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

BACKGROUND

"War is politics by other means." Carl von Clausewitz

"So are recusal motions." Anonymous

It is difficult to imagine a more abjectly cynical ploy than intervenors' Motion to Recuse filed against Justice Gableman. Their rambling olio of surmise and invective bespeaks a well-oiled political operation, as replete with sound bites as it is lacking in legal analysis. The motion's patent purpose and intended effect are to compromise and discredit J. Gableman and any decision in which he participates.

Typical of politically motivated groups seeking to score public relations points, the Wisconsin Democracy Campaign ("WCD") filed a complaint against J. Gableman with the Judicial Commission[1] on December 20, 2011, and simultaneously released the complaint to the Milwaukee Journal Sentinel.[2] The WCD complaint alleges that Michael, Best & Friedrich, LLP ("MBF"), petitioners' original attorney in this matter, also represented Justice

[1] The Judicial Commission process for investigating alleged judicial misconduct (hereafter, "Commission process") is provided at §§ 757.89-.99, Stats. A summary is available at http://www.wicourts.gov/courts/committees/judicialcommission/index.htm.

[2] *See* Milwaukee Journal Sentinel, Dec. 20, 2011, *Group files formal request for Gableman ethics investigation*, available at http://www.jsonline.com/news/statepolitics/group-files-formal-request-for-gableman-ethics-investigation-sd3guc9-135928403.html. The WDC complaint is linked in the story at http://media.jsonline.com/documents/gableman-122011.pdf. WCD also filed a second complaint, *see* http://www.jsonline.com/blogs/news/135997763.html.

Gableman's in *Wisconsin Judicial Commission v. Michael J. Gableman*, 2008AP002458-J, and that J. Gableman "did not have to pay legal fees to the firm," violating the prohibition against receiving a "gift" under SCR 60.05(4)(e).[3]

Because the Commission must keep its proceedings confidential on one hand, but can not sanction complainants for releasing their complaints to the public on the other,[4] the consequent, one-sided furor in the media echo chamber and rabidly partisan blogosphere was predictable, standard operating procedure for politically and ideologically motivated groups like WDC.

Knowing that J. Gableman is precluded from responding publicly both by law and by prudence, intervenors exploit the one-sided trashing of his character and reputation, presenting mere newspaper articles as the "factual"

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[3] SCR 60.05(4)(e)

> (e) A judge may not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, favor or loan from anyone except for the following:
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> Comment: Unless authorized by other provisions of sub. (4) (e), sub. (4) (e) 10 prohibits judges from accepting gifts, favors or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge. *See* sec. 19.43 *et seq.*, Stats.

[4] Sec 757.93(1) requires confidentiality prior to the Commission finding probable cause and filing a petition in this court. Sec. 757.93(2) authorizes the Commission to issue explanatory statements about its procedures and an accused judge's rights, but does not permit any comment on the merits of the complaint. The Commission has issued a generic statement referencing the WDC complaint and providing general information, available at http://www.wicourts.gov/courts/committees/judicialcommission/release122011.pdf.

record supporting their motion, claiming that the "appearance of impropriety" generated by red-meat media requires his recusal under § 757.19(2)(g), Stats.[5] and the Due Process Clause. Utterly lacking in substantive legal analysis (the WCD complaint actually contains more), intervenors' motion is filed simply to exacerbate and exploit the uninformed furor.[6]

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[5] Sec. 757.19(2)(g) provides:

> (2)Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
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> ....
>
> (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

[6] Besides demanding J. Gableman recuse, movants for good measure insert an oblique argument on the merits of this Case No. 2011AP2677-OA and the related Case No. 2011 XX 1409, complaining :

> These cases (i) seek to have the Court effectively block ongoing recall efforts against several Republican officials including the Governor and Lieutenant Governor and (ii) ask the Court to determine the validity of the controversial 2011 Redistricting Plan enacted along party lines by a bare Republican legislative majority, despite the fact that adjudication of the issue is well underway in federal court.

Motion, p. 2. Of course, movants omit the crucial fact that MBF did not initiate those cases until GAB after adopted its staff position paper November 9, pursuant to which GAB will allow movants to collect signatures and campaign for votes from electors against senators who do not even represent those electors, but will bar other electors voting to retain those same senators who *do* represent them. Movants further omit that MBF has withdrawn the petition in Case No. 2011AP2677-OA and amended its complaint in Case No. 2011 XX 1409 to pursue only claims relating to rights of GAB's impairment of their suffrage, speech, and recall rights guaranteed by Wis. Const. Art. I, sec. 3; Art. III, sec. 1; and Art. XIII, sec. 12 - claims which *all parties agree* do not constitute claims subject to the three-judge panel procedure § 801.50(4), Stats. *See generally*, Plaintiffs' Brief in Response to the Order of the Court Dated December 6, 2011, filed December 12 in Case No. 2011 XX 1409, and Plaintiffs' Brief in Reply to the Order of the Court Dated December 6, 2011, filed in the same case on December 13.

Intervenors have provided a letter from MBF's general counsel, Jonathan Margolies, describing the retainer agreement with J. Gableman as providing that payment of fees was contingent upon recovery of fees pursuant to the fee shifting provisions of § 757.99, Stats.[7] As explained below, assuming Mr. Margolies' description of the fee agreement is true for purposes of determining whether intervenors' motion should be dismissed as a matter of law, the dispositive question is *not* whether J. Gableman received legal services "free of charge," as intervenors repeatedly assert. Rather, because a "gift" as "the payment of receipt of anything of value without valuable consideration," § 19.42(6), Stats.,[8] the sole dispositive question is whether the contingent fee agreement was supported by "valuable consideration." As discussed below, it clearly was, and intervenors' motion must be denied as a matter of law.

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[7] Sec. 757.99 provides,

> Attorney fees. A judge or circuit or supplemental court commissioner against whom a petition alleging permanent disability is filed by the commission shall be reimbursed for reasonable attorney fees if the judge or circuit or supplemental court commissioner is found not to have a permanent disability. A judge or circuit or supplemental court commissioner 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 or circuit or supplemental court commissioner seeking recovery of attorney fees authorized or required under this section shall file a claim with the claims board under s. 16.53.

[8] Sec. 1942.(g)(6) provides, "'Gift' means the payment or receipt of anything of value without valuable consideration."

ARGUMENT

Intervenors' sole substantive allegation is the "*appearance* of impropriety caused by Justice Gableman's receipt of legal services from Michael Best & Friedrich ('MBF') free of charge." Motion, p. 2. In sum, they assert that (1) J. Gableman accepted legal services from MBF "free of charge," (2) those services were therefore a "gift" under § 19.42(6), (3) J. Gableman was required to disclose the "gift" on his annual statements to the Government Accountability Board pursuant to § 19.43, Stats.,[9] (4) failing to disclose MBF's "gift" violated SCR 60.05(4)(e), and (5) the "appearance of impropriety" resulting when the "gift" was finally made public requires recusal under § 757.19(2)(g), Stats. and the due process clause as explicated in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252 (2009).

[9] Sec. 19.43(1), Stats., provides "Each individual who in January of any year is an official required to file shall file with the board no later than April 30 of that year a statement of economic interests meeting each of the requirements of s. 19.44 (1). The information contained on the statement shall be current as of December 31 of the preceding year."

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.

Intervenors argue that recusal is required by § 757.19(2)(g) and by *Caperton* due process standards. Int. Br. at 5, 7. Those grounds for recusal and the associated legal standards are the same ones considered in numerous prior cases before this court. *E.g.*, *State v. Allen*, 2010 WI 10 ¶ 322 Wis.2d 372, 778 N.W.2d 863; *Matter of Disciplinary Proceedings Against Crosetto*, 160 Wis.2d 581, 466 N.W.2d 879 (1991); *State v. Henley*, 2011 WI 67 ¶ 11, ___ Wis.2d ___, 802 N.W.2d 175, 178.

To some extent, there are parallel objective and subjective inquiries under § 757.19(2) and *Caperton* due process analysis. Subsecs. 757.19(2)(a)-(f)[10] provide

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[10] Sec. 757.19(2)(a)-(f) provide:

(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(c) When a judge previously acted as counsel to any party in the same action or proceeding.

(d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.

objective standards for recusal *per se*. *State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 182, 443 N.W.2d 662, 665 (1989). Intervenors do not allege any of those objective bases for recusal, and they are not at issue here. Sec. 757.19(2)(g), however, requires only that a judge conduct a subjective inquiry whether "he or she cannot, or it appears he or she cannot, act in an impartial manner." *Henley*, ¶ 42 n. 3. *See also City of Edgerton v. General Cas. Co. of Wisconsin*, 190 Wis.2d 510, 521-522, 527 N.W.2d 305, 309 (1995) ("As pointed out in *American TV, supra,* 151 Wis.2d at 182, 443 N.W.2d 662 the determination under sec. 757.19(2)(g), Stats., unlike the other subdivisions of the statute, is a subjective one.")[11]

(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

[11] Rejecting the argument that § 757.19(2)(g) contains an *objective* standard, the Court stated in *Storms v. Action Wisconsin Inc.*, 2008 WI 110, 314 Wis.2d 510, 754 N.W.2d 480,

> [W]e note that the majority opinion in *Harrell* set forth the appropriate analysis to be employed as follows:
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> In *American TV* we stated that subsection (2)(g) concerns "not what exists in the external world ... but what exists in the judge's mind." *American TV*, 151 Wis.2d at 182-83, 443 N.W.2d 662. We explained:
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> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification ... in a situation in

In *Caperton* the Court discussed that due process also contemplates a subjective inquiry,[12] but found that it also "objective standards may also require recusal whether or not actual bias exists or can be proved. Disqualification was required under the principle that '[[e]very procedure which would offer a possible temptation to the average man as a judge to

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which the judge's impartiality 'can reasonably be questioned' by someone other than the judge.

