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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE HONORABLE
RENA G. HUGHES, EIGHTH JUDICIAL
DISTRICT COURT, FAMILY DIVISION,
DEPARTMENT J. COUNTY OF CLARK,
STATE OF NEVADA.

Case No. 76117

Appeal from the Nevada Commission on Judicial Discipline

APPELLANT'S REPLY BRIEF

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Parent Corporations and/or any publically-held company that owns
10% or more of the party's stock

NONE

2. Law Firms that have represented Appellant Rena G. Hughes
 - a. William B. Terry, Chartered, William B. Terry, Esq., and
Alexandra Athmann-Marcoux, Esq.
 - b. Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole
M. Young, Esq.

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IV. LEGAL ARGUMENT

A. Clear and convincing evidence does not support the imposition of discipline against Judge Hughes.

1. *The Nevada Commission on Judicial Discipline ("NCJD" or "the Commission") misunderstands the culpability requirement for a finding of judicial discipline.*

A judge may be disciplined for willful misconduct pursuant to NRS 1.4653(1)(a). Willful misconduct does not include "claims of error or abuse of discretion in findings of fact [or] legal decisions ... unless supported by ... a disregard for fundamental rights." NRS 1.4653; *see* Procedural Rules of the NCJD ("Procedural Rules" or "Comm. Rule") Rule 8.

Willful misconduct is defined as including:

- (1) Conviction of any crime involving moral turpitude;
- (2) A knowing or deliberate violation of one or more provisions of the Nevada Code of Judicial Conduct [hereinafter "the Code"]; and
- (3) A knowing or deliberate act or omission in the performance of judicial or administrative duties that:
 - (I) Involves fraud or bad faith or amounts to a public offense; and
 - (II) Tends to corrupt or impair the administration of justice in a judicial proceeding.

NRS 1.4653(5)(b); *see In re Fine*, 116 Nev. 1001, 1022, 13 P.3d 400, 414 (2000).

This standard only applies "in cases of intentional or knowing violations" of the ethical canons. *Id.* at 1021.

In its Answering Brief, the Commission argues the willful misconduct standard applies because Judge Hughes disregarded Welthy's fundamental rights. (Answering Brief ("AB"):16-20.) However, the Commission's Findings of Fact, Conclusions of Law and Imposition of Discipline fails to state the discipline is for willful misconduct and fails to analyze the facts of this case under that standard. (APP 4:944-958). Clear and convincing evidence does not support the imposition of discipline against Judge Hughes because the Commission failed to accurately analyze the facts of this case under the applicable law.

Nevada has not adopted a standard to determine when a claim of error amounts to a disregard of fundamental rights warranting judicial discipline. Other courts have adopted a "reasonableness" standard to determine when legal error should amount to misconduct. *See In re Quirk*, 705 So.2d 172, 180 (La. 1997); *see In re Commn. on Jud. Tenure and Disc. ("Pirraglia")*, 916 A.2d 746, 755 (R.I. 2007); and *see Matter of DiLeo*, 83 A.3d 11, 20, 216 N.J. 449, 465 (N.J. 2014). This objective standard considers "whether a reasonably prudent and competent judge, putting himself in the place of the judge in question would conclude that those actions were both obviously and seriously wrong." *Quirk*, 705 So.2d at 180 (internal quotations and brackets omitted); *see also DiLeo*, 83 A.3d at 464.

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Under this standard, this Court would also take into consideration the fact that Welthy brought the case to the attention of the Commission. (APP 3:515-24.)

This is significant because as the Supreme Court of Rhode Island points out:

The members of the judiciary are cognizant of the lamentable fact that dissatisfied litigants, including those . . . embroiled in domestic disputes, sometimes make baseless complaints against judges, which all too often arise from a decision that was rendered in fulfillment of one's judicial responsibilities.

Pirraglia, 916 A.2d at 751. That Court was concerned with "safeguard[ing] the independence of [the] judiciary" because "[e]very trial judge will from time to time commit legal errors in decisions later reversed on appeal, but judicial discipline would be in order in almost none of those cases." *Id.* at 754. It reasoned that judicial discipline based on legal error is limited because "a judicial officer who is attempting to faithfully discharge his or her judicial responsibilities should not be faced with a charge of ethical misconduct for legal error." *Id.* This is the same rule expressed in NRS 1.4653 and Procedural Rule 8. Such instances of ethical misconduct generally "involve multiple instances of knowing and willful violations that demonstrate a pattern of misconduct or flagrant disregard for individual rights." *Id.* "A judge must be free not only to make correct rulings for the proper reasons, but also make an incorrect ruling, believing it to be correct." *Oberholzer v. Commn. on Jud. Perf.*, 20 Cal.4th 371, 398, 975 P.2d 663 (Cal. 1999).

