No. 2008AP2458-J

STATE OF WISCONSIN **IN THE SUPREME COURT**

IN THE MATTER OF JUDICIAL DISCIPLINARY PROCEEDINGS AGAINST THE HONORABLE MICHAEL J. GABLEMAN:

WISCONSIN JUDICIAL COMMISSION,
Complainant,

v.

THE HONORABLE MICHAEL J. GABLEMAN,
Respondent.

JUDICIAL CONDUCT PANEL'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

HARRY G. SNYDER
Presiding Judge, Judicial Conduct Panel

RALPH ADAM FINE
Judge, Judicial Conduct Panel

DAVID D. DEININGER
Reserve Judge, Judicial Conduct Panel

INTRODUCTION

On October 7, 2008, the Judicial Commission filed with the supreme court a complaint against the Honorable Michael J. Gableman, asserting that it had "found probable cause to believe that Judge Gableman willfully violated SCR 60.06(3)(c)" of the Wisconsin Code of Judicial Conduct, and thereby had engaged in judicial misconduct as defined by WIS. STAT. § 757.81(4)(a).[1] The Commission's complaint arose from an advertisement released by then-Judge Gableman during the April 2008 election for the supreme court in which he was running against the incumbent justice, the Honorable Louis Butler. Justice Gableman won the election.[2]

The Judicial Commission is an agency created by WIS. STAT. § 757.83. The Commission is charged with the responsibility of investigating allegations of judicial misconduct by members of the Wisconsin judiciary. *See* WIS. STAT. § 757.85(1)(a) ("The commission shall investigate any possible misconduct or permanent disability of a judge or circuit or supplemental court commissioner. Misconduct constitutes cause under article VII, section 11, of the constitution."). Article VII, section 11, of the Wisconsin Constitution provides:

> Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. No justice or judge removed for cause shall be eligible for reappointment or temporary service. This section is alternative to, and cumulative with, the

[1] Under WIS. STAT. § 757.81(4)(a), judicial misconduct includes the "willful violation of a rule of the code of judicial ethics." All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Justice Gableman assumed his duties on the Wisconsin Supreme Court on August 1, 2008. The actions that are the subject of the Commission's complaint against him took place while he was a circuit court judge for Burnett County.

> methods of removal provided in sections 1 and 13 of this article and section 12 of article XIII.[3]

On October 10, 2008, the supreme court referred this matter to the Chief Judge of the Court of Appeals for the appointment of a Judicial Conduct Panel pursuant to WIS. STAT. § 757.87(3) ("A judicial conduct and permanent disability panel shall consist of either 3 court of appeals judges or 2 court of appeals judges and one reserve judge. Each judge may be selected from any court of appeals district including the potential selection of all judges from the same district. The chief judge of the court of appeals shall select the judges and designate which shall be the presiding judge.").

On October 28, 2008, pursuant to WIS. STAT. § 757.87(3), the Honorable Richard S. Brown, Chief Judge of the Court of Appeals, appointed the Honorable Harry G. Snyder, Judge of District 2, Court of Appeals; the Honorable Ralph Adam Fine, Judge of District 1, Court of Appeals; and the Honorable David G. Deininger, Reserve Judge, to serve as members of the Judicial Conduct Panel to hear the Commission's allegations against Justice Gableman. Judge Snyder was appointed presiding judge of the panel.

Now pending before the panel is Justice Gableman's motion for summary judgment. For the reasons set forth below, the panel recommends that

[3] Article VII, section 1 of the Wisconsin Constitution provides for the impeachment by the Wisconsin Assembly of "all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors." The Wisconsin Senate is designated as "[t]he court for the trial of impeachments." Article VII, section 13 of the Wisconsin Constitution provides that "[a]ny justice or judge may be removed from office by address of both houses of the legislature." Article XIII, section 12 of the Wisconsin Constitution establishes the procedure for recall of "any incumbent elective officer."

the supreme court grant summary judgment in favor of Justice Gableman and dismiss the complaint.[4]

PROCEDURAL BACKGROUND

On November 19, 2008, Justice Gableman filed an answer, affirmative defenses, and counterclaims.[5] On December 8, 2008, the Commission moved to dismiss Justice Gableman's counterclaims. After Justice Gableman filed a response in which he agreed to the dismissal of the counterclaims without prejudice, the panel dismissed the counterclaims without prejudice in a January 13, 2009, order.

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[4] Citing to ***In re Judicial Disciplinary Proceedings against Breitenbach***, 167 Wis. 2d 102, 482 N.W.2d 52 (1992), the Judicial Commission initially "suggest[ed]" that summary judgment was not available to Justice Gableman in a judicial disciplinary context. At oral argument, however, the Commission's attorney conceded that summary judgment was available so long as this panel made its determination in the form of a recommendation to the supreme court. The rules of civil procedure are applicable to judicial disciplinary proceedings "insofar as practicable." WIS. STAT. § 757.85(7). In ***Breitenbach***, the supreme court held that WIS. STAT. § 805.04(1), which permits a plaintiff to dismiss an action upon stipulation of the parties without a court order, did not apply to judicial disciplinary proceedings. ***Breitenbach***, 167 Wis. 2d at 107, 116-120. The supreme court in ***Breitenbach*** wrote that the application of § 805.04(1) to a judicial disciplinary proceeding "would in effect usurp [the supreme court's] constitutional authority and responsibility for the imposition of judicial discipline" and, for that reason, application of § 805.04(1) was not practicable. ***Id.*** at 117.

Motions for summary judgment under WIS. STAT. § 802.08, on the other hand, would have no adverse effect on the supreme court's constitutional authority and responsibility for imposing judicial discipline. Where the material facts are undisputed so that only questions of law are presented, a motion for summary judgment is available to the parties to a judicial disciplinary proceeding. The judicial conduct panel, of course, cannot grant or deny summary judgment. Rather, this panel may make its recommendation as to whether the motion for summary judgment should be granted to the supreme court, which retains the ultimate authority to grant or deny the motion. *See* ***id.*** at 119 (a stipulation may be filed in a judicial disciplinary proceeding so long as the judicial conduct panel makes a recommendation to the supreme court).

