Case Number 10 CV 002

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

RUBEN GALLEGOS and VIRGINIA (SISSIE) GALLEGOS, Plaintiffs *VS.* MICHAEL MARKING and ELIZABETH FLEMING, Respondents	REPLY IN SUPPORT OF MOTION TO DISQUALIFY ATTORNEY

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Respondents, and hereby submit their REPLY IN SUPPORT OF MOTION TO DISQUALIFY ATTORNEY.

ALTHOUGH Respondents' MOTION TO DISQUALIFY ATTORNEY (2013.02.24) has become moot by Forgeron's withdrawal, and a court is generally prohibited from ruling on moot issues, there is

no prohibition against a party replying to new issues raised in the response to a motion. Indeed, in Forgeron's RESPONSE TO MOTION TO DISQUALIFY ATTORNEY (2013.03.18), he has made several baseless, unsupported, and unjustified *ad hominem* attacks against Respondents, in what we take to be an attempt to poison the well at his departure. He filed his abusive, false, unsupported, and self-righteous invective at the last minute, without serving Respondents, so that this Court, on the day of the hearing, the same day it was filed, would have his response in mind, without this Court having heard a proper, reasoned refutation. We are thus compelled to reply.

FURTHERMORE, this Court has indicated that, though now moot, the MOTION would be reconsidered were Forgeron to decide to appear again in the future. Accordingly, a reply is appropriate, to leave this issue on the shelf in a condition appropriate for possible future determination.

WHEREAS

(1) Forgeron was practicing law by advising Ruben Gallegos, was engaged by Plaintiffs in this matter, and the NRPC applies. (see *Plaintiffs engaged Forgeron in this matter*, page 5); and

(2) Forgeron responded to a non-existent accusation (see *It was never claimed that Forgeron knew about being a special master*, page 6); and

(3) Forgeron did not deny acting as advisor in civil cases; the closest he comes to denying acting as advisor in this matter is being "unable to recall", and his recollection of a conversation with Dory included denying only a discussion of the "merits" of the case. (see *Forgeron did not deny acting as legal advisor in civil cases*, page 6); and

(4) Contrary to Forgeron's assertion, there was no "slander" of Dory by Respondents (see *There was no "slander" of Dory*, page 7); and

(5) The mediation attempts were relevant because Dory may have given confidential information to Forgeron (see *The mediation attempts were relevant*, page 7); and

(6) Forgeron does not deny ex parte contact with Dory, and Forgeron's own obligation to report it. (see *Forgeron fails to deny ex parte contact with Dory*, page 8); and

(7) Forgeron offers no support for his position regarding the interpretation of the NCJC and NRPC, and no facts to counter the record (see *Forgeron offers no support for his position*, page 8); and

(8) Claims made by Forgeron are irrelevant to the issues raised by the MOTION (see *Forgeron's defense is irrelevant*, page 10); and

(9) Forgeron resorts to personal attacks without relevance, support, or justification (see *Personal attacks on Respondents are unwarranted*, page 12);

FURTHERMORE, Forgeron did not serve his Response on Respondents, so there appears to be no fixed time limit for filing or serving this Reply.

THEREFORE, Respondents make this REPLY for the record, in the event that this issue becomes no longer moot, and to refute *ad hominem* attacks by Forgeron.

IN SUPPORT of this REPLY, Respondents have attached their MEMORANDUM OF POINTS AND AUTHORITIES and their EXHIBIT A.

DATED this Friday, 7 June 2013.

Michael Marking, Respondent

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Elizabeth Fleming, Respondent

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Memorandum of Points and Authorities

1. Plaintiffs engaged Forgeron in this matter. In his Response (RESPONSE, pg. 2 line 18 to pg. 3 line 9) Forgeron maintains implies that, because he advised Gallegos *pro bono*, he was not engaged by Gallegos. This conclusion is false: Forgeron is operating from his own private lexicon of legal terminology, which is not in accordance with general usage.

2. Nevada has no formal definition of the practice of law, thus following the many states which employ the vague and circular description of law practice as, more or less, whatever lawyers do. *Black's Law Dictionary* (Fifth Edition) includes citations to opinions which include giving legal advice as a part of the definition. By providing such advice to Gallegos, Forgeron was practicing law. Indeed, by characterizing his own actions as *pro bono* work, Forgeron would probably agree.

