

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)
)
RICHARD LEE ZIMMERMAN,) **Case No. 08-29582 HRT**
)
Debtor.) **Chapter 13**
)
_____)

**ORDER RE: NOTICE OF NON-BAR ASSISTANCE OF COUNSEL
OF RIGHT AND MOTION FOR ORDER TO COMPEL**

This matter comes before the Court on Debtor’s *Notice of Non-Bar Assistance of Counsel of Right* (docket #30) [the “Notice”] and Debtor’s *Motion for Order to Compel* (docket #31) [the “Motion”]. The Notice and Motion were filed with the Court on January 12, 2009. Both raise the same issue. Debtor asserts a right to be represented by an unlicensed lay advisor to act in the role of his legal counsel both in this Court and in dealings with the office of the Chapter 13 Trustee. The Trustee objected to the Motion and the Court set both matters down to be heard during the confirmation hearing on the Debtor’s *Chapter 13 Plan* (docket #17) scheduled for February 12, 2009. At that initial hearing, the Debtor said he desired to present evidence in support of his Notice and the Motion. Accordingly, the Court continued these matters for an evidentiary hearing on February 20, 2009. The Court heard evidence and argument from the Trustee and from the Debtor. The United States Trustee appeared at that evidentiary hearing for “monitoring” purposes only and took no position on the question before the Court at that time.

On February 27, 2009, subsequent to the hearing in this matter, the Court entered its *Order Granting Motion to Dismiss* (docket #52) [the “Dismissal Order”]. The Dismissal Order grants the Chapter 13 Trustee’s motion to dismiss Mr. Zimmerman’s chapter 13 case because his debts exceed the § 109(e) eligibility limits. The Dismissal Order did not take effect until ten (10) days from the date it was entered to allow Mr. Zimmerman to convert his case to a chapter under which he is qualified for relief. Mr. Zimmerman elected to appeal the Dismissal Order and did not convert his case to a different chapter. Therefore, the current status of the case is that the Dismissal Order has become effective and is on appeal to the Bankruptcy Appellate Panel.

Notwithstanding the dismissal of the case, the Court will address the issues raised in the Notice and the Motion. If the Court’s Dismissal Order is not affirmed on appeal or if Mr. Zimmerman should file a subsequent case, all of these matters would still need to be resolved.

I. NOTICE TO THE ATTORNEY GENERAL

As an initial matter, the Court construes the Notice as a constitutional challenge to a federal statute. Title 28 U.S.C. § 1654 states that

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 1654. The term “counsel” that appears in § 1654 has consistently been interpreted as referring to licensed legal counsel and not the type of lay advisor on legal matters that Debtor seeks to use in this case. Debtor relies on the First, Sixth, Seventh and Ninth Amendments to the United States Constitution in support of his claimed right to be represented by an unlicensed legal advisor in these proceedings.¹ If this Court were to accept Debtor’s constitutional arguments and rule in his favor on those grounds, that would constitute a finding that a statute of the United States is unconstitutional. Consequently, the Court finds that, under FED. R. CIV. P. 5.1 and 28 U.S.C. § 2403, the Court must give notice to the Attorney General of the United States. As required, the Attorney General will have an opportunity to intervene in these proceedings to assert the interests of the United States before this Court enters a final judgment with respect to the Debtor’s Notice. Therefore, concurrently with the entry of this Order, the Court will give the statutorily required notice to the Attorney General. In compliance with Rule 5.1(c), this Order shall be interlocutory and no final judgment shall enter until the expiration of sixty (60) days within which the Attorney General may intervene in this matter. Nonetheless, in the interim, this Order shall control with respect to all proceedings in this Court.

II. DISCUSSION

It is important, first, to make clear what this matter is *not* about. It is not about Mr. Zimmerman’s choice to seek advice from whatever source or whomever he may wish. The quality of the advice Mr. Zimmerman may receive affects his personal interests and may lead to desirable or undesirable results. It is a choice Mr. Zimmerman is free to make and it is his prerogative to follow whatever advice he decides is appropriate. This Court need not concern itself with how he makes that choice or with whether he benefits or suffers as a result.²

¹ Debtor does not refer to 28 U.S.C. § 1654 in his Notice, so it is unclear if he is cognizant of the existence of a statute that stands in direct contradiction of the rights he claims.