Id. at 183, 151 Wis.2d 175, 443 N.W.2d 662. Appellate review of this subjective determination is "limited to establishing whether the judge made a determination requiring disqualification." *Id.* at 186, 443 N.W.2d 662. *See also City of Edgerton v. General Cas. Co.*, 190 Wis.2d 510, 521-22, 527 N.W.2d 305 (1995); *In re Disciplinary Proc. Against Crosetto*, 160 Wis.2d 581, 584, 466 N.W.2d 879 (1991). The reviewing court must objectively decide if the judge went through the required exercise of making a subjective determination.

Harrell, 199 Wis.2d at 663-64, 546 N.W.2d 115.

Storms, 2008 WI 110 ¶ 24, 314 Wis.2d at 526-527, 754 N.W.2d at 488-489.

[12] The Court stated,

Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case.

. . . .

. . . . There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

. . . .

. . . . [A]actual bias, if disclosed, no doubt would be grounds for appropriate relief.

Caperton, 129 S.Ct. at 2263. The Court noted that "Justice Benjamin did undertake an extensive search for actual bias." *Id.* 129 S.Ct. at 2265.

forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'" *Caperton*, 129 S.Ct. at 2265 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927)).

In *Henley*, this court determined that both § 757.19(2)(g) and *Caperton* due process analyses begin and end within the sole decision of the individual justice subject to the request for recusal. It is up to that individual justice to apply *both* subjective *and* objective standards. Henley ¶ 11 (in *Crosetto*, "this court decided that when presented with a motion for disqualification based on due process grounds, each justice must decide for himself or herself whether his or her disqualification was required").[13]

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[13] *Henley* notes that this court's objective due process analysis predates *Caperton*.

> Furthermore, the issue presented in *Caperton* is not new to this state. Nearly two decades ago, in *In re Disciplinary Proceedings Against Crosetto*, 160 Wis.2d 581, 466 N.W.2d 879 (1991), this court decided that when presented with a motion for disqualification based on due process grounds, each justice must decide for himself or herself whether his or her disqualification was required. In *Crosetto*, the motion to disqualify came before the court had decided the pending matter. Crosetto alleged that each justice had a disqualifying personal interest in Crosetto's disciplinary proceeding because Crosetto had leveled personal criticisms against each justice on other occasions. *Id.* at 584, 466 N.W.2d 879. Crosetto based his motion on the appearance of partiality, citing the due process clauses of the federal and state constitutions, and on Wis. Stat. § 757.19(2) (1989–90), just as Henley has here. Id. at 583, 466 N.W.2d 879.

Henley, 2011 WI 67 ¶ 11.

While the *Henley* dissent disputed whether a four-vote majority existed sufficient to support a *per curiam* opinion, *Henley*, ¶¶ 44-48, *Henley* was published as a *per curiam* decision, and even intervenors concede that it controls. Int. Br. at 7. Thus, intervenors' § 757.19(2)(g) and due process motions are addressed to J. Gableman's sole discretion, and his alone. *State v. Henley*, 2011 WI 67 ¶ 11.

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.

As discussed below, assuming the truth of Attorney Margolies' description of the retainer agreement in the letter submitted by intervenors, *Storms v. Action Wisconsin Inc.*, 2008 WI 110 ¶ 16, 314 Wis.2d 510, 522, 754 N.W.2d 480, 486,[14] their motion should be rejected as a matter of law because the contingent fee agreement, like all other such agreements, is clearly supported by "valuable consideration."

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[14] This court explained in *Storms*,

> In the present case, as in the prior three cases, we determine from the face of Donohoo's motion and accompanying documents that, even accepting all of his allegations as true, neither on the law asserted nor on the facts alleged can it be established that Justice Butler was disqualified by law from participating in this case.

Id., 2008 WI 110 ¶ 16

Intervenors do not even identify, much less analyze that threshold question, and instead ask this court to overrule *Henley*, take up their motion based solely on the meager "record" provided in their exhibits, reach the merits of the same ethics charges that are no pending before the Judicial Commission reviewing the WDC complaint, and disqualify J. Gableman from serving in the two matters pending before this court, regardless of what the Commission might ultimately find.

Even if this court declines to dismiss the motion as a matter of law, intervenors' request is so undeveloped that it is impossible to determine precisely what specific process or holding they propose for resolving their motion. It may be that they favor the concept discussed by the dissent in *Henley*, which would apparently enable a sitting majority of the Court to force recusal of another justice, who would be unable to participate in the decision[15] solely because he or she is the target of a recusal motion (including even a meritless or bad faith motions, apparently). Even assuming intervenors intend that approach, their request to overrule *Henley* presents no legal analysis

[15] C.J. Abrahamson dissenting, *Henley*, at ¶ 59 ("Thus Justice Roggensack participates in deciding the constitutional validity of her participation in the Henley case. . . . . Justice Roggensack is a judge of her own cause) and ¶ 63 ("the court not only had jurisdiction (power) to decide the disqualification of a justice, but also had the constitutional responsibility to decide the issue").

whatever, and only the barest "record." Accordingly, this court should dismiss the request out of hand.

1. INTERVENORS DO NOT PROVIDE EVEN THE BAREST ANALYSIS REQUIRED TO REVISIT PRECEDENT.

Generally, overruling *Henley* is inappropriate in the context of this motion for two reasons. First, intervenors have not provided even the slightest basis for overruling precedent. *See Bartholomew v. Wisconsin Patients Compensation Fund and Compcare Health Services Ins. Corp.*, 2006 WI 91 ¶ 34, 293 Wis.2d 38, 52, 717 N.W.2d 216, 224.[16] Despite well-established requirements that they do so, they provide no citation, no discussion, only the barest of supporting records, and not even a cursory formulation of the process they propose this court substitute for *Henley*. Accordingly, their cursory invitation to overrule it must be summarily rejected. *State v. Avery*, 2011 WI App 124 ¶ 40 804 N.W.2d 216, 230 n. 10 (citing *State v. Pettit*, 171 Wis.2d 627, 646–47, 492 N.W.2d 633

[16] The *Bartholomew* court summarized the traditional consideration for overruling precedent:

> Five factors typically contribute to a decision to overturn prior case law. This court is more likely to overturn a prior decision when one or more of the following circumstances is present: (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is "unsound in principle;" or (5) the prior decision is "unworkable in practice."

Bartholomew ¶ 34 (footnote omitted).

(Ct.App.1992) ("We need not consider arguments which are undeveloped or unsupported by references to relevant legal authority")).

To the contrary, intervenors' motion underscores the reasoning in *Henley* as follows:

- The motion is yet another of the burgeoning spawn of *Caperton*. As the *Henley* majority noted, recusal requests citing *Caperton* are now *motions du jour*.[17]

- Reminiscent of "destroying the village in order to save it," intervenors urge that due process here requires disqualifying J. Gableman on a "record"

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[17] *Henley* ¶ 6 n. 6.

> A motion to disqualify a justice on a case-by-case basis has become the motion du jour, as litigants attempt to manipulate the decisions of this court by disqualifying justices whom they think may decide against the position a litigant takes. Between April 2009 and April 2010, 12 motions requested the court to disqualify a justice from participating in a pending case. In that one year period, more motions to disqualify a justice from a pending case were filed than the total of such motions in the preceding 10 years.

See also, Richard Esenberg, *If You Speak Up, Must You Stand Down: Caperton and Its Limits*, 45 Wake Forest L. Rev. 1287, 1289 (2010) (noting "the likelihood that [*Caperton*] will have legs, leading to more frequent attempts by litigants to seek the recusal of potentially 'unfriendly' judges.") Professor Esenberg catalogs the dispute between the majority and dissenters in *Caperton*. *id.* at 1288, n. 14. The majority noted that "Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections," but concluded "We disagree." *Id.*, 129 S.Ct. 2265. Continuing the "practice *du jour*" noted in *Henley*, the present motion fulfils what the *Caperton* dissent predicted. *Id.* at 2274 (Roberts, C.J., dissenting) ("But I believe that opening the door to recusal claims under the Due Process Clause . . . will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts."); *id.* at 2274 (Scalia, J., dissenting) ("[T]he principal consequence of today's decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges.").

consisting solely of newspapers articles, Attorney Margolies' letter, J. Gableman's GAB reports, and their own generalized, unsworn factual assertions. Such a result would, of course, constitute a binding determination on J. Gableman's character and fitness to serve without affording him adversarial process, rights of confrontation, rights to call witnesses and submit evidence, or any of the fundamental elements of due process afforded by the Commission process. *Henley* ¶ 22. In fact, because intervenors essentially accuse him of *quid pro quo* and shaving his decisions in cases where MBF appeared, Int. Br. at 4, J. Gableman may well have a constitutional right to trial that this court may not usurp.[18]

- Reaching the merits of intervenors' motion in absence of meaningful legal analysis or a sufficient record would simply encourage gamesmanship[19]

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[18] Intervenors claims of defalcation and *quid pro quo* go to the heart of a justices integrity, and may well constitute "cases at law" for which the right of trial is guaranteed. Wis. Const. art. 1, section 5. ("Trial by jury; verdict in civil cases . . . . The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy . . . .")

