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TO: Clerk of the Wisconsin Court of Appeals/Supreme Court (608) 267-0640

FROM: Jeremy P. Levinson, Esq.

RE: *Dennis Clinard et al. v. Michael Brennan et al.*
Appeal Number 2011AP002677 – OA.

DATE: January 17, 2012

TIME: 12:48

OUR FILE NUMBER: 9004.004

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Please see the attached. Thank you.

ANY QUESTIONS, PLEASE CALL: Jeremy or Joe at (414) 271-0130

ORIGINAL WILL NOT FOLLOW VIA MAIL

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January 17, 2012

VIA FACSIMILE: (608) 267-0640
Clerk of Court
Wisconsin Court of Appeals/Supreme Court
110 East Main Street - Suite 215
P. O. Box 1688
Madison, WI 53701-1688

RE: *Dennis Clinard et al. v. Michael Brennan et al.*
Appeal Number 2011AP002677 – OA.

Dear Clerk:

On January 5, 2012, we filed a motion for leave to submit a reply in support of intervenors' motion for recusal or disqualification. Specifically, we requested ten days to do so. Given that today is the tenth day after we filed, in order to promote efficiency, we submit the enclosed proposed reply in support of recusal or disqualification.

By copy of this letter, all counsel of record are being provided with copies of the same.

Thank you for your attention to this matter.

Very truly yours,

FRIEBERT, FINERTY & ST. JOHN, S.C.

/s/ Jeremy P. Levinson

Jeremy P. Levinson
jpl@ffsj.com

JPL/ptk
Encl.
cc: Maria S. Lazar, Esq. (w/encl.) – Via E-mail & U.S. Mail
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STATE OF WISCONSIN
SUPREME COURT

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

Petitioners,

and

Case No. 2011AP00267 - OA

ALVIN BALDUS; CINDY BARBERA; CARLENE BECHEN; ELVIRA BUMPUS; RONALD BIENDSEIL; LESLIE W. DAVIS III; BRETT ECKSTEIN; GLORIA ROGERS; 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 and 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.

INTERVENORS' PROPOSED REPLY IN SUPPORT OF RECUSAL OR DISQUALIFICATION

The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal ("Intervenors"), by their Attorney Jeremy P. Levinson, submit this proposed reply in support of their motion for recusal or disqualification of the Honorable Michael Gableman in these and all related proceedings.

Petitioners have filed a 62 page document opposing recusal or disqualification. Regrettably, it fails to recognize in tone or substance that the extremely unusual and serious circumstances at hand demand sobriety, restraint, and care. This reply makes no attempt to respond to the myriad attacks, digressions, and Jeremiads set out in Petitioners' response.

Rather, this reply limits itself to the several assertions that are the main thrust of Petitioners' opposition to recusal or disqualification. Petitioners' assertions are not merely frivolous; the treatment of them as serious legal assertions in the context of these proceedings would itself cause injury to the judiciary and this Court, and to the critical need that the public view courts as civic institutions that operate with integrity, seriousness, consistency, and evenhandedness such that they can be entrusted with decisions of grave importance to Wisconsin and its residents.

It is a foregone conclusion that these and related proceedings constitute a prominent aspect of a substantial crossroads in Wisconsin's civic and political

history. Petitioners thrust the Court into the center of matters that, for almost one year, have roiled Wisconsin's public life in an unprecedented fashion, *e.g.*, redistricting, recall efforts, *etc.*, making Wisconsin the focus of national and international attention.

These very proceedings triggered the revelations of Justice Gableman's previously concealed financial relationship with Michael Best & Friedrich ("MBF"), the law firm that initiated these proceedings and provided counsel to Republican officials and interests throughout the events from which these proceedings arise, *e.g.*, drafting the redistricting legislation at the center of these proceedings. Any suggestion that the existence, nature, and concealment of the relationship between Justice Gableman and MBF does not present very unusual, profound, and troubling issues in this and related proceedings would be both baseless and would demean the Court and all stakeholders in these proceedings.

Recusal or disqualification is appropriate because Justice Gableman received tens of thousands of dollars worth of free services from MBF. Nonetheless, Justice Gableman participated in these proceedings. No party was in a position to question his participation at the time because Justice Gableman had failed to report this gift on his annual financial disclosures. MBF withdrew from these proceedings and several days later it was made public that the firm had represented Justice Gableman for two years at no charge. The recusal or

disqualification that should have occurred at the beginning of these proceedings should occur now.

