ORIGINAL

IN THE SUPREME COURT OF NEVADA

IN THE MATTER OF THE STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES.

ADKT NO. 458

FILED

MAR 08 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

COMMENTS OF THE STANDING COMMITTEE

The STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES (the "Standing Committee"), pursuant to the Order Scheduling Public Hearing filed on January 19, 2011, respectfully submits these comments to the Supreme Court of Nevada (the "Court").

I. SUMMARY OF COMMENTS

As an administrative body created by the Court, the mission of the Standing Committee, if any, is determined by Court directed policy and rule. The Standing Committee recommends that the Court retain the Standing Committee and its dual functions of rendering advisory ethics opinions and adjudicating judicial campaign disputes. The Court should consider adopting a more systemic means of addressing recurring problems identified in advisory opinions where more guidance is identified and solicited. The Court also should repeal existing Committee Rule 4 and replace that rule with a more robust set of procedural rules that govern the administrative process in unfair campaign practice matters. The Standing Committee has provided proposed rules to address these recommendations.

II. STATEMENT OF RELEVANT FACTS

The Standing Committee is an administrative body established by rules of the Court for the purpose of issuing ethical opinions guiding the Nevada judiciary and to adjudicate judicial campaign practice disputes. Members of the public, the bar and judiciary who are volunteers comprise the membership of the Committee, and provide on average in excess of 350-400 *pro bono* hours annually. The Standing Committee's

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annual public fiscal support is less than Thirty-five Thousand Five Hundred Dollars ($35,500.00) and the majority of its work is done by these volunteers and at private expense.[1] The Standing Committee issues an average of nine advisory opinions annually and decides on average of five unfair election practice matters during the election cycles.

III. COMMENTS AND RECOMMENDATIONS

The mission of the Standing Committee is whatever, if anything, the Court directs and that mission is animated and performed to the extent of the guidance supplied by the Court. Historically, that guidance has been quite circumspect.

From a public policy perspective, the purpose of this Docket is to determine whether the Court should eliminate or modify either or both functions -- rendering advisory ethics opinions and adjudicating judicial campaign disputes -- assigned by the Court to the Committee. An important first premise, however, is that as an administrative body created by the Court, the Standing Committee does not view itself as empowered to find that a provision of the NCJC violates or conflicts with the Constitution of the State of Nevada or the Constitution of the United States. To the contrary, based on settled administrative law principles, the Standing Committee concludes it must presume the Court adopted NCJC, interpretative comments and procedural rules are lawful and constitutional expressions of the law, *see, e.g.,* K-Mart Corp. v. State Indus. Ins. Sys., 101 Nev. 12, 18, 693 P.2d 107 (1985)(Analysis of any law begins with the presumption of constitutionality), and the Standing Committee's duty is to construe, apply and enforce the plain language of these laws in a manner that most practicably can be harmonized with applicable constitutional law principles. *See, e.g.,* Orr Ditch & Water Co. v. Justice Court, 64 Nev. 138, 162, 178 P.2d 558 (1947)(Apply construction of law that results in constitutionality); *see also* Andrews v. Nevada Ed. of

[1] In additional to typical annual fiscal support, the Committee has been required to defend litigation brought by candidates challenging the Court's rules. In the last election cycle these litigation expenditures have exceeded $25,000.00.

Cosmetology, 86 Nev. 207, 208, 467 P.2d 96 (1970)(Administrative agency has no general or common law powers, but only such powers as have been conferred by law expressly or by implication).

The Advisory Ethics Opinion Function.

If the Court eliminates the function of the Committee to provide advisory ethics opinions to the Nevada judiciary, jurists in our State will have no means by which to solicit independent counsel on the interpretation and application of the Nevada Code of Judicial Conduct (the "NCJC"). The Committee views the advisory opinion process as an important function because it has the salutatory effect of providing judges with an efficient outlet for obtaining guidance on how to conduct their affairs in compliance with the NCJC.

The current procedure whereby the Committee issues, through panels consisting of eight judges and attorneys, publicly filed advisory opinions on hypothetical questions, provides a ready mechanism for the Court to evaluate whether the NCJC is being properly construed and applied. The Court has on prior occasions used its review of these opinions as a procedure to identify instances warranting amendment of the Canons or to issue new comments that educate the bench and bar on the Court's interpretation of the NCJC. As an example, an advisory opinion issued by a panel in 2007 resulted in ADKT No. 413 pursuant to which the Court amended Canon 5B. *See, e.g.*, Nev. Standing Comm. Jud. Ethics & Elect. Prac., *Advisory Op. No. JE07-008* (Aug. 10, 2007). Similarly, the advisory opinion process provides a method by which the Standing Committee alerts the Court to emerging issues or developing decisional law that may effect the currency of the NCJC. For instance, long prior to the Court's commencement of this Docket ADKT No. 458, the Committee observed in advisory opinions that federal courts were questioning certain applications of the Canons in the context of judicial elections. *See, e.g.*, Nev. Standing Comm. Jud. Ethics & Elect. Prac., *Advisory Op. No. JE10-005* (Aug. 2, 2010).

This advisory opinion function could be transferred to the Court's staff or the staff of Administrative Office of the Courts (the "AOC"), but most likely not without incurring the need for new employees and more public fiscal support which is in scarce supply given Nevada's fiscal condition. Moreover, such a reassignment would create some potentially problematic conflict issues given the Court's ultimate role in the judicial discipline process. *See* Whitehead v. Commission on Jud. Discipline, 110 Nev. 874, 878 P.2d 913 (1994).

The Standing Committee's experience in authoring since 1998 over one hundred advisory opinions demonstrates that this function is an important and valuable resource that the Court has fashioned for use by Nevada's judiciary. The varied and valuable perspective of the judges and attorneys that serve on the panels that render opinions cannot be replicated by the staff of a judicial branch agency. Procedurally, the Standing Committee has a robust and efficient set of institutional methods for processing, debating, formatting and drafting these opinions. The Standing Committee publishes these opinions in a library available to judges and the bar on the Internet and has recently implemented a web-based index that facilitates reference and use of these opinions. All of these initiatives have been made by the Standing Committee without guidance or direction from the Court.

That said, the Standing Committee believes that the advisory opinion process could be improved. In particular, the Standing Committee suggests that the Court consider implementing a procedure for the adoption of amendments to the NCJC and the comments that specifically address recurring situations where the NCJC or the Court's decisional law provide insufficient guidance to our judiciary. The Standing Committee frequently identifies these issues in advisory opinions where the Court's intervention is invited. *See, e.g.,* Nev. Standing Comm. Jud. Ethics & Elect. Prac., *Advisory Op. No. JE11-001* (Feb. 15, 2011); Nev. Standing Comm. Jud. Ethics & Elect. Prac., *Advisory Op. No. JE10-005* (Aug. 2, 2010). The Court may have other specific

recommendations and the Standing Committee stands ready to entertain methods to improve the advisory opinion process given the body's current resources.

The Campaign Practice Adjudication Function.

In November 2010, Nevada voters once again rejected a measure that would have eliminated contested political campaigns for the selection of state court judges. Consequently, judicial election contests will continue as a part of the Nevada political landscape.

Judicial campaigns in Nevada have become more expensive and contentious in the past decade. Campaigns for judicial office are with noticeable rapidity taking on many of the organizational and advocacy attributes of campaigns for other Nevada political offices. Ethical charges and character attacks, as well as efforts to leverage for political gain some part-time judicial experience, have become more prevalent in campaigns for judicial office. In 2010, more unfair campaign practice complaints were adjudicated than in any election cycle since this responsibility was delegated by the Court to the Standing Committee in 1998. At the same time, nationally the frequency of judicial challenges to the application of the Canons in political contests has dramatically increased. In every case filed with the Standing Committee in 2010, one or both of the participating judicial candidates raised constitutionality claims or defenses.

As long as Nevadans choose their judges through a contested political process, there will be unfair election practice complaints by candidates for judicial office. The record of nearly forty adjudicated cases before the Standing Committee in seven election cycles amply establishes this fact. The Standing Committee, therefore, believes elimination of a Court supervised ***administrative*** mechanism for independently policing unfair judicial campaign practices would be unwise. In the absence of an administrative process to adjudicate these disputes, certain undesirable outcomes can be predicted.

The candidates that are party to these disputes will pursue other forums to redress their grievances. This may result with increasing frequency in filings with the Nevada Secretary of State under the Nevada Campaign Practices Act with the objective of securing an enforcement action before the First Judicial District Court. *See* NEV. REV. STAT. §§ 294A.410 & .420 (2009). These cases, however, will not be decided based on requirements of or standards set by the Court in the NCJC. Instead, the campaign practice standards adopted by the Nevada Legislature will be the applicable law. Alternatively, these controversies will otherwise be presented to the Nevada courts, and ultimately the Court, where the contentious issues can lend themselves to the judicial spectacles being played-out in jurisdictions such as Wisconsin. *See infra* **Exhibit 1** (In the Matter of Wisconsin Jud. Comm'n v. Gableman, No. 2008AP2458-J (Wisc. Sup. Ct. 2010), Compiled Memoranda Decisions).

Moreover, as the Standing Committee most recently experienced in 2010, aggrieved candidates will resort more often to the federal courts to interpret and administer the NCJC. *See, e.g.*, Kishner v. Nevada Standing Comm. on Jud. Ethics & Elect. Prac., Case No. 10-CV-1858-RLH-RJJ (D. Nev. filed Oct. 22, 2010). The federal courts are venues typically and increasingly unsympathetic with state court ethical rules that attempt to regulate judicial campaign practices, and especially judicial speech restrictions. *See, e.g.*, Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010); Carey v. Wolnitzek, 614 F.3d 189 (6th Cir. 2010); Wersal v. Sexton, 613 F.3d 821 (8th Cir. 2010); Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010).

In any or all of these scenarios, the Court will not have direct control over a confidential administrative procedure that governs the destiny of how the NCJC will be interpreted, applied and enforced. In that vacuum, the Court may find public confidence in the Court's ability and the will to regulate the conduct of Nevada's judiciary is seriously impaired.

The Standing Committee routinely weighs these competing interests in adjudicating unfair campaign practice matters. Based on that experience, the Standing Committee concludes that eliminating its administrative functions is not the best course of action. Instead, a preferred course for the Court is to refine the procedures for and elaborate on the guidance provided the Standing Committee in performing its function of adjudicating judicial campaign disputes.

In that regard, the Standing Committee urges the Court to adopt a more robust set of procedural rules that govern the administrative process in unfair campaign practice matters. To that end, the Standing Committee recommends that the Court promptly repeal the existing provisions of Committee Rule 4 and adopt the accompanying proposed rules that would entirely replace the exiting rule. *See infra* **Exhibit 2** (hereinafter "Proposed SCJEEP Rule 4"). Proposed SCJEEP Rule 4 has been drafted by the Standing Committee based on its experience in adjudicating these campaign disputes and with reliance on the administrative law background of the Chair, Vice-Chair and Executive Director. The recommended rules specifically address the recurring issues that face the Standing Committee. Providing more structure to the process will ensure that judicial candidates involved in these disputes are treated consistently according to a clearly articulated set of procedural rules, within a determined time-frame and under standards set by the Court. The addition of both an immediate judicial review process and a administrative review procedure will provide Nevada's judiciary and the public a level of confidence that the Court is actively exercising its oversight functions for the Standing Committee.

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IV. CONCLUSION

The Court should reaffirm its commitment to the Standing Committee. The Court should implement rule changes that will enhance the Standing Committee's dual functions of rendering advisory ethics opinions and adjudicating judicial campaign disputes. The Standing Committee has provided proposed rules to address these recommendations and is prepared to support the Court in this process.

Dated and respectfully submitted this 8th day of March, 2011.

STANDING COMMITTEE ON JUDICIAL
ETHICS AND ELECTION PRACTICES

By: Dan R. Reaser

Dan R. Reaser, Chair

2010 WI 61

No. 2008AP2458-J

STATE OF WISCONSIN : IN 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.

FILED

JUN 30, 2010

David R. Schanker
Clerk of Supreme Court

SHIRLEY S. ABRAHAMSON, C.J., ANN WALSH BRADLEY, J., and N. PATRICK CROOKS, J.

¶1 Under normal circumstances the court would be issuing a per curiam opinion (an opinion BY THE COURT), setting forth the separate writings of the members of the court. See our proposed per curiam attached as Attachment A. See also, State v. Allen, 2010 WI 10, 322 Wis. 2d 372, 778 N.W.2d 863 (Feb. 11, 2010). Unfortunately, Justices David Prosser, Patience Roggensack, and Annette Ziegler are unwilling even to join us in the proposed per curiam attached.

¶2 Surprisingly, Justices Prosser, Roggensack, and Ziegler do not wish their separate writing to have the same

public domain citation as our writing - a complete break from our usual practice. Our writing will have a public domain citation of 2010 WI 61. The separate writing of Justices Prosser, Roggensack, and Ziegler will have a public domain citation of 2010 WI 62.

ATTACHMENT A

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2008AP2458-J 2008AP2458

STATE OF WISCONSIN : IN SUPREME COURT

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Clerk of Supreme Court

PER CURIAM. Separate writings attached.

¶3 SHIRLEY S. ABRAHAMSON, C.J.; ANN WALSH BRADLEY, J.; and N. PATRICK CROOKS, J., deliver the following opinion.

¶4 For ease of reference, here is a road map to this opinion.

I. Justice Gableman's Motion for Summary Judgment Fails to Capture 4 Votes. (See ¶¶3-19)

We three, Chief Justice Shirley Abrahamson, Justice Ann Walsh Bradley, and Justice N. Patrick Crooks, conclude:

- Justice Gableman's advertisement violated the first sentence of SCR 60.06(3)(c).
- The advertisement "misrepresent[ed] . . . [a] fact concerning . . . an opponent" and was made knowingly or with reckless disregard for truth or falsity.
- The First Amendment does not protect knowingly false statements.

Justice David T. Prosser, Justice Patience D. Roggensack, and Justice Annette K. Ziegler[1] conclude otherwise and anticipate a further motion from the Judicial Commission.

Because of a deadlock, we three conclude that a remand to the Judicial Commission for a jury hearing is required.

II. The Advertisement Violates the First Sentence of SCR 60.06(3)(c). (See ¶¶20-63)

III. The First Amendment Does Not Protect Knowingly Made False Statements. (See ¶64-113).

I

¶5 The Wisconsin Judicial Commission (Judicial Commission) filed a complaint against Justice Michael J. Gableman based on a TV advertisement run by his campaign.

[1] See 2010 WI 62 for the separate writing of Justices Prosser, Roggensack, and Ziegler.

¶6 The Wisconsin Judicial Commission contends that Justice Gableman's advertisement violated the first sentence of SCR 60.06(3)(c) because the advertisement "misrepresent[ed] . . . [a] fact concerning . . . an opponent."

¶7 A Judicial Conduct Panel (Panel) was designated to hear this matter under Wis. Stat. § 757.87(3). The parties filed proposed statements of facts,[2] and the Judicial Commission then moved the panel to compel further response from Justice Gableman. The Panel denied this motion, stating that "[g]iven the existence of factual disputes, an evidentiary hearing is the next step in the process." Justice Gableman then moved the Panel for summary judgment.

¶8 The Panel received briefs and heard oral argument on Justice Gableman's motion for summary judgment. In its determination of the motion for summary judgment, the Panel made findings of fact and conclusions of law. The Panel recommended that Justice Gableman's motion for summary judgment be granted[3] and that the Judicial Commission's complaint be dismissed.[4] The

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[2] Following a procedure jointly proposed by the parties, the Judicial Commission filed a Statement of Facts, Justice Gableman filed a Statement of Facts and Response to the Commission's statement, and the Judicial Commission filed a Response to Justice Gableman's Statement.

[3] Judicial Conduct Panel, slip op. at 4, n.4 ("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.")

[4] Judicial Conduct Panel, slip op. at 15 ("[W]e recommend that Justice Gableman's motion for summary judgment be granted and the Commission's complaint be dismissed.").

matter comes before the court on review of the Panel's recommendation to grant summary judgment.[5] The Panel entered its recommendation recognizing that the Supreme Court "retains the ultimate authority to grant or deny the motion." Judicial Conduct Panel, slip op. at 4 n.4. The court is equally divided with respect to the Panel's recommendation.

¶9 Summary judgment is available to a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).[6] In Grams v. Boss, this court set forth the method for evaluating such a motion:

> If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's (in this case the defendants') affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment under sec. 802.08(2). To make a prima facie case for summary judgment, a moving defendant must show a defense which would defeat the plaintiff. If the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party (plaintiffs in this case) to determine whether there exists disputed material facts, or undisputed material facts from which reasonable alternative inferences may

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[5] Justice Gableman moved this court for review of the panel's recommendation that summary judgment be granted pursuant to Wis. Stat. § 757.91. The Judicial Commission agreed that the factual record was complete and could form the basis for this court's review. This court ordered briefing and scheduled oral argument.