3. Again, there is no formal definition of engagement with respect to attorneys and clients. However, common usage in the legal community indicates that, even un-bundled or limited, *pro bono* work constitutes an engagement. As an example, the *Statement of Pro Bono Principles* by the Association of the Bar of the City of New York maintains that "engagement agreements" should be made, where appropriate, with *pro bono* clients, the same as with fee-paying clients. As an additional example, the ABA Standing Committee on Pro Bono and Public Service refers to *pro bono* legal work as "engagements". (*Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers*, March 2013)

4. This is not hair splitting, because the ethics rules use the word, "engage", and so an interpretation of the meaning is necessary.

5. Forgeron also cannot see (RESPONSE, pg. 3 line 10) the relevance of paragraph 5 in the MOTION. That paragraph explains that Forgeron's appearance at the 18 March hearing was not so unplanned as he would like this Court to believe, as paragraph 4 showed that Plaintiffs were advised by Forgeron before this action was first filed, after an extensive consultation. These facts, in turn, erode his argument based on his implicit assumption that "informal" and

"casual" legal work is somehow excluded from the rules. Casual or informal or not, it is the practice of law, and is therefore subject to the NRPC.

6. It was never claimed that Forgeron knew about being a special master. In his RESPONSE (pg. 3, lines 11-15), Forgeron denies that he knew about acting as a special master. However, the MOTION never asserted that Forgeron knew that he might be called as a special master. (MOTION, ¶¶6-8) Moreover, there was no assertion that Forgeron knew that he would be called to act in any capacity whatsoever. It was made clear in the MOTION, that it was Respondents' *assumption* that Forgeron's role would be that of special master. It is still not clear from the record if that was Dory's intention, or not. In either possibility, Forgeron did not read the MOTION closely.

7. In the MOTION, there are only Dory's words, from the TRANSCRIPT, that Forgeron would "act as [Dory's] legal advisor in cases, which he always does". Dory did not distinguish between civil and criminal cases, and the clear meaning of Dory's words was that Forgeron acted as a legal advisor an all types of cases, though it is not implied that he did so in each and every case.

8. Forgeron did not deny acting as legal advisor in civil cases. Although Forgeron denied (RESPONSE, pg. 3 lines 17-24) being requested to give advice to Dory in criminal cases, he did not deny that such requests were made in civil cases, the present case included. He is unable to recall much in this case, without making a denial.

9. Forgeron did, however, said that Dory never sought advice about the "merits of the case". (Response, pg. 4, lines 4-5) While this appears to be a denial, Forgeron again dissembles. The merits of the case were not in question, Respondents readily admitted the debt, and Dory would have no reason to seek such advice. The kind of legal advice which Dory would have sought is clear from the record. Dory wanted advice on the rights of the

parties in executing the judgment. (TRANSCRIPT, pg. 168) In addition, in Forgeron's own words (Forgeron's statement at the 18 March hearing, and his RESPONSE, pg. 3, lines 22-24), Dory was trying to get an attorney for Plaintiffs, or trying to get Plaintiffs to hire one of two specific attorneys, depending on which version of the story is to be believed.

10. Furthermore, Dory's statements contradict those of Forgeron. Dory himself said that Forgeron "always" acted as his (Dory's) legal advisor (MOTION, pg. 5, lines 124-126, and pg. 8, lines 183-185, quoting from the TRANSCRIPT)

11. There was no "slander" of Dory. Forgeron alleges that Respondents "slandered" Dory by alleging that Dory sought legal advice from Forgeron. (RESPONSE, pg. 3, lines 16-17) First, falsity is an essential element of slander, and Respondents are only going on Dory's own words. If Dory's words were false, then Forgeron should be accusing Dory of slander. Instead, perversely, Forgeron decides to accuse Respondents of slander when he imagines (we presume) that Dory was the one lying. Second, by his own statements, Dory would be estopped from bringing a slander action: he would have to contradict himself to claim slander.

12. Then Forgeron sets up another straw man, and denies that Forgeron gave advice to Dory on criminal matters, completely ignoring the civil cases. (RESPONSE, pg. 3, lines 17-20)

13. The mediation attempts were relevant. Forgeron questions the relevance of the mediation attempts. (RESPONSE, pg. 3, line 25) The mediation attempts were relevant because Dory may have given confidential information to Forgeron regarding Respondents' negotiating position. This renders unavailing Judge Schaeffer's reasoning that, because Schaeffer has not communicated with Dory, disqualification of Forgeron is not necessary. The information which Forgeron might have is sufficient to disqualify him. Although Forgeron does not recall much, there is no guarantee that his memory will not return to him.