² This is not to say that the individual providing that advice may not be engaged in the unauthorized practice of law. “[T]he practice of law by a person who is not a licensed attorney in good standing with the State Bar” constitutes the unauthorized practice of law. *People v. Shell* 148 P.3d 162, 170 (Colo. 2006). The Colorado Supreme Court defines the practice of law “as acting ‘in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling [sic], advising and assisting him in connection with these rights and duties’” *Denver Bar Ass’n v. Public Utilities Commission*, 391 P.2d 467, 471 (Colo. 1964). Any question of whether persons providing out of court advice and assistance to

(continued...)

What this case *is* about is whether or not Mr. Zimmerman has the right to be represented in proceedings before this Court by an unlicensed lay individual. Title 28 U.S.C. § 1654 does not grant him that right. Section 1654 allows an individual to appear “personally or by counsel;” it does not grant a right to be represented by an unlicensed lay representative. Nor is the Court persuaded by Mr. Zimmerman’s argument that authority exists in the U.S. Constitution that should compel this Court, contrary to the Court’s reading of § 1654, to allow him to be represented in this Court by a lay individual.

A. The Notice

On page 3 of his Notice, Mr. Zimmerman asserts

Debtor and Counsel are enforcing all **Debtor’s** rights; among which is my **right to counsel**; counsel being **my choice** of a party to assist and counsel me in this matter, and to **speak freely** on my behalf, under my direction, and to **act as my agent** for the purposes of this action; appearing with me and speaking for me at my discretion, as a matter of my rights secured and protected by the Constitution for the united [sic] States of America.

Notice of Non-Bar Assistance of Counsel of Right (docket #130) at 3 (emphasis in original).³
The Notice goes on to say

A state cannot, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the **right of individuals** and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.

Id. (emphasis in original). As noted in the margin, the Notice is a virtually verbatim copy of a document circulating on the internet. Typical of the form of argument employed in the Notice is the following:

²(...continued)

Mr. Zimmerman run afoul of the law with respect to unauthorized practice is not within the scope of the issues raised by the Notice.

³ The Debtor’s Notice, in substantial part, is a copy of a document circulating on the internet. One such copy is located at a website called PoliceCrimes.com at <http://www.policecrime.com/forum/viewtopic.php?t=3285>.

It was held that a state may not pass **statutes** prohibiting the unauthorized practice of law or interfere with the **right** to freedom of **speech**, secured in the first [sic] Amendment. ***United Mine Workers v. Illinois Bar Association*, 389 U.S. 217.**

Id. at 5 (emphasis in original). On its face, the assertion is extraordinary. Upon the Court's examination of the cited authority, the Court finds that the cited case contains no such holding. In *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, "the Union had employed a licensed attorney on a salary basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission." 389 U.S. 217, 218, 88 S. Ct. 353, 354 (1967).

The [Illinois] trial court found . . . that employment of an attorney by the association for this purpose did constitute unauthorized practice and permanently enjoined the Union from "(e)mploying attorneys on salary or retainer basis to represent its members with respect to Workmen's Compensation claims and any and all other claims which they may have under the statutes and laws of Illinois."

Id. The trial court was affirmed by the Illinois Supreme Court, 219 N.E. 2d 503 (Ill. 1966), but the United States Supreme Court vacated the judgment below. It held that the practice of the union in hiring a licensed attorney to prosecute workmen's compensation claims on behalf of its members could not be prohibited as an unauthorized practice of law because such prohibition was "not needed to protect the State's interest in high standards of legal ethics." *Id.* at 225, 357. Nothing in the Supreme Court's opinion even remotely questions the interest of the state in regulating the unauthorized practice of law. Indeed, the previous quote from the opinion specifically recognizes the interest of the state to regulate legal practice.

Had the Notice been filed by a licensed attorney, such attorney would be subject to disciplinary action for failure to abide by the ethical standards of the profession. Certainly, falsely citing an authority in support of a proposition contrary to the authority's actual holding would, at minimum, constitute a violation of an attorney's duty of candor to the tribunal. COLO. R. PROF. CONDUCT 3.3(a)(1). By the same token a licensed attorney violates his duty of candor by his failure to acknowledge overwhelming authority that directly contradicts his position. Rule 3.3(a)(2).

