STATE OF WISCONSIN
SUPREME COURT

APPEAL NO. 2011AP765-W

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.

APPEAL NO. 2011AP613-LV
TRIAL COURT CASE NO. 2011CV1244

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

AFFIDAVIT OF ISMAEL R. OZANNE

STATE OF WISCONSIN)
) ss.
DANE COUNTY)

I, Ismael R. Ozanne, being first duly sworn on oath, states as follows:

1. I am the District Attorney for Dane County, Wisconsin.

2. As of June 14, 2011, I was aware that Michael Best & Friedrich, LLP ("MBF"), and Attorney Eric McLeod ("McLeod") had represented Justice Michael Gableman in an ethics matter before the Wisconsin Judicial Commission and this Court.

3. As of June 14, 2011, I was aware that MBF and McLeod represented Petitioners, State of Wisconsin and Michael D. Huebsch, Secretary of the Wisconsin Department of Administration's ("Secretary Huebsch") in this Matter, together with the Wisconsin Department of Justice.

4. At oral argument on June 6, 2011, I observed McLeod in attendance.

5. On December 16, 2011, I reviewed an article dated December 15, 2011, a true and accurate copy of which is attached hereto as Exhibit 1, on the *Milwaukee Journal Sentinel's* ("*MJS*") website, http://jsonline.com regarding MBF's fee arrangement with Justice Gableman in the above-described ethics matter.

6. I also obtained a letter from MBF, a true and accurate copy of which is attached hereto as Exhibit 2, summarizing its fee arrangement with Justice Gableman in that ethics matter.

7. Had I known of the facts described in this Affidavit prior to oral argument, I would have raised the issue of Justice Gableman's participation before June 6, 2011.

8. Attached hereto as Exhibit 3 is a true and accurate copy of my June 3, 2011, Letter Memorandum, already on file with this Court.

Dated this day of December 30, 2011.

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

Subscribed and sworn to before me
this 30th day of December, 2011.

Notary Public, State of Wisconsin
My commission expires 4-1-2015

JOURNAL INTERACTIVE

PRINTTHIS

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.

Exhibit #1

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 worked 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. But, 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 believed 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.

He 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.

MICHAEL BEST
& FRIEDRICH LLP

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DEC 16 2011

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December 12, 2011

TO COUNSEL OF RECORD
(see attached list)

Re: *John & Linda Adams, et al. v. Livestock Facility Siting Review Board, et al.*
Appeal No. 2009AP608

Dear Counsel:

Michael Best sent the attached letter to the Justices of the Wisconsin Supreme Court today. We are sending copies of the communication to all parties in pending cases where Michael Best appears in the Court.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Michael P. Screnock

MPS:skt

Enclosures

Exhibit # 2

COUNSEL OF RECORD

Re: *John & Linda Adams, et al. v. Livestock Facility Siting Review Board, et al.*
Appeal No. 2009AP608

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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:im

cc: David A. Krutz, Esq.

Milwaukee Journal Sentinel
JSOnline.com/milwaukee

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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.

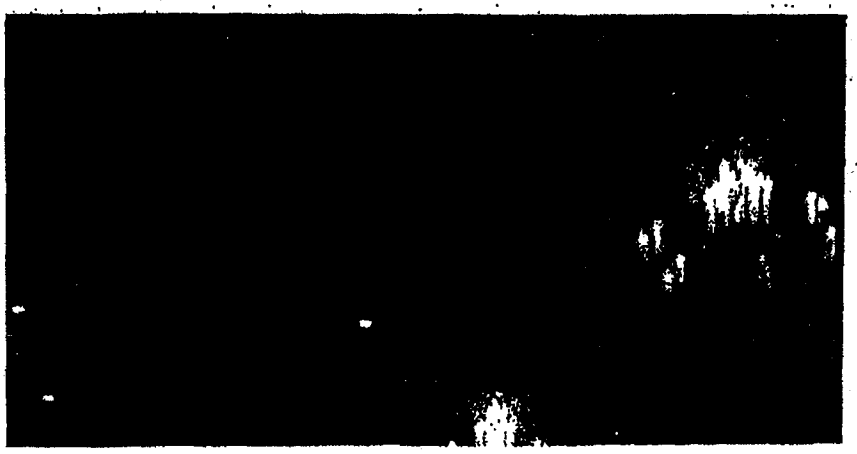
That law was explicit in saying the new maps would take effect for recall elections starting in the fall of 2012.