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That standard supports this Court's decisions in *Goldman v. NCJD*, 108 Nev. 251, 830 P.2d 107 (1992), and *Matter of Davis*, 113 Nev. 1204, 946 P.2d 1033 (1997). In both *Goldman* and *Davis*, a pattern of unethical conduct was established. *Goldman* repeatedly abused his contempt power, oftentimes holding individuals in contempt who were not parties to the cases at issue. 108 Nev. at 276-88. In *Davis*, a pattern of unethical conduct, which mostly related to the judge's self-interest, was established. 113 Nev. at 1219-25.

Here, the Commission failed to provide any evidence, meeting the clear and convincing standard, that Judge Hughes knew or should have known she was violating the ethical canons when she temporarily modified custody. Without such evidence, the Court cannot conclude her alleged misconduct was intentional.

The alleged misconduct at issue relates to the substantive issues of a highly contentious custody dispute. When Judge Hughes made her decision, there was no clear-cut case law or ethical canon telling her how to rectify the dispute on a temporary basis.

Under the "reasonableness" standard, this Court can find that a reasonably prudent and competent judge in Judge Hughes' shoes would not conclude that her actions in the instant case "were both obviously and seriously wrong." *See Quirk*, 705 So.2d at 180. Judge Hughes attempted to balance each parent's fundamental rights to protect the best interest of the child. Prior to modifying custody, Judge

Hughes even asked other family court judges how they deal with similar situations. (APP 2:386-87.) She received and followed advice from the Honorable Charles Hoskins, and the Honorable Cynthia Steel, of the Eighth Judicial District Court, before changing custody. (APP 2:470-80 & 491-97.) The fact that both Judge Hoskin and Judge Steel would have acted similar to Judge Hughes shows that her actions were not "both obviously and seriously wrong."

As a last resort to justify its decision, the Commission contends that even if Judge Hughes' actions were not intentional, this Court should uphold the discipline "for violating the Code in a manner that is not knowing or deliberate." (AB:19-20.) Without a deliberate violation of the Code or a finding of a "disregard for fundamental rights," however, we are only left with a claim of error that must "be left to the appellate process." *See* NRS 1.4653; and *see* Comm. Rule 8.

It is disturbing that the Commission disciplined Judge Hughes for enforcing Nevada law in the face of a mother who continually violated court orders. Welthy failed to act in her daughter's best interest with the goal of destroying the child's relationship with Rogerio. (APP 3:605-10 & 615.) The Commission has now placed a sword over every family court judge's head on motions to modify custody prompted by a parent violating the child's best interest. *See Quirk*, 705 So.2d at 177. This will have a chilling effect on enforcement of custody and visitation orders. *Id*

The evidence in this case shows Judge Hughes balanced Welthy's fundamental rights against Rogerio's when Welthy withheld the child from Rogerio in violation of the child's best interests.

2. *The Commission's reliance on the 14th Amendment's due process protections is misplaced.*

The Commission argues Judge Hughes deprived Welthy of her fundamental rights regarding her child. The 14th Amendment protects an individual's fundamental rights through due process of law. This concept, however, is "not a fixed theory." *Oberholzer*, 20 Cal.4th at 390 fn 16. There is no "standardized set of procedures or a trial-like hearing in each instance." *Id.* When applying due process protection, the "[c]ourt [] must examine *all* procedural protections offered by the state, and must assess the *cumulative* effect of such safeguards." *Santosky v. Kramer*, 455 U.S. 745, 774-75, 102 S.Ct. 1388 (1982). The U.S. Supreme Court acknowledged this 14th Amendment right, stating:

a parent's desire for and right to companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection.

Id. at 787 (internal quotations omitted and emphasis added).

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“In a custody dispute between two fit parents, the fundamental constitutional right to the care and custody of the children is equal.” *Rico v. Rodriguez*, 121 Nev. 695, 704, 120 P.3d 812 (2005) (emphasis added). Any dispute in such cases is best resolved by applying the best interest of the child standard. *Id.*

Here, a powerful countervailing interest, Rogerio’s equal, fundamental rights, are at play. Welthy withheld the child from Rogerio for over one year. (APP 3:605-10.) His relationship with the child was nearing destruction. (APP 3:605-10 & 615.) The change was based on Judge Hughes’ deferred ruling on Rogerio’s prior motions to change custody. (APP 4:785-86 & 792-93.)