[5] Justice Gableman's local counsel, Attorney Eric M. McLeod, filed a motion to admit, *pro hac vice*, Attorneys James Bopp, Jr., and Anita Y. Woudenberg, who are licensed to practice law in Indiana. The motion was granted on November 20, 2008.

In the January 13, 2009, order, the panel also directed the parties to address two matters: (1) what, if any, historical facts were in dispute that would require an evidentiary hearing; and (2) the venue for further proceedings.[6] On January 26, 2009, the parties filed a joint response in which they agreed that venue for any hearing could be in Waukesha county. The parties also suggested that the parties file proposed statements of fact indicating what facts they believed were material to the disposition of the matter and whether they believed those facts were in dispute.

The panel accepted the parties' proposal. On February 27, 2009, the Commission filed its statement of facts; on April 1, 2009, Justice Gableman filed his responsive statement of facts; and on April 16, 2009, the Commission filed its reply to Justice Gableman's statement of facts.

On April 17, 2009, the Commission filed a motion to compel Justice Gableman to respond to certain portions of the Commission's statement of facts. In an April 30, 2009, order, the panel denied the Commission's motion to compel. The panel also ordered the parties to provide scheduling information in the event that an evidentiary hearing were to be held.

On May 11, 2009, Justice Gableman filed a motion for summary judgment. The panel established a briefing schedule. The Commission filed its

[6] WISCONSIN STAT. § 757.87 provides that the hearing on a judicial conduct complaint "shall be held in the county where the judge or circuit or supplemental court commissioner resides unless the presiding judge changes venue for cause shown or unless the parties otherwise agree." In the January 13, 2009, order, the parties were directed to inform the panel whether they objected to Waukesha county being the venue for any hearing and, if so, to confirm Justice Gableman's current county of residence.

response to the motion and Justice Gableman filed a reply to the Commission's response.

On September 16, 2009, the panel held oral argument on the summary judgment motion. Attorney James C. Alexander, executive director of the Commission, appeared and argued on its behalf. Attorney Eric M. McLeod and Attorney James Bopp, Jr., appeared on Justice Gableman's behalf, with Attorney Bopp presenting the argument. Upon consideration of the pleadings, statements of fact, motion papers, and oral argument, the panel makes the following recommendation to the supreme court.

DISCUSSION

A. Undisputed Facts

The following facts, drawn from the pleadings and the parties' factual statements, are not in dispute.[7]

1. At all times material to the Commission's complaint, the Honorable Michael J. Gableman was a circuit court judge for Burnett County, Wisconsin.

2. At all times material to the Commission's complaint, Justice Gableman was a candidate for the office of Wisconsin Supreme Court justice and

[7] The panel recognizes that facts drawn from the parties' factual statements were not presented in affidavit form. However, because both parties conceded at oral argument that summary judgment was an appropriate context in which to address the underlying legal questions, we have included facts set forth in the parties' factual statements that are not in dispute, in addition to facts alleged and admitted to in the pleadings. Moreover, as will be seen, the critical facts are found in the words of the advertisement—language that is not in dispute.

thus was a "candidate" for judicial office pursuant to SCR 60.01(2), Wisconsin Code of Judicial Conduct.[8]

3. During the campaign, advisors to Justice Gableman told him that a third-party political group had released an advertisement in support of Justice Butler that suggested that Justice Gableman had "purchased his job," was a "substandard judge," and had "coddled child molesters." The advisors believed that the advertisement was very damaging to Justice Gableman's campaign and that Justice Gableman needed to respond with an advertisement that focused on the comparative backgrounds of the two candidates, emphasizing Justice Gableman's judicial philosophy and his experience as a prosecutor compared to Justice Butler's experience as a criminal defense attorney and his willingness to represent and find legal loopholes for criminal defendants.

4. Justice Gableman's advisors wanted to air a responsive advertisement as soon as possible, and the advertisement that underlies this complaint was presented to Justice Gableman for his review.

5. Justice Gableman personally reviewed both the audio and video of the advertisement before its release. Justice Gableman was not pleased with the tone of the advertisement and he delayed the release of the advertisement while he sought to verify the accuracy of its contents.

6. As part of that effort, Justice Gableman became familiar with the decisions of the court of appeals and supreme court in Reuben Lee Mitchell's

[8] SUPREME COURT RULE 60.01(2) provides: "Candidate" means a person seeking selection for or retention of a judicial office by means of election or appointment who makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support."

appeal, ***State v. Mitchell***, 139 Wis. 2d 856, 407 N.W.2d 566 (Ct. App. 1987) (unpublished slip op.), *reversed*, ***State v. Mitchell***, 144 Wis. 2d 596, 424 N.W.2d 698 (1988), Justice Butler's arguments made during his representation of Mitchell, and Mitchell's subsequent criminal conduct and conviction.

7. Justice Gableman ultimately approved the advertisement as it had been originally presented to him.

8. On or about March 14, 2008, Justice Gableman published and released a television advertisement supporting his candidacy for the supreme court against then-incumbent Justice Butler. The audio text of the advertisement is as follows:

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

An electronic copy of the advertisement is Exhibit A to the Commission's complaint.

9. The purpose of the advertisement was to compare and contrast the background, qualifications, and experience of Justice Gableman with the background, qualifications, and experience of Justice Butler.

10. Justice Butler had been an appellate state public defender from 1979 to 1992. As part of that employment, he represented Reuben Lee Mitchell, from 1985 to 1988, in Mitchell's appeal from a conviction of first-degree sexual assault of a child. The advertisement refers to Butler's representation of Mitchell.

11. One of the issues raised by Justice Butler in Mitchell's appeal concerned the circuit court's admission of evidence that the victim had been a virgin, evidence that Butler argued should have been excluded under the rape-shield law, WIS. STAT. § 972.11(2)(b) (1985-86). The court of appeals agreed with Butler and reversed Mitchell's conviction.

12. The State sought and the supreme court accepted review of the court of appeals' decision. The supreme court agreed with the court of appeals that evidence of the victim's virginity should have been excluded pursuant to the rape-shield law. The supreme court, however, held that the error was harmless and, therefore, reversed the court of appeals decision. Mitchell's judgment of conviction and sentence were reinstated.

13. Mitchell was not released from prison during the pendency of his appeal. Because the judgment of conviction was ultimately upheld by the supreme court, Mitchell remained in prison as sentenced by the circuit court.

