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January 30, 2012

BY DELIVERY

Mr. A. John Voelker
Acting Clerk of Supreme Court
Wisconsin Supreme Court
110 East Main Street, Suite 215
Madison, WI 53703

Re: *Clinard et al. v. Brennan et al*, Waukesha County Circuit Court Case No. 11 CV 3995
Clinard et al. v. Brennan et al, Wisconsin Supreme Court Case No. 2011 XX 1409
Clinard et al. v. Brennan et al, Wisconsin Supreme Court Case No. 2011 AP 2677-OA

Dear Mr. Voelker:

Enclosed are twelve copies of Petitioners' Surreply to Intervenors' Motion for Recusal or Disqualification in Case No. 2011 AP 2677-OA. Intervenors filed their motion with reference to Case No. 2011 XX 1409 as well as in Case No. 2011 AP 2677-OA, so I request that the Court take notice of the enclosed Petitioners' Surreply in reference to Case No. 2011 XX 1409 as well.

Counsel are being served by copy of this letter. Thank you.

Sincerely,

Michael D. Dean

MDD:jm
Enc.
cc: Jeremy P. Levinson, Esq.
Maria S. Lazar, Esq.
Douglas M. Poland, Esq.
5619.001.107

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, 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 ROGERS, RICHARD KRESBACH, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, JEANNE SANCHEZ-BELL, CECELIA SCHLIEPP, and 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, and

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-Respondents.

PETITIONERS' SURREPLY TO INTERVENORS' MOTION FOR RECUSAL OR DISQUALIFICATION

Intervenors' brief is more repeat than reply. Undeveloped as their original motion was, it at least *referenced* the legal standards governing recusal - a *subjective* determination under § 757.19(2)(g), and an *objective* due process determination under *Caperton*. Their Reply, however, doesn't even mention, much less analyze those standards. Instead of the "sobriety, restraint, and care" to which they give lip service, Intervenors simply repeat the charges that J. Gableman received a "gift" of "free" legal services, then renew their demand that this Court rush to judgment on the character and fitness of a fellow justice and his attorneys based solely on their "small collection of facts," Reply 5, which they ask this Court to considered in isolation, without waiting for the Judicial Commission to make even a threshold determination, much less to conduct a proceeding providing the rudiments of due process to the Justice and his law firm and a plenary record for consideration by this Court.[1]

[1] Intervenors' request to limit consideration to their "small collection" follows immediately after they argue "as a separate matter" that "numerous complaints" by other parties have been filed with the Judicial Commission and Government Accountability Board challenging J. Gableman's participation in other cases in which MBF appeared. Without bothering to identify those complaints, Intervenors assert that they will result in "potentially, various sorts of charges," and that this "separate connection . . . is alone enough to mandate recusal or disqualification." Reply 4. Obviously, those complaints and proceedings are not remotely among the "small collection of facts" to which Intervenors claim this Court should limit its consideration.

I. INTERVENORS PROVIDE NO ARGUMENT SUPPORTING THEIR THRESHOLD PROPOSITION THAT COUNSEL'S WITHDRAWAL DOES NOT RESOLVE THEIR ALLEGATIONS.

Even if J. Gableman had received a "gift" from MBF in violation of SCR 60.05(4)(e) (he didn't), and even if he still somehow owes a "debt of gratitude" to MBF two years later (he doesn't), Intervenors' motion is still without merit because, just as in any other case of an alleged prejudicial relationship between court and counsel, counsel has resolved the matter by withdrawing from the case. Put differently, even if there *were* a prejudicial relationship or transaction between J. Gableman and MBF, the simple, well-established remedy in such cases is for counsel to withdraw, and MBF has done so.

Contrary to that basic proposition, the lynchpin of Intervenors' motion is the tacit assumption that the *court* must *also* withdraw, not just counsel. Apparently hoping this Court will not notice their complete lack of authority or discussion for such a remarkable proposition, Petitioner's argument consists of a single sentence, "MBF's conveniently timed withdrawal does not diminish the need for recusal or disqualification." Reply 4.