[19] J. Scalia stated in dissent:

> What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the Caperton claim. The facts relevant to adjudicating it will have to be litigated—and likewise the law governing it, which will be indeterminate for years to come, if not forever. Many billable hours will be spent

and selective recusal of justices. *Henley* ¶ 35 ("Were Caperton expanded to support the disqualification of a justice on facts less extreme and egregious than those on which the Caperton decision was based, a party could attempt to affect the outcome of his case by filing disqualification motions against certain justices and not against other justices. *See Allen*, 322 Wis.2d 372, ¶ 260, 778 N.W.2d 863 (Ziegler, J., concurring)"). It is not overreaching to wonder whether *Caperton* recusals motions, if unchecked, may become little more than a "fast track" sidestep to the Judicial Commission process.

- Intervenors' motion is long on newspaper articles and short on citation and legal analysis, clearly intended for popular consumption. Reaching the merits of a justices recusal on such a submission demeans the court by creating the impression that its decisions are susceptible to influence by the press. As already noted, it is bad enough that the current Commission process essentially permits open season on a justice - who must stand mute while his reputation is publicly trashed in lurid, front page banner headlines, waiting for vindication in the distant future that, if published at all, will appear in small font, below the fold in the "Local" section, long after the public has formed

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> in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.

Caperton, 129 S.Ct. at 2274.

their opinions and lost interest. Giving credence to intervenors' "trial by newspaper" without pursuing the Commission procedure would compound the abuse. As Secretary Ray Donovan asked when he and all defendants were finally acquitted after years of incessant media rumor that they engineered a kickback scheme in concert with the Genovese crime family, "What office do I go to get my reputation back?"

2. THIS COURT IS NOT INSTITUTIONALLY CONSTITUTED TO CONDUCT THE FACTUAL INQUIRY OR DEVELOP THE RECORD NECESSARY FOR IT TO PROPERLY CONSIDER INTERVENORS' CHARGES.

The second reason for rejecting intervenors' invitation to overrule *Henley* is institutional. The factual and legal bases of intervenors' motion are exactly the same as those contained in the WDC complaint now pending before the Commission. WDC and intervenors both allege violation of SCR 60.05(4)(e)(10), a charge which the legislature has specifically tasked the Commission to investigate. If for some reason the Commission determines the retainer agreement was not supported by "valuable consideration," the Commission will need to investigate factual issues such as the "value" of

services and whether J. Gableman consented to MBF's disclosure of information about the retainer agreement.[20]

The Commission possesses both the institutional expertise and knowledge and the resources required for investigation and fact-gathering. This Court does not. Accordingly, in this particular case, if the court declines to dismiss the motion on the merits as a matter of law, it would be inappropriate to overrule *Henley* and pre-empt the Commission by considering fact-intensive issues for which this court is ill-suited.

This Court's experience in *American TV* also supports letting the Commission do its work. In that case, the attorney general alleged that this court's prior decision involving the same parties (*State v. American TV and Appliance of Madison, Inc.*, 146 Wis.2d 292, 430 N.W.2d 709 (1988)) should be vacated because Justice Bablitch, a member of the 4 vote majority, was

[20] J. Gableman's consent, or lack thereof, may well be significant in the Commission proceedings. Sec. 905.12, Stats., provides, "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege." *See, e.g., Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust*, 2004 WI 57 ¶ 4, 29-31, 271 Wis.2d 610, 614, 679 N.W.2d 794, 796 (¶ 4, "We conclude that a lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents . . . . We hold that only the client can waive the attorney-client privilege under Wis. Stat. § 905.11 regarding attorney-client privileged documents.") Information such as billing records are privileged where they disclose the "nature of the legal services rendered." *Lane v. Sharp Packaging Systems, Inc.* 2002 WI 28 ¶ 39, 251 Wis.2d 68, 104, 640 N.W.2d 788, 804.

disqualified as a matter of law for receiving special financial benefit from American TV.

The court rejected the attorney general's motion, *American TV*, 151 Wis.2d at 181, 443 N.W.2d at 664, relying in large part on the Judicial Commission's investigation conducted after the original case was decided.

> After *State of Wisconsin v. American* [146 Wis.2d 292] was decided, the Judicial Commission conducted an investigation into allegations that Justice Bablitch had engaged in judicial misconduct on the basis of facts substantially the same as those presented here. Following the Judicial Commission's dismissal of those misconduct allegations on June 9, 1989, Justice Bablitch sent the parties in this case a letter on June 21, 1989 in which he unequivocally stated that, prior to taking part in the case, he had determined he could act fairly and impartially.

American TV, 151 Wis.2d at 183, 443 N.W.2d at 665.

It should be noted that the a finding of ethical violations in a Commission proceeding is not dispositive of a recusal motion based on those violations. *American TV*, 151 Wis.2d at 185, 443 N.W.2d at 666 ("The Code of Judicial Ethics governs the ethical conduct of judges; it has no effect on their legal qualification or disqualification to act and a judge may be disciplined for conduct that would not have required disqualification under sec. 757.19, Stats."). Nevertheless, that record developed the Commission process would certainly inform this court in the event of a subsequent motion for reconsideration citing the violations. *E.g., Jackson v. Benson*, 2002 WI 14 ¶ 14,

249 Wis.2d 681, 691, 639 N.W.2d 545, 550[21] (noting that although Justice Jon Wilcox was responsible for misconduct of campaign staff, he was not personally involved in or aware of the misconduct).

Thus, in the event this court does not dismiss intervenors' motion as a matter of law (on the grounds that the MBF retainer agreement was supported by "valuable consideration"), it should defer any decision on intervenors' motion until after the Commission process is completed, just as it deferred on the motion against Justice Bablitch in *American TV*.

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[21] Even after a decision is reached, it may be revised on a motion for reconsideration on grounds that a participating justice should have recused. The *Jackson* court explained,

> The general rule is that, after remittitur, the supreme court has no jurisdiction to vacate or modify its judgment. *Ott v. Boring*, 131 Wis. 472, 110 N.W. 824 (1907). Where a justice who participated in a case was disqualified by law the court's judgment in that case is void. *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, *reh'g granted* 100 Wis. 314, 74 N.W. 220 (1898). We have previously stated, "[a]n attack on the validity of a judgment of the state's highest court on the ground of a member's disqualification by law for an apparent inability to act impartially is not, nor can we conceive of it ever being, a 'routine matter.' " *State v. American TV & Appliance*,151 Wis.2d 175, 192, 443 N.W.2d 662 (1989). We have also said, however, that it behooves the court in the defense of its own legitimacy and of its integrity to consider a party's claim that a decision may be void because a justice should not have participated in the case. *City of Edgerton v. General Cas. Co.*, 190 Wis.2d 510, 527 N.W.2d 305 (1995).

Jackson, 2002 WI 14 ¶ 14.

3. INTERVENORS ARE NOT WITHOUT RECOURSE IF THE COMMISSION PROCESS DETERMINES THAT RECUSAL IS WARRANTED.

Petitioners do not discount the concerns raised by the *Henley* dissent. On one hand, the majority's "sole discretion" rule appropriately avoids the possibility that a majority of this court could prematurely remove a colleague based on ethics charges that have not been fully litigated before the Commission. If, as in *American TV*, that colleague is later exonerated by the Commission process, the grave injustice of improper removal is avoided.

But on the other hand, as the *Henley* dissent contemplates, if a justice refuses to recuse and charges are later substantiated by the Commission process and, in addition, recusal is warranted based on the Commission's fully developed record, then a grave injustice has also been done by the justice continuing to sit in the case. However, even in that unfortunate circumstance, a remedy is still available because this court can decide on a motion for reconsideration that the justice *should* have recused and that the Court's judgment in which he or she participated is therefore void. *Jackson*, 2002 WI 14 ¶ 14.

In sum, should J. Gableman or this court proceed to the merits of intervenors' motion and conclude that recusal is warranted, there is clearly the

potential that such a decision will be ultimately proven wrong when the WDC complaint if fully litigated in the Commission process. Accordingly, Petitioners submit that the *Henley* sole discretion standard is well-supported and prudent, and while the dissents' arguments are well-taken, re-visiting *Henley* is completely inappropriate in the context of this motion where movants have failed to provide even the barest legal discussion or factual basis for the Court to do so.

In the event the Court does not dismiss intervenors' motion outright as a matter of law, then the Court should defer action and allow the Commission process to proceed. If it is ultimately determined in that process that recusal was warranted, there is still a remedy available through a motion for consideration. But if J. Gableman is prematurely recused and the Commission process determines that recusal was *not* warranted, then there is no remedy for the injustice worked upon the member of the Court - an injustice which could have been avoided by deferring action until the Commission process produced a well-developed record and legal analysis.