As noted above, 28 U.S.C. § 1654 controls the resolution of this matter. It provides that an individual may appear on his own, without legal counsel, to prosecute or defend a matter in which he is a party. Alternatively, it provides that he may appear through legal counsel.

The Notice fails to acknowledge 28 U.S.C. § 1654. Also notably absent from the Notice is any reference to any court anywhere that has ever held that either state or federal governments

are prohibited by the U.S. Constitution from regulating who may appear in a representative capacity in the state or federal courts. Mr. Zimmerman's Notice explains that lack of legal authority as follows: "[i]t has only been the rulings of the monopolistic American jurisprudence system that has continuously denied individuals the **RIGHT** of **"ASSISTANCE OF COUNSEL"** to the American Public." *Notice of Non-Bar Assistance of Counsel of Right* (docket #130) at 3 (emphasis in original).

B. Right to Counsel Under the Sixth Amendment

Probably the centerpiece of the argument contained in the Notice is that "counsel" as it is used in the Sixth Amendment⁴ and in constitutional jurisprudence is not at all restricted to qualified and licensed legal counsel but, in fact, may include absolutely anyone that an individual wants to have act as his representative in court. It is a remarkable assertion and is quite without legal support.

The very first matter the Court must note is that this is not a Sixth Amendment case. The right to counsel appears nowhere in the U.S. Constitution other than the Sixth Amendment and the right is specifically limited to criminal cases. The Sixth Amendment is inapplicable to this case because bankruptcy is a civil matter. Mr. Zimmerman's right to counsel appears in 28 U.S.C. § 1654. Nonetheless, if courts applying the Sixth Amendment have interpreted the right to assistance of counsel in criminal cases to embrace a right to be represented by an unlicensed lay individual, then that would be powerful evidence that § 1654's right to appear through counsel in a federal court must also include the right to be represented by a lay person. But, the Sixth Amendment jurisprudence does not provide that support.

The federal courts have consistently rejected attempts at third-party lay representation under the Sixth Amendment based upon the type of constitutional argument that appears in the Notice. In *United States v. Taylor*, a criminal defendant appealed his conviction on numerous grounds. Among them was his claim that his Sixth Amendment right to counsel guaranteed him the right to be represented in court by lay counsel. Part of Taylor's argument, identical to Mr. Zimmerman's argument here, was that the word "counsel" as used in the Sixth Amendment refers to the more generic use of the term and is not restricted to licensed legal counsel. The *Taylor* court notes that "Taylor's historical and linguistic analysis has been repudiated by every court that has considered the issue of whether the right to the assistance of 'counsel' includes the right to representation by persons unlicensed to practice law." 569 F.2d 448, 451 (7th Cir.

⁴ Mr. Zimmerman's Notice also makes reference to the First, Seventh and Ninth Amendments as supporting his right to lay representation. But beyond referencing those amendments in passing, he makes no argument with respect to them. Consequently, the Court will make no attempt to divine how they might support Mr. Zimmerman's claim.

1978), *cert. denied*, 435 U.S. 952, 98 S. Ct. 1581 (1978) (citing *United States v. Grismore*, 546 F.2d 844, 847 (10th Cir. 1976); *United States v. Whitesel*, 543 F.2d 1176, 1177-81 (6th Cir. 1976); *United States v. Kelley*, 539 F.2d 1199, 1201-03 (9th Cir. 1976); *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451, 477-78 (N.D. Tex. 1975)). The circuit court went on to observe that “[i]ndeed, the question is so well settled by now that further discussion seems to us fruitless.” *Id.*