Judge Hughes provided Welthy with procedural protection for over one year while she deprived her ex-husband of his fundamental right to have a relationship with their child. (APP 4:785-86 & 792-93.) Judge Hughes attempted to rectify this situation using therapeutic options and Donna’s House. (APP 4:841-73.) These procedural protections attempted to remedy the situation without drastic measures, such as police involvement. The cumulative effect of these protections, and Welthy’s refusal to follow court orders for visitation and therapy, left Judge Hughes with no other choice but a temporary change of custody. (APP 3:605-10 & 615.)

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This was not a punitive decision, as alleged by the Commission. *See Lewis v. Lewis*, 132 Nev. Adv. Op. 46, 373 P.3d 878, 882 (2016). The sole purpose of the temporary change was to protect Rogerio's fundamental due process rights and ensure that Welthy did not destroy the parent-child relationship. (APP 3:605-10 & 615.) Judge Hughes had multiple reports from therapists and communications from Donna's House documenting Welthy's defiance. (APP 4:841-74.) If Judge Hughes did not temporarily change custody when she did, Welthy would have been successful in terminating Rogerio's relationship with the child without providing him due process. "At some point in time, it must be said, enough is enough." *Santosky*, 455 U.S. at 783. Rogerio was entitled to significant compensatory time for the nearly one and one-half years he lost with his child because of Welthy's defiance. (APP 4:785 & 796-97.)

The Commission incorrectly found that Welthy "was never given her due process right to present evidence or argument." (AB:14.) Judge Hughes scheduled an evidentiary hearing regarding this issue for October 11, 2016. (APP 3:615.) Welthy stipulated to continue that hearing, with advice of counsel, on the day it was scheduled for five months. (APP 4:790.)

If the Commission had properly analyzed the fundamental due process rights, at issue, by considering Rogerio's countervailing interest, it would have found that clear and convincing evidence did not exist to discipline Judge Hughes.

3. *The temporary custody modification was made to promote the child's best interest, not to punish Welthy.*

Judicial discipline based on "a disregard for fundamental rights" limits the Commission's function to fact-finding. *See Quirk*, 705 So.2d at 180. It may only "apply the facts to the determined law." *Id.* (internal quotations and emphasis omitted). It may not "determine, construe, or interpret what the law should be" because it does not have the "power to interpret statutory ambiguities." *Id.* at 179-80 (internal quotations omitted). In this case, the law regarding temporary modifications of child custody is ambiguous. NRS 125C.0045(1)(a) states:

During the pendency of the action, at the final hearing or at any time thereafter during the minority of the child, [the court may] make such an order for the custody, care, education, maintenance and support of the minor child as appears in his or her best interest.

This provision does not differentiate between temporary and permanent changes in custody. This ambiguity is intentional. The custody and care of children is a delicate topic that affects every single child in this State, so the legislature provided family court judges broad discretion to ensure a child's best interest is always met.

The Commission fails to understand this purpose. The Commission's Answering Brief asserts, "Custody Issues Are Not Relevant" in support of its finding that the custody change was a contempt punishment and not in the child's best interest. (AB:21-23.) The application of the facts of this case to NRS

125C.0045(1)(a) is key to determining whether Judge Hughes violated Nevada law when she ordered the temporary change. The best interest of the child and the violation of court orders are two separate and distinct issues. The Commission erred when it blurred the line between these two issues.

a. **The best interest of this child required a temporary change of custody in June of 2016.**

The Commission's findings fail to consider the child. (APP 4:944-50.) In a custody dispute, that does not involve the "fitness" of the parents; the child is the court's main, if not only, concern. *Rico*, 121 Nev. at 704. Nevada's policy concerning the custody of children, directs judges, in part:

1. To ensure that minor children have frequent associations and a continuing relationship with both parents after the parents have ended their relationship, become separated or dissolved their marriage;
2. To encourage such parents to share the rights and responsibilities of child rearing.

NRS 125C.001. Judge Hughes' findings directly relate to this State's public policy regarding child custody. (APP 3:615.)