[6] All references to the Wisconsin Statutes are to the 2007-08 version.

be drawn, sufficient to entitle the opposing party to a trial.

. . . .

The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. . . . If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). In Green Springs Farms v. Kersten, we clarified that the approach taken by an appellate court to a summary judgment motion is identical to that taken by a trial court:

There is a standard methodology which a trial court follows when faced with a motion for summary judgment. The first step of that methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated.

If a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist.

. . . .

When this court is called upon to review the grant of a summary judgment motion, as we are here, we are governed by the standard articulated in section 802.08(2), and we are thus required to apply the standards set forth in the statute just as the trial court applied those standards.

Green Spring Farms v. Kersten, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987) (citations omitted).

¶10 The court is equally divided on the recommendation of the Panel that Justice Gableman's motion for summary judgment be granted and the Commission's complaint dismissed. Three justices would reject the recommendation of the Panel and three would accept it. We three justices, Chief Justice Abrahamson,

Justice Bradley, and Justice Crooks, would deny Justice Gableman's motion for summary judgment on the grounds that he has failed to establish a prima facie case for summary judgment.

¶11 Justice Prosser, Justice Roggensack, and Justice Ziegler would accept the Panel's recommendation to grant Justice Gableman's motion for summary judgment and dismiss the complaint, on the grounds that the Judicial Commission has failed to establish a prima facie case for summary judgment and has failed to meet, to a reasonable certainty by evidence that is clear and convincing, its burden of proof with regard to Justice Gableman's alleged violation of the Judicial Code.

¶12 The court is equally divided on the question of whether the advertisement constituted a violation of SCR 60.06(3)(c) for which discipline may be imposed.

¶13 We three, Chief Justice Abrahamson, Justice Bradley, and Justice Crooks, would reject and three justices, Justice Prosser, Justice Roggensack, and Justice Ziegler, would accept the Panel's recommended conclusion that there was no violation of the first sentence of SCR 60.06(3)(c).[7]

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[7] SCR 60.06(3)(c) provides:

> 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.

¶14 We three justices, Chief Justice Abrahamson, Justice Bradley, and Justice Crooks, conclude that the advertisement misrepresented a fact about Justice Gableman's opponent and that this misrepresentation was made knowingly or with reckless disregard for the truth or falsity of the statement, and thereby violates the first sentence of SCR 60.06(3)(c). Specifically, the advertisement knowingly (or with reckless disregard of the truth or falsity of the statements) communicated the falsehood that Louis Butler's conduct as Mitchell's defense attorney in finding a "loophole" facilitated Mitchell's release and later offense. The advertisement can reasonably be viewed only as communicating that Louis Butler's actions in representing Mitchell and finding a "loophole" led to Mitchell's release and his commission of another crime.[8]

¶15 Further, we conclude that imposing discipline under SCR 60.06(3)(c) would not violate the First Amendment to the United States Constitution in the present case. Since we three justices who find that a violation occurred do not constitute a majority, we do not reach the question of the appropriate sanction.

¶16 The question of whether the advertisement constituted a misrepresentation remains unresolved at this point. This case reaches us in summary judgment posture. Given that no majority of justices agrees to accept the Panel's recommendation that

[8] We conclude that by approving the advertisement, Justice Gableman was in willful violation of the mandatory prohibition against misrepresentations contained in the first sentence of SCR 60.06(3)(c) and therefore engaged in judicial misconduct as defined by Wis. Stat. § 757.81(4)(a).

summary judgment be granted, the Judicial Commission's complaint has survived summary judgment.

¶17 It is contrary to every precedent and principle of civil procedure to suggest, as Justice Prosser, Justice Roggensack, and Justice Ziegler do, that the Judicial Commission, which was successful in defeating a motion for summary judgment in this court, should then be coercively "invited" to bring a motion to dismiss the case that it has not actually lost. Rather, the standard procedure is that a case surviving summary judgment typically proceeds to trial. It is therefore appropriate at this juncture to remand this cause to the Judicial Commission for further proceedings[9] under Wis. Stat. § 757.87.[10]

¶18 Though the recommendation of the Panel failed, it remains necessary to resolve the matter in accordance with the

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[9] See, e.g., Racine County v. Oracular Milwaukee, Inc., 2010 WI 25, ¶5, 781 N.W.2d 88 (remanding for further proceedings after finding that plaintiff had survived summary judgment).

[10] Wisconsin Stat. § 757.87 provides:

> Request for jury; panel. (1) After the commission has found probable cause that a judge . . . has engaged in misconduct . . . , the commission may . . . request a jury hearing.
>
> (2) If a jury is requested under sub. (1), the hearing under s. 757.89 shall be before a jury selected under s. 805.08. A jury shall consist of 6 persons, unless the commission specifies a greater number, not to exceed 12. Five-sixths of the jurors must agree on all questions which must be answered to arrive at a verdict. A court of appeals judge shall be selected by the chief judge of the court of appeals to preside at the hearing, on the basis of experience as a trial judge and length of service on the court of appeals.

governing statutes. When this court cannot reach a decision because of a deadlock, it is incumbent on this court to ensure that a tribunal decide the matter presented by the Judicial Commission's complaint and the recommendations of the Judicial Conduct Panel.

¶19 Upon remand, therefore, the Commission needs to request a jury hearing, with a jury of 12 persons, on the question of whether the campaign ad violated the Judicial Code. As noted above, the parties have submitted statements of facts, but on the record presented, Justice Gableman's motion for summary judgment has not succeeded. There are facts bearing on this case that were not included in the Panel's findings. For example, at oral argument Justice Gableman's counsel urged the court to consider the relevance of case citations that were visually included in the disputed advertisement. The Panel offered no findings or discussion regarding the case citations or the visual aspect of the advertisement. We discuss the citation information at ¶¶50-54. Contrary to Justice Gableman's counsel, we conclude that a jury could find that this citation information misrepresented relevant facts, thus corroborating, rather than disproving, the Judicial Commission's allegation that the advertisement violated SCR 60.03(3)(c).

¶20 On remand, the jury must hear testimony and arguments and view the advertisement at issue. The question for the jury is whether the facts as found by the jury constitute a violation of SCR 60.06(3)(c). The question of the First Amendment's relevance, if any, to SCR 60.06(3)(c), in contrast, is a question of law to be answered, if necessary, by the judge. The

statutes set forth the procedures following a jury request: "A court of appeals judge shall be selected by the chief judge of the court of appeals to preside at the hearing,[11] on the basis of experience as a trial judge and length of service on the court of appeals." Wis. Stat. § 757.87(2). "The allegations of the complaint or petition must be proven to a reasonable certainty by evidence that is clear, satisfactory and convincing. The hearing shall be held in the county where the [respondent justice] resides unless the presiding judge changes venue for cause shown or unless the parties otherwise agree. . . . [T]he presiding judge shall instruct the jury regarding the law applicable to judicial misconduct or permanent disability, as appropriate." Wis. Stat. § 757.89. The presiding judge shall then "file the jury verdict and his or her recommendations regarding appropriate discipline for misconduct . . . with the supreme court." Id.

¶21 It is clear that the court is equally divided regarding the disposition of the matter. No four justices have voted either to accept or to reject the Judicial Conduct Panel's recommendations, nor have four justices agreed on Justice Gableman's motion for summary judgment or any disposition of the Judicial Commission's complaint. No action can therefore be taken on the Panel's recommendation. The Judicial Commission has failed to obtain a majority of justices to reject the

[11] In order to avoid any question under Wis. Stat. § 757.19(2)(e) and SCR 60.04(b) of a judge's eligibility to preside at the hearing, the judge appointed should not be one of the three judges who "previously handled the action or proceeding" when the matter was before the Panel.

recommendation of the Panel. Under these circumstances, the Panel is relieved of any further responsibility in this matter, and we remand the matter to the Judicial Commission with directions to request a jury hearing, in accord with Wis. Stat. §§ 757.87, 757.89, and 805.08.

II

¶22 The full narration of the advertisement at issue was as follows:

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

¶23 First we examine whether the advertisement at issue violates the first sentence of SCR 60.06(3)(c). The first sentence of SCR 60.06(3)(c) 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."

¶24 SCR 60.06(3)(c) applied to then-circuit court Judge Gableman as a candidate in the 2008 campaign for judicial office, namely to be a Justice of the Wisconsin Supreme Court.[12]

¶25 Justice Gableman's advertisement related to his opponent, Louis Butler. The narration of the TV advertisement, set out in full above at ¶20, stated in relevant part:

> 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?

¶26 The narration does not include the visual aspects of the advertisement. Viewing the advertisement is, of course, the best way to evaluate the advertisement to determine whether it presents a violation of SCR 60.06(3)(c). For instance, the advertisement visually includes case citation information which the narration does not reflect. We discuss the import of the citation information at ¶¶50-54. The reader can access a video copy of the advertisement, which was Exhibit A attached to the Commission's complaint, at http://sc-media.wicourts.gov/sc-media/Gableman_Ad_Titled_Prosecutor.wmv.

¶27 We next explore what Justice Gableman knew when he ran the advertisement. Knowledge is important because SCR 60.06(3)(c) bars a candidate for judicial office from "knowingly or with reckless disregard for the statement's truth or falsity misrepresent[ing] . . . [a] fact concerning . . . an opponent."

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[12] Judicial Conduct Panel Finding of Fact #2; SCR 60.01(2).

SCR 60.03(9) defines "knowingly" or "knowledge" as "actual knowledge of the fact in question, which may be inferred from the circumstances."

¶28 Here are the facts relating to Justice Gableman's knowledge. "The advertisement refers to Butler's representation of Mitchell."[13] Justice Gableman "became familiar with the decisions of the court of appeals and supreme court in Reuben Lee Mitchell's 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) . . . ."[14]

¶29 Justice Gableman made "every reasonable effort to ensure that the Ad was accurate" by "being familiar with the Mitchell cases in general, with their facts and holdings, and the arguments advanced by Butler, who represented Mitchell."[15] "Justice Gableman personally reviewed both the audio and video of the advertisement before its release."[16] "Justice Gableman viewed the Ad and reviewed the Ad's script prior to approving it for publication."[17] Justice Gableman "delayed the release of the

[13] Judicial Conduct Panel Finding of Fact #10.

[14] Judicial Conduct Panel Finding of Fact #6. Justice Gableman's answer #13: "In response to [the allegation in the complaint that "prior to publication of the Advertisement, Judge Gableman was familiar with the facts and holdings of both the Supreme Court and the Court of Appeals decisions"], Justice Gableman affirmatively alleges that he had a general understanding of the decisions . . . ."

[15] Justice Gableman's Responsive Statement of Facts, #13(b).

[16] Judicial Conduct Panel Finding of Fact #5.

[17] Justice Gableman's Responsive Statement of Facts, #12.

advertisement while he sought to verify the accuracy of its contents."[18] Justice Gableman "approved the advertisement as it had been originally presented to him."[19]

¶30 Justice Gableman approved and ran the advertisement after knowing key facts about his opponent's role as a public defender representing Reuben Lee Mitchell.

¶31 The advertisement refers to Butler's representation as an appellate state public defender of Mitchell from 1985 to 1988 in Mitchell's appeal from a conviction of first-degree sexual assault of a child.[20] The reference in the advertisement to the "loophole" Butler found was to his successful argument that "the rape-shield law . . . had been violated."[21]

¶32 Justice Gableman knew that the Supreme Court agreed with Butler's "loophole" argument that the circuit court had erroneously admitted evidence against Mitchell in violation of the rape-shield law.[22] Justice Gableman knew that the Wisconsin supreme court declared the circuit court's evidentiary error harmless.[23]

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[18] Judicial Conduct Panel Finding of Fact #5.

[19] Judicial Conduct Panel Finding of Fact #7.

[20] Judicial Conduct Panel Finding of Fact #10.

[21] Judicial Conduct Panel Finding of Fact #20. See also Justice Gableman's Responsive Statement of Facts, #7.

[22] Justice Gableman's Answer #10 admits this is a correct summary of the decisions. The Judicial Conduct Panel Finding of Fact #6 is that "Justice Gableman became familiar with the decisions of the court of appeals and supreme court in Reuben Lee Mitchell's" cases before these courts.

[23] Justice Gableman's Answer #10.

¶33 Justice Gableman knew that Mitchell remained in prison until Mitchell was released according to the terms of his sentence on conviction of the charge on which Louis Butler represented him. Justice Gableman knew that after Mitchell's release from prison on parole, Mitchell committed a new offense.[24]

¶34 On this record, only one conclusion can be reached: Justice Gableman had knowledge of Butler's representation of Mitchell to which the advertisement referred and had knowledge that Louis Butler's representation of Mitchell in finding a "loophole" did not lead to the release of Mitchell.

¶35 The Judicial Conduct Panel found that "[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."[25] The Panel further found that "[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."[26]

¶36 Having established what Justice Gableman knew about his opponent's representation of Mitchell in the supreme court, we now determine whether the following sentences in the TV advertisement violated SCR 60.06(3)(c) by "misrepresent[ing] . . . [a] fact concerning the candidate or an opponent." The key sentences are:

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[24] Justice Gableman's Answer #10 admits these facts.

[25] Judicial Conduct Panel Finding of Fact #16.

[26] Judicial Conduct Panel Finding of Fact #17.

> 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.

¶37 The Judicial Conduct Panel made findings of fact that each of the four sentences in the advertisement relating to Louis Butler was factually true.[27]

¶38 Two judges of the Judicial Conduct Panel concluded that four true statements cannot fit within the prohibition of the first sentence of SCR 60.06(3)(c). They reached the wrong decision for two reasons.

¶39 First, these two judges misread the text of the first sentence. They assert that the first sentence applies only to statements that are false and cannot apply to a true statement. They reach this conclusion, writing that "[t]he first sentence of SCR 60.06(3)(c) speaks to the 'truth or falsity' of any statement that 'misrepresent[s] the identify [sic], qualifications, present position, or other fact concerning the candidate or an opponent."[28] This is not what the first sentence says.

¶40 The phrase "truth or falsity" in the first sentence modifies the words "reckless disregard" in the scienter part of the sentence. The phrase "truth or falsity" does not modify the core prohibition, namely that a candidate "shall not . . . knowingly misrepresent" a "fact concerning the candidate or an

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[27] Judicial Conduct Panel Findings of Fact #18-21.

[28] Judicial Conduct Panel, slip op. at 14.

opponent.[29] The operative language of the Rule is not focused on the "truth or falsity" of individual "sentences" but rather whether a knowing misrepresentation was made. By misapprehending the application of the words "truth or falsity," in the first sentence, the two Panel judges incorrectly concluded that the first sentence of SCR 60.06(3)(c) does not apply to an objective misrepresentation of the facts regardless of the "truth or falsity" of each individual sentence.

¶41 Second, these two judges—and Justice Gableman—would read each of the sentences of the TV advertisement in isolation, as if the other sentences did not exist. They assert that because each sentence is, by itself, literally true, the four sentences together cannot amount to a false statement or a misrepresentation. They ask us to read each sentence standing alone, denuded of any context or meaning.

¶42 The absurdity of that position is evident—it would allow speakers to knowingly convey false information, so long as they are fastidious in their punctuation, clever in the use of omitting a word, and tactical in using as few words as possible. We do not accept such a cramped view of what it means to make a "misrepresentation."

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[29] Justice Gableman picks up this misconstruction of the rule's text in his brief at 4, emphasizing the words of SCR 60.06(3)(c) as follows:

"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."

This emphasis graphically shows the misinterpretation of the words of the first sentence in SCR 60.06(3)(c).

¶43 This view would ignore the normal way that people speak, read, and listen, the way in which people express meaning through language, and the way people understand not just words but sentences, and ultimately meaning. Construing each sentence as an isolated true statement rather than admitting of a single representation or statement, would adopt a view that ignores the way that human language and communication function.

¶44 Justice Gableman's position would allow for a thinly-sliced dissection of syntax to create "plausible deniability" after the fact, rather than acknowledging the only reasonable meaning communicated by the advertisement. Sadly, the approach offered in defense of the advertisement at issue here would approach the Code of Judicial Conduct in the manner of wordplay and linguistic gamesmanship, rather than as an embodiment of substantive ethical standards.

¶45 We refuse to approach the Code of Judicial Conduct in that manner or to adopt an approach to SCR 60.06(3)(c) that invites future judicial candidates to push and distort the content of advertising in judicial campaigns as far past truthful communication as the creative use of language may allow.

¶46 In contrast to Justice Gableman and two judges of the Judicial Conduct Panel, we determine that several literally true sentences can be strung together to communicate an objectively false statement. The law has long acknowledged that to discern

the meaning of language it must be read in context.[30] As Judge Learned Hand put it, "Words are not pebbles in alien

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[30] See, e.g., State ex rel Kalal v. Circuit Court for Dane Co., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (2003) ("Context is important to meaning . . . . [S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole . . . .").