14. Mitchell was released from prison on parole in 1992.

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

16. Nothing that Justice Butler did in the course of his representation of Mitchell caused, facilitated, or enabled Mitchell's release from prison in 1992.

17. Nothing that Justice Butler did in the course of his representation of Mitchell had any connection to Mitchell's commission of a second sexual assault of a child.

18. The statement in the advertisement, "Louis Butler worked to put criminals on the street" is true. As a criminal defense attorney, Justice Butler appropriately assisted accused persons, whether they were innocent or guilty, in lessening or defeating the criminal charges lodged against them.

19. The statement in the advertisement describing Mitchell's 1985 crime, "Reuben Lee Mitchell … raped an 11-year-old girl with learning disabilities" is true.

20. The statement in the advertisement, "Butler found a loophole," is true. In Mitchell's appeal, Justice Butler successfully argued that the rape-shield law, a law designed to protect sexual assault victims, had been violated, an argument that inured to Mitchell's benefit.

21. The statement in the advertisement, "Mitchell went on to molest another child," is true.

B. The Rule

The pertinent sections of SUPREME COURT RULE 60.06(3), and associated comments, state as follows:

SCR 60.06(3) Campaign Conduct and Rhetoric

(a) *In General.* While holding the office of judge or while a candidate for judicial office or a judge-elect, every judge, candidate for judicial office, or judge-elect should maintain, in campaign conduct, the dignity appropriate to judicial office and the integrity and independence of the judiciary. A judge, candidate for judicial office, or judge-elect should not manifest bias or prejudice inappropriate to the judicial office. Every judge, candidate for judicial office, or judge-elect should always bear in mind the need for scrupulous adherence to the rules of fair play while engaged in a campaign for judicial office.

COMMENT

This subsection is new. It states a rule generally applicable to judges, candidates for judicial office, and judges-elect.

….

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

COMMENT

This subsection is new. The first sentence is based on the August 2003 amendments to the ABA model code of conduct.

The second sentence is aspirational. Thus, "should" is used rather than "shall." The remaining standards are mandatory and prohibit candidates from knowingly or with reckless disregard for the truth making various specific types of misrepresentations. Candidates are not responsible for misrepresentations or misleading statements made by third parties not subject to the control of the candidate, e.g., through independent expenditures by interest groups.

C. Conclusions of Law and Recommendation

In its complaint, the Commission alleges that Justice Gableman violated SCR 60.06(3)(c). In his motion for summary judgment, Justice Gableman contends that there are no disputed issues of fact and that, under those undisputed facts, the Commission cannot establish that he violated SCR 60.06(3)(c). The Commission agrees that the facts are not in dispute, but it contends that those facts show that Justice Gableman violated the Rule. For the reasons stated below, we recommend to the supreme court that Justice Gableman's motion for summary judgment be granted and that the complaint filed by the Commission be dismissed.

We begin our analysis with the language of the Rule that Justice Gableman is alleged to have violated. SUPREME COURT RULE 60.06(3)(c) consists of two sentences, and the Commission rests its complaint exclusively on the first sentence of the Rule which states: "A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent." The use of "shall not" in the first sentence creates a "binding obligation" that, if violated, "can result in disciplinary action." *See* SCR 60, Code of Judicial Conduct, Preamble.

The Commission's complaint does not allege a violation of the second sentence of SCR 60.06(3)(c) which states: "A candidate for judicial office should not knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system." In contrast to the first sentence, the use of "should not" in the second sentence signals the "inten[t] to encourage or discourage specific conduct and as a statement of what is

or is not appropriate conduct" but it does "not [create] a binding rule under which a judge may be disciplined." *See* SCR 60, Code of Judicial Conduct, Preamble.

The non-binding nature of the second sentence, and the distinction between the reach of the two sentences, is discussed in the Comment to SCR 60.06(3)(c) which explains that "[t]he second sentence is aspirational" whereas the standards of the first sentence "are mandatory and prohibit candidates from knowingly or with reckless disregard for the truth making various specific types of misrepresentations." *See* SCR 60.06(3)(c), Comment.

Justice Gableman contends that his conduct does not fall within the scope of the first sentence for which discipline is possible, but rather it would fall within the reach of the second sentence, the aspirational language of the Rule upon which discipline cannot be based. Justice Gableman notes that in its complaint, the Commission alleged that the advertisement "directly implied and was intended to convey the message" that Justice Butler's actions "enabled or resulted in" Mitchell's release from prison and commission of a second crime. Justice Gableman stresses that the Commission did not allege that any individual statement in the advertisement was false, but rather the Commission relies on the "impli[cation] and "intended … message" of the advertisement.

The first step in any statutory analysis is to look at the language of the statute.[9] ***Hutson v. State of Wisconsin Personnel Comm'n***, 2003 WI 97, ¶49, 263 Wis. 2d 612, 665 N.W.2d 212. "When construing statutes, meaning should be

[9] As a court-promulgated rule, SCR 60.06(3)(c) is subject to the rules of statutory construction. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 89-94, 420 N.W.2d 381 (Ct. App. 1988) (applying various rules of statutory construction to WIS. STAT. § 805.17, which had been created by supreme court order).

given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible." ***Id.*** (citation omitted). In addition, "a statute must be construed to promote its purpose and objective." ***City of Wisconsin Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 20, 539 N.W.2d 916 (Ct. App. 1995). "In construing a statute, the court must consider it 'in relation to its scope, history, context, subject matter and object to be accomplished.'" ***State v. Excel Mgmt. Servs., Inc.***, 111 Wis. 2d 479, 487, 331 N.W.2d 312 (1983) (quoting ***Kollasch v. Adamany***, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981)).

When we apply the foregoing principles to SCR 60.06(3)(c), we conclude that the allegations of the complaint fall within the scope of the second, non-mandatory, sentence of the Rule. The first sentence of SCR 60.06(3)(c) speaks to the "truth or falsity" of any statement that "misrepresent[s] the identify, qualifications, present position, or other fact concerning the candidate or an opponent." On the other hand, the second sentence of SCR 60.06(3)(c) speaks to statements "that, although true, are misleading." We cannot construe SCR 60.06(3)(c) in a manner that renders the second sentence superfluous. *See* ***Hutson***, 263 Wis. 2d 612, ¶49. Therefore, the first sentence of SCR 60.06(3)(c) cannot be construed to apply to true statements that may mislead because such a construction would render the second sentence superfluous.

