

1 Case Number 10 CV 002

2  
3  
4  
5  
6 IN THE JUSTICE COURT OF AUSTIN TOWNSHIP  
7 COUNTY OF LANDER, STATE OF NEVADA  
8

9 RUBEN GALLEGOS  
10 and  
11 VIRGINIA (SISSIE) GALLEGOS,  
12 Plaintiffs

13  
14 vs.

MOTION TO DISQUALIFY ATTORNEY

15 MICHAEL MARKING  
16 and  
17 ELIZABETH FLEMING,  
18 Respondents  
19

20  
21  
22 COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Respondents, and  
23 hereby submit their MOTION TO DISQUALIFY ATTORNEY.  
24

25 WHEREAS

26 (1) Hy Forgeron asks to represent Plaintiffs in this matter (see *Hy Forgeron seeks to*

27            *represent Plaintiffs in this matter, page 4); and*

28            (2) Plaintiffs had engaged Forgeron for advice prior to litigation (see *Previous engagement*  
29            *of Forgeron by Plaintiffs, page 4); and*

30            (3) This Court previously relied on *ex parte* advice from Forgeron, using Forgeron as an  
31            advisor in this matter (see *Hy Forgeron acted as ex parte advisor to this Court in this*  
32            *matter, page 5); and*

33            (4) Judge Dory acted as mediator in this case (see *Judge Dory acted as mediator in this*  
34            *case., page 6); and*

35            (5) Hy Forgeron has already committed multiple violations of ethical rules in this case  
36            (see *Hy Forgeron has already committed multiple violations of ethics rules in this*  
37            *case, page 7); and*

38            (6) Permitting Forgeron to represent Plaintiffs in this matter would result in further  
39            violations (see *Representation by Forgeron will result in further violations, page 11);*  
40            and

41            (7) Denying Forgeron's request to represent Plaintiffs would result in no prejudice to  
42            Plaintiffs (see *No prejudice to Plaintiffs will result from granting this motion, page 11);*  
43            and

44  
45            THEREFORE Respondents hereby pray to this Court for an Order, disallowing Hy Forgeron's  
46            representation of Plaintiffs in this matter.

47  
48            IN SUPPORT of this Motion, Appellants have attached their MEMORANDUM OF POINTS AND  
49            AUTHORITIES and their EXHIBIT A.

53 DATED this Sunday, 24 February 2013.

54  
55  
56  
57 Michael Marking, Respondent  
58 e-mail: *marking@tatanka.com*  
59

60  
61  
62  
63 Elizabeth Fleming, Respondent  
64 e-mail: *ryuuz@tatanka.com*  
65  
66  
67

68 TABLE OF CONTENTS

69	MEMORANDUM OF POINTS AND AUTHORITIES	<i>Page 4</i>
70	<i>Hy Forgeron seeks to represent Plaintiffs in this matter</i>	<i>Page 4</i>
71	<i>Previous engagement of Forgeron by Plaintiffs</i>	<i>Page 4</i>
72	<i>Hy Forgeron acted as ex parte advisor to this Court in this matter</i>	<i>Page 5</i>
73	<i>Judge Dory acted as mediator in this case.</i>	<i>Page 6</i>
74	<i>Hy Forgeron has already committed multiple violations of ethics rules in this case</i>	<i>Page 7</i>
75	<i>Representation by Forgeron will result in further violations</i>	<i>Page 11</i>
76	<i>No prejudice to Plaintiffs will result from granting this motion</i>	<i>Page 11</i>
77		<i>Page</i>
78	<i>Conclusion</i>	<i>Page 12</i>
	EXHIBIT A: DECLARATION OF MICHAEL MARKING	<i>Page 13</i>
	CERTIFICATE OF SERVICE	<i>Page 15</i>

MEMORANDUM OF POINTS AND AUTHORITIES

79  
80  
81 **1. Hy Forgeron seeks to represent Plaintiffs in this matter.** In the 7 February 2013  
82 hearing, Forgeron described his intended role as “assisting” Plaintiffs. However, inasmuch as  
83 he intends to speak on their behalf in this Court, he will represent them, by the plain meaning  
84 of the word.