Contrary to the Commission's arguments, Judge Hughes made the following findings regarding the child's best interest:

THE COURT FINDS that Welthy has committed extreme parental alienation against Rogerio, such that she has precluded Rogerio from having a relationship with [the child].

THE COURT FURTHER FINDS that Welthy's actions in preventing a relationship between Rogerio and [the child] are contrary to [the child's] best interest.

(APP 3:615.) The language of these findings shows Judge Hughes was concerned with the following factors:

(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.

(d) The level of conflict between the parents.

(e) The ability of the parents to cooperate to meet the needs of the child.

...

(g) The physical, developmental and emotional needs of the child.

See NRS 125C.0035(4).

Justice Springer's dissenting opinion in *Wallace v. Wallace*, 112 Nev. 1015, 1024, 922 P.2d 541 (1996), sheds light on Welthy's actions in this case. Justice Springer commented:

We have in this case a woman who frankly admitted her uncooperative attitude with respect to the best interests of her son. She refused all attempts to discuss or mediate matters relating to child custody and visitation and threatened to “ruin” the father of the child financially by forcing him to pursue unnecessary litigation. Even worse, this woman, according to the trial court, has been “exercising control over [the child's] relationship with his father in a manner which has undermined the father-son relationship.”

...
The mother appears to be trying to avoid, at any cost, any continuing relationship with the child's father. The intention of NRS 125.480 is to reward cooperative behavior by a parent and to punish the kind of behavior engaged in by this mother.

...
Perhaps the mother of this child will be successful in her attempts to "ruin" this father financially and will be able to continue to "undermine" the father-son relationship. This court has gone a long way to assist her in this end.

112 Nev. at 1024-25.

Like the mother in *Wallace*, Welthy was doing everything she could to destroy Rogerio's relationship with the child. Judge Hughes was simply trying to protect that relationship. Ultimately, Welthy never appealed any of the custody orders at issue and stipulated to a change of custody before the evidentiary hearing. (APP 4:790.)

b. Judge Hughes never found Welthy in contempt.

The Commission's entire basis for disciplining Judge Hughes is its erroneous finding that she held Welthy in contempt by temporarily modifying custody to punish Welthy. (AB:20-21.) This argument fails because Judge Hughes is, first and foremost, required to ensure that the best interest of the child is met. *See Rico*, 121 Nev. at 704. Judge Hughes was concerned with the child's best interest, not punishing Welthy. (APP 3:605-10 & 615.)

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The Commission cites to *Gordon v. Geiger*, in support of its conclusion that it established clear and convincing evidence to discipline Judge Hughes. 133 Nev. Adv. Op. 69, 402 P.3d 671 (2017). *Gordon* is distinguishable from the instant case because the court in *Gordon* issued a *sua sponte* permanent change without notice of an evidentiary hearing. *Id.* at 674. Unlike *Gordon*, Rogerio had filed multiple motions to enforce his visitation rights and to change custody. (APP 4:785-86 & 792-93.) Because both Welthy and Rogerio's fundamental rights were equal, Judge Hughes correctly considered the child's best interest to temporarily change custody. *See Rico*, 121 Nev. at 704. Judge Hughes alleviated the concern of *Gordon* by scheduling the evidentiary hearing. (APP 3:615.)

The Commission argues the temporary change was really a contempt punishment because Welthy was not on notice regarding a potential change of custody in June 2016. The facts prove otherwise. Rogerio's motions to change custody date back to February of 2015. (APP 4:785-86 & 792-93.) Judge Hughes' deferred ruling on the most recent motion, which was filed in September of 2015. (APP 785-86 & 792-93.) Judge Hughes put Welthy on notice during the May 12, 2016, hearing that if she continued to deprive Rogerio of his custodial time, she would temporarily change custody. (APP 4:788 & 811-13.) The temporary change

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issued in June of 2016 was no surprise after Welthy once again deprived Rogerio of his visitation. (APP 3:615.) The evidentiary hearing for a final order was set in the normal course. (APP 3:615.)

The Commission erred when it treated the temporary change of custody as a termination of parental rights. (AB:13-14.) This error allowed the Commission to conclude the temporary change was a punishment for contempt. (APP 4:952.) The Commission cites *Santosky* in support of this position. However, that case was a termination of parental rights under the preponderance of the evidence standard by a state against the parents. 455 U.S. at 747. The 14th Amendment due process implications are much higher when a state is attempting to terminate parental rights than in a dispute between parents. *Compare Id.* at 758 *with Rico*, 121 Nev. at 704.

