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Date:	1/15/2012		
Pages including cover sheet:	*13*		

Note:

A hard copy of the attached will be sent to the Supreme Court.

Please let me know if you have any trouble with this transmission.

Thank you,

Bev Jambois

12 JAN 17 PM 2:23
DANE COUNTY
DISTRICT ATTORNEY

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January 15, 2012

A. John Voelker
Acting Clerk
Wisconsin Supreme Court
PO Box 1688
Madison, WI 53701-1688 by fax to: (608) 267-0980

Re: State ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.
Case No. 2011AP0613-LV

State, et al. v. Dane County Circuit Court
Case No.2011 AP000765-W

Dear Mr. Voelker,

I represent State Representative Peter Barca in the above action. Please be advised that Representative Barca, by this letter, joins in the motion of District Attorney Ismael Ozanne to reopen the judgment in the above-entitled case. Representative Barca further joins in the motion to have Justice Gableman recuse himself. In the alternative, Representative Barca joins in the District Attorney's motion to have this court disqualify Justice Gableman from participating in this case.

The documents appended to the District Attorney's motion clearly reveal an undisclosed relationship between Justice Gableman and Attorney McLeod which, if it had been timely disclosed as required by the Judicial Code of Ethics applicable to Justice Gableman and the Attorney Code of Ethics applicable to Attorney McLeod, would have certainly been grounds for the District Attorney, Representative Barca, Senator Miller and Secretary of State Douglas LaFollette to bring these motions in advance of the hearing on this matter and would have certainly required either recusal by, or disqualification of, Justice Gableman.

The very existence of this relationship, whereby the Law Firm of Michael Best and Friedrich essentially underwrote the defense of Justice Gableman in an ethical complaint arising out of his conduct as a judicial candidate, was clearly proscribed by SCR 60.05 (4) (e) which provides in relevant part: " A judge may not accept ... a gift, favor or loan from any one..." Subsection 10 of that rule explicitly provides that a justice may only accept a gift "...if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge ". The Comment following section 10 explains: "...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;" Thus, Justice Gableman was prohibited from accepting legal services under these extremely favorable circumstances (essentially guaranteeing to Justice Gableman that he would be defended for free), from the law firm of Michael, Best and Friedrich and particularly from Attorney McLeod since both that firm and Attorney McLeod himself had come and were both likely to come again, before this court.

Section 946.10 (1) Wis. Stats prohibits any person from providing to any public officer "any property or any personal advantage which the officer or employee is not authorized to receive" "with intent to influence the conduct of any public officer ... in relation to any matter which by law is pending or might come before the officer ... ". Subsection (2) of that statute imposes a corollary prohibition upon any public officer. In this instance, SCR 60.05 (4) (e) generally, and subsection 10 of that rule particularly, prohibits Justice Gableman from accepting free legal services from this law firm. Therefore SCR 20:8.4 (e) imposes a corollary prohibition upon Attorney McLeod from offering and/or performing such services for free.

According to the Milwaukee Journal Sentinel, Attorney McLeod had originally claimed "Gableman had a standard billing agreement with the law firm and has paid that bill."[1] However, two weeks later, General Counsel Jonathan H. Margolies for the Law Firm of Michael Best & Friedrich conceded that McLeod's description of the fee agreement "was arguably incomplete or inaccurate."[2]

"He then conceded that "no bill for attorneys' fees was sent and none were paid."[3] While Attorney McLeod has not admitted that he performed free legal services for Justice Gableman "with the intent to influence the conduct" of Justice Gableman in any pending or future matter that he was or would be arguing before the court, it certainly could look that way to the many citizens of this state who, until this court held otherwise, thought the Open Meetings Law applied to the Legislature (since, after all, the Legislature specifically said it did: "This subchapter shall apply to all meetings of the senate and assembly..." sec. 19.87 Wis. Stats.), or those who thought that nonparties had no standing to pursue a Writ of Supervision in the Supreme Court over a County Circuit Court matter (since that had been the law in this Sate since 1939, see Petition of Heil 230 Wis. 428 (1939).).

