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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 CERTIFYING FACTS TO DISTRICT JUDGE
PURSUANT TO 28 U.S.C. § 636(E)(6); AND**

**ORDER TO JAMES E. KIMSEY TO SHOW CAUSE WHY HE
SHOULD NOT BE HELD IN CRIMINAL CONTEMPT**

Pursuant to 28 U.S.C. § 636(e)(6), in regard to an act that constitutes a criminal contempt occurring outside the presence of the magistrate judge, the magistrate judge is required to certify the facts to the district judge and may serve or cause to be served upon any person whose behavior is brought into question an order, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, requiring such person to appear before the district judge upon a day certain to show cause why that person should not be adjudged by reason of the facts so certified.

Rule 42(a) (1) of the Federal Rules of Criminal Procedure provides that any person who commits criminal contempt may be punished for that contempt after prosecution on notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must (A) state the time and place of the trial, (B) allow the defendant a reasonable time to prepare a defense, and (C) state the essential facts constituting the charged criminal contempt and describe it as such. Rule 42(a)(2) also provides that the Court must request that the contempt

1 be prosecuted by an attorney for the government, unless the interest of justice requires the
2 appointment of another attorney. If the government declines the request, the court must appoint
3 another attorney to prosecute the contempt.

4 **1. Certification of Facts to District Judge:**

5 The undersigned magistrate judge hereby certifies the following facts supporting a finding
6 that James Kimsey is in contempt of court for engaging in the unlawful practice of law in this case:

7 Defendant Frederick (“Rick”) Rizzolo has been representing himself in this lawsuit since
8 January 22, 2009 when his previous attorneys, Patti, Sgro & Lewis were permitted to withdraw.
9 *See Order (#55)*, filed January 7, 2009 (granting Mr. Rizzolo’s counsels’ motion to withdraw, but
10 requiring them to represent him through the hearing on January 22, 2009). On September 3, 2009,
11 Plaintiffs Kirk and Amy Henry filed their Motion to Reveal Pro Se Litigant Rick Rizzolo’s Ghost
12 Writer; Request for Verification Pursuant to FRCP 11; Alternatively For Contempt Sanctions
13 (#184). Plaintiffs alleged in their motion that after the withdrawal of his previous attorneys,
14 Defendant Rick Rizzolo filed several motions and other pleadings in this action that were authored
15 by a non-attorney. Through investigation, Plaintiffs identified James E. Kimsey as the probable
16 author of Mr. Rizzolo’s pleadings. *See Motion (#184), Affidavit of Plaintiffs’ Counsel, Jack F.*
17 *Degree*, pages 2-5; and *Exhibit “4”, Declaration of Dave Groover*. Plaintiffs also attached
18 records showing that Mr. Kimsey was convicted in the Second Judicial District Court of the State
19 of Nevada in and for the County of Washoe in 1987 for the unlawful practice of law and other
20 related charges. *Id., Exhibit “12.”* Plaintiffs requested that Mr. Rizzolo be required to reveal the
21 identity of the person who had allegedly authored the pleadings he filed with the Court.

22 In his written response, Mr. Rizzolo would neither “confirm nor deny” the use of a ghost
23 writer, but argued that the type of services provided by Mr. Kimsey have also been provided to
24 Plaintiffs’ attorneys in other matters. (Dkt. #190).¹ At the hearing on October 7, 2009, Defendant
25 Rizzolo appeared with his new counsel, Kenneth Frizzell, Esq. Mr. Rizzolo’s counsel

26
27 ¹This response may, itself, have been drafted by Mr. Kimsey. Plaintiffs’ counsel denied the
28 allegation that they have employed Mr. Kimsey in the past.

1 acknowledged that Defendant Rick Rizzolo had used the services of James E. Kimsey to prepare
2 and file eight pleadings (Dkt. #s 139-40, 153, 160-62, 170, 172) with the Court. Defendant's
3 counsel argued, however, that Mr. Kimsey's actions did not constitute the unauthorized practice of
4 law but, instead, amounted to no more than permissible clerical actions similar to the work
5 traditionally performed by a paralegal or legal consulting firm. Mr. Frizzell advised the Court that
6 he is now representing Mr. Rizzolo and that Mr. Kimsey will no longer be involved in the lawsuit.

