

STATE OF WISCONSIN

IN SUPREME COURT

02AP2851-D

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST JOSEPH L.
SOMMERS, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,

CASE NO.

FILED

Complainant;

NOV 17 2006

JOSEPH L. SOMMERS,

CLERK OF SUPREME COURT
OF WISCONSIN

Respondent.

COMPLAINT

NOW COMES the Wisconsin Supreme Court - Office of
Lawyer Regulation (OLR), by Assistant Litigation
Counsel Julie M. Falk, and alleges as follows:

1. The OLR was established by the Wisconsin
Supreme Court and operates pursuant to Supreme Court
Rules. This complaint is filed pursuant to SCR 22.11.

2. Joseph L. Sommers (Sommers) is an attorney
admitted to the practice of law in Wisconsin on
September 3, 1992. The most recent address furnished
by Sommers to the State Bar of Wisconsin is 7 N.
Pinckney Street #225B, Madison, Wisconsin 53703-4260.

Counts One - Three

General Allegations

3. Adam J. Raisbeck (Raisbeck) retained Sommers to represent him on criminal charges related to a one-car rollover accident in the Town of Medina, Wisconsin on September 1, 2001.

4. Jerry R. Pageloff (Pageloff), a passenger in Raisbeck's car, died from injuries sustained as a result of the accident.

5. In December 2001, the Dane County District Attorneys Office charged Raisbeck with Homicide by Negligent Operation of a Motor Vehicle relating to the death of Pageloff and another criminal offense relating to the nonfatal injuries sustained by a second passenger.

6. Dane County Assistant District Attorney Paul W. Humphrey (Humphrey) was assigned to prosecute Raisbeck.

7. Sommers' main defense was that the State had failed to make a plausible showing that Raisbeck was driving in a criminally negligent manner immediately prior to the crash, based upon discrepancies in the testimony of the State's witnesses concerning the

identification of tire markings at the accident scene and the actual length and placement of the tire marks.

8. On March 12, 2002, Raisbeck was arraigned before Dane County Circuit Court Judge Paul B. Higginbotham.

Regarding the McCoy Subpoena

9. On September 1, 2001, Kevin T. McCoy (McCoy) stated to a Dane County Sheriff's Deputy that McCoy saw Raisbeck's passengers during the evening of August 31, 2001, leaving at approximately 11:00 p.m. He did not know where they went, or who they went with that evening.

10. On or about March 13, 2002, Humphrey forwarded a police report containing McCoy's statement to Sommers.

11. On September 18, 2002, Humphrey notified Sommers that Humphrey intended to call McCoy as a witness at trial.

12. On or about October 7, 2003, Dane County Detective Anderson served a subpoena on McCoy requiring McCoy to appear in Branch 17 of Dane County Circuit Court, before Judge Higginbotham, to give

testimony or evidence at a jury trial in the Raisbeck case then-scheduled for October 27-30, 2003.

13. On October 15, 2003, Humphrey sent Sommers a two-page witness list that included McCoy's name and street address.

14. On October 21, 2003, Humphrey and Detective Greiber met with McCoy.

15. On October 27, 2003, Detective Greiber prepared a memorandum memorializing the October 21st meeting with McCoy, stating that McCoy told Humphrey and Greiber that McCoy had spoken with Raisbeck about the accident once during the spring following the accident. According to McCoy, Raisbeck was feeling sad about the accident, admitted to McCoy that it was foggy, he was driving too fast and he could not see the sign and drove off the road. McCoy further stated that Raisbeck had driven too fast on another occasion when McCoy was in the car. McCoy indicated he did not wish to testify.

16. On October 23, 2003, Raisbeck's trial was postponed until January 20, 2004. Judge Moser continued the subpoenas to the new trial date.

17. During the week of October 27-30, 2003, McCoy did not appear at the Dane County Courthouse for

trial in the Raisbeck case, nor did Humphrey reach McCoy to inform him the trial had been continued.

18. On November 12, 2003, Humphrey filed an Affidavit for Bench Warrant and Material Witness Warrant in which Humphrey averred in pertinent part that, "McCoy is a material witness in the case against Adam Raisbeck and that he [McCoy] has already not appeared on one subpoena and is unlikely to appear on a subpoena in the future."

19. On November 12, 2003, Judge Ebert granted Humphrey's request for a warrant and signed a bench warrant commanding the arrest of McCoy.

20. After Judge Ebert signed the bench warrant, Detective Anderson found McCoy as an inmate of the Dane County Jail. Detective Anderson advised McCoy of the warrant and read it to McCoy.

