

# Criminal Law Section

 State Bar of Wisconsin

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November 2, 2009

TO: Doug Kammer, President  
State Bar of Wisconsin

FR: Greg O'Meara, S.J.  
Chair, Criminal Law Section

CC: State Bar of Wisconsin Board of Governors  
George Brown, Executive Director

RE: request for State Bar position on the integrity of the justice system

The Criminal Law Section Board voted 12-0 with three not voting to request the State Bar of Wisconsin Board of Governors adopt a public policy position expressing concern about the import of the assertions made on Justice Gableman's behalf in his defense to the Judicial Commission's complaint and the impact on the integrity of the justice system.

We, as representatives of legal professionals in the criminal justice system, including prosecutors, defense attorneys, and judges, are deeply troubled by recent assertions made on behalf of Justice Michael Gableman about the role of criminal defense lawyers and the protections extended to individuals accused of crimes in our criminal justice system. We fear that these comments, especially when associated with a justice of this State's highest court, will denigrate the constitutional rights of our citizens; undermine the perception of independence, impartiality and neutrality of our judiciary; and threaten the public's trust and confidence in the justice system.

The Wisconsin Judicial Commission has filed a complaint against Justice Gableman alleging that he engaged in judicial misconduct during his campaign for the supreme court, in violation of SCR 60.06(3)(c) and Wis. Stat. § 757.81(4)(a), when he authorized a television commercial against then-Justice Louis Butler that allegedly contained false statements and misrepresentations, made knowingly or with reckless disregard for the truth, about then-Justice Butler's background, qualifications, and experience. Justice Gableman has moved to dismiss that complaint, alleging that each individual statement in the commercial is factually true. We do not intend by issuing this statement to weigh in on the issues presently being considered by the court of appeals, and ultimately by the Supreme Court, about whether the statements in Justice Gableman's television commercial were in fact false, and

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whether they constituted judicial misconduct.<sup>1</sup> Rather, our purpose is to express our concern about the import of the assertions made on Justice Gableman's behalf in his defense to the Judicial Commission's complaint.

Justice Gableman denies that his television advertisement falsely asserted or implied that then-Justice Butler, in his previous role as a public defender, used a "loophole" that enabled or resulted in a convicted sex offender's release and subsequent commission of another sexual assault. Justice Gableman argues that his advertisement does not assert (falsely) that then-Justice Butler was successful in winning release for his client, Reuben Mitchell (he was not), or that Mr. Butler's actions in representing Mitchell actually enabled Mitchell to commit his subsequent crime (which in fact was committed after Mitchell had completed the prison portion of his sentence and was released on parole). Rather, in his written response to the complaint, Justice Gableman asserts that the purpose of the ad was to "contrast[] Justice Gableman's history as a prosecutor and judge with Louis Butler's willingness to represent and find legal loopholes for criminals like Reuben Lee Mitchell."

At oral argument before the court of appeals on the Judicial Commission's complaint against Justice Gableman, Justice Gableman's attorney, James Bopp, Jr., repeatedly argued that the purpose of the challenged television commercial was to raise questions about Justice Butler's character and judgment—to "hold him accountable"—precisely because he had once worked as a public defender representing individuals charged with crimes, and in particular a man charged with a child sexual assault. In his oral argument, Mr. Bopp argued that Justice Gableman's position, expressed in the television ad, was that "a criminal defense attorney [is] one who works to put criminals on the street," and that it was intended to criticize "Butler's willingness to find loopholes, for even people that are as despicable as this person [the defendant described in the ad] is."

Immediately after the oral argument, Mr. Bopp conducted an impromptu press conference, in which he elaborated on Justice Gableman's purposes in producing the disputed television commercial. He reiterated that the ad was meant to challenge "Justice Butler's judgment" because "he was willing to represent ... the type of person" depicted in the ad. He then contended that Justice Butler's role as counsel for a man accused of child sexual assault revealed "his willingness to subvert the criminal—our system of criminal—bringing criminals into account." He then questioned, essentially, the value of providing counsel to all accused defendants, asserting that, as a public defender, Mr. Butler "didn't have to take that criminal; he could have walked. I mean, don't you have standards?" And, finally, Mr. Bopp argued that Justice Gableman's point in his commercial was to challenge Justice Butler's contention that everyone, including those charged with serious crimes, is entitled to a vigorous defense. Mr. Bopp characterized Justice Butler's position as, "You know, every scumbag criminal is entitled to legal

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<sup>1</sup> The full text of the television ad 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?

There is no dispute that Louis Butler successfully argued for reversal of Mitchell's conviction in the Wisconsin court of appeals on an evidentiary issue, but that the Supreme Court reversed that decision and reinstated the conviction on the basis that the error was harmless. There is no dispute that Mitchell was not released as a result of Butler's work, but rather was released when he was paroled from that sentence several years later.

defense and, you know, my job is to look for loopholes and I don't care how heinous the person's, you know, crime is but I'm going to look for loopholes. And ... he can continue to be a criminal defense lawyer ... if that's the way he's going to conduct himself."

For a jurist, especially a justice of the State Supreme Court, such overt hostility to the important role of counsel for people accused of crimes is simply unacceptable. Every defendant, regardless of crime or prior record, is entitled under the Constitution to the assistance of counsel, and it is such counsel's sworn duty to represent every client with undivided loyalty and zeal. To suggest that the function of criminal defense lawyers is simply to try to put criminals on the street, or that attorneys for accused individuals work to "subvert" justice, betrays either a lack of understanding of the adversarial process, or a lack of fidelity to constitutional principles. Indeed, the Wisconsin Supreme Court has previously held that similar comments by a prosecutor during a trial, suggesting that the defense lawyer's role is to "get his client off the hook" and "not to see justice done but to see that his client was acquitted," were improper and constituted misconduct.<sup>2</sup> Vigorous representation by defense attorneys for *all* criminal defendants is important not only as a matter of justice for the accused, but also as a check in the adversarial process to ensure that only the truly guilty are convicted, to ensure that case dispositions are appropriate, and, indeed, to ensure that justice is served. It is not appropriate for a justice of the supreme court to suggest that some criminal defendants are unworthy of vigorous representation or that public defenders, as was Justice Butler at the time, should (or can) just "walk" away from the clients whom they are appointed to represent. The statements from Mr. Bopp, on behalf of Justice Gableman, further betray a lack of respect for due process in the criminal courts—by insisting that defense lawyers should assume the guilt of their clients without first subjecting the case to the crucible of adversary testing. Justice Gableman apparently believes that at least some defendants are appropriately condemned without representation, or trial, appeal, or other unbiased process. Such comments pose a serious threat to the perception, if not the reality, of fairness and neutrality on the Court.

We recognize that the comments cited above were made by Mr. Bopp, and not Justice Gableman himself. But an attorney acts as an agent for his client, and Mr. Bopp's statements, made on behalf of Justice Gableman, are therefore attributable to Justice Gableman as his client.<sup>3</sup> Those statements purport to explain Justice Gableman's perspective.

But such assertions have no place in a judicial system committed to the rule of law, fairness, and impartial justice. As the United States Supreme Court has reminded us, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S.83, 87 (1963).

*The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.*

*The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.*

*If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at [slonergan@wisbar.org](mailto:slonergan@wisbar.org) or (608) 250-6045.*

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<sup>2</sup> *State v. Mayo*, 2007 WI 78 ¶ 42, 301 Wis. 2d 642, 734 N.W.2d 115.

<sup>3</sup> *See, e.g., United States v. Brandon*, 50 F.3d 464, 468 (1995).