Long-settled law established in defamation cases involving the First Amendment (including cases relating to "political speech") informs our decision in the present case. Cf. In re Chmura, (Chmura II), 626 N.W.2d 876, 885 (Mich. 2001) ("The language used in Canon 7(B)(1)(d) has its roots in defamation law. New York Times [v. Sullivan, 376 U.S. 254 (1964)]. Thus, we examine defamation case law for guidance in analyzing whether a judicial candidate knowingly, or with reckless disregard, has used or participated in the use of any form of public communication that is false.").

Courts have long declared that in determining whether statements were false (and therefore could be defamatory) the words used must be construed in the plain and popular sense in which they would naturally be understood. "In determining whether language is defamatory, the words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered. . . . One may not dissect the alleged defamatory statement into non-defamatory parts and thus lose the vital overall meaning." Frinzi v. Hanson, 30 Wis. 2d 271, 276-77, 140 N.W.2d 259 (1966) (emphasis added) (relating to political speech); see also, e.g., Kaminske v. Wis. Cent. Ltd., 102 F. Supp. 2d 1066, 1081 (E.D. Wis. 2000) (same); Dilworth v. Dudley, 75 F.3d 307, 310 (7th Cir. 1996) (applying Wisconsin law) (same).

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juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part."[31]

¶47 Here, the four sentences at issue must be understood in the context in which they were offered, spoken in series in a matter of 10-15 seconds. Each sentence takes meaning from the sentence before and gives meaning to the sentence that follows. Accepting this common and necessary approach, we must agree with the Judicial Commission and with Judge Fine's concurrence that the advertisement communicated an objectively false statement.

¶48 The advertisement can reasonably be viewed only as communicating that Louis Butler's actions in representing Mitchell and finding a "loophole" led to Mitchell's release and his commitment of another crime. No other reasonable

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Defamation cases are instructive because, like potential judicial discipline for campaign speech under SCR 60.06(3)(c), defamation law imposes liability for false speech. Of course a judicial determination of whether statements made were, in fact, false, is required. See generally 3 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech § 23:6 ("[T]he First Amendment does not permit liability for defamation unless the plaintiff also demonstrates that the defamatory statement was a false statement of fact."). A state imposition of consequences on speech implicates First Amendment considerations in both defamation and judicial discipline cases and both require a court to examine language to determine whether it expresses a false statement of fact.

[31] Nat'l Labor Relations Bd. v. Federbush Co., 121 F. 2d 954, 957 (2d Cir. 1941).

interpretation of the advertisement has been suggested.[32] The message communicated was that Butler facilitated Mitchell's release and later crime. This message is objectively false. The four sentences misrepresented a fact concerning Louis Butler, Justice Gableman's opponent.

¶49 Another layer of misrepresentation is added to the advertisement's false narration by the visual presentation of case citation information.

¶50 At oral argument Justice Gableman's counsel suggested that a viewer could learn the facts for himself or herself by checking the citations and therefore the advertisement could not have contained a misrepresentation. Justice Gableman's attorney stated that the visuals allowed the viewer to conduct his or her own inquiry into the nature of the statements in the advertisement:

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[32] As Judge Fine put it, "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." Judicial Conduct Panel, slip op. at 23 (Fine, J., concurring).

Judge Fine's concurrence explains that he posed several hypotheticals to Justice Gableman's counsel in the hearing before the Judicial Conduct Panel to determine whether Justice Gableman's counsel found any of them misrepresentations within the first sentence of SCR 60.06(3)(c). Some of Judge Fine's examples were blatant misrepresentations of fact within the meaning of SCR 60.06(3)(c). Nevertheless, in Justice Gableman's counsel's view, none was a misrepresentation. Judge Fine characterized counsel's view as "sophistry," bordering on "'pleated cunning.'" Judicial Conduct Panel, slip op. at 26 (Fine, J., concurring) (quoted source omitted). We agree with Judge Fine.

> Ultimately the ad provides the underlying factual references that demonstrate to the viewer, not after the fact when we're arguing about whether this ad is true or not, but to the viewer, the viewer has the references in the visual piece of the ad to determine what these statements relate to, and the viewer has the ability to conduct his or her own inquiry into the nature of the statements that are made.

¶51 That an attentive viewer was given this information does not change the fact that the advertisement itself misrepresented the facts, as is prohibited by SCR 60.06(3)(c). The prohibition against knowing misrepresentations does not depend on whether a viewer might later learn the truth.

¶52 More importantly, however, the case information provided by the advertisement is in and of itself objectively false and exacerbates the misrepresentation of the spoken words. The advertisement visually contains the following three citation references to cases: "State of Wisconsin CASE # 1984CF000250," "State of Wisconsin CASE # 1995CF952148," and "139 Wis. 2d 856." The first two references are circuit court case numbers for felony convictions of Reuben Lee Mitchell. The third is a citation to the disposition table of unpublished court of appeals decisions. The disposition table states that in the Mitchell case the court of appeals "reversed [the trial court conviction] and remanded [the case]."[33]

¶53 The advertisement does not contain the citation for the Wisconsin Supreme Court decision in the Mitchell case, 144 Wis. 2d 596 (1988). Justice Gableman knew that Butler continued to represent Mitchell in the supreme court and knew the contents

[33] The notation in the disposition table states that a petition for review is pending.

of the supreme court decision. The Wisconsin Supreme Court reversed the decision of the court of appeals and affirmed Mitchell's conviction. Even for an industrious viewer who wished to "conduct his or her own inquiry," the advertisement omitted the key reference to the supreme court case that proves the misrepresentation contained in the advertisement itself. Thus the advertisement misrepresented the court of appeals decision as the final decision on appeal, overturning Mitchell's conviction. A viewer who reviewed the citations referenced by the advertisement would conclude that the misrepresentation contained in the advertisement—that Butler's representation led to Mitchell's release and later crime—was true.

¶54 As we have stated previously, Justice Gableman knew that Louis Butler's representation in the court of appeals and Wisconsin Supreme Court, including finding a "loophole," did not facilitate Mitchell's release or allow Mitchell to commit a new offense. Accordingly, we conclude that Justice Gableman knowingly or with reckless disregard of the truth or falsity of the statements in the TV advertisement "misrepresent[ed] . . . [a] fact concerning . . . an opponent" in violation of the first sentence of SCR 60.06(3)(c).

¶55 In contrast to our conclusion, Judge Deininger's concurring opinion, Judicial Conduct Panel, slip op. at 17-19, concluded that the advertisement violated the second sentence of SCR 60.06(3)(c) and warranted condemnation even if formal

discipline was not appropriate.[34] The second sentence of SCR 60.06(3)(c) provides: A candidate for judicial office should not knowingly make representations that, although true, are misleading . . . ." To fit within the second sentence, the statements must be "true" "representations" that are "misleading."

¶56 We disagree with Judge Deininger that the TV advertisement makes a true representation. It is not true that Mitchell went on to molest another child because Butler represented Mitchell and found a loophole. We agree with Judge Deininger that the TV advertisement was misleading. But contrary to what Judge Deininger says, misleading and misrepresentation are not mutually exclusive concepts. A misrepresentation is, by its very nature, misleading.

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[34] At oral argument in our court, Justice Gableman's counsel urged that the four sentences were not even misleading under the second sentence of SCR 60.06(3)(c). Judge Deininger, one of the two judges who concluded that the advertisement did not violate the first sentence, asserted that Justice Gableman's counsel "virtually conceded at oral argument [before the Judicial Conduct Panel] that the advertisement is misleading." Judicial Conduct Panel, slip. op. at 17 (Deininger, J., concurring).

Judge Deininger wrote that "[t]he 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." We agree with Judge Deininger that the advertisement "confuse[d] the public with respect to the proper role of . . . lawyers in the adversary system," a misrepresentation which SCR 60.06(3)(c) cautions judicial candidates to avoid. Judge Deininger wrote that "[t]hat is precisely what the advertisement does, and what the advertisement was apparently intended to do." Judicial Conduct Panel, slip. op. at 17-18 (Deininger, J., concurring).

¶57 We conclude that by publishing the advertisement Justice Gableman willfully violated the first sentence of SCR 60.06(3)(c) and engaged in judicial misconduct pursuant to Wis. Stat. § 757.81(4)(a). By means of the advertisement, which he personally reviewed after personally reviewing the underlying facts, Justice Gableman knowingly or with reckless disregard for the statements' truth or falsity misrepresented a fact concerning an opponent within the meaning of SCR 60.06(3)(c).

¶58 We turn now to the argument that SCR 60.06(3)(c) and its application in the present case are unconstitutional under the First Amendment of the United States Constitution.

III

¶59 Because we determine that the advertisement at issue here violates SCR 60.06(3)(c), we next address the question whether imposing discipline for this misrepresentation would violate the guarantee to freedom of speech provided by the First Amendment of the United States Constitution.[35]

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[35] "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Article I, section 3 of the Wisconsin Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

¶60 The law is clear: The First Amendment does not protect a false statement that is made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. 254, 280 (1964). The New York Times case adopted the "actual malice" standard: false statements made with actual malice, that is, with knowledge of their falsity or reckless disregard as to truth or falsity, are not protected speech. The actual malice standard distinguishes between on the one hand speech that is constitutionally protected, even if it contains some false statements, and on the other hand speech that the speaker knows to be false or speech uttered with reckless disregard for its truth or falsity, which is not protected by the First Amendment.

¶61 New York Times v. Sullivan, 376 U.S. 254 (1964), first articulated this standard in a case of civil libel (defamation). Civil libel actions involve the First Amendment because state action (tort law and the court) imposes a sanction on speech. The "actual malice" standard was, however, quickly applied to a criminal prosecution for defamation in Garrison v. Louisiana, 379 U.S. 64 (1964), which was published in the same year and authored by the same Justice who authored New York Times v. Sullivan. The Garrison court recognized that "the paramount public interest in a free flow of information to the people concerning public officials" was at stake and described the kind of speech involved as "the essence of self-government."[36]

[36] Garrison v. Louisiana, 379 U.S. 64, 77, 75 (1964).

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¶62 The United States Supreme Court explained in Garrison that an honest but inaccurate utterance may further the exercise of free speech and robust political discourse, while a knowing and deliberate or reckless falsehood used for political ends is at odds with the premises of a democratic government and the guarantee of free speech protected by the First Amendment:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col[um].

The Court saw no meaningful distinction between the interests implicated by civil defamation actions brought by private parties and enforcement of criminal libel law by the state:

> [W]e must decide whether, in view of the differing history and purposes of criminal libel, the New York Times rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.
>
> Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.

Garrison, 379 U.S. at 67. Thus the constitutional standard was the same, whether the cause of action was public or private and whether the sanctions imposed were civil or criminal. "Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards." Garrison, 379 U.S. at 68 n.3.

> L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . . " Chaplinsky v. New Hampshire, 315 U.S. 568, 572. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[37]

¶63 Since 1964, when New York Times v. Sullivan and Garrison v. Louisiana first established "actual malice" as the constitutional standard, numerous cases have invoked the rule

[37] Garrison v. Louisiana, 379 U.S. at 75 (emphasis added).

that knowingly false statements are not sheltered from penalty by the First Amendment.[38]

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[38] See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." (internal citations omitted)); Brown v. Hartlage, 456 U.S. 45, 61-62 (1982) (striking down state law that "provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary;" citing defamation cases in the context of campaign speech regulation and reaffirming that "[o]f course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements"); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials. '[T]here is no constitutional value in false statements of fact.'" (internal citation omitted)); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (internal citations omitted)); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44, 52 (1971) (Brennan, J., plurality opinion) (applying "actual malice" standard in a case brought by a private plaintiff, "extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous" and maintaining that "[c]alculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech'" (quoted source omitted)); St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("[N]either lies nor false communications serve the ends of the First Amendment"; applying the "actual malice" standard to follow "the line which our cases have drawn between false communications which are protected and those which are not"); Time Inc. v. Hill, 385 U.S. 374, 389-90 (1967) (applying "actual malice" standard in case brought under state right of privacy statute, maintaining that "constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential

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¶64 The New York Times v. Sullivan "actual malice" standard is explicitly incorporated in the language of SCR 60.06(3)(c). The Rule prohibits a candidate for a judicial office from making misrepresentations about specified subjects either (1) knowingly or (2) with reckless disregard for the truth or falsity of the statement.

¶65 Justice Gableman agrees that even in what he calls "core political speech," the First Amendment does not protect "objectively false" statements.[39] The First Amendment argument as presented by Justice Gableman therefore continues to focus on

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function. . . . [C]alculated falsehood should enjoy no immunity in the situation here presented us" (citing Garrison v. Louisiana, 379 U.S. at 75)); Linn v. United Plant Guard Workers of Am. Local 114, 383 U.S. 53, 62-63 (1966) (civil libel case arising in a labor organizing campaign and election; acknowledging "a congressional intent to encourage free debate on issues dividing labor and management" and that "cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open . . . '"; maintaining that "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. . . . [M]alicious libel enjoys no constitutional protection in any context" (emphasis added)); Weaver v. Bonner, 309 F.3d 1312, 1320 (11th Cir. 2002) ("restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false—i.e., an actual malice standard").

[39] At oral argument, counsel for Justice Gableman took the position that "The First Amendment would not protect objectively false statements. That's the crux of the issue in this case."

We note that this view is different from the more categorical position of Judge Fine's concurrence to the Judicial Conduct Panel's recommendation. Judge Fine concluded that "the only tribunal that may assess whether campaign speech is true or false is the electorate." Judicial Conduct Panel, slip op. at 29.

the determination we have already addressed—whether the advertisement at issue here knowingly misrepresented a fact about Justice Gableman's campaign opponent or, in the terms used by Justice Gableman, whether the advertisement was "objectively false."[40] Because we have already determined that the advertisement communicated a knowing misrepresentation of fact, and because we agree with Justice Gableman that objectively false speech may properly be disciplined, we conclude that the First Amendment does not prevent the court from imposing discipline on the basis of the advertisement in question here.

¶66 We are guided by the Garrison Court, which stated unequivocally: "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas . . . . Hence the knowingly false statement and the false

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[40] It is not clear in Justice Gableman's brief whether he argues that SCR 60.06(3)(c) is unconstitutional on its face or only if applied to the advertisement in the instant case.

At certain points the brief implies that the law should prohibit judicial adjudication of the truth or falsity of any statement made in an election campaign, arguing that discipline "would be unconstitutional because of this Court's role in determining whether his speech is true or false." Brief of Respondent at 19.

At other points, Justice Gableman's brief, citing Burson v. Freeman, 504 U.S. 191, 198 (1992), and Rickert v. State, 168 P.3d 826, 827 (Wash. 2007), suggests that political campaign speech may be subject to some governmental regulation but that such regulation is then subject to "strict scrutiny" by the courts. See Brief of Respondent at 20.

At oral argument, Justice Gableman agreed that objectively false statements would not be protected by the First Amendment; the corollary to this argument is that SCR 60.06(3)(c) would be constitutional at least as applied to regulate "objectively false" statements.

statement made with reckless disregard of the truth do not enjoy constitutional protection."[41]

¶67 Justice Gableman argues, however, that "defamation law is inapplicable in the context of constitutionally protected political speech," or "core political speech," at issue here.[42]

¶68 Justice Gableman's brief argues that the Judicial Commission has not cited authority bringing the "actual malice" (that is, defamation) analysis specifically to bear in the context of election campaigns. True. But neither has Justice Gableman cited any authority (other than a case decided by a significantly divided Washington Supreme Court) supporting his position that the clearly articulated, oft-adopted "actual malice" standard does not apply in campaign advertising cases.

¶69 Some tension exists in the language of First Amendment cases.

¶70 On the one hand, First Amendment cases often include rhetorical statements which, if read in isolation, sound like

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[41] Garrison, 379 U.S. at 75.

[42] See Brief of Respondent at 8.

Although Justice Gableman's position concedes that the First Amendment does not protect objectively false statements, he argues that the advertisement here was not objectively false. In effect, this argument restates the claim already addressed: that the four sentences do not contain a false statement or a misrepresentation of fact.

absolute protection for free speech.[43] For example, the United States Supreme Court recently reminded us in United States v. Stevens, 130 S. Ct. 1577 (2010): "[T]he First Amendment's free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. . . . Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[44]

¶71 On the other hand, while absolutist statements have a rhetorical value in emphasizing the commitment our constitution makes to freedom of speech, such absolutism is not the rule of law.[45] A clear line of authority exists protecting against dishonesty in public discourse and safeguarding open and

[43] See, e.g., Wisconsin Right to Life, Inc., ("Our jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech between what is protected and what the Government may ban it is worth recalling the language we are applying . . . we give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech' demands at least that.").

[44] United States v. Stevens, 130 S. Ct. 1577, 1580, 1585 (2010).