At least one commentator has suggested that "the relevant question is whether the possibility of recovering fees is real and not whether the possibility is sufficiently strong or whether the firm made a 'good deal'"[4]. There is no question in this matter that "the firm made a good deal" so long as nobody else knew about it. A fact apparently not lost on Attorney McLeod as he chose to misrepresent the terms of the agreement or, as the firm's general counsel put it, describe the arrangement in a manner that was "arguably incomplete or inaccurate". It became a not-so-good deal when the firm's ethics section felt compelled to disclose that the law firm of Michael Best & Friedrich LLP had done Justice Gableman the huge favor of defending him in a very unsavory ethics complaint for free. Michael Best & Friedrich is now doing what it was required to do all along: notify the court and litigants against their firm before this court of this arrangement thereby ensuring that these other litigants will all request that Justice Gableman recuse himself or that the Court disqualify him in those cases.

The litigants in this case were entitled to the same opportunity now being afforded the litigants in the six pending cases before this court who are up against this firm. One further point, SCR 60.05 (4) (e) 10 doesn't merely prohibit a justice from accepting a "gift", it prohibits a justice from accepting a "favor" as well. Whether this fee arrangement is deemed a "gift" or a "favor," it was

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[1] November 29, 2011, Milwaukee Journal Sentinel, "Law firm at center of redistricting debate," by Patrick Marley, page 5B, attached to Attorney Jonathan H. Margolies of Michael Best & Friedrich LLP letter dated December 12, 2011 attached hereto as Exhibit 1.

[2] Ibid.

[3] December 15, 2011, Journal Interactive (Milwaukee Journal Sentinel), "Justice Gableman not charged legal fees in ethics case; Justice's arrangement with firm raises questions about cases, ethics rules" by Patrick Marley, attached hereto as Exhibit 2.

[4] January 5, 2012, Journal Interactive (Milwaukee Journal Sentinel) "Another View, Critics of Gableman Haven't Made Their Case," by Attorney Rick Esenberg, attached hereto as Exhibit 3 (note disclaimer).

indisputably a benefit of tremendous value to Justice Gableman and tremendous cost to the law firm of Michael Best & Friedrich. Lest anybody think this was the normal way for this firm to conduct business, I suggest an open records request be made of the Legislature, the Governor's Office, the Department of Administration or the Attorney General's Office for all of the contracts between those agencies and the Law Firm of Michael Best & Friedrich.

Furthermore, Esenberg's argument that the question isn't whether it was a "good deal" was expressly refuted by this Court:

> "Respondent's acceptance of the favorable automobile rental arrangement from Rank and Son during and after he had presided over a case in which the auto dealer was a party does constitute a violation of Rule 8" [the predecessor to SCR 60.05 (4)]. In the Matter of the Complaint against the Honorable Christ T. Seraphim, 97 Wis. 2d 485, 294 N. W. 2d 485 (1980).

It also doesn't matter that, as Attorney Esenberg put it "the relationship did not result in 'favorable' treatment... Gableman essentially voted against the firm's client as often as they voted for them." Judge Christ had also ruled against Rank and Son in the case he had decided and then imposed a penalty that was the same as he had imposed against similarly situated defendants. This Court held:

"Rule 8 goes beyond prohibiting a judge from accepting a 'bribe'. It prohibits judges accepting gifts under circumstances which may give the appearance of impropriety. Respondent's acceptance of Rank and Son's automobiles at substantially reduced rates both during and after he had presided over an action to which it was a party gave that appearance. It is therefore a violation. In the Matter of the Complaint against the Honorable Christ T. Seraphim, 97 Wis. 2d 485, 294 N.W. 2d 485 (1980).

For the foregoing reasons, Representative Peter Barca notifies this court that he joins in the motions filed in this matter by District Attorney Ishmael Ozanne.

Sincerely,

Robert J. Jambois
State Bar # 1002922

cc: Assistant Attorney General Maria S. Lazar by fax to: 608-267-2223
District Attorney Ismael R. Ozanne by fax to: (608) 267-2545
Attorney Roger Sage by fax to: (608) 257-2722
Attorney Susan M. Crawford by fax to: (608) 251-2883
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Jonathan H. Margolies
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December 12, 2011

Wisconsin Supreme Court Justices
16 East State Capital
Madison, WI 53703-1688

Dear Justices:

An article in the November 29, 2011 edition (attached) of the Milwaukee Journal Sentinel reported on matters concerning this Court and our representation of Justice Gableman. The article's description of the terms of this engagement was arguably incomplete or inaccurate.

