



**DANE COUNTY
DISTRICT ATTORNEY
ISMAEL R. OZANNE**

77



17 pgs.

VIA HAND DELIVERY

February 29, 2012

Mr. A. John Voelker
Acting Clerk
Wisconsin Supreme Court
PO Box 1688
Madison WI 53701-1688

RECEIVED
FEB 29 2012
CLERK OF SUPREME COURT
OF WISCONSIN

RE: *State of Wisconsin, et al. v. Circuit court of Dane County, et al.*
Case No. 2011AP765-W
L.C. Case Number 2011CV1244 (Dane County)

State ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.
Case No. 2011AP613-LV
L.C. Case Number 2011CV1244 (Dane County)

Dear Mr. Voelker:

Please find enclosed for filing the:

- District Attorney's Motion To File Supplemental Memorandum Of Law Regarding Motion For Recusal Of Justice Michael Gableman And For Relief From Judgment.
- District Attorney's Supplemental Memorandum Of Law In Support Of His Motion For Recusal By Justice Michael Gableman And His Motion For Relief From Judgment.
- Affidavit Of Ismael R. Ozanne.

Copies are being served on all other parties as well.

Sincerely,

Ismael R. Ozanne
Dane County District Attorney

cc: Atty. Susan Crawford (*representing Mark Miller*)
Carlo Esqueda, Dane County Clerk of Courts
Atty. Robert Jambois (*representing Peter Barca*)
Atty. Jina Jonen (*representing WI Education Association Council*)
Atty. Steven Kilpatrick (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)
Atty. Kurt Kobelt (*representing WI Education Association Council*)
Atty. Maria Lazar (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)
Atty. Eric McLeod (*representing Michael Huebsch*)
Atty. Joseph Olson (*representing Michael Huebsch*)
Atty. Tamara Packard (*representing Mark Miller*)
Atty. Lester Pines (*representing Mark Miller*)
Atty. Roger Sage (*representing Douglas LaFollette*)
Atty. Michael Screnock (*representing Michael Huebsch*)
Atty. Kevin St. John (*representing Michael Huebsch*)
Atty. Marie Stanton (*representing Maryann Sumi*)
Atty. Dean Strang (*representing Maryann Sumi*)

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**STATE OF WISCONSIN
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**APPEAL # 2011AP765-W
TRIAL COURT CASE # 2011CV1244 (DANE COUNTY)**

STATE OF WISCONSIN and
STATE OF WISCONSIN EX REL. MICHAEL D. HUEBSCH,
Secretary of the Wisconsin Department of Administration,

PETITIONERS,

V.

CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE MARYANN SUMI, Presiding,
ISMAEL R. OZANNE, District Attorney for Dane County,
JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER,
MARK MILLER,
PETER BARCA,
DOUGLAS LAFOLLETTE,
JOINT COMMITTEE ON CONFERENCE,
WISCONSIN STATE SENATE and
WISCONSIN STATE ASSEMBLY,

RESPONDENTS.

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TRIAL COURT CASE # 2011CV1244 (DANE COUNTY)**

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE,

PLAINTIFF-RESPONDENT,

V.

JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER,

DEFENDANTS,

AND

DOUGLAS LAFOLLETTE,

DEFENDANT-PETITIONER-MOVANT

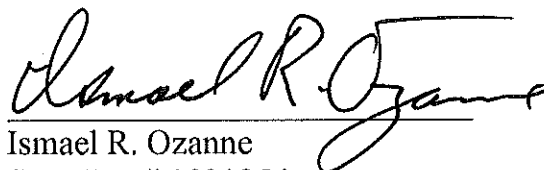
**DISTRICT ATTORNEY'S MOTION TO FILE SUPPLEMENTAL
MEMORANDUM OF LAW REGARDING MOTION FOR
RECUSAL OF JUSTICE MICHAEL GABLEMAN AND FOR
RELIEF FROM JUDGMENT**

Pursuant to Wis. Stat. § 809.14, Respondent, Ismael R. Ozanne, District Attorney for Dane County, Wisconsin, and Plaintiff-Respondent, State of Wisconsin *ex rel.* Ismael R. Ozanne ("District Attorney") hereby

gives notice of and does move for an Order allowing him to file a Supplemental Memorandum of Law in this matter in support of his previously filed Motion for Recusal by Justice Michael Gableman and his Motion for Relief from Judgment. The District Attorney's Supplemental Memorandum of Law and a supporting Affidavit accompany this Motion.

As grounds for this Motion, the District Attorney respectfully submits that Justice Gableman's Order dated January 20, 2012 ignores the actual issues the District Attorney has raised in his pleadings regarding recusal.

Dated this 29th day of February, 2012.