[45] See generally 1 Rodney A Smolla, Smolla and Nimmer on Freedom of Speech §§ 2:10, 2:49, 2:50 (2006). "It should come as no surprise that the reality of absolutism does not match its rhetoric." Id., § 2:50.

fruitful public discourse,[46] namely the "actual malice" standard.[47] As the Stevens case reminds us, http://scholar.google.com/scholar_case?case=10183527771703896207&q=buckley+v.+valeo&hl=en&as_sdt=400000000000002there continue to exist "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[48] Relevant here is that knowingly uttered false speech is one such category of speech for which the government may impose sanctions without violating the First Amendment.[49]

¶72 The United States Supreme Court has not directly addressed how knowingly false statements, when made in a political campaign, may be regulated. There are cases addressing the regulation of campaign advertising in which false statements are not at issue. There also are cases allowing liability for knowingly false speech regarding public officials

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[46] We have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." New York Times v. Sullivan, 376 U.S. 254, 269 (1964).

[47] See Buckley v. Valeo, 424 U.S. at 14-15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.").

[48] Stevens, 130 S. Ct. at 1584 (quoting Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572 (1942)).

[49] Stevens, 130 S. Ct. at 1580 (recognizing defamation and fraud as among the areas where speech may be punished or prohibited without violating the First Amendment).

or public affairs, but not in the specific context of judicial discipline for political campaign advertising.

¶73 To discern the applicable law in this judicial discipline case, we must look below the surface of the rhetoric to the analysis and legal standards of the United States Supreme Court's interpretations of the First Amendment. Our analysis must "harmonize these two strains of law."[50] We proceed recognizing that "[p]rotecting judicial integrity is a government interest of highest magnitude, as is protecting the rights guaranteed by the First Amendment. Reconciling these two competing interests is no small feat . . . ."[51]

¶74 Justice Gableman's brief extracts language from cases interpreting federal statutes regulating political election campaigns, such as Buckley v. Valeo, 424 U.S. 1 (1976),[52] and Federal Election Commission v. Wisconsin Right to Life, Inc.,

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[50] See Siefert v. Alexander, No. 09-1713, slip op. at 11 (7th Cir. June 14, 2010).

[51] Siefert v. Alexander, No. 09-1713, slip op. at 33 (7th Cir. June 14, 2010) (Rovner, J., dissenting in part).

[52] We agree with and apply the teaching of Buckley v. Valeo, 424 U.S. 1, 14 (1976): "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

551 U.S. 449 (2007).[53] Justice Gableman's reliance on the federal campaign law cases does not support a categorically different analysis for regulation of campaigns and judicial discipline than for other First Amendment cases. The language from these cases is not persuasive to overcome the application of the "actual malice" standard to the present case for several reasons. Rather, the U.S. Supreme Court's holdings "do not necessarily forbid any regulation of a judge's speech. . . . [R]estrictions on judicial speech may, in some circumstances, be required by the Due Process Clause. This provides a state with a sufficient basis for restricting certain suspect categories of judicial speech, even political speech."[54] Knowingly false speech is such a "suspect category."

¶75 First, the United States Supreme Court in Wisconsin Right to Life elaborated a standard that is "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."[55]

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[53] Significantly, the analysis in these cases is not about evaluating the truth or falsity of campaign communication, but about whether the communication falls within categories distinguished in federal election law, such as advertisements advocating election or defeat of candidates or those discussing issues.

[54] Siefert v. Alexander, No. 09-1713, slip op. at 19 (7th Cir. June 14, 2010).

[55] The United States Supreme Court rejected a test "for distinguishing between discussions of issues and [discussions of] candidates" that depends either the intent of the speaker or the subjective effect the communication had upon a listener. Wisconsin Right to Life, 551 U.S. at 467-68. The analysis instead focuses on the "substance of the communication." Wisconsin Right to Life, 551 U.S. at 469.

(continued)

The objective standard approach to the assessment of political advertisements adopted in Wisconsin Right to Life, 551 U.S. at 469 (2007), is the very approach that we use in the instant case regarding campaign advertisements and judicial discipline. See ¶¶3, 18, 32, above.

¶76 This objective standard approach in the United States Supreme Court cases not only comports with our approach to the language and substance of Justice Gableman's advertisement but also comports with the approach taken in Wisconsin defamation cases. As the Wisconsin Supreme Court stated in Frinzi v. Hanson, 30 Wis. 2d 271, 276-77, 140 N.W.2d 259 (1966), discussed at ¶46 n.30 above: "[W]ords must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered. . . . One may not dissect the alleged defamatory statement into nondefamatory parts and thus lose the vital over-all meaning." Like the Court in Wisconsin Right to Life, we reject a focus on

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The United State Supreme Court maintained and applied this objective approach to determining what meaning was conveyed by the contested campaign speech in Citizens United v. Federal Election Commission, 130 S. Ct. 876, 889-90 (2010) ("a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate") (emphasis added); see also id. at 898 ("While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter . . . [Wisconsin Right to Life, Inc.] provides a sufficient framework for protecting the relevant First Amendment interests in this case.").

the speaker's intent and focus instead on the "substance of the communication" in the present case.

¶77 In Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990), the United States Supreme Court addressed an analogous issue. The Court had to decide "whether a reasonable factfinder could conclude that the statements [in a newspaper article] . . . imply an assertion" that was factually false. The argument was made that the statements were constitutionally protected as "opinion."

¶78 The Milkovich Court determined that the article's "connotation" was "sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence . . . . Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." Milkovich, 497 U.S. at 21.

¶79 Similarly here, the fact communicated by the advertisement, "unlike a subjective assertion," was "an articulation of an objectively verifiable event." Milkovich, 497 U.S. at 22. Because the legal standard we apply turns on establishing factual truth or falsity, the nature of the required determination is the same in the present case as in Milkovich and other defamation cases.

¶80 Second, in Wisconsin Right to Life the United States Supreme Court's bottom-line determination was whether "the ad is susceptible of no reasonable interpretation other than" the one that would make it subject to the prohibitions of federal campaign law. Wisconsin Right to Life, Inc., 551 U.S. at 469-

70; id. at 474 (the test is whether "the ads can only reasonably be viewed as advocating or opposing a candidate . . . ").[56] We use this very same "no reasonable approach other than" basis in evaluating Justice Gableman's advertisement in this judicial discipline case. We conclude that the advertisement can reasonably be viewed only as communicating that Louis Butler's actions in representing Mitchell and finding a loophole led to

[56] Citizens United v. Federal Election Commission, 130 S. Ct. 876, 890 (2010), followed the same method for determining what meaning was communicated by the contested film and whether that meaning brought it into conflict with the relevant statutory restriction. There, the Court applied the objective standard as "elaborated in [Wisconsin Right to Life, Inc.]" to reject the appellant's argument that the content of the contested film should be viewed narrowly and as falling outside the restrictions analyzed in that case governing communications that are "the functional equivalent of express advocacy."

In evaluating whether a communication did or did not violate the statutory prohibition, the Court viewed the communication as a whole and in context, as we have reviewed the contested communication here. There, the Court observed how "the film would be understood by most viewers" and noted that "[t]he narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that [then-Senator Clinton] is unfit for the Presidency." 130 S. Ct. at 890. In light of those observations, the Court concluded that "there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton." Id.

Contrary to Justice Gableman's suggested approach, the Court in Citizens United did not analyze each sentence in isolation. Rather, the Court employed the "no reasonable interpretation other than" approach, looking to the "thesis" of the communication when viewed as a whole. Likewise here, there is no doubt how the advertisement "would be understood by most viewers" or that its "thesis" was that Butler was somehow responsible for Mitchell's release. Our method of determining whether the advertisement violated the relevant prohibition in this case is entirely consistent with the approach for evaluating the content of regulated political speech in Citizens United.

Mitchell's release and his commitment of another crime. No other reasonable interpretation of the advertisement, reading its language in context, has been suggested.

¶81 Third, in Wisconsin Right to Life, Inc., 551 U.S. at 469 (emphasis added), the Court focused on protecting "the liberty to discuss publicly and truthfully all matters of public concern . . . ." The focus of the First Amendment protection was not articulated by the Court in terms of "campaign speech," but in terms of discussing "all matters of public concern."[57] This language rebuts Justice Gableman's argument that the law takes a categorically different view in an election campaign context than in regulation of other public speech addressing important public matters. Furthermore, Wisconsin Right to Life, Inc. stated that the speech to be protected is that which "truthfully" addresses matters of public concern, not that which misrepresents the facts about such matters.

¶82 Fourth, while Justice Gableman quotes language in these cases that properly observes the vital role of protecting free speech in the context of political campaigns, the United States Supreme Court considered equally weighty First Amendment "political speech" values in the cases in which the "actual malice" standard was first developed. Garrison, for instance, was a case decided in the context of public criticisms of

[57] In this central statement of the holding, Wisconsin Right to Life, Inc. cites Consolidated Edison Co. of N.Y. v. Public Service Commissionn of N.Y., 447 U.S. 530, 534 (1980).

elected judges, addressing their fitness for office. Garrison, 379 U.S. at 64-65.[58]

¶83 Fifth, the "actual malice" standard is a demanding one, difficult to meet and highly protective of free speech. It is therefore a standard that can be applied to political campaigns in which the First Amendment "has its fullest and most urgent application."[59]

¶84 Sixth, because the First Amendment allows a court to adjudicate the questions of (1) speaking "knowingly," or (2) with "reckless disregard of the truth or falsity," as well as (3) the "truth or falsity" of statements in civil and criminal defamation cases, we see no reason why the First Amendment would raise a categorical bar against adjudicating the same questions in a judicial disciplinary proceeding, the setting in which the issue arises here.

¶85 Seventh, differences between defamation law and the legal sanction of false speech in the present case do not provide a reasoned basis why the actual malice standard should not be applied here. A plaintiff in a traditional defamation action, unless proceeding on a theory of defamation per se, proves damages or a harm to reputation. Here, the Judicial

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[58] The United States Supreme Court's analysis in the Wisconsin Right to Life case also undermines the suggestion that a sharp distinction can be maintained between formal campaign speech and speech that, although not directly addressing a candidate or campaign, implicates core First Amendment interests. See Wisconsin Right to Life, 551 U.S. at 457 ("the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application.'") (quoted source omitted).

[59] Buckley v. Valeo, 424 U.S. 1, 15 (1976).

Commission need not prove harm to reputation or damage. Knowing misrepresentations of an opponent cause harm to elections and damage judicial integrity. The interests the first sentence SCR 60.06(3)(c) protects are not private reputational interests but substantial well-recognized interests.

¶86 SCR 60.06(3)(c) protects the reputation, independence and integrity of Wisconsin's judicial elections and the judiciary. A state has a compelling interest in preserving the integrity of its election process."[60] "[A] state has a compelling interest in the integrity of its judiciary,"[61] and may "properly protect the judicial process from being misjudged in the minds of the public."[62] "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary,"[63] and "[t]he state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary."[64] See ¶¶101-102, below.

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[60] Burson v. Freeman, 504 U.S. 191, 199 (1992) (quoting Eu v. San Francisco Co. Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

[61] Stretton v. Disciplinary Bd. f the Supreme Court of Penn., 944 F.2d 137, 142 (3d Cir. 1991).

[62] Cox v. Louisiana, 379 U.S. 559 (1965).

[63] Landmark Comm'ns, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

[64] In re Chmura (Chmura I), 608 N.W.2d 31, 40 (Mich. 2000):

> The state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary. The appearance of fairness and impartiality is necessary to foster the people's willingness to accept and follow court orders. The state's interest in protecting the reputation of the judiciary is also a compelling interest.

¶87 For the reasons we have just set forth, we conclude that in accordance with the United States Supreme Court cases, the "actual malice standard" set forth in New York Times, Garrison, and subsequent cases is applicable in the instant case.

¶88 Our First Amendment analysis is supported by other courts. Some courts have applied much the same standard we use to evaluate political campaign material and to determine that provisions similar to SCR 60.06(3)(c) do not impermissibly curtail the freedom of speech either facially or as applied.[65]

¶89 We look first to Rickert v. State of Washington, Public Disclosure Commission, 168 P.3d 826 (Wash. 2007), upon which Judge Fine's concurring opinion at the Judicial Conduct Panel relied (although Judge Fine did not adopt all of the Washington court's analysis).

¶90 In Rickert, the nine Justices of the Supreme Court of Washington divided 4-1-4 in deciding the constitutionality of a state statute prohibiting a person from "sponsor[ing] with actual malice . . . [p]olitical advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office." Rickert, 168 P.3d at 828.

¶91 Four of nine justices joined a "majority" opinion that declared that any statute purporting to regulate "speech uttered during a campaign for political office" based on its content is

[65] Decisions of other courts have sometimes struck down as unconstitutional provisions that limit or penalize campaign speech, using standards encompassing a broader swath than is addressed by the first sentence of SCR 60.06(3)(c).

subject to "strict scrutiny" analysis, under which the State must demonstrate that the statute "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" 168 P.3d 826, ¶8 (citing Burson v. Freeman, 504 U.S. 191 (1992)). These justices concluded that the statute in question did not meet this test.

¶92 Chief Justice Alexander concurred in the result, nevertheless concluding that "the majority goes too far" and that "the government . . . may penalize defamatory political speech." The Chief Justice viewed the Washington statute as also prohibiting nondefamatory speech.[66]

¶93 Four other justices dissented. They viewed the majority result as "an invitation to lie with impunity." Rickert, 168 P.3d 826, ¶30 (Madsen, J., dissenting). Rejecting the majority's interpretation and application of prior Washington cases, the dissenters concluded that "[t]he United States Supreme Court has made it absolutely clear that the deliberate lie in political debate has no protected place under the First Amendment because such lies do not advance the free political process but rather subvert it." Rickert, 168 P.3d 826, ¶32 (Madsen, J., dissenting) (citing Garrison, 379 U.S. at 75).[67]

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[66] Rickert, 168 P.3d 826, ¶28.

[67] Other features of the analysis in Rickert also make the case inapplicable to our evaluation of SCR 60.06(3)(c) and the facts of the present case. In Rickert, the Washington court viewed the statute as "underinclusive" because it limited speech about a campaign opponent but included an exception for a candidate's speech about himself or herself. Rickert, 168 P.3d 826, ¶¶19-20. In contrast, SCR 60.06(3)(c) governs speech both about a candidate and his or her opponent.

(continued)

¶94 We are neither bound by the majority result in Rickert nor persuaded by its reasoning. We conclude that the dissenting opinion in Rickert has the correct view of the First Amendment to be applied in the instant case: "[I]f the actual malice standard is met the speech falls within a class of speech that is not constitutionally protected. Therefore, a statute that proscribes speech under this standard does not have to meet the strict scrutiny/compelling governmental interest test . . . ." Rickert, 168 P.3d 826, ¶36.

¶95 We agree with the Rickert dissent that the strict scrutiny analysis is not necessary because the only speech prohibited by the first sentence of SCR 60.06(3)(c) is knowingly false speech, which the First Amendment does not shield from the imposition of sanctions.[68]

The restriction addressed in Rickert was also enforced through an administrative body with members appointed by the governor, a procedural mechanism that the four-justice "majority" opinion viewed as impermissibly limiting a candidate's access to independent, de novo judicial review. Rickert, 168 P.3d 826, ¶22-24. Wisconsin's system of judicial discipline creates no such concerns. Grievances against judges are presented first to an independent Judicial Commission composed of a majority of public members (non-lawyers), judges, and lawyers. If the grievance is found to have merit, a complaint is filed and heard by a Judicial Conduct Panel composed of three court of appeals judges. The Panel makes recommendations to the supreme court, which makes the final disciplinary determination.

[68] SCR 60.06(3)(c) also cannot be considered presumptively unconstitutional as a prior restraint on speech. "In First Amendment jurisprudence, prior restraints are . . . traditionally contrasted with 'subsequent punishments,' which impose penalties on expression after it occurs." 2 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech § 15:1.

(continued)

¶96 In any event, SCR 60.06(3)(c) can withstand a strict scrutiny analysis. The first sentence of the rule is necessary to protect the reputation, independence, and integrity of Wisconsin's judiciary. These are compelling interests. A state may "properly protect the judicial process from being misjudged in the minds of the public."[69] "[T]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary,"[70] and "[t]he state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary."[71] The compelling interest in judicial integrity places it "beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth

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In Citizens United, the United States Supreme Court suggested that the regulatory scheme at issue there, although "not a prior restraint on speech in the strict sense," "function[ed] as the equivalent of prior restraint" "[A]s a practical matter," because "a speaker wishing to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission . . . ." Citizens United, 130 S. Ct. at 882. The FEC employed an "11-factor balancing test" to determine whether a communication was prohibited. No similar complexity or regulatory scheme for prior approval is involved in SCR 60.06(3)(c).

[69] Cox v. Louisiana, 379 U.S. 559 (1965).