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 engagement further provided that Justice Gableman would be responsible for all out of pocket disbursements incurred in connection with our representation. These charges were billed and paid in full by Justice Gableman.

Our representation of Justice Gableman ended in July of 2010.

We are providing a copy of this letter to all attorneys of record in cases now pending before this Court that Michael Best and Friedrich, LLP, attorneys have filed appearances.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Jonathan H. Margolies
General Counsel

JHM:lm

cc: David A. Krutz, Esq.

Milwaukee Journal Sentinel
JSOnline.com/milwaukee
Tuesday
November 29, 2011
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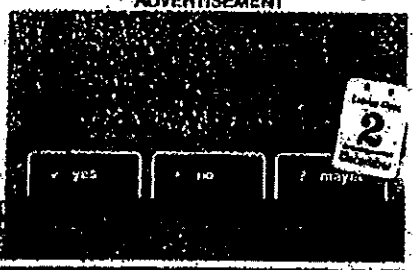
LOCAL

Hunting: Season will go down as one of the safest. **3B**
Obituary: McDonald had a flair for the dramatic. **5B**



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RECALL ELECTIONS

Law firm at center of redistricting debate

Lawyers gave advice on law they are now suing over

By PATRICK MARLEY
pmarley@journalsentinel.com

Madison — The law firm bringing a suit against the state's elections agency advised the Legislature on how to write the very law it is suing over.

Republican lawmakers hired Michael Best & Friedrich and the Troupis Law Office to help them draw new legislative maps this year and write legislation implementing those maps. Taxpayers paid the two firms $400,000 for the work.

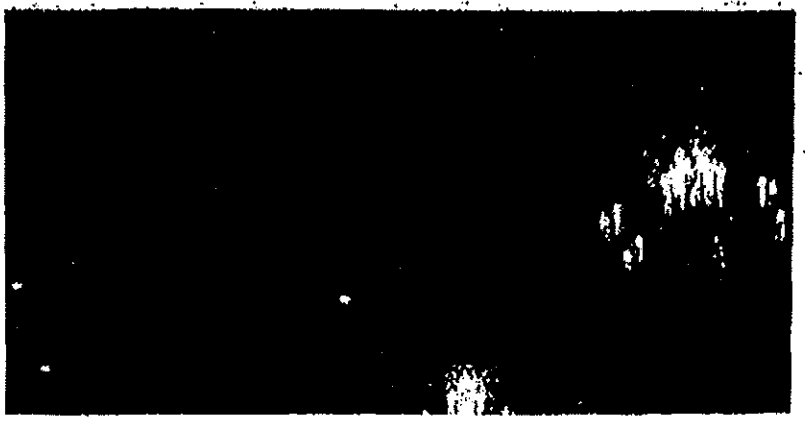
That law was explicit in saying the new maps would take effect for recall elections starting in the fall of 2012.

"This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election," it says.

That means any recall elections before then must be held in the old districts, according to the state Government Accountability Board, which runs state elections.

Please see REDISTRICTING, 5B

G GUESTS TO CITY'S BEST



Bonuses to offset pension costs

Reimbursements balance higher contributions

By LARRY SANDLER
lsandle@journalsentinel.com

More than 200 employees at two quasi-independent Milwaukee city

from page 1

REDISTRICTING

Lawyers advised on law suit targets

Now, Michael Best is representing a group of Republicans who have sued the accountability board, arguing any recall elections must be held using the new maps. The new maps favor Republicans.

Michael Best attorney Eric McLeod is representing the group and also advised lawmakers on redistricting. He declined to talk about discussions his firm might have had with lawmakers about what implementation date to include in the legislation.

"I can't comment on the legal advice we provided to our client," McLeod said.

While the law says the new maps are not to take effect for recalls until the fall of 2012, McLeod said the accountability board should have ordered that any new elections from now on be held in the new districts. That's because the old districts are no longer constitutional because some of them include significantly higher populations than others.

The group McLeod represents has asked the state Supreme Court to take up the case or appoint a panel of three county circuit judges to hear its case. The high court has not said what, if anything, it will do in the case.

Recusal issue?

