

WISCONSIN JUDICIAL COMMISSION
110 East Main Street, Suite 700
Madison, WI 53703
(608) 266-7637

REQUEST FOR INVESTIGATION

Name: WISCONSIN DEMOCRACY CAMPAIGN
(please type or print)

Address: 210 N BASSETT ST SUITE 215
MADISON, WI 53703

Phone: Daytime () 608-255-4266 Evening () _____

I have information of possible misconduct or disability on the part of
MICHAEL GABLEMAN, of the WISCONSIN SUPREME Court in
(name of judge or court commissioner)
MADISON, DANE, Wisconsin.
(city) (county)

STATEMENT OF FACTS

1. When and where did this happen?

Date(s): _____ Time: _____ Location: _____

2. If your information arises out of a court case, please answer these questions:

a) What is the name and number of the case?

Case name: IN THE MATTER OF Case no.: 2010 WI 62
JUDICIAL PROCEEDINGS AGAINST MICHAEL GABLEMAN

b) What kind of case is it?

criminal, domestic relations, small claims, probate,

civil, juvenile, other (specify): CH. 757

c) What is your relationship to the case?

plaintiff/petitioner defendant/respondent

attorney for _____

witness for _____

other (specify): THE WISCONSIN DEMOCRACY CAMPAIGN IS A NONPROFIT ORGANIZATION WHOSE MISSION IS TO HOLD PUBLIC OFFICIALS ACCOUNTABLE FOR THEIR ACTIONS.

d) If you were represented by an attorney in this matter at the time of the conduct of the judge or court commissioner, please identify the attorney:

Name: _____

Address: _____

Phone: () _____

e) Identify any other attorney(s) who represented you or any person involved in the case:

Name of attorney: _____

Addresses: _____

Phone: () _____ () _____

Represented: _____

3. List documents that help support your information that the judge or court commissioner has engaged in misconduct or has a disability, noting which ones you have attached:

4. Identify, if you can, any other witnesses to the conduct of the judge or court commissioner:

Name(s): _____

Addresses: _____

Phone: () _____ () _____

5. Specify below the details of what the judge or court commissioner did that you think constitutes misconduct or indicates disability. (Please type or print legibly; attach additional paper if necessary.)

PLEASE SEE ATTACHMENT 1

I UNDERSTAND THAT STATE LAW PROVIDES THAT THE JUDICIAL COMMISSION'S PROCEEDINGS ON THIS REQUEST FOR INVESTIGATION ARE CONFIDENTIAL AND THAT I MAY REQUEST THE COMMISSION NOT TO DISCLOSE MY IDENTITY TO THE JUDGE OR COURT COMMISSIONER PRIOR TO THE FILING OF A PETITION OR FORMAL COMPLAINT WITH THE SUPREME COURT.

I REQUEST THE COMMISSION NOT TO DISCLOSE MY IDENTITY TO THE JUDGE OR COURT COMMISSIONER.

Signature:  Date: 12/20/2011



210 N Bassett St., Suite 215 / Madison, WI 53703 / 608 255-4260 / www.wisdc.org

ATTACHMENT 1

On behalf of Wisconsin Democracy Campaign, I, Michael McCabe, primarily based upon public records but also upon information and belief, hereby allege as follows:

1. On October 8, 2007, the Wisconsin Judicial Commission filed a complaint against Michael Gableman claiming 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). 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. 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." In the Matter of the Judicial Proceedings Against Michael Gableman, 2010 WI 62, ¶4 (footnotes omitted).
2. Justice Gableman was represented in that matter by the law firm of Michael, Best & Friedrich, LLP (MBF), and more specifically, Attorney Eric McLeod. Justice Gableman was represented by him from July, 2008 to July 2010.
3. Attorney McLeod, through his employment with MBF, was subsequently retained by the Wisconsin State Legislature to assist in the drawing of redistricting lines, and to bring suit with regard to that redistricting in *Clinard v. Brennan*, 2011AP002677 - OA.
4. Justice Gableman has not recused himself as to any matter involving either Attorney McLeod or MBF at any time since he has been a Wisconsin Supreme Court Justice.
5. As a part of Attorney McLeod's representation of the legislature in *Clinard v. Brennan*, on November 28, 2011, he spoke with journalists from the Milwaukee Journal Sentinel about his representation of Justice Gableman. A part of discussion included whether or not Justice Gableman had any obligation to recuse himself in cases involving MBF or Attorney McLeod. In that discussion, as reported on November 28, 2011, Attorney McLeod told the Milwaukee Journal Sentinel that Justice Gableman had "a standard billing arrangement" with MBF and "has paid that bill". [Milwaukee Journal-Sentinel, "Law Firm Gave Advice On Elections Law It Is Suing Over", 11/28/11]
6. Shortly prior to December 15, 2011, MBF General counsel Jonathan Margolies wrote a letter to the Wisconsin Supreme Court divulging that Justice Gableman did not have a standard billing arrangement with MBF. In fact, Justice Gableman was required to pay his attorney fees under the arrangement only if he recovered those fees from the state. Since Gableman was not able to recover them, he did not have to pay legal fees to the firm. MBF has refused to provide a copy of the retainer agreement.
7. At no time prior to the filing of this complaint has Justice Gableman disclosed his billing arrangement with MBF to any party, including those opposing MBF before the Wisconsin Supreme Court.
8. The Judicial Commission complaint against Justice Gableman was filed pursuant to Wisconsin Statutes Chapter 757, specifically §757.85. There is an attorneys fees statute which addresses actions under §757.85, which reads in relevant part:

§757.99 Attorneys Fees A judge . . . against whom a petition alleging permanent disability is filed by the commission shall be reimbursed for reasonable attorney fees if the judge . . . is found not to have a permanent

disability. A judge . . . against whom a formal complaint alleging misconduct is filed by the commission and who is found not to have engaged in misconduct may be reimbursed for reasonable attorney fees. Any judge . . . seeking recovery of attorney fees authorized or required under this section shall file a claim with the claims board under §16.53.