[70] Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829 (1978) (Stewart, J., concurring).

[71] In re Chmura (Chmura I), 608 N.W.2d 31, 40 (Mich. 2000):

> The state's interest in the integrity of the judiciary extends to preserving public confidence in the judiciary. The appearance of fairness and impartiality is necessary to foster the people's willingness to accept and follow court orders. The state's interest in protecting the reputation of the judiciary is also a compelling interest.

Amendment to develop . . . independent-minded and faithful jurists."[72]

¶97 Furthermore, the State "indisputably has a compelling interest in preserving the integrity of its election process."[73] The United States Supreme Court has recently reaffirmed the important governmental interest in "providing information to the electorate" and in political campaigns.[74] Voters must "be able to evaluate the arguments to which they are being subjected,"[75] and the transparency of information provided in campaign advertisements "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[76]

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[72] Siefert v. Alexander, No. 09-1713, slip op. at 8 (7th Cir. June 14, 2010) (citing, inter alia, Republican Party of Minn. v. White, 536 U.S. 794, 796 (2002) (Kennedy, J., concurring); Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009)).

[73] Burson v. Freeman, 504 U.S. 191, 199 (1992) (quoting Eu v. San Francisco Co. Democratic Central Committee, 489 U.S. 214, 231 (1989)); see also Brown v. Hartlage, 456 U.S. 45, 61, (1982) (recognizing the "state interest in protecting the political process from distortions caused by untrue and inaccurate speech").

[74] Citizens United, 130 S. Ct. at 914 (upholding disclosure requirements under "exacting scrutiny" analysis, which is less demanding than "strict scrutiny" and requires a "substantial relation" between the burden on political speech and a "sufficiently important" governmental interest).

[75] Citizens United, 130 S. Ct. at 915.

[76] Citizens United, 130 S. Ct. at 916 (recognizing the "sufficiently important" governmental interests passing the "exacting scrutiny" analysis to uphold disclaimer and disclosure requirements which "may burden the ability to speak, but . . . 'impose no ceiling on campaign-related activities and 'do not prevent anyone from speaking.'").

¶98 Knowing misrepresentations are "no essential part of any exposition of ideas . . . ."[77] They may undermine the electorate's ability to "make informed decisions" and "give proper weight" to competing speakers and messages.[78] The open, even contentious exchange of ideas in an election need not permit knowingly false statements, which undermine rather than serve the First Amendment's protection for political debate.[79]

¶99 SCR 60.06(3)(c) serves compelling state interests. "A prime purpose of judicial discipline is to foster public trust and confidence in the judicial system";[80] "[d]iscipline is designed to restore and maintain the dignity, honor, and impartiality of the judicial office."[81] By deterring the use of knowingly false statements about candidates in a judicial election, the Code fosters an electoral process in which the public can have greater confidence and a climate in which the

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[77] Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (citing Chaplinsky v. New Hampshire, 315 U. S. 568, 572 (1942)).

[78] See Citizens United, 130 S. Ct. at 915-16.

[79] Vanasco v. Schwartz, 401 F. Supp. 87, 100 (E. & S.D.N.Y. 1975) (concluding that provisions of New York campaign code were unconstitutional because they were overbroad and reached past the "actual malice" standard; recognizing that "[n]othing in our decision downgrades the state's legitimate interest in insuring fair and honest elections. Undoubtedly, deliberate calculated falsehoods when used by political candidates can lead to public cynicism and apathy toward the electoral process.").

[80] In re Ziegler, 2008 WI 47, ¶¶5, 35, 309 Wis. 2d 253, 750 N.W.2d 710.

[81] Id. at ¶35 ("Discipline is not imposed to punish the individual judge. Rather, the purpose of judicial discipline, like the purpose of the Code of Judicial Conduct, is to protect our court system and the public from misconduct.").

public can elect the candidate of their choice based on correct information.

¶100 Thus, numerous compelling interests are served by SCR 60.06(3)(c) and its enforcement through judicial discipline proceedings. The necessity of protecting these interests through reasonable enforcement of the Code of Judicial Conduct is apparent and well recognized. The interests protected relate to both the integrity and reputation of the judiciary and the integrity of the election process, and the rule reaches only those whose conduct implicates both the judiciary and elections. The Rule applies evenly to all candidates for judicial office and is not overinclusive or underinclusive. Most importantly, SCR 60.06(3)(c) prohibits only statements made under the "actual malice" standard, a narrow category of speech not protected by the First Amendment. The first sentence of SCR 60.06(3)(c) therefore passes a strict scrutiny analysis.

¶101 We also examine the two In re Chmura cases decided by the Michigan Supreme Court.[82] There, the constitutionality of Canon 7(B)(1)(d) of Michigan's Code of Judicial Conduct was challenged. The Canon reached much more broadly than SCR 60.06(3)(c), restricting "communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation . . . or omits a fact necessary to make the statement considered as a whole not materially

[82] In re Chmura (Chmura I), 608 N.W.2d 31 (Mich. 2000); In re Chmura (Chmura II), 626 N.W.2d 876 (Mich. 2001).

misleading . . . ."[83] The Michigan court held that the Canon was overbroad and therefore facially unconstitutional. The court gave the rule a "saving construction," narrowing it only "to prohibit a candidate for judicial office from knowingly or recklessly using or participating in the use of any form of public communication that is false." [84]

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[83] Chmura I, 608 N.W.2d at 32 n.1.

[84] Chmura I, 608 N.W.2d at 43.

Similar to the outcome of Chmura I is Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002), in which the court struck down provisions of Georgia law that were not narrowly tailored to the compelling interests and that reached too broadly, stating that "to be narrowly tailored, restrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false, i.e., an actual malice standard."

Using similar reasoning, in Vanasco v. Schwartz, 401 F. Supp. 87, 95 (E. & S.D.N.Y. 1975), a panel convened of judges of the federal Eastern and Southern Districts of New York "concluded that the deliberate calculated falsehood does not enjoy constitutional protection even when made during the course of a political campaign and when it involves a proceeding by the Board [of Elections] rather than a civil defamation suit or criminal prosecution." In analyzing the application of the "actual malice" standard, the court stated:

> It is important to emphasize . . . that any state regulation of campaign speech must be premised on proof and application of a Times "actual malice" standard. We are not dealing with defamation suits brought by "private individuals" where a standard somewhat less than that required by Times would be appropriate. To the contrary, Board proceedings concern regulation of the speech of "public officers" and "public figures" during campaigns for political office where the constitutional guarantee of freedom of speech "has its fullest and most urgent application." With this proposition in mind, we can agree with the Board's argument that calculated falsehoods are of such slight social value that no

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¶102 Thereafter, in Chmura II, the Michigan Supreme Court applied its rewritten narrower rule.[85] Reckoning with the concept of falsity in a political advertisement, the Michigan Court rejected application of the "substantial truth" doctrine from tort law "because a judicial candidate's communication could be interpreted in 'numerous, nuanced ways.'" Chmura II, 626 N.W.2d at 887 (quoted source omitted). The court then reviewed the substance of the contested advertisements and found

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matter what the context in which they are made, they are not constitutionally protected.

Vanasco v. Schwartz, 401 F. Supp. 87, 92 (E. & S.D.N.Y. 1975).

See also District One Republican Comm'n v. District One Democrat Comm'n, 466 N.W.2d 820, 828, 829 (N.D. 1991) (applying a prohibition that "[n]o person may knowingly sponsor any political advertisement or news release that contains any assertion, representation, or statement of fact, including information concerning a candidate's prior public record, which the sponsor knows to be untrue, deceptive, or misleading;" holding that "sensitive First Amendment considerations for political speech dictated that stringent mental culpability requirement and that the constitutional requirements necessary to impose liability for defamation of a public figure ["actual malice" standard] also established a minimum culpability for political speech;" determining the required "knowing" mental state was not established in the case before it).

[85] In re Chmura (Chmura II), 626 N.W.2d 876 (Mich. 2001).

them "substantially true despite their inaccuracies,"[86] thus declining to impose discipline. A dissent agreed with the standard but disagreed with its application to some of the advertisements at issue. No justice determined that the application of the standard would present a First Amendment problem.

¶103 In other words, once the Michigan Rule was properly narrowed to track the "actual malice" standard, the Michigan Court had no constitutional qualms in applying the rule to prohibit campaign communications which were false and made knowingly or with reckless disregard of the truth or falsity of the communications.

¶104 In Pestrak v. Ohio Elections Commission, 926 F.2d 573, 577 (6th Cir. 1991), the United States Court of Appeals

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[86] Chmura II, 626 N.W.2d at 897. The court determined that in analyzing whether a judicial candidate had violated the Code restriction on false campaign communication, "the public communication must be analyzed to determine whether the statements communicated are literally true. . . . [I]f the communication conveys an inaccuracy, the communication as a whole must be analyzed to determine whether 'the substance, the gist, the sting,' of the communication is true despite the inaccuracy. In other words, we must decide whether the communication is substantially true." Chmura, 626 N.W.2d at 887. Were we to apply that standard in the present case, it is clear that the advertisement was substantially and objectively false.

The Chmura I case also determined that in evaluating whether a candidate recklessly disregarded the truth, a contested communication was to be analyzed using an "objective" standard, by which it meant a standard that did not require a showing that the speaker "actually entertain[ed] serious doubts" as to the truth of the statement. Chmura I, 608 N.W.2d at 44. This standard sanctions more, rather than less speech than our interpretation of SCR 60.06(3)(c) allows.

evaluated portions of an Ohio statute which proscribed "only the knowing making of false statements" and determined that these "clearly come within the Supreme Court holdings in Garrison v. Louisiana and New York Times v. Sullivan."

¶105 These cases demonstrate that false speech, even false political speech, "does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."[87] Pestrak comports with our view of the applicable law, namely, that SCR 60.06(3)(c) supports the imposition of discipline using the "actual malice standard" for false campaign speech without violating the First Amendment.

¶106 We conclude that the rule emphasized in Garrison v. Louisiana and explicitly maintained in cases thereafter, including in the context of political speech, is determinative here: False statements knowingly made or false statements made in reckless disregard of their truth or falsity are not protected by the First Amendment. Because SCR 60.06(3)(c) incorporates this standard, its application to judicial discipline in the present case does not violate the First Amendment.

* * * *

[87] Pestrak, 926 F.2d at 577. The court in Pestrak went on to determine that enforcement of the measure by fines or cease and desist orders issued by an administrative body was unconstitutional because the administrative nature of the enforcement provisions did not meet the "clear and convincing" evidentiary burden as imposed administratively and because the cease and desist orders amounted to an impermissible prior restraint rather than a subsequent punishment. Pestrak, 926 F.2d at 578.

¶107 We conclude that by publishing the advertisement at issue, Justice Gableman willfully violated the first sentence of SCR 60.06(3)(c) and engaged in judicial misconduct pursuant to Wis. Stat. § 757.81(4)(a). By means of the advertisement that he personally reviewed and checked out, Justice Gableman knowingly or with reckless disregard for the statements' truth or falsity misrepresented a fact concerning an opponent within the meaning of SCR 60.06(3)(c).

¶108 We further conclude that the rule emphasized in Garrison v. Louisiana and explicitly maintained in cases thereafter is determinative here: False statements knowingly made or false statements made in reckless disregard of their truth or falsity are not protected by the First Amendment. Because SCR 60.06(3)(c) incorporates this standard, its application to judicial discipline in the present case does not violate the First Amendment.

¶109 It is clear that the court is equally divided regarding the disposition of the matter. No four justices have voted either to accept or to reject the Judicial Conduct Panel's recommendations, nor have four justices agreed on Justice Gableman's motion for summary judgment or any disposition of the Judicial Commission's complaint. No action can therefore be taken on the Panel's recommendation. The Judicial Commission has failed to obtain a majority of justices to reject the recommendation of the Panel. Under these circumstances, the Panel is relieved of any further responsibility in this matter, and we remand the matter to the Judicial Commission with

directions to request a jury hearing, in accord with Wis. Stat. §§ 757.87, 757.89, and 805.08.

¶110 For the reasons set forth we write separately.

2010 WI 62

No. 2008AP2458-J

STATE OF WISCONSIN : IN 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.

FILED

JUN 30, 2010

David R. Schanker
Clerk of Supreme Court

MEMORANDUM DECISION OF JUSTICE DAVID T. PROSSER, JUSTICE PATIENCE DRAKE ROGGENSACK AND JUSTICE ANNETTE KINGSLAND ZIEGLER

¶1 Justice David T. Prosser, Patience Drake Roggensack and Justice Annette Kingsland Ziegler: The court is at an impasse. Three members of the court, Justice Prosser, Justice Roggensack and Justice Ziegler, agree with the recommendation of the three-judge Judicial Conduct Panel (Panel) that the Wisconsin Judicial Commission's (Commission) complaint against Justice Michael J. Gableman must be dismissed. We agree with the Panel's recommendation because after conducting an

independent review of the record and considering the arguments of counsel, we have concluded that the Commission failed to establish, by evidence that is clear, satisfactory and convincing, that Justice Gableman violated Supreme Court Rule 60.06(3)(c).

¶2 The campaign advertisement that gave rise to the Commission's complaint against Justice Gableman and the governmental rule, SCR 60.06(3)(c), by which the Commission seeks to punish Justice Gableman for that advertisement must be examined according to the commands of the First Amendment. As the United States Supreme Court has explained, the First Amendment applies to judicial elections and to canons of judicial conduct that states seek to apply to candidates in judicial elections. Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002). We acknowledge that the advertisement run by Justice Gableman's campaign committee was distasteful; however, the First Amendment prevents the government from stifling speech, even when that speech is distasteful. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 380, 391 (1992). The United States Supreme Court has established the parameters of the First Amendment's protections of campaign speech that we follow in our decision below.

¶3 In order to meet its burden of proof under Wis. Stat. § 757.89, the Commission must persuade at least four justices, by clear, satisfactory and convincing evidence, that the advertisement by Justice Gableman's campaign committee violated SCR 60.06(3)(c). The Commission has failed to do so.

Accordingly, we anticipate that the Commission, or the Commission and Justice Gableman together, promptly will file a motion to dismiss the complaint against Justice Gableman.[1]

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[1] Chief Justice Abrahamson, Justice Bradley and Justice Crooks would like to remand the complaint for a hearing before a jury panel that the Commission never requested. (One could interpret their writings as actually remanding the matter for a jury trial. See writings of Chief Justice Abrahamson, Justice Bradley and Justice Crooks, 2010 WI 61, ¶105 [hereinafter the Abrahamson writings]. However, when the court is sitting six, it takes the affirmative vote of four justices to make any type of court order, including a remand. There are not four votes to remand.)

They assert their suggestion of a jury panel is necessary to resolve the court's impasse. Abrahamson writings, ¶16. Generally, when the court reaches an impasse, the decision immediately preceding our review is affirmed. See, e.g., Hornback v. Archdiocese of Milwaukee, 2008 WI 98, ¶5, 313 Wis. 2d 294, 752 N.W.2d 862. Our impasse here could be resolved by adopting the recommendation of the three-judge panel and dismissing the complaint.

The Abrahamson writings do not choose this usual mode of resolving an impasse because they do not like the result. However, their attempt at a second trial is wholly without merit. Any request for a jury panel must have been made before the complaint was filed. Wis. Stat. § 757.87(1). However, pursuant to § 757.87(1), the Commission chose to have the Wis. Stat. § 757.89 hearing before a panel of three court of appeals judges. The Panel conducted the § 757.89 hearing the Commission requested. The Panel that conducted the hearing made findings of fact, conclusions of law and the recommendation to dismiss the complaint against Justice Gableman. There is no availability of a second hearing on this complaint. The Abrahamson writings omit words from § 757.87(1) in an attempt to support the writings' position. For further discussion of these omissions, see infra note 24.

I. BACKGROUND

¶4 This action began on October 7, 2008, when the Commission filed a complaint alleging that it had found probable cause to believe that then-Judge Gableman willfully violated SCR 60.06(3)(c) of the Wisconsin Code of Judicial Conduct and thereby engaged in judicial misconduct as defined by Wis. Stat. § 757.81(4)(a) (2007-08).[2] The Commission alleged that the violation of SCR 60.06(3)(c) occurred in a television advertisement that then-Judge Gableman's campaign committee ran during the course of his campaign for election to the Wisconsin Supreme Court.[3] The Commission alleged that the television advertisement "directly implied and was intended to convey the message that action or conduct of Louis Butler enabled or resulted in [Reuben] Mitchell's release and Mitchell's subsequent commission of a criminal molestation."[4]

¶5 Justice Gableman timely answered the complaint and raised affirmative defenses. Thereafter, Justice Gableman moved the three-judge panel for summary judgment dismissing the complaint. The Commission agreed that summary judgment was an

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[2] Commission complaint, ¶16.

Wisconsin Stat. § 757.81(4)(a) (2007-08) provides that it is judicial misconduct to commit a "willful violation of a rule of the code of judicial ethics." All further references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Commission complaint, ¶¶6-15.

