

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS**

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| GRETCHEN WILKINSON, <i>et. al.</i> |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case No. 2015 L 980 |
| v. |) | |
| |) | Hon. Judge Kenneth L. Popejoy |
| INSTITUTE IN BASIC LIFE PRINCIPLES, INC. |) | |
| and WILLIAM W. GOTHARD, JR., |) | Courtroom 2020 |
| |) | |
| Defendants. |) | |

**DEFENDANT’S, WILLIAM W. GOTHARD, JR., AMENDED MOTION TO
DISQUALIFY DAVID GIBBS, III AND THE GIBBS LAW FIRM, P.A., AND FOR
SANCTIONS FOR BLATANT VIOLATIONS OF THE ILLINOIS RULES OF
PROFESSIONAL CONDUCT**

Defendant, William W. Gothard, Jr., (“GOTHARD”), by his attorneys, Gaffney & Gaffney, P.C., for his Amended Motion to Disqualify David Gibbs, III and the Gibbs Law Firm, P.A., and for sanctions against David Gibbs and the Gibbs Law Firm, P.A. for blatant violations of the Illinois Rules of Professional Conduct, states:

INTRODUCTION

David Gibbs, III has committed clear violations of Rule 1.9 and 4.2 of the Illinois Rules of Professional Conduct, (“IRPC”), prohibiting conflicts of interest and by communicating with a person Gibbs knew to be represented. He thereby obtained information from GOTHARD, including, but not limited to, the Affidavit attached as Exhibit A to Plaintiff’s First Amended Complaint, as the fruit of those IRPC violations. As a result, Defendant, GOTHARD, moves to disqualify David Gibbs, III, and the Gibbs Law Firm, P.A., and obtain such sanctions and other relief as this Court deems just, including a prohibition of Plaintiffs’ use of any information or documents received in violation of IRPC 1.9 and 4.2.

FACTUAL SUMMARY

Attached hereto as Exhibit A is the Affidavit of Defendant, William W. Gothard, Jr., along with exhibits appended thereto. Attached as Exhibit B is the Affidavit of Roger Blair. Those allegations are incorporated herein by reference, which makes a complete recitation of the facts here redundant. In summary, the Affidavits reveal that Defendant GOTHARD was represented by attorney Kevin Moore for most of the months of April through November, 2015. Mr. Gibbs was aware of the fact that GOTHARD was represented by Mr. Moore, and on at least two occasions, had telephone communications with Mr. Moore, wherein he essentially asked attorney Moore to join with him as "allies" in bringing claims against the Institute's Board. Knowing that Mr. Gothard was represented, Mr. Gibbs engaged in repeated and ongoing communications with Mr. Gothard from May, 2015 through December, 2015. At no time did Mr. Gibbs ever state to Mr. Gothard that he could not communicate with Mr. Gothard because he was represented by attorney Moore, and at no time did Mr. Gibbs ever ask Mr. Moore for his consent to communicate directly with Mr. Gothard.

Mr. Gothard reasonably and in good faith believed that Mr. Gibbs was assisting him in his endeavor to return to his position as Board President and Trustee. Their correspondence and communications ran from mid-May, 2015 through December, 2015. During this time, Mr. Gibbs obtained from Mr. Gothard extensive information about the women who are now filing claims against both the Institute and Mr. Gothard, as well as information about the Institute's Board of Directors, the Institute's assets and its activities. Gibbs led Gothard to believe they were working together and communicated regularly on issues related to the pending litigation.

APPLICABLE LAW

Rule 1.9 of the Illinois Rules of Professional Conduct – Conflict of Interest – Duties to Former Clients, provides as follows:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - 1. whose interests are materially adverse to that person; and
 - 2. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - 1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - 2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 4.2 of the IRPC: Communication with Person Represented by Counsel, provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

I. THE VIOLATION OF IRPC 4.2

The above prohibitions are clear and unambiguous, and the affidavits of William Gothard and Roger Blair establish multiple violations of the IRPC. Even if these rules were not clear and unambiguous on their face, Illinois case law further clarifies how Mr. Gibbs violated his ethical duties. Precedent establishes that our Code of Professional Conduct, part of our Supreme Court

Rules, have the force of law and embody the public policy of our State. *In re: Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 40. The Illinois Supreme Court Rules should be followed; they are not suggestions, nor are they aspirational. *Applebaum v. Rush University Medical Center*, 231 Ill.2d 429, 447, 326 Ill.Dec. 45, 899 N.E.2d 262 (2008).