Ismael R. Ozanne
State Bar # 1031954
Dane County District Attorney
215 S. Hamilton St. #3000
Madison, WI 53703-3297
Phone: (608) 266-4211
Fax: (608) 267-2545
ismael.ozanne@da.wi.gov

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**DISTRICT ATTORNEY'S SUPPLEMENTAL MEMORANDUM OF
LAW IN SUPPORT OF HIS MOTION FOR RECUSAL BY JUSTICE
MICHAEL GABLEMAN AND HIS MOTION FOR RELIEF FROM
JUDGMENT**

INTRODUCTION

Respondent, Ismael R. Ozanne, District Attorney for Dane County,
Wisconsin, and Plaintiff-Respondent, *State of Wisconsin ex rel. Ismael R.*

Ozanne (“District Attorney”) submits this Supplemental Memorandum Of Law In Support Of His Motion For Recusal By Justice Michael Gableman And His Motion For Relief From Judgment. This Supplemental Memorandum of Law is submitted in response to Justice Gableman’s Order dated January 20, 2012, declining to recuse himself. As a result, this Court should order Justice Gableman’s disqualification.

SUPPLEMENTAL STATEMENT OF FACTS

On January 20, 2012, Justice Gableman issued an Order denying the District Attorney’s Motion to recuse himself. Justice Gableman claimed the District Attorney brought this motion based on Michael Best & Friedrich’s (“MBF”) previous representation of him and its involvement in the instant matter. If that is how Justice Gableman has chosen to frame the factual basis for the District Attorney’s Motion, it is clear he has not “carefully considered the motion.”

The District Attorney’s Motion was clearly based on Justice Gableman’s receipt of free legal services from MBF for two years. In the media, Justice Gableman’s attorney, Viet D. Dinh, advanced the argument this was a contingent fee arrangement because MBF’s fee was contingent

on the outcome of its representation of Justice Gableman, and that Justice Gableman “has the same fundamental right to representation as any other individual.” *See* attached Affidavit of Ismael R. Ozanne and Exhibit 1. Attorney Dinh has also claimed this arrangement was not a gift because MBF’s opportunity to represent Justice Gableman and to recover fees was “valuable consideration.” *See id.*

Justice Gableman is not “any other individual.” Supreme Court Rules regulate the conduct of lawyers and judges. What any other individual could receive for free from a lawyer is not the issue. What a sitting Wisconsin Supreme Court Justice received for free from a law firm involved in this case is the issue.

ARGUMENT

THIS COURT MUST REMOVE JUSTICE GABLEMAN FROM FURTHER PARTICIPATION IN THIS MATTER.

Wis. Stat. § 757.19(2)(g) requires a judge to recuse himself “When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.” This is a subjective determination. *See State v. American TV & Appliance of Madison, Inc.*, 151 Wis.2d 175, 182, 185-86, 443 N.W.2d 662 (1989).

When a Supreme Court Justice against whom this type of disqualification motion is made is capable of deciding the motion, this Court has limited its review “to whether that individual justice made the determination that the motion required.” *See State v. Allen*, 2010 WI 10, ¶ 208, 322 Wis.2d 372, 778 N.W.2d 863 (Roggensack, J.). In reviewing the individual justice’s determination, the Court objectively decides if the justice in question went through the required exercise of making a subjective determination. *See id.*; *see also Donohoo v. Action Wisconsin, Inc.*, 2008 WI 110, ¶¶ 24-25, 314 Wis.2d 510, 754 N.W.2d 480; *Jackson v. Benson*, 2002 WI 14, ¶ 2, 249 Wis.2d 681, 639 N.W.2d 545; *City of Edgerton v. Gen. Cas. Co. of Wis.*, 190 Wis.2d 510, 521-22, 527 N.W.2d 305 (1995); *American TV*, 151 Wis.2d at 183.

Justice Gableman decided not to claim that his arrangement with MBF was a legitimate fee arrangement and instead chose to recast the clearly stated grounds in the District Attorney’s Motion. Justice Gableman ignored the allegations raised against him and chose to not decide the Motion. Court precedent requires this Court to determine whether it will accept Justice Gableman’s Order dated January 20, 2012 as his determination of the issue, even though he has not explained or discussed how a Justice could receive

free legal services from a law firm, yet still appear impartial on subsequent matters in which that law firm represented a party in front of him. This Court has clearly reserved for itself the authority to force its members to address recusal requests to honor both Wisconsin law and the public's faith in this Court's impartiality. Justice Gableman's failure to provide a transparent examination of the issue violates both Wisconsin law and the public trust.

To the extent Justice Gableman declined to provide his reasoning in this matter on the actual issues raised about his recusal, the District Attorney respectfully requests that this Court revisit the issue of its authority to require recusal of a fellow Justice in light of the facts of this case and this Court's most recent consideration of the issue in *State v. Henley*, 2011 WI 67, ¶ 39, 335 Wis.2d 559, 802 N.W.2d 175, and to determine whether the facts in this matter require the Court to compel Justice Gableman to recuse himself.