21. McCoy told Anderson that the reason why he did not appear for the October trial was because he called a telephone number and spoke with a female who advised him that the trial had been cancelled.

22. McCoy also told Anderson that McCoy spoke with Raisbeck, who told him that the trial was going to be rescheduled for January 2004.

23. On November 13, 2003, Detective Anderson generated a report summarizing her previous day's interaction with McCoy at the Dane County Jail concerning the Material Witness Warrant. On or about November 28, 2003, Humphrey forwarded a copy of this report to Sommers.

24. On December 11, 2003, Sommers wrote to the Court of Appeals questioning how Humphrey could in good conscience label McCoy a material witness given the only statement McCoy provided to the defense was his innocuous statement of September 1, 2001.

25. Sommers inferred that McCoy had given other statements - over and above McCoy's original statement of September 1, 2001 - that were damning to the defense case, but not disclosed to Sommers.

26. On or about January 26, 2004, Dane County Assistant District Attorney Timothy R. Verhoff (Verhoff) took over the prosecution of the Raisbeck case.

27. On February 24, 2004, despite the fact that McCoy had been served with a subpoena, Sommers sent a six-page letter to Verhoff that asserted in bold typeface, "It appears that Mr. McCoy was never subpoenaed for the trial the week of October 27,

2003." Sommers attached a January 13, 2004 affidavit of McCoy, which did not specifically address whether Detective Anderson served a subpoena requiring McCoy to appear at the Raisbeck jury trial on October 27-30, 2003.

28. On May 4, 2004, in a motion to suppress McCoy's testimony, Sommers asserted, "It appears that the bench warrant for Kevin McCoy was even in further bad faith in that there is no evidence that he was actually even subpoenaed for the trial the week of October 27, 2003."

COUNT ONE

29. By asserting on May 4, 2004, in a motion to suppress the testimony of witness Kevin McCoy that, "It appears that the bench warrant for Kevin McCoy was even in further bad faith in that there is no evidence that he was actually even subpoenaed for the trial the week of October 27, 2003," Sommers knowingly advanced a factual position without a basis for doing so that was not frivolous, in violation of SCR 20:3.1(a)(2); and knowingly made a false statement of fact to a tribunal in violation of SCR 20:3.3(a)(1); and engaged

in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of SCR 20:8.4(c).

*Sommers' Conduct During the
Hearing of May 24, 2004*

30. On or about October 22, 2003, Reserve Judge Robert R. Pekowsky (Judge Pekowsky) took over as trial court judge in the Raisbeck case.

31. On May 24, 2004, jury selection in the Raisbeck case was scheduled to commence. Before calling in the venire, Judge Pekowsky heard argument concerning pretrial motions.

32. During argument, Sommers made the following statements to Judge Pekowsky:

I mean, Your Honor, this is -- You're to a certain extent, I guess, part of the problem that I have right now. And I don't mean to get the Court upset, but to a certain extent I'm like a mathematician who is being forced to provide or try to disprove that two and two is five. . .

Your Honor, I guess one thing I can just say, Your Honor, I don't know. I think that I don't want to say this -- I don't know how to say this without offending the Court, but I don't know what else to say . . . I believe it is my opinion that this Court is absolutely determined not to give him [Raisbeck] a fair trial in order to cover up for the State.

And because of that I believe that his potential to be acquitted in this case is going to be reduced for the obvious reasons . . . I believe it is absolute. My opinion is -- It's obvious this Court is going to close us off. It's obvious that this Court is going to --Both times today when this Court has carefully -- everything has been carefully cut off, there is no answers and the whole thing about the emails was right when -- they know and I got to believe this Court knows it was going to go for the evidence that would show that Judy Schwaemle [Dane County DDA] and Brian Blanchard [Dane County's elected DA] were involved in the whole thing. And everybody has been orchestrated throughout this proceeding to cut it off at that moment. You cut it off right now at that moment. You've cut everything off, everything in this case is done to keep the cover-up going. That's my belief. I believe that your intention in this trial is to do everything that you can, because apparently, Judge, it's just too dirty, you can't take it. The bottom line is he's the one going -- that's going to pay the price. You cover up for them, his right to a fair trial is going to be strongly . . .

33. Judge Pekowsky responded to Sommers' statements in pertinent part:

I'm going to tell you something: What you just said is extremely insulting. Though you never use the word conspiracy between myself and any of the DA's, you came very close to suggesting this is orchestrated -- you used that word -- and I can tell you I

deeply resent that. And it is nearly contentious of you to bring that to this public forum today.

