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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KIRK AND AMY HENRY,
 Plaintiffs,
vs.
FREDRICK RIZZOLO, aka
RICK RIZZOLO, *et al.*,
 Defendants.

Case No. 2:08-cv-00635-PMP-GWF

Order
**Motion to Reveal Pro Se Litigant
Rick Rizzolo’s Ghost Writer (#184)**

This matter came before the Court on Plaintiffs’ Motion to Reveal Pro Se Litigant Rick Rizzolo’s Ghost Writer (Dkt. #184), filed September 3, 2009; Defendant Rick Rizzolo’s Response to Plaintiffs’ Motion to Reveal (Dkt. #190), filed September 9, 2009; and Plaintiffs’ Reply in Support of Motion to Reveal (Dkt. #193), filed September 14, 2009. The Court conducted a hearing in this matter on October 7, 2009, took the matter under advisement and now issues the following written decision.

BACKGROUND AND DISCUSSION

Plaintiffs’ Motion alleges that Defendant Rick Rizzolo has filed motions and other pleadings authored by a non-attorney to which Mr. Rizzolo signed his name as a *pro se* defendant. Through their investigation, Plaintiffs identified the probable author of Mr. Rizzolo’s pleadings as James Kimsey, who is not a licensed attorney-at-law. Plaintiffs requested, however, that Mr. Rizzolo be required to reveal the identity of the person who had allegedly authored the pleadings he filed with the Court. Plaintiff also requested that Mr. Rizzolo be sanctioned for the use of a ghost writer while claiming to appear *pro se*. In his written response, which appeared to have also been authored by the ghostwriter, Mr. Rizzolo would neither “confirm nor deny” the use of a ghost writer, but argued that any services provided to Mr. Rizzolo by James E. Kimsey have been provided to attorneys in other matters,

1 including Plaintiffs' counsel. Plaintiffs' counsel state to their knowledge, they have never employed
2 Mr. Kimsey in any fashion.

3 At the hearing on October 7th, Defendant Rizzolo appeared with new defense counsel, Ken
4 Frizzell. Mr. Rizzolo's counsel acknowledged that Defendant Rick Rizzolo had used the services of
5 Mr. James E. Kimsey to prepare and file pleadings with the Court. Defendant's counsel argued,
6 however, that Mr. Kimsey's actions did not constitute the unauthorized practice of law or a fraud upon
7 the Court, but instead amounted to no more than permissible clerical actions, similar to the work
8 traditionally performed by a paralegal or legal consulting firm. In any event, Mr. Frizzell advised the
9 Court that he is now representing Mr. Rizzolo and indicated that Mr. Kimsey will no longer be involved
10 in the lawsuit.

11 The line distinguishing clerical service from the practice of law is crossed when the person
12 makes a judgment regarding "the legal sufficiency of instruments" in the "drafting of any instrument,
13 simple or complex." *Pioneer Title Ins. & Trust Co. V. State Bar of Nevada*, 326 P.2d 408, 411 (Nev.
14 1958). *See also In re Discipline of Lerner*, 197 P.3d 1067, 1078 (Nev. 2008) (holding the practice of
15 law "includes activities calling for the exercise of trained judgment in applying the general body of
16 legal knowledge to the specific problem of a client and recommending a course of action"). In this
17 instance, Mr. Rizzolo relied on a non-attorney, James E. Kimsey, to prepare legal pleadings which were
18 then filed with the Court. In doing so, Defendant Rick Rizzolo allowed a non-attorney to determine the
19 legal sufficiency of the instruments filed with the Court and relied on Mr. Kimsey's judgment in
20 applying legal knowledge to the specific issues pending in this action. As a result, the Court finds that
21 Mr. Kimsey engaged in the unauthorized practice of law on behalf of Defendant Rick Rizzolo.

