

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE EGGLESTON,

Appellant,

v.

GEORGINA STUART; CLARK
COUNTY, NEVADA, LISA
CALLAHAN; AND BRIAN
CALLAHAN,

Respondents.

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Sep 28 2020 04:15 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.: 80838

District Court No.: A-16-748919-C

**APPELLANT'S OPPOSITION TO MOTION TO DISQUALIFY
APPELLANT'S ATTORNEY**

COMES NOW, Appellant, Steve Eggleston, by and through his attorney, Emily McFarling, Esq. of McFarling Law Group, and hereby requests an Order denying Respondents' Motion to Disqualify Appellant's attorney. This Opposition is based upon the Memorandum of Points and Authorities, Declaration of Emily McFarling, Esq., and all other papers and pleadings on file herein.

DATED this 28th day of September, 2020.

McFARLING LAW GROUP

/s/ Emily McFarling

Emily McFarling, Esq.
Nevada Bar Number 8567
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
*Attorney for Appellant,
Steve Eggleston*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent seeks to disqualify Appellant's counsel for representation in this appeal from a procedural dismissal prior to the taking of any evidence on the basis that counsel may be a witness at a future trial in the district court in the event that Appellant prevails in this appeal. That request should be denied.

II. STATEMENT OF FACTS

This appeal is an appeal of an order dismissing a civil case filed by Appellant. The basis for the dismissal is that he had not yet exhausted his administrative remedies because his administrative appeal of a Child Protective Services substantiation is still pending. He additionally appeals the dismissal of certain claims that were dismissed on procedural grounds prior to the filing of an answer. No evidence was taken in District Court.

In and around 2015, Attorney McFarling represented Appellant in a child custody case in family court against the mother of his children. She also represented Appellant in filing the request for administrative appeal of a Child Protective Services Substantiation. The substantiation appeal filed by Attorney McFarling as Appellant's counsel is the administrative remedy that remains unresolved and is the basis of the dismissal for failure to exhaust administrative remedies. Appellant has had no other attorney represent him in any matter in Nevada. Appellant represents

himself in the District Court case that is the subject of this appeal pro se and listed Attorney McFarling as a witness in that case. It is expected that if this case is remanded, Attorney McFarling will testify at the trial regarding things that occurred during her representation of Appellant in and around 2015. As shown in the emails attached to Respondent's motion, Attorney McFarling has already made clear to Respondent's counsel that she will not represent Appellant on remand in the District Court¹.

III. LEGAL ARGUMENT

A. Attorney McFarling should not be disqualified because this is not a trial, there is no jury, and there will be no witnesses

Respondent seeks to disqualify Attorney McFarling as counsel in this appeal. That request should be denied under the plain reading of the rule which applies only to an attorney acting as both attorney and witness during the same trial.

Pursuant to the Nevada Rules of Professional Conduct, rule 3.7, a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.

Respondent cites to *DiMartino v. District Court*, 119 Nev. 119, 66 P.3d 945 (2003). In that case, a District Court's complete disqualification of an attorney was reversed by this court as unwarranted. *DiMartino, supra*, provides that an attorney

¹ See *Culebras Enterprises Corp. v. Rivera-Rios*, 846 F.2d 94 (1st Cir. 1988) (lawyers performing substantial pretrial work did not violate the advocate-witness rule because they did not plan to act as advocates at trial if called as witnesses).

being listed as a witness does not completely disqualify the attorney from all representation. *DiMartino, supra*, clarifies that the concern is a jury being confused by the dual roles at trial. As such, the attorney who is listed as a witness may appear at pretrial hearings.

This appeal is clearly not a trial, there is no jury, and no witnesses will be called during these proceedings. This is not an appeal from a trial, either. Obviously under the plain meaning of the rule, Attorney McFarling is not disqualified.

B. Attorney McFarling should not be disqualified because rule 3.7 does not bar representation in an appeal of a procedural dismissal issued prior to any evidence being taken

Respondent seeks to disqualify Attorney McFarling as counsel in this appeal. That request should be denied and Attorney McFarling should be allowed to remain appellate counsel as the appeal does not deal with any evidence as there was no evidence presented in District Court and this appeal is from a procedural dismissal, not an appeal after a trial.

Pursuant to *DiMartino, supra*, an attorney may not appear in any situation requiring the lawyer to argue her own veracity to a court or other body, including in an appeal.