34. Judge Pekowsky and Sommers then had the following exchange:

THE COURT: You know, you can make most of your comments without further reference to me, whether you think that I'm going to treat you fairly or not, but - So confine your comments, use good judgment, and confine your comments not to what you think I might do, make your arguments and be quiet. I don't think that's asking too much. Your innuendo time and time again, and not so much of an innuendo, is that I've already decided how to rule and this is carefully orchestrated and that somehow you say it publicly.

MR. SOMMERS: And I will again and again.

THE COURT: I know you will. And I'm telling you not to do it again in this proceeding. You have the opportunity to go public outside this courtroom, and you certainly have an opportunity to express your opinion. But this is so detrimental to the proceeding, it absolutely detracts from everything . . .

35. Sommers then accused Judge Pekowsky of "glossing over" a misrepresentation that the prosecutors allegedly made to Judge Pekowsky on May 7, 2004.

36. Sommers told Judge Pekowsky:

You go out of your way -- Even today you go out of your way as much as you can just to ignore it -- to have tunnel vision and say we can't acknowledge it. . .

37. Judge Pekowsky cautioned Sommers to "stick to business here" and admonished Sommers "[i]t is apparently very easy for you to accuse anyone of almost anything as you have done in --" at which point Sommers interrupted, yelling at Judge Pekowsky, "Your Honor, how dare you ever say that about me."

38. Sommers then stated to Judge Pekowsky:

You won't give me a hearing. You won't let me put -- You say how dare you accuse me when you will not put a witness on the stand. You've gone out of your way to prevent any - - any evidence at all. You've gone out of your way. You won't even address the fact that he [Humphrey] has lied to you and the whole thing. You won't address anything. Why don't you just be honest and say: You know what, we don't care folks, we don't care. These people matter. They're the club. They're powerful. They matter. Adam Raisbeck doesn't count. Why don't you be - Why don't just you be honest about it, damn it?

39. Judge Pekowsky responded to Sommers, "Sir, you are totally out of control."

40. Sommers replied, "I'm not -- Judge, I am basically frustrated by the fact that this is now over the top."

41. Judge Pekowsky responded:

You're not only disrupting this proceeding completely, but obviously almost everybody in this entire hallway if not the building has heard you now shout -- yell at the top of your voice. There is no reason for this, and you're out of control . . .

42. Moments later, when Sommers interrupted Judge Pekowsky, the judge told Sommers:

Quiet. No more talk. Let me talk. You are so totally out of control. I have never, since 1976 on the bench, ever seen anyone so out of control in the courtroom.

You wonder why all these bailiffs are in here, because we don't have this kind of disturbance. And when we do, it's ordinarily a defendant who is outraged about something. Should I hold you in contempt for your behavior today? It's totally out of line. Totally out of line. You're out of control.

43. Sommers then told Judge Pekowsky:

What I'm saying is, you, though, for whatever reason, because maybe you have too much of a invested stake in the whole thing, you just cannot come to terms with what has happened in this case, and you are refusing and you are stubbornly refusing to come to terms with what is going on up to this very moment . . . I take this case seriously. Adam Raisbeck is a son of Owen Raisbeck who has been one of my dearest and closest

friends, and that has a lot to do with why I've done this . . .

44. After listening to Sommers' grievances for a few more moments, Judge Pekowsky interjected:

THE COURT: Can you stop, please, Joe? Joe Sommers listen to me. I don't think I've ever done this across the bench before. I have read this file twice. This is not the first time that it appears that you're an attorney that's out of control. The record reflects that. And it clearly does today. Oh, it isn't going to reflect the amount of volume that you had or how totally out of control you were, that it required six, seven, eight bailiffs in here to see what was going on to protect the dignity of the Court which diminished entirely with your outrageous demeanor . . .

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. .
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I understand passion. I've seen many of the defense attorneys that are sitting here passionate -- passionate about what they do. They don't react in the manner that you just did. They don't -- They tend to let go. They tend to make their case. They tend to make their motion, and if they lose it, they know there's an appellate route. There is a way to get someone to review this. I seriously question whether you've got yourself together, Joe Sommers. I'm sorry. But you are not in control. I am very fearful of going forward with a jury, it's almost a certain mistrial. It is almost impossible to get you to stop talking, and there was no stopping you minutes ago when all those bailiffs -- there was no stopping you, nothing I said or could have done . . .

