

JAN 09 2008

4TH DISTRICT
9:00 AM

**IN THE FOURTH JUDICIAL DISTRICT COURT,
UTAH COUNTY, STATE OF UTAH**

GREG KERSTEN, an individual, GREG
KERSTEN d/b/a EQUINE SERVICES,
EQUINE SERVICES, INC., a Utah
corporation, and JENNIFER KERSTEN,

Plaintiffs,

vs.

EQUINE ASSISTED GROWTH AND
LEARNING ASSOCIATION, INC., a Utah
non-profit corporation, LYNN THOMAS, TIM
JOB, DAVID CURRIE, LISA ROSKENS,
MICKEY DIGIACOMO, AMY BLOSSOM,
BARBARA SCOTT, DAVID TIDMARSH
and RHONDA SMITH,

Defendants.

RULING

Date: December 28, 2007

Case No.: 070401941

Judge: Gary D. Stott

The matter before the Court is Plaintiff's Motion to Disqualify Holland & Hart because of alleged conflicts of interests between the defendants' law firm and the plaintiff. Argument of counsel was heard on December 19, 2007

In 1998, the plaintiff, Greg Kersten, went to an attorney, Matthew Wirthlin, at Prince, Yeates & Geldzahler, to determine if he should sell some of his ideas to a company offering to buy them. The attorney looked over the plaintiff's ideas on using horses as therapy for troubled youth suffering from emotional and social dysfunction. The lawyer allegedly consulted other attorneys in the firm

in connection with his representation of the plaintiff. After examination of Plaintiff's ideas and consultation with the other attorneys, Attorney Wirthlin advised him not to sell the ideas because they were worth marketing himself. He told Plaintiff that the ideas were increasing in value and if Plaintiff were to sell them, then he would lose control over them. Based on these beliefs, the lawyer and Plaintiff drafted articles of organization and bylaws for a company that would further solidify and market the plaintiff's ideas. Plaintiff's company, called Equine Services, Inc. (ESI), was formed on December 27, 1999. It had been operating, however, as "Equine Services" ever since 1990.

From 1990 to 1999, Plaintiff had developed and produced training material and instructions for his company, including training manuals, specific exercise techniques, and particular names for those exercises. They all related to what he termed, "Equine Assisted Psychotherapy" (EAP). Plaintiff claims EAP is a unique modality and system in this new and developing field of psychotherapy, which he pioneered.

Plaintiff partnered with Defendant Thomas, who became a part of ESI at its incorporation. At that time, Attorney Wirthlin represented both Plaintiff and Defendant Thomas. Defendant Thomas assisted Plaintiff in training others in EAP, using the substantial body of unique materials for EAP that Plaintiff and ESI developed over the previous years of study, testing, experience and training.

Before ESI, Plaintiff and Defendant Thomas formed another company – a nonprofit organization – called "Equine Growth and Learning Association" (EAGALA). Together, they retained Attorney Wirthlin to draft incorporation documents. EAGALA was formed on July 7,

1999. Plaintiff and Defendant Thomas decided to use Plaintiff's training materials and instructions for the nonprofit organization. Plaintiff and Defendant Thomas agreed with each other that Plaintiff would maintain property rights in the ideas that he brought into the nonprofit organization. After six years, on November 16, 2005, the nonprofit organization terminated Plaintiff.

To this day, the nonprofit organization continues to use Plaintiff's training materials: the same manuals, exercises, and names for exercises. Plaintiff argues that he owns the training materials and information and that the nonprofit is violating those rights by continuing to use the training materials, exercises, and their names. Defendants Thomas and EAGALA argue the training materials, exercises and ideas are no longer Plaintiff's because they have been substantially modified during the past several years. Plaintiff contacted Attorney Wirthlin at Holland & Hart, which now employs him, to request documents he had prepared in an earlier representation. He also informed Attorney Wirthlin that a dispute had arisen regarding EAGALA and that the documents may be needed for litigation.

As a result of the disagreements, Plaintiff sued Defendants Thomas and EAGALA. The defendants retained Holland & Hart, the firm where Attorney Wirthlin now works.

The matter before the Court is Plaintiff's Motion to Disqualify the defendants' law firm, Holland & Hart, because the information Attorney Wirthlin gained from the prior representation of Plaintiff allegedly creates a conflict of interest of loyalty in violation of Utah Rules of Professional Conduct Rules 1.7 and 1.9. The conflict would be imputed to Holland & Hart under Utah Rules of Professional Conduct Rule 1.10.