In the case of *United States v. Grismore*, the Tenth Circuit Court of Appeals has also rejected the notion that the Sixth Amendment’s reference to the right of assistance of counsel is not restricted to licensed legal counsel. The court said that “[t]he Constitution does not provide the right of representation by a lay person. ‘Counsel’ as referred to in the Sixth Amendment does not include a lay person, rather ‘counsel’ refers to a person authorized to the practice of law.” 546 F.2d 844, 847 (10th Cir. 1976) (citing *United States v. Cooper*, 493 F.2d 473 (5th Cir. 1974), *cert. denied*, 419 U.S. 859, 95 S. Ct. 108 (1974); *Guajardo v. Luna*, 432 F.2d 1324 (5th Cir. 1970); *Harrison v. United States*, 387 F.2d 203 (D.C. Cir. 1967), *rev’d on other grounds*, 392 U.S. 219, 88 S. Ct. 2008 (1968); *McKinzie v. Ellis*, 287 F.2d 549 (5th Cir. 1961)).

C. The Right to Counsel Under 28 U.S.C. § 1654

The right to appear through counsel in courts of the United States has been the law of the land since the Judiciary Act of 1789 and is now embodied in 28 U.S.C. § 1654.⁵ That right is applicable to Mr. Zimmerman’s civil bankruptcy proceeding. But, claims of a right to lay representation under § 1654 have been no more successful than such claims in criminal cases under the Sixth Amendment.

The Court of Appeals for the Second Circuit has addressed the question. It said

We have interpreted 28 U.S.C. § 1654, which governs appearances in federal court, to allow two types of representation: “that by an attorney admitted to the practice of law by a governmental regulatory body and that by a person representing himself.” The statute does not permit “unlicensed laymen to represent anyone else other than themselves.”

Lattanzio v. COMTA, 481 F.3d 137, 139 (2nd Cir. 2007) (quoting *Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1308 (2d Cir. 1991)).

⁵ Title 28 U.S.C.A. § 1654 was “formerly codified as § 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, and later as 28 U.S.C.A. § 394.” *Turner v. Am. Bar Ass’n*, 407 F. Supp. 451, 475 (N.D. Tex. 1975) (“Since the beginnings of our nation there has been statutory authority to enforce the rights recognized in the Sixth Amendment.”).

This Court has not found a better or more comprehensive examination of the issues raised in Mr. Zimmerman's Notice than an opinion authored by Hon. Reynaldo G. Garza, then a District Judge in the Southern District of Texas and later a Circuit Judge on the Fifth Circuit Court of Appeals. He was designated to determine the rights of litigants to be represented by lay individuals in lawsuits filed in federal courts in Texas, Pennsylvania, Indiana, Minnesota, Alabama and Wisconsin. His opinion in those combined cases is found at *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451 (N.D. Tex. 1975) *aff'd Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976) *aff'd Pilla v. Am. Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976). Judge Garza's opinion examines the development of the bifurcated system of solicitors and barristers as it existed in England's common law system and the translation of that system to the fledgling American colonies as the background to the framers understanding of the word "counsel" as it is used in the Sixth Amendment. After his exhaustive examination of the arguments asserted in those cases, which are virtually identical to the arguments Mr. Zimmerman has adopted, Judge Garza concluded that from his

analysis of the history of the practice of law, both in England and in the United States, this Court concludes that there is insubstantial historical support for the Plaintiffs' contention that they have a right to have an unlicensed layman assist them under the guise of the Sixth Amendment. This Court further concludes that 28 U.S.C.A. § 1654, which was enacted to enforce the Sixth Amendment's guarantees to right to counsel, only allows for two types of representation: that by an attorney admitted to the practice of law by a governmental regulatory body and that by a person representing himself. The statute does not allow for unlicensed laymen to represent anyone else other than themselves.

Id. at 476-77.

D. Conduct of Mr. Zimmerman's Bankruptcy Case

The brief history of the case at bar provides the most eloquent illustration of why Mr. Zimmerman's request for lay representation cannot be granted. In the two hearings before this Court on this matter, the Court permitted Mr. Zimmerman's "advisor" to advise him from a seat located in the well of the courtroom. Numerous times during questioning of Mr. Zimmerman by the Chapter 13 Trustee's attorney, after a question was asked of Mr. Zimmerman, his advisor "whispered" loudly to Mr. Zimmerman instructing him to "object" or to "take the Fifth."⁶ Even

⁶ Mr. Zimmerman characterized this as receiving guidance and advice. But that characterization misses the mark. Mr. Zimmerman cannot plausibly claim he is receiving anything other than legal representation from this "advisor" when he is advised to invoke his

(continued...)

though Mr. Zimmerman's advisor was clearly instructed that he was not permitted to speak for Mr. Zimmerman, more than once he attempted to directly address the Court on Mr. Zimmerman's behalf. The recording of those hearings contains his clearly audible prompts while Mr. Zimmerman was on the witness stand and his direct comments to the Court.