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."

Again, as summarized above, intervenors assert that (1) J. Gableman accepted legal services from MBF "free of charge," (2) those services were therefore a "gift," (3) he was required to disclose that "gift" on his annual GAB statements, (4) failing to disclose the "gift" violated SCR 60.05(4)(e), and (5) recusal is therefore required under § 757.19(2)(g), Stats. and *Caperton* due process standards.

As explained in *Storms*, this court conducts a threshold review of recusal motions, accepting movants' allegations as true in determining whether to dismiss the motion as a matter of law. 2008 WI 110 ¶ 16, 314 Wis.2d 510, 522, 754 N.W.2d 480, 486.[22] Although deferral to the Commission process may be appropriate in some instances, it is unnecessary here because, assuming intervenors' factual allegations are true for purposes of the Court's threshold review, MBF's legal services were supported by "valuable consideration," and thus were not a "gift."

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[22] *Storms*, 2008 WI 110 ¶ 16

> In the present case, as in the prior three cases, we determine from the face of Donohoo's motion and accompanying documents that, even accepting all of his allegations as true, neither on the law asserted nor on the facts alleged can it be established that Justice Butler was disqualified by law from participating in this case.

Intervenors' § 757.19(2)(g) and *Caperton* claims *both* turn on the assumption that J. Gableman's alleged violation of SCR 60.04 for failure to disclose the "gift" of "free legal services" in his § 19.43 GAB statements creates the "appearance of impropriety." Intervenors argue that the facts here are so outrageous that he cannot possibly consider himself impartial under § 757.19(2)(g), and that his recusal is required *per se* under objective *Caperton* standards. Int. Br. at 5. In a remarkable exercise of circular reasoning (again without citation or explanation), intervenors argue that "Had Justice Gableman disclosed the free services provided by MBF as the law required, it is self-evident he would have been compelled to recuse himself . . . ." Int. Br. at 3.

The response to such charges is simple. The MBF services were not a "gift" because they were provided for "valuable consideration" pursuant to the contingent retainer agreement, entered into by MBF in contemplation of the fee-shifting provisions of § 757.99. As a matter of law, an appearance of partiality can not result from a gift that never existed and was neither given nor received.

As discussed below, the Wisconsin Democracy Campaign, the Milwaukee Journal Sentinel, and intervenors may well have disseminated sufficient ill-

informed commentary and conclusory allegations that the public has been victimized by a false appearance of partiality. But as a matter of law, false appearances cannot possibly mandate recusal, no matter how successful a smear campaign may be in destroying a justice's reputation and impugning the integrity of the court on which he sits and the decisions in which he participates.

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."

The "free of charge" allegation is a sound bite appropriate for political attack ads, not a relevant legal term. No doubt it makes good copy and boosts circulation, and the Milwaukee Journal Sentinel and intervenors have been so successful in repeating it that J. Gableman's personal counsel, Viet D. Dinh, apparently felt compelled to write a letter to editor Martin Kaiser requesting that the paper engage in more responsible reporting and stop mis-characterizing MBF's services as "free."[23] This Court is not a newspaper, of course, and should not permit facile sound bites to supplant legal analysis.

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[23] *See* letter of Viet D. Dinh to Martin Kaiser, Dec. 27, 2011, available at http://media.jsonline.com/documents/gableman-letter-122711.pdf

Intervenors correctly note that § 19.42(6), Stats., defines a "gift" as "the payment or receipt of anything of value without valuable consideration," and that "anything of value" includes "service" under § 19.42(1), Stats. Int. Br. at 4.[24] Then, in an omission that can only be intentional, they simply repeat *ad infinitum ad nauseum* the bald assertion that MBF services were a "gift" because they were received by J. Gableman "free of charge." Int. Br. *passim.*

However, other than that single quotation of § 19.42(6), intervenors do not mention, much less analyze, the dispositive phrase, "without valuable consideration." Similarly, intervenors attach the letter from Attorney Margolies, but fail to mention, much less discuss, Margolies' statement that "Our engagement provided that payment for attorneys fees would be contingent upon recovery of fees pursuant to Wis. Stat. § 757.99." Int. Br., Exh. A.

Accepting Margolies' statements as true, MBF's retainer agreement with J. Gableman provided that MBF would represent the justice on a contingent basis, with the anticipation of being compensated under the fee shifting provisions of § 757.99.

[24] SCR 60.01(7) also defines a "gift" as "the payment or receipt of anything of value without valuable consideration."

The precise dispositive issue of law is, therefore, whether a fee agreement is supported by "valuable consideration" where the attorney agrees to defend a judge in the Commission process with the attorney's compensation limited to recovery of fees under the fee shifting provisions of § 757.99.

B. Adequacy of Consideration Supporting Contingent and Fee Shifting Retainer Agreements Is Beyond Question.

Intervenors' proposition that a contingent fee agreement is "without consideration" would preclude any judge or judicial candidate from entering into a contingent fee agreement with legal counsel to pursue § 1983 civil rights claims, employment claims under Title VII or WFEA, or even garden variety personal injury claims.

No such absurd result is warranted. There is no question whatever that contingent fee retainer agreements are supported by valuable consideration. Perhaps the most highly compensated practitioners in the profession are those whose contingent fee agreements limit their fees to a percentage of damages recovered in personal injury or other tort actions. *See generally, e.g.*, *Markwardt v. Zurich American Ins. Co.*, 2006 WI App 200 ¶ 28, 296 Wis.2d 512, 537, 724 N.W.2d 669, 681 (summarizing cases discussing reasonableness of contingency fee agreements); and *Markwardt v. Zurich American Ins. Co.*, 2006

WI App 200 ¶ 12 n. 6, 296 Wis.2d 512, 528, 724 N.W.2d 669 (retainer agreement of personal injury firm reciting contingent fee as "consideration" for legal services).

Further, contingent fee agreements are specifically authorized and regulated by the Rules of Professional Conduct. *See, e.g. In re Disciplinary Proceedings Against Mandelman*, 2006 WI 45 ¶ 26, 290 Wis.2d 158, 170, 714 N.W.2d 512, 518.[25] Adequacy of consideration is never even questioned in holding counsel liable for negligence in failing to provide competent representation under such agreements. *See, e.g. Lewandowski v. Continental Cas. Co.*, 88 Wis.2d 271, 276

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[25] This Court summarized the allegations,

> The OLR's complaint alleged the following counts of misconduct with respect to his representation of N.C.:
>
> COUNT ONE-By failing to provide N.C. with a written fee agreement for the malpractice representation, Mandelman charged a contingent fee without a written fee agreement, in violation of SCR 20:1.5(c).FN1
>
> FN1. SCR 20:1.5(c) provides: Fees.
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

2006 WI 45 ¶ 26.

N.W.2d 284 (Wis., 1979) (attorney failed to timely commence personal injury action pursuant to contingent fee agreement).

Particularly instructive in this case are contingent fee agreements which limit attorneys fees to those awarded in the discretion of the court under various "fee shifting" statutes adopted by Congress and state legislatures to encourage "private attorneys general" to represent clients vindicating various rights. *See, e.g.,* 42. U.S.C. § 1988[26] (authorizing award of attorneys fees against government officials in various post-Civil War civil rights actions); *Tatum v. Labor and Industry Review Com'n*, 132 Wis.2d 411, 421-422, 392 N.W.2d 840, 844 (Ct.App.,1986) (noting that this court has authorized fee-shifting awards to employees under the Wisconsin Fair Employment Act to "effectuate the purpose of" the Act despite the absence of specific statutory language

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[26] 42 U.S.C. § 1988 provides,

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982,1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

authorizing such awards (citing, *Watkins v. Labor and Industry Review Com'n*, 117 Wis.2d 753, 764, 345 N.W.2d 482, 487 (1984)).

In particular, contingent agreements based on percentage recoveries and fee shifting statutes are an essential component of the justice system, encouraging and facilitating representation and vindication of rights, especially clients who cannot afford to pay attorneys fees themselves. *See, e.g., Maynard Steel Casting Co. v. Sheedy*, 307 Wis.2d 653, 662, 746 N.W.2d 816, 820 ("Contingent fee agreements are an important part of the civil justice system. Such agreements provide access to justice for claimants who otherwise could not afford legal assistance. *See Anderson*, 281 Wis.2d 66, ¶ 38, 697 N.W.2d 73.") In respect to fee-shifting statutes, *see Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 2009 WI App 65 ¶ 19, 318 Wis.2d 802, 816, 767 N.W.2d 394, 401 (explaining that consumer protections statutes provide fee shifting agreements to benefit the plaintiff's family which was, "in the truest sense, one unexpected expense away from financial disaster").

There is no question that fee shifting retainer agreements are routinely acknowledged and supported by adequate consideration. See, e.g. Blanchard v. Bergeron 489 U.S. 87, 94, 109 S.Ct. 939, 945 (1989) and Yahoo!, Inc. v. Net Games, Inc. 329 F.Supp.2d 1179, 1183 (N.D.Cal.,2004) (summarizing

Blanchard and other Supreme Court precedent, noting that "In each case, the Supreme Court concluded that the fee agreement was enforceable . . . .").