Rule 1.7 prohibits representation if there is a concurrent conflict of interest that poses a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibilities to a former client. Rule 1.9 prohibits a lawyer from representing a client in a matter substantially the same or similar to a matter in which the lawyer previously represented a former client if the clients' interests are materially adverse to each other.

Demonstrating how substantially similar the matters are between the matters of this representation and the matters of prior representations with Attorney Wirthlin, Plaintiff claims that at trial, Attorney Wirthlin would have to testify that Plaintiff never owned the original ideas (in contradiction to his previous representations) or that he does not now own them. If he testifies in either of these ways, then he is testifying against Plaintiff, his former client, while being employed at the firm representing the defendants – a clear conflict of loyalty. If, however, he testifies that Plaintiff owned the ideas and they have not changed, then he would be testifying adversely to his firm's current client.

The defendants argue the issues of this lawsuit are not substantially related to the previous representation, and thus the representation does not violate Rule 1.9, because business advice and assistance in forming businesses do not share similarities to claims of intellectual property infringement and conversion. Defendants claim that Attorney Wirthlin has no confidential information that would materially disadvantage the plaintiff and limit his firm's representation of the defendants in violation of Rule 1.7. They also claim that the lawyer is not a necessary witness because he will not have to testify against the plaintiff. If, however, he were needed as a witness,

then Rule 3.7 would apply, allowing Attorney Wirthlin to testify at trial because there is no violation of either Rule 1.7 or 1.9.

The primary issue in this case is whether EAGALA has developed Plaintiff's Equine Assisted Psychotherapy ideas, exercises and training to the point that the practice and ideas have substantially changed from what they were in 1999. If they have changed substantially, then Plaintiff will not have any rights to them whether or not they were his intellectual property in 1999 and whether or not he contractually bound EAGALA to surrender them upon his termination. This change, though, must be proven.

Witnesses are necessary to prove what the ideas were and what they are now. The Court could then determine if there has been a substantial change. Apparently, there are only a few people who could testify regarding these ideas. They are the plaintiff, Defendant Thomas, and Attorney Matthew Wirthlin. The only reason Attorney Wirthlin could testify is because he has personal knowledge of what the 1999 ideas were, which he gained from his representation of the plaintiff. At that time, the plaintiff asked him to scrutinize his ideas and render an opinion as to whether he should sell them. If Attorney Wirthlin testifies, then whatever he says will be materially adverse to either his firm's current client or his former client. If he testifies to the effect that there has been no substantial change, then he disadvantages his firm's current client. If he testifies to the effect that there have been substantial changes, then he disadvantages his former client with knowledge that he gained from prior representation of that client.

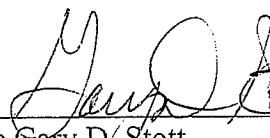
The dilemma Attorney Wirthlin would be in if asked to testify demonstrates how

substantially similar these two matters are. Because his testimony has the potential to either make his firm's current client win over his former client, or a former client win over the current client, the representation of the defendants is either materially adverse to their interests or to the plaintiff's. If Attorney Wirthlin and his firm were disqualified, then he could be called to testify without any conflict of loyalty and help establish whether there has been any substantial change in the ideas.

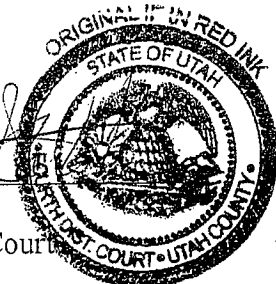
After considering the possible scenarios and the Rules of Professional Conduct, the Court finds that Holland & Hart are disqualified from representing defendants because the matters are substantially similar and materially adverse to the interests of the clients in violation of Rule 1.7. Further, the representation of the defendants runs a significant risk that it may be materially limited by Attorney Wirthlin's responsibilities to Plaintiff, a former client, in violation of Rule 1.9. These violations are imputed to the defendants' whole firm under Rule 1.10. Rule 3.7 would require disqualification if Attorney Wirthlin testifies because his testimony would violate Rules 1.7 and 1.9.

Counsel for the plaintiff shall prepare the appropriate order and submit it for the Court's signature.

Dated this 7 day of January, 2008.



Judge Gary D. Stott
Fourth Judicial District Court



A certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 070401941 by the method and on the date specified.

METHOD	NAME
Mail	LOIS A BAAR Attorney DEF 60 E SOUTH TEMPLE ST 2000 SALT LAKE CITY, UT 84111-3508
Mail	EVAN A SCHMUTZ Attorney PLA 4844 N 300 W STE 300 PROVO UT 84604

Dated this 2 day of January, 2008

Munich
Deputy Clerk