85 **2.** Moreover, he intends to be their attorney in this activity. Consistent with RPC 1.2,  
86 Nevada allows unbundled legal services by attorneys to clients (*Formal Opinion No. 34*, State  
87 Bar of Nevada, Standing Committee on Ethics and Professional Responsibility, as revised  
88 2009.06.24) as long as the assistance and identity of the attorney are disclosed. However, in  
89 relying on RPC 1.2 as permitting authority, Nevada thus would implicitly characterize  
90 Forgeron's limited engagement as “representation”, in the language of the Rule.

91 **3.** In other words, albeit for limited purposes, Forgeron would be Plaintiffs' attorney.  
92

93 **4. Previous engagement of Forgeron by Plaintiffs.** Prior to initiating this litigation,  
94 Plaintiffs engaged Hy Forgeron for advice on how to proceed. “Rubin [*sic*] Gallegos: Your  
95 Honor, I went on this case right here and I sat down with the District Attorney [Hy Forgeron]  
96 for one and one half hours. The District Attorney [Hy Forgeron] has the contract, signed by  
97 them, he's got a copy of it, and he sat down and studied this whole thing, and his advice was  
98 to file in this Court [...]” (TRANSCRIPT, pg. 60) “Rubin [*sic*] Gallegos: What the District  
99 Attorney told me is for us to file on the principle [*sic*] and a court would add the interest. That  
100 is exactly what he told me [...] That's what the District Attorney told me I checked with him  
101 on things [...] And that was from a lawyer.” (TRANSCRIPT, pg. 99) “Hifordrun [Hy Forgeron]  
102 [...] told me [Ruben Gallegos] that I could get paid. He told me that I could file under this  
103 court right here.” (TRANSCRIPT, pg.180)

104 **5.** We note that, despite Forgeron's attempt to give the impression that his decision to

105 represent Plaintiffs was *ad hoc*, made just that morning, the engagement apparently preceded  
106 that. Ruben Gallegos had been telling people at least the previous day that he would have an  
107 attorney for the hearing (*Declaration of Michael Marking*, EXHIBIT A), contradicting the image  
108 which Forgeron sought to convey.

109  
110 **6. Hy Forgeron acted as ex parte advisor to this Court in this matter.** At the  
111 September 2010 hearing: “Judge Joe Dory: Okay. October 12<sup>th</sup> 2010 we will hold the debtor’s  
112 inquest and what I’m going to try to do is see what we need in the meantime, get a hold of  
113 Highfordrun [Hy Forgeron], I need to work hand in hand with him since he’s the county  
114 attorney and he knows procedure, to tell me what to do [...]” (Transcript, pg. 168)

115 **7.** Respondents, knowing that Forgeron had already acted as attorney to Plaintiffs in this  
116 matter, and seeing the blatant conflict of interest, assumed that Forgeron was being called in  
117 to act as a special master. They filed their MOTION TO DISQUALIFY MASTER (2010.10.25).

118 **8.** At the next hearing, Dory allowed the motion, but missed the main point that using  
119 Forgeron constituted a conflict of interest, feeling it was acceptable to use him for advice in  
120 general.

121 Judge Joe Dory: “We do have a last minute motion to disqualify master. And what  
122 that motion is, to summarize it, it’s a motion not to have Hifordrun (spelling?) [Hy  
123 Forgeron] act as a master in this case [...]

124 “And I will grant that motion. I also agree that Hifordrun [Hy Forgeron] should  
125 not be a master in this case. That’s my job. And I think that I should try to do this the best  
126 I can. However, that being said, I’ll grant this motion. He will not be a master in this case,  
127 but I do want to state on the record that Hifordrun [Hy Forgeron] will, as always, act as  
128 my legal advisor in cases, which he always does. If I have a legal question, he is the  
129 attorney that I go to.”

127 (Transcript, pg. 179, emphasis added)

128 **9.** Considering that many of the cases coming before Dory involved the State as a party  
129 (ranging from traffic tickets to other misdemeanors), that was an amazing confession by Dory.