[4] Id., ¶11.

appropriate procedure to use in the Panel's recommendation to the Supreme Court because the material facts were not disputed.[5] The Panel accepted submissions of fact from the parties, accepted briefs from the parties and held a hearing prior to making its own findings of fact upon which its recommendation relied. The Panel found:

> 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 thus was a "candidate" for judicial office pursuant to SCR 60.01(2), Wisconsin Code of Judicial Conduct. (Footnote omitted.)
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> 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.
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> 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.

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[5] Judicial Conduct Panel Decision, 4 n.4 [hereinafter Panel Decision].

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 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.

II. DISCUSSION

A. Standard of Review

¶6 We review the findings of fact, conclusions of law and recommendation of the Panel pursuant to Wis. Stat. § 757.91.[6] In re Disciplinary Proceedings Against Laatsch, 2007 WI 20, ¶1, 299

[6] Wisconsin Stat. § 757.91 provides in relevant part:

> Supreme court, disposition. The supreme court shall review the findings of fact, conclusions of law and recommendations under s. 757.89 and determine appropriate discipline in cases of misconduct . . . . The rules of the supreme court applicable to civil cases in the supreme court govern the review proceedings under this section.

Wis. 2d 144, 727 N.W.2d 488. We interpret and apply SCR 60.06(3)(c) independently of the Panel, as questions of law, but benefitting from the Panel's discussion. Filppula-McArthur v. Halloin, 2001 WI 8, ¶32, 241 Wis. 2d 110, 622 N.W.2d 436. Whether the Commission has met its burden under Wis. Stat. § 757.89, to prove the allegations in its complaint "to a reasonable certainty by evidence that is clear, satisfactory and convincing," is a question of law for our independent review. See Seraphine v. Hardiman, 44 Wis. 2d 60, 64-65, 170 N.W. 739 (1969).

¶7 Neither party contends that the Panel's findings of fact should be overturned or supplemented. Rather, the Commission contends that the application of SCR 60.06(3)(c) to the facts found by the Panel prove that Justice Gableman violated SCR 60.06(3)(c). Justice Gableman contends that when SCR 60.06(3)(c) is interpreted and applied to the campaign speech at issue here in a manner that does not contravene the First Amendment of the United States Constitution, no violation of SCR 60.06(3)(c) occurred. The interpretation and application of SCR 60.06(3)(c) under constitutional standards present questions of law that we review independently of the Panel's determination. State v. Brienzo, 2003 WI App 203, ¶9, 267 Wis. 2d 349, 671 N.W.2d 700. While the Panel's recommendations are not binding on this court, they "are entitled to some deference." In re Complaint Against Seraphim, 97 Wis. 2d 485, 513, 294 N.W.2d 485 (1980).

B. The First Amendment

¶8 The advertisement that forms the basis for the Commission's complaint was run during the course of a campaign for political office. To consider the advertisement in the context in which it was distributed, we first interpret SCR 60.06(3)(c) consistent with the commands of the First Amendment, and then we apply that interpretation to the advertisement itself. We begin with foundational First Amendment principles.

1. General principles

¶9 The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[7] As a general matter, this means that the First Amendment prohibits government restrictions on speech "because of its message, its ideas, its subject matter, or its content." Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotes and citation omitted). Time and again the United States Supreme Court has held that regulations authorizing the government to restrain or suppress speech and to prosecute violations of government-imposed regulations restraining speech are disfavored due to the protections accorded by the First Amendment. Thomas v. Collins, 323 U.S. 516, 530 (1945); Buckley v. Valeo, 424 U.S. 1, 17

[7] The First Amendment is applied to the states by the Fourteenth Amendment. State v. Douglas D., 2001 WI 47, ¶2 n.2, 243 Wis. 2d 204, 626 N.W.2d 725 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n.1 (1996)).

(1976); Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 469 (2007).

¶10 There are limited, permitted exceptions to the general prohibition on governmental regulations of speech. See, e.g., United States v. Williams, 553 U.S. 285, 288-89 (2008) (permitting governmental restrictions on child pornography); Brown v. Glines, 444 U.S. 348, 353 (1980) (upholding an Air Force regulation that prohibited the solicitation of petitions on military bases without prior approval by base commanders); Roth v. United States, 354 U.S. 476, 483 (1957) (explaining that suits based on the restraint of obscenity may proceed).

¶11 The constitutional protection of the First Amendment has its fullest and most robust application to speech during a campaign for political office. Buckley, 424 U.S. at 14. It cannot be disputed that campaign advertisements are political speech that come within the scope of the First Amendment. See Wisconsin Right to Life, 551 U.S. at 469.

¶12 When a challenge is made to the regulation of campaign speech, the challenger is not required to prove that the regulation was unconstitutionally applied. See id. at 464. Because core First Amendment speech is being regulated by the government, the government's application of the regulation is subject to strict scrutiny. See id. Accordingly, the government bears the burden of proving that the application of its regulation does not contravene the First Amendment. Id. (explaining that with "strict scrutiny, the Government must prove that applying [the regulation] . . . furthers a compelling

interest and [that the regulation] is narrowly tailored to achieve that interest").

¶13 Recent United States Supreme Court decisions that address governmental restrictions on speech demonstrate the application of strict scrutiny. In R.A.V., the Supreme Court examined the St. Paul Bias-Motivated Crime Ordinance that provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 505 U.S. at 380. The Minnesota Supreme Court upheld the ordinance, concluding that it was a constitutionally permissible regulation of "fighting words" that the First Amendment did not protect. Id. at 380-81.

¶14 The United States Supreme Court accepted the Minnesota Supreme Court's interpretation of the ordinance as affecting only "fighting words," but it nevertheless struck down the ordinance because it restricted speech "solely on the basis of the subjects the speech addresses." Id. at 381. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." Id. at 391. In so concluding, the Supreme Court demonstrated that the First Amendment prevents governments from stifling speech.

¶15 More recently, in Republican Party, the United States Supreme Court examined a canon of the Minnesota Code of Judicial Conduct that provided, a "candidate for a judicial office, including an incumbent judge," may not "announce his or her views on disputed legal or political issues." Republican Party, 536 U.S. at 768 (internal quotes and quotation omitted). The candidate whose claim was before the Court alleged that the canon operated as a prior restraint of his speech because it "forced [him] to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announce clause." Id. at 770.

¶16 The United States Supreme Court recognized that campaign speech is "at the core of our First Amendment freedoms." Id. at 774 (quotation omitted). The Court then subjected the Minnesota canon of judicial ethics to strict scrutiny, requiring the state to prove that the canon was "narrowly tailored[] to serve [] a compelling state interest." Id. at 774-75.

¶17 Minnesota had claimed that the "special context" of judicial elections permitted its "abridgement" of speech during the campaign. Id. at 781. The United States Supreme Court strongly disagreed with the State of Minnesota, by pronouncing that such an argument "sets our First Amendment jurisprudence on its head." Id. After a lengthy discussion, the Supreme Court

concluded that the canon of judicial ethics violated the First Amendment. Id. at 788.

¶18 In 2010, the United States Supreme Court once again examined restrictions of speech relating to elections. Citizens United v. Federal Elections Comm'n, 130 S. Ct. 876 (2010). In Citizens United, the Court explained that a First Amendment challenge to government regulation begins with interpreting the governmental regulation at issue. Id. at 889. The Court said that when interpreting a government regulation, courts must avoid drawing fine lines and making intricate case-by-case determinations to verify whether political speech is banned because to do so will chill the exercise of political speech contrary to the mandate of the First Amendment. Id. at 891-92 (explaining that "[t]he interpretative process itself would create inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable"). Moreover, reviewing courts "must give the benefit of any doubt to protecting rather than stifling speech." Id. at 891 (further citations omitted).

¶19 In interpreting a governmental regulation of campaign speech, courts must recognize that, "[t]he decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others." Id. at 895. Accordingly, for those involved in political campaigns, governmental regulations of uncertain meaning effectively act as prior restraints on speech, in contravention of the First Amendment. Id. at 895-96.

A constitutional interpretation of government-imposed regulation of campaign speech cannot include an interpretation that permits government officials to "pore over each word of a text to see if, in their judgment, it accords with the [regulation]." Id. at 896. Care must be taken in any interpretation that the government is not placed in the position of deciding "what political speech is safe for public consumption by applying ambiguous tests." Id. Furthermore, governmental regulations that cause the censorship of campaign speech are contrary to the principles upon which the First Amendment is predicated. Id.

¶20 Even though defamation cases such as New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), are sometimes discussed in opinions where a governmental regulation of speech is at issue, principles from civil defamation cases should not be transferred into the analysis of governmental regulations that operate on protected speech. This is so because: (1) civil defamation claims do not involve enforcement of governmental regulations that are subject to strict scrutiny under the First Amendment; and (2) the law of defamation permits prosecution of false statements by private persons only when those statements also harm another's reputation, see New York Times, 376 U.S. at 267, thereby permitting evidence of the effect of the statement on others.

¶21 To explain further, judicial consideration of an alleged violation of a governmental regulation of speech employs strict scrutiny to assure that the regulation serves a

compelling governmental interest and also to assure that application of the regulation is narrowly tailored to achieve that compelling interest. Wisconsin Right to Life, 551 U.S. at 464. Construction and application of governmental regulations of speech require the use of an objective test of the truth of the statement, which test does not permit consideration of the effect of the statement on the person hearing it. Id. at 469 (citing Buckley, 424 U.S. at 43-44) (explaining that "the proper standard for an as-applied challenge . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect").

¶22 By sharp contrast in a civil defamation suit, no governmental regulation is construed, and in order to prevail, the plaintiff must prove he has sustained an injury to his reputation. Rechsteiner v. Hazelden, 2008 WI 97, ¶72 n.11, 313 Wis. 2d 542, 753 N.W.2d 496 (explaining that to prevail on a claim for defamation the plaintiff must prove a false statement that is unprivileged and "tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her"). Accordingly, proof that the statement's effect was to injure the plaintiff's reputation requires courts to consider the understanding of the hearer. See New York Times, 376 U.S. at 267; Rechsteiner, 313 Wis. 2d 542, ¶72 n.11.

¶23 For example, New York Times was based on a private right of action, New York Times, 376 U.S. at 265 (noting "this is a civil lawsuit between private parties"); its holding

balanced Sullivan's right to recover for damage to his reputation with the speaker's defense under the First Amendment, id. at 279-80. However, when the government seeks to enforce a restraint it has placed on speech by punishment for what the government has concluded is a violation of its regulation, there is no private injury warranting compensation that is balanced with rights arising under the First Amendment, as was present in New York Times. See Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 238 (1992).[8] As explained above, the government must prove that the regulation it seeks to enforce survives strict scrutiny such that the application of the regulation is narrowly tailored to achieve a compelling state interest. A strict scrutiny analysis is completely absent from civil defamation cases.[9]

2. Interpretation and Application of SCR 60.06(3)(c)

¶24 It is within the above described framework of core constitutional principles established to ensure that campaign speech is not diminished, that we must interpret and apply SCR 60.06(3)(c) because the television advertisement occurred during

[8] "The First Amendment protects a liberty—liberty of expression—and it is an effect of this liberty that there is wide and uninhibited discussion of political matters. . . . The First Amendment does not protect a person from lies or imposition by private individuals. Rather the First Amendment protects against impositions by government." Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. Chi. L. Rev. 225, 226-27, 234 (1992).

[9] See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

the course of a campaign for political office.[10] It was run "to compare and contrast the background, qualifications, and experience of Justice Gableman with the background, qualifications, and experience of Justice Butler."[11] More importantly, each statement in the advertisement is true.[12]

¶25 While reluctant to identify any impact of the First Amendment on SCR 60.06(3)(c), the Commission did opine that the compelling interest furthered by SCR 60.06(3)(c) is "the protection of the integrity of the judicial system," and that the rule could not be tailored more narrowly.[13] Justice Gableman does not contend that the protection of the integrity of the judicial system is not a compelling interest. However, he maintains that the Commission's interpretation and application of SCR 60.06(3)(c) is contrary to the First Amendment's protection of campaign speech. Stated otherwise, Justice Gableman maintains that when SCR 60.06(3)(c) is interpreted and applied using strict scrutiny, which the constitution requires, his campaign speech does not violate the Supreme Court Rule.

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[10] Panel Decision (Finding of Fact No. 2).

[11] Id. (Finding of Fact No. 9).

[12] Id. (Findings of Fact Nos. 18-21). The Commission does not contest these, or any, findings of the Panel.

[13] April 16, 2010 statement of James Alexander at oral argument before this court.

¶26 Our interpretation of SCR 60.06(3)(c) presents as a question of first impression and begins with the language of SCR 60.06(3)(c), which provides:

> 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.

¶27 SCR 60.06(3)(c) has the potential to operate as a prior restraint of speech during judicial campaigns. This is so because, without defining "truth or falsity," SCR 60.06(3)(c) both prohibits judicial candidates from making certain statements during the course of campaigns and permits the government to prosecute and punish willful violations. See Wis. Stat. §§ 757.81(4)(a), 757.85(5) and 757.91.

¶28 When a governmental regulation is not clear and is interpreted using "ambiguous tests," it forces a speaker who wants to avoid the threat of punishment to obtain prior permission to speak. See Citizens United, 130 S. Ct. at 896. Rather than undertake the burden of obtaining prior approval, a speaker may choose simply to abstain from protected speech. The result is self-censorship. See id.; William T. Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245 (1982).

¶29 Without a doubt, the First Amendment applies to SCR 60.06(3)(c)'s interpretation and application, see Wisconsin Right to Life, 551 U.S. at 476, and, therefore, SCR 60.06(3)(c) is subject to strict scrutiny by this court, see id. at 464 (explaining that "the Government must prove that applying [the regulation] . . . furthers a compelling interest and [that the regulation] is narrowly tailored to achieve that interest"); see also Republican Party, 536 U.S. at 774-75. Under strict scrutiny, SCR 60.06(3)(c) can be constitutionally applied "only if it is narrowly tailored to further a compelling interest." Wisconsin Right to Life, 551 U.S. at 476.

¶30 Supreme Court Rules are subject to the rules of statutory construction. Filppula-McArthur, 241 Wis. 2d 110, ¶32. Accordingly, we begin with the language of the rule. State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Context is also an important consideration in rule interpretation. See Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, ¶26, 294 Wis. 2d 274, 717 N.W.2d 781. That this rule operates in the context of judicial elections is important because it affects core political speech, which enjoys the "fullest and most urgent" protection under the First Amendment. Wisconsin Right to Life, 551 U.S. at 469; Buckley, 424 U.S. at 15.

¶31 The Commission alleges no violation of the second sentence of SCR 60.06(3)(c); rather, the Commission claims Justice Gableman violated the first sentence of SCR 60.06(3)(c), which provides:

> A candidate for judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

The Panel interpreted SCR 60.06(3)(c), and in so doing, it compared the first sentence of SCR 60.06(3)(c), which is phrased in mandatory terms, and the second sentence of SCR 60.06(3)(c), which is phrased in aspirational terms.[14]

¶32 The second sentence of SCR 60.06(3)(c) addresses statements that although true, are misleading or likely to confuse. It must regulate conduct that does not fall within the parameters of the first sentence, to avoid rendering the second sentence mere surplusage.[15] Therefore, to violate the first sentence, the statement must be false because a true statement that misleads falls within the second sentence of SCR 60.06(3)(c).

¶33 Two members of the Panel concluded that because each of the statements in the advertisement was true, no violation occurred.[16] Stated otherwise, those Panel members determined that SCR 60.06(3)(c) does not regulate objectively true statements. We agree with that interpretation of the rule.

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[14] SCR 60.06(3)(c) cmt. (explaining that "[t]he second sentence is aspirational" and "[t]he remaining standards are mandatory").

[15] We interpret rules to avoid surplusage. See Hutson v. Wisconsin Pers. Comm'n, 2003 WI 97, ¶49, 263 Wis. 2d 612, 655 N.W.2d 212.

[16] Panel Decision, 14.

¶34 To explain further, the Panel's interpretation comports with the requirements of the First Amendment as well as generally accepted principles of statutory interpretation. This is so because defining "truth" as a statement that is objectively true, without regard to any effect the statement may or may not have on the hearer, narrowly tailors the rule as strict scrutiny requires.[17]

¶35 Defining "truth" as a statement that is objectively true also accomplishes at least three other important First Amendment goals: (1) it limits the rule's potential to be enforced as an effective prior restraint of speech, see Citizens United, 130 S. Ct. at 892; (2) it removes uncertainty from the rule, thereby reducing the propensity for self-censorship, i.e., the chilling of political speech, see id. at 895-96; and (3) it promotes uniform application of the rule because the speaker is not at the mercy of the hearer's understanding, see Wisconsin Right to Life, 551 U.S. at 469.

