it about his judgment
21 relative to Mitchell's first rape of the
22 special needs child that you're questioning?
23 Why the additional statement?

24 MR. BOPP: Because it shows what a
25 truly heinous criminal Mitchell was, that

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1 after having been in jail, been convicted and
2 in jail for having raped one girl, he would
3 be willing to go out and rape another girl.
4 This is somebody that is recalcitrant, that
5 is not going to rehabilitated. It shows what
6 a terrible person he truly is.

7 REPORTER: You argued that each of
8 the individual sentences should be locked at
9 on its own merit in terms of its
10 truthfulness. Mr. Alexander said, "You need
11 to look at all four together, and together
12 they are not true" Do you believe --

13 MR. BOPP: That's not what he said.

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14 He said that you had to add an amended fact.
 15 He had -- he said that the way you have to
 16 look at this paragraph is that you have to
 17 pretend that the paragraph said that a result
 18 of -- as a result of finding a loophole,
 19 Mitchell got out of jail. That's what he
 20 told the Court. And that is a -- that is
 21 a -- it would be a statement that was not
 22 made. So they want to punish Justice
 23 Gableman for a statement he didn't make and
 24 whose every single statement that he did make
 25 was true.

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1 REPORTER: Mr. Bopp, did you get a
 2 feeling from the judges from their questions
 3 as to their -- as to their interpretation of
 4 all this? What's your sense of their
 5 feelings?
 6 MR. BOPP: I look forward to
 7 reading their opinion. You know, they
 8 obviously were very well prepared. And their
 9 questions were very thoughtful and very --
 10 and went right to the central issues of the

11 case. So we had a -- I think a panel that
 12 did a fine job, and I look forward to their
 13 decision on this.
 14 REPORTER: Can I ask why you took
 15 this case? The suggestion might be that
 16 Butler was doing his job -- Gableman ran his
 17 ad to apply for a new job.
 18 MR. BOPP: I'm sorry?
 19 REPORTER: So why did you take this
 20 case?
 21 MR. BOPP: Why did I take what
 22 case?
 23 REPORTER: The Gableman case.
 24 MR. BOPP: Because he is being
 25 wrongly accused, and his first amendment

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1 rights are being violated wrongly. And this
 2 is what I do all over the United States.
 3 I represent organizations,
 4 candidates, political parties, packs, because
 5 the government -- because, you know, the
 6 government is apt to -- to try to undermine
 7 political campaigns through government
 8 action, and this is an example.

9 REPORTER: But --
 10 MR. BOPP: Because who --
 11 REPORTER: Butler suggested that he
 12 was just doing his job so --
 13 MR. BOPP: What led -- well,
 14 Butler hasn't been charged with anything. He
 15 is not spending tens of thousands of dollars
 16 to -- for attorneys to defend him for these
 17 charges.
 18 I mean, how many people do you all
 19 expect to run for public office in Wisconsin?
 20 If they have got to have a hundred thousand
 21 dollars sitting in their bank account to
 22 defend the charges from the government that
 23 you quote, misled, end of quote, someone
 24 during your campaign? I mean, these are
 25 common charges, you know, omitted facts

1 that -- people always argue about omitted
 2 facts. Well -- well, to me, fact X is
 3 important. And you omitted it, so you
 4 misled. And it's one thing to debate that,
 5 which this was debated, hotly debated, as I

6 understand, among the media, various
 7 organizations, the voters. It was a subject
 8 of ads in response to this ad. So it was
 9 hotly debated, and the voters got to decide
 10 whether or not it made any difference to
 11 them.
 12 But it's a whole horse of a different
 13 color, isn't it, to have to have a hundred
 14 thousand dollars to defend yourself from the
 15 government that's going to hold you into
 16 account? I mean, this is -- you know, it's
 17 nice to be wealthy, but I guess only the
 18 wealthy can be public officials and run for
 19 office here in Wisconsin.
 20 REPORTER: You suggested that the
 21 ad questions the character of Louis Butler.
 22 That --
 23 MR. BOPP: What he is willing to
 24 do, yes; what he is willing to do.
 25 REPORTER: Is it -- was it the

1 suggestion of the ad, in your estimation,
 2 that no defense attorney should have taken
 3 that case?

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4 MR. BOPP: No. No. It doesn't say
5 that.
6 REPORTER: The defense attorney
7 doing his job taking the case should be held
8 accountable for the decision to take that
9 case?
10 MR. BOPP: I think a lawyer using
11 his talents should be expected -- his expected
12 to be held accountable in what decisions he
13 makes. And -- and, you know, Justice Butler
14 could defend representing Mitchell, which I'm
15 sure he did at the time. You know, every
16 scumbag criminal is entitled to legal
17 defense.
18 And, you know, my job is to look for
19 loopholes. And I don't care how heinous the
20 person -- you know, the crime is, but I'm
21 going to look for loopholes. And well, I
22 mean, that's his position. He can continue
23 to be a criminal defense lawyer, but the
24 people now have to make the decision whether
25 or not they want him as a judge, if that's

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1 the way he's going to conduct himself. He
2 didn't have to run for -- to be judge.
3 REPORTER: All right. Thanks for
4 your time. Thanks. We appreciate it.
5 (End of recording)
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1 STATE OF WISCONSIN)

2) ss.

3 COUNTY OF DANE)

4 I, ANNE JACOBS, a Registered Professional

5 Reporter and Notary Public in and for the State of

6 Wisconsin, do hereby certify that I have carefully

7 compared the foregoing pages with my stenographic

8 notes, and that the same is a true and correct

9 transcript.

10 Dated at Madison, Wisconsin, this 22nd day of

11 September, 2009.

12

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Registered Professional Reporter,

Notary Public, State of Wisconsin

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