

# Coalition for America's Families

TO: Wisconsin Judicial Review Commission

FROM: Barbara Sellett, President, Coalition for America's Families

DATE: November 20, 2008

RE: Complaint of Coalition for America's Families, Inc. against Judge Thomas E. Lister

## Introduction

On Sunday November 2, 2008, Judge Lister stated for the [record](#), that he had conducted extensive ex parte communications dealing with substantive matters and issues on the merits of a motion before him. The Judge also stated for the record that he advised the Plaintiff to amend his motion before the court. It is simply not plausible to suggest that Judge Lister reasonably believed that no party would gain a procedural or tactical advantage as a result of that ex parte communication.

Judge Lister also stated for the record, that during the afternoon of October 31, 2008, he requested and obtained contact information for Attorney Mike Wittenwyler who he believed to be counsel for the Defendant, and that despite this fact, he failed to contact Mr. Wittenwyler until Saturday morning.

Judge Lister again stated for the record granted an interview with the [Milwaukee Journal Sentinel](#) on Saturday November 1, 2008, during which he defended his decision to issue the restraining order.

Due to the fact that there is no public record of the ex parte hearing conducted on Friday, and that discovery in the case has not been completed, the full extent to which Judge Lister violated the Judicial Code of Conduct is not yet known.

This complaint is based on the public record thus far.

It should also be noted that Judge Lister, the Plaintiff and his relatives are active members of the [Jackson County Bar](#) and the Tri County Bar Association.

- JUDGE LISTER VIOLATED SCR 60.04
- (b) A judge shall be faithful to the law and maintain professional competence in it. A judge may not be swayed by partisan interests, public clamor or fear of criticism.
- (g) A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law. A judge may not initiate, permit,

- engage in or consider ex parte communications concerning a pending or impending action or proceeding except that:
  1. A judge may initiate, permit, engage in or consider ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits if all of the following conditions are met:
    - a. The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.
    - b. When the ex parte communication may affect the substance of the action or proceeding, the judge promptly notifies all of the other parties of the substance of the ex parte communication and allows each party an opportunity to respond.
  2. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.
  3. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.
  4. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

## Summary

On October 31, 2008, Judge Thomas E. Lister accepted review and conducted an ex parte hearing of pleadings by Attorney Mark Radcliffe, a Democratic candidate for State Assembly. Radcliffe and Democratic Party of Wisconsin Attorneys Mike Maistelman and David Holbrooks, requested a temporary restraining order restraining radio stations from playing radio ads sponsored by the Coalition for America's Families (CFAF).

The ex parte hearing took place at the Jackson County courthouse after the close of business on Friday October 31, 2008, several hours after Judge Lister was notified that the request was forthcoming. There is no public record of the hearing which resulted in the issuance of [a temporary restraining order](#) against CFAF.

CFAF did not receive notice of the motion requesting a temporary restraining order, and was given no opportunity to respond to the motion. Judge Lister notified CFAF by [voice mail message](#) a full hour after the plaintiff had received and publicized the signed order on Saturday November 1, 2008. In fact, CFAF representatives first learned about the Judge's decision from a reporter for the Associated Press. Later that day, Judge Lister granted an interview with the [Milwaukee Journal Sentinel](#) during which he defended his decision to issue the restraining order.

Jackson County Circuit Judge Thomas Lister defended his emergency order, which was requested via telephone Friday by state Democratic Party attorneys representing an Assembly

candidate in a hotly contested race in western Wisconsin. Lister will hold a hearing with all parties on the case this morning. Lister said he was justified in issuing a temporary stoppage until a full court hearing could be held because state election laws might have been violated.

Lister said Saturday that he thought the emergency order was justified, considering that Election Day is so near. One of the standards for issuing such an order is whether the plaintiffs can show a likelihood of success in proving - at a full court hearing - violations of law. "The law, I think, called for it," he said of his order. He declined to respond to allegations about partisanship, saying he could not do so while the case is pending.

CFAF did not receive a copy of the pleadings from Mr. Radcliffe until 2:57 pm on Saturday November 1<sup>st</sup>.

On Sunday November 2, 2008, Judge Lister conducted a conference call hearing during which he denied CFAF's motion to vacate the TRO because 12.05 doesn't provide a civil action. It doesn't provide a private cause of action.