MBF's conveniently timed withdrawal does not diminish the need for recusal or disqualification. Given the extraordinary nature of these proceedings and the extreme and unusual nature of the issues raised by Justice Gableman's conduct, MBF's withdrawal will not prevent the ongoing injury to the integrity of the Court and these proceedings. As a separate matter, numerous complaints have been filed with both the Judicial Commission and the Government Accountability Board against Justice Gableman. Among other things, these complaints seek an investigation of Justice Gableman's participation in cases in which MBF appeared before him. This is one such case and it will be the subject of investigation and, potentially, various sorts of charges. This separate connection between Justice Gableman's personal interests in such investigations and this case is alone enough to mandate recusal or disqualification.

DISCUSSION

I. THE UNDISPUTED FACTS OF RECORD – JUSTICE GABLEMAN'S UNDISCLOSED ACCEPTANCE OF FREE LEGAL SERVICES FROM MBF – REQUIRE RECUSAL OR DISQUALIFICATION.

Petitioners argue that the motion rests on un-established facts and baseless attacks on Justice Gableman by sinister forces in the media and elsewhere. This contention is dispatched summarily. First, if the Court were to decide it required

additional facts, it certainly could appoint a special master to ascertain such facts. The Court is not nearly as powerless to protect its integrity as an institution as Petitioners suggest.

Second, and more important, the motion rests on a small collection of facts that are already before the Court. On December 12, 2011, the General Counsel of MBF advised the Court in writing:

> Michael Best was engaged by Justice Gableman in July 2008. Our engagement provided that payment for attorneys fees would be contingent upon the recovery of fees pursuant to Wis. Stat. § 757.99. The prerequisite in that statute was not met, and thus, we made no application for fees. Thus, no bill for attorneys' fees was sent and none were paid.

The letter proceeded to state that MBF's representation of Justice Gableman, defending him from a Judicial Commission prosecution that arose from his campaign for election to the Court, concluded in July, 2010, two years after it began. The docket for 2008AP2468-J demonstrates that during the two year representation, Justice Gableman's ethics charges were vigorously litigated and involved numerous motions, briefings, oral argument, and related legal work.

The December 12, 2011 letter to the Court establishes without any dispute that (1) for two years Justice Gableman received services from MBF; (2) Justice Gableman did not pay MBF for these services; (3) Justice Gableman obtained arrangements with MBF that provided that he would never face any chance of having to pay for MBF's work; and, in fact, (4) MBF was never paid for the work. While the docket for 2008AP2468-J does not, of course, indicate the value of

these free services, it shows that MBF provided Justice Gableman with very substantial services over the two years.

Justice Gableman's annual financial disclosure filings show that he never disclosed receipt of MBF's free legal services before the December 12, 2011 letter indicated so. The records of the Court show that MBF has appeared before Justice Gableman throughout all relevant events. Court records also establish that MBF, including the individual MBF lawyer that provided Justice Gableman with free legal services, initiated these proceedings. Finally, it is a matter of record that Justice Gableman participated in these proceedings.

These facts are of record and they are undisputed.

The December 12, 2011 letter's specific explanation of the arrangements was that MBF could only be paid for its services if and to the extent provided by § 757.99, Wis. Stats. The letter confirms, as a matter of law, that Justice Gableman received free services, a "gift" forbidden by the judicial code, and either prohibited by the ethics laws or subject to mandatory disclosure pursuant to § 19.41, Wis. Stats., *et seq.*

II. PETITIONERS' CONTENTION THAT THE FREE LEGAL SERVICES JUSTICE GABLEMAN RECEIVED WERE NOT A "GIFT" IS NOT MERELY FRIVOLOUS; IT MOCKS THE ETHICS STATUTES, THE JUDICIAL CODE, AND THIS COURT.

Petitioners' strident defense of Justice Gableman's arrangement with MBF rests on the notion that MBF might have been able to obtain a tiny fraction of its fees from someone other than Justice Gableman by virtue of § 757.99, Wis. Stats.

The statute, of course, could never change the fact that Justice Gableman would never pay MBF. And, Petitioners entirely mischaracterize the statute. The December 12, 2011 letter's reference to the statute creates only an illusory possibility of recovering a tiny fraction of the value of its services. Indeed, the letter's reference to the statute makes things worse, not better. The gift of many tens of thousands of dollars in free services would be bad enough. The fact that an attempt was made to dress up this gift as a meaningful business arrangement makes things worse.

A. The Judicial Code and Ethics Laws Do Not Permit Judges or Other Officials to Receive Otherwise Forbidden Things of Value Merely Because the Arrangement Provides for Symbolic, Sham Payment.