Attorneys and clients may also enter into "hybrid" agreements providing for fees paid by the client out of pocket at a reduced hourly rate, with the balance to be recovered by the attorney pursuant to an award of "reasonable fees" authorized by the court upon successful prosecution of the client's claim. *E.g., Fink v. City of New York*, 154 F.Supp.2d 403, 407 (E.D.N.Y.,2001)[27]

In *Thompson v. Village of Hales Corners*, 115 Wis.2d 289, 310, 340 N.W.2d 704, 714 (1983), this court cited *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir.1978), where the First Circuit observed that in civil rights cases where fee shifting statutes are available, a pure contingency retainer agreement based on a percentage of damages recovered is "atypical."[28]

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[27] The court explained

> It is quite clear from the retainer agreement, however, that Fink's attorneys did not believe that the $150.00 that they were charging him was a reasonable rate; rather, they specifically referred to it as a reduced rate and took the case on what might be described as a partial contingency basis. If anything, it is their customary rate and not the reduced rate that they charged to Fink that could be considered the market rate that they charge to their clients. See *Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1524 (D.C.Cir.1988) (finding that for-profit attorneys who charge lower rates to some clients in order to promote the public interest are nevertheless entitled to compensation at the market rate).

[28] This Court explained that in *Sharp*, "the court noted that the case under consideration was 'atypical of civil rights actions' in that it had been brought on a contingent fee basis. 579 F.2d at 648." *Thompson*, 115 Wis.2d at 310, 340 N.W.2d at 714.

C. The Adequacy of Consideration Is Also Beyond Question in Relation to J. Gableman's Fee-Shifting Agreement Entered Into Under § 757.99.

Similar to the rationales underlying the "civil rights" fee-shifting statutes discussed above, the legislative rationale underlying § 757.99 is not hard to determine. The cost of attorneys fees to defend even a single suit or proceeding are prohibitive.[29] Absent fee shifting or indemnity statutes, few capable individuals would accept or seek high profile or high risk public employment or office if doing so subjected them to substantial financial loss or ruin incurred defending ethics complaints, civil rights suits, or other proceedings, many of which may be commenced for partisan or ideological

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[29] The Deloney court explained,

> This conclusion is not inconsistent with the articulated purpose of employee indemnification statutes which, as the plaintiffs contend, is to protect employees. See Cole, *787 *Defense and Indemnification of Local Officials: Constitutional and Other Concerns*, 58 Albany L.Rev. 789, 799 (1994) (" '[g]overnment cannot effectively function without some assurance that its members will not be called upon to personally defend themselves against claims arising out of the daily operation of the government' "). See also *Wright v. City of Danville*, 267 Ill.App.3d 375, 385-86, 204 Ill.Dec. 681, 689, 642 N.E.2d 143, 151 (1994), *leave to appeal granted*, 159 Ill.2d 583, 207 Ill.Dec. 525, 647 N.E.2d 1018 (1995), stating:
>
> "Where conduct which is required of those holding a certain office carries with it a risk of criminal prosecution, it can be reasonable for the public entity for which the work is done to bear financial responsibility even for expenses incurred in such criminal prosecutions, at least in some cases. [Citation.] Otherwise, it may be difficult to encourage capable individuals to seek public office."

Deloney v. Board of Educ. of Thornton Tp. 281 Ill.App.3d 775, 787, 666 N.E.2d 792, 799, 217 Ill.Dec. 123, 130 (Ill.App. 1 Dist.,1996)

reasons, or which may be of dubious or non-existent merit. *See, e.g.,* Wis. Stat. § 895.46(1)(a).[30]

Taking the statements in the Margolies' letter as true, the existence of consideration underlying MBF's contingent fee agreement is beyond cavil. As Professor Esenberg noted in a recent blog,

> It was Justice Gableman's agreement to retain Michael Best in a potentially fee generating case. Whether or not you think that is "enough" consideration to warrant spending time on the case in the mere hope of recovery is immaterial. Every first year law student learns that courts do not examine whether the consideration underlying a contract is "enough" for whatever is promised in return. We all learn that a mere "peppercorn" will do.

Available at http://sharkandshepherd.blogspot.com/, posted Dec. 20, 2011.[31]

There are, of course, circumstances under which MBF might *not* have recovered fees, even if successful. Conceivably, the Commission might require

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[30] Wis. Stats. § 895.46(1)(a) reads in relevant part:

> If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. *Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. . . .*

Id. (Emphasis added.)

[31] Professor Esenberg's entire commentary is well worth reading.

Gableman to actually pay fees in advance because, technically, the statute authorizes only "reimbursement" of fees. That seems like a silly construction since a prevailing judge could simply wait to see if he prevailed, cut a check for fees, then immediately apply for "reimbursement." Further, courts *never* impose such requirement under § 1988, WFEA or other fee shifting statutes because the very *purpose* of those statutes is to make it feasible for the lawyer, not the litigant, to bear the financial risk.[32]

Perhaps of more substance, the Commission might ultimately find that reimbursement was inappropriate because the conduct which was the subject of the complaint consisted of J. Gableman's election activities outside his judicial responsibilities. That construction also seems unlikely, not only because the statutory language doesn't say that, but because judges in particular are subject to ethical canons governing their private lives, subjecting them to ethics complaints in relation to matters that would be outside the

[32] Courts do not require an injured party to prove he paid his own medical bills out of pocket before the jury can award "reimbursement" for medical expenses. *E.g. Weichert Co. of Maryland, Inc. v. Faust* 419 Md. 306, 329, 19 A.3d 393, 407 n. 7 (2011) ("the central holding in Henriquez, is that the party still 'incurred' fees, despite her not being charged for the pro bono services") and 419 Md. 306, 330, 19 A.3d 393, 407 (although the Petitioner did not personally pay his medical bill, he was still entitled to reimbursement by his automobile insurer for his medical bills resulting from automobile accident).

scope of employment or responsibility for any other public official. *See, e.g.* WI SCR 60.05[33]

In the end, however, it is irrelevant whether the Commission ultimately would or would not have reimbursed Gableman because MBF clearly contemplated that possibility and accepted the "risks of litigation" which are routine considerations in every retainer agreement. *See, e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 662 (C.A.7 (Ill.),1985) (noting that treble damages were "inducement to accept the risk of litigation - a risk the plaintiff takes in every case, although admittedly a less costly risk when his attorneys work on a contingency basis" (citations omitted)).

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[33] WI SCR 60.05(1) and the accompanying Comment provide,

> (1) Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do none of the following:
>
> (a) Cast reasonable doubt on the judge's capacity to act impartially as a judge.
>
> (b) Demean the judicial office.
>
> (c) Interfere with the proper performance of judicial duties.
>
> COMMENT
>
> Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.
>
> Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. *See* SCR 60.03(1) and (3).

WI SCR 60.05

The only circumstance under which the MBF agreement might *not* be supported by consideration would be if both parties knew it was a sham agreement with no possibility of recovering fees. But such a possibility borders on the absurd, because it assumes that J. Gableman and MBF knew or should have known that the Commission, the advisory panel, and this court had all prejudged the charges against J. Gableman in advance so that there was no meaningful possibility of recovering fees. Put differently, the agreement was only a sham if, for instance, MBF and J. Gableman knew or should have known in advance that the Commission would file charges with this court, that the advisory panel would recommend sustaining the charges, and that at least half the remaining members of this court had so pre-judged the charges that there was no meaningful possibility J. Gableman could "prevail" under § 757.99.

Thus, even asserting that the MBF retainer agreement was a sham is an indefensible calumny against this court and its members. While this court ultimately did differ 3-3 in the proceeding against J. Gableman, it would be an insult to the those justices voting against him to argue that MBF knew or

should have known in advance that they would vote against J. Gableman and that there was no possibility MBF could ever recover fees.[34]

D. WITHDRAWAL OF MBF CURES ANY POSSIBLE BASIS FOR RECUSAL.

Intervenors argue that "MBF's withdrawal during the last days that Justice Gableman's receipt of free services remained concealed does not begin to cure the need for recusal." Int. Br. at 3. That statement is yet another in intervenors' litany of bald assertions unsupported by citation nor explanation. Apparently, the implication is that, as a matter of law, MBF's mere initial appearance in the suit so biased J. Gableman that he is unable to rid himself of that bias even after its source has exited the case. There is simply no authority for such a remarkable proposition, and intervenors' assertion is nothing more than a vicious personal attack on the integrity of a sitting justice.

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[34] Dissenting, C.J. Roberts noted the peril of impugning the integrity of the Court under *Caperton.*

> There is a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. See *Republican Party of Minn. v. White,* 536 U.S. 765, 796, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (KENNEDY, J., concurring) ("We should not, even by inadvertence, 'impute to judges a lack of firmness, wisdom, or honor' " (quoting *2268 *Bridges v. California,*314 U.S. 252, 273, 62 S.Ct. 190, 86 L.Ed. 192 (1941))).

Caperton, 129 S.Ct. at 2267 -2268.