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. .
And I'm trying very hard, very hard to be fair under what I consider extraordinarily difficult proceedings today. Very difficult. I -- I'm just amazed at how out of control you have become. And today kind of the last nail in the coffin, so to speak, is when you tie me into the conspiracy. And you said oh, no, it's not quite a conspiracy, you have a good record, Judge, for all these years, but this morning there was an orchestration with these people here --

MR. SOMMERS: That's not what I'm saying. You can't understand what I'm saying?

THE COURT: I think I understand quite well. I'll bet you if I took a poll in here everybody would say that you are outrageously rude to me.

MR. SOMMERS: And I bet if you took a poll in here everybody would say this is a kangaroo court.

THE COURT: That's another thing that might cost you your license along the way. Couldn't you be just -- Do you realize what you just said?

45. Sommers later told Judge Pekowsky:

Now and again, so I can clarify, I have not said that there has been a conscious orchestration between you and the district attorney's office in this case before today or today. What I am saying is, though, that basically it comes down to it -- This is -- I guess I'm more accusing you of a lack of

nerve. So I guess if it sounds better, it's better. I'm accusing you of a lack of nerve. I'm accusing you of the lack of nerve to basically have the courage to come to terms with what has happened and to even enforce your own orders . . .

46. On June 24, 2004, the parties appeared before Judge Pekowsky for a pretrial motion hearing. Judge Pekowsky indicated that before he addressed motions he wanted to discuss "unfinished business" concerning Sommers' conduct at the May 24, 2004 hearing. Judge Pekowsky recalled that Sommers audibly "laughed inappropriately" at the court's May 24th decision not to impose a sanction against the prosecution for certain late affidavits; that "most of the second floor of the City County Building" was disrupted by Sommers' behavior which "greatly demeaned this court"; and that he had never "seen more contemptuous conduct in a courtroom" than what Sommers had engaged in on May 24th.

COUNT TWO

47. By engaging in loud, disorderly, contemptuous or insolent behavior during a hearing in the Raisbeck case on May 24, 2004; and by accusing Judge Pekowsky falsely - or with reckless disregard to

truth or falsity - of covering up for the District Attorney's office, having tunnel vision, having a vested interest in the State's case, lacking nerve to enforce his own rulings, and running a kangaroo court, Sommers engaged in conduct intended to disrupt a tribunal in violation of SCR 20:3.5(c); and made statements known to be false or with reckless disregard as to their truth or falsity concerning the integrity of a judge, in violation of SCR 20:8.2(a); and violated the Attorneys Oath, SCR 40.15, which states in pertinent part, "I will maintain the respect due to courts of justice and judicial officers," contrary to SCR 20:8.4(g).

Trial Publicity

48. On October 4, 2002, while the matter was in litigation before Judge Higginbotham, Sommers provided an interview to the *Isthmus*, a local Madison paper, regarding Humphrey's "unethical conduct" during the Raisbeck trial. Sommers informed the *Isthmus* that Humphrey "frustrated his efforts to obtain exculpatory evidence, primarily photos taken at the scene," and

accused Humphrey of ongoing misrepresentations "he believes is intended to wear the defense down."

49. On September 29, 2003, Sommers sent correspondence to Governor James Doyle and Chief Justice Shirley Abrahamson arguing that Raisbeck was being bound over to stand trial solely on the basis of alleged expert testimony that for all practical purposes had been declared null and void due to the expert's "flawed methodology." Sommers also asserted that ADA Humphrey kept hidden the fact that the expert had reversed his position, falsely represented to the court that all exculpatory evidence had been disclosed to the defense, withheld photographic evidence from the defense, misrepresented his second expert's opinions, and made misrepresentations in an affidavit, without consequence for his actions.

50. On December 30, 2003, Sommers forwarded correspondence to all Dane County judges concerning "serious prosecutorial misconduct" in the Raisbeck matter. Sommers asserted that Humphrey obtained a warrant on a "clearly fraudulent basis," dealt with a witness in a "flagrant, dishonest, and heavy-handed fashion," and indicated in bold that, "In that this

bench warrant application drafted by ADA Humphrey omitted informing Judge Ebert that in fact there was no trial scheduled from October 28th through October 30, 2003"

51. Fliers were disseminated to the public prior to trial, some of which were placed on cars, including the cars of potential jury members, at the Dane County Courthouse parking lot.

52. One flier entitled "Seeking Justice For the Raisbecks!," invited people to congregate at Holy Trinity Lutheran Church on Friday May 7, 2004. The flier provided information asserting unfair prosecutorial practices regarding the Raisbeck case, including the ADA's use of flawed expert testimony, that the ADA misrepresented to the court that all evidence had been turned over to Raisbeck's attorney, and the ADA lied about the existence of a photograph of the scene.