"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
lsandler@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.

■

DANE COUNTY
DISTRICT ATTORNEY
ISMAEL R. OZANNE

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VIA HAND DELIVERY

RECEIVED
JUN 0 3 2011
CLERK OF SUPREME COURT
OF WISCONSIN

June 3, 2011

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

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 accept this letter memorandum as my response to the Supreme Court of Wisconsin's June 2, 2011, Order in the above-referenced cases. In Case No. 2011AP765-W, I am designated as "Respondent, Ismael Ozanne, District Attorney for Dane County, Wisconsin." In Case No. 2011AP613-LV, I am the "Plaintiff-Respondent, State of Wisconsin ex rel. Ismael R. Ozanne" and I represent the State of Wisconsin.

The effect of the circuit court's Findings, Conclusions, Decision and Judgment on Case No. 2011AP613-LV and on Case No. 2011AP765-W issued on May 26, 2011, is to render both petitions moot. My answers to the questions posed by the Court fully support this conclusion and are set forth below.

1. Whether an appeal is an available remedy and to whom in L.C. 2011CV1124?

An appeal is an available remedy to any aggrieved party in L.C. 2011CV1124. Secretary of State Douglas La Follette, the Joint Committee on Conference as constituted on March 9, 2011, the Wisconsin State Senate and the Wisconsin State Assembly may pursue an appeal as of right pursuant to Wis. Stat. § 808.03(1). Similarly, Senator Miller and Representative Barca, as members of the Joint Committee, could appeal the declaratory judgment if they choose to do so. They accepted service of process and waived any applicable legislative privilege. Senator Miller and Representative Barca are parties with rights to direct appeal. They have an institutional interest in whether the courts are

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Exhibit #3

authorized to judicially review the activities of legislative committees for compliance with the Open Meetings Law (OML). Should this Court conclude that the May 26, 2011, Findings, Conclusions, Decision and Judgment does not constitute a final judgment, each of these parties would have a right to appeal pursuant to Wis. Stat. § 808.03(2). Lastly, a non-party may seek to intervene in L.C. 2011CV1124 pursuant to Wis. Stat. § 803.09 and pursue the same appellate remedies. Wisconsin law allows an aggrieved non-party to intervene post-judgment provided the statutory requirements are met. *See C.L. v. Edson*, 140 Wis. 2d 168, 178, 409 N.W.2d 417 (Ct. App. 1987).

2. Whether the circuit court's judgment is final for purposes of appeal?

"A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties." *Edson*, 140 Wis. 2d at 178. The circuit court's Judgment at p. 18 plainly stated:

> This is a Final Judgment for purposes of appeal as to the validity of actions taken on March 9, 2011 [by the Joint Committee on Conference]. This Judgment supersedes previous orders entered in this case.

On several recent occasions, this Court has clarified the requirements for a document to be a final judgment or order for purposes of appeal:

> A document must meet three conditions in order to be considered a final judgment for purposes of appeal: (1) the document must be entered by the circuit court, (2) dispose of the entire matter in litigation as to one or more parties, and (3) state on its face that it is the final document for purposes of appeal.

Werner v. Hendree, 2011 WI 10, ¶ 62, 331 Wis. 2d 511, 795 N.W.2d 423, *citing Tyler v. The Riverbank*, 2007 WI 33, ¶ 26, 299 Wis. 2d 751, 728 N.W.2d 686. *See also Wambolt v. West Bend Mutual Insurance. Co.*, 2007 WI 35, ¶ 31, 299 Wis. 2d 723, 728 N.W.2d 670.