McLeod defended Justice Michael Gableman, before the other state Supreme Court justices after the Wisconsin Judicial Commission alleged he had violated the state's ethics code for judges by lying in a 2008 campaign ad. The court split 3-3 in June 2010, and the case ended there with no agreement on whether Gableman lied or violated the ethics code.

McLeod said he did not believe his relationship with Gableman would require the justice to have to step aside in the case.

"I don't think my past representation of a justice would result in the need for recusal," he said, noting his work for him ended more than a year ago.

McLeod said Gableman had a standard billing agreement with the law firm and has paid that bill.

State ethics rules say judges must recuse themselves from cases in which a well-informed person might reasonably question their ability to be impartial.

Keith Swisher, an assistant professor who teaches legal ethics at Phoenix School of Law in Arizona, said he believed that rule would require Gableman to step aside in this case because of the importance of the work McLeod did for Gableman. But he said deciding whether he should have to step down was a "close call" because some time had passed since he did the work.

"It's not a slam dunk one way or the other," he said. "To me, it raises a question about Gableman's ability to be impartial."

Monroe Freedman, an expert on judicial ethics at Hofstra Law School in New York, also said Gableman should step aside.

"I just don't understand why these lawyers put themselves, and more importantly the court, in this position," he said.

But other experts said they believed Gableman could participate in the case.

"I would not be particularly bothered by Gableman hearing this case," said James Sample, a Hofstra associate law professor who has criticized Gableman in the past over the ethics case. "The scope of any ruling on redistricting will dwarf what at best is a minor conflict."

Stephen Gillers, a New York University Law School professor, said he saw no need for Gableman to recuse himself because the case was more than a year old and Gableman had paid his bill for the work.

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JOURNAL INTERACTIVE

Justice Gableman not charged legal fees in ethics case

Justice's arrangement with firm raises questions about cases, ethics rules

By Patrick Marley of the Journal Sentinel

Dec. 15, 2011 |(164) Comments

Madison - State Supreme Court Justice Michael Gableman received free legal service worth thousands of dollars from one of Wisconsin's largest law firms as it defended him against an ethics charge, according to a letter released Thursday by the firm.

The state's ethics code says state officials cannot receive anything of value for free because of their position. And a separate ethics code specifically for judges says they cannot accept gifts from anyone who is likely to appear before them.

A former state ethics official on Thursday said authorities should thoroughly investigate how the deal between Gableman and attorney Eric McLeod of Michael Best & Friedrich worked because Gableman did not end up paying any attorneys fees.

"It seems to me that they have to investigate all the facts, and if the investigation discloses (McLeod) gave as a gift to Gableman counsel services, that is a problem," said Gordon Myse, a former member of the Government Accountability Board.

The accountability board oversees the state's general ethics code. Myse said the Wisconsin Judicial Commission, which enforces the judicial ethics code, should also look into the matter.

Michael Best has five cases currently before the Supreme Court. Gableman is participating in all of them. Gableman did not respond Thursday to a request for an interview.

In the 2008 campaign for the high court, Gableman ran an ad that said then-Justice Louis Butler "found a loophole" for an offender who "went on to molest another child." But it did not mention that Butler was unsuccessful in getting the offender out of prison early and that he committed the subsequent crime after serving his sentence.

After the election, the state Judicial Commission filed an ethics complaint against Gableman, alleging he violated a provision of the ethics code for judges that says judicial candidates cannot lie about their opponents.

The high court last year split 3-3 on whether Gableman in fact violated the judicial ethics code. The commission then stopped pursuing the case because of the impasse.

Gableman hired McLeod and Indiana attorney James Bopp to represent him.

McLeod recently told the Journal Sentinel that Gableman had a standard agreement with Michael Best and that Gableman had fulfilled his obligations with that agreement.

In a letter to the court this week responding to a story that mentioned that agreement, the firm more fully described the deal. Michael Best General Counsel Jonathan Margolies wrote that Gableman was required to pay his attorney fees under the arrangement only if he recovered those fees from the state. Since Gableman was not able to recover them, he

did not have to pay legal fees to the firm.

Gableman was responsible for out-of-pocket expenses, and he did pay those, the letter from Margolies said.

The firm represented Gableman from July 2008 to July 2010. In an interview, Margolies declined to describe the value of that work, but other attorneys said it likely was worth tens of thousands of dollars.