¶36 The Commission asserts a television advertisement run by Justice Gableman's campaign committee "directly implied and was intended to convey the message that action or conduct of

[17] The Abrahamson writings repeatedly rely on defamation cases. In so doing, the writings fail to recognize that civil defamation cases do not employ strict scrutiny as part of the analysis. However, subjecting the governmental regulation of speech to strict scrutiny is a foundational principle that a proper First Amendment analysis requires when the government is seeking punishment for an alleged violation of its regulation. Federal Elections Comm'n v. Wisconsin Right to Life, 551 U.S. 449, 464 (2007).

Louis Butler enabled or resulted in [Reuben] Mitchell's release and Mitchell's subsequent commission of a criminal molestation."[18] The Commission fundamentally misunderstands the test required by the United States Supreme Court for governmental regulations of campaign speech. Its misunderstanding of the appropriate test leads the Commission to attempt to punish speech not because the statements were untrue but because they "implied" or "intended to convey" a particular message. To do what the Commission attempts is constitutionally impermissible; it is prohibited by the First Amendment. Let us explain more fully.

¶37 In Wisconsin Right to Life, the United States Supreme Court mandated the use of an objective standard when evaluating speech to which a governmental regulation was being applied. Id., 551 U.S. at 469. The required objective standard does not consider the intent of the speaker or the effect of the speech on the hearer. Id. (explaining that "the proper standard for an as-applied challenge . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect").

¶38 Furthermore, United States Supreme Court precedent prohibits applying SCR 60.06(3)(c) in a way that considers what a hearer thinks the campaign speech means. See Citizens United, 130 S. Ct. at 896 (explaining that the First Amendment protects

[18] Commission complaint, ¶11 (emphasis added).

against government officials "por[ing] over each word of a text to see if, in their judgment, it accords with the [regulation]"). However, that is exactly what the Commission has done.

¶39 The Commission admits that each statement made in the advertisement is true. All parties agree that the First Amendment prohibits punishing truthful speech. See Wisconsin Right to Life, 551 U.S. at 467-68. That should be the end of the discussion. However, rather than acceding to this foundational First Amendment principle, the Commission attempts to redefine what "true" means. The Commission does so through its interpretation of the advertisement as statements that "implied and w[ere][] intended to convey" an untrue message about Louis Butler.[19]

¶40 Wisconsin Right to Life repeatedly explains that the court has rejected a First Amendment test of campaign speech that considers the intent of the speaker. Id.

> For the reasons regarded as sufficient in Buckley, we decline to adopt a test for as-applied challenges turning on the speaker's intent to affect an election. . . . The test should also "reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." A test turning on the intent of the speaker does not remotely fit the bill.

Id. (emphasis added) (quoting Buckley, 424 U.S. at 14 (further internal quotes and citation omitted)). The Supreme Court

[19] Id.

explained that considering the speaker's intent could lead to "the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." Id. at 468.

¶41 Wisconsin Right to Life also reaffirmed Buckley's holding that First Amendment campaign speech cannot be limited by the hearers' understanding of what was said, rather than evaluating the words actually spoken. As the Supreme Court related:

> Buckley also explains the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers." . . . Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

Id. at 469 (emphasis added) (quoting Buckley, 424 U.S. at 43). Accordingly, because the proper test for an as-applied challenge to governmental regulation of political campaign speech "must give the benefit of any doubt to protecting rather than stifling speech," it cannot be limited by a hearer's interpretation. Id. To apply the governmental regulation broadly so as to encompass what a hearer may infer from the statement, as the Commission has done, contravenes the mandate of strict scrutiny that regulations of speech must be narrowly tailored as they are applied. Id.

¶42 The Commission asserts we must "interpret" the statements based on the "context in which [they were] made."[20] The Commission relies on various defamation cases "for guidance in determining that the Advertisement contains a false statement of fact."[21] The Commission's reliance on defamation cases for support in defining that the statements in the advertisement are false is misplaced. This is so because the Commission employs a broad interpretation and application of SCR 60.06(3)(c), contrary to strict scrutiny, and also because the test for determining whether a statement is false is different in defamation cases than it is in governmental restraint cases. Compare New York Times, 376 U.S. at 267, with Wisconsin Right to Life, 551 U.S. at 469.

¶43 Our position that defamation principles should not be applied to SCR 60.06(3) also is supported by the plain meaning of SCR 60.06(3)(c). To explain, while SCR 60.06(3)(c) applies to statements that one candidate makes about another candidate, it also applies to statements that a candidate makes about himself or herself. Defamation cases can have no relevance to

[20] April 16, 2010 statement of James Alexander at oral argument before this court.

[21] Commission brief in chief, 12. The Abrahamson writings fall into the same quagmire because of their reliance on civil defamation cases where the effect of the statement on the hearer is not only a permissible part of the analysis of the claim, it is a required part. See, e.g., Milkovich, 497 U.S. at 20 n.7.

an alleged SCR 60.06(3)(c) violation based on an untruthful statement a candidate makes about himself or herself.

¶44 The Supreme Court's discussion of false statements in civil defamation cases is not appropriate to engraft onto cases addressing governmental regulations of political speech. This is so for at least three reasons: (1) in defamation cases, the falsity of the statement is interwoven with the effect of the statement on the hearer, Milkovich, 497 U.S. at 20 n.7; (2) in governmental regulation of political speech cases, we are prohibited from considering the effect of the speech on the hearer, Wisconsin Right to Life, 551 U.S. at 469; and (3) civil defamation cases arise from a private right of action where the plaintiff's right to recover for damages to his good name is balanced with the speaker's defense under the First Amendment, without concerns that a governmental regulation will chill constitutional speech.[22]

¶45 A United States Supreme Court defamation decision provides a helpful example, demonstrating how the analysis of whether a statement is false in a defamation case differs from the analysis of whether a statement is false in a governmental regulation of political speech case. In Milkovich, the Supreme Court was asked to decide whether a statement expressed as an opinion was protected from prosecution as defamation. Milkovich, 497 U.S. at 3. There, the Lorain Journal published

[22] See supra ¶¶20-23 (discussing defamation cases).

an article "implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding." Id.

¶46 The defamation claim in Milkovich required proof that the published statement was false and also that it lowered Milkovich in the esteem of others. Id. at 11. The Supreme Court noted that because Milkovich's claim was based on defamation, the issue of falsity was interwoven with the defamatory nature of the statement. Id. at 20. As the Supreme Court has explained for defamation claims, "the issue of falsity relates to the defamatory facts implied by a statement." Id. at 20 n.7. Therefore, in order to prove that a statement is defamatory, the defamatory effect on a reasonable hearer must be shown. Id. at 20. Accordingly, in defamation suits, implications from the statements actually made are discussed because of the requirement to prove that the statements had a defamatory effect on the hearer.

¶47 The evaluation of whether a statement is false when the potential for restraint of political speech is at issue is much different. When a governmental regulation of speech results in the government's seeking to punish the speech that it sought to regulate, the United States Supreme Court has precluded consideration of the effect of the speech on the hearer. Wisconsin Right to Life, 551 U.S. at 469 (explaining that "a test based on the actual effect speech will have . . . puts the speaker . . . wholly at the mercy of the varied understanding of his hearers"). Rather than considering the

effect of the speech on others, an objective test for the truthfulness of the statement is applied. Id. Stated otherwise, the alleged falsity when governmental regulation of speech is at issue is not related to facts that may be implied by the statement. See id. Furthermore, when a civil defamation claim is under review, strict scrutiny is not part of the analysis, yet when the government regulates campaign speech, strict scrutiny forms the foundation for the constitutional analysis. Buckley, 424 U.S. at 75.

¶48 We are bound to follow the directives of the United States Supreme Court's First Amendment jurisprudence as we apply SCR 60.06(3)(c). Republican Party clearly establishes that candidates for judicial office have First Amendment rights that codes of judicial conduct may not transgress. Republican Party, 536 U.S. at 788. Accordingly, we apply an objective test in our review of whether the statements made are false statements of fact. We review the words actually used in the advertisements. We do not apply "amorphous considerations of intent and effect." Id. Furthermore, the United States Supreme Court has instructed that courts are to apply governmental regulations in a way that will preserve their constitutionality. Citizens United, 130 S. Ct. at 892.

¶49 We conclude that the statements in the campaign advertisement were objectively true and therefore, they did not violate SCR 60.06(3)(c). Were we to conclude that objectively true statements can be punished for what the government asserts they imply or for the alleged effect they may have on some

hearer, we would violate the command of strict scrutiny that the regulation be narrowly construed and applied. We follow the directives of the United States Supreme Court in our decision, as we must.

C. Burden of Proof

¶50 The Commission commenced this original action[23] by filing a complaint against then-Judge Gableman with the clerk of the supreme court, pursuant to Wis. Stat. § 757.85(5). In so doing, the Commission assumed the obligation to prosecute the complaint, § 757.85(6), and was given the burden to prove the complaint as set out in Wis. Stat. § 757.89. Section 757.89 requires that a complaint alleging judicial misconduct "be prove[d] to a reasonable certainty by evidence that is clear, satisfactory and convincing."

¶51 Wisconsin Stat. § 757.91, entitled "Supreme court; disposition," assists us in determining how the facts are established. Section 757.91 provides as follows:

> The supreme court shall review the findings of fact, conclusions of law and recommendations under s. 757.89 and determine appropriate discipline in cases of misconduct. . . . The rules of the supreme court applicable to civil cases in the supreme court govern the review proceedings under this section.

¶52 In this case, there is no dispute by either party about the Panel's findings of fact. On review, we employ the rules applicable to civil proceedings and we accept the Panel's

[23] The Wisconsin Supreme Court has appellate and original jurisdiction. Wis. Const. art. VII, § 3(2).

findings of fact unless they are clearly erroneous. No party contends the Panel's fact findings are clearly erroneous or that there is any need for further fact-finding. Rather, both parties accept the Panel's findings of fact as the facts upon which our ultimate decision is to be made.

¶53 We three justices have concluded that based on the undisputed facts before us, the Commission has failed to prove the allegations in its complaint by evidence that is clear, satisfactory and convincing as Wis. Stat. § 757.89 obligates the Commission to do. When a party has not met its required burden of proof, dismissal of the complaint is required by law. Wis. Stat. § 757.89; see Seraphine, 44 Wis. 2d at 65.

¶54 This case has not been dismissed because Chief Justice Abrahamson, Justice Bradley and Justice Crooks refuse to apply the burden of proof to the Commission that the legislature specifically requires in § 757.89. They refuse to follow the law, even though it is apparent that the Commission has not met its burden of convincing four members of this court that Justice Gableman violated SCR 60.06(3)(c), and even though the

Commission agrees that the facts found by the Panel are all true.[24]

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[24] Instead of applying the burden of proof required by Wis. Stat. § 757.89, Chief Justice Abrahamson, Justice Bradley and Justice Crooks suggest that the complaint should be returned to the Commission so that the Commission can now request a jury trial. Abrahamson writings at ¶¶15-17. This suggestion passes belief. Juries determine facts and the facts of this matter are not in dispute, by either the Commission or Justice Gableman. Furthermore, no party has asserted that the facts as found by the Panel should be supplemented.

A hearing before a jury panel is not a legal option. This is so because Wis. Stat. § 757.87(1) requires that any request for a hearing before a jury panel must have been made by the vote of a majority of the members of the Commission "before the commission files a formal complaint." § 757.87(1) (emphasis added). Such votes "shall be recorded and shall be available for public inspection under [Wis. Stat.] s. 19.35." Id. The Commission did not request a hearing before a jury panel; the Commission chose a hearing before a three-judge panel, as it had the right to do. § 757.87(1).

In addition, the Abrahamson writings are not forthright in their representations to the public about the availability of a hearing before a jury panel. Their writings Gerry-rig Wis. Stat. § 757.87(1) by eliminating words from the statute to make it appear that their suggestion of a jury panel is reasonable. In that regard, it is worth reading the actual statute, so that a comparison can be made with the Abrahamson writings' representation, see ¶15 n.9, and what actually is written in the statute. Section 757.87(1) provides:

> After the commission has found probable cause that a judge or circuit or supplemental court commissioner has engaged in misconduct or has a permanent disability, and before the commission files a formal complaint or a petition under s. 757.85(5), the commission may, by a majority of its total membership not disqualified from voting, request a jury hearing. If a jury is not requested, the matter shall be heard by a panel constituted under sub. (3). The vote of each member on the question of a jury request shall be recorded and shall be available for

(continued)

¶55 The Abrahamson writings also repeatedly try to shift the focus of the reader to a discussion of summary judgment, when no party has moved this court for summary judgment.[25] This is not an appellate review process in which we are engaged, where we review motions made and decided by a previous court. This complaint was filed with the Wisconsin Supreme Court; it is a case of original jurisdiction. No one has moved this court for summary judgment. The Abrahamson writings' attempt to fog the issues actually presented with their summary judgment ploy is unworthy of the difficult process in which we are engaged.

¶56 Applying the burden of proof set out by the legislature in Wis. Stat. § 757.89, requires dismissal of the complaint. Other courts have dismissed actions when the party who had the burden of proof garnered only an evenly divided court. For example, in In re Isserman (Isserman I), 345 U.S. 286 (1953) the United States Supreme Court was equally divided when the Court was confronted with whether Isserman, an attorney convicted of misconduct and disbarred by a state supreme court, should be disbarred by the United States Supreme Court as well.

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public inspection under s. 19.35 after the formal complaint or the petition is filed.

[25] The Abrahamson writings also mischaracterizes our opinion as "granting summary judgment." Abrahamson writings, ¶9. No party moved this court for summary judgment and we three justices are not ruling on a motion for summary judgment. Because this is a case of original jurisdiction, we are not reviewing a summary judgment motion made to the Panel. We have independently reviewed the record, including the basis for the findings of fact made by the Panel, and the applicable law.

When the Isserman matter was first presented to the Supreme Court, the rule provided that Isserman be disbarred unless "he shows good cause to the contrary within forty days." Id. at 287. The Supreme Court was equally divided on the issue and resolved the division based on Isserman's failure to meet his burden to prove good cause:

> The order of the Court placed the burden upon respondent to show good cause why he should not be disbarred. In our judgment, he has failed to meet this test. An order disbarring him from practice in this Court should issue.

Id. at 290.

¶57 Less than one year later, on rehearing, the Supreme Court vacated the order entered in Isserman I. In re Isserman (Isserman II), 348 U.S. 1 (1954). The Court noted that on April 6, 1953, "an order was entered disbarring Isserman from the practice of law in this Court pursuant to . . . this Court's Rules then in effect." Id. at 1. However, at the time of Isserman II, the governing rule had been amended such that "'no order of disbarment will be entered except with the concurrence of a majority of the justices participating.'" Id. (quoting Supreme Court Rule 2). Because it was no longer Isserman's burden to prove why he should not be disbarred, the previous order of disbarment was set aside. Id. At the United States Supreme Court level, the party who had the burden of proof lost whenever that burden was not met.

¶58 In In re Apportionment of Michigan Legislature, 140 N.W.2d 436 (Mich. 1966), in an original action, an equally

divided Michigan Supreme Court dismissed a petition alleging defects in a plan of legislative apportionment. While each of the justices filed a separate writing, dismissal occurred because a majority of the court could not agree that the alternate apportionment plan was constitutionally deficient, i.e., the allegations in the petition had not been proved. Id. at 468.

¶59 In Lohrmann v. Arundel Corp., 500 A.2d 344 (Md. Ct. Spec. App. 1985), the Maryland Court of Special Appeals was confronted with "whether an evenly-divided vote by the Ann Arundel County Board of Appeals operates as a denial of a special exception previously granted by a zoning hearing officer or as an affirmance of the hearing officer's decision." Id. at 345. The court concluded that Arundel Corporation had the burden of proof before the Board. Because the Board was evenly divided, Arundel Corporation had not met its requisite burden of proof. Id. Accordingly, Arundel Corporation's request for a special exception was denied. Id.

¶60 The burden of proof is a foundational premise of law. The person to whom that burden is assigned must meet it or dismissal of the complaint is required. This is so because when the burden of proof has not been met, the evidence presented is held insufficient to satisfy the charge made in the complaint as a matter of law. See Bubb v. Bruskey, 2009 WI 91, ¶30, 321 Wis. 2d 1, 768 N.W.2d 903; State v. Bonds, 2006 WI 83, ¶53, 292 Wis. 2d 344, 717 N.W.2d 133.

¶61 The equal division of the justices in the complaint pending against Justice Gableman shows that the Commission has failed to carry its burden to prove to a majority of the court that Justice Gableman violated SCR 60.06(3)(c) by evidence that is clear, satisfactory and convincing, as Wis. Stat. § 757.89 requires. Accordingly, we anticipate that the Commission, or the Commission and Justice Gableman together, promptly will move this court to dismiss the Commission's complaint, as it is apparent that it cannot be proved.