Petitioners cite no authority for such a "scarlet letter" proposition because there is none. The case law is, not surprisingly, quite to the contrary. In *State v. Harrell*, 199 Wis.2d 654, 546 N.W.2d 115 (1996), this court ruled that where a

trial judge's wife was employed in the district attorney's office prosecuting a case before him, any actual or apparent prejudice was avoided simply by appearance of different attorney from the same office. Neither the judge nor any other attorney in his wife's office was required to recuse or withdraw. J. Abrahamson concurred, concluding that representation by a different lawyer in the same office satisfied not only the *subjective* inquiry required under § 757.19(2)(g), but also *objective* standards under § 757.19(2)(a) (disqualification for kinship), the due process clause, and § 757.19(2)(g) (were that section construed to require one). *Harrell* , 199 Wis.2d at 672, 546 N.W.2d at 122 (J. Abrahamson, concurring).

In *Ex parte City of Dothan Personnel Bd.*, 831 So.2d 1 (Ala., 2002), counsel for a party in the action was contemporaneously representing the judge in a different action. Just as this court held in *Harrell*, the Alabama Supreme Court also ruled that to avoid disqualification of the judge, it was not necessary for counsel's *firm* to withdraw, but simply to substitute another attorney from the same firm.

> As earlier discussed, we conclude that the trial judge in this case was disqualified under Canon 3.C.(1) no later than July 12, 2001, and was therefore under a duty at that point to recuse himself. *We further hold, however, consistent with the views expressed by the JIC in its various advisory opinions, that such a disqualification can be removed where the judge's attorney withdraws from the case pending*

> *before the judge and another member of the same firm, who has had no involvement in the judge's case, takes over the handling of the case . . . .*

Dothan, 831 So.2d at 11 (emphasis added).

Further, the *Dothan* court held that the conflict would *also* be resolved "when the litigation involving the judge concludes or the representation of the judge in that litigation by the lawyer in question otherwise ceases." *Id.* Remarkably, Petitioners turn that common sense notion on its head, blaming Petitioners for "thrust[ing] the Court into the center of matters that . . . have roiled Wisconsin public life," Reply 3, apparently missing the irony that, far from trying *exploit* the alleged "debt of gratitude" owed them by J. Gableman, MBF filed a notice withdrawing their petition entirely, and it is due to *Intervenors'* opposition that this case even remains before the Court.

II. INTERVENORS DON'T EVEN MENTION, MUCH LESS SATISFY, THE LEGAL STANDARDS FOR RECUSAL ON WHICH THEIR MOTION IS BASED.

Obviously, recusal must be based on some governing legal standard. Intervenors' motion raised two such bases for recusal: (1) J. Gableman's subjective determination under § 757.19(2)(g), and (2) an objective "due process" argument referencing *Caperton*.

As stated in Petitioners' Response, 7 *et seq.*, under § 757.19(2)(g), a reviewing court's sole inquiry into a judge's "subjective determination is

'limited to establishing whether the judge made a determination requiring disqualification.'" *Harrell*, 199 Wis.2d at 664, 546 N.W.2d at 119 (quoting *State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 186, 443 N.W.2d 662, 666 (1989)). Clearly, J. Gableman's decision of January 20 satisfies that requirement.

Intervenors' other ground for recusal was a due process claim *a la Caperton*. As thoroughly discussed in Petitioners' Response, the objective due process test under Wisconsin law is also conducted solely by the individual justice. Response, 7-11 (discussing *State v. Henley*, 2011 WI 67 ¶ 11, Wis.2d , 802 N.W.2d 175, 178). J. Gableman's January 20 decision thus satisfies the objective due process standard as well.

Far from replying to those standards and Petitioners' accompanying discussion, Intervenors' Reply fails to mention or provide any additional citation or analysis at all. Instead, Intervenors baldly argue in Sec. I that recusal is mandated based solely on their "small collection of facts that are already before the Court." Apparently, they believe these "facts" are sufficiently shocking to require recusal without a single citation to controlling legal standards, without a single word of analysis demonstrating how those "facts" meet those standards, and without bothering to accord J. Gableman or MBF

the opportunity to present countervailing facts or argument in their own defense before being found guilty of ethical violations.