9. Upon information and belief, the only available statute under which Justice Gableman, through his attorneys, could petition for fees after conclusion of his Judicial Commission complaint is §757.99.

10. I have reviewed the law under §757.99 and reached the following conclusions:

Fees are Discretionary: §757.99 makes clear that the awarding of fees for a successful challenge of a Judicial Commission complaint is discretionary. The first sentence reads that a judge involved in a disability action "shall" have his fees reimbursed. That language is mandatory. In comparison, the part of the law addressing persons successfully prevailing in a Judicial Complaint "may" have their fees reimbursed. When the same statute uses those same terms, it can be assumed that the legislature intended them to have differing meanings.

Additionally, the last line of the statute uses the phrase "authorized or required." This recognizes that while the fees for judges involved in disability proceedings are mandatory, the fees for those with judicial complaints are not.

The Law Requires A Separate Petition: The Judicial Commission itself does not award the fees involved. Indeed the person seeking fees must file a separate action pursuant to §16.53, "Preaudit Procedure." That statute addresses how the Department of Administration is to handle claims against the State of Wisconsin. The fee request becomes a general claim upon the state, to be evaluated under a variety of requirements (see §16.53(1)(c)).

11. I have spoken with various attorneys who represent individuals in contingency fee matters. I have been informed that a contingency fee agreement pursuant to §757.99 would be extraordinary and is generally unheard of. This is because §757.99 does not mandate attorneys fees be awarded. In personal injury cases, lemon law, or consumer actions under §100.18, if the attorney is successful on behalf of his client, he or she will recover some sum as attorneys fees. In personal injury cases, those fees are (generally) a percentage of the total sum recovered. In Lemon Law or Consumer Actions, those fees are either (1) a contingency fee on a total sum recovered through settlement or (2) a reasonable amount of fees awarded by the court pursuant to statute requiring fees to be awarded. In all cases, there is a guaranteed route to obtaining fees if the Plaintiff is successful.

12. In the fee arrangement set forth by MBF as to Justice Gableman (a contingency fee based upon §757.99) there is no guarantee of any monies being available for attorney fees. Indeed, consider the actual scenario - if Justice Gableman had lost his Judicial Commission complaint, there would be no fees. If he won his Judicial Commission complaint, there are still no available fees - only the right to ask the state to award them. It is this lack of any sort of guarantee as to fees that makes such a contingency fee retainer extremely suspect - it makes the likelihood of working for free very great.

13. §757.99 has another important clause - it states that fees "may be reimbursed." Reimbursement has been held in Wisconsin law as meaning amounts paid or liable for. (Shepherd Legan Aldrian v. Village of Shorewood, 182 Wis.2d 472, 513 N.W.2d 686 (Ct. App. 1994).

In this case, according to the information received regarding the fee agreement between MBF and Justice Gableman, Justice Gableman was neither liable for, nor had he paid any monies for his attorneys fees. You cannot "reimburse" that which has neither been paid nor owed.

14. I am unaware that any petition for reimbursement of any attorneys fees as to Justice Gableman was filed with the Department of Administration at any time with regard to soliciting reimbursement of attorneys fees pursuant to §757.99.

15. Having established that (1) MBF has asserted that it agreed to work pursuant to a contingency fee agreement and (2) That agreement was contingent upon an award of attorneys fees pursuant to the reimbursement language of §757.99, and (3) In order to seek reimbursement pursuant to §757.99 Justice Gableman had to have paid or agreed to owe those fees, the next issue is what happened to Justice Gableman's obligations as to those fees?

16. Wisconsin rules governing judges prohibit the accepting of gifts except under limited circumstances. SCR 60.05(4)(e). Specifically, SCR 60.05(4)(e)(10) prohibits judges from accepting gifts from anyone who "has come or is likely to come or whose interest have come or are likely to come before the judge." The comment to that rule clarifies that unless otherwise permitted (by the rules governing birthday and other personal gifts) it prohibits accepting "gifts, favors or loans from lawyers or their firms if they have come or are likely to come before the judge."

17. If Justice Gableman had an obligation to pay fees, such that he was eligible to have them considered for reimbursement pursuant to §757.99, and he no longer has that obligation, he has received a gift in the sum of those attorneys fees.

18. I have seen an estimate in the Milwaukee Journal Sentinel that the value of the attorneys fees provided to Justice Gableman by MBF is in the tens of thousands of dollars.

19. To my knowledge, Justice Gableman has not disclosed the gift of attorney services from MBF to anyone.

20. Therefore, regardless of whether the Board addresses this matter under the Code of Ethics, decides to issue an advisory opinion, or finds it appropriate to refer the matter to a district attorney for investigation, I respectfully submit that the facts warrant the Board's attention, regardless of any statutorily imposed time limitations.