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March 19, 2010

VIA MESSENGERMr. David Schanker
Clerk, Wisconsin Supreme Court
110 East Main Street, #215
Madison, WI 53703**RECEIVED**

MAR 19 2010

CLERK OF SUPREME COURT
OF WISCONSIN

Re: In the Matter of the Disciplinary Proceedings Against the Honorable Michael J. Gableman; Wisconsin Judicial Commission v. The Honorable Michael J. Gableman
Case No. 2008AP2458-J

Dear Mr. Schanker:

Enclosed for filing in the above matter please find the original and nine copies of Respondent's Motion for Recusal pursuant to which Respondent moves the Honorable N. Patrick Crooks for an order recusing himself from participation in this matter. Please return a file-stamped copy with the messenger completing this delivery. By copy of this letter, we are providing copies of same to counsel of record as noted below.

Thank you for your time and attention to this matter.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Eric M. McLeod

EMM:skt

Enclosures

cc: James C. Alexander, Esq.
James R. Bopp, Jr., Esq.

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FILED**MAR 19 2010**CLERK OF SUPREME COURT
OF WISCONSININ THE SUPREME COURT
OF THE STATE OF WISCONSIN

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

Wisconsin Judicial Commission,

Case No. 2008AP2458-J

Complainant,

v.

The Honorable Michael J. Gableman,

Respondent.

RESPONDENT'S MOTION FOR RECUSAL

Pursuant to Wis. Stat. § 757.19(2)(g) and SCR 60.04, Respondent, Justice Michael J. Gableman, by his attorneys, respectfully moves the Honorable N. Patrick Crooks for an order recusing himself from participation in this matter. In support of his motion, Justice Gableman states as follows:

1. SCR 60.04(4) states that "a judge shall recuse himself or herself in a proceeding when the facts and circumstances the judge knows or reasonably should know establish one of the following ...: (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer ..." The Comments to SCR 60.04(4) indicate that "[a] bias or prejudice requiring recusal ... may arise from strong personal feelings about the alleged conduct of a party." The Comments provide further that "[i]f a judge's personal bias or prejudice concerning a party's lawyer is of such a degree as to be likely to transfer to the party, the judge's recusal is required under this provision."

2. The Comments to SCR 60.04(4) also recognize the “extrajudicial source doctrine” stating that “for recusal to be required under this provision, the personal bias or prejudice for or against a party or the personal knowledge of disputed facts must come from an extrajudicial source.” Under the extrajudicial source doctrine, a “judge is not ... recusable for bias or prejudice [if] his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.” *Liteky v. U.S.*, 510 U.S. 540, 551 (1994). However, despite finding an extrajudicial source requirement for recusal, the *Liteky* Court held that opinions formed during a judicial proceeding may nevertheless give rise to a duty to recuse. This is because the words “extrajudicial bias” are really intended to convey the notion of a “wrongful or inappropriate” bias, regardless of whether the improper bias arises from evidence adduced at trial or from some other source. Thus, “[a] favorable or unfavorable predisposition can ... deserve to be characterized as ‘bias’ or ‘prejudice’ because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.” *Id.* Such bias creates a duty to recuse where the court’s actions “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Id.* at 555.

3. On February 11, 2010, this Court issued a 3-3 ruling in *State of Wisconsin v. Allen*, No. 2007AP795, 2010 WI 10, slip op. (Feb. 11, 2010), addressing whether the full Court could review Justice Gableman’s denial of a recusal request by Petitioner in that case. Three justices believed further briefing was needed on the matter, with three other justices deciding that such review was inappropriate. *Id.*, ¶¶ 3, 4. Justice Gableman

recused himself from participating in that aspect of the case. *Id.*, ¶ 2. Because four justices did not agree to grant the motion, the motion was denied. *Id.*, ¶ 8.

4. In addition to joining the three-judge *per curiam* opinion which held that further briefing was needed to review Justice Gableman's denial of the recusal motion in *Allen*, Justice Crooks separately authored a concurrence. In it, Justice Crooks condemned statements made by Attorney James Bopp, Jr., *in this case*, which Attorney Bopp made during oral argument before the Judicial Conduct Panel and to the press afterward. In Justice Crooks' view, "[t]hese statements, made on Justice Gableman's behalf to explain his campaign strategy against an opponent, startled and appalled many in the legal community." *Id.*, ¶ 189. Justice Crooks characterized those statements as "attacking the opponent [Louis Butler] as a public defender[.]" *Id.* Justice Crooks concluded that "[t]hose statements dramatically misrepresent the role of attorneys in the criminal justice system[.]" *Id.*

5. Justice Crooks' criticisms were not limited to the statements made by Justice Gableman's attorney. Justice Crooks went further by rebuking Justice Gableman because he "has not repudiated any of the public statements made by his attorney, even those made at the press conference." *Id.*

6. The foregoing statements made by Justice Crooks in his concurrence in *Allen* were gratuitous personal attacks – they were not necessary to resolve the question of whether this Court should simply proceed with further briefing on the recusal motion pending in that case. Indeed, the three-judge *per curiam* opinion, in which Justice Crooks joined, offers no characterization of the allegations made by the Petitioner in support of his motion for recusal. Rather, Justice Crooks' separate statements in *Allen*

constitute personal criticisms of the arguments made by Justice Gableman's attorney *in this case*.

7. Moreover, Justice Crooks' hostility toward Attorney Bopp clearly evinces, by extension, hostility toward Justice Gableman. Justice Crooks' comments not only denounce Justice Gableman's attorney for the manner in which he has represented his client in this case, but also criticize Justice Gableman for not publicly repudiating his attorney. In other words, the statements demonstrate not only that Justice Crooks' bias against Attorney Bopp is "of such a degree as to be likely to transfer to the party" but that such bias has in fact transferred to Justice Gableman. The clear message is that unless and until Justice Gableman denounces Attorney Bopp's comments to a degree and with a level of specificity personally satisfactory to Justice Crooks, Justice Gableman can expect that Justice Crooks will use his opportunity in the pending matter to give effect to the hostility he has plainly set forth in his concurrence in *Allen*. Justice Crooks would require Justice Gableman to make a public comment concerning a matter of pending litigation, something which Justice Crooks, who has substantial experience as a trial court judge, knows would be inappropriate.

8. While Justice Crooks' comments were made in a judicial writing, they do not fall within the exception recognized by the "extrajudicial source doctrine." The nature of those comments demonstrate they "deserve to be characterized as 'bias' or 'prejudice' because [they are] so extreme as to display clear inability to render fair judgment" in this case. *Liteky*, 510 U.S. at 551. Justice Crooks' comments were entirely unnecessary to resolve the issue at hand in *Allen*, yet Justice Crooks' made them knowing full well that they specifically relate to matters pending before the Court here. Thus,

before this case has even been presented to this Court for its review pursuant to Wis. Stat. § 757.91, Justice Crooks has evinced a clear bias and prejudice against both Attorney Bopp and Justice Gableman regarding matters which have occurred in proceedings before the Judicial Conduct Panel. Fair judgment in this matter is undermined in both appearance and in fact.

WHEREFORE, Justice Gableman respectfully requests Justice Crooks recuse himself from participating in this matter.

Dated this 19th day of March, 2010.

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By: 
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