Intervenors' "small collection of facts" consists of allegations 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," that the value of the work was "very substantial," and that J. Gableman did not report the services on his annual financial disclosures to GAB. Reply 5-6.

Of course, Intervenors must still establish that those "facts" satisfy some cognizable legal basis before recusal is required. Since the subjective § 757.19(2)(g) basis is now eliminated, the only possible remaining basis is due process. Even assuming those "facts" are true and that no other countervailing or relevant facts exist, the situation they present is not *remotely* similar to that in *Caperton* or in any precedent on which *Caperton* relies.

As already noted, the suspect relationship in *Caperton* was between the justice and a *party*, not between the justice and *counsel*, and any improper relationship or influence between court and *counsel* here is easily cured by

counsel's withdrawal, which has already occurred. Further, when MBF first filed the petition in this case, Intervenors and all other parties obviously knew of MBF's prior representation of J. Gableman, and did not object. Thus, the *sole* relevant "fact" on which Intervenors' motion turns is the "discovery" after the petition was filed that MBF had provided legal services to J. Gableman under a § 757.99 fee shifting agreement, with J. Gableman apparently paying nothing out-of-pocket for legal fees except to reimburse MBF for costs.

The best possible case Intervenors can make, therefore, is that J. Gableman received "several tens of thousands" of dollars in free legal services in a representation that ended over a year ago, and that he therefore still owes such a "debt of gratitude" to MBF that even thought he's voted against that firm in 4 out of 9 decisions since the representation ended, he will still rule in favor of MBF here, even though MBF is no longer appearing in the case and filed a notice to withdraw the petition entirely before withdrawing as counsel.

Again, those "facts" are so far removed from *Caperton* that Intervenors' Reply doesn't even cite it, much less analyze its factual setting or that of any precedent on which it relied. As discussed in Petitioners' Response, 13-14, since Intervenors haven't attempted to develop an argument, this Court need not consider it. *State v. Avery*, 2011 WI App 124 ¶ 40 n. 10 (citations omitted).

III. MBF'S CONTRACT WITH J. GABLEMAN WAS SUPPORTED BY "VALUABLE CONSIDERATION," AND JUDICIAL ETHICS AND RECUSAL ARE SEPARATE AND DISTINCT INQUIRIES IN ANY EVENT.

Intervenors deny that they're trying to establish an ethical violation of SCR 60.05(4)(e). Reply 16. But that is exactly what they attempt to do because, having failed even to argue, much less establish, that recusal is required under *Caperton* or § 757.19(2)(g) standards, the alleged violation is all they have left.

As explained above, for purposes of this motion, it is irrelevant whether J. Gableman received a "gift" from MBF, because any improper relationship ceased to exist when MBF withdrew. Beyond that, however, Intervenors' motion fails because MBF's contract with J. Gableman *was* supported by "valuable consideration, and because judicial ethics violations are a separate and distinct inquiry from recusal in any event.

A. SEC. 757.99 AUTHORIZES RECOVERY OF *ALL* ATTORNEYS FEES EXPENDED IN SUCCESSFUL DEFENSE OF A MISCONDUCT CHARGE.

Intervenors argue that MBF's contract with J. Gableman was a sham because the firm could only recover a "tiny fraction" of its fees. Reply 6. They represent that "at all relevant times, the limit [to recovery] was $5,000.00." Reply 11. J.

Intervenors' representations aren't remotely accurate. Sec. 757.99[2] authorizes a prevailing judge to apply to the Claims Board for reimbursement of attorneys fees pursuant to the procedure in § 16.53. Under § 16.007(6)(a), the Board is authorized to pay claims up to the small claims jurisdictional limit on its own motion without resort to the legislature. Claims in excess of that limit are referred to the legislature for separate approval.[3]

Contrary to Intervenors' representation, § 757.99 clearly contemplates that attorney fee awards to judges will exceed the small claims limit. The first sentence of § 757.99 *mandates* an award of "reasonable attorneys fees" to a judge who successfully defends against allegations of *disability*. (The judge "*shall* be reimbursed for reasonable attorney fees . . . .") Obviously, the

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[2] Sec. 757.99 provides,

> 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.