Furthermore:

> When an order or judgment is entered that disposes of all of the substantive issues in the litigation, as to one or more of the parties, as a matter of law, the circuit court intended it to be the final document for purposes of appeal, notwithstanding the label it bears or subsequent actions taken by the circuit court.

Harder v. Pfitzinger, 2004 WI 102, ¶ 19, 274 Wis. 2d 324, 682 N.W.2d 398.

Clearly, under the standards set forth by this Court's previous decisions, the circuit court's May 26, 2011, Findings, Conclusions, Decision and Judgment are a final judgment for purposes of Wis. Stat. § 808.03(1). The documents were entered by the circuit court, contain an explicit statement that the judgment is intended to be final, and the judgment disposed of the entire matter in litigation against the Wisconsin State Senate, the Wisconsin State Assembly, the Joint Committee on Conference, Secretary La Follette and legislators Barca and Miller.

3. Whether this Court's exercise of original jurisdiction may include the appellate power to review a circuit court judgment absent the filing of an appeal?

Article VII, § 3 of the Wisconsin Constitution defines this Court's jurisdiction:

> **Supreme court; jurisdiction.** SECTION 3 [As amended April 1977] **(1)** The supreme court shall have superintending and administrative authority over all courts. **(2)** The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction. **(3)** The supreme court may review judgments and orders of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.

Several statutes also codify this Court's authority. Wisconsin Statutes § 751.05 states this Court "has appellate jurisdiction only, except as provided by law or the constitution." Before the Supreme Court may take jurisdiction over an appeal, an appeal must have been made to the Wisconsin Court of Appeals. *See* Wis. Stat. § 809.61.

Wisconsin law requires a party to file a notice of appeal containing certain required pieces of information that alerts the Courts of Appeal, the circuit court, and the opposing party of the parties' intention to seek appellate review. *See In re Commitment of Sorenson*, 2000 WI 43, ¶ 16, 234 Wis. 2d 648, 611 N.W.2d 240 (citations omitted). *See also* Wis. Stat. § 809.10(1)(a).

> The timely filing of a notice of appeal is necessary to give the court of appeals subject matter jurisdiction over an appeal. . . . If a party fails to comply with the statutory requirements for filing a timely notice of appeal, the court of appeals lacks jurisdiction, and the court must dismiss the appeal as defective.

Sorenson at ¶ 16. *See also* Wis. Stat. § 809.10(1)(e).

I am aware this Court has exercised its original jurisdiction in order to review a decision from a circuit court in the absence of the filing of a notice of appeal based on a petition for a writ of mandamus filed by a party to the circuit action. *See State of Wisconsin ex rel. Nader v. Circuit court for Dane County*, 04-2559-W (2004); *Green For Wisconsin v State Election Board*, 2006 WI 120, ¶21, 297 Wis. 2d 300, 723 N.W.2d 418 (Roggensack, J. dissenting). However, *Nader* is distinguishable for several reasons. First, the facts were undisputed in *Nader* and as we set forth below there are likely disputed facts in this case. Second, the exigencies confronting Nader were real; whereas the claimed exigency in this case is wholly contrived. The legislature has the ability to provide its own remedy; *Nader* did not. Lastly, there is a final judgment in this case. In *Nader*, there was decision but not a final judgment upon which an appeal could rest.

4. Are any of the circuit court's findings of fact clearly erroneous?

We do not take issue with any of the Findings of Fact, and believe them to be well supported by the evidence presented.

5. Whether any facts beyond those found by the circuit court, material to the determination of the issues in Case No. 2011AP613-LV and in Case No. 2011AP765-W, are in dispute?

After receiving this Court's order yesterday, I unsuccessfully attempted to determine whether there was a consensus as to facts not found by the circuit court that are material to a determination of an issue in either petition.