Because of the fundamental difference between a termination of parental rights and a temporary change of custody, the application of due process is different based on the flexibility of the 14th Amendment. *See Santosky*, 455 U.S. at 744. The rule in *Santosky* is that a state may not terminate a parent's rights over the child on a preponderance of the evidence. *Id.* at 758. Judge Hughes only issued a temporary custody modification pending an evidentiary hearing. (APP 3:615.) Because this case's due process implications are not as severe as *Santosky*, it does not require the same procedural protections. *Id.* at 774-75.

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The Commission uses Judge Hughes' lack of findings under each best interest factor to support its finding that the sole purpose of the temporary change was to punish Welthy. (AB:15.) This is an absurd conclusion given the totality of the circumstances. Such failure by a judge more likely means that judge may have made a legal error or simply failed to provide complete findings. *See Pirraglia*, 916 A.2d 746, 754 (2007); *see* Comm. Rule 8. Such issues are resolved through the appellate process, not judicial discipline. *Id.*

The Commission confuses a *prima facie* finding of contempt to issue an order to show cause with an actual finding of contempt. Before a judge can actually hold a litigant in contempt, she must first make a *prima facie* finding that sufficient evidence exists to justify the required evidentiary hearing. *See Awad v. Wright*, 106 Nev. 407, 409, 794 P.2d 713, 715 (1990), *abrogated on other grounds* by *Pengilly v. Rancho Santa Fe Homeowners Assn.*, 116 Nev. 646, 5 P.3d 569 (2000); *see also Bohannon v. Eighth Judicial District Court ("EJDC")*, 400 P.3d 756, *2 (2017). If there is sufficient evidence, an order to show cause is issued to give the party the opportunity to show cause why he/she should not be held in contempt. *Id.*

Judge Hughes issued an Order to Show Cause and set an evidentiary hearing regarding Welthy's violations of court orders. (APP 3:605-10 & 615-16.) At that hearing, which took place on July 28, 2016, Judge Hughes permitted Welthy to

introduce evidence why she should not be held in contempt, and Welthy's arguments prevailed! (APP 3:620.) Judge Hughes did not hold Welthy in contempt for violating the visitation orders. (APP 3:620.) Judge Hughes made this finding of no contempt on her own volition.

B. The Commission's request for additional discipline based on other cases is improper.

On an appeal from judicial discipline, this Court's "role is limited to a determination of whether the evidence in the record provides clear and convincing support for the Commission's findings." *In re Assad*, 124 Nev. 391, 405, 185 P.3d 1044, 1053 (2008) (emphasis added). While this Court may impose any discipline deemed necessary, it may not consider conduct outside of the record based on the Formal Statement of Charges, filed on October 10, 2017. *See Id.*

Here, the Commission asks for additional discipline, in the form of a mentor, for conduct that is not contained in the record at issue. (AB:24-31.) This argument and the citation to mostly unpublished cases where this Court or the Court of Appeals have reversed Judge Hughes are without legal merit. Each of the seven cases cited only contain claims of error or abuses of discretion that properly went through the appellate process. Those cases do not implicate any violations of the Code.

Moreover, the Commission's Answering Brief fails to analyze any canon or rule allegedly violated in the seven cases cited. This is because the Commission is

without sufficient evidence to claim Judge Hughes violated the Code in those cases. The Commission cannot short circuit its Procedural Rules by claiming additional discipline on appeal for conduct that was not charged in the Formal Statement of Charges and not contained in the record.

Further, the decisions at issue in the other cases occurred while Judge Hughes was still a new judge. This year alone, the Court of Appeals affirmed Judge Hughes in three cases.¹

Because this Court may only consider "evidence in the record," it should strike Section B (pages 24-31) of the Commission's Answering Brief. *See Assad*, 124 Nev. at 405. The Commission's entire argument in Section B is based on evidence that is not contained in the record at issue in this case. Reliance on those cases to impose additional discipline would amount to a gross violation of Judge Hughes' due process rights. She is entitled to have the opportunity to be heard regarding any alleged ethical violations in those seven cases. The Commission's inclusion of those cases in support of additional discipline amounts to a complete disregard of Judge Hughes' fundamental rights and should be stricken from the Commission's Answering Brief.

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¹ *Holmes v. Holmes*, Case No. 76206-COA, 2019 WL 1932067 (Nev. App. Apr. 26, 2019); *Carroll v. Carroll*, Case No. 73534-COA/75425-COA, 2019 WL 1858576 (Nev. App. Apr. 24, 2019); *Hall v. Hall*, Case. No. 76444-COA, 2019 WL 1255225 (Nev. App. Mar. 14, 2019).