Attorney McFarling did not appear as a witness in the District Court as the case was dismissed prior to any evidence even being taken. As such, this appeal does

not contain any issue arguing the veracity of any witness, including Attorney McFarling. If this were an appeal from a trial where Attorney McFarling had testified, this consideration may apply. But, in this appeal it does not.

This appeal deals only with the procedural issue of a dismissal of a case. There was no evidence or testimony taken in the District Court, therefore this appeal does not deal with any issue of veracity of a witness. As such, Attorney McFarling should not be disqualified in representing Appellant in this appeal.

C. Attorney McFarling should not be disqualified because doing so would work substantial hardship on Appellant and he is entitled to counsel of his choosing

Respondent seeks to disqualify Attorney McFarling as counsel in this appeal. That request should be denied and Attorney McFarling should be allowed to remain appellate counsel because disqualification would work a substantial hardship on Appellant.

Rule 3.7 provides for disqualification (in the limited circumstances discussed above) unless doing so would work a substantial hardship on the client. While this appeal should not be subject to rule 3.7 as discussed above, even if it does, disqualification would work a substantial hardship on Appellant.

DiMartino, supra, noted the importance of preserving a party's right to counsel of one's own choice.

Appellant has never had any other attorney in Nevada. When he attempted to bring this appeal in proper person the runner he hired did not timely file his opening brief. Appellant lives in London, England and therefore cannot every effectively represent himself. While there are other attorneys at Attorney McFarling's office who could have their name listed as attorney of record in this appeal, if there is an oral argument set in this matter, it is Appellant's preference that his longtime attorney be the attorney to argue for him. Disqualifying Attorney McFarling from that ability would work substantial hardship on Appellant.

As such, Attorney McFarling should not be disqualified from representation in this appeal.

A. Attorney McFarling should not be disqualified because the request for disqualification is made simply to attempt to prejudice Appellant

Respondent seeks to disqualify Attorney McFarling as counsel in this appeal. That request should be denied and Attorney McFarling should be allowed to remain appellate counsel because Respondent's request is made simply to attempt to prejudice Appellant.

In *DiMartino, supra*, there was concern noted that a request to disqualify not be made simply for the purpose of prejudicing the other party. As noted above, Attorney McFarling had no involvement in the District Court case aside from being

named as a potential witness by Appellant. Respondent has no real reason to want her disqualified from representation in this appeal aside from wanting to prejudice Appellant.

Because the request is made simply to prejudice Appellant, the request to disqualify Attorney McFarling should be denied.

IV. CONCLUSION

Based on the foregoing, the Court should deny Respondent's motion to disqualify Attorney McFarling from representation of Appellant in this appeal.

DATED this 28th day of September, 2020.

MCFARLING LAW GROUP

/s/ Emily McFarling

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(702) 565-4335
*Attorney for Appellant,
Steve Eggleston*

DECLARATION OF EMILY MCFARLING, ESQ.

I, Emily McFarling, Esq., declare under penalty of perjury under the laws of the State of Nevada that the following is true and correct:

1. I represent the Appellant in the above-entitled case.
2. I have read the attached Opposition and know the contents thereof; the same is true of my own knowledge, except for those matters stated upon information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the State of Nevada and the United States (NRS 53.045 and 28 USC § 1746), that the foregoing is true and correct.

DATED this 28th day of September, 2020.

MCFARLING LAW GROUP

/s/ Emily McFarling

Emily McFarling, Esq.
Nevada Bar Number 8567
6230 W. Desert Inn Road
Las Vegas, NV 89146
(702) 565-4335
Attorney for Appellant,
Steve Eggleston

CERTIFICATE OF SERVICE

I, an employee of McFarling Law Group, hereby certify that on the 28th day of September, 2020, I served a true and correct copy of Appellant's Opposition to Motion to Disqualify Appellant's Attorney as follows:

☒ by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

Brian Callahan
300 Ashley Dr.
New York, IL 60451
Respondent in Proper Person

Lisa Callahan
300 Ashley Dr.
New York, IL 60451
Respondent in Proper Person

☒ via the Supreme Court's electronic filing and service system (eFlex):

OLSON CANNON GORMLEY &
STOBERSKI
Felicia Galati, Esq.
Attorney for Respondents, Georgina Stuart and Clark County

/s/ Christiane Smith
Christiane Smith