III. INTERVENORS' "FACTS" ARE MERE HISTRIONICS, NOT THE "EXTRAORDINARY SITUATION" REQUIRING RECUSAL UNDER *CAPERTON*.

Although they provide no supporting citation or relevant discussion, intervenors' repeated assertions of "extraordinary" facts are apparently intended to address the *Caperton* comment that it is only an "extraordinary situation where the Constitution requires recusal," and to demonstrate that in this case, "[t]he facts now before us are extreme by any measure." 129 S.Ct. at 2265

To begin with, the facts in this case are not analogous to *Caperton*, as intervenors readily admit. Int. Br. at 7. The *legal* issues aren't analogous either. As discussed above, a single legal issue is dispositive of the motion: Whether agreements to provide legal services pursuant to a fee shifting statute lack "valuable consideration"? Because the answer is clearly "no," movants resort to innuendo and histrionics to gin up the *subjective appearance* of impropriety that they fail to establish in *objective substance*.

Further, though the facts here are not analogous to those in *Caperton*, they *are* analogous to those in *American TV*. In that case, as explained above, the attorney general alleged that this court's prior decision, *American TV*, 146 Wis.2d 292, 430 N.W.2d 709, should be vacated because Justice Bablitch was

disqualified as a matter of law because he had received a financial benefit from American TV. The court explained that the "alleged disqualification is based on the fact that, prior to taking part in the case, Justice Bablitch had purchased merchandise from the respondent, American, some of it through a friend who worked as salesman and department manager at American, at discounted prices assertedly more favorable than those offered to the general public." *American TV*, 151 Wis.2d at 177-78, 443 N.W.2d at 662. More specifically,

> The State contends that Justice Bablitch was disqualified under sec. 757.19(2)(g), Stats., because "[h]is receipt of discounts from a litigant greater than that available to the general public on several thousands of dollars in purchases based on an arrangement with an American TV manager certainly would leave his impartiality open to reasonable question."

American TV, 151 Wis.2d at 181, 443 N.W.2d at 664.

Remarkably, the allegation against Justice Bablitch - that he received discounts on "several thousands of dollars" of merchandise - is almost identical to intervenors' allegation against J. Gableman here - that he received legal services worth "at least several tens of thousands of dollars." Int. Br. at 3-4.

The *American TV* court dismissed the attorney general's complaint out of hand. "[N]either on the law asserted nor on the facts alleged [in the motion] can it be established that Justice Bablitch was disqualified by law from

participating in this case." *American TV*, 151 Wis.2d at 181, 443 N.W.2d at 664. The court noted that "Justice Bablitch sent the parties in this case a letter on June 21, 1989 in which he unequivocally stated that, prior to taking part in the case, he had determined he could act fairly and impartially." *American TV*, 151 Wis.2d at 183, 443 N.W.2d at 665.

Noting that the law required only that Justice Bablitch conduct a "subjective" inquiry whether he could act impartially, and finding that he had done so, the court concluded that the attorney general's motion was "meritless." *Id.* 151 Wis.2d at 181, 443 N.W.2d at 664.

Finally, cursory consideration of intervenors' "facts" reveals that they are neither "extraordinary" nor outrageous.

- As noted, intervenors repeat dozens of times that MBF provided services to J. Gableman "free" and "free of charge." Int. Br. *passim.* That charge is repeated without even identifying, much less analyzing, the dispositive issue, whether the services were provided "without consideration."

- Intervenors note that MBF defended J. Gableman in *Wisconsin Judicial Commission v. Michael J. Gableman*, 2008AP002458-J. Int. Br. at 2. There is no question about that, but it has been a year since that representation terminated, and MBF has withdrawn from both the present cases. Intervenors

present no authority -because there is none - that appearing before a judge one year after representing him and then withdrawing somehow creates an "extraordinary" continuing conflict of interest, such that dues process is denied if the judge continues sitting in the case. If such "facts" were as shocking and extraordinary as intervenors claim, no serious lawyer or law firm would ever again represent a member of this court or the court of appeals, knowing that such a representation would create an automatic conflict whenever they appear before the court on which that member sits.

- Intervenors next assert that MBF initiated Case No. 2011AP2677-OA and Case No. 2011 XX 1409, which "triggered" the "recent disclosure that Justice Gableman received substantial legal services from MBF." Int. Br. at 2. That statement is misleading. The "trigger," if any, was the Milwaukee Journal Sentinel's publication on November 29, 2011, of a mere summary (without direct quotations marks) of a statement apparently made by Attorney Eric McLeod to the effect that "Gableman had a standard billing agreement with the law firm and has paid that bill." (Quotations are of the Journal Sentinel's verbiage, not of Attorney McLeod's actual statement.") If Attorney Margolies' letter is taken as correct, then as Attorney McLeod apparently stated, the MBF agreement may very well have been "standard" for representation in a "fee

shifting" case, and Justice Gableman apparently "paid that bill" for costs advanced by MBF pursuant to the agreement.

The puzzling question, actually, is why Attorney McLeod commented on the terms of the representation to begin with, why Attorney Margolies felt compelled to send his clarifying letter to the Journal Sentinel, and whether Justice Gableman gave consent to disclose terms of the retainer agreement and representation before they did so. (As explained above, in the event this court does not reject intervenors' motion as a matter of law, *those* questions present issues of fact material to the WDC ethics charges against J. Gableman, and should be explored only by the Commission in its ordinary proceedings, not by this court on briefs.)

- Intervenors' next assertion is an outright misstatement:

> These cases (i) seek to have the Court effectively block ongoing recall efforts against several Republican officials including the Governor and Lieutenant Governor and (ii) ask the Court to determine the validity of the controversial 2011 Redistricting Plan enacted along party lines by a bare Republican legislative majority, despite the fact that adjudication of the issue is well underway in federal court.

Int. Br. at 2. As intervenors well know, MBF moved to withdraw the petition in Case No. 2011AP2677-OA, and amended their complaint in Case No. 2011 XX 1409 (Waukesha County Case No. 2011 CV 3995). Intervenors themselves agree that the amended complaint no longer constitutes a

"redistricting challenge." (*See* Proposed Intervenors' Submission at 5, filed with this court on December 12, 2011 in Case No. 2011AP2677-OA.) Consequently, at this point in time, *neither* case seeks to block the recall efforts, and *neither* case requests a declaratory ruling on the validity of the 2011 Wis. Acts 43 and 44 (the "2011 Redistricting Plan").

As petitioners repeatedly asserted in their response to the Court's December 6 briefing order, they are not pursuing and have requested to withdraw their petition, and the sole reason it remains before this court is the objections of intervenors and involuntary plaintiffs themselves, attempting to secure a dismissal with prejudice they can turn to their advantage in *Baldus Brennan*, E.D.Wisc. Case No. 2:11-cv-00562, where *they* are challenging the validity of the 2011 Redistricting Plan.

Similarly, the only reason Case No. 2011 XX 1409 remains before this court is, once again, that intervenors oppose remand to Waukesha County, despite that fact that they agree the case is no longer an "apportionment challenge" under § 801.50(4m). Proposed Intervenors' Submission at 5. Again, intervenors adopt that contradictory posture in hope of obtaining a decision on the merits they can turn to their advantage elsewhere, despite the fact that only a 3 judge panel has subject matter jurisdiction to proceed if it *is* an

"apportionment challenge," and only Waukesha County Circuit Court has subject matter jurisdiction to proceed if it is *not* an apportionment challenge.

Petitioners have repeatedly explained that "[T]he sole claim under the Amended Complaint presents unique, state constitutional challenges under ART. XIII, SEC. 12." Letter of Attorney Michael Dean, Dec. 6, 2011. Petitioners *do* wish to pursue Case No. 2011 XX 1409 in Waukesha County, but as all agree, the amended complaint is no longer an apportionment challenge, and its sole claim is challenging "GAB's impairment of their suffrage, speech, and recall rights guaranteed by Wis. Const. Art. I, sec. 3; Art. III, sec. 1; and Art. XIII, sec. 12." Plaintiffs' Brief in Response to the Order of the Court Dated December 6, 2011 at 46.[35]

In sum, intervenors cynically complain that the pendency of the cases before the court creates a conflict of interest, when it is intervenors themselves who are preventing the cases from being withdrawn or remanded.

- As their next "fact," Intervenors' argue, "As a separate matter, MBF

[35] As explained above, those claims did not even arise until GAB's November 9 meeting, when it adopted its staff position with the result that GAB intends to allow intervenors to collect signatures and campaign for votes from electors against senators who do not even represent those electors, but will bar other electors whom those same senators who *do* represent them from voting to retain their own senators. Plaintiffs' Brief in Response to the Order of the Court Dated December 6, 2011 at 45 *et seq.* (quoting Amended Complaint).

initiated this proceeding and its companion case as one aspect of its lead role in the Republican Party of Wisconsin's legislative, redistricting, campaign [commas *sic*] and recall strategies." Int. Br. at 3. Intervenors conclude, "These facts will never change and it [sic] alone warrants recusal."

To put that "fact" in perspective, intervenors are, of course, represented by Friebert, Finerty & St. John ("FF&SJ"), a leading law firm in this state representing Democratic, union, and left of center organizations and causes. Intervenors are four partisan committees organized to recall four duly elected Republican state senators. Without the slightest touch of irony, FF&SJ occupies much of its motion with this and similar complaints that MBF represents Republicans, as if that were somehow suspicious.[36] Consistent with the hyper-partisan nature of this litigation, intervenors apparently consider representation of an opposing political party and related interests grounds for recusal *per se*.