Having concluded that the second sentence of SCR 60.06(3)(c) applies to statements that, although true, may be misleading, it stands to reason that the first sentence must apply to statements that, standing alone, are false. *See* ***id.*** (Statutes must be construed to give effect to every provision.).

The Commission's complaint alleged that the advertisement "directly implied and was intended to convey the message" that Justice Butler's finding of a "loophole" "enabled" Mitchell's release from prison and "resulted in" Mitchell's commission of a second crime. In this case, it is undisputed that the individual statement in the advertisement were true. By its own words, the complaint relies on an implicit message which the Commission contends was false or, at best, misleading. However, because the individual statements in the advertisement were true, any false or misleading implied message of the advertisement necessarily falls within the reach of the second sentence of SCR 60.06(3)(c), for which discipline may not be imposed. Therefore, we conclude that the facts alleged in the complaint do not constitute a violation of SCR 60.06(3)(c) for which discipline may be imposed. Accordingly, we recommend that Justice Gableman's motion for summary judgment be granted and the Commission's complaint be dismissed.[10]

[10] We agree with Judge Fine's concurrence that the line between a misrepresentation of fact, addressed in the first sentence of SCR 60.06(3)(c), and a true-but-misleading representation, addressed in the second sentence, is not as distinct as some might wish. We also acknowledge that the instant advertisement navigates close to that line. Finally, we agree with Judge Fine that any regulation which places a government tribunal in the position of having to judge whether certain campaign speech should subject the speaker to sanctions raises serious First Amendment concerns.

Unlike Judge Fine, however, we conclude that consistent with the First Amendment, we must strictly and narrowly interpret the first sentence of SCR 60.06(3)(c) to reach only express representations of fact that are clearly and blatantly false. Speech debating the qualifications of candidates for judicial office is "core" political speech, and statutes that seek to limit, or that have the effect of limiting political speech, must be strictly and narrowly construed. *See* ***Republican Party of Minnesota v. White***, 536 U.S. 765, 774-75 (2002). Because we conclude that, under this standard, the advertisement before us does not contain a misrepresentation of fact, we conclude that we need not (and should not) consider whether, if it had done so, sanctions could be imposed on Justice Gableman without violating the First Amendment. *See* ***State v. Popenhagen***, 2008 WI 55, ¶5, 309 Wis. 2d 601, 749 N.W.2d 611 (if matter can be decided on a statutory ground, constitutional arguments need not be addressed); ***Labor & Farm Party v. Elections Bd.***, 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984) (constitutional questions need not be decided if a case can be resolved on other grounds).

(continued)

Nevertheless, we note that our construction of SCR 60.06(3)(c), limiting the mandatory first sentence to objectively false statements, is consistent with First Amendment principles. Any restriction on core political speech will only be upheld if it is narrowly tailored to serve a compelling state interest, *see* ***Brown v. Hartlage***, 456 U.S. 45, 53-54 (1982), and any attempted regulation of campaign speech "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," ***Federal Election Comm'n v. Wisconsin Right to Life, Inc.***, 551 U.S. 449, 469 (2007).

The mandatory first sentence of SCR 60.06(3)(c) must be construed to apply only to objectively false statements. *See* ***In re Chmura***, 608 N.W.2d 31, 42-43 (Mich. 2000) (declaring unconstitutional a rule of judicial conduct that permitted discipline for "statements that are not false, but, rather, are found misleading or deceptive"). A contrary construction, permitting that part of the Rule to be applied to any intended or implied message, would necessarily implicate the perceptions of the listener. One listener of the speech might draw the allegedly impermissible inferences while another listener of the speech might not draw those inferences. The contours of the First Amendment cannot be drawn on the basis of the disparate perceptions of the listener. *See* ***Buckley v. Valeo***, 424 U.S. 1, 43, *quoting* ***Thomas v. Collins***, 323 U.S. 516, 535 (1945).

DEININGER, J. (*concurring*). I join Judge Snyder in recommending that the complaint against Justice Gableman be dismissed for the reasons set forth in the Conclusions of Law and Recommendation. I write separately, however, to emphasize that, although the panel recommends that the Commission's complaint against Justice Gableman be dismissed, no one should be misled into believing that we find no fault with the advertisement in question. Justice Gableman's counsel virtually conceded at oral argument that the advertisement is misleading because it falsely implies that Justice Butler's representation of Reuben Mitchell caused or resulted in Mitchell's release from prison, and it thus contravenes the "aspirational" second sentence of SCR 60.06(3)(c).[1]

More troubling than the misleading implication, however, is the advertisement's disdain for the role of defense counsel in our adversary system. The advertisement would be every bit as deserving of condemnation under SCR 60.06(3)(c) had Justice Butler's representation of Mitchell in fact resulted in Mitchell's release from prison. In addition to providing that judicial candidates "should not knowingly make representations that, although true, are misleading," the second sentence of SCR 60.06(3)(c) also informs judicial candidates that they should not "knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary

[1] "I mean, this is [a] classic example, once you recognize that these are of course true, a classic example of what would fall under the second sentence; and that is, you would have three or four truthful statements that are misleading because of a key fact that is omitted from the advertisement." Transcript of Oral Argument at 29.

system." ***Id.*** That is precisely what the advertisement does, and what the advertisement was apparently intended to do.

Justice Gableman's counsel informed the panel at argument that the advertisement "is not about Mitchell; this is about Butler, what he is willing to do, what advocacy is he willing to make, and who is he willing to find loopholes for." Transcript of Oral Argument at 17. This was not an offhand or isolated comment by Justice Gableman's attorney. Counsel also told the panel that the "focus" of the advertisement "is on Butler's willingness to find loopholes for even people that are as despicable as this person [Mitchell] is." Transcript of Oral Argument at 14. Counsel summarized the message of the advertisement as being, "[W]ould you feel safe having somebody on the Supreme Court that is willing to find a loophole for a scum bag like Reuben Lee Mitchell [?]" Transcript of Oral Argument at 16. Later, Justice Gableman's counsel said that "I would expect that most people in Wisconsin to look at this and say, wow, you know, this guy is willing to find a loophole for such an evil person, do we really want him on the State Supreme Court if that's his mind set?" Transcript of Oral Argument at 23. Finally, counsel explained "that's what is the power, it seems to me, of the ad, because it's talking about Butler's willingness to do something that … certainly could result in this person getting out of jail, whether it caused him to get out or not." Transcript of Oral Argument at 25.