22 Where a person has engaged in the unauthorized practice of law and filed pleadings in an action,
23 the first appropriate remedy is to strike the improperly filed pleadings. *See Hamilton v. Ill. Central*
24 *Railroad Co.*, 2008 WL 78784 at *1-*2 (S.D. Ill., Jan. 7, 2008) (striking affidavits submitted through
25 the unauthorized practice of law); *Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. New*
26 *Jersey*, 2007 WL 4547501 (D.N.J., Dec. 17, 2007) (striking Plaintiff's motion for sanctions as its filing
27 by a person without a license to practice law constituted unauthorized practice of law). In this case, the
28 District Judge has already denied the motions that were prepared for Mr. Rizzolo by Mr. Kimsey.

1 Striking those pleadings is therefore something of a formality. Consistent with striking the improperly
2 filed pleadings, the party should also be prohibited from further using the services of the non-attorney
3 on pain of more severe sanctions being imposed should he continue to do so.

4 Plaintiffs' counsel also request that the Court sanction Mr. Rizzolo by ordering him to pay the
5 attorney's fees and costs incurred by Plaintiffs in responding to the improper and frivolous motions and
6 pleadings prepared on his behalf by Mr. Kimsey. Plaintiffs argue that the improper filings are frivolous
7 and contain offensive and improper allegations against Plaintiffs' counsel and the District Judge. The
8 subject motions were heard and decided by District Judge Pro on September 15, 2009. Plaintiffs did
9 not request monetary sanctions in their written oppositions or responses to any of Mr. Rizzolo's
10 improperly filed motions and pleadings. Nor did they request an award of such sanctions at the time of
11 the hearing. *Pro se* litigants are generally held to a lower standard than parties who are represented by
12 counsel who are presumed to understand the procedural and substantive law. It is possible that Judge
13 Pro would have been receptive to a request for sanctions on the motions filed by Mr. Rizzolo, if the
14 Court had known that Mr. Rizzolo was using the services of a non-attorney to prepare his pleadings.
15 Judge Pro, however, was not presented any requests for sanctions in regard to those motions. It is not
16 appropriate for this Court to award sanctions on the motions that were previously decided by Judge Pro
17 and as to which no request for sanctions were made. Plaintiffs are not precluded by this order from
18 moving for sanctions in regard to the motions previously decided by Judge Pro. The District Judge will
19 determine whether to hear any such motions himself or refer them to the undersigned magistrate judge.

20 The Court finds, however, that some sanctions against Mr. Rizzolo are appropriate in regard to
21 the instant Motion (Dkt. #184). First, Mr. Rizzolo appears to have allowed Mr. Kimsey to respond to
22 Plaintiffs' instant motion on his behalf after Plaintiffs had called his attention to the impropriety of
23 permitting Mr. Kimsey to act as his ghostwriter. Second, Mr. Rizzolo's (Mr. Kimsey's) response to the
24 motion was evasive as to whether Mr. Kimsey was, in fact, acting as the ghostwriter. Defendant's
25 response was also frivolous and untrue in regard to Mr. Kimsey's assertion that he performed work in
26 the past for Plaintiffs' lawyers. The Court will therefore award Plaintiffs their reasonable attorneys fees
27 and costs in replying to Mr. Rizzolo's Response to Plaintiffs' Motion to Reveal (Dkt. #190).

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1 During the October 7, 2009 hearing, Plaintiffs argued that Mr. Kimsey has a felony record and
2 that Mr. Rizzolo may have violated the terms of his supervised release by having contact with Mr.
3 Kimsey. Reportedly, Mr. Kimsey's civil rights have been restored. Mr. Rizzolo's new counsel also
4 informed the Court that Mr. Rizzolo's probation officer is already aware of his contact with Mr.
5 Kimsey. Because the Court has no independent knowledge of Mr. Kimsey's current legal status or
6 whether Mr. Rizzolo's contact with him is known to Mr. Rizzolo's probation officer, the Court will
7 order that a copy of the hearing transcript and this order be sent to the United States Parole and
8 Probation Department for whatever action, if any, they may deem appropriate.¹ Accordingly,

