

1 Case Number 10 CV 002

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6 IN THE JUSTICE COURT OF AUSTIN TOWNSHIP  
7 COUNTY OF LANDER, STATE OF NEVADA

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

13  
14 vs.

MOTION FOR ADHERENCE TO RULES OF  
LAW AND PROCEDURE

15 MICHAEL MARKING  
16 and  
17 ELIZABETH FLEMING,  
18 Respondents  
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21 COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Respondents, and  
22 hereby submit their MOTION FOR ADHERENCE TO RULES OF LAW AND PROCEDURE.

23  
24 WHEREAS

25 (1) The Hon. William Schaeffer has engaged in wilful and repeated judicial misconduct and

26 violation of the JCRC and the law

27 (a) by scheduling hearings and thereby granting relief to Plaintiffs without informing the  
28 parties of the reasons, thereby denying them their rights to be heard (see *Hearings*  
29 *called without giving reasons*, page 4); and

30 (b) by scheduling hearings without without acting on motion (see *Examinations called*  
31 *without motion*, page 6); and

32 (c) by scheduling hearings, acting as advocate to Plaintiffs, or by engaging in improper  
33 and undisclosed *ex parte* communication with Plaintiffs (see *Ex parte or advocate?*,  
34 page 7); and

35 (d) by acting as advocate to Plaintiffs during the conduct of hearings (see *Judge acted as*  
36 *advocate for Plaintiffs*, page 7); and

37 (2) This Court has improperly designated today's hearing as a continuation of the previous  
38 hearing. (see *Improper continuation of hearing*, page 7); and

39 (3) This Court has scheduled hearings in such a way as to deny Respondents their right to  
40 timely reply to responses by Plaintiffs (see *Omitting right to object from schedule*, page  
41 8); and

42 (4) This Court has changed its schedule on short notice and refused to entertain reasonable  
43 requests for re-scheduling by Respondents

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45 THEREFORE, Respondents pray to this Court for an Order requiring this Court itself, and the  
46 Hon. William Schaeffer to adhere in the future to all applicable Rules and Laws, including but  
47 not limited to the ones cited herein, and to compel the Parties, especially Plaintiffs, to abide  
48 by the rules to the extent appropriate for them as a party.

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50 THIS MOTION is based on the record, and requires no affidavit.

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IN SUPPORT of this Motion, Respondents have attached their MEMORANDUM OF POINTS AND  
AUTHORITIES.

DATED this Tuesday, 27 May 2014.

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Michael Marking, Respondent  
e-mail: *marking@tatanka.com*

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Elizabeth Fleming, Respondent  
e-mail: *ryuuz@tatanka.com*

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89 MEMORANDUM OF POINTS AND AUTHORITIES  
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91 **1. Hearings called without giving reasons.** In the history of this case, since the 2010  
92 judgment, there have been a half dozen hearings called, yet this Court has never specified the  
93 reason. Although some have been properly specified as “debtors’ inquests” or some similar  
94 name, there has never been a reason given for calling for the hearing, with any chance for  
95 protest by any party. In this most recent case, of the hearing set for today, it is not even clear  
96 the purpose of the hearing, never mind the reason it was called. This denies the parties their  
97 rights to be heard, should they wish to object to the hearing in case the reason is invalid or  
98 insufficient.

99 **2.** The reason for calling the hearing, and the purpose for which it is called, are distinct,  
100 but both are required. Effectively, this Court has been conducting its operations partly in

101 secret. This should be an open court.

102 3. Respondents have no way to know if the judge has called the hearings, perhaps as an  
103 advocate for Plaintiffs, or if Plaintiffs have requested them. When the number of hearings  
104 becomes excessive, as this Court noted at the previous hearing, who is responsible, Plaintiffs  
105 or the Court? In any case, the Court is responsible for violations of the rules by ordering the  
106 hearing without proper explanation and procedure.