14. Furthermore, the rules require his disqualification, regardless of his arguments.

Forgeron is effectively saying, the rules do not matter.

15. Forgeron fails to deny *ex parte* contact with Dory. In his RESPONSE, at page 4, lines 1-8, Forgeron sets up another straw man to destroy, and fails to deny the allegations of improper *ex parte* contact with Dory.

16. Forgeron has already admitted to *ex parte* contact. (See, for example, his 18 February hearing testimony, and the watered down version in his RESPONSE at page 3, lines 21-25) The straw man is his denial that he discussed the merits of the case during that contact. It is as if someone charged with breaking and entering were to defend himself by saying, "I didn't steal anything from the kitchen cabinets."

17. The rules don't care whether he discussed the merits of the case. Breaking and entering doesn't depend on whether the accused went into the kitchen cabinets. The rules prohibit all *ex parte* contact except under specific, limited circumstances which don't apply here.

18. "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except [...]" (NCJC 2.9(a))

19. The communication was made outside the presence of the parties and it concerned this case. It did not qualify as an exception. Therefore it was prohibited.

20. Forgeron offers no support for his position. Forgeron offers no support for his conclusion that his admitted *ex parte* conversation or conversations with Dory were somehow allowed by the rules. He repeatedly says that he did not discuss the "merits" of the case with Dory, as if this somehow clears him. The word, "merit", appears nowhere in the NCJC 2.9. That he did not discuss the merits of the case is not a get-out-of-jail-free card. Nor does Forgeron offer any evidence supporting his contention that the facts in the MOTION are

somehow wrong.

21. Forgeron doesn't bother to quote the rules, cite any cases, or bring to the Court's attention any portion of the record. Nor does Forgeron directly contradict the facts cited in the MOTION.

22. Perversely, he offers, in support of his opposition, two quotations, allegedly from Joseph Goebbels, but didn't bother to check out their authenticity or veracity. He doesn't say how they relate to this MOTION.

23. His first quotation (REPLY, pg. 5, lines 22-23), "If you tell a lie big enough [...]", isn't from Goebbels. The idea of the Big Lie (*Große Lüge*) is from Adolph Hitler, but those aren't Hitler's words, either. Goebbels borrowed Hitler's idea many years later, but never said the words attributed to him by Forgeron. Hitler dictated the original words while in Landsberg Prison after the failed *Hitler-Ludendorff-Putsch*; they became part of his book, *Mein Kampf* [My Struggle]. Since neither the words nor the *Große Lüge* itself are relevant to the MOTION, they aren't quoted here. (The source is: Hitler, Adolph, *Mein Kampf*, Erster Band: Eine Abrechnung [First Volume: An Accounting], 10 Kapitel: Ursachen des Zusammenbruches [Chapter 10: Causes of the Collapse], Müller & Son, München, 1936; the copyright date for Erster Band was 1925)

24. Forgeron's second quotation is also misattributed: it's another line from Hitler, also from *Mein Kampf*. The second quotation, however, is a faithful translation of Hitler's words. On the other hand, it isn't relevant, either. (See *Mein Kampf*, Erster Band: Eine Abrechnung, 6 Kapitel: Kriegspropaganda [Chapter 6: War Propaganda])

25. Thus Forgeron offers two misquotes of a Third Reich Nazi leader in his own support. In American courts, pronouncements by demagogic German *Führer* are not binding authority. Perhaps he would like us to believe that his propaganda skills were learned from a master such as Goebbels. We are inclined to believe that he has a modicum of natural talent, but is not well trained.

26. Forgeron's defense is irrelevant. The arguments made in his own defense by Forgeron are almost entirely irrelevant.

27. Forgeron repeatedly claims that he did not discuss the merits of the case with Dory. It does not matter. There was never any claim that he did. The word "merit" appears nowhere in the MOTION, and nowhere in the rule prohibiting *ex parte* communications with a judge. His denial of a nonexistent claim, arguing a non-issue, is unavailing.

28. Also, Forgeron falls back on how much good he has done, how he has never been sanctioned before, and so on. No doubt, in his long career, he has done good and helped some people. However, when he was prosecutor, what would he have done if some accused person, in his own defense, had pointed out that he had never been caught before? Forgeron would point out, to the court, how ridiculous that defense would be. The Nazis cited by Forgeron helped to get Germany back on its feet, and Al Capone set up soup kitchens for the poor during the previous Depression. Does that excuse them from the other things they did? What matters is the issues raised by the MOTION, not the "I've never been caught before" defense raised by Forgeron.