Criminal defendants in the United States have a constitutional right to the effective assistance of counsel during criminal prosecutions and in their first, matter-of-right appeals from criminal convictions. ***Strickland v. Washington***, 466 U.S. 668, 688 (1984); ***State v. Knight***, 168 Wis. 2d 509, 511-12, 484 N.W.2d 540, 540-41 (1992). Defense counsel, in turn, have an ethical obligation to "zealously assert[] the client's position under the rules of the adversary system." SCR Ch 20,

Rules of Professional Conduct for Attorneys, Preamble, [2]. It would appear that Justice Butler, in representing Reuben Mitchell during his criminal appeal, ably performed "the proper role of … [a] lawyer[] in the American adversary system," SCR 60.06(3)(c). By casting Justice Butler's representation of Mitchell as something that voters should view as sinister and as a reason to reject him from sitting on the Wisconsin Supreme Court, the advertisement transgresses the aspirations set forth in the second sentence of SCR 60.06(3)(c).

Justice Butler's proper discharge of his ethical and constitutional obligations to his client subjected him to the attack advertisement that is at issue in this action. Justice Gableman's counsel argued in this proceeding that the First Amendment to the U.S. Constitution requires a strict and narrow construction of the reach of the first sentence of SCR 60.06(3)(c). The majority of this panel agrees. *See* ***Conclusions of Law and Recommendation***, n. 10. Accordingly, we have concluded that we must recommend that the Commission's complaint against Justice Gableman be dismissed. It is more than a bit ironic that Justice Gableman has been represented in this matter by an able lawyer who, it might be argued, "found a loophole."

FINE, J. (*concurring*). Although I agree with the Majority's bottom-line recommendation that the supreme court should dismiss the Judicial Commission's complaint against Justice Michael J. Gableman for the advertisement he approved and ran in his campaign against then-Justice Louis B. Butler, Jr., I respectfully disagree with its analysis—specifically, its conclusion that the advertisement did not violate the first sentence of SCR 60.06(3)(c), which is the only provision that could subject Justice Gableman to discipline because of the advertisement. I concur in the Majority's bottom-line recommendation, however, because I conclude that SCR 60.06(3)(c) is an unconstitutional arrogation to a government tribunal of the electorate's responsibility and sole power to assess campaign speech.

A. *The advertisement violates the first sentence of SCR 60.06(3)(c).*

As the Majority recounts, the advertisement that Justice Gableman approved and ran during his campaign against Justice Butler was a television commercial whose off-screen announcer intoned:

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

> Can Wisconsin families feel safe with Louis Butler on the Supreme Court?[1]

The video accompanying this script showed at various times images of Justice Gableman, then a circuit-court judge, Justice Butler, and Reuben Lee Mitchell. As the Majority recounts, Justice Butler had represented Mitchell when Justice Butler was a lawyer employed by the Office of the State Public Defender. As Mitchell's lawyer, Justice Butler persuaded the Wisconsin Court of Appeals that Mitchell's conviction of first-degree sexual assault should be reversed because the trial court had improperly admitted evidence of the virginity of Mitchell's eleven-year-old victim. *See* ***State v. Mitchell***, 144 Wis. 2d 596, 600, 424 N.W.2d 698–699 (1988) (the court of appeals decision, No. 86-0879-CR, is unreported). Although Justice Butler again represented Mitchell before the supreme court, and orally argued the appeal, ***id.***, 144 Wis. 2d at 600, 424 N.W.2d at 698, and the supreme court agreed with the court of appeals's conclusion that the evidence was admitted improperly, it reversed the court of appeals, and reinstated Mitchell's conviction because receipt of the evidence was "harmless error," ***id.***, 144 Wis. 2d at 607–620, 424 N.W.2d at 701–706. As the Majority here points out, Mitchell served his sentence and was released on parole in 1992. In 1995, Mitchell was later convicted of second-degree sexual assault of a child based on something he did after his release in 1992. As the Majority finds, and none of the parties disagree, "[n]othing that Justice Butler did in the course of his representation of Mitchell caused, facilitated, or enabled Mitchell's release from prison in 1992," and "[n]othing that Justice Butler did in the course of his representation of Mitchell had any connection to Mitchell's commission of a second sexual assault of a child." Yet, Majority holds

[1] I adopt the Majority's formatting of the advertisement's audio.

that the following critical part of the advertisement is true because each sentence, when read in it own vacuum, is true:

> Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.

I respectfully disagree.

SUPREME COURT RULE 60.06(3)(c) reads in its entirety:

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

For ease of reference, the first sentence reads, as material here:

> A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent [a] … fact concerning … an opponent.

As the Majority notes, violation of this rule subjects the candidate to discipline because its prohibition is "mandatory."

The second sentence of SCR 60.06(3)(c) reads:

> A candidate for judicial office should not knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system.

As the Majority also notes, violation of this rule does not subject the candidate to discipline because its prohibition is *merely* "aspirational."[2] The Majority sees Justice Gableman's advertisement as violating only this aspirational prohibition. As noted, I do not agree and believe that the two sentences read in the context of each other make this clear.

The crux of my disagreement with the Majority is that I see the *advertisement* as the "statement" to which the first sentence of SCR 60.06(3)(c) refers. Thus, the advertisement violates the "shall not … misrepresent a fact" mandate. Let me explain.

The "fact" asserted in the advertisement, by its language and the juxtaposition of that language, is that Justice Butler did something when he was a lawyer representing Mitchell that permitted Mitchell to commit another sex crime. There is in my view no other way to read the advertisement's two key sentences ("Butler found a loophole. Mitchell went on to molest another child."); the "went on to" phrase flows from the trigger "loophole" event. Stated another way, the only significance of "found a loophole" followed by "went on to" in the two-sentence sequence is that the "find a loophole" permitted Mitchell to commit the later sex crime.