Petitioners suggest that judges and other elected officials may accept anything from anyone if they pay a "mere 'peppercorn'" in return without including it in the required financial disclosures. *Petitioners Opp.* at 33.[1] The notion that the judicial code and ethics laws permit a judge to secretly receive expensive legal services (or fancy cars or lakefront real estate) in return for sham, symbolic payment, say, a "peppercorn" – is not merely frivolous, it seeks to play the Court and the public as fools. Here, Justice Gableman did not ever need to provide even a peppercorn. And, § 757.99, Wis. Stats., did not offer one to MBF.

[1] Petitioners cite and quote a "blog" called "Shark and Shepherd," maintained by Rick Esenberg, an activist attorney, Republican commentator, and adjunct law professor.

One of Petitioners' diversions is to resort to the basics of the law of contract which holds that one element necessary to a finding that a contract exists is "consideration," *i.e.*, that both parties agree to give the other something. There is little doubt that over the centuries, courts have lessened their scrutiny of whether consideration is present and generally will not refuse enforcement of a contract based on a judicial finding that consideration, though present, is insufficient.

This pedestrian observation of how an aspect of the law of contract has evolved has as much to do with the questions at hand as do the rules of gin rummy. Petitioners' attempt to jumble this aspect of the law of contract together with the Judicial Code and the ethics laws would permit judges and other officials to receive all manner of things, *e.g.*, money, automobiles, exotic travel, jewelry, *etc.*, from anyone, *e.g.*, litigants, lawyers, businesses seeking favorable treatment, so long as the judge or official gave something, nearly anything no matter how miniscule in proportion to the benefit received, in return.

The Judicial Code forbids a judge or justice to accept "gifts, favors," *etc.*, from lawyers or their firms if they have come or are likely to come before the judge or justice. *See* SCR 60.05(4)(c) and related Comment. The ethics laws forbid any official to use his or her office to obtain private financial gain or benefit. § 19.45(2), Wis. Stats. Section 19.45(3), Wis. Stats., mandates:

> No state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction.

If neither § 19.45(2) or (3) do not outright forbid the official from receiving the gift, thing of value, *etc.*, § 19.43, Wis. Stats., requires public officials, including Justice Gableman, to disclose receipt of such on the mandatory annual financial disclosure forms submitted to the GAB. Legally required disclosures include "gifts." Section 19.42(6), Wis. Stats., defines a "gift" as "the payment or receipt of anything of value without valuable consideration." Section 19.42(1), Wis. Stats., defines "Anything of value" as "any money or property, favor, ***service***, payment, advance, forbearance, loan, or promise of future employment . . . ." (emphasis supplied).

It is lamentable that it must actually be articulated: phony or symbolic payment does not permit a judge or other official to evade the foregoing rules and laws. This Court was called upon to express just this self-evident concept over 30 years ago in a judicial disciplinary proceeding. *See In re Seraphim*, 97 Wis. 2d 485, 498-99, 294 N.W.2d 485 (1980) (judge's acceptance of an automobile from a litigant "at substantially reduced rates" violated judicial code).

B. The Discussion of § 757.99, Wis. Stats., Does Nothing to Make Justice Gableman's Conduct Lawful or Ethical; It Merely Indicates an Attempt to Camouflage an Obviously Improper Arrangement.

Petitioners argue the unimaginable, that MBF's arrangements with Justice Gableman represented no gift and no special favor, but merely an everyday business arrangement in which both parties gave and both got. Petitioners specifically assert that since MBF could be paid, if and to the extent provided by § 757.99, Wis. Stats., Justice Gableman provided "valuable consideration" to MBF in return for its services. This argument is fraudulent.

Nothing changes the reality that Justice Gableman received years of legal services for free pursuant to an arrangement by which Justice Gableman never could have been responsible to pay. To argue that this does not represent a very sizable gift and financial favor is to argue up is down and black is white. And, it is the type of argument likely to contribute to public doubt and cynicism about these proceedings and this process.[2]

As a separate matter, Petitioners mischaracterize the statute, which provides in relevant part:

[2] To be sure, if proceedings are ever instituted against Justice Gableman in connection with some or all of these matters, Justice Gableman will have, as he should, the full right to defend himself as he sees fit. Justice Gableman's attorney, Viet D. Dinh, saw fit to write a letter to the editor of the Milwaukee Journal Sentinel, criticizing the newspaper's coverage and effectively launching the defense of his client echoed in Petitioners' Opposition, which cites Attorney Dinh's letter as legal authority. Attorney Dinh's decision to argue his case in the press – and Petitioners' decision to rely on Attorney Dinh – does little to serve the larger and more important public and institutional interests at stake.

> 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.

(emphasis supplied).

The text of the statute indicates that MBF could not have recovered anything because its agreement did not require Justice Gableman to pay any attorneys fees.[3] In other words, there was nothing to "reimburse[]."