According to the IRPC 4.2 comments, "This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation. Further, "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule." Finally, "A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury." The lawyer's knowledge that the person is in-fact represented in the matter being discussed, "may be inferred from the circumstances." "Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

The comments to Rule 4.2 also reference Rule 4.3 in terms of dealing with unrepresented persons. This could be significant if Mr. Gibbs asserts that he was not aware attorney Moore represented Mr. Gothard. IRPC 4.3 provides that in dealing with unrepresented persons, if a person "misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Further, "The lawyer shall not give legal advice to an

unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." The Committee's comments to Rule 4.3 further clarify that it is the lawyer's obligation to clearly communicate with third persons. It is the professional obligation of the lawyer to "identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." Further, when there is the possibility that there is a conflict between the lawyer's interests and the interest of an unrepresented person, "the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel." It is the obligation of the lawyer to clearly communicate with such a person that he is not representing that person. IRPC 4.3, comments.

II. THE VIOLATION OF IRPC 1.9

In Illinois, an attorney/client relationship can be created at the initial interview between a prospective client and an attorney, and the passing along of confidential information during such an interview may be sufficient to disqualify the attorney from representing the opposing party in related litigation. *Nuccio v. Chicago Commodities, Inc.*, 257 Ill.App.3d 437, 440, 195 Ill.Dec. 670, 628 N.E.2d 1134 (1993) (citing *Herbes v. Graham*, 180 Ill.App.3d 692, 129 Ill.Dec. 480, 536 N.E.2d 164 (1989)). The relationship can come into being during the initial contact between the lay person and the lawyer and hinges upon "the client's belief that he is consulting a lawyer in that capacity and his manifested intent to seek professional legal advice." *In re: Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 31. Here, there is clearly a substantial relationship between David Gibbs, III's communications with GOTHARD and the pending litigation. It is obvious from the affidavits that GOTTHARD's understanding was that prior to the filing of the Amended Complaint, he reasonably believed attorney Gibbs was assisting him in resolving concerns and

issues now raised by the Plaintiffs in this litigation, as well as assisting him in his desire to return to the Board of Trustees of the Defendant, Institute. Once a substantial relationship is found between the prior and present representations, it is irrefutably presumed that confidential information was disclosed during the earlier representation. *Herbes v. Graham*, 180 Ill.App.3d 692, 700 (1989). There can be no doubt here that GOTHARD provided Mr. Gibbs with confidential information.

An example of disqualifying communication occurred in the case of *King v. King*, 52 Ill.App.3d 749, 10 Ill.Dec. 592, 367 N.E.2d 1358 (1977), when the husband visited the law office of an attorney to discuss his marital problems and the possibility of divorce. He consulted with the attorney for less than a half hour and did not retain him. *Id.* at 751. Although the trial court allowed King to later represent the wife, the Appellate court found that an attorney/client relationship existed between the attorney and the husband and that it was improper for the attorney to then undertake representation of the wife. *Id.* at 753. The Appellate court reversed an award of attorneys' fees to King, holding that the Rule against representing conflicting interest applies even though the attorney acquired no knowledge which could operate to the client's disadvantage and, "it makes no difference that the client offered no compensation and the attorney neither made nor expected to make any charge for his services." *Id.* at 753. That Court further held that the motives or intentions of the attorney are irrelevant in making the determination of disqualification and voiding his request for attorneys' fees. *Id.* at 753.