There is, of course, nothing at all wrong or suspicious about representing partisan or ideological causes. That's what lawyers do. But why MBF representing Republicans is more suspicious than FF&SJ representing

[36] Also without any touch of irony, movants seek recusal of Justice Gableman in Case No. Case No. 2011 XX 1409, in which they are not even a party.

Democrats, or why any of that relates J. Gableman or demands his recusal, intervenors do not explain. Intervenors' spending so much time complaining about who MBF represents and so little effort on analysis supporting their motion belies that their motion is designed primarily for consumption in the popular media and the partisan blogosphere to create public pressure for J. Gableman to recuse and to undermine the credibility of any act of the Court in which he participates should he decline to do so.

- In the same paragraph, intervenors also note that MBF provided representation to the "Republican legislative leadership" drafting the 2011 Redistricting Plan, and initiated these "proceedings taking issue with the effective date provided for by the legislation." *Id.* Again, intervenors omit the critical fact on which the entire case turns - the unforeseen action of GAB determining on November 9 that some electors may vote to recall senators who do not represent those electors, but other electors who *are* represented by those very same senators may not vote to retain them.

MBF's actions may well be perplexing to someone not privy to the details of the representation. (MBF no doubt had good reasons supporting whatever advice it gave, although, as this court no doubt knows, clients don't always follow counsel's advice). Once again, however, intervenors do not explain

how that perplexity relates to J. Gableman at all, nor why it demands his recusal.

- Intervenors' next "extraordinary fact" is that "Questions were raised" about whether MBF had a conflict of interest seeking injunctive relief related to the 2011 Redistricting Plan. Int. Br. 3. (Again, intervenors omit that GAB changed the game with its November 9 resolution.) Apparently, the "questions" intervenors are concerned about are reflected in the Journal Sentinel articles they submit with their motion, though it is difficult to tell because they do not identify the questions, don't identify the conflicting parties or interests, and certainly don't explain how those potential conflicts may affect the litigation remaining before this court. Further, a conflict of interest is a matter for resolution between MBF and its clients. How a conflict, if one existed at all, relates to J. Gableman or requires his recusal, intervenors again do not explain.

- Intervenors next "fact" is that "Similar questions were raised" about MBF representing J. Gableman in the 2008 Judicial Commission proceeding. Int. Br. at 3. Again, intervenors do not identify the "questions," do not explain their similarity, and do not identify the conflicting parties or interests. To the extent intervenors complain that the representation raises questions about J.

Gableman's impartiality, that is a different issue, and is the subject of this motion and briefing before the court.

- Intervenors next claim that "as a direct result of these proceedings, it was disclosed for the first time that Justice Gableman received MBF's legal services free of charge." Int. Br. at 3. That "fact" just repeats the earlier claim discussed above that these proceedings "triggered" the disclosure of the MBF retainer agreement, and petitioners' response is the same. Again, a relevant question may well be why MBF commented on the terms of the agreement at all. That question, the specific terms of the agreement, and whether J. Gableman consented to their disclosure, are questions of fact which should be left to the Judicial Commission if this court declines to dismiss intervenors' motion as a matter of law.

- Intervenors' next "extraordinary fact" is an unattributed, unsourced assertion that "The value of these services is as yet undisclosed but is widely estimated to be at least several tens of thousands of dollars." Int. Br. at 3-4. Characteristic of their entire motion, intervenors jump directly from speculation to fact, "The revelation that Justice Gableman accepted free services (in connection with a judicial ethics case) worth at least tens of thousands of dollars from MBF, a hitherto undisclosed transaction, ignited a

substantial public controversy." Int. Br. at 4. As discussed below, it is hardly shocking that partisan and ideologically motivated interests seek to advance their interests by igniting controversy. But it is utterly improper to ground recusal on the misperception of partiality created by a political-style public relations campaign disseminating conclusory charges while ignoring the sole dispositive legal issue.

- Intervenors next note that J. Gableman "sat on cases in which MBF appeared or was otherwise involved . . . ." Int. Br. at 4. Again, there is no discussion of specific cases, or whether J. Gableman's reasoning was suspect in any of them. More significantly, as pointed out by Professor Esenberg, J. Gableman's actual rulings demonstrate that intervenors engage in nothing more than salacious innuendo.

> Apparently, Gableman voted for Michael Best's position five times and against it four times. The three other "conservative" justices, Prosser, Roggensack and Ziegler, broke 4-5, 4-4 and 4-4. That difference is not statistically significant. The "liberal" wing - Chief Justice Abrahamson and Justice Bradley and Crooks (to whom the liberal label should be applied lightly) - all went 1-8. This suggests that the outcomes were a matter of philosophy and not some external bias.

Available at http://sharkandshepherd.blogspot.com/, posted Dec. 20, 2011.

- For their final "fact," intervenors state that "While Justice Gableman submitted disclosure forms to GAB for each year between 2008 and the present, he never disclosed the free services he received from MBF, despite

the legal requirement to do so." Int. Br. at 4. They conclude that "Had Justice Gableman disclosed this 'gift,' it is inconceivable that he would not have hade to recuse himself from participation in this case the moment it was filed." Typical of intervenors' other "extraordinary facts," whether there was an illegal "omission" of the MBF services on the GAB disclosure depends entirely on whether they were provided by MBF "without valuable consideration." If the services weren't a "gift," there was no duty to disclose them and no requirement for recusal, whether they were "known" or not.

- As a final observation about the intervenors' "facts," it simply doesn't matter whether a law firm representing judges in Commission proceedings on a fee shifting basis is common or "extraordinary." If the possibility of obtaining an award of attorneys fees under a fee-shifting statute is sufficient to support a contingent retainer agreement, then the law firm received "valuable consideration" and there is no "gift," no violation, no misconduct, and no basis for recusal. Even if the frequency of such fee agreements *were* relevant, there is no way to tell how common it is. Law firms simply don't disclose that information, even in those instances where the Commission does award fees.

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.

Understanding the "reasonable observer" standard laid down in *Caperton* is especially important in this case, where intervenors seek to turn the sow's ear of ill-informed, subjective perception into the silk purse of objective denial of due process. If, as intervenors imply, the "appearance of impropriety" may be established merely by the extent and intensity of suspicion expressed in popular media, then the basis for recusal can be generated by political style public relations campaigns and earned or paid negative media. If the "appearance of impropriety" does not depend, at bottom, on the existence of actual, objective impropriety, then recusal can be achieved simply by successfully generating the dust and smoke characteristic of partisan attack ads. Consequently, as a matter of law, an erroneous public perception that J. Gableman's received a "gift" of "free" legal services does not constitute an "appearance of partiality," no matter how pervasive that erroneous perception may be.

The *Caperton* Court cites with approval the objective standard under West Virginia law that the requisite appearance of impartiality must be informed by objective facts - whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." *Id.*, 129 S.Ct. at 2258. The Court stresses that the appearance of bias is necessarily based on accurate knowledge of relevant facts:

> We conclude that there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.

Caperton, 129 S.Ct. at 2263-64.

Thus, for purposes of determining whether a due process challenge is well-grounded, the "reasonable observer" must be a hypothetical person - one well-informed of the relevant facts and legal issues, and unbiased by extraneous, irrelevant information about the challenged judge. The "reasonable observer" can *not* be an uninformed or mis-informed member of the public, biased by one-sided, skewed articles and partisan public relations campaigns deliberately created and executed to distort controlling legal issues and standards and damage the reputation of a judge the partisans deem unsympathetic to their cause. Resorting to general public perception as

intervenors do produces an protean due process recusal standard that varies in proportion to the sophistication and financial backing of the public relations campaign mounted against the targeted judge.

In this case, as Attorney Dinh's letter reflected, there can be no objective "perception of impropriety" necessary to establish a denial of due process where the perception of J. Gableman's partiality or impartiality is uninformed or mis-informed. Where the dispositive issue is the presence or absence of "valuable consideration" supporting MBF's contingent fee contract, the perception that he received MBF's services "free" or "free of charge" does not support recusal, no matter how widespread that perception may be.

B. Deliberate Manipulation of Public Perception by Mis-Reporting or Misrepresentation.

Demanding recusal based on ill-informed, ginned up perception is a dangerous game. There is no place in a justice system for the old saw that emerged from the Clarence Thomas confirmation hearings, "It's not the weight of the evidence that's important. It's the seriousness of the charges."

In fact, it is dangerous to rely on nose counting and opinion of any kind, ginned up or not. For instance, the *Caperton* Court noted that in its proof of partiality, "Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would

be fair and impartial. Justice Benjamin again refused to withdraw, noting that the 'push poll' was 'neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.'" *Caperton*, 129 S.Ct. at 2258.

Suppose Caperton's poll was *not* "push poll," that it was a legitimate, scientifically conducted, statistically valid poll? Did it really purport to advise the poll respondents of all the "relevant facts" that a "reasonably informed" person would need to know to form an opinion of Justice Benjamin's partiality or impartiality? And how did the poll ensure that respondents' perceptions were not influenced by extraneous information irrelevant to the legal analysis? It is impossible to know or control the factual basis on which public opinion poll respondents form their opinions. Further, beyond the vagaries public opinion polling, does due process jurisprudence necessarily assume that it is impossible for "reasonable persons to disagree"? Did Caperton really propose that the Court conclude as a matter of law that 33% of West Virginians were "unreasonable"?

