

**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

STEVE EGGLESTON,
Appellant,
vs.
GEORGINA STUART; CLARK COUNTY, *et*
al.
Respondents.

Supreme Court No. 80838
District Court Case No. A748919
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Elizabeth A. Brown
Clerk of Supreme Court

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

COME NOW Respondents and hereby submit their Reply to Appellant's Opposition to Motion to Disqualify Appellant's Counsel made and based upon all papers, pleadings and records on file herein, the below Memorandum, and such oral argument, testimony and evidence as the Court may entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant does not dispute Respondents' factual and procedural background, but unsuccessfully tries to minimize Ms. McFarling's role. Appellant's counsel is a necessary witness to disputed First Amended Complaint (FAC) allegations (re the temporary guardianship Appellant signed for the Callahans)¹, and her Affidavit² supporting Appellant's Opposition to Respondent's Motion to Dismiss. Ms.

¹ See FAC, e.g., 14, 26(b), (e), (g) to (i), (l), (q), (s) and 29(k) (Exh. A).

² See ROA 245-46 (Exh. D).

McFarling indicates: **“I have been involved assisting Mr. Eggleston since prior to him signing the temporary guardianship consents and am shocked at how the guardians [(Callahans)] have taken advantage of the very specific plan that I confirmed with the CPS caseworker prior to advising my client to sign a temporary guardianship consent.”**³ Thus, she had a critical role in the underlying matters because she advised Appellant to sign the temporary guardianship, immediately after which the Callahans removed the children from Nevada.⁴ Now, she wants to brief this appeal relating thereto and her very own actions, thereby impacting her credibility and/or creating confusion as to whether she is speaking as a witness and/or as an attorney. Ms. McFarling has a separate conflict of interest based on her advice to Appellant to sign the temporary guardianship impacting her own interests and FAC allegations alleging Respondents caused him to sign it. Rule 1.7(a)(2)⁵. Respondents should not be prejudiced by Ms. McFarling being both an advocate and a witness with a personal conflict of interest.

II. LEGAL ARGUMENT

Rule 3.7 applies to an appeal. DiMartino v. Dist. Ct.⁶ Respondents have met

³ See Appellant’s Exhibit C to Opposition (Exh. D).

⁴ See footnotes 1 and 2, supra.

⁵ “[A] lawyer shall not represent a client if....[t]here is a significant risk that the representation...will be materially limited...by a personal interest of the lawyer.”

⁶ 119 Nev. 119, 122, 66 P.3d 945, 947 (2003).

their burden and established Ms. McFarling is “likely to be a necessary witness,” confirmed by their Exhibits containing Appellant’s and his counsel’s statements. Ms. McFarling’s testimony is material and relevant to the determination of the issues being litigated, including her legal advice to Appellant to sign the temporary guardianship and disputed communications between her and Respondent Georgina Stuart, which evidence cannot be obtained elsewhere. Pasina v. California Cas. Indem. Exch., 2010 WL 11579016, at *3 (D. Nev. Feb. 12, 2010) citing Laforest v. Ameriquest Mortgage, Co., 2006 WL 2228871, at *3 (D. Mass.)

“Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.”...“The opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation.” “A witness is required to testify on the basis of personal knowledge” ...“while an advocate is expected to explain and comment on evidence given by others.” Accordingly,...“[i]t may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.”

Laforest, 2006 WL 2228871, at *2 citing Comments 1 and 2.

Appellant argues Ms. McFarling is not a witness on the appeal. An appeal, by its very nature, does not involve “witness” testimony, but a decision on the underlying record. If this Court accepts Appellant’s argument, Rule 3.7 and DiMartino are rendered meaningless because there will never be a situation where an attorney is a witness on the appeal. The policies supporting the Rule involve important issues regarding a conflict of interest between counsel and client,

prejudice to the opposing party, and the public's interest in the scrupulous administration of justice that this Court must balance. Brown v. Dist. Ct., 116 Nev. 1200, 1205, 14 P.3d 1266, 1269–70 (2000). Conflict rules apply to an attorney's work on an appeal. There is substantial evidence of Ms. McFarling's representation of Appellant in various underlying matters as alleged in the FAC and her statements and actions as an attorney and witness that cannot be separated and create a conflict of interest regarding her advice to Appellant to sign the temporary guardianship, after which the Callahans removed the children from Nevada. Those facts implicate Ms. McFarling's actions – not Respondents – as a cause of Appellant's damages, which is a conflict that cannot be ignored. That alone prevents her from appearing on this appeal to argue her own veracity. Balancing the various interests, Ms. McFarling's disqualification is required because of her dual role in the underlying actions, the related prejudice to Respondents, and the public interest of protecting the integrity of the judicial proceeding. “[T]he likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.” Cronin v. Dist. Ct., 105 Nev. 635, 641, 781 P.2d 1150, 1153 (1989).

Appellant argues that he should have his counsel of choice and alleges a substantial hardship. This Court must balance both parties' competing interests and has recognized that “in light of the interests underlying the standards of ethics, the

social need for ethical practice outweighs the party's right to counsel of his choice.” Practice Mgmt. Sols., LLC v. Dist. Ct., 132 Nev. 1019, 2016 WL 2757512 (Table), at *3 citing U.S. v. Kitchin, 592 F.2d 900, 903 (5th Cir.1979). **“A defendant's right to counsel of his choice is not absolute and must yield to the higher interest of the effective administration of the courts...**The right is specifically limited by the trial court's power and responsibility to regulate the conduct of attorneys who practice before it.” Kitchin, supra (emphasis added). In addition to the confusion and prejudice, any mixing of an attorney appearing as an advocate and witness, “diminishes the effectiveness of the entire system...The practice not only raises the appearance of impropriety....but also disrupts the normal balance of judicial machinery.” Cottonwood Estates Inc., v. Paradise Builders Inc., 624 P.2d 296. 103 (Ariz. 1981). Disqualification at this early pre-briefing stage of the appeal will not work a substantial hardship on him and is necessary to protect Respondents from prejudice and the public's interest in the scrupulous administration of justice. Brown, 116 Nev. at 1205, 14 P.3d at 1269-70. Finally, any doubt should be resolved in favor of disqualification. Id. Based on all of the foregoing, Respondents respectfully request this Court grant their Motion To Disqualify Ms. McFarling because she is a necessary witness on contested issues in this case; and, balancing the parties’ and public’s interests, her disqualification at this early stage will not substantially burden Appellant, and is required to avoid prejudicing Respondents

and protect the public interest in the integrity of the proceedings.

DATED this 5th day of October, 2020.

OLSON CANNON GORMLEY
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/s/ Felicia Galati

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CERTIFICATE OF SERVICE

On the 5th day of October, 2020, the undersigned, an employee of Olson Cannon Gormley & Stoberski, hereby served a true copy of **RESPONDENTS' REPLY TO APPELLANT'S OPPOSITION TO MOTION TO DISQUALIFY APPELLANT'S ATTORNEY** to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order (Administrative Order 14-2) effective June 1, 2014, and or emailed/mailed:

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