130 **10.** There were, and still ought to be, notes in the case file indicating that Dory consulted

131 with Forgeron in this matter. ( *Declaration of Michael Marking*, EXHIBIT A)

132 **11.** Finally, Forgeron himself remembers discussing the case with Dory, according to  
133 Forgeron's testimony in the 7 February 2013 hearing, although, three years later, he admitted  
134 he could recall not much specific.

135 **12.** Thus all three sources agree, although there are not many details. However, in the  
136 ensuing, the details do no matter. Regardless, Dory's contemporaneous statements, in the  
137 transcript, and the notes in the case file, should be given more weight than a recollection  
138 dimmed by the passing of so much time.

139  
140 **13. Judge Dory acted as mediator in this case.** During the first hearing, Joe Dory  
141 invited the parties to use him as a mediator.

142 Justice Dory: You know there's another option that we can do here and I think it  
143 may be a good option for both of you guys, because it seems like, to me its [*sic*] seems  
144 like your [*sic*] getting a bit closer to being more friendly about things. And I think that  
145 you could possibly with me helping mediate, you know, I am willing to do whatever I can  
146 do, but maybe we could possibly just work out a settlement agreement right now or over  
147 the next few days or whatever that states on the record exactly what amounts are owed,  
148 who owes who what, how the payments are going to be worked out, how this is all going  
149 to work and what the penalties will be for if it doesn't work like its [*sic*] suppose [*sic*] to.  
150 We could renegotiate basically all the stuff we have right here, right now and onto the all  
151 new figures and dates and times and I would be a witness to it and it would be all pretty  
152 much black and white and everybody would know what everybody is going to do and  
153 maybe we could get passed [*sic*] this whole thing that way. That's something I would like  
154 to through out there.

150 (TRANSCRIPT, pg. 50)

151  
152 **14.** Subsequently, in the same hearing and later in subsequent hearings, he acted more as  
153 mediator than as judge.

157 Justice Dory: Well if we're, if we're just negotiating and settling I don't think we  
158 have an jurisdictional [limits], if this is just a settlement hearing.

159 Elizabeth Fleming: Are we doing a settlement conference?

160 Justice Dory: I said if it is we're kind of, yea, if we're doing that we can do  
161 anything we want to.

162 (TRANSCRIPT, pg. 53)

163 Justice Dory: No, if we settle it we can come up with a brand new, we'll have  
164 brand new paperwork right here. You agree you owe him that much money, we'll put on  
165 the record, we'll set up, you know, on the record the whole, we'll just lay it out in black  
166 and white and we'll start fresh, it'll just, all this paperwork will be just put in the file,  
167 we'll start out fresh with a new agreement between you two guys. A settlement agreement  
168 that agrees you owe him so much money, you're going to try to pay so much a month,  
169 what happens if you don't what the interest rates are going to be. Let's just figure that, put  
170 it all down, put it on the record, type it up, we'll have [a] transcript made, everybody can  
171 have a copy, and we have a fresh start to go forward with.

172 (TRANSCRIPT, pg. 59)

173 **15.** Not all of the mediation process was on the record. Twice, immediately after the first  
174 two hearings, Respondents spoke with Joe Dory in his chambers, and explained their  
175 positions. Although Joe Dory was widely known as willing to conduct *ex parte* discussions of  
176 substantive matters of pending cases, no such discussions were held with Respondents. Only  
177 the negotiating positions were discussed. (*Declaration of Michael Marking*, EXHIBIT A) As is  
178 typical in mediations, the mediator is expected to keep such positions confidential, and to use  
179 his judgement and private knowledge of the positions of the parties to effect a settlement.

180 **16.** It is perhaps important to note that subsequent to Dory's revelation that he used  
181 Forgeron as an advisor, Respondents no longer trusted Dory as a mediator. The mediation  
182 discussions in Dory's chambers took place prior to the third hearing.