C. The Commission's exclusion of evidence was based on its failure to understand the applicable law in the underlying case.

The Nevada Rules of Evidence applicable to civil proceedings apply at judicial discipline hearings. Comm. Rule 24.

In support of its position, the Commission cites *Assad* for the proposition that expert testimony may be excluded if it is "irrelevant or if it impermissibly encroaches on the trier of facts province." 124 Nev. at 400. The Commission's reliance on *Assad* is misplaced. This Court excluded the expert in *Assad* because his testimony evaluated the testimony of witnesses and weighed evidence. *Id.* at 401. Such determinations are "reserved to the Commission." *Id.*

Despite excluding the expert in *Assad*, this Court also criticized the Commission's reasons for excluding that expert because those reasons were "flawed." *Id.* One of the reasons provided by the Commission was the "testimony would completely usurp the role of the Commission." *Id.* (internal quotations omitted). This Court rejected that argument and cautioned:

[T]hat expert testimony may prove helpful in many cases, and **the Commission would therefore be wise to carefully evaluate whether to admit proposed expert testimony in future hearings**, based on the substance of the proposed testimony and the facts of the case, rather than maintain a position that such testimony should routinely be rejected simply because the Commission is not "compelled" to admit it in every case.

Id. at 401 & 403 (emphasis added).

Despite this Court's ruling in *Assad*, the Commission continues to reject expert testimony simply because it is not compelled to admit it. The Commission stands by this argument in its Answering Brief. (AB:31-34.) First, the Commission committed reversible error when it excluded the testimony and article of Dr. Childress. (APP 2:308-310 & 4:880-934.) Unlike the expert in *Assad*, Dr. Childress' testimony and article did not evaluate the testimony of witnesses or weigh the evidence. Dr. Childress would have aided the Commission in understanding the underlying custody dispute and why Judge Hughes had to temporarily modify custody to protect the best interest of the child and Rogerio's fundamental rights.

Because the Commission does not understand the actual alleged ethical violations at issue, it analyzes the exclusion of Dr. Childress incorrectly. The Commission was required to review the merits of the change of custody for purposes of judicial discipline. A judge should not be disciplined for making a correct decision. *See Oberholzer*, 20 Cal.4th at 398. While Dr. Childress' testimony and article are not relevant regarding contempt or due process, it is relevant in determining whether Judge Hughes' temporary custody modification was in the best interest of the child. Dr. Childress' testimony and article would help the Commission properly analyze whether Judge Hughes violated NRS 125C.0035(4).

Second, the Commission improperly excluded three (3) character letters. (APP 4:934-943.) The Commission reasons it excluded these letters because "they contained opinions regarding the propriety of Judge Hughes' actions in the Silva case." (AB:33.) It excludes these letters on the grounds that they "impermissibly encroach[] on the trier of facts province." (AB:33.) The Commission cites the unpublished decision of *Burrows v. Riley*, Case. No. 71350, 2018 WL 565431 (Nev. App. Jan. 19, 2018), even though the cited language is a direct quote from *Assad*. The Commission then cites to a Ninth Circuit Court of Appeals decision to state, "an expert witness cannot give an opinion on an ultimate issue of law." (AB:33-34.) However, NRS 50.295, which is controlling law over the Ninth Circuit, specifically allows expert testimony on "an ultimate issue to be decided by the trier of fact."

Further, the holding under *Assad* does not exclude these letters because the letters do not evaluate the testimony of witnesses or weigh the evidence. *See Assad*, 124 Nev. at 401. These letters go to the propriety of Judge Hughes' decision, which is directly at issue.

The Commission abused its discretion by excluding Dr. Childress' testimony, article, and the character letters because it failed to properly analyze "the substance of the testimony and the facts of the case." *See Id.* at 403. The Commission did exactly what the *Assad* court cautioned against.

D. Judge Hughes suffered actual prejudice because the Commission required her to answer interrogatories under oath in violation of its Procedural Rules.²

In the United States, it is well established that "a fair trial in a fair tribunal is a basic requirement of due process" which applies to the courts and administrative agencies. *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464 (1975). "Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 47 (internal quotations omitted).