9 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Reveal Pro Se Litigant Rick Rizzolo's
10 Ghost Writer (Dkt. #184) is **granted in part** and **denied in part** as follows:

- 11 1. Defendant Rick Rizzolo is hereby prohibited from further using the services of James
12 Kimsey in connection with his defense of this action.
- 13 2. The Court hereby strikes the following motions or pleadings that were filed by Mr.
14 Kimsey on behalf of Defendant Rick Rizzolo:
 - 15 a. Motion to Dismiss Amended Complaint, or in the alternative for Summary Judgment or
16 to Certify Questions of Law to the Nevada Supreme Court (Dkt. #139);
 - 17 b. Ex Parte Motion for Hearing on an Order to Shorten Time (Dkt. #140);
 - 18 c. Motion for Hearing on Motion to Stay Discovery and Discovery Orders Pending
19 Decision on Dispositive Motions or Certification of Questions of Law to the Supreme
20 Court of the State of Nevada and Objection to the Court's Order (#151) Granting
21 Plaintiffs' Motion for Enlargement of Time by Defendant Fredrick Rizzolo (Dkt. #153);
 - 22 d. Motion for Hearing re: Notice of Plaintiffs' Failure to Join Indispensable Parties (Dkt.
23 #160);

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27 ¹The Court will issue a separate order regarding Plaintiffs' request that an order to show
28 cause be issued to Mr. Kimsey as to why he should not be held in contempt for the unlawful
practice of law.

- 1 e. Motion to Dismiss Amended Complaint, or in the alternative, for Summary Judgment or
2 to Certify Questions of Law to the Nevada Supreme Court (Dkt. #161);
3 f. Motion to Stay Discovery Pending Decision on Dispositive Motions or Certification of
4 Questions of Law (Dkt. #162);
5 g. Motion to Disqualify the Law Firms of Campbell and Williams and Hunterton and
6 Associates as counsel for Plaintiffs (Dkt. #170); and
7 h. Objection to Court's Order (#167) on Ex Parte Motion to Extend Time (Dkt. #172).
8 3. Plaintiffs' request for monetary sanctions on the foregoing motions and pleadings listed
9 in paragraph 2 is denied without prejudice.

10 4. Plaintiffs are awarded their reasonable attorneys fees and costs incurred in preparing
11 their reply to Defendant's opposition to their Motion (Dkt. #184).

12 a. Counsel for Plaintiffs shall, no later than 15 days from entry of this order, serve
13 and file a memorandum, supported by the affidavit of counsel, establishing the amount of attorney's
14 fees and costs incurred in the motion addressed in this order. The memorandum shall provide a
15 reasonable itemization and description of the work performed, identify the attorney(s) or other staff
16 member(s) performing the work, the customary fee of the attorney(s) or staff member(s) for such work,
17 and the experience, reputation and ability of the attorney performing the work. The attorney's affidavit
18 shall authenticate the information contained in the memorandum, provide a statement that the bill has
19 been reviewed and edited, and a statement that the fees and costs charged are reasonable.

20 b. Counsel for Defendant shall have 15 days from service of the memorandum of
21 costs and attorney's fees in which to file a responsive memorandum addressing the reasonableness of
22 the costs and fees sought, and any equitable considerations deemed appropriate for the court to consider
23 in determining the amount of costs and fees which should be awarded.

24 c. Counsel for Plaintiffs shall have 11 days from service of the responsive
25 memorandum in which to file a reply.

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1 **IT IS FURTHER ORDERED** that the Clerk of the Court shall provide the United States
2 Parole and Probation Office for the District of Nevada with a copy of the this order and the transcript of
3 the October 7, 2009 hearing.

4 DATED this 23rd day of October, 2009.

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7 **GEORGE FOLEY, JR.**
8 **United States Magistrate Judge**

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