7 The Local Rules of Practice of the United States District Court for the District of Nevada
8 require that in order to be eligible to practice before the District Court, an attorney must be
9 admitted to practice before the Supreme Court of Nevada or, if the attorney is appearing *pro hac*
10 *vice*, that he or she be a member in good standing and eligible to practice before the bar of any
11 jurisdiction in the United States. See LR 10-1 and LR 10-2. Nevada Revised Statute (NRS) 7.285
12 makes it unlawful for a person to practice law in Nevada if the person is not an active member of
13 the State Bar of Nevada or otherwise authorized to practice law in Nevada. A person who violates
14 this statute is guilty of a misdemeanor for a first offense within the immediately preceding seven
15 years. Federal courts have the inherent power to punish for contempt those who engage in the
16 unauthorized practice of law before the court. *United States v. Johnson*, 327 F.3d 554, 559-61 (7th
17 Cir. 2003); *United States v. Marthaler*, 571 F.2d 1104 (9th Cir. 1078) (affirming judgment of
18 criminal contempt for unlawful practice of law).²

19 The line distinguishing clerical service from the practice of law is crossed when the person
20 makes a judgment regarding "the legal sufficiency of instruments" in the "drafting of any
21 instrument, simple or complex." *Pioneer Title Ins. & Trust Co. v. State Bar of Nevada*, 326 P.2d
22 408, 411 (Nev. 1958). See also *In re Discipline of Lerner*, 197 P.3d 1067, 1078 (Nev. 2008)
23 (holding that the practice of law "includes activities calling for the exercise of trained judgment in
24 applying the general body of legal knowledge to the specific problem of a client and

25
26 ²Based on the representations made by Defendant Rick Rizzolo's counsel at the October 7,
27 2009 hearing, it does not appear that Mr. Kimsey is continuing to engage in the unauthorized
28 practice of law in this action. Therefore, imposition of civil contempt sanctions are not applicable
in this case.

1 recommending a course of action”). Based on the information provided to the Court in support of
2 Plaintiffs’ Motion to Reveal Pro Se Litigant Rick Rizzolo’s Ghost Writer; Request for Verification
3 Pursuant to FRCP 11; Alternatively For Contempt Sanctions (#184) and Defendant Rick Rizzolo’s
4 response thereto, it appears that Mr. Kimsey’s actions as a non-attorney in preparing and filing
5 legal instruments constitutes the unauthorized practice of law on behalf of Defendant Rick
6 Rizzolo.

7 **2. Appointment of Prosecutor:**

8 Pursuant to Rule 42(a)(2), the Court hereby requests that the contempt be prosecuted by the
9 United States Attorney for the District of Nevada, or his designated Assistant United States
10 Attorney. The Court further directs that this Order be served upon the Office of the United States
11 Attorney and that he inform the Court in writing on or before **December 15, 2009** whether he
12 accepts or declines the Court’s request to prosecute the contempt in this matter.

13 **3. Counsel To Provide the Court With the Current and/or Last Known Address**
14 **of James E. Kimsey for Purposes of the United States Marshal Serving this**
Order.

15 Counsel for the Plaintiffs Kirk and Amy Henry and for Defendant Frederick (“Rick”)
16 Rizzolo are hereby ordered, **within seven (7) days of the filing of this Order**, to provide the
17 Court with the current and/or last known address of James E. Kimsey so that this Order to Show
18 Cause may be served upon Mr. Kimsey by the United States Marshal. Accordingly,

19 **ORDER TO SHOW CAUSE**

20 It appearing from the records and files in this case that James E. Kimsey has engaged in the
21 unlawful practice of law in the above entitled action; therefore,


22 **IT IS ORDERED** that James E. Kimsey appear before the Honorable Philip M. Pro,
23 United States District Judge at 333 Las Vegas Blvd. South, Las Vegas, Nevada 89101, on **Friday,**
24 **January 29, 2010, at 9:30 a.m., in Courtroom 7C** or as soon as counsel can be heard, to show
25 cause, if any, why he should not be found guilty of and punished for contempt of court for the
26 unlawful practice of law in the above entitled action.

27 **IT IS FURTHER ORDERED** that the Clerk of Court shall serve a copy of this Order
28 upon the Office of the United States Attorney.

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IT IS FURTHER ORDERED that the United States Marshal shall serve this Order to Show Cause on James E. Kimsey.

DATED this 30th day of November, 2008.



GEORGE FOLEY, JR.
United States Magistrate Judge