The Second District case of *Herbes v. Graham*, 180 Ill.App.3d 692, 699 (2nd Dist. 1989) follows *King* and further adds that the case law under the Federal ADA Model Rules is applicable in Illinois. The *Herbes* court instructs that an analysis of federal cases show that an attorney-client relationship need not be explicit or expressed and is not dependent on the amount of time the client spends with the attorney, the payment of fees or execution of a contract, the consent of the

attorney, or the actual employment of the attorney. *Id.*, citing *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978); *Hughes v. Paine, Webber, Jackson & Curtis, Inc.*, 565 F. Supp. 663, 667 n.10, 669 (N.D. Ill. 1983). Rather, the relationship can come into being during the initial contact between the layperson and the professional and appears to hinge on “the client’s belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.” *Id.* Like *King*, the federal cases focus on the client’s viewpoint rather than that of the attorney. *Id.* Thus, if the client consults the attorney for the evident purpose of securing legal advice, an attorney-client relationship will probably be found regardless of the attorney’s intent or the fact that a further relationship did not develop as a result of the primary consultation. *Id.*

Here, the nature and extent of the communications between Mr. Gothard and Mr. Gibbs substantially exceeded that of the lawyer in *King*. Mr. Gibbs obtained extensive information from Mr. Gothard and communicated with him for a lengthy period of time, even when he knew that Mr. Gothard was represented by attorney Kevin Moore. This highly unethical conduct constitutes blatant violations of the IRPC.

III. A VIOLATION OF RULE 1.9(A) REQUIRES DISQUALIFICATION OF DAVID GIBBS, III AND HIS LAW FIRM

Not only is David Gibbs, III disqualified, but so are all lawyers in his law firm. See, 1.10(a) of the Illinois Rules of Professional Conduct. (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm”).

IV. PLAINTIFFS SHOULD BE BARRED FROM USING ANY INFORMATION ACQUIRED FROM DEFENDANT, GOTHARD, IN VIOLATION OF THE IRPC RULES, INCLUDING, BUT NOT LIMITED TO, THE AFFIDAVIT ATTACHED AS EXHIBIT A TO PLAINTIFF'S FIRST AMENDED COMPLAINT

When violations occur, such as a violation of Rule 1.9, the benefits obtained or gained through the violation are void *ab initio*. *In re: Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 40 (court deemed fee agreement between attorney and client void *ab initio* arising out of Rule 1.9). In this case, there should be a blanket order prohibiting Plaintiffs from using any information Gibbs acquired from GOTHARD in violation of the IRPC rules. That would include, but not be limited to, the affidavit attached to Plaintiff's First Amended Complaint as Exhibit A. That affidavit, as well as the other information Gibbs acquired through GOTHARD, is the fruit of a poisonous ethical tree. *Also see, Bruske v. Arnold*, 44 Ill.2d 132, 135 (1969) (evidence deemed inadmissible that was improperly obtained after suit was filed and in violation of Illinois Ethical Canon 9, with the Court stating that "rules, to be effective, must carry an appropriate sanction; otherwise, the orderly process of a lawsuit is left to the mercy of the individuals' sense of justice," with the Court then deeming the appropriate sanction as the exclusion from evidence of the statement improperly obtained in violation of the ethical rules of a lawyer's conduct); *Also see, Mondelli v. Checker Taxi Co.*, 197 Ill.App.3d 258, 267 (1st Dist. 1990) (following *Bruske*, and stating that "statements elicited in violation of these rules of professional responsibility and discovery are treated as illegally obtained evidence, and their admission will be barred at trial as a sanction.").

WHEREFORE, Defendant, William W. Gothard, Jr., seeks the following relief:

- A. An order disqualifying David Gibbs, III in this cause;
- B. An order disqualifying the Gibbs Law Firm, P.A., and all attorneys within the Gibbs Law Firm, P.A. in this cause;
- C. An order striking the Affidavit of William W. Gothard, Jr., attached as Exhibit A to

Plaintiffs' Amended Complaint, and ordering that the same cannot be used for any litigation purpose; and

- D. An order prohibiting Plaintiffs from using any information or documents obtained by David Gibbs, III from Defendant, William W. Gothard, Jr., including, but not limited to, any statements, correspondence, emails, communications, records, reports, or other documents received from Defendant, Gothard;
- E. Such other relief this Court deems just, including an award of attorneys' fees and expenses.

Respectfully submitted,

/s/ Glenn R. Gaffney
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NOTICE OF FILING / CERTIFICATE OF SERVICE

Please take notice that pursuant to DuPage County Local Court Rule 5.11, this document was filed electronically with the Clerk of the Circuit Court, DuPage County, Illinois, reviewed and accepted with transmission completed on February 17, 2016. Pursuant to Local Court Rule 5.12(d), this document was served by E-Service via email to the following persons on February 17, 2016:

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