Mr. Zimmerman stated that he was very dissatisfied with the attorney who represented him in a previous bankruptcy case. If Mr. Zimmerman had a bad prior experience with his legal counsel, the Court can certainly appreciate his frustration. But a prior bad experience cannot justify the use of an unlicensed lay advisor.⁷

In view of the events at those prior hearings, the Court wants to insure that Mr. Zimmerman is fully aware of the Court's expectations of him in the conduct of further proceedings before this Court. If Mr. Zimmerman should desire to have anyone accompany him to court for future proceedings, unless that person is a licensed attorney admitted to the bar of the district court, that person shall be seated in the gallery of the courtroom behind the bar and remain silent during court proceedings. While Mr. Zimmerman is representing himself *pro se* during court proceedings, he shall not communicate with or seek advice from anyone else in the courtroom. The Court will not delay or adjourn its proceedings to allow Mr. Zimmerman to seek advice from any party who is not his licensed legal counsel. Any party who interrupts or otherwise causes a disruption in this Court's proceedings will not be allowed to remain in the courtroom.

None of the above rules are unique to Mr. Zimmerman's case. They are universally adhered to by all litigants before this Court and observers of proceedings before this Court. Nonetheless, under the circumstances, it seems prudent to insure that all parties with any connection to this matter be fully informed with respect to what this Court expects of them.

E. The Motion to Compel

Mr. Zimmerman claims the right to be represented by a lay advisor in dealings with the Chapter 13 Trustee. Although his Motion deals exclusively with the Chapter 13 Trustee, the

⁶(...continued)
rights under the Fifth Amendment because he may be in danger of implicating himself in criminal activity.

⁷ The Court also notes that attorney licensing authorities have complaint procedures in place where a client may seek redress with respect to an attorney who has not complied with his obligations and, in more extreme situations, the law provides relief through malpractice actions. An individual who chooses to be advised by an unlicensed lay individual has no such recourse if he should come to believe he received bad advice from his lay advisor.

issues raised are equally applicable to Mr. Zimmerman's dealings with the United States Trustee or any other case trustee appointed under the Bankruptcy Code.

This Court will not compel a trustee under any bankruptcy chapter to permit lay representation of Mr. Zimmerman at a meeting of creditors. Such a lay advisor is a stranger to Mr. Zimmerman's bankruptcy proceedings – not a party or a party's legal representative. Any trustee is entirely within his or her rights to decline to allow an unlicensed lay representative to speak for the Debtor or to even accompany the Debtor during the trustee's questioning at the § 341 meeting of creditors. The meeting of creditors is a meeting required under the Bankruptcy Code and, as such, it is very much a part of the Debtor's bankruptcy case. The Court's conclusions with respect to Mr. Zimmerman's right to have an unlicensed individual represent him in this Court apply with equal force to his claimed right to be represented by an unlicensed individual at a meeting of creditors.

Moreover, any advice given to Mr. Zimmerman during a meeting of creditors is just as much an unauthorized practice of law as if it were rendered during court proceedings. Just as this Court will not allow such unauthorized practice to take place in the courtroom, it will not compel a trustee to allow it to take place at a meeting of creditors.

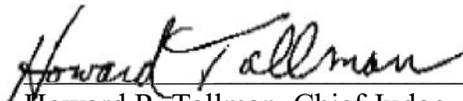
In accordance with the above discussion, it is

ORDERED that the relief sought by the Debtor in his *Notice of Non-Bar Assistance of Counsel of Right* (docket #30) is DENIED; it is further

ORDERED that Debtor's *Motion for Order to Compel* (docket #31) is DENIED.

Dated this 10th day of March, 2009.

BY THE COURT:


Howard R. Tallman, Chief Judge
United States Bankruptcy Court