Justice Gableman argues, however, that such a reading derives meaning by implication. In my view, respectfully, that is a crabbed reading, lashed to the mast of a sentence-by-sentence literalism, and ignores the way we use

[2] In my view, the distinction between the first sentence of SCR 60.06(3)(c) and the second sentence of that rule is, at least at their abutting edges, as ephemeral as the distinction between twilight and dusk. Nevertheless, we must take the Rule as it is written and as the Comments quoted by the Majority instruct.

language, often deriving significant meaning by implication. Thus, the most current unabridged Webster's dictionary tells us that "imply" means: "**a** : to indicate or call for recognition of as existent, present, or related not by express statement but by logical inference or association or necessary consequence" and "**b** : to involve as a necessary concomitant." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1135 (1993).

Neither common sense nor the law permits the sculpting of literally true "facts" into a lie. *See* ***Turner v. KTRK Television, Inc.***, 38 S.W.3d 103, 114–116 (Tex. 2000) (assertion may "convey a substantially false and defamatory impression by omitting material facts or *suggestively juxtaposing true facts*") (emphasis added) (citing and discussing examples); ***Church of Scientology of California v. Flynn***, 744 F.2d 694, 696 (9th Cir. 1984) ("It is well settled that the 'arrangement and phrasing of apparently nonlibelous statements' cannot hide the existence of a defamatory meaning. Indeed, the meaning of a statement is often dependent upon its context.") (quoted source omitted); ***Memphis Publishing Co. v. Nichols*** 569 S.W.2d 412, 420 (Tenn. 1978) (In a libel action, "[i]t is no defense whatever that individual statements within the article were literally true. Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true."); W. Page Keeton, et al, PROSSER AND KEETON ON THE LAW OF TORTS § 116 at 117 (5th ed. Supp. 1988) (In a defamation case, "if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.") (footnotes omitted); RESTATEMENT (SECOND) OF TORTS § 563, cmt. d. (1977) ("[W]ords which alone are innocent

may in their context clearly be capable of a defamatory meaning and may be so understood.").[3]

In my view, the advertisement violated the first sentence of SCR 60.06(3)(c) because it did "misrepresent the … fact concerning" Justice Butler's role in Mitchell's ability to commit the post "found a loophole" sex crime.[4]

Without unduly belaboring the point, it is often helpful to test a hypothesis by applying it to permutations of the thing being analyzed. Thus, I asked Justice Gableman's lawyer during oral argument whether the advertisement would, in his view, still be outside the scope of the first sentence of SCR 60.06(3)(c) *if*:

> (1) "Justice Butler had nothing at all to do with the Reuben Mitchell case";
>
> (2) as a criminal defense lawyer Justice Butler had found a "'loophole'" in a disorderly-conduct case where the defendant was accused of "shouting in a store"; and
>
> (3) the rest of the advertisement was the same.

Transcript of Oral Argument at 25. Justice Gableman's lawyer replied that the advertisement would just be "misleading" within the ambit of the rule's second

[3] Idioms are another way that we use language to convey meaning that may have little or no relation to the literal definitions of the individual words. Thus, we can comfortably say that a person made "a killing on Wall Street" without triggering a homicide investigation. Similarly, no one would suggest that an assertion that Ted Williams had "eagle eyes" meant that his ocular organs were literally those of an eagle, or that an "eager beaver" co-worker spent much of the day building dams.

[4] SUPREME COURT RULE 60.06(3)(c) requires scienter: either "knowingly" or "reckless disregard." Neither party disputes that the scienter element is satisfied here. Indeed, as the Majority recounts, Justice Gableman apparently agonized over whether he should run the advertisement.

sentence and would not "misrepresent [a] … fact concerning" Justice Butler within the scope of the first sentence of SCR 60.06(3)(c). Transcript of Oral Argument at 26.

Justice Gableman's lawyer also indicated that in his view an advertisement that wove a candidate's comment about something wholly unrelated to the rest of the advertisement would similarly not run afoul of the first sentence of SCR 60.06(3)(c). During argument, I posited a situation where a judge is asked about judges in Milwaukee County having to empty their own wastebaskets. The judge says on camera, "I think it's a big deal over nothing." Transcript of Oral Argument at 6.

> Q[5] Later that judge runs for office, and the opponent runs an advertisement that says crime is at an all-time high, judges aren't doing what they should do to protect society, and then they run that clip [that says] ["]It's a big deal over nothing.["]

Transcript of Oral Argument at 6. Justice Gableman's lawyer responded that it was his position that the advertisement would violate only the second, "aspirational," sentence of SCR 60.06(3)(c) and not the first "mandatory" sentence. He explained: "That would not be a false statement. He [the judge to whom the advertisement in my hypothetical referred] made the statement. But the fact that the, what he was referring to is omitted created a false or misleading impression of what he was saying." Transcript of Oral Argument at 6-7. This is, in my view and respectfully, sophistry and borders on, to borrow Shakespeare's phrase from *King Lear*, Act I, sc. 1, "pleated cunning."

[5] I have substituted throughout this concurring opinion "Q" for questions posed by a member of this panel and "A" for responses of the respective lawyers, even though the transcript names them.

Now let us look at the second sentence of SCR 60.06(3)(c), which the majority concludes that Justice Gableman did violate:

> A candidate for judicial office should not knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system.

In my view, an analysis of this sentence supports my reading of the first sentence because this second sentence refers only to "true" "representations" that, for some reason are misleading, not, as does the first sentence, a "statement" that "misrepresent[s a] … fact concerning the … opponent." Certainly, it is *not* a true representation to imply through a crafty sculpting of words that because Justice "Butler found a loophole[,] Mitchell went on to molest another child."

The following would be an example of a true representation (I put it italics because this was *not* the advertisement that Justice Gableman ran):

> *Louis Butler was a defense lawyer. He sought loopholes for criminals. In fact, he found one for Reuben Lee Mitchell, who raped an eleven-year-old with learning disabilities. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?*

The distinction between this and the advertisement that Justice Gableman ran is that the "representation" concerning Justice Butler would be true—not only on a sentence-by-sentence reading, but also as a whole: he was a defense lawyer and, appropriately, he sought to represent his clients to the best of his ability within the law, using what one respected United States Supreme Court justice, Robert H.