[3] *See* the Board's website at http://claimsboard.wi.gov/section.asp?linkid=105&locid=28 . It states, "The Board has the authority to make payments of $10,000 or less. Any award larger than $10,000 must be passed into law by the state legislature if payment is recommended by the Claims Board."

legislature did not anticipate, and certainly did not mandate, that "reasonable" attorneys fees in such a case would be limited to $5,000.00 or $10,000.00.[4]

The second sentence of § 757.99 authorizing reimbursement of judges accused of *misconduct* is the same as the first sentence, except that awards are discretionary ("may") rather than mandatory ("shall"). Otherwise, the procedure under §§ 16.53 and 16.007 is the same for judges defending either disability or ethics charges, and concluding that the legislature intended to limit fee awards to $5,000.00 is no more valid for judges defending misconduct allegations than it is for judges defending disability allegations.

Further, even the most cursory inquiry shows that claims to the Board in excess of small claims limits are routine. A listing of claims for the last 10 years is available on the Board website, and claims exceeding $100,000 are common.[5] Most recently, the first two claims heard August 12 of last year were for $52,921.87 and $35,764.89.[6] Similarly, at its April 28, 2010 hearings, the Board considered claims of $120,833.12 and $25,000,000.00.[7]

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[4] Sec. 799.01(1)(d), Stats. The legislature recently increased the limit from $5,000.00 to $10,000.00. 2011 Wisconsin Act 32.

[5] http://claimsboard.wi.gov/section.asp?linkid=109&locid=28.

[6] http://claimsboard.wi.gov/docview.asp?docid=22067&locid=28

[7] http://claimsboard.wi.gov/docview.asp?docid=19569&locid=28

Intervenors also make the ridiculous claim that the Board's referring a § 757.99 $5,000.00+ fee claim to the legislature is no different than an ordinary citizen requesting the legislature to pay a personal debt. If that were so, there would be no need for the Board procedure at all where claims exceed the small claims limit, and the legislature would be flooded with constituent requests to pay from the public till not just attorney fees, but everything else from mortgages to pet food.[8]

Thus, assuming that MBF and J. Gableman contemplated that fees would substantially exceed $5,000.00,[9] they also reasonably assumed they would be entitled to recover those fees through the Claims Board process. That assumption is even more reasonable in this case because *other* claims before the Board are contested and involve disputed matters of proof and law. In contrast, the standard for recovery under § 757.99 is straightforward and based on prior findings of the Judicial Commission, not an original proceeding

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[8] Perhaps they inadvertently misspoke, but referring to the claims procedure, Intervenors really do state: "[O]ne 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 free to ask the legislature to enact and the governor to sign legislation providing for such an appropriation." Reply 11, n. 4.

[9] Assuming it is not protected by attorney-client even admissible, evidence of MBF and J. Gableman's negotiations and thought processes in entering into the agreement would be critical. Intervenors' demand that this court limit its purview to their "small collection of facts" would MBF, J. Gableman, and this court the right and benefit of introducing and considering such evidence.

before the Board. In fact, the Board's usual hearing and determination of the merits would be erroneous, because § 757.99 authorizes fee awards where the judge is found by the *Commission* "not to have engaged in misconduct."

Intervenors' reference to the $5,000.00 Board limit is therefore the reddest of herrings. Claims exceeding the small claims limit are routine, and it does not change the calculus at all that MBF and J. Gableman may have anticipated applying to the legislature for reimbursement. The observation in Petitioners' Response applies to the legislature just as much to the Commission and this Court - Intervenors' claim the agreement with MBF was a sham is "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." Response, 36. The Reply rests on the same indefensible claim as to the legislature - that, regardless of the merits of his case, J. Gableman and MBF knew or should have known that any application for a $5,000.00+ reimbursement would be futile because of the legislature's bias, prejudice, or partisan rancor.