C. Even if the Statute Permitted Reimbursement of Uncharged and Unpaid Fees – the Limit on Reimbursement Confirms that it would Have Been Sham Payment for Two Years of Substantial Legal Services.

The claims board cannot reimburse amounts greater than the jurisdictional limit for small claims court. *See* § 16.007(6)(a), Wis. Stats. At all relevant times, this limit was $5,000.00.[4] In sum, even if § 757.99, Wis. Stats., permitted reimbursement of uncharged and unpaid fees, MBF would have been limited to a tiny fraction of the value of the services it rendered Justice Gableman. And, of

[3] Established law holds that reimbursement is available only for expenses paid or at least for which an obligation to pay has been incurred. *See generally Shepherd Legan Aldrian Ltd. v. Village of Shorewood*, 182 Wis. 2d 472, 513 N.W. 2d 686 (Ct. App. 1994).

[4] To be fair, the statute also permits the board to recommend that the legislature pass legislation reimbursing a larger amount. But, one does not need a statute or an agreement to ask the legislature to enact legislation for the Governor's signature to pay an individual's debt. Anyone is free to ask the legislature to enact and the governor to sign legislation providing for such an appropriation.

course, none of this would change the fact that Justice Gableman would never have to pay for what he received from MBF.

D. Petitioners' Characterizations of the Arrangement Between Justice Gableman and MBF as a Meaningful Contingency Agreement and § 757.99, Wis. Stats., as a "Fee Shifting Statute" are False.

The instant motion rests on the undisputed fact that Justice Gableman received two years of vigorous representation from MBF for free. Justice Gableman paid nothing and the arrangements were such that there were no circumstances under which Justice Gableman would have to pay anything for these legal services. The motion rests on the Judicial Code provision forbidding a judge to accept free services, or other gifts or favors, from lawyers and firms that have appeared or are likely to appear before the judge and the ethics laws that either prohibit any official from accepting the same or require that the official disclose receipt on mandatory financial disclosure forms.

Petitioners fashion these points into an argument that was not made, *i.e.*, that judges would be forbidden from ever entering into any contingency fee arrangement. *See Petitioners' Opp.* at 27.[5] The real point is very uncomplicated and well-recognized. Judges and officials are forbidden from getting the benefit of sham arrangements that amount to gifts or financial treatment substantially greater than is generally available to others from lawyers who have or are likely to

[5] While not at issue here, it may be that judges should not participate in cases in which a litigant's lawyer is also the judge's lawyer, generally, or when the judge's fee arrangement is a *bona fide* contingency agreement.

appear before them. *See In re Seraphim, supra.* And, in those instances in which officials may accept such treatment, they are required by law to publicly disclose it.

Justice Gableman's arrangements with MBF have nothing in common with anything approaching a typical contingency agreement. Genuine contingency agreements involve a client with a claim to recover money and provide for the attorney to receive a percentage of money recovered for the client to be paid as the fee. Here, Justice Gableman had no claim for money or any other claim; Justice Gableman was defending himself from Judicial Commission charges. Further, a client with a *bona fide* contingent fee arrangement pays for the representation from the funds the client recovered as a result of the representation. Justice Gableman's arrangements were such that he would never have to pay MBF for its services under any circumstances.

Typical contingent fee arrangements also have a business rationale to them: a lawyer accepts a client with a claim to recover money who cannot, or prefers not to, pay an hourly rate for legal services. The lawyer gets the benefit of the possibility that the likelihood of a fee determined by a percentage of the ultimate recovery balances the likelihood of no recovery or a small one. The client gets the benefit of legal services that would likely be unaffordable if paid for on an hourly basis as the case proceeded. And any fee will be a portion of moneys recovered for the client.

Justice Gableman received two years of vigorous legal services and, at best, MBF received the bare chance (if § 757.99, Wis. Stats., authorized reimbursing uncharged and unpaid fees) that the State might pay a minute fraction of the value of the services rendered. This was not a contingent fee arrangement. It was a barely concealed arrangement for Justice Gableman to obtain many tens of thousands of dollars in free services from lawyers who appeared before him.