53. Another flier was entitled, "Seeking Justice in Dane County," again reciting the ADA's unfair ethical practices regarding the Raisbeck matter, including that Raisbeck was bound over for trial based upon expert testimony declared null and void, the ADA falsely represented to the court all evidence,

including photographic evidence, had been disclosed to the defense, the ADA falsely claimed a second expert's opinion was consistent with the sworn testimony of the first expert regarding tire marks, the ADA had filed a false affidavit in the case and the court failed to take any action, and the ADA obtained a fraudulent warrant and interfered on multiple occasions with subpoenas. The flier encouraged the public to visit www.thedemeterfoundation.com for additional facts and key court documents.

54. On January 12, 2005, the Dane County Clerk distributed a Notice of Hearing to Sommers, Raisbeck and the district attorney, setting the case for jury trial during the week of April 18, 2005.

55. On February, 15, 2005, two email messages were disseminated from justicedanecountystyle@yahoo.com, to several Dane County attorneys, attaching documents entitled *The Raisbeck Case Made Simple, Justice Dane County Style I, Justice Dane County Style II, Justice Dane County Style III, and Justice Dane County Style V*, which referenced the expected testimony of witnesses, the results of examinations, and the character and

credibility of the District Attorney's office in the Raisbeck case.

56. The website, www.justicedanecountystyle.com, a website which Sommers assisted with and provided information to, contained various articles and factual timelines regarding the Raisbeck trial titled, "Withholding of the Photographic Evidence," "Judge Higginbotham's Revision of the Record," "DA's Office use of a fraudulent warrant to hold a reluctant witness in the Dane County Jail," "Dane County Courts Attitude Toward Prosecutorial Misconduct/Outrageous Government Conduct," "Other Cases Involving Dane County Assistant District Attorney Paul Humphrey," "Expert Testimony - Krenz (The DA's Office 2nd "Expert")," and "Facts behind Channel 27's Coverage Correction (Speed Facts)."

57. On February 17, 2005, Deputy District Attorney Schwaemle reported to OLR Sommers' involvement in an electronic distribution of information about the Raisbeck case. Her letter described the distribution to include "law firms, attorneys, UW law school personnel, to a number of media outlets, and perhaps organizations." The letter

asserted that the attached documents were last written or edited by Sommers and contained prejudicial information that must have come from him.

58. On February 17, 2005, Attorney Paul Schwartz sent an email to the Forum for Criminal Defense Lawyers stating Sommers readily admitted he was heavily involved in drafting the pieces and working with the people who sent out these e-mails.

59. On March 18, 2005, the *Isthmus* reported that the Raisbeck case, set for trial on April 18, had a new distinction: Its own Web site, www.justicedanecostyle.com, which "offers vast amounts of information in support of the defense's contentions." The *Isthmus* stated that, "although Sommers says he's not the site's architect" he "conceded he's assisted and cooperated and provided information."

60. On April 8, 2005, Sommers deposed Mr. Robert Krenz, the State's expert, for the purpose of using his testimony at trial. Between April 8, 2005, and the trial, which began on April 18, 2005, the

transcript of Mr. Krenz's deposition was posted to the web site for Justice Dane County Style.

61. On April 15, 2005, an e-mail was sent out from Truth4U@justicedanecostyle.com, advising the recipients to review transcript pages providing evidence that the DA's office committed perjury, and knew from the beginning of the Raisbeck case that the evidence utilized to bind Raisbeck over for trial was invalid.

62. On April 18, 2005, the Raisbeck case went to trial. Raisbeck was acquitted of all charges.

COUNT THREE

63. By drafting documents and providing information for public dissemination via email, the Internet, and the *Isthmus* regarding the expected testimony of witnesses, the results of examinations, and the character and credibility of the District Attorney's office in the upcoming Raisbeck case, Sommers made extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication when he knew or

reasonably should have known that the statements would have a substantial likelihood of materially prejudicing an adjudicative proceeding, in violation of SCR 20:3.6.

WHEREFORE, the Office of Lawyer Regulation asks that Attorney Joseph L. Sommers be found in violation of the Supreme Court Rules as alleged in the three (3) counts of this Complaint, and that the Supreme Court of Wisconsin suspend Attorney Sommers' license to practice law in Wisconsin for sixty (60) days, and order such other and further relief as may be just and equitable, including an award of costs.

Dated this 17 day of November, 2006.

OFFICE OF LAWYER REGULATION



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