B. THE LAW OF CONTRACT IS THE ONLY CONCEIVABLE BASIS FOR ANALYZING WHETHER MBF'S AGREEMENT WITH J. GABLEMAN WAS SUPPORTED BY "VALUABLE CONSIDERATION."

Remarkably, Intervenors allege that J. Gableman's contract for services with MBF was a sham without "valuable consideration" under § 19.42(6), Stats., then complain that Petitioners engage in "diversion" by citing the law of contracts in determining whether it was supported by "consideration." Reply 8. Following the same approach they used to argue for recusal, Intervenors provide no citation whatever for construing that term, and instead rely on their "small collection of facts," untethered to any relevant legal principle.

Contrary to Intervenors' complaints about "digression," Reply 2, informing statutory construction by resort to the common law of contracts is well established. For example, both the United States Supreme Court and this Court have relied on common law to construe the term "restraint of trade" incorporated by Congress in anti-trust statutes. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 386, 111 S.Ct. 1344, 1357 (1991) ("Construing the statute in the light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited"); *Pulpwood Co. v. Green Bay Paper & Fiber Co.*, 170 N.W. 230, 232 (Wis. 1919)

("The words 'restraint of trade' in the federal statute have the same meaning which they had at common law . . . .) (superseded by subsequent statute on other grounds, discussed in *Istad v. Microsoft Corp.*, 2005 WI 121 ¶¶ 21 et seq., 284 Wis.2d 224, 236, 700 N.W.2d 139, 145).

Not only do Intervenors provide no reason or alternative for abandoning common law, it is difficult to conceive what other legal basis there might be for construing the term "consideration," which clearly originated under common law of contract. *See, e.g., NBZ, Inc. v. Pilarski*, 185 Wis.2d 827, 833, 520 N.W.2d 93, 94.(Ct.App.,1994) (holding that "restrictive covenants in employment contracts, subject to the requirements of § 103.465, STATS., are also subject to common law contract principles requiring that a contract be supported by consideration).

Intervenors next argue that the agreement was a sham because the term "reimbursement" in § 757.99 prohibits fee-shifting retainer agreements and mandates that an accused judge pay as he goes. Reply 11. Once again, Intervenors ignore established law for comparable contracts. Attorney fee awards under fee shifting statutes are routinely referred to as "reimbursements," even where they are made to impecunious plaintiffs who can not possibly pay them in advance.

For example, in 2010, the Supreme Court commented with approval, "As Judge Carnes noted below, when an attorney agrees to represent a civil rights plaintiff who cannot afford to pay the attorney, the attorney presumably understands that no *reimbursement* is likely to be received until the successful resolution of the case . . . ." *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662, 1675 (2010) (emphasis added). And in *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir., 1988), the 7th Circuit awarded "reimbursement" of over $50,000 in attorneys fees to an inmate seeking employment in the prison library. The court ruled, "As the prevailing party in the underlying civil rights action, Ustrak is entitled to *reimbursement* of fees reasonably incurred . . . ." *Id.* at 990 (emphasis added).

In sum, just as they failed to provide any rationale or alternative for ignoring the law of "contracts" in construing the term "consideration," Intervenors also fail to provide any rationale or alternative for ignoring established law for other fee shifting statutes in construing the term "reimbursement."

Intervenors next argue that J. Gableman received services upon improperly favorable terms, citing *In re Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485 (1980), where Judge Seraphim accepted a car from a litigant at rates "substantially reduced" from those offered the general public. Reply 9. *Seraphim* might have

persuasive value had MBF been a litigant[10] and had they sold J. Gableman a car, but they weren't, and they didn't. Sec. 757.99 provides a benefit *exclusively* to *judges*, not the general public, and the appropriate inquiries are (1) whether standard terms exist within the Wisconsin bar for representing supreme court justices (or even judges generally) who are accused of misconduct in Commission proceedings, and (2) even if such standard terms of representation exist within the bar, and even if they differ from the terms agreed to by MBF and J. Gableman, whether the contract in question was nevertheless reasonable or in good faith in light of the specific circumstances of the parties, the allegations, and any other relevant facts or background.