In the present case, imagine taking a current opinion poll of Wisconsin citizens regarding J. Gableman's partiality. It is likely that many respondents would have a negative view of J. Gableman for reasons completely unrelated to the present motion. It is also likely that many other respondents would

have formed a negative opinion based on weeks of incessant bashing in the Journal-Sentinel and the rabidly partisan blogosphere. And it is even more likely that 99% of all respondents, regardless of their opinion of J. Gableman, would be unable to cite a single statute or rule relevant to the dispositive legal analysis, would be unaware that "free" or "free of charge" is not the applicable legal standard, and would have no idea whether contingent fee agreements are supported by adequate "consideration."

Intervenors reliance on subjective, media generated perception leads to the following remarkable arguments on page 6 of their brief.

- *J. Gableman's "failure to meet the disclosure requirements of Chapter 19 . . . almost certainly increases rather than cures the perception of partiality."* As explained repeatedly already, that argument assumes that MBF services were a "gift" the justice was obligated to report in the first place, and further assumes that a negative perception already exists, which needs to be "cure[d]".

- *Justice Gableman now faces "two formal complaints" that "directly and profoundly implicate his personal financial, political, and professional interests," and he will be "dealing with [those] matters while this matter proceeds simultaneously."* By that logic, a litigant or interested third party can assure recusal simply by filing attack complaints against any justice he or she believes is unsympathetic to the filer's desired

outcome. If the mere filing of complaints and charges creates the "perception" of partiality, implicates the justices personal affairs and views, and ties up the justice while the relevant case is ongoing, then the filer achieves his objective merely be filing a complaint. He need not concern himself whether the complaint is well-founded, and need not wait for the Commission process to run its course and produce a finding on the merits.

- *"This proceeding is inextricably tied to Act 43, the redistricting legislation that was drafted and enacted with MBF's direct involvement as counsel for the Act's proponents."* That MBF's representation in relation to the Act is somehow tainted because it represented the proponents who drafted it is like saying that a law firm can't litigate a contract because it represented the party/client it drafted the contract for. No doubt MBF's representation of the legislature in drafting Act 43 makes for good copy in the press, but it is utterly irrelevant to J. Gableman. His recusal or retention depends on other factors entirely.

- *Intervenors conclude that "MBF initiated this proceeding as part of a larger litigation strategy on behalf of the Republican Party and its incumbents and these proceedings remain a part of a larger partisan strategy on which MBF continues to work."* This argument is ridiculous. Is it now unethical for major law firms to pursue litigation strategy on behalf of clients? Are we really to believe that FF&SJ is

not representing recall committees and pursuing this litigation and the present motion as part of a larger partisan strategy?

Lending any credence whatever to such arguments will only encourage the evil that *Caperton* sought to prevent - the cynical reality of interested parties obtaining illicit influence in cases, filing selective complaints and motions against unsympathetic judges, "trying their case in the press," then claiming that the resulting damage to a judge's reputation achieved by such scurrilous tactics demands that he recuse.

V. BE CAREFUL WHAT YOU WISH FOR: CAUTION IS ADVISABLE BEFORE ENCOURAGING "MOTIONS DU JOUR."

A final word of caution is in order. This Court should carefully consider the consequences of countenancing or encouraging politically motivated recusal practice like the instant motion.

Ch. 19, Stats., applies to *all* public officials. If MBF's contingent fee services to J. Gableman are a "gift," then every public official in the state subject to Ch. 19 must disclose similar representation agreements and legal services provided by counsel in personal injury, § 1983, and employment cases. And when firms like FF&SJ represent legislators or other public

officials in matters of public concern on reduced or shared fee bases, those partial "gifts" must also be reported.

Moreover, it takes very little imagination to gin up "extraordinary facts" to support a *Caperton* motion. For example, the very next day after former Justice Louis Butler interviewed with Gov. Doyle's selection committee on August 17, 2004, it was reported that he publicly discussed pending litigation eventually decided in *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107295 Wis.2d 1, 719 N.W.2d 408, in which parties sought to overrule this court's earlier decision in *Panzer v. Doyle*, 2004 WI 52, 271 Wis.2d 295, 680 N.W.2d 666, which held that Gov. Doyle had exceeded his constitutional authority in executing "eternal" gaming compacts with Indian tribes. According to the Milwaukee Journal-Sentinel, Butler discussed *Dairyland* in terms of policy rather than constitutional law, stating that it was "one of [the court's] most significant [cases] in recent years, because it stands to have a 'huge impact' on how much tribes with casinos pay state government for that franchise."

The very next day, Gov. Doyle announced his appoint of Justice Butler as his choice to replace Justice Sykes.[37] Thereafter, with Justice Butler providing the deciding vote and writing the opinion in *Dairyland*, this court overruled *Panzer*, confirming Gov. Doyle's authority under the Wisconsin Constitution to enter into the gaming compacts with the tribes. Notably, those very same tribes had made last minute, 7 figure contributions to the Democratic National Committee, which legally returned the funds back to Wisconsin to finance a campaign media blitz in the last 72 hours that carried Gov. Doyle to victory in his race against then Gov. McCallum.[38]

How one views those facts likely reflects his or her general political and policy views. Certainly some segments of the public would view them as the kind of "extraordinary circumstances" contemplated by *Caperton*, with prospective justice Butler tipping his hand to Gov. Doyle that he would vote

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[37] http://www.jsonline.com/story/index.aspx?id=251999; http://www.wrn.com/gestalt/go.cfm?objectid=AF76B323-1B17-4F19-B7C58F0548E8A46E.

[38] http://www.wisdc.org/suntodark.php#phony; http://www.casinowatch.org/indian_casinos/political_contributions.html; http://www.casinowatch.org/indian_casinos/political_contributions.html.

to ensure that the tribes received their payoffs for supporting the governor's election.[39]

Just as certainly, other segments of the public would view as obscene calumny even the suggestion that there may have been a wink and a nod exchanged to ensure that Justice Butler got his appointment and that Gov. Doyle and the tribes got their compacts. The Milwaukee Journal Sentinel, for example, did not question whether Butler was tipping his hand on a hotly contested political matter likely to come before this court. It simply reported his comments, ensuring that Gov. Doyle and anyone else interested knew that he had made them.

Post-*Caperton*, Justice Butler would, no doubt, have been the target of serial recusal motions and, given the enormous financial interests involved, *Panzer-Dairyland* litigation might still be grinding on somehow, somewhere, in some due process *Bleak House* of horrors. Thankfully, this court and the State of

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[39] In *Caperton*, the A.T. Massey executive had to spend upwards of $3 million dollars to ensure that his company's case was heard by a sympathetic justice. In *Dairyland*, Gov. Doyle had to spend not a dime. It could certainly by argued that the same "appearance of impropriety" existing in *Caperton* is even more pronounced and certain where the party with a critical case before the court wields *total* authority to select a sympathetic justice, unmitigated by the vicissitudes of popular elections.

Wisconsin escaped such a constitutional purgatory. Petitioners suggest that this court deliver itself and the people of Wisconsin in this case as well.

Intervenors appropriately urge this court to consider "the law, the public interest, and the well-being of the Court as an institution." Int. Br. at 3. However, as explained already, intervenors don't discuss the "law" at all, they skew the "public interest" by exacerbating and exploiting erroneous perceptions based mis-information and ignorance of controlling legal issues, and risk the "well-being of this court" by attempting to influence and persuade it based on public opinion and perception rather than on dispassionate legal analysis.

It is difficult to imagine what could be more destructive to this court "as an institution" than lending credence to or in any way encouraging such a motion. To do so will ensure that politically motivated *motions du jour* become standard practice in this court. To the contrary, nothing could be more salutary for this court than to reject what is fast becoming the same old play from the same old playbook - "pick a justice you think is unsympathetic, gin up a charge, play to the media, question his or impartiality based on 'controversy,' demand recusal."

This Court, its members, and its reputation have suffered enough in the recent past. Enough truly is enough. Intervenors' motion should be rejected as a matter of law.

CONCLUSION

For the foregoing reasons, this court should conclude dismiss intervenors' motion as a matter of law. In the event it does not, it should defer action until the Judicial commission process is concluded.

Respectfully submitted on this 3rd day of January, 2012.

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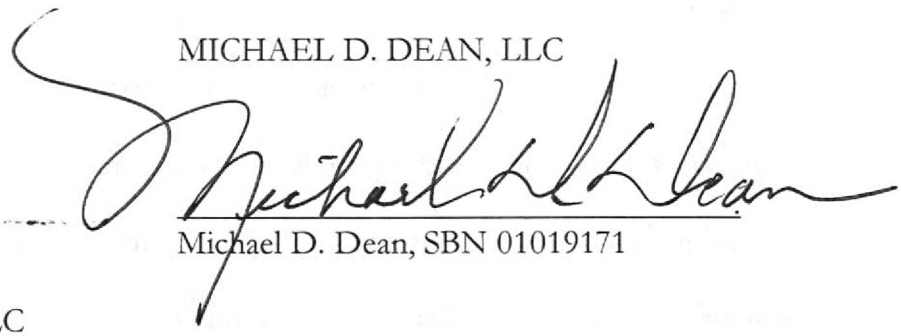

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