CONCLUSION

This Motion is not a matter of partisan demands. It is a matter of protecting the integrity of the judicial process. Justice Gableman's actions and failure to examine those actions have placed this Court in the difficult

position of returning to the contentious issue of when this Court may or must remove one of its members from participation. This Court should not accept Justice Gableman's deliberate obfuscation as binding upon it.

Dated this 29th day of February, 2012.

A handwritten signature in black ink, appearing to read "Ismael R. Ozanne", written over a horizontal line.

Ismael R. Ozanne
State Bar # 1031954
Dane County District Attorney
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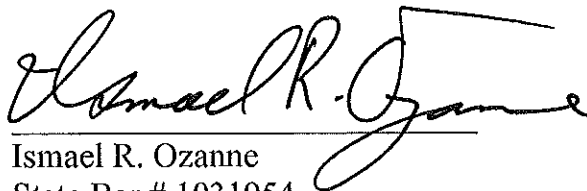
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2. Attached to this Affidavit as Exhibit 1 is a true and accurate copy of a letter signed by Attorney Viet D. Dinh regarding MBF's fee arrangement with Justice Gableman in the above-described ethics matter. This letter was displayed on the *Milwaukee Journal Sentinel's* ("MJS") website, <http://jsonline.com>.

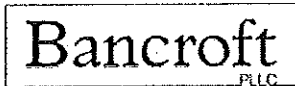
Dated this 29th day of February, 2012.



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Subscribed and sworn to before me
this 29th day of February, 2012.


Notary Public, State of Wisconsin
My commission expires 2-23-14.



December 27, 2011

Mr. Martin Kaiser
Editor
Milwaukee Wisconsin Journal Sentinel
333 West State Street
Milwaukee, Wisconsin 53203

Dear Mr. Kaiser,

I am writing about the misleading coverage your paper has provided regarding recent ill-founded allegations that Justice Michael Gableman violated state ethics rules when obtaining legal services from Michael Best and Friedrich LLP ("Michael Best") in 2008. The Journal Sentinel's stories pertaining to this matter contain glaring substantive errors and misleading language.

Contrary to the consistent mischaracterization of the Journal Sentinel's coverage, Justice Gableman did not receive "free" legal services under the contingency fee contract with Michael Best. For example, in the story *Justice Gableman not charged legal fees in ethics case*, which appeared in your paper on December 15, 2011, Patrick Marley declared that "Justice Michael Gableman received free legal service worth thousands of dollars from one of Wisconsin's largest law firms." Marley made a similar statement again on December 19, 2011 in his article *Gableman voted with law firm after receiving free legal services*. And on December 21, 2011, Jason Stein suggested that Justice Gableman received "free legal services" in his piece entitled *Group seeks Gableman recusal*. These statements are simply false: Justice Gableman did not receive free legal services from Michael Best. The contractual arrangement outlined in your coverage of the Justice describes no more than a commonplace contingency fee agreement. Private litigants, even State Attorneys General, enter into these sorts of agreements with lawyers all the time.

Justice Gableman has the same fundamental right to representation as any other individual, and there is nothing improper or unethical about acquiring legal representation through a contingency fee agreement. Wisconsin Supreme Court Rules provide that "[a] fee may be contingent on the outcome of the matter for which the service is rendered." Wis. S. Ct. R. 20:1.5(c). All that is required is that the "contingent fee arrangement shall be in a writing signed by the client" and "clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party."

A contingency fee arrangement is not a "gift" proscribed by Wisconsin law. "Gift" is defined as "the payment or receipt of anything of value without valuable consideration." Wis. S. Ct. R. 60.01(7). The opportunity to represent and to recover fees for such services is quintessentially "valuable consideration." No one who hires a lawyer on a contingency fee basis

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Exhibit #1

feels like they are receiving something for free from that attorney. On the contrary, the client is bestowing a valuable opportunity to the attorney to advocate the matter and recover fees if he is successful.

The inaccuracies are so persistent, and their pattern against Justice Gableman so consistent, that one unfortunately must consider editorial and journalistic bias. For example, on December 19, 2011, Patrick Marley stated that Justice Gableman "has participated in nine cases in which the court voted on substantive issues involving Michael Best clients" and that the Justice "ruled in those clients' favor in five of those cases – more than any other justice." Surely the indictment of a judge's impartiality, and a man's professional integrity, must be justified by something more than that he voted slightly higher than 50-50. What of the four cases in which Justice Gableman did not find the position advocated by Michael Best persuasive? What of the merits? Would Mr. Marley's casual empirical analysis condemn a firm that prevailed in the one case it had in front of the court and thus had a success rate of 100%?

Your paper needs to be more careful in covering the false allegations levied against Justice Gableman. At the very least, it should stop describing Justice Gableman's contract with Michael Best as providing for free legal services. It is untrue.

Sincerely,

A handwritten signature in black ink, appearing to read "Viet D. Dinh". The signature is stylized and cursive.

Viet D. Dinh