Finally, even if the term "reimbursement" is ultimately construed to somehow require advance payment, it would be indefensible to ground an ethical violation on a retrospective application of a post hoc statutory construction that had not been litigated, much less authoritatively resolved, at the time J. Gableman and MBF entered into their contract.

[10] As explained above, Intervenors simply ignore that critical distinction between court-party relationships, where the *judge* must withdraw, and court-counsel relationships, where *counsel* may withdraw.

C. ETHICS VIOLATIONS ARE A SEPARATE INQUIRY FROM RECUSAL.

As discussed in Petitioners' Response, it is important to again note that because ethical inquiries are separate and distinct proceedings issues from recusal, recusal is not necessarily required even if MBF and J. Gableman were found by the Judicial Commission or otherwise to have committed an ethical violation. *State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 185, 443 N.W.2d 662, 666 (Wis.,1989) ("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.")

IV. PREEMPTING THE JUDICIAL COMMISSION PROCESS BASED SOLELY ON INTERVENORS' "SMALL COLLECTION OF FACTS" WOULD DENY MBF AND J. GABLEMAN DUE PROCESS AND DEPRIVE THIS COURT OF A PLENARY RECORD AND ANALYSIS.

Intervenors demand that this Court preempt the Commission process and grant their motion based on their "small collection of facts."[11] They would have this Court find that a justice and one of the state's leading law firms

[11] Intervenors suggest that if other facts are relevant, the Court could appoint a "special master." Reply 5. Such a procedure would duplicate the Commission proceedings, multiply costs for the parties and J. Gableman, create the risk of conflicting outcomes, and could not possibly replicate the institutional knowledge and expertise of the Commission, which is the agency actually constituted to consider the subject matter of Intervenors' motion.

engaged in ethical violations without permitting them to submit testimony or argument to the contrary. Such an approach denies the parties the most basic rudiments of due process, and denies this Court the plenary record indispensable for resolution of the issue before it.[12]

Among other things, Petitioners would have this Court find that the MBF contract violated judicial canons without looking at the contract itself or taking testimony of the parties who entered into it. They would have this Court rule that MBF and J. Gableman intended to enter into a sham agreement without considering their own testimony whether they contemplated that fees would be substantially in excess of $5,000.00, whether they believed they would be entitled to recover those fees through the Claims Board process, or what the bases for their beliefs might have been. Perhaps J. Gableman negotiated with other firms, or perhaps MBF accepted the representation knowing that he would do so if they did not sign an agreement to his liking. MBF may well, and likely did, have its own reasons for negotiating the particular agreement they did.

[12] To repeat, the questions identified in this section are not relevant, because any problem related to the relationship between court and counsel was resolved by MBF's withdrawal. They are provided to illustrate the kind of inquiry necessary only in the event that, if for some reason this Court determines MBF's withdrawal was insufficient, and determines not to dismiss this case as Petitioners themselves have requested.

With perfect 20/20 hindsight, Intervenors "estimate" the value of MBF's fees to have been in the "tens of thousands of dollars." As already explained, Intervenors are utterly wrong that MBF could never have recovered more than a "tiny fraction" of those fees, and they ask this to Court rule without evidence from the parties how they estimated the fees or the likelihood or recovery Perhaps most important, this Court should also receive evidence how the "gift" prohibition has been interpreted and applied by the Commission and Government Accountability Board in relation to favors provided other judges in comparable contexts - for instance, providng professional services as campaign treasurer to a judicial election campaign.

CONCLUSION

For the foregoing reasons, Intervenors' motion should be either dismissed or deferred until the Judicial Commission process is concluded.

Respectfully submitted on this 30th day of January, 2012.

ATTORNEYS FOR PETITIONERS
MICHAEL D. DEAN, LLC

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