The cases Petitioners cite in support of their insistence that this was a contingent fee arrangement reflect nothing more than courts reviewing, analyzing, and enforcing fairly standard contingent fee agreements in matters for which they are typical, *i.e.*, where the client had a claim for money and the lawyer was to be paid a portion the recovery. Oddly, these cases also recognize the economics and importance of actual contingent cases: they make it possible for clients with claims for money to obtain counsel they could not afford to pay on an hourly basis and they require lawyers to evaluate claims before they agree to take them on. And, contingent fee agreements accomplish these goals by giving lawyers both the possibility of fees that hourly work would likely generate and the risk of receiving no fee in some cases. *See Maynard Steel Casting Co. v. Sheedy*, 2008 WI App 27, ¶¶ 16-17, 307 Wis. 2d 653, 662-63, 746 N.W.2d 816 (*discussing Anderson v. MSI Preferred Ins.* Co., 2005 WI 62, 281 Wis. 2d 66, 697 N.W.2d 73 (Bradley, J., concurring)).

Likewise, Petitioners reference to fee shifting statutes fails to acknowledge that, where they exist, they provide for payment of the attorneys fees incurred by a victorious party. The purpose of these statutes is to make possible the judicial vindication and protection of certain rights and public policy goals.[6] As discussed, § 757.99, Wis. Stats., permitted reimbursement of up to $5,000.00. But Justice Gableman was not charged fees and did not pay any to be reimbursed. And in any event, even the maximum $5,000.00 figure would have had absolutely no relationship to the value of the services Justice Gableman enjoyed or what MBF would have charged anyone else for the same services.

Petitioners' discussion of the social utility of contingent fee arrangements does not change the facts: Justice Gableman would never have to pay MBF – win, lose, or draw. And even if § 757.99, Wis. Stats., applied, MBF's greatest return would have been a pittance, a sure loss to the firm, a minute fraction of what it would have charged anyone else for two years of litigation work.[7]

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[6] Even if § 757.99, Wis. Stats., were a "fee switching statute," an arrangement in which counsel may seek fees pursuant to statute from a source other than the client who has no obligation to pay is generally understood as pro bono representation. *See, e.g.*, ABA Guidelines for Pro Bono Programs 3.5-6 and Commentary.

[7] Petitioners attempt to make much of this Court's opinion in *State v. American TV and Appliance*, 151 Wis. 2d 175, 443 N.W.2d 662 (1989), which rejected a motion to vacate the Court's decision in the case the previous year, 146 Wis. 2d 292, 430 N.W.2d 709 (1988). The movant contended that one of the Court's justices should not have participated in the earlier decision because he had received discounts on certain products purchased from American TV years before the cases came before the Court. Petitioners pronounce the facts in that case and these proceedings "almost identical." *Petitioners' Opp.* at 39. In fact, the sets of facts are critically opposed.

> [Justice Bablitch] purchased some of that merchandise through a friend, who was a salesman and manager of American's

This was a give-away and Justice Gableman accepted it. And Justice Gableman failed to disclose it as required.

III. THIS MOTION DOES NOT SEEK A DETERMINATION THAT JUSTICE GABLEMAN VIOLATED THE ETHICS LAWS OR JUDICIAL CODE; IT SEEKS ONLY TO PROTECT THE INTEGRITY OF THESE PROCEEDINGS AND TO ENSURE THAT THE LITIGANTS AND THE PUBLIC PERCEIVE THEM TO BE IMPARTIALLY ADJUDICATED.

This motion does not seek adjudication of charges that may or may not be brought in connection with these matters. Likewise, it does not seek to usurp the roles of the Judicial Commission or other investigatory bodies. The motion respectfully submits that traditional bases for recusal and disqualification, the public interest, and the well-being of the Court as an institution, require that Justice Gableman not participate in these extraordinary proceedings at such a delicate time in Wisconsin's history.

> television division. At the time of those purchases, American did not display price tags on its merchandise but had a policy of allowing customers to negotiate a price with the salesperson. At times, the negotiated sale price would be at American's cost or below that cost, but Justice Bablitch made no purchases at prices below cost.
>
> In making purchases of electronic equipment, Justice Bablitch would seek his friend's advice and select from alternatives suggested by his friend. Justice Bablitch told his friend that he did not want any favors and his friend assured him that there were no favors involved and that he would be paying a price available to other members of the general public. When Justice Bablitch made his selection of merchandise, his friend would set a price without negotiating and it was Justice Bablitch's understanding with his friend that the price was above cost and one that was fair to him and to American.

151 Wis. 2d at 187.

It should not go unsaid that Justice Gableman could well conclude that he is confident that his relationship with MBF will ultimately be deemed entirely proper – but that the good of the Court and the State would be best served by refraining from participating in the interim. In any event, either Justice Gableman or the Court should bring to a close Justice Gableman's participation in this and related proceedings.

CONCLUSION

For the forgoing reasons and based on the entire record in this matter, Justice Michael Gableman should be recused or disqualified from further participation in this and related proceedings.

Dated this 17th day of January, 2012.

FRIEBERT, FINERTY & ST. JOHN, S.C.

By: 

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