Judge Lister then indicated that he based his decision not on the motion as presented, but on the Plaintiff's affidavit and his belief that the plaintiff had been defamed and was therefore entitled to relief.

CFAF [appealed](#) the decision the following day and was granted relief from Judge Lister's TRO. The [court](#) said, In short, we are aware of no caselaw which permits prior restraint of speech before an adjudication on the merits of the defamatory nature of the statement at issue.

## **Chronology**

### **10/31/2008**

Circuit Court Judge Thomas Lister engages in ex parte communications with Attorney Mark Radcliffe, a Democratic candidate for Assembly, Democratic Party of Wisconsin Attorneys Mike Maistelman and David Holbrooks, Government Accountability Board Director Kevin Kennedy, and the Federal Communications Commission.

Judge Lister holds an off the record, ex parte hearing with Radcliffe and his attorneys after business hours.

Violation of SCR 60.04:

(g) 1 b. When the ex parte communication may affect the substance of the action or proceeding, the judge promptly notifies all of the other parties of the substance of the ex parte communication and allows each party an opportunity to respond.

2. A judge may obtain the advice of a disinterested expert on the law applicable to a

proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

### **11/01/2008**

Judge Lister grants a temporary restraining order to Radcliffe for Assembly restraining the Coalition for America's Families. Radcliffe notifies CFAF by voice mail message an hour after the signed order is released to the Democratic Party of Wisconsin and the press.

Judge Lister defends his actions in an interview with the [Milwaukee Journal Sentinel](#), saying he was justified in issuing a temporary stoppage until a full court hearing could be held because state election laws might have been violated, yet when asked to comment on questions regarding his potential partisan conflict of interest in the case, Lister says he cannot remark while the case is pending.

Violations of SCR 60.04:

- (b). A judge may not be swayed by partisan interests, public clamor or fear of criticism.
- (g) A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding

### **11/02/2008**

Judge Lister holds a conference call [hearing](#) to discuss CFAF's request to vacate the temporary restraining order. Lister says he was advised by the FCC that stopping the ads would constitute prior restraint and therefore be unconstitutional. He then communicated with the plaintiff who advised him he was requesting a TRO against CFAF rather than the radio stations airing the ads. Judge Lister did not indicate why the TRO was permissible against CFAF but not against the radio stations.

*Like I said before, initially the TRO request seemed to be directed at the radio stations, and I contacted the Federal Communications Commission to ask for their assistance in enlightening the court as to whether or not temporary restraining orders or injunctions against radio stations were even possible.*

*I was advised by the Federal Communications Commission that they were not and that it would be deemed a violation of the First Amendment to restrain media or radio stations from playing political ads and that the radio stations may be vested with discretion as to what they might play, but that TRO would not be appropriate.*

*When I advised Mr. Radcliffe and his counsel of that fact they indicated that was not actually what they sought to do, that they wanted a temporary restraining order against the sponsor of the ad, the Coalition. At that point in time I called Kevin Kennedy while that conference was going on and advised him that the TRO was not*

*being sought against the radio stations but was being sought against the Coalition.*

Violations of SCR 60.04

2. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

Despite the fact that both the plaintiff's motion and the Judge's [order](#) repeatedly and exclusively cite Wis. Stat 12.05, the Judge said he based his decision on his belief that CFAF made false statements about Mark Radcliffe that may be defamatory.

*That it appears from a of the pleadings that the Plaintiff is entitled to relief from false representations that are intended to affect voting at an election as per Wisconsin Statute Sec. 12.05. (Ex parte Temporary Restraining Order, Case No. 08-CV-204)*

*The entry of this ex parte temporary restraining order at the request of a private party is unprecedented given that Wis. Stat. § 12.05 is not a statute that provides for civil relief or a private cause of action. Instead, it is a statute that must be initiated and prosecuted by the State. “[T]he decision to prosecute a possible violation of a criminal statute is ordinarily within the discretion of the District Attorney or the Attorney General.” Tatur v. Solsrud, 174 Wis.2d 735, 744 (1993) (examining and rejecting civil application of Wis. Stat. § 12.05).(CFAF Motion to vacate TRO)*

**MR. WITTENWYLER:** Even if you take it on its face as being false, which we don't concede at all, but if you were to even take it on its face as being false, plaintiff's complaint as drafted is insufficient and its reliance on 12.05 is misplaced.