29. If Mr Forgeron had wanted, he could have merely said, "I didn't know about the mediation, and ask this Court's permission to withdraw based on a technical violation of the rules, so as not to convey the appearance of impropriety." That would have been the end of it. But he did not. He decided to take personal offense.

30. Forgeron's so-called defense not only ignores the specific allegations – weaselling out of them by addressing straw man arguments, instead – but is peppered with unfounded, snide, personal attacks which have no bearing on the issues. Rather than dealing with the facts and law in an honest and professional manner, Forgeron got snarky.

31. His Response contains unfounded, unjustified, and irrelevant abuses such as these:

32. He scornfully uses scare quotes without justification. (Pg. 2, line 13). He accuses

Respondents of slandering Dory, when Respondents merely quoted Dory from the record. (Did Dory slander himself? This is logically and legally absurd.) (Pg.3, line 9) At the same place, without any examples, he says that the so-called slander is "typical" of Respondents. (Pg. 3, line 9) Without logical basis or support from the record, he claims that, in their arguments, Respondents "bootstrap" (Pg. 4, line 5), "stoop" (Pg. 4, lines 9 and 16), and were "venting". (Pg. 5, line 2) He accuses Respondents of "puffery" (Pg. 5, line 17) He accuses one of the respondents of being a "ghost attorney", but offers no evidence whatsoever to support this. (Pg. 6, lines 19 *et sequentia*) Supposedly, Respondents' allegations are "spewed forth". (Pg. 7, line 10), and he says that Respondents are "rude and vexatious" (Pg. 7, line 16)

33. Either careless or ignorant of fundamental legal terminology, he even offers – again without any support – the claim that one of Respondents is a "ghost lawyer" in his own case! ("[in] another case in which he is the *pro per* Plaintiff", pg. 6, lines 21-22) Forgeron's response is one for the record books: not only are Third Reich Nazis his only authority, he accuses an *openly* proper person plaintiff of *secretly* being his own attorney!

34. Respondents' Motion quotes from the transcript and the rest of the record; Forgeron calls this "slander" and "venting". He, on the other hand, did not once quote from the record. He does not deny the record, he merely ignores it. The MOTION TO DISQUALIFY ATTORNEY cites the law, and draws logical conclusions in support of its request. Forgeron, on the other hand, uses scare quotes and diatribe, sets up a straw man, fails to deny the allegations made, and offers only his personal opinion of Respondents as his defense.

35. Respondents invite this Court to read the MOTION TO DISQUALIFY ATTORNEY carefully, and to note the following: Although the MOTION TO DISQUALIFY ATTORNEY showed that Forgeron violated the rules, and that his continued involvement in this case would compound the problem, there never were any personal attacks on him. All significant facts were supported by citations from the record, mostly from Dory. We did not discuss Forgeron's "reputation", his other cases, or use sarcasm or reference to irrelevant behaviour in other matters.

Respondents did not condescend to the same tactics as did Forgeron.

36. Yet, in spite of using all of these dishonourable weapons, Forgeron has failed to address the gravamen of the issues we raised.

37. Personal attacks on Respondents are unwarranted. Among the irrelevant claims made by Forgeron are slurs, innuendo, and disparagements against Respondents. If Forgeron wants to poke fun at the MOTION itself, so be it: that is the risk one takes when entering the fight, that one's performance might be ridiculed. After all, if we were to go out on a limb and misquote dead Nazis instead of citing binding legal authority or evidence in the record, then we would deserve some mockery ourselves.

38. However, to imply that our reputation, habits, or other unrelated activities are relevant to the MOTION is not only petty, mean, and undignified, it is unethical as well. It is also irrelevant. The MOTION was based on Dory's and Forgeron's behaviours. We did not induce or coerce them in any way. How could our behaviour be relevant to *their* breaches of the ethics rules?

39. We have no way to know what our "reputation" is, since Forgeron didn't say from what sample he took his data. Was it from among his close acquaintances? Was it a scientific poll of the Lander County electorate? So we do not have a response. This Court has no more information than we have, so his statements in that regard are unsupported and properly to be disregarded.

40. Forgeron's response is based on implication, implication, and more implication, but he offers almost no details, even details without support. What is the nature of Respondents' "reputation"? In which cases did Respondents supposedly "ghost write" for someone else? If Respondents are acting "typically", then where are the examples which form a pattern? He implies that there is more, he implies that he knows things, he implies that other people know, as well, but he only offers suggestions: no details, no support, no quotations, no statistics, no

citations, no record, and no specifics, nothing which can be proved or checked out.