183 **17. Hy Forgeron has already committed multiple violations of ethics rules in this**  
184 **case.** For starters, Forgeron has violated NRPC 8.4(f): "It is professional misconduct for a  
185 lawyer to [...] [k]nowingly assist a judge or judicial officer in conduct that is a violation of

183 applicable rules of judicial conduct or other law.” Dory said, “I do want to state on the record  
184 that [...] [Hy Forgeron] will, as always, act as my legal advisor in cases, which he always  
185 does.” (TRANSCRIPT, pg. 179) Such conversations are unequivocal violations of NCJC 2.9,  
186 prohibiting *ex parte* communications. NCJC has several exceptions, none of which apply. By  
187 Forgeron’s own recollection, Dory sought in this case to get help for Plaintiffs. This is not the  
188 act of a man who believed he would not gain an advantage for one of the parties by the  
189 communication: Dory sought to affect the outcome of the case. Clearly, Forgeron assisted  
190 Dory, else Dory wouldn’t have repeatedly consulted him.

191 **18. Second**, by conducting such *ex parte* conversations, Forgeron was himself also in  
192 violations of the *ex parte* rules: “A lawyer shall not communicate *ex parte* with a judge, juror,  
193 prospective juror or other official except as permitted by law.” (NRPC 3.4(b))

194 **19. Third**, Forgeron apparently failed to abide by NRPC 8.3(b): “A lawyer who knows  
195 that a judge has committed a violation of applicable rules of judicial conduct that raises a  
196 substantial question as to the judge’s fitness for office shall inform the appropriate authority.”  
197 Had the *ex parte* communications been reported, there is a strong presumption that Dory  
198 would have been asked by the Commission on Judicial Discipline to cease, and Dory wouldn’t  
199 have arrogantly defended his violations from the bench.

200 **20. Fourth**, Forgeron’s representation of Plaintiffs constitutes a violation of NRPC 1.12(a)  
201 “[...] [A] lawyer shall not represent anyone in connection with a matter in which the lawyer  
202 participated personally and substantially as a judge or other adjudicative officer, or law clerk  
203 to such a person or as an arbitrator, mediator or other third-party neutral [...]” There is a lively  
204 body of case law interpreting the phrase, “personally and substantially”, complicated by  
205 assertions that each court has a right to set its own standards. Nevada has not weighed in with  
206 significant guidance. However, several principles are clear among most jurisdictions,  
207 including Federal courts:

208 (a) When an attorney has played one of the specifically named roles (judge, law



209 clerk, mediator, *et caetera*), the rule is taken at face value, without much dispute. In  
210 other cases, however, the decision is based not on the *name* of the role played (judge,  
211 mediator, and so on), but rather on the *de facto* role played by the attorney facing  
212 disqualification; that is, whether the participation is personal and substantial. (For  
213 example, in *Rennie v. Hess Oil*, 981 F. Supp. 374 (DVI, 1997), it was decided that an  
214 “advisor” to someone in a disqualifying role is also subject to disqualification, even  
215 though “advisor” is not listed as a disqualifying role. *Rennie* is cited both with  
216 approval and disapproval, but disapproval is about the strictness of the “personally and  
217 substantially” standard, and not about its application to an advisor.)

218 (b) The facts and circumstances of each case must be determined separately,  
219 although in some cases (for instance, when the attorney was a mediator) the procedure  
220 is fairly cut and dried.

221 (c) The basis for the rule is two-fold: possible conflict of interest which might  
222 affect the “vigor” of an attorney’s representation, and access the attorney might have  
223 had to confidential information in his or her previous role. Appearance of impropriety,  
224 to preserve the reputation of, and public confidence in, the court is considered when  
225 an ordinary, reasonable person – a layman – might view the representation as  
226 improper. (*Board of Education v. Nyquist*, , 590 F.2d 1241 (2nd Cir. 01/09/1979))

227 **21.** As Dory’s advisor, Forgeron had access to confidential information from the  
228 mediation process. Given Forgeron’s own would-be client, his previous engagement by  
229 Plaintiffs, and his own testimony that Dory sought help for one of the parties (Plaintiffs), there  
230 is no reason to believe that Dory had much regard for ethics, or that he would keep  
231 confidential information from the mediation process. Forgeron admits his own recollection is  
232 foggy, but that is not to say that his memory might not return to him if he were to continue to  
233 work on the case. The case law bases disqualification on access to confidential information,  
234 whether or not it was acted upon. On this basis, Forgeron violated Rule 1.12.