12.05 is enforced by the Government Accountability Board, district attorneys, the attorney generals. Mr. Maistelman and the democratic party have been trying for the last two weeks to get any of those parties to act on their 12.05 complaints, and as far as I know not a single person in the state has acted on those efforts. 12.05 doesn't provide a civil action. It doesn't provide a private cause of action. It's an action for the state to take, not Mr. Radcliffe. So even if it is false, he doesn't have a remedy under 12.05.

Mr. Halbrooks is somehow alluding to that this is some sort of defamation case. The pleading that we provided is not a defamation complaint. Wisconsin law is very clear on how one must plead a defamation case, and they have not done so. This is not a defamation case.

**THE COURT:** Mr. Wittenwyler?

**MR. WITTENWYLER:** Yes.

**THE COURT:** Let me clarify for the parties in order to save a lot of time, I think, that the court does not believe that I have any authority to issue a TRO based on 12.05. There are a number of reasons for that, but the primary reason is that 12.05 is a criminal statute. 12.05 would have to be enforced by a district attorney. Unless or until I was advised that a district attorney had decided to issue a charge under 12.05, it would be impossible for the court to conclude that there was a reasonable probability that the petitioner could succeed in obtaining a -- I'm sorry, could ultimately succeed in prevailing in the action.

Obviously, unless or until a DA brought a charge -- of course, the DA cannot bring that charge unless the DA believes that beyond a reasonable doubt he can prove the charge -- the court would have no basis for issuing a TRO based on that.

So nobody needs to discuss 12.05, because 12.05 is not considered by the court as a basis for whether I do or do not continue a TRO, and it was not considered by the court in deciding to issue the TRO in the first instance.

**MR. WITTENWYLER:** Well, Your Honor, I guess I'm confused by the two references to 12.05 in the court's order, and I would ask then what was the basis for the order being issued? What was the legal issue?

**THE COURT:** The basis for the order that the court issued was the allegation made by Mr. Radcliffe that he was being defamed, and it considered the fact that there is the additional element in a defamation action involving a political or public figure of actual malice. I recognize that because he is, in the court's opinion, a public figure that there would have to be that there would have to also be proof of actual malice as actual malice is defined.

When I looked at the hearing allegations of the defamation, looked at his sworn affidavit and his pleadings which he signed as an attorney, the court concluded that there was reasonable probability that he would succeed in the defamation action and that to not issue the TRO would give him a right without a remedy.

**MR. WITTENWYLER:** Your Honor, was there another complaint issued, a second complaint, because I see no mention of defamation anywhere in this complaint.

**THE COURT:** The court relied primarily on the affidavit --

**MR. WITTENWYLER:** But even the affidavit doesn't properly frame a defamation a complaint, sir.

**THE COURT:** Whether you think it does or not, the court concluded that a defamation action was properly before me.

**MR. WITTENWYLER:** Your Honor, it's not what I believe, it's what the statute

states.

For a defamation complaint Wisconsin law requires it to be pled in a particular manner.

**THE COURT:** All right. Just so everybody understands, I wanted to address 12.05.

**MR. WITTENWYLER:** So Your Honor, just so I can I just be clear then, you're suggesting that the complaint and the order –

**THE COURT:** Mr. Wittenwyler, what I'm telling you is that I read an affidavit in support of the motion for the ex parte order which provided in the second paragraph an allegation that the defendant -- I'm sorry, Mr. Radcliffe was being falsely accused of supporting a plan to double taxes, et cetera, et cetera, et cetera, and that those allegations were false and that they not only allege they violated Wisconsin Statute 12.05 but that they were false representations, and he then in his complaint again referenced the fact that these references were false.

**THE COURT:** And that they were, as he alleges in paragraph No. 5, made with actual malice. If he makes a representation that they are false statements and are made with actual malice, the court deems that sufficient to allege defamation.

Now, I did indicate to Mr. Radcliffe that he may wish to amend his pleadings insofar as they were seeking restraining orders against radio stations, because the court would not, could not and should not issue such a restraining order. Whether there is any amended pleading that's been filed on Saturday morning, I don't know. I haven't seen them.

Violation of SCR 60.04:

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