Contingency arrangements are common in personal injury cases, where plaintiffs' attorneys receive a percentage of the award if they win a case but get nothing if they lose. But contingency deals are less common when lawyers are defending someone because winning fees is less likely.

State law says judges who prevail in an ethics case can ask the state Claims Board to reimburse their legal fees. In recent decades, there been only one case in which a judge had the ability to pursue legal fees, in 1988.

Because the Supreme Court split 3-3, Gableman could not argue before the Claims Board that he had prevailed and the state should cover his fees. "Thus, no bill for attorneys' fees was sent and none were paid," Margolies' letter said.

In the interview, Margolies said Michael Best handles billings in a number of different ways, including contingencies. He declined to say how frequently the firm had an arrangement similar to the one with Gableman.

Michael Best also represented Justice Annette Ziegler in a 2007 ethics case. Ziegler said Thursday she did not have a contingency deal with the firm for its service, which ended in 2008.

Margolies said the agreement with Gableman was put in writing when the firm was retained, but he declined to release a copy of it.

He said he sent the letter to the justices and parties in pending cases to ensure they fully understood how the agreement orked after it was briefly described in the Journal Sentinel. He said he was uncomfortable providing additional details because he wanted the court and the parties to all have the same information.

"We sent the letter to the court and the parties so there's no confusion or incomplete information," he said. "Because there was a statement in the newspaper, we wanted to make sure this information was clear."

He said he was confident the arrangement comported with state ethics laws.

Bopp, the Indiana attorney also involved in the case, declined to describe his arrangement with Gableman other than to say it complied with Wisconsin's ethics laws.

"My attorney-client relationship is privileged, so I don't discuss that," he said.

Jonathan Becker, the ethics administrator for the Government Accountability Board, did not speak specifically to Gableman's situation, but said in general the board would consider how common a type of fee arrangement was in examining a specific one given to a public official. He said he did not know if contingency arrangements were common in Judicial Commission cases.

State officials would "quite possibly" have to list free legal services they have received on economic interest statements they file annually with the state, Becker said. Gableman has not listed receiving any gifts on his last three reports, according to the board.

Jim Alexander, executive director of the Judicial Commission, said he did not know if contingency arrangements were common because judges with ethics cases before the commission don't share the details of their arrangements with him. At, he noted the judicial ethics code's ban on judges accepting gifts from those who are likely to appear before them.

"If it was a gift, that could create a problem if the attorney was someone who appeared before the court," he said.

The judicial ethics code also says judges cannot participate in cases if a neutral person knowing all the facts could reasonably question their impartiality.

Stephen Gillers, a New York University Law School professor who specializes in legal ethics, said last month that he elieved Gableman could hear cases involving Michael Best because the firm no longer represents him. But on Thursday he said he based that view on the understanding that Gableman had paid for the legal work. After reviewing the letter from Margolies, he said he now believed Gableman may be barred permanently from hearing cases involving Michael Best.

"Thanks to the firm, Gableman was in a position of 'no financial exposure' (putting aside disbursements) because of the willingness of the firm to go unpaid for its time . . . if it could not secure any (or its full) compensation under the statute," he wrote in an email.

"The firm conferred a significant benefit on Gableman, namely representation free to him. I don't know how much work was required in the firm's representation, but I assume it was substantial since it involved a proceeding before the state Supreme Court.

"In my view the 'no financial exposure' benefit the firm gave Gableman requires him to recuse himself indefinitely from cases the firm brings to the court."

Margolies had no comment on Gillers' view, other than to point out that under Wisconsin's law judges alone decide whether they can hear cases.

Charles Geyh, a professor at the Maurer Law School at Indiana University Bloomington, said Gableman must consider the value of any free legal service he received in determining whether he can participate in cases involving Michael Best.

e said he needs to keep in mind whether a neutral, reasonable person would think the relationship could affect Gableman's ability to be impartial.

"A reasonable perception would be, 'This guy owes him one,' " Geyh said. "When you're talking about tens of thousands of dollars (in a case) that is that important to the judge, it certainly raises some concern."

He said he believed Gableman should make a note on the record that he would not hear cases involving Michael Best for two or three years after receiving the legal service. The period should be longer before hearing cases by McLeod because he personally worked on the case, Geyh said.