107 4. In September 1998, the Nevada Commission on Judicial Discipline removed the Hon.  
108 Frances-Ann Fine from office for various violations of the NCJC. Among the reasons given  
109 were *ex parte* communications and failure to notify the parties of the reasons for calling  
110 hearings. Fine appealed to the Nevada Supreme Court, and the judgment of the Commission  
111 was upheld. (*Fine v. Nevada Commission on Judicial Discipline*, 116 Nev. 1001, 13 P.3d 400  
112 (Nev. 11/30/2000)) “[...] Judge Fine sua sponte set a hearing regarding the minor child's  
113 custody without first informing the parties of the reasons for the hearing and without any  
114 motion currently pending before the court. [...]” (*Fine*, ¶81) “Canon 3B(7) states, in relevant  
115 part: ‘A judge shall accord to every person who has a legal interest in a proceeding, or that  
116 person's lawyer, the right to be heard according to law.’ [...]” (*Fine*, fn.10)

117 5. There are legitimate grounds upon which Respondents might have protested the  
118 calling of additional examinations after the first, October 2010, examination. For example, in  
119 requesting a second or subsequent examination, Plaintiffs must show by affidavit the  
120 acquisition of specific new property by Respondents. (CJS Executions, §564) The affidavit  
121 must show the source of the information: Plaintiffs may not merely speculate or go fishing.  
122 (Ibid.)

123 6. Regarding today's hearing, even the Clerk was unable to tell Respondents the reason.  
124 She said she didn't know. She was unaware of any request by Plaintiffs for a hearing. When  
125 Respondents asked the Clerk to remind the Judge of specific rules and statutes requiring a

126 motion, the Clerk later told Respondents that the Judge would make the motion. Even after  
127 being reminded that a motion was necessary, this Court has ignored the requirements of the  
128 rules and statutes. The first Canon of the NCJC, reflecting its paramount importance, is that a  
129 judge must follow the law.

130  
131 **7. Examinations called without motion.** “An application to the court for an order shall  
132 be by motion which, unless made during a hearing or trial, shall be made in writing, shall  
133 state with particularity the grounds therefor, and shall set forth the relief or order sought. [...]”  
134 (JCRC 7(b)(1)) If motions have been made, they have been concealed from Respondents, in  
135 violation of the procedures outlined in JCRC, and the Court’s entertainment of such *ex parte*  
136 motions has been in violation of the NCJC.

137 **8.** “In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due  
138 regard for the rights of the parties to be heard . . . . Containing costs while preserving  
139 fundamental rights of parties also protects the interests of witnesses and the general public.  
140 Thus, a district court may not simply dispense with the adversary process when it senses the  
141 equities of the case are obvious. In *Kinna v. State*, 84 Nev. 642, 647, 447 P.2d 32, 35 (1968),  
142 we noted: ‘Firmly embedded in our tradition of even-handed justice”and indeed its very  
143 cornerstone”is the concept that the trial judge must, at all times, be and remain impartial. So  
144 deeply ingrained is this tradition that it is now well settled that the trial judge must not only  
145 be totally indifferent as between the parties, but he must also give the appearance of being so.’

146 **9.** “Although we are eager to activate plans to streamline litigation, we also acknowledge  
147 that the pursuit of justice is seldom economical and uncomplicated, and that any alterations or  
148 reforms must conform with notions of due process. [...]” (*Sierra Nevada Stagelines v. Rossi*,  
149 111 Nev. 360, 892 P.2d 592 (Nev. 3/30/1995))

151           **10. Ex parte or advocate?** Because Respondents have seen no motions for examinations  
152 or other hearings, there appear to be two alternatives to consider: Either the Hon. William  
153 Schaeffer is acting as advocate for Plaintiffs, calling the hearings sua sponte, or there has been  
154 *ex parte* communication during which Plaintiffs or perhaps third parties such as Ray “Bubbie”  
155 Williams have made motions which have been concealed from Respondents. For all  
156 Respondents might know, both possibilities are true. Regardless, in either case, there have  
157 been repeated violations of NCJC. Furthermore, these violations must indeed be wilful,  
158 because this Court did not schedule the hearings “accidentally”. In *Fine*, the Supreme Court  
159 agreed that a wilful violation does not require malicious motives on the part of the judge.

160  
161           **11. Judge acted as advocate for Plaintiffs.** During the previous hearing, the Hon.  
162 William Schaeffer acted as advocate for the Plaintiffs. He asked the questions for them, he  
163 gave them advice and recommendations, and generally drove the proceedings. Such advocacy  
164 is improper.