The combination of investigatory and adjudicatory functions within a single entity contains the inherent danger that the entity, which has "the responsibility of appraising the strength of a case" will also seek to make the case "as strong as possible." *Matter of Johnson*, 99 Wash.2d 466, 476, 663 P.2d 457, 463 (Wash. 1983) (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 44, 70 S.Ct. 445, 451 (1950)).

As such, the Louisiana Court of Appeals, citing *Withrow*, held that when such functions are combined, and "depending on the facts and circumstances of the case, the risk of error could become intolerably high to prompt due process

² In the longest section of its Answering Brief, the Commission regurgitates the arguments it made in *Andress-Tobiasson v. NCJD*, Case No. 77551. This issue was argued before this Court on April 2, 2019. The reason Judge Hughes did not include this case in her Docketing Statement, filed on September 28, 2018, is because *Tobiasson* was not filed before this Court until December 3, 2018.

concerns." *Matter of Cerwonka*, 249 So.3d 30, 33 (La. App. 1st Cir. 2018). To establish a procedural due process violation based on the combination of functions, the party "must demonstrate that the risk of actual bias is intolerably high." *Id.* The court reasoned:

Although the law allows some blurring of the distinctions between investigatory, prosecutorial, and adjudicatory functions, those distinctions cannot be totally abandoned, even with the best of intentions. When this occurs and basic procedural safeguards are ignored, the tribunal loses the appearance of fairness and impartiality required by due process.

Id. at 35.

In *Jones v. NCJD*, this Court upheld the combination of the investigatory and adjudicatory functions of the Commission by stating that "due process rights will generally not attach before a formal statement of charges is filed." 130 Nev. 99, 106, 318 P.3d 1078 (2014). In finding that "due process typically will not be implicated during the investigatory stage," this Court held that "relief from any procedural violations occurring during the investigatory stage may be obtained only by a showing of actual prejudice." *Id.* at 107.

A simple review of the Commission's Procedural Rules provides clear direction regarding the procedure that must be followed in all cases before the Commission. Instead of following the procedures, as outlined in these rules, the Commission deviates from the rules to suit its own purposes.

Specifically, the Commission required Judge Hughes to answer interrogatories, under oath, in its letter dated April 26, 2017, instead of simply directing the judge to "respond" to the complaint, as required under Rule 12. (APP 1:1-6.) Procedural Rule 12 does not permit the Commission to require answers to interrogatories under oath. *See Andress-Tobiasson v. NCJD*, Case No. 77551, *4 (May 10, 2019). Rule 12 only requires the judge to "respond" to the complaint based on the records provided by the Commission. Comm. Rule 12(3-4).

In a recent unpublished opinion, this Court held, "nothing in our statutes or the Commission's procedural rules authorize the Commission to demand that a judge answer questions under oath during the investigative phase, before a formal statement of charges has issued." *Andress-Tobiasson*, at *4.

In this case, the Commission's practice of requiring answers to interrogatories under oath during the Rule 12 investigatory stage of the case violates the procedural safeguards put in place by the legislature to protect a judge's procedural due process rights. This practice combines the investigatory and adjudicatory functions into one, instead of each function being independent and distinct from the other. At the investigatory stage, the Commission should only be concerned with the strength of the case based on whether an ethical violation exists. By requiring answers to interrogatories under oath during the investigatory (Rule 12) stage of the case, the Commission improperly switches to its

adjudicatory function to make the case as strong as possible. By improperly switching functions before the Formal Statement of Charges is filed, which signals the shift in functions, the Commission has created a risk of actual bias that is intolerably high. Because of this practice, Judge Hughes suffered actual prejudice during the adjudication of her case.

Judge Hughes filed a Motion to Dismiss the Complaint on May 11, 2018, objecting to the procedural violation of requiring her to answer interrogatories under oath prematurely. (APP 2:314-15.) The Commission denied that motion on May 25, 2018, stating it "followed the step by step path set out in the Procedural Rules of the Commission from the initial complaint through the investigation and adjudication phase." (APP 2:320.) *Contra Andress-Tobiasson*, at *4.

At the hearing, the Prosecuting Officer referenced Judge Hughes' answers to interrogatories in his opening statement for the Commission to use those answers against her. (APP 2:331.) The Prosecuting Officer also used those answers to cross-examine Judge Hughes. (APP 2:357, 363 & 366.)