Jackson, writing for the Court, accurately described as "loopholes" in the law.[6] In contrast, the advertisement that Justice Gableman used represents that Justice Butler did something that permitted Mitchell to commit another sex crime. Thus, as noted, I believe that Justice Gableman's advertisement misrepresented the consequences of what Justice Butler did in the ***Mitchell*** case, and thus violated the first sentence of SCR 60.06(3)(c). This does not end the analysis, however, because I also conclude that SCR 60.06(3)(c) does not pass muster under the First Amendment.

B. *SCR 60.06(3)(c) violates the First Amendment.*

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment applies to the states as well as to Congress. ***Gitlow v. New York***, 268 U.S. 652, 666 (1925). It also applies to judicial-election campaigns. ***Republican Party of Minnesota v. White***, 536 U.S. 765 (2002). "Of course, *demonstrable falsehoods* are not protected by the First Amendment in the same manner as truthful statements. But erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the breathing space that they need ... to survive." ***Brown v. Hartlage***, 456 U.S. 45, 60 (1982) (citations, quoted sources, and internal quotation marks omitted; ellipses by

[6] "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty." ***Stein v. New York***, 346 U.S. 156, 196–197 (1953), *overruled by* ***Jackson v. Denno***, 378 U.S. 368, 391 (1964). Loopholes in our criminal justice system are made by judges, not lawyers.

Brown; emphasis added). Thus, special First-Amendment protection must be given to political speech: "'[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." ***White***, 536 U.S. at 781 (quoted source omitted, brackets by ***White***). ***Brown***'s emphasis on "demonstrable falsehoods" is, as I discuss below, key: "For the Constitution protects expression … without regard … to the truth, popularity, or social utility of the ideas and beliefs which are offered." ***NAACP v. Button***, 371 U.S. 415, 444–445 (1963). As I understand the Judicial Commission's contentions here, it does not dispute these fundamental principles.

The issue as I see it is not whether the Commission, or this panel, or the supreme court believes that Justice Gableman's advertisement was false under the first sentence SCR 60.06(3)(c), but *who* is, under our system of government and Wisconsin's delegation to the voters to select judges and justices, to make that determination. In my view, the only tribunal that may assess whether campaign speech is true or false is the electorate.

That only the electorate may assess the truth or falsity of political speech flows from the whole body of First-Amendment law. Thus, ***White*** observed that "[i]t is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." ***White***, 536 U.S. at 782 (quoted source and quotation marks omitted). More in point, given the allegations of falsity, is Justice Robert H. Jackson's observation in his concurring opinion in ***Thomas v. Collins***, 323 U.S. 516, 545 (1945), the first sentence of which was quoted with approval by ***Riley v. National Federation of the Blind of North Carolina, Inc.***, 487 U.S. 781, 791 (1988):

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public

> mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.[7]

Thus, absent concerns not present here, our jurisprudence recognizes that, in the words of Justice Sandra Day O'Connor announcing the judgment of the Court in ***Waters v. Churchill***, 511 U.S. 661, 670 (1994), we must guard against the "risk of erroneous punishment of protected speech." Accordingly, we permit "attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected." ***Bates v. State Bar of Arizona***, 433 U.S. 350, 380 (1977); *see also* ***Riley***, 487 U.S. at 794 (The risk of erroneous result "must necessarily chill speech in direct contravention of the First Amendment's dictates.") (statute requiring charities' fundraising fees be reasonable); ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 340 (1974) ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").

During oral argument, we explored the possibility, apart from the specific facts in this case, that the first sentence of SCR 60.06(3)(c) would lead to reasonable, but differing, interpretations of campaign speech. Thus, the Commission's lawyer declared that if a judge seeking either re-election or election to a higher court "said, I have decided 600 cases in the year and a half I've been on the bench, and the judge decided five, that's a misrepresentation."[8] Transcript of

[7] The core of the second sentence, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us," was quoted with approval by ***Collin v. Smith***, 578 F.2d 1197, 1203 (7th Cir. 1978).

[8] As we have seen, the first sentence of SCR 60.06(3)(c) also applies to assertions a candidate for judicial office makes about him- or herself: "A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent the … qualifications, present position, … or other fact concerning the candidate."

Oral Argument at 42. The Commission's lawyer and I then discussed the boundaries:

> Q What if – That would be a false statement?
>
> A Yes.
>
> Q What if the judge had decided 559?
>
> A It's still a false statement.
>
> Q 599?
>
> A Yeah, it is still a false statement.

Transcript of Oral Argument at 43. In my view, reasonable persons might look at the "559" or "599" assertions to be mere spinning or puffery, and not the type of false statement reached by the first sentence of SCR 60.06(3)(c). I then asked the Commission's lawyer about an assertion that Justice Patience Drake Roggensack made during an interview on the public radio show based in Madison hosted by Tom Clark when she was running for the supreme court in February of 2003:

> Q And she said on the Tom Clark show, "You know, every case that I've had as an appellate judge where there has been both a state and a federal constitutional claim, you will find, if you pull my opinions up on the Web, and they are all there, that I analyzed each one separate and independently."
>
> Well, I looked at it, and I couldn't find any. And I sent her an E-mail, and she responded citing me one. Spinning or falseness?
>
> A I would – I don't know the facts of that case, Judge Fine. If what she said is not true, then it's obviously a false statement, and it's not, it goes beyond spinning.
>
> Q And the First Amendment would not protect it?
>
> A The First Amendment would not protect it. Because she was giving a false statement about her own qualifications and her own background.

Transcript of Oral Argument at 43–44.

These two examples from the oral argument in this case highlight the First-Amendment flaws in the first sentence of SCR 60.06(3)(c)—persons might reasonably conclude that the "559" and "599" boasts were mere spinning or puffery, not subject to sanction, and, it seems to me, that Justice Roggensack's "every case" assertion if in fact it was not true, as her response to my email seems to indicate, could also be viewed as puffery.[9] But, as we have seen, a responsible intelligent lawyer with broad experience in the area of judicial discipline felt otherwise (at least insofar as the truth or falsity aspects of the rule are concerned—neither example addressed the additional requirement that the assertion deemed by someone to be false be made "knowingly").

