

**FILED**

JAN. 03 <sup>2012</sup> 2011 *MS*

CLERK OF SUPREME COURT  
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011 AP00267 - OA

DENNIS CLINARD, ERIN M. DECKER, LUONNE A. DUMAK,  
DAVID A. FOSS, LaVONNE J. DERKSEN, PAMELA S. TRAVIS,  
JOHN E. HAGER, JAMES L. WEINER, JEFF L. WAKSMAN and KEVIN  
CRONIN,

Petitioners,

and

ALVIN BALDUS, CINDY BARBERA, CARLEN BECHEN, ELVIRA  
BUMPUS, RONALD BIENDSEIL, LESLIE W. DAVIS III, BRETT  
ECKSTEIN, GLORIA ROGERSE, RICHARD KRESBACH, ROCHELLE  
MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-  
BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Involuntary Petitioners,

v.

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL,  
THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE,  
each in his official capacity as a member of the  
Wisconsin Government Accountability Board, and

KEVIN KENNEDY,  
Director and General Counsel for the  
Wisconsin Government Accountability Board,

Respondents.

PETITIONERS RESPONSE TO INTERVENORS'  
MOTION FOR RECUSAL OR DISQUALIFICATION

## OUTLINE

### BACKGROUND

### ARGUMENT

- I. FIRST THE VERDICT, THEN THE TRIAL: INTERVENORS ASK THIS COURT TO RELY ON NEWSPAPERS ARTICLES TO PRE-EMPT ESTABLISHED PROCEDURE, JUSTICES' DISCRETION, AND THE JUDICIAL COMMISSION PROCESS.
  - A. RECUSAL MOTIONS UNDER § 757.19(2)(G) AND *CAPERTON* DUE PROCESS STANDARDS ARE ADDRESSED TO THE SOLE DISCRETION OF THE INDIVIDUAL JUSTICE.
  - B. IF THIS COURT DOES NOT DENY THE MOTION AS A MATTER OF LAW, IT SHOULD ALLOW THE JUDICIAL COMMISSION TO COMPLETE THE COMPLAINT PROCESS RATHER THAN PRE-EMPT THAT PROCESS BY REVISITING *HENLEY* BASED ON THE DEFICIENT ARGUMENT AND RECORD PRESENTED IN THE MOTION.
    1. INTERVENORS DO NOT PROVIDE EVEN THE BAREST ANALYSIS REQUIRED TO REVISIT PRECEDENT.
    2. THIS COURT IS NOT INSTITUTIONALLY CONSTITUTED TO CONDUCT THE FACTUAL INQUIRY OR DEVELOP THE RECORD NECESSARY FOR IT TO PROPERLY CONSIDER INTERVENORS' CHARGES.
    3. INTERVENORS ARE NOT WITHOUT RECOURSE IF THE COMMISSION PROCESS DETERMINES THAT RECUSAL IS WARRANTED.

- II. INTERVENORS' MOTION SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE MBF LEGAL SERVICES WERE NOT A "GIFT" PROVIDED TO JUSTICE GABLEMAN "WITHOUT VALUABLE CONSIDERATION."
- A. UNDER THE § 757.99 FEE SHIFTING AGREEMENT ALLEGED BY INTERVENORS, THE DISPOSITIVE LEGAL QUESTION IS NOT WHETHER MBF SERVICES WERE PROVIDED "FREE OF CHARGE," BUT WHETHER THEY WERE PROVIDED "WITHOUT VALUABLE CONSIDERATION."
- B. ADEQUACY OF CONSIDERATION SUPPORTING CONTINGENT AND FEE SHIFTING RETAINER AGREEMENTS IS BEYOND QUESTION.
- C. THE ADEQUACY OF CONSIDERATION IS ALSO BEYOND QUESTION IN RELATION TO J. GABLEMAN'S FEE-SHIFTING AGREEMENT ENTERED INTO UNDER § 757.99.
- D. WITHDRAWAL OF MBF CURES ANY POSSIBLE BASIS FOR RECUSAL.
- III. INTERVENORS' "FACTS" ARE MERE HISTORICALS, NOT THE "EXTRAORDINARY SITUATION" REQUIRING RECUSAL UNDER *CAPERTON*.
- IV. THIS COURT SHOULD REJECT THE CONCERTED EFFORT TO MANUFACTURE THE "APPEARANCE OF PARTIALITY" OUT OF ILL-INFORMED NEWS COVERAGE, PARTISAN ACCUSATIONS, AND CONCLUSORY ARGUMENT.
- A. THE "REASONABLE PERSON" STANDARD.
- B. DELIBERATE MANIPULATION OF PUBLIC PERCEPTION BY MIS-REPORTING OR MISREPRESENTATION.
- V. BE CAREFUL WHAT YOU WISH FOR: CAUTION IS ADVISABLE BEFORE ENCOURAGING "MOTIONS DU JOUR."

CONCLUSION