Judge Hughes suffered actual prejudice at this hearing because of her Answer to Interrogatory No. 3. (APP 2:363.) During the hearing, the Prosecuting Officer attempted to impeach Judge Hughes with this answer, stating, "So in your answers to interrogatories, that does indicate that you did find her in contempt, not a prima facie finding of contempt, right?" (APP 2:363.) The interrogatory at issue

asks, "Please explain how your findings of the Complainant in contempt complies with Nevada Revised Statutes regarding finding a party in contempt for violating a court order(s)?" (APP 1:206.)

Because Judge Hughes wanted to "cooperate and be candid and honest" with the Commission, as required by Canon 2, Rule 2.16 of the Code, she provided an over two (2) page explanation of the tortured history of the underlying case which led to her temporary modification of custody. (APP 1:206-8.) She could have simply stated that she did not find Welthy in contempt, but she thought it was important to be as candid and honest as possible so she detailed all the facts relating to why she issued the order to show cause. (APP 1:206-8.)

Finally, in his closing statement, the Prosecuting Officer uses Judge Hughes' interrogatory answers to argue that Judge Hughes is not credible. (APP 3:500-501.) Without the under oath answers to interrogatories, the Prosecuting Officer would not have been able to make those arguments regarding Judge Hughes' credibility.

In its decision, the Commission finds Judge Hughes is not credible based on her interview, which was not under oath, and answers to interrogatories, which were under oath. (APP 4:946.) The finding that Judge Hughes was not credible relates to her testimony at the hearing that she made *prima facie* findings of contempt in support of her order to show cause, but did not actually hold Welthy in contempt. (APP 4:947.) The reliance on an interview that was not under oath and

answers to interrogatories that violated Judge Hughes' procedural due process rights is improper for a finding of lack of credibility.

When Judge Hughes was interviewed and answered the interrogatories at issue, the Commission did not provide her notice that it would seek discipline against her based on its mistaken view that she punished Welthy for not following court orders by temporarily modifying custody. If she knew this would be the charge against her, then she would have been in a better position to properly answer each interrogatory in light of the charges. However, because Judge Hughes was compelled to answer interrogatories under oath during the investigatory stage, she answered without ever knowing the charges against her. She understands that the Commission's investigation is meant to protect the integrity of the judiciary and safeguard the public's confidence in the judicial branch. *See Jones*, 130 Nev. at 106-7. The Commission is not permitted to violate its procedures to fabricate a stronger case against a judge. Such violations do not protect the integrity and public confidence in the judiciary.

The Commission exceeded its authority by requiring Judge Hughes to answer interrogatories under oath before the Formal Statement of Charges was filed. This Court should strike Judge Hughes' answers to interrogatories from the record, pursuant to *Andress-Tobiasson*.

Judge Hughes suffered actual prejudice because the Commission used her interview and answers to interrogatories out of context to ultimately find she was not credible in support of its finding to discipline her. As such, her interview and answers to interrogatories and all findings of credibility relating to those answers should be stricken from the record.

V. CONCLUSION

Based on the foregoing, this Court should reverse the discipline imposed by the Commission against Judge Hughes. The actions taken by the Commission in this case exceeded its authority. It imposed discipline against a judge who was placed in a bad situation. Welthy was violating the best interest of the child and Rogerio's corresponding due process rights because she did not want him to have a relationship with their child. Judge Hughes was simply trying to protect the best interest of that child, as she is mandated under Nevada law.

Judicial authority means nothing if a judge is not empowered to uphold the law in the face of a litigant who completely disregards the law. It is in these situations where the power of the courts is most valuable.

The Commission's actions in this case threaten judicial authority because it has a chilling effect on family court judges in Clark County. In family court, litigants often engage in behavior similar to Welthy. The Commission has now empowered litigants, like Welthy, to violate the best interest of the child, and has

left judges, like Judge Hughes, powerless to prevent such violations for fear of discipline from the Commission. A judge should never be disciplined for issuing a temporary order in furtherance of the best interest of the child.

If this Court allows the Commission to discipline judges in similar situations, the integrity and power of the courts will be tarnished. Litigants in family court will then have free reign to violate the best interest of the child standard because they will seek judicial discipline over the appellate process whenever they receive a decision they do not like. This can have negative implications for future child custody decisions. As such, this Court should reverse the imposition of discipline against Judge Hughes in this case.

DATED this 21 day of May, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 6,376 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

DATED this 21 day of May, 2019.

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A handwritten signature in cursive script, appearing to read 'Daniel Marks', is positioned above a horizontal line.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 21 day of May, 2019, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF** on the following:


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