One more example. During her most recent campaign for re-election, Chief Justice Shirley S. Abrahamson ran an advertisement that featured Dane County Sheriff David J. Mahoney saying: "The Chief? She's law enforcement's ally."[10] What does this mean? Is this true? Is it capable of being proven true? Is it capable of being proven false? SUPREME COURT RULE 60.06(3)(c) opens the door for disappointed candidates or their supporters to seek punishment for something said during the campaign in the teeth of the voters' judgment. That, in my view, violates the First Amendment.

There is also another flaw in the first sentence of SCR 60.06(3)(c)—it permits either the unpunished evasion by so-called "independent" committees

[9] "'Spinning' is a common term used to describe putting different perspectives on facts." ***Rickert v. State of Washington, Public Disclosure Commission***, 168 P.3d 826, 829, n.6 (Wash. 2007).

[10] Available at: http://wispolitics.com/1006/TwoStrikes_FINAL.mov.

supporting a candidate, or the significant problem explored by Judge Deininger with the Commission's lawyer at oral argument:

> Q [G]iven your argument that you were going into on intentionality, if a judicial candidate hires a campaign manager and media staff and says ["]run whatever ads you want to, I don't want to see them,["] does that insulate the candidate then from, I mean, admitted falsehoods in the ads? If the candidate himself or herself does not know prior?
>
> A Unfortunately, yes.

Transcript of Oral Argument at 58.

Returning to the "risk of erroneous punishment of protected speech," the boundaries demarking the two sentences of SCR 60.06(3)(c) are far from clear, as the reasonable but differing interpretations of the members of this panel show. Thus, the potential of imposing discipline because a government tribunal—whose makeup is fraught with happenstance—deems a campaign assertion to be within the first sentence rather than the second impermissibly chills core First Amendment speech. Accordingly, I agree with the conclusion in ***Rickert v. State of Washington, Public Disclosure Commission***, 168 P.3d 826 (Wash. 2007), but not all of ***Rickert***'s analysis, that: "The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment." ***Id.*** at 827.

The great decision in ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964) also recognized that government tribunals are not permissible fora to decide the truth or falsity of core First-Amendment speech: "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for *any* test of truth—*whether administered by judges, juries, or*

administrative officials." ***Id.*** at 271 (emphasis added).[11] Since SCR 60.06(3)(c) arrogates to a government tribunal (initially the Commission, then a panel like this one, but ultimately the supreme court) whether a campaign assertion may be punished, I conclude that it violates the First Amendment and, therefore, that no sanction may be imposed in this case. Accordingly, I join in the Majority's

[11] The excerpt in context reads:

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth-whether administered by judges, juries, or administrative officials-and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." In *Cantwell v. Connecticut*, 310 U.S. 296, 310, the Court declared:
>
> > 'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'
>
> That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need … to survive."

New York Times Co. v. Sullivan, 376 U.S. 254, 271–271 (1964) (most internal citations and quoted sources omitted; ellipses by ***New York Times***).

recommendation that the Commission's complaint against Justice Gableman be dismissed.

One final thought. There are those who might say that results of judicial elections with which they disagree, and our recommendation if adopted by the supreme court merely highlights what Justice O'Connor opined was a flaw inherent in a process that elects, rather than appoints, judges and justices. Thus, concurring in ***White***, she wrote that "the very practice of electing judges undermines" a state's compelling interest in "an actual and perceived" "impartial judiciary." ***White***, 536 U.S. at 788 (O'Connor, J., concurring) (quoted source and internal quotation marks omitted). The alternative, however, is appointing judges, either after vetting by so-called "merit" selection committees or by the naked authority of the appointing power.[12] In my view, the people should select their judges, and I agree with Winston S. Churchill's insightful observation to the House of Commons on November 11, 1947, *after he lost* his post-war bid for re-election: "Democracy is the worst form of government, except for all those other forms that have been tried from time to time."[13]

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[12] The late Richard S. Arnold, who served with distinction on the United States Court of Appeals for the Eighth Circuit, once observed that "my merit, incidentally, was that I was a friend of a senator." Arnold, *Judges and the Public*, 9 LITIGATION, No.4 at 5 (Summer 1983).

[13] http://wais.stanford.edu/Democracy/democracy_DemocracyAndChurchill(090503).html

The Honorable Diane S. Sykes, a former justice on the Wisconsin Supreme Court and now a judge on the United States Court of Appeals for the Seventh Circuit, gives us a cogent analysis of the elect-or-appoint quandary. Diane S. Sykes, *Independence v. Accountability: Finding A Balance Amidst The Changing Politics Of State-Court Judicial Selection*, 92 MARQ. L. REV. 341 (2008) (http://law.marquette.edu/lawreview/Winter2008/sykes.pdf). Although noting that "[t]he price of direct electoral judicial accountability may be too high," 92 MARQ. L. REV. at 350, she recognizes that one of the benefits of election of judges is that it tends to keep judges from straying too far from core neutral principles, a common practice of judges "who subscribe to a more expansive view of the judicial role and see the law as a malleable instrument

(continued)

through which judges should try to achieve the 'right' or 'best' or 'just' result." ***Id.*** at 348. Thus, Judge Sykes writes:

> Elections operate as an external constraint on state judges' job performance. There is no question that this weakens judicial independence—that's the whole point. Independence and accountability are important, but conflicting, values. In choosing an elected judiciary, Wisconsin has accepted a reduction in judicial independence in order to achieve a greater level of judicial accountability.
>
> In the ordinary course, the internal constraints on judges operate to prevent this from becoming too great a sacrifice. Most of the time, judges who do not stray too far too fast from the judicial mainstream are reelected, often without opposition. But if the judges start loosening the internal constraints on the use of their power by altering the rules of interpretation too much or too swiftly—and therefore expanding their own power—the other branches of government and those who have an interest in the work of the courts will take notice, and the external constraint of the ballot box will kick in.

Id. at 349. Finally, Judge Sykes also observes:

> But no method of judicial selection is perfect; all are prone to manipulation and politicization of some sort. The problem exists in federal judicial selection too, which has in some cases pretty much deteriorated into raw power politics. Special-interest coalitions now routinely subject federal judicial nominees to ideological litmus tests and distort records and attack reputations in order to defeat some nominees.

Id. at 351.