235           **22.** Furthermore, the reputation of this Court is, frankly, quite low, no doubt in large part  
236 due to the actions of the current judge’s predecessor. Joe Dory proudly boasted, from the  
237 bench, that – despite having his “hand slapped” for violations – he would do it again. As one  
238 of the first matters to come before his Court in the current judge’s new term, this case and its  
239 disposition will have a significant impact on public perception of this Court going forward.  
240 The tattered reputation of the Austin Justice Court will be undermined if there is a perception  
241 that past abuses are not being rectified.

242           **23.** Forgeron’s role as on-going advisor to Dory exacerbates the situation. As one court  
243 put it, “If the court's hypothetical private citizen were to view the present case, he would see  
244 that Horn had some involvement in almost all criminal tax cases in the U.S. Attorney's office,  
245 including Strike Force cases. The citizen would see little to assure himself that Horn had not  
246 utilized his position to obtain confidential information or to serve conflicting loyalties.  
247 Therefore, we see no error in the district court's conclusion that the Supreme Court of New  
248 Jersey would prohibit Horn's representation of appellant.” (*United States v. Miller*, 624 F.2d  
249 1198 (3rd Cir. 06/26/1980))

250           **24. Fifth**, Forgeron has violated NCJC 2.11(A)(2)(b): “A judge shall disqualify himself or  
251 herself in any proceeding in which the judge's impartiality might reasonable be questioned,  
252 including but not limited to the following circumstances: [...] The judge knows that the judge  
253 [...] is [...] acting as a lawyer in the proceeding”. By providing legal advice to the judge,  
254 Forgeron was acting as an extension of the judge, which made him subject to the NCJC in the  
255 same way as was Dory. (With respect to some of the activities of law clerks, who sometimes  
256 assume a similar role, see *Bishop v. Albertson’s*, 806 F. Supp. 897 (E.D.Wash. 11/15/1992);  
257 and *Oliva v. Heller*, 839 F.2d 37 (2nd Cir. 02/05/1988))

258           **25. Sixth**, Forgeron has violated NCJC 2.9(A): “A judge shall not initiate, permit, or  
259 consider ex parte communications, or consider other communications made to the judge  
260 outside the presence of the parties or their lawyers, concerning a pending or impending

261 matter,” Once Forgeron had the first of his conversations with Dory, he was obligated not to  
262 discuss the matter further *ex parte* with either party, including Plaintiffs. Clearly, he has  
263 discussed the matter with Plaintiffs.

264 **26.** These violations have been repeated, knowing, and deliberate. It is inconceivable that  
265 an attorney, actually licensed to practice in Nevada for over three decades, would not know the  
266 rules. (*Declaration of Michael Marking*, EXHIBIT A)

267  
268 **27. Representation by Forgeron will result in further violations.** Allowing Hy  
269 Forgeron to represent plaintiffs in this matter will result in further violations of the NRPC and  
270 NCJC. The six violations listed in the above section (beginning on page 7) have already taken  
271 place. Allowing Forgeron to continue his representation of Plaintiffs in this matter will  
272 necessarily result in additional and continuing violations of the last three rules listed above:  
273 NRPC 1.12(a), NCJC 2.11(A)(2)(b), and NCJC 2.9(A). The illustration is obvious and would  
274 merely repeat what is laid out above.

275 **28.** Indeed, all parties might benefit from this motion. The research shows conclusively  
276 that the determination of a motion based on Rule 1.12(A) is appealable. Some of the appeals  
277 are interlocutory, but the applicability of an interlocutory appeal to this case has not yet been  
278 determined. Granting this motion might give some stability to the results of this proceeding.

279  
280 **29. No prejudice to Plaintiffs will result from granting this motion.** Forgeron  
281 minimized the role he would play in these proceedings. There is no evidence that he has  
282 invested any substantial amount of time in this matter, at least during the post-judgment  
283 phase, and no evidence that he provides any special abilities or knowledge which Plaintiffs  
284 cannot obtain from a different attorney.