In addition to the five cases now before the Supreme Court, Michael Best represented a Republican group that wants to change what district maps are used for possible recall elections for the state Senate.

It has brought two cases over the matter. The group recently dropped Michael Best from one of them but not the other, according to online court records.

The Supreme Court has not said what to do with the cases. Changing the maps would give an advantage to Republicans in the recall elections.

Jeremy Levinson, an attorney for Democratic recall groups, said he was considering asking Gableman to step aside in the cases because of Michael Best's role in them.

Levinson, who has represented attorneys and others accused of ethics violations, called Michael Best's contingency arrangement with Gableman peculiar.

This is inexplicable except as cover to give the guy free legal service," he said.

Find this article at:
http://www.jsonline.com/news/statepolitics/gableman-not-charged-legal-fees-pc3f5do-135711223.html

☑ Check the box to include the list of links referenced in the article.

JOURNAL INTERACTIVE

To our readers: An "Another View" published Friday by local attorney and Journal Sentinel community columnist Rick Esenberg about the issue of state Supreme Court Justice Michael Gableman's legal fees should have noted that Esenberg recently argued a case before the court.

Another View | Gableman's Legal Fees

Critics of Gableman haven't made their case

Jan. 5, 2012 |(28) Comments

In assessing state Supreme Court Justice Michael Gableman's arrangements with the law firm of Michael Best & Friedrich, there are a few foundational points to be kept in mind.

First, the relationship did not result in "favorable" treatment of Michael Best's clients. In those cases, each member of the court's "conservative" majority, including but certainly not limited to Gableman, essentially voted against the firm's clients as often as they voted for them. If Michael Best thought it was "buying a justice" (and it didn't), the firm got a raw deal.

Second, it is highly misleading to refer to the services provided by the firm to Gableman as a gift or as "free." We are all familiar with the typical contingency fee arrangement in personal injury cases in which a lawyer is not paid unless there is a recovery. No one believes that, if the case is lost, the lawyer has given a gift or worked for "free."

There are other forms of contingency fee arrangements. There are statutes that enable a court or other agency to award fees to a lawyer if his or her client wins. In cases to which these statutes apply, a lawyer often will agree to limit fees to whatever is awarded.

Such arrangements are the bread and butter of lawyers who specialize in civil rights cases and class actions. In fact, in the absence of such arrangements, clients in those cases generally would be financially unable or unwilling to retain counsel.

State law permits the payment of fees to judges who prevail in ethics cases. The firm's agreement to limit itself to whatever might be awarded looks an awful lot like this second form of contingency arrangement.

Gableman's critics have argued that there has been only one judicial ethics case in which fees have been awarded and, in that case, the full amount was not paid.

This is a red herring. Ethics charges against judges are rare, and that there has been only one case in which fees were awarded is because there has been only one case in which a judge prevailed. To extrapolate from that 24-year-old case involving a lower court judge to one in which a case involve a Supreme Court justice is a fool's game.

While the Legislature may have had to approve the award, it appropriates funds to cover claims against the state on a regular basis. While the firm was not assured of recovering all of its fees, that is always the case under fee-shifting statutes such as this.

In any event, the relevant question is whether the possibility of recovering fees is real and not whether the possibility is sufficiently strong or whether the firm made a "good deal."

The Gableman case raised questions of substantial public interest requiring good lawyers. They do not come cheaply. Unlike the rest of us, Gableman could not establish a "defense fund" to cover fees because contributions to it would

have been gifts.

That is precisely why state law allows a prevailing judge to collect fees.

.ecusal is a different issue and one that I cannot fully address here. In the context of the Wisconsin Supreme Court, it raises difficult and unique issues and is committed, except in rare and unusual circumstances, to the judgment of each individual justice. For example, recusal on the budget-repair bill, which was heard a year after the representation ended, would have raised vexing questions concerning the ability of a judge to ever hire a good lawyer and frustration of the public interest in having the full court hear important cases.

Rick Esenberg of Mequon is president and general counsel of the Wisconsin Institute for Law & Liberty and an adjunct professor of law at Marquette University Law School. He recently argued a case before the state Supreme Court. Esenberg also is a community columnist for the Journal Sentinel. Email rick@will-law.org