41. However, Forgeron makes a specific although incomplete assertion regarding the authorship behind some filings in the Sixth Judicial Court. That assertion warrants some discussion. We deny that we have ghost written anyone's briefs, in that venue or in any other. We have been hired occasionally by attorneys who used us as researchers, but never in the Sixth Judicial District. One of us (Marking) has done appraisals of patents related to electronics and computing, which necessarily involved factoring in relevant court opinions. Also, we have presented research to our own attorneys in cases where our businesses were represented by them, to explain our position so that they might better represent us, but none of that or any other work for attorneys was in the Sixth Judicial District. In fact, outside of filings signed by us, in cases where we appear *pro se*, we haven't even read any filings in the Sixth Judicial District, except for those of one case, *Wilson v. Atlas Towing*.

42. It is easy to imagine why Forgeron thought we might have ghost-written for Wilson, and we will explain that presently, but it is quite another matter to guess how we might have written briefs for a case we haven't even seen. Perhaps Forgeron could enlighten us: maybe he thinks we do it while asleep, and don't remember it during waking hours.

43. Regarding *Wilson v. Atlas Towing*, we took an interest in that case after it was brought to our attention by several third parties who knew that we had written some of our own briefs and who knew that we had done work for some attorneys. In the proceedings as well as in the surrounding facts and circumstances, we saw some serious miscarriages and travesties of justice, and began writing about the case. Ultimately, we wrote a paper, *The Dalton Wilson Affair, Part I*, which is attached to this Reply as Exhibit A. We made the research widely available, to the extent of posting it on the Internet, and e-mailed electronic copies to numerous interested parties. Wilson had access to early draughts. To this day, the summary paper receives a fair amount of traffic, some from government agencies and law firms, but most from IP addresses without identifying domains. We don't know who is reading it. If

Wilson and others borrowed from, or even outright plagiarized, our work, we don't care. It was presented to the public, and we hope it has been and remains useful.

44. We have done the same for other cases, mostly our own, but also with research into other matters which ought to be of public concern. Much of it remains on the Internet, free for anyone to use as they please.

45. We do not believe this is the unauthorized practice of law, any more than when a newspaper runs an editorial, or a radio or television commentator expresses an opinion on any newsworthy case. How many non-lawyers with opinion columns or talk shows have discussed *Roe v. Wade* or *Citizens United*? Our own editorializing is free speech, political speech, protected by the First Amendment.

46. *The Dalton Wilson Affair, Part I* was never followed by a *Part 2*. We don't know what happened to Wilson's case after about his Rule 59 motion was made. We haven't read the filings from his previous Federal cases, so we have no opinion on them.

47. We presume that Forgeron is exercised by the way that *The Dalton Wilson Affair, Part I* portrayed him. Frankly, it was an unflattering light.

48. If a trained attorney such as Forgeron, with over three decades of experience, has been humbled by some non-lawyer acting as a ghost attorney, then by all means he should hunt the scoundrel down. But not here: we didn't do it.

49. We note that Forgeron, while Lander County District Attorney, gave advice to the Commissioners and to Ron Unger regarding the Wilson matter, then went on to act as counsel representing Atlas Towing. The instant case is not, therefore, Forgeron's first experience acting under a conflict of interest.

50. We note also that no clerk in any court has ever failed to file any paper, motion, or other document submitted by us, except one. That one was refused at Dory's direction, and the Sixth Judicial District Court pointed out, citing a Nevada Supreme Court opinion, that it was not the clerk's prerogative to refuse to file any document. Filing documents is a ministerial

duty, with no discretion permitted. Eventually, the document was filed.

51. Conclusion. Respondents' Motion was supported by quotations from the transcript and citations to applicable authority to show that Forgeron was prohibited by the rules from representing Plaintiffs in this matter.

52. Forgeron has failed to deny the facts alleged in the Motion. Forgeron set up a straw man by denying that he discussed the merits of the case with Dory, but failed to show that this has any relevance to the issues or to the rules. His Response was also based partly on personal attacks against Respondents, without any showing of relevance to the Motion.

53. Accordingly, the impropriety of Forgeron's representation having been shown, and the arguments not being refuted, Forgeron should not be allowed to represent Plaintiffs in this case.

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

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

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

Dated Friday, 7 June 2013.

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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 Friday, 7 June 2013.

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Michael Marking

(Appellants' electronic document name: *ggvmf_reply_support_motion_disqualify_attorney_20130610g*)