285 **30.** It has been almost a year and a half since the final judgment in this matter, and, even  
286 if Plaintiffs were to need additional time to seek a new attorney, the delay would be relatively

287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312

small.

**31.** Respondents do not foresee any significant change in their financial position for most of the rest of the year, so a delay will not affect Plaintiffs ability, if any, to collect on their judgment. Respondents testimony in an NRS 21.270 hearing is expected to be the same in several months as it would have been last month or even now. (*Declaration of Michael Marking*, EXHIBIT A)

**32. Conclusion.** The facts cited herein are supported without contradiction by the record, and the law has little ambiguity.

**33.** A line from *Board of Education v. Nyquist* (590 F.2d 1241 (2nd Cir. 01/09/1979)) is often misquoted in citing opinions: “We believe that when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases.” The misquote occurs when the clause, “when there is no claim...” is omitted, implying – wrongly – that appearance of impropriety is very infrequently justification for disallowing representation.

**34.** In this case, there is a legitimate claim of confidential information potentially being passed to Forgeron. Thus we have not only the appearance of propriety, bolstered by a history of ethical violations, but also the concern that the proceedings will be tainted as well.

**35.** Forgeron should be disallowed from representing Plaintiffs.

313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338

DECLARATION OF MICHAEL MARKING

State of California                    }  
County of Santa Clara               } ss.

Michael Marking, on 24 February 2013, under penalty of perjury, declares as follows:

    This declaration is being given for Respondents in this case.

    I was told on 6 February 2013 that Ruben Gallegos had told at least one person in Austin that he, Ruben, would have an attorney for the 7 February 2013 hearing. I heard this from one of the people he told.

    Several weeks ago, my wife Elizabeth Fleming went to the Austin Court Clerk’s office to obtain a copy of a document from the file. She saw, in the file, handwritten notes, presumably by Joe Dory, listing discussion items from a conversation with Hy Forgeron (whose name appeared on the notes). She told me this after returning from the Clerk’s office.

    After the first two hearings in this case, Elizabeth Fleming and I met after the hearings in Joe Dory’s chambers. He had expressed a desire to act as a mediator, and we wanted to settle the matter. We revealed our concerns and positions to him, but did not discuss the matter itself. We had waived the disqualification because of his relationship to Sissie Gallegos, we trusted him at the time, but no longer believed he was honest after he persisted in having ex parte conversations with Hy Forgeron, because Hy Forgeron was Ruben’s and Sissie’s attorney. Later we also learned from others that his attitude in our presence was very different that when he spoke to others. In the company of others we learned he spoke with a great deal of prejudice against us.

339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364

Ruben and Sissie have frequently emphasized that they were “good friends” of the District Attorney (Forgeron) and the Judge (Dory). They also repeat, almost ad nauseum, that, since Sissie is a Williams (Ray Jr.’s niece), nothing will happen to them.

Forgeron has his own boastful streak, such as when he said very deliberately during an Austin Roping Club meeting that he was “actually licensed to practice” in Nevada for over thirty years. “Actually”, as if he were impressed with himself. After over three decades as a Lander County “power broker” (such as it is), he seems to feel a little immunity, himself.

Our financial situation has remained the same so far this year, and we do not expect it to change for the rest of the year. We do not expect the Gallegoses’ ability or inability to execute the judgment will be materially different for the rest of the year, at least.

---

Michael Marking

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, US. postage prepaid, at San Jose, California, addressed as follows:

Hy Forgeron; 168 South Reese Street; Post Office Box 1179; Battle Mountain,  
Nevada 89820

Austin Justice Court; Post Office Box 100; Austin, Nevada 89310

Dated Sunday, 24 February 2013.

---

Michael Marking

AFFIRMATION

(Pursuant to NRS 239B.030)

I hereby affirm that the preceding document filed in the above-described manner does not contain the social security number of any person.

Dated Sunday, 24 February 2013.

---

Michael Marking

(Appellants' electronic document name: *ggvmf\_motion\_disqualify\_attorney\_20130224a*)