165           12. “While it is ordinarily the function of counsel for the parties to interrogate witnesses,  
166 a trial court may properly interpose questions to witnesses for the purpose of clarification of  
167 the facts.” (*Schommer v. Bergfield et al.*, 132 N.W.2d 345, 178 Neb. 140 (Nebr. 1965)) The  
168 judge may not usurp the functions of counsel. (CJS Trial, §150)

169           13. The Court in this case has gone beyond the need to clarify the testimony of witnesses.  
170

171           **14. Improper continuation of hearing.** The court has improperly designated today’s  
172 hearing as a “continuation” of the previous hearing. When the previous hearing ended,  
173 Plaintiffs had no more questions, and near the end the Court reminded Plaintiffs that an  
174 excessive number of hearings might be considered harassment. There was no indication that  
175 the hearing would be resumed.

176 15. In the examination of a debtor, “The proceedings cannot be adjourned indefinitely,  
177 even though the debtor consents. The proceedings will lapse if they are irregularly adjourned,  
178 as where they are adjourned without date, and they cannot thereafter be revived without notice  
179 to the debtor.” (CJS Executions, §578)

180 16. “All motions for the continuance of cases shall be made on affidavit, except where it  
181 shall appear to the court that the moving party did not have time to prepare an affidavit, in  
182 which case counsel for the moving party need only be sworn and orally testify to the same  
183 factual matters as hereinafter required for an affidavit.” (RJCR 10.1) Not only was there no  
184 affidavit giving a reason to re-convene, there wasn’t even a motion.

185 17. In the Ninth Circuit and in some others, there is a 30-day rule for re-convening a  
186 debtor’s examination, consistent with the 30 days allowed for creditors to object to certain  
187 kinds of evidence. There is no such rule allowing late objections in Nevada courts, and, even  
188 if there were, 30 days has long passed.

189 18. In a question involving examination of a debtor in a bankruptcy case, the United  
190 States Supreme Court concluded, “Deadlines may lead to unwelcome results, but they prompt  
191 parties to act and they produce finality. In this case, despite what respondents repeatedly told  
192 him, Taylor did not object to the claimed exemption. If Taylor did not know the value of the  
193 potential proceeds of the lawsuit, he could have sought a hearing on the issue, [...], or he could  
194 have asked the Bankruptcy Court for an extension of time to object, [...]. Having done neither,  
195 Taylor cannot now seek to deprive Davis and respondents of the exemption.” (*Taylor v.*  
196 *Freeland & Kronz*, 503 US 638 (1992))

197  
198 **19. Omitting right to object from schedule.** Although the point became moot, this  
199 Court arranged its schedule so as to preclude Respondents from objecting to Forgeron’s  
200 representation of Plaintiffs last year. Even though Forgeron’s response to the motion to



201 disqualify him was late, this Court clearly intended to allow him to represent Plaintiffs. The  
202 Court made its decision without even awaiting Forgeron's response. This is clear because this  
203 Court scheduled the hearing in advance. If Forgeron had been disqualified, there would have  
204 been no hearing – allowing Plaintiffs time to get a new attorney – but the hearing was not  
205 continued. Obviously, this Court anticipated a favourable decision for Forgeron without even  
206 waiting for the briefs.

207 20. Similarly, we can only speculate that today's hearing may be in response to a similarly  
208 favourable ruling for Plaintiffs regarding the question of the propriety of asking questions  
209 about the ownership of Respondents. There have been no opposing points of law presented by  
210 Plaintiffs, yet this Court, acting as advocate for Plaintiffs, may be determined to ask its  
211 questions even without opposition. Respondents are entitled to see, and to object to, any  
212 opposing points raised in opposition. Once again, Respondents are being denied their rights to  
213 a hearing.

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:

Ruben Gallegos and Virginia (Sissie) Gallegos; Post Office Box 221; Austin, Nevada 89310

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

Dated Tuesday, 27 May 2014.

\_\_\_\_\_  
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 Tuesday, 27 May 2014.

\_\_\_\_\_  
Michael Marking

(Appellants' electronic document name: *ggvmf\_motion\_law\_procedure\_20140527a*)