Regardless, I believe there are material facts that *might* be in dispute that are not part of the circuit court's Findings of Fact that relate to a determination of the merits, should this Court address the merits. For example, the circuit court makes no findings of fact regarding the testimony of Chief Senate Clerk Robert Marchant. Pet. App., Vol. 3, pp. 35-108. Mr. Marchant testified on April 1, 2011. *See id.* His testimony concerned the rules under which the Senate and Assembly operate. *Id.* He testified about the 24-hour notice requirement for meetings and under what circumstances the notice period can be shortened to two hours for "good cause." *Id.* There is no discussion or findings related to the "good cause issue;" nor have the parties argued and briefed the potential impact of this issue. To the point, there are facts regarding an afternoon meeting on March 7, 2011, a full two days before the Joint Committee of Conference met, to discuss the removal of fiscal items from what was to become 2011 Wis. Act 10.

Moreover, the facts concerning the discussions occurring on March 7 and the afternoon of March 9 bear on the egregiousness of the violation, a factor arguably relevant to the circuit court's exercise of discretion in deciding to void the act. Consequently, there are

material facts that would bear upon not only the absence of any good cause for a notice of less than 24 hours, but also support the inference the violation of the OML was planned and willful, and not the result of mistake or accident. Pet. App., Vol. 3, pp. 575, 600-610. These facts take on greater significance when one considers the public's high level of interest in the legislation and its access to the debate are key components of the state's enforcement action. Similarly, these facts have additional meaning because they relate to the ability of the elected representatives to be informed in a timely fashion so that they may cast an informed vote on behalf of the public they represent. None of this was accomplished as a result of the violation of the OML that occurred on March 9, 2011.

Additional key facts that are likely in dispute and not part of the circuit court findings concern the testimony of Michael Barman, Cathleen Hanaman and Stephen Miller given on March 29, 2011. Pet. App., Vol. 2, pp. 22-124. These facts are critical to the determination of the issues set forth in 2011AP613-LV and 2011AP765-W for these reasons. In their pleadings requesting a dismissal of the petition for leave to appeal regarding the Temporary Restraining Order, the Attorney General argued 2011 Wis. Act 10 had been published in the constitutional and statutory sense; and was law. Petitioners appear to take a different approach in the Petition for Supervisory Writ. Nevertheless, whether the law was published when the circuit court declared it a nullity may affect the analysis regarding the separation of powers doctrine, as expressly argued by the Attorney General.[1]

Furthermore, there is the issue of irreparable harm. Petitioner Huebsch has argued there is a $30 to $300 million dollar fiscal injury at stake. I have argued there is no fiscal injury at all. *Ozanne Response Brief* at 5-6. If this Court is to resolve this case on the merits, it should have the benefit of a finding from the circuit court, particularly since the state's fiscal health has improved significantly.

This takes me to the final point. If this case were addressed in the normal course of a direct appeal, this Court would not only have the benefit of the complete trial record below, but also the benefit of briefs from the affected parties regarding all issues and facts relevant to the procedural issues as well the merits. In its current posture, this Court does not have a sufficiently developed record to exercise its original or appellate jurisdiction.

Respectfully, I believe these arguments militate against this Court exercising original jurisdiction. The circuit court's May 26, 2011, Findings, Conclusions, Decision and Judgment represent a declaratory judgment issued pursuant to Wis. Stat. § 806.04. If a

[1] As previously argued, I do not believe the separation of powers doctrine is violated regardless of whether the Act had been "published" at the time the circuit court issued its Findings, Conclusions, Decision and Judgment.

party appealed this case to the Court of Appeals or to this Court, Wisconsin law provides that the standard of review would be to determine whether the circuit court had engaged in a clearly erroneous exercise of its discretion. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 35-37, 309 Wis. 2d 365, 749 N.W.2d 211 (citations omitted). If this Court were to perform such a review, it would generally look for reasons to uphold the circuit court's decision. *See Loomans v. Milwaukee Mutual. Ins. Co.*, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). This Court would be allowed to "search the record to determine if it supports the court's discretionary determinations." *Randall v. Randall*, 2000 WI App 98, ¶ 7, 235 Wis. 2d 1, 612 N .W.2d 737.

To conclude, this Court's policy regarding the acceptance of a case on original jurisdiction and the current procedural posture of these petitions do not afford this Court with an opportunity to exercise original jurisdiction. Therefore, these petitions must be dismissed.

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)*