III. CONCLUSION

¶62 Three members of the court, Justice Prosser, Justice Roggensack and Justice Ziegler, agree with the recommendation of the three-judge Panel that the Commission's complaint against Justice Gableman must be dismissed. We agree with the Panel's recommendation because after conducting an independent review of the record and considering the arguments of counsel, we have concluded that the Commission failed to establish, by evidence that is clear, satisfactory and convincing, that Justice Michael J. Gableman violated SCR 60.06(3)(c).

¶63 The campaign advertisement that gave rise to the Commission's complaint against Justice Gableman and the governmental rule, SCR 60.06(3)(c), by which the Commission seeks to punish Justice Gableman for that advertisement must be examined according to the commands of the First Amendment. As the United States Supreme Court has explained, the First Amendment applies to judicial elections and those canons of judicial ethics that states seek to apply to judicial elections.

Republican Party, 536 U.S. at 788. We acknowledge that the advertisement run by Justice Gableman's campaign committee was distasteful; however, the First Amendment prevents the government from stifling speech, even when that speech is distasteful. R.A.V., 505 U.S. at 380, 391. The United States Supreme Court has established the parameters of the First Amendment's protections of campaign speech that we have followed in our decision.

¶64 In order to meet the burden of proof assigned to the Commission by Wis. Stat. § 757.89, at least four justices must conclude that the advertisement by Justice Gableman's campaign committee violated SCR 60.06(3)(c), when SCR 60.06(3)(c) is interpreted and applied consistent with the commands of the First Amendment. The Commission has not met that burden of proof. Accordingly, we anticipate that the Commission, or the Commission and Justice Gableman together, promptly will file a motion to dismiss the complaint against Justice Gableman.

PROPOSED REVISIONS TO RULE 4 OF THE RULES GOVERNING THE STANDING COMMITTEE ON JUDICIAL ETHICS AND ELECTION PRACTICES

March 8, 2011

RULE 4. UNFAIR ELECTION PRACTICES

Rule 4.1. Definitions.

As used in this Rule 4, the words and terms defined in paragraphs (a) through (h), inclusive, shall have the meanings ascribed to them in those paragraphs.

(a) "Committee Rule" means the Rules Governing the Standing Committee on Judicial Ethics and Election Practices.

(b) "Complainant" means a judicial candidate who files a complaint pursuant to Committee Rule 4.3.

(c) "Court" means the Supreme Court of Nevada.

(d) "Judge" means any district judge, a justice of the peace or municipal judge, or a senior judge, justice of the peace or municipal judge who is not disqualified from serving on a panel under the provisions of NCJC or Committee Rule 4.4(b).

(e) "NCJC" means the Nevada Code of Judicial Conduct.

(f) "Panel" means an adjudicative body comprised of five members of the Committee, including either the Chair or the Vice-Chair and otherwise selected in accordance with Committee Rule 4.4.

(g) "Respondent" means a judicial candidate against whom a complaint pursuant to Committee Rule 4.3 is filed with the Committee.

(h) "Unfair election practice" means any practice or act which would violate Canon 4 of the NCJC.

Rule 4.2. Jurisdiction of Committee.

(a) *Panel authority.* The Committee through a Panel designated pursuant to Committee Rule 4.4:

(1) Shall have the authority to conduct proceedings as necessary to adjudicate a complaint filed pursuant to Committee Rule 4.3, including without limitation, in matters involving NCJC Rule 4.4, to determine whether a person is, in fact, working for the election of a candidate.

(2) Shall not have the authority to determine whether:

(A) A provision of the NCJC violates or conflicts with the Constitution of the State of Nevada or the Constitution of the United States.

(B) A candidate has made pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office as prohibited NCJC Rule 4.1(A)(13).

(b) *Additional limitations.* A committee panel may consider only:

(1) Matters presented by the complaint and answer filed by the candidates for judicial office involved in the specific matter; and

(2) Incidents arising from actions of a candidate for judicial office or those working for a candidate's election.

Rule 4.3. Procedure for Filing Complaint and Answers.

(a) *Commencing proceedings.* A proceeding before the Committee to adjudicate an alleged unfair election practice is commenced by filing a complaint with the executive director of the committee. A complaint may only be filed by a judicial candidate and against another judicial candidate.

(b) *Content of complaint.* The complaint must be in writing and set forth with specificity the provisions of the NCJC applicable to and the facts that constitute the claim of an unfair election practice. The complaint shall be accompanied with:

(1) A fee of One Hundred Fifty Dollars ($150.00);

(2) A certificate of the complainant establishing:

(A) The efforts by complainant to meet and confer with the respondent in an effort to informally resolve the unfair campaign practice dispute; and,

(B) The complaint has been served upon the respondent by delivery in person, through electronic mail or facsimile transmittal, and the United States Postal Service.

(c) *Limitation period.* The committee may not consider a complaint that is filed:

(1) Within twenty-one (21) calendar days preceding the date upon which the applicable primary, general or special election shall be conducted.

(2) More than sixty (60) calendar days after the date upon which the claimed unfair election practice occurred or became known directly or indirectly to the complainant.

(d) *Answer.* The respondent shall file an answer to the complaint with the executive director of the committee within seven (7) calendar days of the date upon which service of the complaint is received. The answer shall be in writing and set forth with specificity whether the allegations of the complaint are admitted or denied and any defense to or ground for avoidance of the claim of an unfair election practice. The answer shall be accompanied with a certificate establishing the answer has been served by the respondent upon the complainant by delivery in person, through electronic mail or facsimile transmittal, and the United States Postal Service.

(e) *Counterclaims disallowed.* An answer may not contain a counterclaim by the respondent that the complainant engaged in an unfair election practice. A respondent who desires to raise a claim of an unfair election practice against the complainant must file an independent complaint pursuant to Committee Rule 4.3(a).

Rule 4.4. Composition and Selection of Panels.

(a) *Panel selection.* Within five (5) business days after the answer is filed, the chair will select a panel to review and adjudicate the complaint. The panel will be comprised of five persons, including two attorneys and two non-attorneys who are members of the committee, and a judge who is a member of the committee or is otherwise selected by the chair if necessary to comply with the requirements of Committee Rule 4.4(b). The Chair or the Vice-Chair shall serve as one of the attorney members of each panel. Except as is necessary to comply with Committee Rule 4.4(b), the four remaining members of the panel shall be chosen on a random basis through a procedure adopted by the Chair.

(b) *Judge members.* The chair shall not request a judge to serve on a panel and a judge shall not serve on a panel if:

(1) The alleged unfair election practice involves a candidate for any judicial office within the judicial district in which the judge holds office or previously held office; or

(2) The judge is a candidate for judicial office and he or she has an opponent who has officially filed a declaration of candidacy for the same judicial office.

(c) *Other disqualification.* No person who has made a contribution to either or both the Complainant or Respondent may serve on a panel without the consent of the parties.

Rule 4.5. Scheduling and Notice of Panel Hearing.

(a) *Hearing notice.* Within five (5) business days after the answer is filed the panel shall serve on the Complainant and the Respondent notice of date, time and place set for a hearing to adjudicate the complaint.

(b) *Hearing timing.* The hearing will be set for not less than ten (10) days nor more than thirty (30) days after the answer is filed unless the chair and the parties otherwise agree to set a different time for the hearing.

Rule 4.6. Prehearing Disclosures and Submissions.

(a) *Mandatory submission and exchange of evidence.* Five (5) calendar days before the date set for the panel hearing, both the complainant and the respondent shall serve and file with the executive director an original and five copies of the following documents:

(1) All documents, reports, brochures, flyers, advertisements, photographs, audio or video recordings or other tangible items that the party intends to use at the panel hearing;

(2) A list of all witnesses whose testimony will be presented at the panel hearing; and,

(3) A memorandum of points and authorities summarizing any legal arguments that will be presented at the panel hearing,

(b) *Presenting video or audio evidence.* The parties are responsible for providing at the panel hearing any equipment necessary to display audio or video recordings upon which a claim or defense is based and the failure to do so shall be grounds for a summary disposition of the matter.

(c) *Prehearing discovery and motions disallowed.* Except for the mandatory prehearing exchange required by paragraph (a) of this Rule, the Committee will not impose, direct or allow any prehearing discovery and there will not be any motion practice before a panel.

(d) *No subpoena authority.* The panel does not have the authority to issue or apply for judicial issuance of subpoenas.

Rule 4.7. Panel Hearing Procedure.

(a) *Conduct of uncontested proceedings.* In matters where the respondent's answer admits the truth of the allegations of the complaint, then the matter shall be referred to a panel of the committee for appropriate action in imposing a remedy. At the discretion of the panel, the parties may be requested to attend the hearing for the purpose of considering mitigating factors and to present recommendations on the form of remedy.

(b) *Conduct of contested hearings.*

(1) A party may be represented by an attorney or other non-witness advisor.

(2) The Judge member of a panel will act as the presiding officer for the panel hearing.

(3) At the commencement of any hearing, the presiding officer will:

(A) Resolve any preliminary matters;

(B) Cause administration of a testimonial oath for all witnesses;

(C) Record any objections of the parties to the composition of the panel;

(D) Confirm the agreement of the parties to adhere to the confidentiality requirements of Committee Rule 4.11; and

(E) Exclude all witnesses except the parties, if any.

(4) Panel hearings will be conducted in accordance with the following procedures:

(A) The complainant may present an opening statement on the merits and the respondent may then make a statement of the defense. The respondent may reserve his or her statement of the defense for the presentation of his or her case.

(B) After his opening statement, if made, and the respondent's statement of the defense, if not reserved, the complainant shall present his or her case in chief in support of the complaint.

(C) Upon conclusion of the complainant's case in chief, the respondent shall then present his or her case in defense.

(D) Upon conclusion of the respondent's case, the complainant may present rebuttal evidence.

(E) The Panel may allow for additional evidence from either party after the Complainant's rebuttal case if such evidence is considered important by the panel to the disposition of the matter.

(F) After the presentation of the evidence by the parties, the complainant may present a closing argument. The respondent may then present his or her closing argument and the complainant may then present a rebuttal argument. Thereafter the matter will stand submitted for decision.

(5) All or part of the hearing may be conducted by video conference or telephone.

(6) The hearing must be recorded by the panel on audio tape or other means of sound reproduction, unless it is reported stenographically for a party at the party's own expense, in which case the party must provide the original hearing transcript to the panel. The panel's audio recoding of the hearing shall be retained for a period of one hundred twenty calendar days following the hearing.

(c) *Presentation of evidence in contested cases.*

(1) Oral evidence may be taken only upon oath or affirmation administered by the panel.

(2) Affidavits may be received in evidence.

(3) Each party may:

(A) Call and examine witnesses;

(B) Introduce exhibits relevant to the issues of the case;

(C) Cross-examine opposing witnesses on any matter relevant to the issues of the case, even though the matter was not covered in a direct examination;

(D) Impeach any witness, regardless of which party first called him to testify; and

(E) Offer rebuttal evidence.

(4) If a party does not testify on his own behalf he may be called and examined as if under cross-examination.

(d) *Admissibility of evidence.*

(1) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence may be admitted and is sufficient in itself to support a finding if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action.

(2) The parties or their counsel may by stipulation agree that certain evidence be admitted even though such evidence might otherwise be subject to objection.

(3) Irrelevant and unduly repetitious evidence should not be admitted. The evidentiary rules of privilege will be observed by the panel.

(4) The panel may take official notice of any generally accepted information or technical or scientific matter, and of any other fact which may be judicially noticed by the courts of this state. The parties must be informed of any information, matters or facts so noticed and must be given a reasonable opportunity, on request, to refute such information, matters or facts by evidence or by written or oral presentation of authorities. The manner of such refutation shall be determined by the panel.

(e) *Burden of proof.* Except as provided in Committee Rule 4.9(e), the complainant bears the burden of showing an unfair election practice by a preponderance of the evidence.

Rule 4.8. Resolution of Complaint.

(a) After the hearing, the panel shall deliberate outside the presence of the parties and render a decision and determine an appropriate remedy.

(b) Four voting members shall constitute a quorum, and the vote of three members of any panel is necessary to take action.

(c) Except as provided in Committee Rule 4.10(c), the decision of the panel shall be documented in a written decision and order containing findings of fact and a determination of the issues presented. Every decision shall be signed by the chair or vice-chair. No disclosure of the panel's deliberations and decision shall be made except as provided in the written decision and order.

(d) All written decisions and orders shall be open for public inspection at the Commission's office.

(e) The written decision and order shall be served on each party and publicly filed with the Court within five (5) business days of the hearing. The decision and order must be accompanied by proof of service in the form of a certificate signed by an employee of the Committee stating the date and manner of service. The decision and order is effective and final upon service on all parties. If the decision and order is sent by mail, it shall be deemed to have been served three (3) days after it is deposited with the United States Postal Service with the postage thereon prepaid.

Rule 4.9. Standards Governing NCJC Rule 4.1(A)(11) Matters.

In adjudicating complaints that a judicial candidate has made a false or misleading statement in the course of a campaign in violation of NCJC Rule 4.1(A)(11), a panel shall apply the following standards:

(a) The statements of the judicial candidate or his or her campaign committee must be scrupulously fair and accurate.

(b) The judicial candidate or his or her campaign committee must refrain from making any statement that omits facts necessary to make the communication as a whole not materially misleading.

(c) The statements of the judicial candidate or his or her campaign committee must be considered as a whole in context and where made in connection with a candidate debate, joint interview or other event in which all the impacted candidates are present and permitted to participate, the iterative statements of all the participants must be evaluated as the relevant communication of each and all participating judicial candidates.

(d) Any allegedly false or misleading statement must be made by the judicial candidate or his or her campaign committee with actual knowledge of falsity or under circumstances reasonably demonstrating that the judicial candidate or his or her campaign committee failed to conduct an investigation of the factual basis for the statement to ascertain its accuracy.

(e) The complainant bears the burden of showing a violation of NCJC Rule 4.1(A)(11) by clear and convincing evidence.

Rule 4.10. Permitted Remedies.

(a) If the panel finds an unfair election practice, the panel has authority to:

(1) Issue a public censure which may be used by the aggrieved candidate in the campaign.

(2) Require a candidate for judicial office to publish a retraction or other corrective communication in a manner reasonably calculated to be received by the same audience that received an unfair campaign communication. For example, an untrue statement may be corrected by a public retraction of the statement by the offending candidate; in the event that the group addressed by the offending candidate was relatively small, then a retraction directed to that particular group may be deemed sufficient.

(3) Directing a judicial candidate to discontinue the use of any unfair campaign practice.

(4) Refer any matter to the appropriate body for professional discipline, and the committee's or panel's findings may be used as evidence in any disciplinary proceeding.

(b) The panel may not impose any fine or civil penalties.

(c) The panel may decline to issue a written decision and order if the panel determined that a public statement of its findings is not appropriate because the claimed violation of the NCJC is only technical in nature or a violation of the NCJC may be sufficiently addressed through more limited measures. For example, an untrue statement may be corrected by a public retraction of the statement by the offending candidate; in the event that the group addressed by the offending candidate was relatively small, then a retraction directed to that particular group would be adequate. In such cases, the panel will not issue a public decision and order and the disposition of the matter will be confidentially noted in the records of the committee.

Rule 4.11. Confidentiality.

(a) No complainant, respondent, representative of a party, witness or any member of the committee or panel shall make any public reference to the fact that a matter is pending under this Rule 4 before the committee.

(b) All meetings of panels concerning unfair election practices are confidential.

(c) Except as provided in Committee Rule 4.8(d), all pleadings, papers, exhibits, affidavits, testimony and other records, including without limitation any audio recording made pursuant to Committee Rule 4.7(b)(6), filed or submitted in connection with an unfair campaign practice matter under this Rule 4 are confidential and will not be disclosed in whole or part by any person except on the order of the Court.

(d) Nothing in this Committee Rule 4.11 prohibits:

(1) A candidate from making public charges of unfair election practices.

(2) The Committee or panel from responding publicly to any unauthorized public reference to the committee by a candidate.

Rule 4.12. Judicial Review.

(a) The exclusive method of judicial review of a final decision and order of a panel is by a writ of review to the Court pursuant to NRS 34.010 to 34.140, inclusive.

(b) On the first judicial day of March in each odd number year, the Committee shall file with the Court a written report that summarizes the ethics advisory opinions issued pursuant to Committee Rule 5 and each decision and order entered in accordance with Committee Rule 4.8 for the preceding biennium. The Court shall review the report in an administrative docket and provide to the Committee any guidance as necessary to address any correction or clarification the Court considers proper in the interpretation or application of the NCJC in any advisory opinion or decision and order entered in accordance with Committee Rule 4.8. Except as the Court may provide such guidance, the committee may rely on it prior ethics advisory opinions issued pursuant to Committee Rule 5 and each decision and order entered in accordance with Committee Rule 4.8 as precedent in rendering subsequent decisions and orders under this Rule 4.